

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-20550

<p>In the Matter of</p> <p>Calmare Therapeutics Incorporated.,</p> <p>Respondent.</p>
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**DIVISION OF ENFORCEMENT’S MOTION TO STRIKE EXPERT TESTIMONY AND
INCORPORATED MEMORANDUM OF LAW**

The Division of Enforcement (“Division”), pursuant to Rules of Practice 154(b) and 222, hereby moves to strike the Designation of Expert Witness Testimony (“Designation”), Declaration of Peter Brennan in Support of Respondent’s Opposition to Division of Enforcement’s Motion for Summary Disposition (“Brennan Declaration”), and Respondent’s Supplement to Its Submission of Expert Disclosures (“Supplemental Disclosure”) filed by Calmare Therapeutics Incorporated (“Respondent” or “Calmare”).

PRELIMINARY STATEMENT

On January 25, 2022, Calmare filed the Designation listing three expert witnesses it would like to have testify in this case: John Kaufman, Neil Levine, and Peter Brennan. On the same day, Calmare filed the Brennan Declaration. On January 28, 2022, Calmare filed the Supplemental Disclosure.

The Designation contains such limited information with respect to Mr. Kaufman and Mr. Levine that it facially fails to meet the standards of Rule 222 regarding expert disclosures. Most critically, it does not contain an expert report from either purported expert. Additionally,

although the Designation, Brennan Declaration, and Supplemental Disclosure provide slightly more information with respect to the testimony of Mr. Brennan, they still fail to establish that his proposed testimony is proper expert testimony from a qualified witness rather than a regurgitation of legal arguments on behalf of Calmare by Mr. Brennan, who also serves as Chairman of Calmare's Board of Directors. The Division requests that the Commission strike the proposed expert testimony and rule on the Division's pending Motion for Summary Disposition.

FACTUAL AND PROCEDURAL BACKGROUND

This is a proceeding under Section 12(j) of the Securities Exchange Act of 1934 ("Exchange Act") to determine whether to revoke the registration of each class of securities registered by Calmare. The basis for the proceeding is Calmare's ongoing failure to file periodic reports with the Commission in violation of Exchange Act Section 13(a) and Rule 13a-1 thereunder. Calmare has stipulated that it is delinquent in its filings and has been delinquent for more than four years.¹ The only remaining issue to determine in this proceeding is what the sanction for Calmare's long-term and ongoing delinquency should be.

The parties have also been in dispute regarding whether and when the Division could move for summary disposition in this matter, with the Division seeking resolution sooner and Calmare seeking to postpone briefing indefinitely. The entire history of that dispute need not be repeated here. But even under Calmare's proposed schedule, Calmare was supposed to submit its experts **reports** by January 25, 2022. Indeed, as Calmare stated in its November 10, 2021

Statement Regarding Prehearing Conference:

The parties are in agreement on the point that Calmare will provide its disclosures under 17 C.F.R. § 201.222(b) by January 25, 2022. These disclosures would include the following:

¹ See Division's Motion for Summary Disposition at p. 3 and accompanying Declaration of Gina Joyce in Support of the Division of Enforcement's Motion for Summary Disposition at Exh. 5.

- a statement of the expert's qualifications,
 - a listing of other proceedings in which the expert has given expert testimony during the previous four years,
 - a list of publications authored or co-authored by the expert in the previous ten years, and
- a copy of the expert's report regarding this matter.**

Calmare Statement of Prehearing Conference at 3 (emphasis added). The Designation utterly fails to meet either the requirements of Rule 222 or Calmare's prior promises in this case.

With respect to Mr. Kaufman, the Designation contains his name, a job title, a business address, the statement "Mr. Kaufman will testify concerning U.S. Federal Government contracting standards," and nothing more. With respect to Mr. Levine, the Designation contains his name, a job title, a business address, the statement "Mr. Levine will testify concerning the derogatory effect of a revocation of registration of Calmare's stock and the relative expense associated with revocation versus filing a new 10k" and nothing more.

