Ontario Securities Commission
Commission des valeurs mobilières de l'Ontario
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IN THE MATTER OF THE
***SECURITIES ACT*, RSO 1990, c S.5**

- AND -

IN THE MATTER OF
BLUE GOLD HOLDINGS LTD., DEREK BLACKBURN,
RAJ KURICHH AND NIGEL GREENING

REASONS AND DECISION ON SANCTIONS AND COSTS
(Sections 127 and 127.1 of the *Securities Act*)

Hearing: November 4, 2016

Decision: December 7, 2016

Panel:

Alan Lenczner, Q.C.	- Commissioner and Chair of the Panel
Janet Leiper	- Commissioner
Timothy Moseley	- Commissioner

Appearances:

Swapna Chandra Anna Huculak	- For Staff of the Commission
Clarke Tedesco	- For Raj Kurichh

No one appeared for Blue Gold Holdings Ltd. or Nigel Greening

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REASONS AND DECISION ON SANCTIONS AND COSTS

I. OVERVIEW

[1] In a merits decision issued on July 26, 2016 (the "**Merits Decision**"),[1] the Ontario Securities Commission (the "**Commission**") found that the respondents Blue Gold Holdings Ltd. ("**BGH**"), Raj Kurichh and Nigel Greening had contravened various provisions of the *Securities Act* (the "**Act**").[2] No findings were made against the respondent Derek Blackburn, who died before the merits hearing and against whom Enforcement Staff of the Commission ("**Staff**") withdrew all allegations.

[2] The Commission made the following findings:

a. BGH, Kurichh and Greening (collectively referred to as the "**Respondents**" for the purposes of this decision) engaged in the business of trading without being registered, contrary to section 25 of the Act;

b. BGH and Kurichh engaged in illegal distributions of BGH shares, contrary to section 53 of the Act; and

c. BGH and Kurichh contravened section 38 of the Act by representing that BGH would become a public company listed on an exchange.

[3] The Commission also found various frauds:

a. Kurichh knowingly participated in BGH's fraudulent misrepresentations regarding BGH's sales pipeline and government approval of BGH's activities, contrary to section 126.1 of the Act;

b. Kurichh actively participated in Blackburn's fraudulent diversion of company funds for Blackburn's personal use, contrary to section 126.1 of the Act; and

c. BGH and Kurichh fraudulently diluted the interests of BGH's retail shareholders (the "**Dilution Fraud**"), contrary to section 126.1 of the Act.

[4] At paragraphs 9(e) and 88(e) of the Merits Decision, the Commission found that Kurichh and Greening, as directors and officers of BGH, were also deemed to have contravened Ontario securities law by their having acquiesced in or actively participated in BGH's breaches. In those paragraphs, the Commission should have cited section 129.2 of the Act but incorrectly cited section 129.1. With that correction, the finding stands.

[5] Staff seeks the following:

a. permanent orders effectively removing the Respondents from Ontario's capital markets;

b. permanent orders prohibiting Kurichh and Greening from being directors or officers, or from being a registrant, fund manager or promoter;

1 *Re Blue Gold Holdings Ltd.* (2016), 39 OSCB 6947.
2 RSO 1990, c S.5.

c. administrative penalties of $200,000 and $150,000 against Kurichh and Greening, respectively, with BGH being jointly and severally liable for these penalties;

d. orders that the Respondents disgorge amounts obtained as a result of their non-compliance with Ontario securities law; and

e. costs of approximately $180,000 against Kurichh and $25,000 against Greening, with BGH being jointly and severally liable for both amounts.

[6] For the reasons that follow, we order the permanent bans and administrative penalties sought by Staff, as well as disgorgement orders and costs. The prohibition against Kurichh trading in securities is subject to a carve-out following payment of the amounts ordered.

II. LEGAL FRAMEWORK

[7] Subsection 127(1) of the Act lists the sanctions that may be imposed where the Commission considers it to be in the public interest to do so. This jurisdiction must be exercised in a manner consistent with the two purposes of the Act; namely the protection of investors from unfair, improper or fraudulent practices, and the fostering of fair and efficient capital markets and confidence in the capital markets.[3]

[8] The Supreme Court of Canada held in 2001 that the public interest jurisdiction and the sanctions listed in section 127 of the Act are protective and preventive and are intended to prevent future harm to Ontario's capital markets.[4] Any sanctions must be appropriate and proportionate to the respondent's conduct in the circumstances of the case.

[9] The Commission has identified a non-exhaustive list of factors to be considered with respect to sanctions generally, including the seriousness of the misconduct, any mitigating factors, and the likely effect of any sanction on the respondent as well as on others ("general deterrence").[5]

III. ANALYSIS

A. THE RESPONDENTS

[10] Staff submits that the Respondents' misconduct, including the illegal trading and distribution of securities, was all part of a scheme to defraud investors. That may not have been the case from BGH's inception, since, as noted in the Merits Decision, "BGH was, at least for a time, attempting to conduct a legitimate business."[6] However, we agree with Staff's submission that over time, all of the Respondents' misconduct served to facilitate the frauds perpetrated against the BGH investors.

[11] The seriousness of the Respondents' misconduct is compounded by the significant financial harm that the misconduct caused BGH investors and by the

3 Subsection 1(1) of the Act.

4 *Committee for Equal Treatment of Asbestos Minority Shareholders v Ontario (Securities Commission)*, 2001 SCC 37 at paras 42-43.

5 *Re Bradon Technologies Ltd.* (2016), 39 OSCB 4907 ("***Bradon***") at para 28; and at para 47, citing *Re Cartaway Resources Corp.*, [2004] 1 SCR 672 at para 52.

