

SECURITIES AND EXCHANGE COMMISSION  
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934  
Release No. 77502 / April 1, 2016

Admin. Proc. File No. 3-16913

In the Matter of the Application of  
AUTOCHINA INTERNATIONAL LIMITED  
For Review of Action Taken by FINRA

OPINION OF THE COMMISSION

REGISTERED SECURITIES ASSOCIATION—REVIEW OF ASSOCIATION ACTION  
DENYING REQUEST TO PROCESS CORPORATE ACTION

Registered securities association, in declining to process issuer's proposed name change, made findings that are not supported by the record. *Held*, review proceeding is *remanded*.

APPEARANCES:

*Mitchell S. Nussbaum, Jay K. Musoff, Giovanni Caruso, and Amanda-Jane Thomas* of Loeb & Loeb LLP, for AutoChina International Limited.

*Alan Lawhead and Jennifer C. Brooks*, for the Financial Industry Regulatory Authority, Inc.

Appeal filed: October 21, 2015

Last brief received: February 2, 2016

AutoChina International Limited ("AutoChina" or the "Company"), an issuer of securities quoted on the OTCQB Venture Marketplace ("OTCQB"),<sup>1</sup> appeals from FINRA's denial of

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<sup>1</sup> OTCQB is one of the tiers of OTC Link®ATS ("OTC Link"), an alternative trading system that allows broker-dealers to post and disseminate their quotations (prices) to the marketplace and to negotiate trades at agreed-upon prices. *See* <http://www.otcmart.com/about/otc-markets-history>.

AutoChina's request that FINRA process and announce its name change to Fincera, Inc.<sup>2</sup> FINRA found that AutoChina's request was deficient under FINRA Rule 6490(d)(3)(3) because FINRA had actual knowledge that AutoChina was the subject of a civil action related to fraud or securities law violations.<sup>3</sup> FINRA then determined that processing the name change would pose too great a risk to the investing public and the securities markets and declined to process the request.<sup>4</sup> In denying the request FINRA stated that AutoChina had "fail[ed] to address" why certain defendants in the civil action "are apparently still employed by or affiliated with AutoChina," and that failure "weighs heavily against processing the proposed name change."

In its appeal, AutoChina does not dispute FINRA's finding that its request was deficient; rather, AutoChina disputes FINRA's finding that certain defendants in the civil action are employed by or affiliated with AutoChina, and our own review of the record has identified no evidence to support FINRA's finding. As explained below, we do not remand on the issue of whether the request was deficient under FINRA Rule 6490(d)(3)(3). We are remanding the proceeding to FINRA to determine the employment and/or affiliation status of those defendants, and in light of those findings, determine whether denying the requested name change is necessary for the protection of investors and the public interest. As outlined below, FINRA should ensure that the record contains all of the evidence upon which its action is taken.

## I. Facts

### A. AutoChina's Request that FINRA Process Company-Related Actions

FINRA processes requests from issuers of securities traded on the over-the-counter markets to announce and publish certain corporate actions. These actions include both actions provided for in Exchange Act Rule 10b-17,<sup>5</sup> such as dividends and stock splits (collectively "SEA Rule 10b-17 Actions") and "Other Company-Related Actions,' includ[ing] . . . any issuance or change to a symbol or name."<sup>6</sup> FINRA publishes announcements of these actions on its website. On February 17, 2015, AutoChina asked FINRA to process and announce a stock

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<sup>2</sup> FINRA Rule 6490 sets forth requirements and procedures governing FINRA's review and processing of documents related to, among other things, "any issuance or change to a symbol or name" "to facilitate the orderly trading and settlement" of securities traded on the over-the-counter markets. Rule 6490(a)(1), (2).

<sup>3</sup> Rule 6490(d)(3)(3) permits FINRA to base a deficiency determination on FINRA's "actual knowledge that the issuer [or certain other persons] . . . are the subject of . . . a civil or criminal action related to fraud or securities laws violations."

<sup>4</sup> FINRA Rule 6490(d)(3) provides that "[i]n circumstances where an SEA Rule 10b-17 Action or Other Company-Related Action is deemed deficient, the Department may determine that it is necessary for the protection of investors, the public interest and to maintain fair and orderly markets, that documentation related to such SEA Rule 10b-17 Action or Other Company-Related Action will not be processed."

