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**IN THE MATTER OF THE *SECURITIES ACT*,
R.S.O. 1990, c. S.5, AS AMENDED**

- AND -

**IN THE MATTER OF
POWERWATER SYSTEMS, INC., DUNCAN CLEWORTH and
POWERWATER USA LTD.**

REASONS AND DECISION
(Subsection(s) 127(1) and 127(10) of the Act)

Hearing:	February 9, 2015	
Decision:	March 17, 2015	
Panel:	Alan J. Lenczner, Q.C.	- Commissioner and Chair of the Panel
Counsel:	Keir D. Wilmut Jennifer Lynch	- For Staff of the Commission
	Alistair M. Crawley Michael L. Byers	- For PowerWater Systems, Inc., Duncan Cleworth and PowerWater USA Ltd.

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REASONS AND DECISION

I. INTRODUCTION

[1] Ontario Securities Commission Staff ("Staff") seek an order – pursuant to s. 127(1) and s. 127(10)4 of the *Securities Act*, R.S.O. 1990, c. S. 5, as amended (the "**Act**") - imposing sanctions on PowerWater Systems, Inc. ("**PSI**"), Duncan Cleworth ("**Cleworth**") and PowerWater USA Ltd ("**PUL**") (collectively, the "**Respondents**"), based on the Findings of Fact, Conclusions of Law and Order, dated October 21, 2013 (the "CDB Order"), of the Banking Commissioner of the Connecticut Department of Banking, State of Connecticut ("CDB"). The CDB is the securities market regulator for Connecticut.

[2] The CDB found that:

a. PSI and Cleworth engaged in the offering and selling of unregistered securities, and that PUL materially aided them in doing so.

b. Cleworth engaged in activities related to the purchase or sale of securities while unregistered to do so; and

c. the Respondents' conduct constituted a fraud.

II. ISSUES AND ANALYSIS

[3] The issues I must address are:

a. Does the CDB Order meet the requirements of s. 127(10)4?

b. Is the threshold for reciprocating the CDB Order met?

c. Having regard to the findings made by the CDB in the CDB Order, is it in the public interest to make an order under subsection 127(1) of the Act?

d. If so, what are the appropriate sanctions?

A. Requirements of Paragraph 4 of Subsection 127(10)

[4] Staff rely on s. 127(10)4, which provides:

> **127(10) Inter-jurisdictional enforcement -** Without limiting the generality of subsections (1) and (5), an order may be made under subsection (1) or (5) in respect of a person or company if any of the following circumstances exist:
>
> …
>
> 4. The person or company is subject to an order made by a securities regulatory authority, derivatives regulatory authority or financial regulatory authority, in any jurisdiction, that imposes sanctions, conditions, restrictions or requirements on the person or company.

[5] I am satisfied that the CDB Order meets the requirements of s. 127(10)4.

B. Threshold for Reciprocating the CDB Order

[6] The threshold for determining whether it is in the public interest to reciprocate an order from another regulatory authority is a low threshold. Comity requires that there not be barriers to recognizing and reciprocating the orders of other regulatory authorities when the findings of the foreign jurisdiction qualify under subsection 127 (10) of the Act as a judgment that evokes the public interest (*Re New Futures Trading International Corp.* (2013), 36 OSCB 5713 ("**New Futures**"), at paras. 22, 27). As recognized by the Supreme Court of Canada, "there can be no disputing the indispensable nature of interjurisdictional co-operation among securities regulators today" (*McLean v. British Columbia (Securities Commission)*, [2013] 3 S.C.R. 895 at para. 51).

[7] However, the Commission should refuse to reciprocate an order from another jurisdiction where the respondent can demonstrate that:

e. there was no substantial connection between the respondent and the originating jurisdiction;

f. the order of the foreign regulatory authority was procured by fraud; or

g. there is a denial of natural justice in the foreign jurisdiction (*Beals v. Saldanha*, [2003] 3 SCR 416; *New Futures* at para. 27).

[8] The Respondents submit that the Commission should refuse to reciprocate the CDB Order because they were denied natural justice.