6 Merits Decision at para 21.

fact that it was not an isolated occurrence. Rather, it was recurrent and extended over a long time.

[12] The steps taken by the Respondents are a clear justification for the concern expressed in 2010 by Staff of the Canadian Securities Administrators (CSA) regarding certain going public transactions.[7] CSA Staff identified characteristics that may indicate that a transaction is contrary to the public interest. The following circumstances are particularly relevant to this matter and underscore the seriousness of the Respondents' conduct:

a. a business with little operating history and no clear proxy for valuation;

b. intended reliance on a stock exchange as the sole gatekeeper;

c. issuance of shares for nominal amounts, particularly where founders receive a large block of shares in return for a nominal amount compared to the initial public offering price; and

d. founders who spend little time or resources developing the business.

B. KURICHH

1. Introduction

[13] Kurichh was inexperienced in the capital markets. He testified that his background was in policing and that his involvement with BGH was the first time he had ever raised capital. Staff did not challenge this assertion.

[14] Kurichh first met Blackburn in 2005. In 2010, Blackburn told Kurichh about his new venture, and Kurichh became an officer of BGH from its earliest days. He maintains that his activities were limited to raising capital and "keep[ing] investors happy", and that he was not involved in the technical side of the business.

2. Kurichh's Misconduct

[15] As is reflected in the Merits Decision, some of Kurichh's fraudulent conduct was deliberate and planned. He knowingly:

a. participated in the issuance of a blatantly false news release that claimed that BGH's technology had received approval from the provincial government;

b. participated in the production of false documents that significantly overstated the true value of BGH's sales pipeline;

c. played a part in falsifying BGH's subscription forms, some of which purported to show that an investor was "a close personal friend of a director, executive officer, founder or control person" of BGH, when Kurichh knew that this was not the case; and

d. participated in the diversion of company funds to Blackburn's personal use.

7 *CSA Staff Notice 41-305: Share Structure Issues – Initial Public Offerings* (2010), 33 OSCB 8469.

[16] Kurichh engaged in the business of trading in securities without being registered and in illegal distributions of BGH shares, and he made prohibited representations that BGH would become a public company, listed on an exchange.

[17] In addition, Kurichh was an active participant in the Dilution Fraud, although he did not expressly admit to having acted deceitfully. Despite that, his conduct breached section 126.1 of the Act, which imposes responsibility where a person participates in conduct that the person "knows or reasonably ought to know perpetrates a fraud".

3. Potential Mitigating Factors

[18] In determining sanctions that would be proportionate to a respondent's conduct, the Commission should consider potentially mitigating factors, including the role played by the respondent in any breaches, the respondent's experience in the marketplace and whether the respondent has recognized the seriousness of the misconduct or has otherwise expressed remorse.

(a) Kurichh's role in the frauds other than the Dilution Fraud

[19] Kurichh testified at the merits hearing, and submits now, that he played a secondary role to that of Blackburn with respect to all the activities that are the subject of this proceeding. This assertion was not seriously challenged by Staff and was corroborated by the merits hearing testimony of Mr. Albi, who was a sometime Chief Financial Officer and accounting service provider to BGH and related entities. We accept Kurichh's description of his overall involvement in BGH relative to that of Blackburn.

[20] However, Kurichh goes further. He testified at the merits hearing that he did everything at Blackburn's direction, including when Kurichh permitted the issuance of false documents with his name on them, and when Kurichh knowingly repeated false claims to investors. According to Kurichh, this is just the way Blackburn operated.

[21] In addition, Kurichh maintains that as far as he knew, BGH and Blackburn were relying upon legal advice from a reputable law firm. Kurichh says he was comforted by that belief.

[22] These assertions cannot benefit Kurichh with respect to frauds in which he was deliberately deceitful. The seriousness of that misconduct is not moderated by the fact that others participated, and we reject the suggestion that Kurichh was in any way pressured or compelled to engage in it. Kurichh did not claim that he even considered walking away from this enterprise at any time, and he offered no reason why he could not have done so had he made that choice.

[23] Similarly, these frauds are not justified by the sometime presence of a law firm, particularly given the limited communication between Kurichh and the firm. The only evidence of any such communication came from Kurichh, who identified five interactions over the course of a year and a half. Kurichh did not suggest that in any of the five instances anyone at the firm said anything remotely connected to the fraudulent conduct set out in paragraph [15] above.

(b) Kurichh's role in the Dilution Fraud

[24] Kurichh's counsel submits that we ought to treat the Dilution Fraud differently. In his submission, Kurichh understood that "it was all being reviewed and approved by counsel." There is some truth to Kurichh's counsel's submission that Kurichh "stumbled backwards" into the Dilution Fraud, as opposed to having deliberately breached the law.

[25] While we accept the truth of Kurichh's statement as to his understanding, the basis upon which he reached his understanding is weak, and is insufficient for a corporate officer or director in the circumstances of this case. As noted in the Merits Decision,[8] Kurichh correctly conceded that as an officer of BGH throughout the material time, as a director from December 2012, and as one of very few principals of the company, he ought to have done his own due diligence. This is particularly true since, even on Kurichh's evidence, in none of the interactions with the law firm did he hear a member of the firm give advice with respect to the validity or propriety of any steps that Kurichh or others were taking. Kurichh was at least reckless, if not wilfully blind, in drawing the inference he did.

(c) Kurichh's experience in the marketplace

[26] Kurichh's inexperience in the capital markets at the time of his misconduct cannot inure to his benefit with respect to the frauds that involved deceit. Fundamental to each finding involving a falsehood was the patency of the falsehood and Kurichh's intentional dishonesty, the severity of which is unaffected by his lack of expertise about securities.