<sup>5</sup> 17 C.F.R. § 240.10b-17.

<sup>6</sup> FINRA Rule 6490(a)(2).

split, and on June 8, 2015, while its stock split request was still under review, the Company asked FINRA to process and announce a name change to Fincera, Inc.<sup>7</sup>

In submitting the stock split request, AutoChina disclosed to FINRA that it had "recently settled a regulatory action with the SEC." FINRA staff asked AutoChina to provide additional information and documents related to its request.<sup>8</sup> Within a week after beginning its review, FINRA staff discovered the 2014 Commission litigation release announcing a settlement with two defendants in a civil action ("Civil Action") against AutoChina, its former Secretary Hui Kai Yan ("Yan"), eight other individuals, and two limited corporations (together, the "AutoChina Defendants").<sup>9</sup> On February 27, AutoChina provided a summary of salient facts about the Civil Action, provided additional information about the Commission's investigation that resulted in the Civil Action, made representations about AutoChina's cooperation with the investigation and compliance with the terms of the settlement, and noted, among other things, that no officers or directors other than Yan were named in the complaint filed in the Civil Action ("Complaint") and that the Commission did not make any allegations regarding AutoChina's financial reporting or operations.<sup>10</sup>

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<sup>7</sup> AutoChina apparently submitted the request electronically. The record contains a print-out of the form AutoChina submitted, but not the attachment in pdf format that the form references. The record does not contain any communication from FINRA acknowledging the receipt of the request, or any documents obtained or generated during FINRA's review of the request. On remand, FINRA should ensure that the record contains all of the evidence upon which its action is taken.

AutoChina's application to the Commission sought review of FINRA's denial of both the request for a name change and request for a stock split. In its reply brief, AutoChina withdrew its application with respect to the request to process a stock split. We have reviewed documents concerning FINRA's review of the stock split request only to the extent they bear on FINRA's decision regarding the name change.

<sup>8</sup> Few of the documents the staff requested are contained in the record certified to us. For example, FINRA asked for ten documents in an e-mail dated February 18, 2015. AutoChina replied by e-mail on February 24, 2015, referring to "the attached letter and related documents in response to the questions raised below." However, the record contains only the text of the February 24 e-mail.

<sup>9</sup> *SEC v. AutoChina Int'l Ltd.*, Litigation Rel. No. 23033, 2014 WL 2915933 (June 27, 2014). In an e-mail exchange dated February 25, 2015, the staff asked AutoChina whether the litigation release related to the Company, and AutoChina confirmed that it did.

<sup>10</sup> The Complaint alleged that the AutoChina Defendants fraudulently manipulated AutoChina's shares to increase AutoChina's trading volume and create the appearance of liquidity, thereby enhancing the ability of AutoChina's chairman and chief executive officer, Yong Hui Li ("Li"), to obtain financing for the Company. The Complaint further alleged that the stock manipulation involved 26 brokerage accounts at E\*Trade Financial Corporation ("E\*Trade") into which more than \$60 million were deposited over four months and through which millions of shares of AutoChina stock were sold. The Complaint alleged that account-opening documents at E\*Trade indicated that six of the individual defendants were employees of

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## B. FINRA's Denial of AutoChina's Requests

On August 21, 2015, FINRA's Department of Market Operations ("Department") issued a notice denying AutoChina's requests ("Deficiency Notice"), based on its determination that the requests were deficient under FINRA Rule 6490(d)(3)(3) and that denying the requests was "necessary for the protection of investors, the public interest, and to maintain fair and orderly markets." In explaining its determination, the Department relied on FINRA's actual knowledge of the Civil Action, the allegations of the Complaint, and the Final Judgments.<sup>11</sup>

On August 28, 2015, AutoChina appealed the Department's determination to a subcommittee of FINRA's Uniform Practice Code Committee ("Subcommittee"), asserting that "[t]he [Deficiency] Notice . . . fails to point out that the [Defaulting Defendants] are not employed by the Company (and were not so employed at the time of the Civil Action)."<sup>12</sup> The Company also made several arguments as to why, in its view, refusing to process the requests was detrimental to the public interest.<sup>13</sup>

