

**UNITED STATES OF AMERICA**  
**Before the**  
**SECURITIES AND EXCHANGE COMMISSION**

**ADMINISTRATIVE PROCEEDING**  
**File No. 3-20550**

<p><b>In the Matter of</b></p> <p><b>Calmare Therapeutics Incorporated.,</b></p> <p><b>Respondent.</b></p>
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**RESPONDENT’S MOTION FOR EXTENSION OF TIME**

Pursuant to Rules of Practice 161 and 250, Calmare Therapeutics Incorporated (“Respondent” or “Calmare”), by and through its undersigned counsel, requests an extension of time or, alternatively, that the Securities and Exchange Commission or hearing officer (“Commission”) deny or defer the Division of Enforcement (“Division”)’s Motion for Summary Disposition. In support, Calmare respectfully states as follows:

**BACKGROUND**

The Division instituted this proceeding against Calmare on September 14, 2021. On October 15, 2021, the Commission granted the Division’s unopposed request for an extension of time to conduct a prehearing conference, due to a scheduling conflict of counsel, from October 8 to October 19, 2021. The Division agreed to conduct the prehearing conference on October 21, 2021.

In its Statement Regarding Prehearing Conference, the Division recognized the parties’ agreement “that if the Division elects to file a motion for summary disposition, the timing of the motion would follow [an expert] report,” submitted by Calmare. *See* Division of Enforcement’s

Statement Regarding Prehearing Conference (hereinafter, “Division Statement”) at 5. The parties “agreed to be open to continue discussing, by email, a potential schedule for a potential motion for summary disposition that would commence after January 25, 2022,” where the expectation was that Calmare would have until that date to submit its expert disclosures. *Id.* The Division has insisted that this was conditional on Calmare naming and locking in a specific expert by November 30, 2021. *See Id.* at 3-4.

Calmare’s Statement Regarding Prehearing Conference discussed in detail the parties’ miscommunication about this November 30 deadline, which ultimately manifested in the Division’s premature motion for summary disposition. *See* Respondent Statement at 8-9.

The Division filed the present motion for summary disposition on December 2, 2021, and, without any input from Calmare, the Commission, by its own initiative, issued a Scheduling Order on December 6, 2021, which established a briefing schedule that “provides the parties with more time than generally provided for in Rule 154(b) for the filing of opposition and reply briefs.” Scheduling Order at 2. The Commission ordered that Calmare’s opposition brief would be due by January 5, 2022, and the Division’s reply would be due by January 19, 2022. *Id.*

## **LAW AND ARGUMENT**

Without the expert and factual discovery that the parties originally had agreed would not be due until after January 25, 2022, Calmare is forced into a briefing schedule in which it “cannot present. . . facts essential to justify opposition” to the Division’s motion for summary disposition. This circumstance is covered by 17 C.F.R. § 201.250(b) which states that “[i]f it appears that a party, for good cause shown, cannot present prior to the hearing facts essential to justify opposition to the motion, the hearing officer shall deny or defer the motion.”. Denial or deferral of the pending motion for summary disposition at this time is not only corroborated by the foregoing, but also the

Division's original agreement to file that motion, if at all, only "after January 25, 2022." See Division Statement at 5 (emphasis added).

Under Rule of Practice 161, which governs motions for extensions of time, the Commission, "may, for good cause shown, extend or shorten any time limits prescribed. . . and may [] . . . postpone or adjourn any hearing." Rule 161 provides, in pertinent part, as it applies to Calmare's request for an extension of time:

In considering all motions or requests [under Rule 161] . . . the Commission or the hearing officer should adhere to a policy of strongly disfavoring such requests, *except in circumstances where the requesting party makes a strong showing that the denial of the request or motion would substantially prejudice their case.* In determining whether to grant any requests, the Commission or hearing officer shall consider, *in addition to any other relevant factors*[], . . . [t]he length of the proceeding to date. . . [t]he number of postponements, adjournments or extensions already granted. . . [t]he stage of the proceedings at the time of the request. . . [t]he impact of the request on the hearing officer's ability to complete the proceeding in the time specified by the Commission; and. . . [a]ny other such matters as justice may require.

