

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-18017

In the Matter of

Can-Cal Resources Ltd., *et al.*,

Respondents.

**DIVISION OF ENFORCEMENT'S OPPOSITION
TO THE MOTION BY CERTAIN INVESTORS TO INTERVENE**

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**DIVISION OF ENFORCEMENT'S OPPOSITION TO THE
MOTION BY CERTAIN INVESTORS TO INTERVENE**

The Division of Enforcement ("Division") submits this brief in opposition to the Motion to Intervene as Parties, or on a Limited Basis, or Otherwise Pursuant to Rules of Practice 210 (b), (c) and (f), filed by thirty-five minority investors.

1. The Motion to Intervene Should be Denied as Proposed Intervenors have no Authority to Represent Can-Cal Resources Ltd.

The thirty-five minority investors ("Proposed Intervenors") argue that they should be allowed to intervene on behalf of Respondent Can-Cal Resources Ltd. ("Can-Cal") in this Section 12(j) proceeding in order to impede the remedy of revocation being ordered, even if the established Section 12(j) standards and procedures require the ordering of revocation. The Proposed Intervenors seek to hold revocation in abeyance until at least the completion of the trial in their Nevada state court case, which trial is currently scheduled for February 2018. It is respectfully submitted that the disruption sought by the Proposed Intervenors is inappropriate.

Rule 102(b) of the Rules of Practice requires that, with limited exception not applicable here, only an attorney at law or a bona fide officer of the corporation may represent a corporation. Accordingly, the Proposed Intervenors have no authority to represent or speak for the Respondent in this proceeding, as they sought to do when they expected the Respondent to default.

Contrary to the Proposed Intervenors' prediction (Motion at 4), both counsel and Directors for the Respondent have entered an appearance in this administrative proceeding. They represent the issuer that is responsible for the delinquent filings. There thus is no meaningful role for the Proposed Intervenors to play in this case. The Proposed Intervenors are in no position to bring the delinquent filings up to date and thereby avoid the need for revocation.

There is nothing that the Proposed Intervenors can say or do in this proceeding that will significantly alter the likelihood of revocation.

In making a determination of the appropriate sanction for a Section 12(j) violation, the Commission has said it will consider, among other things: (1) the seriousness of the issuer's violations; (2) the isolated or recurrent nature of the violations; (3) the degree of culpability involved; (4) the extent of the issuer's efforts to remedy its past violations and ensure future compliance; and (5) the credibility of the issuer's assurances against future violations. *Gateway Int'l Holdings, Inc.*, Securities Exchange Act Rel. No. 53907, 2006 SEC LEXIS 1288, at *19-*20 (May 31, 2006).¹ Notably, the Proposed Intervenors are not in a position to shed meaningful light on any of the *Gateway* factors. Further, the Commission has held that "[t]he extent of any harm that may result to existing shareholders cannot be the determining factor in our analysis." *America's Sports Voice, Inc.*, Securities Exchange Act Rel. No. 55511, 2007 SEC LEXIS 1241 at *15 (March 22, 2007), quoting *Gateway* at 2006 SEC LEXIS 1288, at *31. 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." *America's Sports Voice*, 2007 SEC LEXIS 1241 at *15.

As indicated by their Nevada litigation, the Proposed Intervenors are at odds with the officers of Can-Cal. The only result from allowing intervention in this proceeding will be confusion and delay as the Proposed Intervenors attempt to extend their contentious litigation

¹ See also *Steadman v. SEC*, 603 F.2d 1126, 1140 (5th Cir. 1979) (setting forth the public interest factors that informed the Commission's *Gateway* decision). Although no one factor is controlling, *Stansbury Holdings Corp.*, Initial Decision Rel. No. 232, 2003 SEC LEXIS 1639 (July 14, 2003), at *14-*15; and *WSF Corp.*, Initial Decision Rel. No. 204, 2002 SEC LEXIS 1242 (May 8, 2002) at *5, *18, the Commission has stated that it views the "recurrent failure to file periodic reports as so serious that only a strongly compelling showing with respect to the other factors we consider would justify a lesser sanction than revocation." *Impax Laboratories, Inc.*, Securities Exchange Act Rel. No. 57864, 2008 SEC LEXIS 1197 at *27 (May 23, 2008).

with Can-Cal into this forum. This would be inconsistent with the purpose of a Section 12(j) proceeding. This is a civil law enforcement action which should not be held up for resolution of a private state court proceeding. Section 12(j) proceedings were not designed to be used to obtain leverage in state court litigation or to, in effect, obtain injunctive relief.

Confirming that their goal is to accomplish a takeover of this administrative proceeding for their own purposes, the Proposed Intervenors request an unprecedented hearing that would allow them to prove: (1) the alleged fraud that Can-Cal is engaged in to “complete the transfer of the value of [its] Pisgah Property to Candeo;” and (2) that this “would strip the value of [Can-Cal]’s only asset from [Can-Cal] and its shareholders.” (Proposed Intervenors’ Brief at VI.) The proposed hijacking and distortion of this narrow Section 12(j) proceeding should be denied. Not only might it create a bad precedent for future Section 12(j) cases but, to the extent their allegations have merit, the Proposed Intervenors have ample recourse in their pending Nevada Proceeding.