On September 29, 2015, the Subcommittee denied AutoChina's requests to process the stock split and name change. The Subcommittee's decision said it was reached "[a]fter careful

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AutoChina. It also alleged that one of the individual defendants was a manager at an AutoChina subsidiary and another was a former manager at AutoChina, that four of the individual defendants were relatives of Li, and that AutoChina identified one of the corporate defendants as an "affiliate" on a Form 20-F filed with the Commission in 2011 for the period ending December 31, 2010. *SEC v. AutoChina Int'l Ltd.*, No. 12-cv-10643-GAO (D. Mass.) (complaint filed Apr. 11, 2012).

On June 25, 2014, the district court entered judgments by consent against AutoChina and Yan (the "Final Judgments"). In consenting to the entry of the Final Judgments, AutoChina and Yan neither admitted nor denied the allegations of the Complaint. The Final Judgments permanently enjoined AutoChina and Yan from future violations of the antifraud provisions of the Securities Act of 1933 and the antifraud and anti-manipulation provisions of the Exchange Act. The district court also ordered AutoChina to pay a civil penalty of \$4.35 million and permanently barred Yan from serving as an officer or director of any public company. The court entered default judgments as to the remaining defendants (the "Defaulting Defendants") on October 24, 2014.

<sup>11</sup> The Department did not explain how it obtained "actual knowledge" as required by FINRA Rule 6490(d)(3)(3), but it cited both the Complaint and the litigation release.

<sup>12</sup> AutoChina also noted that the Department inaccurately stated in the Deficiency Notice that the Civil Action was still pending against the Defaulting Defendants. As noted above, a final judgment was entered by default against those defendants in October 2014.

<sup>13</sup> After acknowledging the appeal, the Subcommittee instructed the Department to submit AutoChina's company-related action notification form; the Department's deficiency notice; and the Department's documentation in support of the deficiency notice. The record does not show that the Department submitted these documents.

consideration of AutoChina's request, the Department's denial of that request, and the additional supporting documentation that the Department and AutoChina submitted in this appeal." The Subcommittee agreed that the Department had correctly found AutoChina's request deficient under Rule 6490(d)(3)(3), based on the settlement of the Civil Action. In its public interest analysis, the Subcommittee found the Civil Action and the Final Judgment against AutoChina "very serious," particularly in light of "the gravity of the violations at issue" and AutoChina's proposed corporate actions. The Subcommittee stated that "the Commission's investigation, which led to the filing of the [Civil Action], initially focused on the conduct of Li and AutoChina's current Chief Financial Officer," and found that "the continued involvement of executives, managers, and directors who were employed with AutoChina when the misconduct occurred raises significant concerns about the company-related actions that AutoChina has requested." The Subcommittee also found that although Yan was the only former senior executive and director named as a defendant in the Complaint,

[the Complaint] also details misconduct by several other individuals and corporate entities affiliated with AutoChina and Li. . . . Although AutoChina has stated that Yan is no longer with the company, it has made no such representations with regard to the other AutoChina Defendants. AutoChina's failure to address why the other AutoChina Defendants are apparently still employed by or affiliated with AutoChina weighs heavily against processing the company's proposed name change and forward stock split.

The Subcommittee noted that the Civil Action had resulted in AutoChina's payment of \$4.35 million as a civil penalty a little more than a year previously and stated that the AutoChina Defendants "have demonstrated a profound disregard for securities regulation." Under these circumstances, the Subcommittee affirmed the Department's denial, concluding that the processing of AutoChina's proposed actions would pose too much risk to the investing public and the securities markets.<sup>14</sup>

## II. ANALYSIS

### A. Standard of Review

Exchange Act Section 19(f) governs our review of a self-regulatory organization's denial of access to services.<sup>15</sup> Under Section 19(f), we must dismiss AutoChina's application for review if we find that (i) the specific grounds on which FINRA based its denial exist in fact; (ii) the denial was in accordance with FINRA's rules; and (iii) those rules are, and were applied in a manner, consistent with the purposes of the Exchange Act.<sup>16</sup>

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<sup>14</sup> Under FINRA Rule 6490(e), the Subcommittee's decision is FINRA's final decision in this matter.