17 C.F.R. § 201.161 (emphasis added).

The factors in Rule 161 weigh in favor of allowing an extension of time. There is a single previous extension of time, and it was stipulated to by the parties. The current request for extension of time is made almost a month before the January 25, 2022 date for which the parties originally had agreed to even begin discussing the possibility of a briefing schedule on a motion for summary disposition. The current request does not impact the hearing officer's ability to complete the proceeding in any way.

#### **A. Denial of An Extension of Time Would Substantially Prejudice Calmare's Case**

The Division originally agreed that Calmare's 17 C.F.R. § 201.222(b) disclosures would be due by January 25, 2022. Nothing in 17 C.F.R. § 201.222 or any other law binding these proceedings requires Calmare to identify a specific expert two months before its expert disclosures

are due. Nor would such a requirement move this case forward. It only would function to limit Calmare's ability to defend itself in these proceedings. Indeed, Calmare has not had the opportunity to conduct discovery that is necessary for it to present the "facts essential to justify opposition" to a motion for summary disposition. *E.g.*, § 201.250(b). Denying this motion for extension of time would therefore substantially prejudice Calmare's case.

### **B. Justice Requires That Calmare Be Afforded An Opportunity for Endorsement**

As noted in Calmare's Statement Regarding Prehearing, not requiring designation of expert witnesses prior to submission of expert reports is not unusual. *See* Respondent Statement at 5-7. There are numerous cases currently proceeding in our legal system under the Federal Rules of Civil Procedure where no party is required to name or lock in an expert prior to their deadline to provide expert reports and other materials. *See* FED R.CIV.P. 26(a). In fact, under those rules, the only earlier deadline to provide the identity of a witness is the general initial disclosure deadline under Rule 26(a)(1), which does not require a party to designate which witnesses it will call at trial, and which is subject to ongoing supplementation while the case proceeds. *See id.*; FED R.CIV.P. 26(e). In other words, it is routine for cases in our legal system to progress without the early designation of expert witnesses that the Division demands, and there is no apparent reason why Calmare should not be allowed to designate an expert witness a week or 10 days prior to January 25, without extending the January 25 date for submission of expert witness reports.

In this case, the potential areas of necessary expert testimony may include:

- i. With respect to a company for which the SEC previously had halted trading in that company's stock, the impact that revocation of a Smaller Reporting Company's securities registration with the Securities Exchange Act of 1934 can be expected to have on large government contracts that the company has with the U.S. federal government as opposed to allowing that company a specified period of time to correct its filing deficiencies;
- ii. With respect to a company for which the SEC previously has halted trading in its stock by the consequences to that company's public shareholders of a revocation of the SEC registration of its stock rather than allowing the Company to complete full compliance with

its past and current reporting requirements – provided that company demonstrates its financial and other ability, and commitment, to remain current and in compliance; and

- iii. Whether, if a revocation of registration does occur, the revoked company's subsequent filing of a Form 10 avoids the damage to the company's business and/or the harm to the public shareholders described in (i) and (ii) above.

*See* Respondent Statement at 6.

As the Commission is aware, a key consideration in enforcement proceedings under Section 12(j) of the Securities Exchange Act of 1934 (hereinafter, the "Exchange Act"), 15 U.S.C. § 78l(j), is whether and how the Division's actions against a respondent are in the public interest. There is a strong presumption that relevant evidence should be admitted, and evidence is generally relevant and admissible if it tends to make the existence or nonexistence of a disputed material fact more probable than it would be without that evidence. *See, e.g., GN Netcom, Inc. v. Plantronics, Inc.*, 930 F.3d 76, 85 (3d Cir. 2019) (citing FED R. EVID. 401, 402, 403); Nationally Recognized Statistical Rating Organizations (release No. 34-64514; File No. S7-18-11), 2011 WL 3970313, at \*4 ("[w]e agree with the Commission's conclusion that a public interest finding is an appropriate predicate to a suspension or revocation. . . [under] the Exchange Act given the severity of the penalty.").