[27] On the other hand, the Dilution Fraud did comprise a series of somewhat complex corporate transactions. Kurichh's inexperience cannot excuse his participation in the scheme, but we do accept that it is a mitigating factor in this case. We expect anyone who occupies the role that Kurichh did to fulfill their duties and to be on the alert for improper conduct that may harm innocent investors. This obligation would be more pronounced for more experienced individuals, because they are better equipped to identify misconduct and possibly to prevent it.

(d) Remorse or recognition of harm

[28] Finally, we are unable to give Kurichh credit for any recognition of the harm caused to BGH investors, or for otherwise showing remorse. At both the merits and sanctions hearings, the thrust of Kurichh's response was to minimize his role and to attempt to deflect responsibility to Blackburn.

[29] At the sanctions hearing before us, Kurichh chose not to submit any evidence or to demonstrate in any way that he is remorseful. Kurichh's counsel submitted that we should give Kurichh credit for his being co-operative during Staff's investigation. However, we have no evidence in support of this submission, and Staff urged us to reject it.

[30] Kurichh's counsel also drew our attention to a draft *Statement of Financial Condition of Raj Kurichh* that was attached to email correspondence between Staff and Mr. Kurichh's former counsel. We were asked to conclude that settlement discussions took place during which Kurichh had demonstrated a

8 At paras 85-86.

willingness to make admissions. We were urged to give Kurichh some credit for doing so. In our view, Staff was correct in its submission in response that we should reject that invitation. The evidence available to us gives no reliable sense of how prepared Kurichh was to make concessions.

[31] Kurichh did attend both hearings in their entirety and was respectful and co-operative throughout. With limited exceptions, he accepted the evidence against him.

4. Disgorgement

(a) General principles

[32] Paragraph 10 of subsection 127(1) of the Act provides that if "a person or company has not complied with Ontario securities law", the Commission may, if it determines it to be in the public interest to do so, issue "an order requiring the person or company to disgorge to the Commission any amounts obtained as a result of the non-compliance."

[33] The purpose of a disgorgement order is not to provide restitution; rather, it is an equitable remedy that seeks to prevent a wrongdoer from retaining amounts obtained through the wrongdoing.[9]

[34] As the Commission has previously made clear, the words "amounts obtained" are to be distinguished from the concept of profit earned. Calculation of amounts obtained is done without reference to whether a respondent "profited" from one or more breaches of Ontario securities law.[10]

[35] If we decide to issue a disgorgement order against one or more respondents, we must determine the "amounts obtained" as a result of non-compliance. It is Staff's position that these words refer not only to sums of money obtained (from investors, for example), but also to the non-cash benefits received as a result of the Dilution Fraud, *i.e.*, the shares of Blue Gold Tailing Technologies Inc. ("**BGTT**"). Staff says that this interpretation both accords with the natural meaning of the words and aligns with the legislative objective.

[36] It is well established that the words of a statute are to be given their ordinary and natural meaning, consistent with the intention of the legislature.[11] As noted above in paragraph [7], the legislative purpose of the Act is found in the twin objectives set out in section 1.1, namely investor protection and the promotion of fair and efficient capital markets and confidence in those markets.

[37] Staff submits that the ordinary meaning of the word "amount" can include quantities other than cash, that there are instances of that term in the Act in contexts where it is clear that the word's meaning is not limited to cash,[12] and that the proposed broader interpretation better aligns with the legislative objectives of investor protection and confidence in the capital markets.

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9 *Re Phillips* (2015), 38 OSCB 9311 ("***Phillips***") at paras 25-26.

10 *Re Limelight Entertainment Inc.* (2008), 31 OSCB 12030 ("***Limelight***") at paras 48-49.

11 *York Condominium Corp. No. 382 v Jay-M Holdings Ltd.*, 2007 ONCA 49 at paras 11-14.

12 Paragraph 10 of subsection 128(3) ("money") in contrast to paragraph 15 of subsection 128(3) ("amounts obtained"); subsection 137(1); and paragraph 2(ii) of subsection 138.5(1) of the Act.

[38] In Staff's submission, the broader interpretation better protects investors and fosters greater confidence in the capital markets in the specific context of this case and in similar cases, because it seeks to prevent a respondent from retaining anything received as a result of breaches of the Act.

[39] We therefore agree with Staff's submissions as to the proper interpretation of "amounts obtained"; *i.e.*, that it refers not only to cash, but must also include non-cash amounts obtained by Kurichh through the Dilution Fraud or otherwise (*e.g.*, shares of Golden Cross Resources Inc., which has since changed its name to Fineqia International Inc., and is referred to as "**Fineqia**" throughout these reasons).[13]

[40] The Commission has previously referred to disgorgement-related principles that were established in decisions of the United States Securities and Exchange Commission, and that were then adopted by this Commission with the substitution in Ontario of "amounts obtained" rather than "profits earned" for the reasons referred to above in paragraph [34].