[9] In order for the Commission to refuse to reciprocate an order on this basis, the Respondents must demonstrate that the procedure by which the order was reached was unfair. In *Beals, supra*, the Supreme Court of Canada held:

> Fair process is one that, in the system from which the judgment originates, reasonably guarantees basic procedural safeguards such as judicial independence and fair ethical rules governing the participants in the judicial system. This determination will need to be made for all foreign judgments. Obviously, it is simpler for domestic courts to assess the fairness afforded to a Canadian defendant in another province in Canda. In the case of judgments made by courts outside Canada, the review may be more difficult but is mandatory and the enforcing court must be satisfied that fair process was used in awarding the judgment. This assessment is easier when the foreign legal system is either similar to or familiar to Canadian courts.
>
> … If the foreign state's principles of justice, court procedures and judicial protections are not similar to ours, the domestic enforcing court will need to ensure that the minimum Canadian standards of fairness were applied. If fair process was not provided to the defendant, recognition and enforcement of the judgment may be denied.
>
> The defence of natural justice is restricted to the form of the foreign procedure, to due process, and does not relate to the merits of the case. The defence is limited to the procedure by which the foreign court arrived at its judgment.

> However, if that procedure, while valid there, is not in accordance with Canada's concept of natural justice, the foreign judgment will be rejected. The defendant carries the burden of proof and, in this case, failed to raise any reasonable apprehension of unfairness (*Beals, supra* at paras. 62-64).

[10] The Respondents submit that the procedure by which the CDB Order was reached was unfair because:

a. they were not provided with disclosure by the CDB prior to the hearing that led to the CDB Order;

b. their request for an adjournment of the hearing so they could obtain Connecticut counsel was refused; and

c. the allegations forming the basis for the penalties against the Respondents were deemed to be true and not proven.

[11] The Respondents also submit that the Commission should not reciprocate the CDB Order because the conduct that was the subject of that order, if it had occurred in Ontario, could not be the basis for sanctions against them due to the six year limitation period in s. 129.1 of the *Act*.

1. Disclosure

[12] The CDB commenced its proceeding against the Respondents with an Order to Cease and Desist, Notice of Intent to Fine and Notice of Right to Hearing, dated January 11, 2013 (the "***CDB Notice***"), which contained clear notice of the facts alleged against the Respondents, the provisions of the Connecticut Uniform Securities Act ("**Connecticut Act**") alleged to have been breached by the Respondents, and the sanctions against the Respondents sought by the CDB. The CDB Notice also imposed temporary bans on the Respondents.

[13] In response to the CDB Notice, the Respondents' counsel wrote to the CDB on January 30, 2013 and, among other things, requested full disclosure of the case against the Respondents.

[14] The Respondents submit that they were denied natural justice because they did not receive any disclosure of the allegations against them prior to the hearing before the CDB, held on June 25, 2013 (the "**CDB Hearing**"), other than what was contained in the CDB Notice.

[15] In proceedings before the Commission, Staff are required to disclose to the Respondents all documents that are relevant to the proceeding in accordance with the principles articulated in the Supreme Court of Canada's decision in *R v. Stinchcombe*, [1991] 3 S.C.R. 326. As stated by the Commission in *Re Biovail Corp.* (2008), 31 OSCB 7161 (at para. 32), "[t]he obligation to disclose is a matter of fundamental justice based on fairness to respondents to permit them to make full answer and defence to the allegations against them."

[16] However, the obligation to disclose is not one-sided. A respondent must diligently pursue disclosure, and if he or she does not, his or her lack of diligence will be taken into account in determining whether the non-disclosure affected the fairness of the proceeding. Lack of diligence will be a very significant factor

where the materiality of the undisclosed information is very low (*R. v. Dixon*, [1998] 1 S.C.R. 244, at paras. 37-39; *Re Proprietary Industries Inc.*, 2005 ABASC 745, at para. 136).

[17] The Respondents did not diligently pursue disclosure. After their counsel's January 30th correspondence to the CDB, the Respondents did not in any of their further communications with CDB Staff make any other requests for disclosure prior to the CDB Hearing. Their request for disclosure was not raised again in subsequent correspondence between their counsel and the CDB, and was not raised in response to the CDB advising that their last request for an adjournment was denied.

