

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

Administrative Proceedings Rulings
Release No. 5064 / September 19, 2017

Administrative Proceeding
File No. 3-18017

In the Matter of

**Can-Cal Resources Ltd.,
China Fruits Corp., and
SkyStar Bio-Pharmaceutical Co.**

**Order on Motion to Intervene
and on Motion for Ruling on
the Pleadings**

Background

The Securities and Exchange Commission issued an order instituting proceedings (OIP) on June 8, 2017, alleging that Respondents have securities registered with the Commission and have not filed required periodic reports. The OIP was served on Respondents Can-Cal Resources, Ltd., China Fruits Corp., and SkyStar Bio-Pharmaceutical by June 15, 2017. *Can-Cal Res., Ltd.*, Admin. Proc. Rulings Release No. 4906, 2017 SEC LEXIS 2010 (ALJ July 3, 2017); *Can-Cal Res., Ltd.*, Admin. Proc. Rulings Release No. 4889, 2017 SEC LEXIS 1952 (ALJ June 26, 2017).

On June 19, 2017, thirty-five Can-Cal shareholders (collectively, Intervenors) filed a motion to intervene as parties, or otherwise on a limited basis, pursuant to Commission Rule of Practice 210(b), (c), and (f), and to have a hearing (Motion).¹

¹ Four exhibits were attached to the Motion: Ex. 1 is the complaint in *Ronald D. Sloan v. Can-Cal Resources, Ltd.*, No. A-14-701465-B (Nev. Dist. Ct. Clark Cty. May 29, 2014); Ex. 2 is Candeo Lava Products Inc.'s annual meeting presentation dated December 11, 2015; Ex. 3 is a cease trade order issued by the British Columbia Securities Commission on March 7, 2017, against Can-Cal Resources Ltd., 2017 BCSECCOM 87; Ex. 4 is a cease trade order issued by the Alberta Securities Commission on March 3, 2017, against Can-Cal Resources Ltd., 2017 ABASC 34.

On June 30, 2017, I conducted a telephonic prehearing conference with participation by Justin C. Jones, Casey Douglas, and Gary Oosterhoff for Can-Cal; Neil J. Welch, Jr., and Kevin O'Rourke for the Division of Enforcement; and William Fishman and Stephen Hackett for Intervenors. I allowed Intervenors limited participation in the prehearing conference. *Can-Cal Res., Ltd.*, Admin. Proc. Rulings Release No. 4889, 2017 SEC LEXIS 1952 (June 26, 2017). China Fruits and SkyStar Bio-Pharmaceutical did not participate in the prehearing conference.²

On July 7, 2017, and on July 10, 2017, respectively, the Division and Can-Cal filed oppositions to Intervenors' Motion.

Can-Cal's answer, filed July 18, 2017, admits it was a Nevada corporation based in Las Vegas with common stock registered pursuant to Section 12(g) of the Exchange Act, denies the other allegations on the basis of having insufficient information, and advances seven affirmative defenses. Answer at 1-3.

On July 21, 2017, the Division filed a motion for a ruling on the pleadings as to Can-Cal's third affirmative defense of laches. The Division maintains that case law establishes that laches is inapplicable where a government agency seeks to vindicate public rights and act in the public interest.

On July 31, 2017, Intervenors filed for leave to supplement their Motion with three exhibits.³ On August 4, 2017, the Division filed an opposition to Intervenors' supplemental motion.

This order resolves Can Cal's motion to intervene and the Division's motion for ruling on the pleadings, and orders a prehearing conference to determine how to resolve the OIP's allegations against Can-Cal. I will separately issue an initial decision on the allegations as to China Fruits and SkyStar Bio-Pharmaceutical.

² On July 3, 2017, I issued a show cause order to China Fruits and SkyStar Bio-Pharmaceutical because neither had filed an answer, participated in the prehearing conference, or otherwise defended the proceeding. *Can-Cal Res., Ltd.*, 2017 SEC LEXIS 2010. The time for responding to the order to show cause has expired without a response.

³ Supp. Ex. 1 is Can-Cal's Form 8-K dated July 24, 2017; Supp. Ex. 2 is a printout from the Nevada Secretary of State website showing that Can-Cal is a revoked Nevada corporation; and Supp. Ex. 3 is a permit transfer agreement effective August 25, 2016.