[41] After considering those principles, which support Staff's proposed interpretation, the Commission held that it should consider the following factors when contemplating a disgorgement order, in addition to the considerations regarding sanctions generally that are referred to in paragraph [9] above:

a. whether an amount was obtained by a respondent as a result of non-compliance with the Act;

b. the seriousness of the misconduct and whether investors were seriously harmed;

c. whether the amount that a respondent obtained as a result of non-compliance with the Act is reasonably ascertainable;

d. whether those who suffered losses are likely to be able to be compensated in another way; and

e. the deterrent effect (both general and specific) of a disgorgement order.[14]

(b) Calculation of amounts obtained

[42] We accept Staff's submission, not contested by Kurichh, that we should calculate the disgorgement amount as at the time of the Dilution Fraud without regard to any subsequent event, including for example disposition of, or diminution in value of, shares received.[15]

[43] Staff bears the onus, in the first instance, of proving on a balance of probabilities the amount obtained as a result of a respondent's misconduct. If Staff discharges that burden, the risk of any uncertainty in the calculation "should fall

13 Golden Cross Resources Inc. changed its name to Blue Gold Water Technologies Limited prior to the amalgamation, changed its name again to NanoStruck Technologies Inc., and then to Fineqia International Inc.

14 *Limelight* at para 52; *Re MRS Sciences Inc.* (2014), 37 OSCB 5611 at para 135, citing *Re Sabourin* (2010), 33 OSCB 5299 ("***Sabourin***") at paras 69 and 71.

15 *Phillips* at para 19.

on the wrongdoer whose non-compliance with the Act gave rise to the uncertainty."[16]

(c) Personal benefits

[44] At the merits hearing, Staff submitted an analysis of the source and use of funds in connection with the matters referred to in the Statement of Allegations. The analysis showed that apart from the Dilution Fraud, Kurichh obtained a net amount of $376,288.09 from BGH, received further net proceeds of $91,545.00 from investors who acquired shares of BGH, and made business expenditures on behalf of BGH in the amount of $51,813.44. Staff seeks disgorgement of the funds Kurichh received from BGH and investors, less the amount he spent on behalf of the business, for a net total of $416,019.65. This amount was not challenged by Kurichh, and we accept it as accurate.

(d) Dilution Fraud

[45] Staff also submitted a summary of issuances of BGTT common shares that shows Kurichh receiving BGTT shares on four occasions in 2013. He received "consulting shares" (purportedly in return for consulting services provided) on January 15, January 31, and February 28, 2013 and gifted shares on March 8, 2013. All of Kurichh's 14.44 million shares of BGTT were exchanged in the amalgamation with Fineqia that closed on May 29, 2013.

[46] As noted above in paragraph [42], the amount to be disgorged should be calculated as at the time of the Dilution Fraud, *i.e.*, as Kurichh received the BGTT shares. Because BGTT shares were highly illiquid and did not trade for extended periods of time, it is impossible to directly attribute a market value to the shares as at a particular day. Staff submits that in the absence of a market price for the shares, we ought to refer to the closing price of Fineqia shares as near in time as possible to each of the four occasions on which Kurichh received shares, and then take into account the exchange ratio contemplated for the amalgamation.

[47] We asked Kurichh's counsel whether he proposed a better method of calculating this portion of the benefit that accrued to Kurichh. Kurichh's counsel was unable to offer an alternative. We therefore adopt Staff's proposed methodology. While this approach is not perfect, it is the best available.

[48] Staff's calculation, the detail of which was tendered as evidence and not challenged by Kurichh, leads to the conclusion that Kurichh received $2,270,559.95 worth of BGTT shares between January 15 and March 8, 2013. Staff seeks a disgorgement order in respect of the Dilution Fraud in the amount of $2,213,032.72, being the above value of BGTT shares less $57,527.73 as credit for Kurichh's consulting services actually provided, which amount was fixed by a BGTT resolution signed by Blackburn on January 15, 2013.

[49] The principles and considerations set out in paragraph [41] above support the inclusion of an amount in respect of the BGTT shares in any disgorgement order:

a. Kurichh received the BGTT shares as a result of the Dilution Fraud;

b. as the Commission has previously stated, fraud "is one of the most egregious securities regulatory violations and is both an affront to the

16 *Limelight* at para 53.

individual investors directly targeted and decreases confidence in the fairness and efficiency of the entire capital market system generally";[17]

c. both investors who testified at the merits hearing described the total loss of their investment as being serious for them;

d. the amount obtained by Kurichh, *i.e.*, the value of the BGTT shares, is reasonably ascertainable; and

e. a disgorgement order would have a significant deterrent effect on Kurichh and others.

(e) Total to be disgorged

[50] Based on the above analysis, we conclude that it is in the public interest to order that Kurichh disgorge all amounts obtained as a result of the breaches of Ontario securities law found in the Merits Decision. This includes the $416,019.65 referred to in paragraph [44] above and the $2,213,032.72 referred to in paragraph [48] above, for a total of $2,629,052.37.

(f) Kurichh's offer to surrender Fineqia shares

[51] At the sanctions hearing, Kurichh offered to surrender the Fineqia shares that he controls, in part satisfaction of any disgorgement order we might make. However, the record before us does not tell a complete picture of what happened to Kurichh's Fineqia shares upon or following the amalgamation. A report from System for Electronic Disclosure by Insiders (SEDI) tendered at the sanctions and costs hearing shows Kurichh acquiring approximately 5.4 million shares of Fineqia on the date of the amalgamation. That same report indicates that Kurichh holds 5 million of those shares indirectly through Elbasan International Inc. ("**Elbasan**"), a corporation about which we heard no evidence either at the merits hearing or the sanctions and costs hearing. Kurichh holds the remaining 394,126 shares directly.

[52] At the sanctions hearing, we attempted to explore whether Kurichh has control over all shares of which he is shown as the beneficial owner. We were advised by his counsel that Kurichh does not, and that Kurichh "hasn't received any money for them", but we have no evidence to explain this, and we were given no further information by Staff or by Kurichh. While it is clear that there is some relationship between Kurichh and Elbasan, there is nothing in the record as to the nature of that relationship.