2. The Proposed Intervenors Ignore the Importance of Periodic Filings and Section 12(j) Revocation Proceedings.

Even though there is nothing that the Proposed Intervenors can say or do to make the delinquent filings at issue in this case, they seek to intervene in order to abort or delay the revocation process. In doing so, they ignore the importance of periodic filings, as well as the importance of Section 12(j) proceedings.

Section 13(a) of the Securities Exchange Act of 1934 (“Exchange Act”) and the rules promulgated thereunder require issuers of securities registered pursuant to Section 12 of the Exchange Act to file periodic and other reports with the Commission. Exchange Act Section 13(a) is the cornerstone of the Exchange Act, establishing a system of periodically reporting core

information about issuers of securities. Section 12(j) proceedings are an important remedy to cure filing deficiencies. The Commission has stated:

Failure to file periodic reports violates a central provision of the Exchange Act. The purpose of the periodic filing requirements is to supply investors with current and accurate financial information about an issuer so that they may make sound decisions. Those requirements are “the primary tool[s] which Congress has fashioned for the protection of investors from negligent, careless, and deliberate misrepresentations in the sale of stock and securities.” Proceedings initiated under Exchange Act Section 12(j) are an important remedy to address the problem of publicly traded companies that are delinquent in the filing of their Exchange Act reports, and thereby deprive investors of accurate, complete, and timely information upon which to make informed investment decisions.

Gateway International Holdings, Inc., Securities Exchange Act Rel. No. 53907, 2006 SEC LEXIS 1288 at *26 (quoting *SEC v. Beisinger Indus. Corp.*, 552 F.2d 15, 18 (1st Cir. 1977)).

3. There is No Basis for the Proposed Intervenors to Intervene Since the Remedy of Revocation Will Not Cause Can-Cal to Cease Being the Kind of Company It Was Before its Securities Registration is Revoked.

Revocation will not be overly harmful to whatever business operations, finances, or shareholders Can-Cal may have. The remedy of revocation will not cause Can-Cal to cease being whatever kind of company it was before its securities registration was revoked. The remedy instead will ensure that until Can-Cal becomes current and compliant on its past and current filings, its shares cannot trade publicly on the open market (but may be traded privately).

See Eagletech Communications, Inc., Exchange Act Rel. No. 54095, 2006 SEC LEXIS 1534, at *9 (July 5, 2006) (revocation would lessen, but not eliminate, shareholders’ ability to transfer their securities). Revocation will not only protect current and future investors in Can-Cal, who presently lack the necessary information about Can-Cal because of the issuer’s failure to make Exchange Act filings, it will also deter other similar companies from becoming lax in their reporting obligations.

A new registration process will place all investors on an even playing field. All current investors will still own the same amount of shares in Can-Cal that they did before re-registration, though their shares will no longer be devalued because of the company's delinquent status. All investors, current and future alike, will also benefit from the legitimacy, reliability, and transparency of a company in compliance. The time-out will protect the status quo, and will give Can-Cal the opportunity to come into full compliance, to calmly and thoroughly work through all of its remaining issues with its attorney, consultants, auditors, and management, and to complete its financial statements in compliance with Regulations S-K and S-X. Similarly, even with revocation, the Proposed Intervenors may continue to pursue their pending state court action, replete with its various allegations of fraud, conversion, unjust enrichment, self-dealing, and breaches of fiduciary duties.

We, of course, have no comment about the various allegations made in the state court proceeding. That is for the Nevada state court to decide. However, we re-emphasize that there is no need to delay or complicate this Section 12(j) proceeding, with a narrow scope limited to delinquent periodic filings, as a result of the pending issues in the state court action.

The Proposed Intervenors insist that they will prevail at the state court trial and will then install a new board of directors to take control of Can-Cal. They say that they will then make sure that all SEC rules and regulations will be complied with, presumably including the periodic filing requirements. (Proposed Intervenors' Brief, at V.) As previously stated, however, when Can-Cal's current registration is revoked in this Section 12(j) proceeding based on its delinquent filings and the *Gateway* factors, Can-Cal could immediately file a new registration statement with two years of audited financial statements and have its securities become re-registered automatically within sixty days of filing the new registration statement. Intervention in this

Section 12(j) proceeding is neither necessary nor appropriate for that to happen. To the contrary, such intervention may result in delay and potential confusion in this or another similarly situated Section 12(j) proceeding if Proposed Intervenors, without any present ability to cure delinquent filing deficiencies or file a new registration statement, are allowed to intervene.

4. Intervention Pursuant to Rule 210(b), (c) and (f) has been Rarely Allowed in Enforcement Proceedings and the Scope of any Such Intervention has been Narrowly Limited.