Motion to Intervene

Motion

Intervenors, allegedly owners of seventeen percent of Can-Cal's outstanding shares, contend that Can-Cal's officers, directors, and a controlling person are scheming to transfer valuable real estate to the detriment of Can-Cal's shareholders. Mot. at 2-3, Ex. 1. In 2014, Intervenors initiated a lawsuit on this claim in a Nevada state court; a trial is scheduled for February 2018. Mot. at 3; Ex. 1.

Intervenors request an opportunity to present their position that Can-Cal deliberately failed to file periodic reports because deregistration of its securities will allow Can-Cal's board to continue to conceal material information concerning a valuable property owned by the company. Tr. 7-8; Mot. at 3-5. Intervenors believe they can demonstrate at a hearing that suspension or revocation of Can-Cal's registered securities is not necessary to protect investors and that it would permit a fraud because the result would allow Can-Cal to transfer control of the property—its only asset—without needing to comply with proxy rules and by hiding material information from its shareholders. Mot. at 3-4, 6. Intervenors contend further that revocation is unnecessary because the British Columbia Securities Commission and the Alberta Securities Commission both prohibited trading in Can-Cal securities in early March 2017, and, if there is any trading, it is done in Canada where most Can-Cal shareholders reside. Mot. at 5; Exs. 3, 4.

In their supplemental motion, Intervenors claim that Can-Cal filed a false and misleading Form 8-K on July 24, 2017, and that Can-Cal's directors illegally signed a transfer agreement on August 25, 2016. Supp. Exs. 2, 3. Intervenors reiterate their request for a hearing at which they be allowed limited participation to show that Can-Cal "seeks to game the system with the SEC" in that Can-Cal's directors want Can-Cal's registration revoked or suspended so that they are not obligated to disclose their actions to shareholders. Supp. Mot. at 5-6.

Division's opposition

The Division argues that Intervenors have no standing to represent Can-Cal, citing Rule 102(b) that limits representation to, as relevant here, an attorney or bona fide representative of a company. Opp'n at 1. The Division contends that Intervenors cannot play a meaningful role in this proceeding because they are not positioned to satisfy Can-Cal's periodic filing obligations. *Id.* The Division argues that Intervenors' desire to use this proceeding to further their allegations pending in the Nevada state court proceeding is inappropriate because "Section 12(j) proceedings were not

designed to be used to obtain leverage in state court litigation or to, in effect, obtain injunctive relief.” *Id.* at 2-3. The Division further contends that Intervenors do not understand the importance of having periodic filings available to investors. *Id.* at 3-4. According to the Division, revocation will not overly harm Can-Cal’s business operations or shareholders because it will still be the same company, and its shares can trade privately but not on the open market. *Id.* at 4. The Division argues further that revocation will protect investors who presently lack current information, and it will deter other companies from similar behavior. *Id.* at 5. Finally, the Division notes that Rule 210(b)(1) and (c) are inapplicable to this enforcement proceeding and that limited intervention pursuant to Rule 210(f) has been granted rarely in Section 12(j) proceedings. *Id.* at 6-8.

Can-Cal’s opposition to the Motion

Can-Cal asserts that Rule 210(f) is the only rule cited by Intervenors that is applicable and it has been used in only very limited circumstances such as where there were no remaining company officers or directors. That is not the case here. Can-Cal Opp’n at 2-3. Can-Cal agrees with the Division that Intervenors seek to hijack and distort the nature of this proceeding. *Id.* at 3.

Ruling on Motion

The Rules of Practice restrict intervention in enforcement proceedings such as this one. Under Rule 210(b), “any person may seek leave to intervene as a party by filing a motion setting forth the person’s interest in the proceeding,” but this is limited to “any proceeding, *other than an enforcement proceeding.*” 17 C.F.R. § 201.210(b)(1) (emphasis added). Rule 210(c) permits motions for leave to participate on a limited basis, but this is similarly limited to proceedings “other than an enforcement proceeding.” 17 C.F.R. § 201.210(c). Pursuant to Rule 210(f), the hearing officer may “modify the provisions of this rule which would otherwise be applicable, and may impose such terms and conditions on the participation of any person in any proceeding as it may deem necessary or appropriate in the public interest.” 17. C.F.R. § 201.210(f).