<sup>15</sup> 15 U.S.C. § 78s(f) (authorizing Commission review of SRO action that prohibits or limits "any person with respect to access to services offered" by the SRO); *see, e.g., Positron Corp.*, Exchange Act Release No. 74216, 2015 WL 470454, at \*5-11 (Feb. 5, 2015) (applying Section 19(f) to review of FINRA denial of request to process corporate actions).

<sup>16</sup> *Fog Cutter Capital Grp., Inc. v. SEC*, 474 F.3d 822, 825 (D.C. Cir. 2007).

## B. Certain Grounds for the Denial do not Exist in Fact

We first analyzed a denial of a Company-Related Action request under FINRA Rule 6490(d)(3) in *mPhase Technologies, Inc.*, where we explained:

FINRA Rule 6490(d)(3) requires FINRA to conduct a two-step analysis in determining whether to process a Company-Related Action request. First, FINRA must assess whether the issuer's request is deficient. As the Rule states, FINRA's deficiency determination "shall" be based "solely . . . [on] one or more" of the five enumerated factors . . . . Second, in the event that FINRA deems an issuer's request deficient, FINRA then "may determine" not to process the issuer's request if it finds that denial "is necessary for the protection of investors, the public interest and to maintain fair and orderly markets."<sup>17</sup>

The preponderance of the record supports the facts on which FINRA based its finding of a deficiency under the first step of the Rule 6490(d)(3) analysis. Among other things, a request is deficient if FINRA has "actual knowledge that the issuer, . . . officers, . . . or other persons connected to the issuer . . . are the subject of a . . . settled . . . civil . . . action related to fraud or securities laws violations."<sup>18</sup> The record reflects that FINRA had actual knowledge about the Civil Action while considering AutoChina's requests. AutoChina disclosed the existence of the Civil Action to FINRA on its initial request that FINRA process a stock split, and FINRA received additional information about the Civil Action during its review of that request. Because the Civil Action named AutoChina, among others, as a defendant and alleged that AutoChina had violated the federal securities laws, AutoChina's request was deficient under Rule 6490(d)(3)(3).<sup>19</sup> Therefore, we sustain FINRA's finding of a deficiency under Rule 6490(d)(3)(3). FINRA need not revisit this finding on remand, and indeed AutoChina does not dispute that its request was deficient under the first step of the analysis.

However, FINRA's public interest analysis relied on facts not in the record.<sup>20</sup> FINRA emphasized in its decision that AutoChina's failure to address the alleged continued employment

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<sup>17</sup> *mPhase*, Exchange Act Release No. 74187, 2015 WL 412910, at \*4 (Feb. 2, 2015) (citations omitted). *See also Positron Corp.*, 2015 WL 470454, at \*6 (setting forth and applying two-step analysis that FINRA must conduct under FINRA Rule 6490(d)(3) in determining whether to process a Company-Related Action request).

<sup>18</sup> FINRA Rule 6490(d)(3)(3).

<sup>19</sup> AutoChina does not dispute that its request was deficient under the first step of the analysis pursuant to Rule 6490(d)(3)(3).

<sup>20</sup> Certain evidence that FINRA cited in its public interest analysis is supported by the record, but FINRA did not find this evidence to be independently dispositive of whether a denial of the request was in the public interest. For example, evidence clearly establishes that AutoChina consented to a final judgment in the Civil Action and that AutoChina paid the \$4.35 million civil penalty in 2014. The record contains copies of the final judgments as to the two defendants who settled and the Commission's litigation release announcing the entry of these final judgments. The record also contains a copy of the Complaint, providing a basis for findings as to the allegations it contains. *See, e.g., mPhase Techs., Inc.*, 2015 WL 412910, at \*6-7

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or affiliation of the AutoChina Defendants "weighed heavily" in its determination to deny the request for the name change. FINRA found that the AutoChina Defendants (other than Yan) are still employed by or affiliated with AutoChina. We found no evidence that supports this finding, and FINRA fails to identify the evidence on which it relied in determining that the defendants are still employed by or affiliated with AutoChina.<sup>21</sup> Other evidence is to the contrary. AutoChina asserted before the Subcommittee that "the other defendants to the [Civil Action] are not employed by the Company (and were not so employed at the time of the Civil Action)."<sup>22</sup>