[53] Kurichh, through counsel, advised that the 5 million BGTT shares went directly to Elbasan and "were never his, personally." It is unclear to us on what basis this information can be reconciled with the SEDI report referred to above, that shows Kurichh as the beneficial owner of these shares.

[54] The only evidence before us leads us to the conclusion that Kurichh either received all of the Fineqia shares to which he was entitled and then disposed of some interest in some of the shares to Elbasan, or that he directed the transfer of some shares directly to Elbasan for no or some consideration. We cannot and need not speculate as to the circumstances of that possible transfer, and in any event the terms of whatever transfer happened do not reduce Kurichh's obligation to disgorge any amount obtained as a result of his misconduct.

17 *Re Bluestream Capital Corp.* (2015), 38 OSCB 2333 at para 45.

[55] We accept Staff's submission that we ought not to attempt to fashion a mechanism whereby the Commission accepts control of some shares and oversees their disposition for the benefit of investors. While Kurichh's proposal that we do so is tempting in substance, we agree that it would be inappropriate for the Commission to manage or oversee such a process in this case, even assuming that the authority to do so exists.

5. Administrative Penalty

[56] Fraud is one of the most egregious regulatory violations. It is therefore not surprising that in many cases fraud has attracted some of the most severe sanctions available.

[57] Kurichh's breaches warrant the imposition of a meaningful administrative penalty. His acts of misconduct were recurrent, not isolated. He engaged in illegal trading and illegal distribution, and he made prohibited representations regarding listing. More seriously, his participation in the frauds involving deceit is unmitigated by any circumstances in his favour. His involvement in the Dilution Fraud contributed to significant financial losses being suffered by many investors, and represented a failure to discharge the responsibilities of a corporate officer and director in the circumstances in which he found himself.

[58] In reviewing previous Commission decisions in which administrative penalties were imposed, Staff found few that involved multiple respondents with varying degrees of culpability. Of the decisions that did meet that criterion,[18] the administrative penalties imposed upon the individual respondents who were found to have participated in fraud ranged from a minimum of $150,000 to a maximum of $750,000. In all those cases, the total investor loss was significantly less than in this case.

[59] Staff requested the imposition of a $200,000 administrative penalty against Kurichh. In our view, a greater penalty might be justified, given the finding of multiple frauds, the degree of Kurichh's participation in BGH's frauds, and the findings in addition to the frauds. However, the amount sought by Staff is not unreasonable and we accede to Staff's request.

6. Financial Sanctions Taken Together

[60] When the Commission imposes both a disgorgement order and an administrative penalty on a respondent, the Commission should consider the total of those sanctions in determining the appropriate amount of each.[19] In this case, we were not asked to reduce either the disgorgement amount or the administrative penalty in light of the other, should we make both orders. In any event, we see no reason to reduce either component. The disgorgement order fairly represents the amount improperly obtained, and the administrative penalty is at the lower end of the range, all for the reasons set out above.

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18 *Bradon*; *Re Portfolio Capital Inc.* (2015), 38 OSCB 7357 ("***Portfolio***"); *Re 2196768 Ontario Ltd.* (2015), 38 OSCB 2374 ("***2196768***"); *Re Rezwealth Financial Services Inc.* (2014), 37 OSCB 6731; *Re Axcess Automation LLC* (2013), 36 OSCB 2919.

19 *Re York-Rio Resources Inc.* (2014), 37 OSCB 3422 ("***York Rio***") at para 36, citing *Sabourin* at para 59.

[61] In addition, while a respondent's ability to pay may be a relevant consideration, it is not a dominant factor, and in any event we were not asked to reduce the amount of any financial sanction in recognition of Kurichh's ability to pay. Such a submission would have been difficult, given that we had no evidence of Kurichh's financial status. We were shown a draft and partially completed Statement of Financial Position purporting to show some information regarding Kurichh. We observe that the statement shows monthly revenue approximately equal to monthly expenses, and a net worth of approximately $24,000, including approximately 8.5 million shares of Fineqia (instead of the approximately 5.4 million reflected on the SEDI report). Those shares are stated to have an estimated fair market value of approximately $45,000 based on the last trading price of those shares before trading was halted on March 31, 2016, due to the announcement of a business change. The draft financial statement appears to have been prepared as at April 15, 2016, just two weeks later.

[62] However, the document is incomplete in substantial respects, is neither sworn nor affirmed, and was not tested by Staff. We therefore have no reliable basis on which, and no reason, to adjust our conclusions about the appropriate disgorgement or administrative penalty amounts.

7. Permanent Bans

[63] Staff requests that Kurichh be removed from the capital markets permanently through an order that, among other things, prohibits him from trading or acquiring securities, provides that the exemptions contained in Ontario securities law no longer apply to him, and prohibits him from acting as a director, officer, registrant, investment fund manager or promoter.

[64] Staff points to numerous Commission decisions in which individuals who have perpetrated a fraud are made subject to permanent bans of the kind sought by Staff.[20] Such bans often apply not only to the sole directing mind of an enterprise, but also to colleagues who played a lesser role but did participate in the fraud, usually along with other breaches such as contraventions of the dealer registration requirement or the prospectus requirement.[21]

[65] A permanent ban is a significant sanction that has both specific and general deterrent effect. For the reasons set out in paragraph [57] above, Kurichh's breaches warrant significant restrictions on his ability to participate in the capital markets.

[66] Taking all these factors into account, we find that it is in the public interest to order the permanent bans against Kurichh as requested by Staff, subject to the question of whether it would be appropriate to incorporate into those bans a "carve-out", *i.e.*, an opportunity for Kurichh to conduct limited trading at some point during the life of the order.