[18] On the evidence before me, the significance of the undisclosed information was low. The exhibits to the CDB proceeding consist of information and documents that were in the possession of the Respondents, including correspondence from Cleworth to shareholders of PSI. The Respondents made no submissions regarding the significance of those documents, the transcripts of depositions of witnesses which are referred to in Cleworth's Affidavit, sworn November 28, 2014 (Exhibit 3), or the other documentation which Cleworth states in his Affidavit he believes the CDB has but has not disclosed.

[19] For these reasons, I find that the non-disclosure did not affect the fairness of the proceeding which led to the CDB Order.

2. Request for Adjournment Refused

[20] The hearing before the CDB was originally scheduled for March 5, 2013. It was rescheduled to April 9, 2013, and then to June 26, 2013 at the Respondents' request. These adjournments were at the Respondents' request so that they could retain Connecticut counsel.

[21] The second adjournment request was made on April 5, 2013, shortly before the scheduled hearing. In response to the second adjournment request, the CDB set a conference call for May 7, 2013, to schedule a new hearing date, and advised Respondents' counsel that the Respondents had until that conference call to retain new counsel.

[22] On the May 7th conference call, Respondents' counsel advised that the Respondents' were in the process of retaining Connecticut counsel, and a June 26th date was set for the hearing.

[23] On June 25, 2013, the day before the CDB Hearing, the Respondents requested that the hearing be adjourned for another 45 days so that the Respondents could retain Connecticut counsel, and because Cleworth needed to be in Madagascar on business that week and could not attend the hearing on June 26th. Mr. Cleworth testified that he did not, ultimately, travel to Madagascar that week and he could have attended the hearing, which leaves only the retention of counsel as the reason for the adjournment request.

[24] The Respondents last request for an adjournment was refused, which the Respondents submit constitutes a denial of natural justice.

[25] The decision to grant or refuse an adjournment request is discretionary. Whether a refusal to grant an adjournment constitutes a denial of natural justice depends on the circumstances of the case (*BP Canada Energy Company v. Alberta (Energy and Utilities Board)*, 2004 ABCA 75 at para. 26; *Law Society of*

Upper Canada v. Igbinosun (2009), 96 O.R. (3d) 138 (C.A.) at paras. 37, 46-49).

[26] In *Re Ochnik*, [2007] O.J. No. 1730 (Div. Ct.), the Divisional Court affirmed the Commission's refusal to grant an adjournment to the respondent so that he may retain counsel, and stated that "[a] decision to grant or not grant an adjournment is best determined by the tribunal." The circumstances of that case are similar to those before the CDB. The Commission held that the respondent had been given a reasonable opportunity to retain counsel and refused the respondent's request for a further adjournment (*Re Ochnik* (2006), 29 OSCB 3929 at paras. 12-13, aff'd, [2007] O.J. No. 1730 (Div. Ct.).

[27] I find that the CDB's refusal of the Respondent's last adjournment request does not constitute a denial of natural justice. The Respondents were given two adjournments for a period of five months to retain counsel.

[28] I reject the Respondents' submission that the fact that both the CDB hearing officer and the lawyer prosecuting the matter were employed by the CDB affected whether the Respondents' adjournment request was granted. The Respondents adduced no evidence to support their submission that the lawyer prosecuting the case had any influence on the hearing officer's decision. To the contrary, the CDB hearing officer granted the Respondents' first two adjournment requests.

3. Allegations Deemed to Be True

[29] The CDB Notice advises that the temporary bans ordered in the notice will become permanent if the Respondents fail to attend the hearing, and that a maximum fine of $100,000 per violation may be imposed.

[30] Section 36a-1-31(b) of the Regulations of Connecticut State Agencies provides that allegations against a party may be deemed admitted when a party fails to appear at the hearing:

> When a party fails to appear at a scheduled hearing, the allegations against the party may be deemed admitted. Without further proceedings or notice to the party, the presiding officer shall submit to the commissioner a proposed final decision containing the relief sought in the notice, provided the presiding officer may, if deemed necessary, receive evidence from the department, as part of the record, concerning the appropriateness of the amount of any civil penalty, fine or restitution sought in the notice. The commissioner shall issue a final decision in accordance with section 4-180 of the Connecticut General Statutes and section 36a-1-52 of the Regulations of Connecticut State Agencies.

[31] The Respondents did not attend the hearing that led to the CDB Order. Nor did their counsel.

[32] Accordingly, the CDB Order was made on the basis that the allegations in the CDB Notice were admitted.