The Brennan Declaration briefly recites Mr. Brennan's employment history in summary fashion, providing far less detail than a typical expert resume or curriculum vitae. It then recites eight factual assertions that appear to be the bases for Mr. Brennan's opinions, but sources none of the eight assertions. Since several of the assertions appear on their face to be nothing more than adoptions of arguments made by Calmare,² the lack of sourcing is a critical omission. The report's only discussion regarding the methods Mr. Brennan used to reach his conclusions is a vague reference to his "experience" that does not even tie the assertion to any specific portions of his prior experience. Finally, the opinions themselves are not tied to any factual support in the

² See, e.g., statement (viii), reading in part "The Company believes that if the SEC revokes the 1934 Act registration of the Company's stock, there is a substantially higher probability that the Government would invoke the "Responsible Contractor" provision to terminate the contracts than there would be if there is not a revocation of registration."

record or attached to the declaration. Rather, the reader is left with the impression that these things are the case simply because Mr. Brennan claims them to be the case.

The Division sent an email to counsel for Calmare on January 26, 2022 outlining the deficiencies in the Designation. Calmare responded by filing the Supplemental Disclosure, but that provided no additional information with respect to Mr. Kaufman or Mr. Levine and still completely fails to meet the standards of Rule 222.

ARGUMENT

I. The Commission Should Strike the Proposed Expert Testimony of John Kaufman and Paul Levine.

In general, the Commission favors including evidence in administrative proceedings and resolving issues about the reliability of that evidence by determining how much weight to give that evidence, including for expert testimony *See, e.g., Ralph Calabro, et al.*, Exchange Act Release No. 75076, 2015 SEC LEXIS 2175 at n.66 (May 29, 2015) (“We see no reason why a law judge, if he deems it appropriate, cannot hear expert testimony (and cross-examination) and then determine what weight to give that testimony.”).

But even that broad policy favoring admissibility of evidence has its limits. At times ALJs have excluded expert testimony. *See Christopher M. Gibson*, AP Rulings Release No. 6624, 2019 SEC LEXIS 1722 at *5 (July 11, 2019) (excluding Respondent’s expert report because the “report lacks any expert opinions” and was “essentially a legal brief and will not help me in resolving the case.”) (footnotes omitted). ALJ’s have also found that expert testimony that fails to meet the Commission’s standards regarding evidence may technically be admitted, but given no weight. For example, in *David Pruitt*, AP Rulings Release No. 6678, 2019 SEC LEXIS 3939 (Sept. 17, 2019) the ALJ noted that “evidence presented in Commission proceedings must be relevant, material, and reliable. And an expert’s opinion that something is

so, simply because she says it is, does not meet this standard.” *Id.* at *3-4 (footnotes omitted).

The ALJ further noted that an “expert cannot opine about legal standards to apply to the facts of a case . . . [nor] offer testimony that simply regurgitates what a party has told him.” *Id.* (footnotes and quotation marks omitted). Based on this, the ALJ in *David Pruitt* declined to give any weight to portions of certain expert reports.

Here, the Commission should strike the proposed expert testimony of Mr. Kaufman and Mr. Levine because the proffered testimony fails to meet the requirements of Rule 222 and is completely unreliable.

Rule 222 requires that an expert notice include the following:

1. a statement of the expert’s qualifications.
2. a listing of other proceedings in which the expert has given expert testimony during the previous four years,
3. a list of publications authored or co-authored by the expert in the previous ten years.

Rule 222(b)(1); 17 C.F.R. 201.222(b)(1). Additionally, if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party’s employee regularly involve giving expert testimony, then the party must include in the disclosure a written report prepared and signed by the witness.³ The report must contain:

- (i) A complete statement of all opinions the witness will express and the basis and reasons for them;
- (ii) The facts or data considered by the witness in forming them;
- (iii) Any exhibits that will be used to summarize or support them; and
- (iv) A statement of the compensation to be paid for the study and testimony in the case.

³ Because Mr. Levine and Mr. Kaufman are listed as having employment separate from Calmare, the Division presumes that they are retained to provide expert testimony in this case.

Rule 222(b)(1)(i); 17 C.F.R. 201.222(b)(1)(i).

The Designation and Supplemental Disclosure provide absolutely none of this information with respect to either Mr. Kaufman or Mr. Levine. Due to this utter and complete failure to abide by the terms of Rule 222, or to provide the reports that Calmare promised it would provide, the Commission should strike the proposed testimony of Mr. Kaufman and Mr. Levine. *See Black Diamond Asset Management LLC et al.*, AP Rulings Release No. 5028, 2017 SEC LEXIS 2759 at *7 (ALJ reminded the parties that “[f]ailure to comply with the requirements of Rule 222(b) may result in the striking of an expert’s report.”); *see also* Fed R. Civ. Pro. 37(c)(1) (“If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless.”).