[67] Staff referred us to previous Commission decisions, some of which allowed a carve-out, and some of which did not. Kurichh submits that we should permit him to trade once he has satisfied any payment obligation we include in our order, as the Commission has ordered in some cases. Staff agreed that Kurichh's proposal was appropriate.

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20 See, *e.g.*, *Bradon* and *Portfolio*.
21 See, *e.g.*, *2196768* and *Re Winick* (2014), 37 OSCB 501.

[68] We accept that submission. We therefore conclude that following satisfaction of the amounts Kurichh is ordered to pay, Kurichh should be able to trade in securities through one registrant who is given a copy of the Merits Decision and this decision, and a certificate of Staff that the amounts ordered to be paid have indeed been paid. Providing that Kurichh may trade through only one registrant ensures that the registrant has the complete picture of Kurichh's trading activity and would therefore be well positioned to prevent or detect impropriety.

8. Joint and Several Liability for Amounts Owed by BGH

[69] Staff submits that Kurichh ought to be held jointly and severally liable for the amount of any disgorgement order we make against BGH. As Staff notes, the Commission has on numerous occasions issued orders that hold one respondent jointly and severally liable for amounts ordered to be paid by another respondent.

[70] In support of this submission, Staff points to the fact that the calculation of the amount to be disgorged is as of early 2013, without any recognition that the shares beneficially held by Kurichh may already have, and/or may in the future, increase in value. Staff submits that we should reduce, as much as possible, the risk that Kurichh will satisfy the disgorgement order but be left retaining a benefit that he ought not to have.

[71] Staff's fear of this scenario is amplified by the fact that Fineqia is now seeking to "provide an online platform and associated services for the placement of debt and equity securities, initially in the UK", according to a news release issued on November 1, 2016. That same news release announces that Fineqia recently raised more than $5 million in a non-brokered oversubscribed private placement.

[72] Kurichh's submission is that he ought not to be made jointly and severally liable for amounts owed by BGH, particularly because he has never had, and still has, no access to or control over the funds or assets in the hands of BGH. Kurichh distinguishes the decisions submitted by Staff on this basis.

[73] In support of this, Kurichh refers us to the Commission's 2013 decision in *Re Global Energy Group, Ltd.*,[22] which bears important similarities to this case. The Commission held that although more than US$16 million was raised from investors through a scheme involving a corporate respondent and two individual respondents, approximately US$11.5 million of those funds went into accounts over which none of those three respondents had any control or authority. The Commission declined to order that each of the three respondents disgorge the full amount. Instead, each respondent was required to disgorge the smaller amount obtained by that respondent.

[74] In response, Staff urged us to consider *Phillips*, the 2015 decision cited in paragraph [33] above, in which the Commission explicitly found that it was appropriate to hold the respondents jointly and severally liable for amounts obtained by non-respondents as part of the fraudulent scheme. In our view, there are important factors present in that case that are not applicable here:

22 (2013), 36 OSCB 12153 ("***Global Energy***") at para 81.

a. the respondents created a complex corporate structure that comprised about 161 limited partnerships and companies, with significant interrelationships among, and transactions between, those entities;[23]

b. the Commission stated in *Phillips* that individual respondents "cannot shelter behind the corporate vehicles through which their conduct was carried out";[24] we see no basis to draw a similar conclusion in this case; and

c. the respondents in *Phillips* were registrants and had been registered in various capacities for a number of years.[25]

[75] In our view, the Commission decision in *Global Energy* is consistent with the principles discussed in paragraphs [32] to [41] above and we adopt its approach. We echo the concern of the Commission in *Sabourin*[26] that in the circumstances of this case, where each of BGH and Kurichh obtained separate amounts, with Kurichh's ostensibly being for the services he provided to BGH, holding Kurichh liable for amounts obtained by BGH could amount to "double counting". We caution that this concern is driven by the facts of this case, and must not be taken as a rejection of joint and several where appropriate.

[76] The disgorgement amount with respect to Kurichh represents the entirety of the amount he obtained through all of the events that were the subject of the Merits Decision. It also reflects the role that Kurichh played.[27] We decline to impose joint and several liability on Kurichh for amounts obtained by BGH.

C. GREENING

1. Introduction

[77] Our approach to analyzing Kurichh's role and the appropriate sanctions for Kurichh applies equally to Greening. We now consider the same principles and factors, in the context of the facts as they apply to Greening.

[78] Given Greening's failure to participate meaningfully in the merits hearing, or at all in the sanctions and costs hearing, we have no evidence from him that might be relevant to a sanctions order, beyond the evidence cited in the Merits Decision.

2. Greening's Misconduct

[79] The Commission found that Greening:

a. engaged in the business of trading without being registered, contrary to section 25 of the Act; and

23 *Phillips* at para 41.
24 *Phillips* at para 22.
25 *Phillips* at para 38.
26 At para 71.
27 *York Rio* at para 69.

b. as a director and officer of BGH throughout, is deemed to have contravened Ontario securities law by virtue of his having authorized, permitted or acquiesced in BGH's breaches.[28]

3. Potential Mitigating Factors

[80] Greening's role in the breaches was analyzed in the Merits Decision. For the reasons noted above, we have no evidence that might operate in Greening's favour as mitigating factors.

[81] In particular, we have no basis to conclude that Greening was acting at Blackburn's direction, we have no information about Greening's experience in the marketplace, and we have no indication of any remorse or other acknowledgment of the harm caused to investors.