[33] The Respondents submit that they were denied natural justice because the allegations against them were deemed admitted and not proven.

[34] *Voudoris v. Appeal Tribunal of the Certified General Accountants' Assn. of Ontario*, 2014 ONSC 1865 (Div Ct.), which the Respondents rely on, does not support the Respondents' submission that reliance on deemed admissions constitutes a denial of fairness. The respondent in that case was not contesting the procedure which led to deemed admissions; he conceded that the structure of the procedure which led to the deemed admissions was procedurally fair (*Voudoris, supra* at para. 27). Instead, the Divisional Court was considering the tribunal's refusal to allow the respondent to withdraw those deemed admissions and adduce contrary evidence. The Divisional Court found that the tribunal's refusal was unreasonable given, among other things, that the respondent did not appreciate the consequences of the procedure leading to the deemed admissions, and that the respondent made the request to withdraw the admissions promptly after retaining counsel and in advance of the hearing (*Voudoris, supra*, at paras. 41-46.)

[35] The Respondents' circumstances are closer to those of the defendants in *Beals, supra.* In that case, the Supreme Court of Canada held that the defendants were not denied natural justice in the process leading to the default judgment against them because they were advised of the allegations against them and were granted a fair opportunity to defend those allegations (*Beals, supra*, at paras. 68-70). The defendants chose not to defend. Similarly, the Respondents were aware of the allegations against them and were given an opportunity to defend those allegations. They chose not to attend the CDB hearing.

[36] The Respondents were aware of the implications of not attending the CDB hearing. When Respondents' counsel was advised that the Respondents' last adjournment request was refused, he simply asked for a copy of the issued default order against the Respondents. Cleworth testified that the Respondents did not take any steps in Connecticut to contest the CDB Order prior to Staff commencing this proceeding.

[37] I find that the CDB Order being made on the basis of, in part, deemed admissions does not constitute a denial of natural justice.

4. Limitation Period

[38] The Respondents submit that the Commission should not reciprocate the CDB Order because the conduct that was the subject of that order, if it had occurred in Ontario, could not be the basis for sanctions against them due to the six year limitation period in s. 129.1 of the *Act*.

[39] The Respondents submit that all of the conduct that was the subject of the CDB Order occurred in 2004/2005, more than six years before this proceeding was commenced.

[40] It is not clear that the Respondents' submission regarding their conduct is correct. The CDB found that the conduct occurred from 2004 to present. The communications to shareholders from Cleworth on which the CDB relied at the hearing were dated in 2009 and 2010.

[41] In any event, under s. 127(10), I do not need to determine when the underlying conduct took place. In *McLean, supra*, the Supreme Court of Canada held that the triggering event for a similar provision in the British Columbia *Securities Act*, R.S.B.C. 1996, c. 418, is the order and not the underlying conduct (*McLean, supra* at paras. 51-59).

5. Conclusion on Threshold

[42] I find that the threshold for reciprocally enforcing the CDB Order is met. I reject the Respondents' submission that, taken in totality, the issues they identified suggest I should decline to reciprocally enforce the order even though none of those issues constitutes a denial of natural justice.

C. Is it in the Public Interest to Make an Order under Subsection 127(1)?

[43] Having regard to the findings made by the CDB in the CDB Order, I must determine whether it is in the public interest to impose sanctions under subsection 127(1) of the Act (*Re Euston Capital Corp.* (2009), 32 OSCB 6313 at paras. 46, 57; *Re Elliott* (2009), 32 OSCB 6931 at paras. 24, 27). An important factor to consider is, if the facts had occurred in Ontario, whether the Respondent's conduct would have constituted a breach of the *Act* and/or been considered to be contrary to the public interest (*New Futures, supra*, at para. 17).

[44] In deciding whether it is in the public interest to impose sanctions on the Respondents, I am guided by the underlying purposes of the *Act*, as set out in section 1.1:

a. to provide protection to investors from unfair, improper or fraudulent practices; and

b. to foster fair and efficient capital markets and confidence in capital markets.