In proceedings pursuant to Section 12(j) of the Exchange Act, the determination "of what sanctions will ensure that investors will be adequately protected . . . 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." *Gateway Int'l Holdings, Inc.*, Exchange Act Release No. 53907 (May 31, 2006), 88 SEC Docket 430, 438-39 (citing *Steadman v. SEC*, 603 F.2d 1126, 1139-1140 (5th Cir. 1979) (citation omitted), *aff'd on other grounds*, 450 U.S. 91 (1981)). In that context, the above areas of expert testimony are both relevant and extremely probative of disputed factual details that are highly material to the determination of this

case and should be allowed into evidence. *See id.*; *GN Netcom, Inc.*, 930 F.3d at 85 (citing FED R. EVID. 401, 402, 403).

The Division's only basis for attempting to foreclose Calmare the opportunity to conduct a brief period of discovery is that "expert testimony on the impact that revocation would have on present investors is not proportional to the needs of this case." *See* Division of Enforcement Motion for Summary Disposition at 6. In support, the Division cites to the Commission's reasoning in *A-Power Energy Generation Systems*:

in any deregistration current shareholders could be harmed by a diminution in the liquidity and value of their stock by virtue of the deregistration, but . . . any harm that may result to existing shareholders cannot be the determining factor in our analysis. In evaluating what is necessary or appropriate to protect investors, regard must be had not only for existing stockholders of the issuer, but also for potential investors. Indeed, we have emphasized the significant interests of prospective investors who can be substantially hindered in their ability to evaluate an issuer in the absence of current filings. In any event, both existing and prospective shareholders are harmed by the continuing lack of current and reliable financial information for the company.

Exchange Act Release No. 69439, 2013 WL 1755036 at \*3 (April 24, 2013).

But in this case, because the Commission has suspended trading in Calmare's stock and investors are therefore protected, and given the damage to Calmare's business and the harm to Calmare shareholders that would result from a revocation of the 1934 Act registration of Calmare stock at this time without allowing a short time period for Calmare to complete preparation of its delinquent reports, such revocation would significantly harm, rather than protect, investors. Calmare should be afforded the opportunity to adequately present its case and defend itself in these proceedings.

### **C. The Division Should Enforce the Parties' Original Agreement**

The parties originally agreed that Calmare's expert disclosures would be due by January 25, 2022, and that the briefing schedule on a motion for summary disposition would start to be discussed, if at all, after that date. Calmare is working diligently and intends to meet this January 25, 2022 deadline. The Division's insistence that Calmare name and lock in an expert before expert disclosures are due has no basis in law.

Calmare has retained the accounting services of Friedman LLP for the purpose of bringing its reporting into compliance in the foreseeable future. An extension of a brief period is needed to allow Calmare the opportunity to adequately present this and other evidence that is relevant and critical to the Commission's ruling on a motion for summary disposition. Calmare's request for an extension of time is reasonable under these circumstances and, if granted, would merely function to enforce the parties' original agreement that a briefing schedule would be discussed, if at all, only after Calmare's submission of expert disclosures by January 25, 2022.

Denial of this motion for extension of time would substantially prejudice Calmare's case.

### **CONCLUSION**

Without discovery that the parties originally agreed is necessary before even considering whether to proceed under Rule 250, Calmare cannot present facts essential to justify opposition to the Division's motion for summary disposition. In these circumstances, Rule 250 expressly requires that the hearing officer "deny or defer the motion." Accordingly, at minimum, there is good cause for the Commission to allow an extension of time under Rule 161.

WHEREFORE, Respondent respectfully requests that the Commission allow an extension of time that enforces the parties' original agreement that Calmare submit its expert disclosures by January 25, 2022, and thereafter establish a briefing schedule that is fair to all parties to address

the Division's motion for summary disposition. Alternatively, Respondent respectfully requests that the Commission or hearing officer deny or defer the Division's Motion.

Dated: January 3, 2022

Respectfully submitted,

*/s/ Paul L. Vorndran*\_\_\_\_\_

Paul L. Vorndran

Alan Talesnick

Albert B. Sahlstrom

Jones & Keller, P.C.

1675 Broadway, 26th Floor

Denver, Colorado 80202

pvorndran@joneskeller.com

atalesnick@joneskeller.com

asahlstrom@joneskeller.com

Counsel for Respondent Calmare Therapeutics Incorporated