4. Disgorgement

[82] Staff seeks a disgorgement order of $2,213,032.72 against Greening in respect of the Dilution Fraud, which amount is equal to that sought in respect of Kurichh. Greening and Kurichh received the same number of BGTT shares at the same times, and there is no reason to distinguish between them with respect to the Dilution Fraud. For the reasons set out above in paragraphs [46] to [49], we will order that Greening disgorge the same amount.

[83] In addition, Staff's analysis referred to in paragraph [44] above demonstrates that Greening received net proceeds of $256,777.56 from BGH share sales in breach of the dealer registration requirement, which amount remains in Greening's hands, as far as the record before us indicates. Staff's analysis also shows that Greening received an additional net amount of $79,187.00 from BGH. Staff seeks disgorgement of this amount as a result of Greening having authorized, permitted or acquiesced in all breaches but the Dilution Fraud.

[84] We accept Staff's unchallenged submissions with respect to disgorgement and will order that Greening disgorge a total of $2,548,997.28.

5. Administrative Penalty

[85] In our view, Greening should be ordered to pay a lesser administrative penalty than we concluded Kurichh should pay, since we did not find that Greening deliberately and deceitfully perpetrated a fraud. However, given Greening's role as director and officer throughout, and his resulting shared responsibility for BGH’s participation in the Dilution Fraud, a significant administrative penalty is warranted. We find that it is in the public interest for Greening to pay an administrative penalty in the amount of $150,000.

6. Financial Sanctions Taken Together

[86] When we consider the total disgorgement amount and the administrative penalty against Greening together, we see no reason to adjust either, in the absence of a request to do so and in the absence of any evidence to support such a conclusion.

28 Merits Decision at para 88(e).

7. Permanent Bans

[87] Staff requests that Greening also be removed from the capital markets permanently through an order that, among other things, prohibits him from trading in or acquiring securities, provides that the exemptions contained in Ontario securities law no longer apply to him, and prohibits him from acting as a director, officer, registrant, investment fund manager or promoter.

[88] In our view, the permanent bans sought by Staff are appropriate in all the circumstances and are in the public interest, given Greening's role throughout as discussed in the Merits Decision, including his responsibility for BGH's participation in the Dilution Fraud.

[89] We had no request before us to allow Greening a "carve-out" following his satisfaction of amounts owing under our order, so we make no such provision.

8. Joint and Several Liability for Amounts Owed by BGH

[90] For the reasons set out above at paragraphs [75] to [76], we decline Staff's request to order that Greening be jointly and severally liable for any amounts we order to be paid by BGH.

D. BGH

[91] Staff requests that BGH be permanently removed from the capital markets through an order that, among other things, ceases trading in its securities, ceases trading by it in securities, and removes from it the benefit of the exemptions contained in Ontario securities law. In our view, such an order is amply supported by our findings in this case.

[92] Staff also seeks a disgorgement order against BGH, comprising two amounts, both of which are supported by Staff's analysis referred to in paragraph [44] above and are unchallenged:

a. $949,036.88, being the net amount obtained from investors less the net amounts obtained by Kurichh and Greening, as referred to in paragraphs [44] and [83] above; and

b. $3,516,001.41, the net amount obtained in respect of the Dilution Fraud, being the value of BGTT shares issued under the licence agreement between BGH and BGTT, less the value of the license rights under that agreement.

[93] We accept Staff's submission as to the amounts obtained by BGH. We must, however, determine whether it is in the public interest to order disgorgement of part or all of those amounts.

[94] As noted above in paragraph [33], the purpose of a disgorgement order is to prevent a wrongdoer from retaining amounts obtained through breaches of Ontario securities law. In this case, the wrongdoers were the individual Respondents. BGH was the vehicle through which they carried out their wrongdoing.

[95] To impose a substantial disgorgement order on BGH would, to the extent BGH has any assets and anyone with authority to dispose of those assets and direct the disgorgement of money, deprive harmed investors of any chance of

recovering funds from BGH, should they decide to pursue a claim. While any such funds would be directed to worthwhile causes under subsection 3.4(2)(b) of the Act, in our view the better cause is the interests of the harmed investors. Accordingly, we decline to make a disgorgement order against BGH.

[96] For the same reasons, we decline Staff's request that BGH be made jointly and severally liable for the amounts ordered to be paid by Kurichh and/or Greening.

[97] In light of our conclusion that it is in the public interest to prohibit BGH from trading in securities, we wish to note that if BGH holds shares of Fineqia or any other securities and those securities have value that harmed investors choose to pursue, it is open to affected persons, on a proper application under section 144 of the Act, to ask the Commission to vary any order we make so as to permit the disposition of those securities.

IV. COSTS

[98] Section 127.1 of the Act empowers the Commission to order that a respondent pay costs of an investigation and hearing if the Commission is satisfied that the respondent has breached the Act. Such an order is not a sanction; instead it allows the Commission to recover some of the costs expended in connection with the investigation and hearing. In determining an appropriate order for costs, the Commission considers many factors,[29] among which the most relevant in this case are the seriousness of the breaches, the relative impact of each respondent on the costs incurred, the respondent's conduct in the proceeding, and the reasonableness of the costs requested by Staff.

[99] In support of its claim for costs, Staff submitted detailed evidence that identifies each member of Staff who was involved in the investigation and the hearings, with the corresponding number of hours spent by, and hourly rate for, each person. Staff documented approximately $15,000 in disbursements, consisting primarily of court reporting services.

[100] Staff seeks costs in the total amount of approximately $204,000, which represents a discount of approximately 77% from the costs incurred. In arriving at this substantial discount, Staff limited its claim for time to that spent by only one investigator and one counsel. Staff further reduced the amount claimed by attributing most of the time spent to the investigation of Blackburn's activities and to preparation for a merits hearing that would include Blackburn as a respondent.