[45] As held by the Supreme Court of Canada, the purpose of an order under section 127 of the *Act* is protective and prospective. It is to restrain future conduct that is likely to be prejudicial to the public interest in fair and efficient capital markets. The court stated that "the role of the OSC under s. 127 is to protect the public interest by removing from capital markets those whose past conduct is so abusive as to warrant apprehension of future conduct detrimental to the integrity of the capital markets" (*Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, [2001] 2 S.C.R. 132, at para. 43; *Re Mithras Management Ltd.* (1990), 13 O.S.C.B. 1600).

[46] The CDB made the following findings of fact which are relevant to my consideration of whether it is in the public interest to impose sanctions on the Respondents:

> 1. PSI is an Ontario, Canada corporation whose principal place of business last known to the Commissioner is 159 Main Street, Markham, Ontario, Canada L3P.
>
> 2. Cleworth is an individual whose address last know[n] to the Commissioner is 8 Savanah Crescent, Markham, Ontario, Canada L3P 3C&. From at least April 15, 2005, Cleworth has been the President of PUL in the Chairman of PSI.
>
> 3. PUL is a Connecticut corporation whose principal place of business last known to the Commissioner is One Pond Place, Avon, Connecticut, 06001.

> 4. From at least September 17, 2004 to the present, PSI has been an issuer of securities in the form of common stock ("PSI Securities").
>
> 5. From September 17, 2004 to the present, Cleworth, both individually and jointly with PUL, offered and sold PSI Securities on behalf of PSI in or from Connecticut to investors ("Investors"). PUL materially aided Cleworth and PSI in the offer and sale of PSI Securities to the Investors.
>
> 6. The Investors, at Cleworth's direction, paid PUL for the PSI Securities, which payments were deposited into a bank account that is controlled by Cleworth. Cleworth withdrew some of the funds provided by the investors from the PUL bank account and used money for his personal use.
>
> 7. The PSI Securities offered and sold by Respondents were never registered in Connecticut… nor were they exempt from registration… nor were they the subject of a filed exemption claim or claim of covered security status.
>
> 8. At no time were PUL or Cleworth registered in any capacity under the [Connecticut Act].
>
> 9. Cleworth has never been registered in Connecticut as an agent of issuer of PSI.
>
> 10. In connection with the offer and sale of the PSI Securities, Respondents failed to disclose, *inter alia*, any financial information about Respondents, the registration status of the securities, that Cleworth was acting as an agent of issuer of PSI in Connecticut absent registration, the estimated cash proceeds of the PSI stock offering, any specific risk factors related to the investment, or that Cleworth would use some of the Investors' money for his personal use. Each of these omitted items was material to the Investors and prospective PSI investors (citations omitted).

[47] The CDB made the following conclusions of law with respect to the Respondents' conduct:

> 2. Respondents offered and sold unregistered securities in or from Connecticut, in violation of … the [Connecticut Act] ….
>
> 3. PUL materially aided PSI and Cleworth's violation of… the [Connecticut Act]….
>
> 4. The conduct of Respondents constitutes, in connection with the offer, sale or purchase of any security, directly or indirectly employing a device, scheme or artifice to defraud, making untrue statement of a material fact or omitting to state a material fact necessary in order to make statements made, in the light of the circumstances under which they are made, not misleading, or engaging in an act, practice or

> course of business which operates as a fraud or deceit upon any person, in violation of… the [Connecticut Act]….
>
> 5. Cleworth received compensation directly or indirectly related to the purchase or sale of securities and transacted business as an agent of issuer in the state absent registration, in violation of… the [Connecticut Act]….
>
> 6. PSI employed Cleworth as an unregistered agent of issuer in the state, in violation of… the [Connecticut Act]….

[48] The CDB imposed the following sanctions on the Respondents:

a. permanently banning the Respondents from directly or indirectly violating the provisions of the Connecticut Act, including those provisions the CDB found were violated by the Respondents;

b. requiring PSI to pay a fine of $225,000;

c. requiring Cleworth to pay a fine of $225,000; and

d. requiring PUL to pay a fine of $200,000

[49] I am satisfied that, if the same events had occurred in Ontario, they would have constituted breaches of the *Act* contrary to the public interest. The findings of the CDB warrant apprehension that the future conduct of the Respondents will be detrimental to the integrity of Ontario's capital markets. I find that it is in the public interest to impose sanctions on the Respondents.

