

22nd Century Group – Undisclosed SEC Investigation Revealed

- 22nd Century currently has an undisclosed SEC investigation.
- FOIA responses revealed that SEC investigative records are being withheld that could interfere with “on-going enforcement proceedings.”
- Sharesleuth exposed articles from a network of connected authors promoting XXII – those authors also wrote about other “IRTH Communications” & “Honig, Brauser, and Frost” companies.
- Still no MRTP (Modified Risk Tobacco Product) application!

We are short XXII (22nd Century Group) because our FOIA (Freedom of Information Act) requests have revealed that the SEC has an undisclosed investigation into 22nd Century Group. The SEC Office of the General Counsel determined that records regarding any information about an investigation into XXII could be withheld from our FOIA requests due to a 7 (A) exemption because “releasing the withheld information could reasonably be expected to interfere with on-going enforcement proceedings”.



OFFICE OF THE
GENERAL COUNSEL

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

Stop 9612

September 21, 2018

Re: Appeal, Freedom of Information Act Request No. 18-02520-FOIA, designated on appeal as No. 18-00609-APPS

Dear

This responds to your Freedom of Information Act (FOIA) appeal of the FOIA Officer's denial of your July 16, 2018 FOIA request for “all documents in the possession of SEC that pertain to investigations regarding 22nd Century Group (XXII) for the time period January 1, 2016 through July 16, 2018.” By letter dated August 13, 2018, the FOIA Officer denied your request pursuant to FOIA Exemption (b)(7)(A). On September 14, 2018, you filed this appeal challenging the FOIA Officer's invocation of Exemption 7(A). I have considered your appeal and it is denied.

I have determined that the FOIA Officer correctly asserted Exemption 7(A).¹ There is a two-step test to determine whether information is protected under Exemption 7(A), whether: (1) a law enforcement proceeding is pending or prospective, and (2) release of information about it could reasonably be expected to cause some articulable harm.² We have confirmed with staff that releasing the withheld information could reasonably be expected to interfere with on-going enforcement proceedings.³

¹ Exemption 7(A) authorizes the withholding of “records or information compiled for law enforcement purposes, but only to the extent that production of such law enforcement records or information *** could reasonably be expected to interfere with enforcement proceedings.” 5 U.S.C. § 552(b)(7)(A), 17 C.F.R. § 200.80(b)(7)(i).

Sources – [Letter from the SEC Office of the General Counsel](#) (we redacted the Name & Address it was mailed to & the highlights are our additions); [Initial SEC FOIA denial](#); [More information on 7 \(A\) exemptions](#).

It is important to note that we cannot deduce exactly what the SEC is investigating due to this 7 (A) exemption, nor should the existence of an investigation mean that a person, entity or security has violated the law. We would only discover those things if/when the SEC brought forth any charges.

Our Recent History with Undisclosed SEC Investigations – Zion Oil & Gas

The last time we published information regarding an undisclosed SEC investigation it involved Zion Oil & Gas on March 26, 2018 ([see our tweet](#)). Zion management publicly denied there was an [investigation](#). They even called us “[market manipulators](#).” Then months later the company confirmed that there was an ongoing SEC investigation when Zion filed an 8-K that the SEC Dallas Ft. Worth Office had subpoenaed [Zion Oil & Gas](#). Meanwhile the stock fell from \$5.35 (on March 26th) to its current \$1.09—a 79% decline.

Alleged Undisclosed Stock Promotion for XXII – An IRTH Communications client:

Since we wrote our earlier article on XXII, Chris Carey at Sharesleuth wrote a damning exposé of a large network of often undisclosed stock promotions that included the creation of fictitious authors. 22nd Century (XXII) was a constant focus of these authors’ bullish articles: see [Sharesleuth’s Pretenders & Ghosts: Stealth Promotion Network article](#). This should be required reading for anyone considering investing in XXII, either long or short.

The article exposes how the same authors (sometimes fictitious people) wrote a multitude of bullish investment articles for both IRTH Communication clients & companies backed by Barry Honig, Michael Brauser, and Philip Frost. Since Sharesleuth’s article was published, the SEC filed charges ([link](#)) against Barry Honig, Michael Brauser, Philip Frost, John H. Ford, et al. for allegedly running pump & dumps and manipulating the stock price of 3 specific companies (assumed to be MBVX, COCP, and MGTI). MBVX was also written on extensively by [Samuel Rae](#), an author of many of the past bullish XXII pieces in 2017 ([here](#) & [here](#)). John H. Ford, who was charged by the SEC and has already settled the charges ([link](#)), was also an author of a positive article on XXII (it has since been removed from SeekingAlpha.com).