I will not exercise my authority under Rule 210(f) for the following reasons. Rule 210(b) and (c) articulate the Commission’s view that third parties should not be permitted to intervene in enforcement proceedings. The Commission has explained that “[p]rohibiting intervention or participation in these cases served the purpose of preventing extraneous issues from diverting administrative proceedings before the Commission and promoted

timely and efficient resolution of all matters before the Commission.” Rules of Practice, 63 Fed. Reg. 63,404, 63,404 (Nov. 13, 1998).⁴

The risk of extraneous issues is high in this proceeding, where Intervenor are currently litigating allegations of illegal conduct by Can-Cal in state court. My authority is limited to determining whether Can-Cal is delinquent in filing required periodic reports, considering any defenses Can-Cal advances, and deciding whether it is necessary and appropriate for the protection of investors to suspend or revoke the registration of Can-Cal’s registered securities. OIP at 2; 15 U.S.C. § 78l(j). Intervenor’s allegations of misconduct by Can-Cal’s officers and directors are collateral to the allegations that I am to consider, and Intervenor hope to use a collateral consequence of Can-Cal’s registration of securities to protect their interests as shareholders. This is extraneous to the purpose of the Commission’s periodic reporting system, which is designed “to supply investors with current and accurate financial information about an issuer so that they may make sound [investment] decisions.” *Gateway Int’l Holdings, Inc.*, Exchange Act Release No. 53907, 2006 SEC LEXIS 1288, at *26 (May 31, 2006). Under these circumstances, using Rule 210(f) to allow Intervenor to participate to pursue their allegations is not necessary and appropriate in the public interest.

Deciding the OIP’s allegations as to Can-Cal necessitates consideration of public interest factors to evaluate whether revocation is necessary and appropriate for the protection of investors.⁵ If the allegations against Can-Cal are resolved by summary disposition, which appears likely since I am aware of no genuine issues of material fact in dispute, I will consider Intervenor’s Motion, which is part of the record, to the extent it is relevant to the public interest factors. *See* 17 C.F.R. §§ 201.210(e), .250(b); *Gateway Int’l Holdings*,

⁴ The Commission made this statement in commentary to a rules amendment that permitted federal or state prosecutors to intervene and seek a stay during the pendency of a criminal investigation or prosecution arising out of the same facts as the Commission proceeding. *See* 17 C.F.R. § 201.210(c)(3).

⁵ The Commission “consider[s], *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.” *Gateway Int’l Holdings*, 2006 SEC LEXIS 1288, at *19 (emphasis added).

2006 SEC LEXIS 1288, at *19. In addition, I GRANT Intervenors' motion to supplement and will consider it for the same limited purpose.

Rule 210(e) permits any person to seek leave to file a memorandum or make an oral statement of his or her views. *See* 17 C.F.R. § 201.210(e). If this case proceeds to summary disposition briefing and Intervenors seek to reiterate or add to their position, I will permit them to file a memorandum, limited to ten pages, solely to address whether revocation is necessary and appropriate for the protection of investors. *See Gateway Int'l Holdings*, 2006 SEC LEXIS 1288, at *19. Citations to any comparable or analogous situations would be helpful.

Division's Motion on Can-Cal's Affirmative Defense of Laches

Can-Cal raised seven affirmative defenses. The Division moved for judgment on the pleadings solely as to the third—the defense of laches. Can-Cal did not respond to the Division's motion.

I GRANT the Division's motion. "Laches is available only to equitable private actions and is not available in either SEC enforcement actions or government criminal actions." James D. Cox, Robert W. Hillman, Donald C. Langevoort, *Securities Regulation: Cases and Materials* 827 (8th ed. 2016); *see Michael J. Marrie, CPA*, Initial Decision Release No. 191, 2001 SEC LEXIS 2799, at *75 (ALJ Sept. 21, 2001) ("I am aware of no cases in which the Commission has found a laches defense to be meritorious."). Can-Cal's third affirmative defense does not apply in this proceeding.

Scheduling

I ORDER a telephonic prehearing conference on September 28, 2017, at 2:00 p.m. Eastern time, to discuss whether this proceeding should be resolved as to Can-Cal by summary disposition or a hearing.

Brenda P. Murray
Chief Administrative Law Judge