Most critically, the Designation does not contain a report from either Mr. Kaufman or Mr. Levine setting forth their opinions, as required by Rule 222(b)(1). Rather, each purported expert’s testimony is described in vague and general terms in a single sentence. This vague description hampers the Division’s ability to respond to the expert’s testimony, as the Division does not even know what the expert’s opinions are. Such a glaring failure to abide by the basic requirements of Rule 222 warrants striking the proposed expert testimony.

Additionally, because the Designation and Supplemental Disclosure fail to contain any information about the qualifications of Mr. Kaufman and Mr. Levine, the data they relied on, or the methods they used, their purported testimony is completely unreliable and should be stricken.

Further, the proffered testimony by Mr. Kaufman and Mr. Levine is not proper expert testimony. There is no indication in the Designation why the subject matter of Mr. Kaufman’s

testimony “U.S. Federal Government contracting standards” is anything other than legal analysis which the Commission can consider without the assistance of an expert witness. Similarly, there is no indication why the proffered area of Mr. Levine’s testimony “the derogatory effect of a revocation of registration of Calmare’s stock and the relative expense associated with revocation versus filing a new 10k” is anything other than a repetition of legal arguments made by Calmare.

II. The Commission Should Strike the Proffered Expert Testimony of Mr. Brennan.

First, it is worth noting that while the Brennan Declaration is titled “Declaration of Peter Brennan in Support of Respondent’s Opposition to Division of Enforcement’s Motion for Summary Disposition,” Calmare still has not filed an opposition to the Division’s Motion for Summary Disposition.

Second, although the Brennan Declaration does contain a modicum of information with respect to Mr. Brennan’s qualifications and the facts he considered, the Commission should still strike his proffered testimony because the report does not contain any expert opinions. Rather, the report simply regurgitates arguments that Calmare has previously made to the Division regarding why it believes a suspension would be more favorable to investors than revocation. In reciting these conclusions, the Brennan Declaration relies on hearsay from Calmare’s unnamed “contract consultants,” puts forth an unsupported *ipse dixit* claim that “beginning anew with a 1934 Act registration and preparing a new Form 10 in order to do so, is considered significantly more negative by a company’s shareholders and the investment community,” and generally makes other unsupported claims. This renders the opinions expressed in the report so unreliable that the Commission should strike the Brennan Declaration in its entirety.

Third, none of the opinions put forth in the Brennan Declaration are the proper subject of expert testimony. Accordingly, they are all irrelevant and should be stricken.

III. In the Alternative, the Commission Could Allow the Designation and Declaration to Remain in the Record, but Give the Testimony No Weight.

The Division understands the general preference for including evidence in the record in Commission administrative proceedings. Nonetheless, the Division believes that Calmare's proffered expert testimony is so unreliable and irrelevant that it falls outside the lenient standards for admission in a Commission proceeding. That said, another possible alternative would be to allow the evidence into the record, but give it no weight for all the same reasons listed above.

Additionally, even if the Commission were to give the testimony some weight, it does not create an issue of disputed fact in this case. Even the Brennan Declaration, the only one of the three proffered testimonies containing any substance, myopically focuses exclusively on existing shareholders, ignoring the interests of prospective shareholders. Thus, even if the Commission were to accept the Brennan Declaration's unsupported claims that revocation would harm existing shareholders, there is still more than a sufficient basis for the Commission to revoke the registration of Calmare's stock due to the harm that the lack of financial information presents to prospective investors. In the past, the Commission has "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." *A-Power Energy Generation Systems*, Exchange Act Release No. 69439, 2013 SEC LEXIS 1204 at *11 (April 24, 2013).

CONCLUSION

Accordingly, the Commission should strike the proposed expert testimony from Calmare’s three witnesses. Alternatively, the Commission can accept the testimony into the record, but give it no weight. In any event, the Division believes that the Commission can now rule on the Division’s Motion for Summary Disposition.

Dated: February 2, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the Division of Enforcement's Motion to Strike Expert Testimony and Incorporated Memorandum of Law was served on the following on February 2, 2022, in the manner indicated below:

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