In light of the lack of record evidence that supports the finding of employment or affiliation of the AutoChina Defendants (other than Yan), and because that finding "weighed heavily" in FINRA's decision, we find that it is appropriate to remand this matter to FINRA.<sup>23</sup>

On remand, FINRA should determine whether the AutoChina Defendants (other than Yan) are employed by or affiliated with the Company. In the course of making such findings, FINRA should consider providing the Company with an opportunity to introduce additional

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(holding that FINRA could consider the underlying findings in a settlement order that were neither admitted nor denied in making its public interest determination under Rule 6490, where FINRA gave the applicant the opportunity to dispute the relevance of the settlement to the Company-Related Action Request, and where FINRA "considered a number of factors in addition to the settlement").

<sup>21</sup> FINRA also found that "the Commission's investigation, which led to the filing of the federal civil action, initially focused on the conduct of Li and AutoChina's current Chief Financial Officer." We have not located, and FINRA has not cited, any record evidence in support of this finding.

<sup>22</sup> AutoChina attached to its brief on appeal what appears to be a chain of e-mails dating from March 12, 2015 to June 3, 2015, between "OTC Corporate Actions" at finra.org and counsel for AutoChina, in which AutoChina represented, on June 3, 2015, "Except for Hui Kai Yan, who was employed as the Secretary and a Director of AutoChina during the time of the SEC complaint, no other person named as a defendant in the complaint was a director, officer or employee of AutoChina or had any other affiliation with AutoChina during the time of the SEC complaint." This e-mail string, which we have reviewed as part of our consideration of the Company's appeal, should have been certified as part of the record, in accordance with Rule of Practice 420(d) (requiring the self-regulatory organization whose action is the subject of an application for Commission review to "certify and file with the Commission one copy of the record upon which the action complained of was taken"). AutoChina asserts, without contradiction by FINRA, that the appendices attached to its brief "all were reviewed by or available to the UPCC Subcommittee, but were not included in FINRA's certified record on appeal."

<sup>23</sup> In its brief on appeal, FINRA argues that the defendants "were connected to the Company for purposes of FINRA's review under Rule 6490." But FINRA's public interest determination was not based on whether certain defendants in the Civil Action were "connected to" AutoChina. Instead, FINRA looked to whether those defendants were *employed by or affiliated with* AutoChina.

evidence to resolve this issue. If the defendants are not employed by or affiliated with AutoChina, FINRA should determine whether, in light of the deficiency of the Company's request, a denial of the request is in the public interest. FINRA also should ensure that the record contains all of the evidence upon which its action is taken.<sup>24</sup>

An appropriate order will issue.<sup>25</sup>

By the Commission (Chair WHITE and Commissioners STEIN and PIWOWAR).

Brent J. Fields  
Secretary

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<sup>24</sup> See note 22 *supra* (quoting Rule of Practice 420(d)). We do not intend to suggest any view as to the outcome of the proceedings on remand.

<sup>25</sup> Because the issues have been thoroughly briefed and can be adequately determined on the basis of the record filed by the parties, Applicant's request for oral argument is denied. Rule of Practice 451, 17 C.F.R. § 201.451 (providing for Commission consideration of appeals based on the "papers filed by the parties" unless the "decisional process would be significantly aided by oral argument").

SECURITIES AND EXCHANGE COMMISSION  
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934

Release No. 77502 / April 1, 2016

Admin. Proc. File No. 3-16913

In the Matter of the Application of  
AUTOCHINA INTERNATIONAL LIMITED  
For review of Action Taken by FINRA

ORDER REMANDING ASSOCIATION ACTION

On the basis of the Commission's opinion issued this day, it is

ORDERED that the review proceeding arising out of FINRA's refusal to process the corporate action requested by AutoChina International Limited is remanded to FINRA for further proceedings consistent with this opinion.

By the Commission.

Brent J. Fields  
Secretary