Highlights of the Sharesleuth article involving 22nd Century Group include:

- Fake authors like George Ronan writing positive XXII stories. This fake author is shown to have 3 different profile pictures & bios for different investment sites, but despite his multiple fictitious personalities, he is [bullish on XXII](#).
- Lack of disclosure - authors like Samuel Rae did not disclose if they were compensated for or had positions in the stocks. If they were indeed compensated then this lack of disclosure would violate the law.
- Exposed a network of connected authors for XXII (they produced more than 20 positive stories in 2017 alone). Sharesleuth’s list of XXII promotional articles is [here](#). Authors were shown to write positive articles about IRTH Communications or Honig-related companies and often right before events like stock offerings.

The exposé of this network of promotional authors is especially important given that last year, the SEC brought enforcement actions against 27 different firms & individuals for stock promotion schemes that led investors to believe they were reading independent, unbiased analyses. ([SEC charges](#))

22nd Century's management has still not explained who authorized or funded the articles regarding XXII. Nor has it explained why the company believes that using these tactics of having fake authors write positive articles is acceptable for a public company.

Furthermore, XXII continues to pay & use IRTH Communications as their investor relations firm. IRTH Communications is still listed as 22nd Century's IR contact on their website & in press releases ([link](#), and [link](#)) - even as it sits at the epicenter of these articles.



Despite having extraordinarily long quarterly calls in which management talks about hypothetical future licensing deals, XXII has not bothered to explain who is responsible for the use of this network of authors or the paid stock promotions.

MRTP (Modified Risk Tobacco Product) Update:

22nd Century has still failed to re-file their MRTP application 2 years after it was withdrawn in December 2016. Recently, they finally promised they will do so by the end of 2018 ([XXII promise](#)). Despite not even having an MRTP application on file ([see FDA list of applications here](#)), management still talks extensively about what receiving an MRTP designation would do for their business and how they could hypothetically license out this designation/brand. We find it highly unlikely that the FDA will ever approve a low-nicotine cigarette for a MRTP marketing designation primarily because XXII's Low Nicotine Brand A cigarettes contain a similar amount of tar & other carcinogens.

As a reminder, 22nd Century has already attempted to get a MRTP designation and failed. ([2016 10-K pg 8](#)).

On December 31, 2015, we submitted to the FDA a Modified Risk Tobacco Product application requesting a reduced exposure marketing authorization from the FDA to market *BRAND A* as a Modified Risk Cigarette with product labeling and advertising that states that *BRAND A* has 95% less nicotine than conventional cigarettes. In December 2016, the FDA provided us with helpful and positive feedback on our combined Modified Risk Tobacco Product Applications (MRTPAs) and Premarket Tobacco Product Applications (PMTAs) for our *BRAND A* Very Low Nicotine tobacco cigarettes. In response to the FDA's requests, and in conjunction with additional clarifying guidance, we withdrew our existing application with the FDA in order to file new MRTPAs and PMTAs for *BRAND A* that will include additional scientific data and information from already completed clinical studies on our Very Low Nicotine tobacco cigarettes, in addition to smoking cessation research as requested by the FDA. In order to help further expedite the FDA review process, we also intend to bifurcate our application into separate PMTAs and MRTPAs for *BRAND A*, as PMTAs have shorter review periods.

Cannabis Update:

The one positive development for 22nd Century Group has come from their minority stake in Anandia Laboratories. Anandia was purchased by Aurora Cannabis in an all stock deal (they exchanged 12,716,482 shares and 6,358,210 warrants) in August 2018 ([link](#)). We estimate that XXII's 14.8% stake in Anandia Labs would amount to 1.88m shares and 941k warrants (with a \$9.37 strike price) to be worth about \$15 million if they sold & exercised all their shares today. Depending on if XXII has held their Aurora shares, they should also have a small investment (~\$85k) in Australis Capital.

Source for Anandia Labs Deal - Aurora Cannabis FY2018 Annual Report pg 30-h ([download available from SEDAR](#))

Previous Article on XXII:

Please see our earlier XXII article on Seeking Alpha – [22nd Century - Cutting Through the Smoke & Hype](#) for a more complete list of all the red flags that an investor needs to be aware of before considering investing in XXII. We introduce investors to XXII's history of a reverse merger & paid stock promotion, analyze their failed MRTP application and failed phase II-B trials of X-22, compare XXII's patents & products with competitors, go through the dismal fundamentals of XXII's business, analyze a major tobacco company giving up a cheap option on XXII's patents, and more.

Investors need their questions answered:

- Why is the SEC investigating 22nd Century Group?
- Why hasn't the SEC investigation & "on-going enforcement proceedings" been disclosed to shareholders?
- Why is your company still involved with IRTH Communications and a network of promotional authors?

We are short XXII due to all the red flags raised in our 1st article and because of the undisclosed SEC investigation.

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