D. **Appropriate Sanctions**

[50] In determining the appropriate sanctions to order, I must ensure that the sanctions are proportionate to both the particular circumstances of the Respondents' conduct and the range of sanctions ordered in similar cases (*Re M.C.J.C. Holdings*, (2002), 25 OSCB 1133 at 1134).

[51] Staff submit the Commission should order that trading in PSI and PUL cease permanently and Cleworth be permanently banned from acting as an officer or director and from participating in Ontario's capital markets based on the CDB's findings that:

a. PSI and Cleworth engaged in the offering and selling of unregistered securities, and PUL materially aided them in doing so;

b. Cleworth engaged in activities related to the sale of securities while unregistered to do so; and

c. the Respondents' conduct constituted a fraud.

[52] Staff submit that the conduct for which the Respondents were sanctioned by the CDB, would, if it occurred in Ontario, be contrary to the public interest and constitute contraventions of s. 25 (unregistered trading in securities), s. 53 (unregistered distribution of securities) and s. 126.1 (fraud) of the Act.

[53] Staff relies on *New Futures, supra,* in which the Commission imposed sanctions similar to those sought by Staff based on the final judgments of the United States District Court of New Hampshire. In those final judgments, the court

found that the respondents engaged in fraud based on deemed admissions and imposed bans similar to those imposed by the CDB. I note that the deemed admissions were of an established fraudulent scheme. The U.S. court accepted as true that the Respondents had raised at least $1.3 million from the sale of securities to investors: $937,000 was funnelled into a Ponzi scheme and used to make payments to prior investors in the scheme; and $359,000 was used by the respondent to support his lifestyle and to operate a horse breeding ranch in Ontario.

[54] The Respondents submit that I should not impose the permanent bans sought by Staff, because:

a. the sanctions sought by Staff are broader than the sanctions imposed by the CDB, which prohibit the Respondents from further violations of the Connecticut Act, including unregistered trading and fraud

b. there is insufficient evidence before me of the fraud to warrant the imposition of permanent bans;

c. PSI and PUL were, in fact, unsuccessful ventures in which Cleworth himself lost substantial amounts of money; and

d. the sanctions sought by Staff would seriously impinge on Cleworth's ability to earn a living.

[55] In imposing sanctions pursuant to ss. 127(1) and 127(10), the Commission must consider whether it has sufficient evidence or an admission of a respondent's wrongdoing to support the sanctions ordered (*Lines v. British Columbia (Securities Commission)*, 2012 BCCA 316 at para. 33).

[56] The CDB's findings of fact relating to the CDB's conclusion that the Respondents' conduct constituted fraud are as follows:

> 6. The Investors, at Cleworth's direction, paid PUL for the PSI Securities, which payments were deposited into a bank account that is controlled by Cleworth. Cleworth withdrew some of the funds provided by the investors from the PUL bank account and used money for his personal use.
>
> 10. In connection with the offer and sale of the PSI Securities, Respondents failed to disclose … that Cleworth would use some of the Investors' money for his personal use [citations omitted].

[57] In support of its findings of fact, the CDB cited the admitted facts and portions of the testimony of Salvatore Cannata, principal financial examiner with the Securities Division. Mr. Cannata testified that of the approximately $1 million raised from investors, $420,750 was paid to two corporations controlled by Cleworth: $285,000 was paid to PSI and $135,750 was paid to 1472500 Ontario Inc. Mr. Cannata did not know how these funds were used after being paid to those corporations. Mr. Cannata testified that Cleworth had a debit card associated with the PUL bank account, and that the remaining approximately $600,000 deposited into PUL's bank account was used up in a number of smaller charges. Mr. Cannata testified that there were a variety of charges to the PUL account that did not appear to be business in nature, including charges for hotels

in Canada, restaurants and trips to Florida (CDB Hearing Transcript, Exhibit 4, Tab 3, p. 23:24-29:20.)

[58] The Respondents submit that the CDB appears to have assumed that the funds were used by Cleworth for his personal use – based in part on the admitted facts – and that there is insufficient evidence that the funds were, in fact, used by Cleworth for his personal use. The Respondents note that promotional materials marked as Division Exhibit 3 in the CDB hearing (Exhibit 4, Tab 4J), demonstrate that PSI was a real business which distributed product across Canada and was marketing in the United States. Respondents submit that it does not inexorably follow that the expenses noted by the CDB investigator did not have a business purpose.