Pursuant to Rule 210 of the Rules of Practice, intervention, either generally under Rule 210(b)(1), or on a limited basis under Rule 210(c), is not allowed in an Enforcement proceeding. Rule 210(f) does allow for a modification of the provisions of Rule 210 by the hearing officer, with the imposition of such terms and conditions as deemed necessary or appropriate in the public interest. However, Rule 210(f) participation only has been allowed in limited circumstances with a narrow scope, and rarely has been allowed in Section 12(j) proceedings. A review of the case law provides the proposed intervenors with no support.

In the Matter of Comverse Technology, 2010 WL 2886397 (July 22, 2010), decided by ALJ Mahony, is one of the few Section 12(j) cases that considered Rule 210 participation. In *Comverse*, only a statement of views was allowed to be accepted into the record pursuant to Rule 210(e).² Of importance, the Court noted that, consistent with the specific language of Rule 210(e), the statement of views submitted would be considered “only to the extent that the statements therein made are otherwise supported by the record.” 2010 WL 2886397, at *2.

Of importance, in *Comverse*, not only was the non-party participation limited to a written statement of views (that already had been submitted), but there was a specific limitation on the

² Counsel for the Minority Investors in the pending proceeding informed Division counsel that they also believe they should be allowed to participate pursuant to Rule 210(e).

consideration to be given to the submission, *i.e.*, only to the extent the statements made in the submission were otherwise supported by the record. *Comverse* speaks volumes about the limited role that the current Proposed Intervenors should be allowed to play in this proceeding, if allowed any role. At most, the Proposed Intervenors should be allowed only to submit into the record the filing that they already made. In fact, most, if not all, of that filing must be severely limited since it is replete with allegations of fraudulent and other unrelated activity, and numerous pages of exhibits related to the Nevada allegations, the basis for which is not now, and never properly will be, included in the record of a Section 12(j) proceeding. For instance, the Nevada Complaint attached to the motion to intervene is made up of allegations that have been the subject of litigation for years in the Nevada state court. The Proposed Intervenors seek to intervene as a party to present their case against Can-Cal. That, however, is contrary to not only Rules 210(b) and (c), but also to Rule 210(e), and to the limitation in *Comverse* to a statement of views and, even then, only to the extent supported by facts in the record. The effort of the Proposed Intervenors to go beyond, indeed entirely beyond, that which is or will be in the record illustrates why the effort should be denied *ab initio*.

In re Left Behind Games, Inc., 2013 WL 11270127 (Oct. 30, 2013) (J. Elliot), was another rare Section 12(j) case where Rule 210(f) participation was considered. The case provides the proposed intervenors here with no support. Unlike the Respondent in the present case, in *Left Behind Games* there were no remaining officers or directors of the Respondent to speak on its behalf. Accordingly, Judge Elliot allowed the remaining stockholder with voting control to speak in the proceeding. The Proposed Intervenors here, accounting for 17% of the outstanding shares, do not have voting control of the Respondent. Further, counsel for the Respondent, as well as two of its Directors, now have entered an appearance in this proceeding.

Similarly unavailing is *In the Matter of the Application of Russell Simpson*, 1998 WL 801399, n.2 (Nov. 19, 1998). In *Simpson*, the Commission allowed a brief to be filed pursuant to Rule 210(f) in a Commission review of a NASD action. The case was not an Enforcement proceeding, was not a Section 12(j) proceeding, and it was only a single brief that was allowed, not active participation in the case. The case thus does not provide the Proposed Intervenors with any support in this proceeding.

Finally, the case of *In the Matter of Steven W. Bingaman*, 1996 WL 713382 (date) (C,J. Murray), allowed a limited intervention in an Enforcement case that was not a Section 12(j) proceeding. The United States Attorney's Office was allowed to intervene not to participate in the proceeding, but solely to seek a stay of the Enforcement action based on the existence of a parallel criminal proceeding, both the civil and the criminal cases having been brought in the public interest by law enforcement agencies. *Bingaman* thus provides no support for the intervention sought in the present motion.

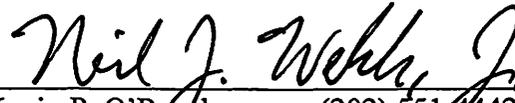
The extant case law thus illustrates that even if some form of intervention is allowed, it must be narrow and restricted to a statement of views consistent with evidence in the record. In none of the cases was an intervenor allowed to take over a Section 12(j) proceeding, conduct its own hearing, or even participate in the hearing.

5. Conclusion

For the reasons set forth above, the Division respectfully requests that the Motion to Intervene as Parties, or on a Limited Basis, or Otherwise Pursuant to Rules of Practice 210 (b), (c) and (f), filed by certain (35) minority investors, should be denied.

Dated: July 7, 2017

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that true copies of the Division of Enforcement's Opposition to the Motion by Certain Investors to Intervene in this Proceeding were served on the following on this 7th day of July, 2017, in the manner indicated below:

By Hand:

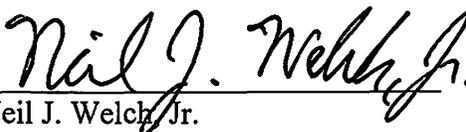
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