[101] Staff asks that the costs order against Greening be $25,000 of the total $204,000 sought. In our view, that amount is toward the low end of a reasonable range. While Greening's role in the breaches of Ontario securities law was less active than Kurichh's, those breaches were serious, Greening was a founder of BGH, he was a director and officer of BGH throughout, he executed all the necessary resolutions, and he was responsible for each of BGH's contraventions.[30] However, the amount requested is reasonable, and we will make that order.

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29 *Bradon* at para 114, citing *Re Ochnik* (2006), 29 OSCB 5917 at para 29; *Ontario Securities Commission Rules of Procedure* (2014), 37 OSCB 4168, r 18.2.

30 Merits Decision at para 87.

[102] Staff seeks the balance of $179,000 from Kurichh. Staff is being conservative in its overall approach by excluding the time in respect of Blackburn and by applying a further discount from time spent. However, in our view a costs amount of $100,000 is more appropriate for Kurichh, particularly because had it not been for Blackburn's conduct, the allegations in this proceeding (including those against Kurichh) would likely have been substantially narrower, had there been any at all.

V. CONCLUSION

[103] For the reasons set out above, we will issue an order that provides as follows:

a. with respect to BGH:

   i. pursuant to paragraph 2 of subsection 127(1) of the Act, trading in any securities of BGH shall cease permanently, and trading in any securities or derivatives by BGH shall cease permanently;

   ii. pursuant to paragraph 2.1 of subsection 127(1) of the Act, the acquisition of any securities by BGH is prohibited permanently;

   iii. pursuant to paragraph 3 of subsection 127(1) of the Act, any exemptions contained in Ontario securities law do not apply to BGH permanently; and

   iv. pursuant to paragraph 8.5 of subsection 127(1) of the Act, BGH is prohibited permanently from becoming or acting as a registrant, as an investment fund manager or as a promoter;

b. with respect to Kurichh:

   i. pursuant to paragraph 9 of subsection 127(1) of the Act, Kurichh shall pay to the Commission an administrative penalty of $200,000, which amount shall be designated for allocation or use by the Commission in accordance with paragraphs b(i) or (ii) of subsection 3.4(2) of the Act;

   ii. pursuant to paragraph 10 of subsection 127(1) of the Act, Kurichh shall disgorge to the Commission $2,629,052.37, which amount shall be designated for allocation or use by the Commission in accordance with paragraphs b(i) or (ii) of subsection 3.4(2) of the Act;

   iii. pursuant to section 127.1 of the Act, Kurichh shall pay $100,000 to the Commission to reimburse the costs of the investigation and hearings;

   iv. pursuant to paragraphs 2 and 2.1 of subsection 127(1) of the Act, trading in any securities or derivatives by Kurichh, and the acquisition of any securities by Kurichh, shall cease permanently, except that following satisfaction of the three payments required to be paid by him, evidenced by a certificate issued by Staff of the Commission, Kurichh may trade securities in his own name, only through one registrant who has been given a copy of the Merits Decision and this decision;

v. pursuant to paragraph 3 of subsection 127(1) of the Act, any exemptions contained in Ontario securities law do not apply to Kurichh permanently, except to the extent necessary to allow him to trade securities as permitted by the preceding paragraph;

vi. pursuant to paragraphs 7, 8, 8.1, 8.2, 8.3 and 8.4 of subsection 127(1) of the Act, Kurichh shall immediately resign any position he holds as a director or officer of an issuer, registrant or investment fund manager, and that he be prohibited permanently from holding any such position; and

vii. pursuant to paragraph 8.5 of subsection 127(1) of the Act, Kurichh is prohibited permanently from becoming or acting as a registrant, as an investment fund manager or as a promoter; and

c. with respect to Greening:

i. pursuant to paragraph 9 of subsection 127(1) of the Act, Greening shall pay to the Commission an administrative penalty of $150,000, which amount shall be designated for allocation or use by the Commission in accordance with paragraphs b(i) or (ii) of subsection 3.4(2) of the Act;

ii. pursuant to paragraph 10 of subsection 127(1) of the Act, Greening shall disgorge to the Commission $2,548,997.28, which amount shall be designated for allocation or use by the Commission in accordance with paragraphs b(i) or (ii) of subsection 3.4(2) of the Act;

iii. pursuant to section 127.1 of the Act, Greening shall pay $25,000 to the Commission to reimburse the costs of the investigation and hearings;

iv. pursuant to paragraphs 2 and 2.1 of subsection 127(1) of the Act, trading in any securities or derivatives by Greening, and the acquisition of any securities by Greening, shall cease permanently;

v. pursuant to paragraph 3 of subsection 127(1) of the Act, any exemptions contained in Ontario securities law do not apply to Greening permanently;

vi. pursuant to paragraphs 7, 8, 8.1, 8.2, 8.3 and 8.4 of subsection 127(1) of the Act, Greening shall immediately resign any position he holds as a director or officer of an issuer, registrant or investment fund manager, and that he be prohibited permanently from holding any such position; and

vii. pursuant to paragraphs 8.5 of subsection 127(1) of the Act, Greening is prohibited permanently from becoming or acting as a registrant, as an investment fund manager or as a promoter.

Dated at Toronto this 7th day of December, 2016.

"*Alan Lenczner*"

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Alan Lenczner, Q.C.

"*Janet Leiper*"

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Janet Leiper

"*Timothy Moseley*"

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Timothy Moseley