[59] With respect to the business of PSI and PUL, Cleworth states in his Affidavit (Exhibit 3):

> 6.… I first became acquainted with the product "PowerWater", which is a distilled oxygenated water, in or about 2001. I started PSI in or around 2001, which is when I purchased the rights to the technology used to make PowerWater.
>
> 7. From in or around 2001 to 2005, PowerWater products were sold in a number of retail outlets across Canada, including Rabba, Fortino's, Pusateri's, Loblaws, and a number of independent stores.
>
> 8. After PowerWater enjoyed some initial success in Canada, Theodore Munson – a friend of mine who lived in Connecticut - and I attempted to try and expand the product into the United States. We first started selling the product in the United States in 2003, but sales were slow, and there were administrative difficulties associated with running an American business through a Canadian corporation. As such, in or around 2004, we caused PUL to be incorporated in Connecticut. Certain Connecticut residents, who I understood to be friends and family of Mr. Munson, made investments in PSI.
>
> 9. Unfortunately, for a variety of reasons, the expansion of PowerWater into the United States was not successful. PowerWater has not been actively sold in either the United States or Canada since in or about the end of 2006. Since this time, I've been experiencing financial troubles, as the failure of PowerWater has caused me to suffer a significant loss.
>
> …
>
> 34. I believe that, if the Commission orders the sanctions sought by Staff in this proceeding, I will face significant challenges earning a living and face permanent reputational damage. I note, in particular, that Staff is seeking penalties and sanctions that would essentially permanently ban me

> from trading in securities or being an officer or director of any company that issue securities. This would prevent me from contributing to my RRSPs or saving for my retirement.

[60] Cleworth was not cross-examined on these statements.

[61] Taking into account the evidence before the CDB and Cleworth's Affidavit evidence, I am not satisfied that it has been demonstrated, on a balance of probabilities, that Cleworth used the investors' funds for his personal benefit. The evidence is insufficient for me to determine that the finding of fraud made by the CDB should, in these circumstances, draw the usual sanction, in Ontario, of a permanent ban.

III. CONCLUSION

[62] For the reasons stated above, I find that it is in the public interest to impose the following sanctions, and will issue an order to that effect:

a. pursuant to s. 127(1)2 of the Act, trading in any securities of PSI shall cease permanently;

b. pursuant to s. 127(1)(2) of the Act, trading in any securities by PSI shall cease permanently;

c. pursuant to s. 127(1)2 of the Act, trading in any securities by PUL shall cease permanently;

d. pursuant to s. 127(1)2 of the Act, trading in any securities by Cleworth shall cease for a period of 10 years from the date of the order, except Cleworth shall be permitted to trade securities through a registrant for the account of his Registered Retirement Savings Plan, as defined in the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.), as amended, provided that he is not engaging in or holding himself out as engaging in the business of trading in securities, and provided Cleworth first notifies the registrant of these conditions by delivering to the registrant a copy of this order;

e. pursuant to s. 127(1)3 of the Act, any exemptions contained in Ontario securities law do not apply to Cleworth for a period of 10 years from the date of the order;

f. pursuant to s. 127(1)7 of the Act, Cleworth resign any positions that he holds as director or officer of an issuer;

g. pursuant to s. 127(1)8 of the Act, Cleworth be prohibited from becoming or acting as an officer or director of an issuer for a period of 10 years from the date of the order;

h. pursuant to s. 127(1)8.1 of the Act, Cleworth resign any positions he holds as director or officer of a registrant;

i. pursuant to s. 127(1)8.2 of the Act, Cleworth be prohibited from becoming or acting as an officer or director of a registrant permanently;

j. pursuant to s. 127(1)8.3 of the Act, Cleworth resign any positions he holds as director or officer of an investment fund manager;

k. pursuant to s. 127(1)8.4 of the Act, Cleworth be prohibited from becoming or acting as an officer or director of an investment fund manager permanently; and

l. pursuant to s. 127(1)8.5 of the Act, Cleworth be prohibited from becoming or acting as a registrant or as an investment fund manager permanently.

Dated at Toronto this 17th day of March, 2015

"*Alan J. Lenczner, Q.C.*"

_____

Alan J. Lenczner, Q.C.