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Securities
Commission

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Citation: Mawji (Re), 2019 ONSEC 39
Date: 2019-12-03
File No. 2019-38

**IN THE MATTER OF
ALY BABU HUSEIN MAWJI**

**REASONS AND DECISION
(Subsections 127(1) and 127(10) of the *Securities Act*, RSO 1990, c S.5)**

Hearing: In Writing

Decision: December 3, 2019

Panel: Heather Zordel Commissioner and Chair of the Panel

Submissions: Hanchu Chen For Staff of the Commission

No submissions made by or on behalf of Aly Babu Husein Mawji

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REASONS AND DECISION

I. OVERVIEW

- [1] On October 12, 2012, the respondent Aly Babu Husein Mawji was convicted before the Stuttgart District Court in Germany for illegal market manipulation.¹
- [2] In this inter-jurisdictional enforcement proceeding, Enforcement Staff of the Ontario Securities Commission (**Staff of the Commission**) requests a protective and preventative order in the public interest pursuant to the *Securities Act* (the **Act**) s.127(1) and s.127(10).² Specifically, Staff relies on s.127(10)1 of the Act, which provides that an order may be made under s.127(1) in respect of a person who has been convicted in any jurisdiction of an offence arising from a transaction, business or course of conduct related to securities or derivatives.³ I also will consider the Act s.127(10)3, which provides that an order may be made under s.127(1) in respect of a person who has been found by a court in any jurisdiction to have contravened the laws of the jurisdiction respecting the buying or selling of securities.⁴ Staff submits that the s.127(1) precondition has been met, and that it is in the public interest to make an inter-jurisdictional enforcement order against Mr. Mawji in Ontario on the terms proposed.
- [3] There are two issues for my consideration:
- a. Has Mr. Mawji been convicted in any jurisdiction of an offence arising from a transaction, business or course of conduct related to securities or derivatives and/or has Mr. Mawji been found by a court in any jurisdiction to have contravened the laws of the jurisdiction respecting the buying or selling of securities?
 - b. If so, should the Commission exercise its jurisdiction to make a protective and preventative order in the public interest in respect of Mr. Mawji?
- [4] Based on the written submissions, hearing brief and supporting legal authorities filed by Staff, I am satisfied that the precondition for the proposed order has been met, and it is in the public interest to issue the requested order. These are my reasons.

II. SERVICE AND PARTICIPATION

- [5] Staff filed a Statement of Allegations dated October 10, 2019, naming Mr. Mawji as the sole respondent in this proceeding and electing to proceed with a hearing in writing. The next day, the Commission issued a Notice of Hearing commencing this proceeding and posted it on the Commission's website.
- [6] Staff served Mr. Mawji with the Statement of Allegations, the Notice of Hearing, and Staff's written submissions, hearing brief⁵ and brief of authorities on October

¹ Exhibit 1, Staff's Hearing Brief, Decision of the German Federal Court of Justice re: Aly Babu Husein Mawji, et al. dated December 4, 2013, Tab 2 (translation) and Tab 3 (original) (**Federal Decision**) at para 8; see also Staff's Hearing Brief, Decision of the Stuttgart District Court, Commercial Crime Court re: Aly Babu Husein Mawji dated October 12, 2012, Tab 4 (partial translation) and Tab 5 (original) (**District Decision**) at 4.

² RSO 1990, c S.5 (the **Act**).

³ The Act, s.127(10) para 1.

⁴ The Act, s.127(10) para 3.

⁵ Marked as Exhibit 1 in this proceeding.

25, 2019, via email. Staff filed an Affidavit of Service sworn on October 29, 2019.⁶ I find that Staff properly effected service on Mr. Mawji.

- [7] In accordance with the *Ontario Securities Commission Rules of Procedure and Forms*, the deadline for the respondent to serve and file written submissions was November 22, 2019.⁷ That deadline has passed.
- [8] Mr. Mawji chose not to participate in the proceeding. Although properly served, Mr. Mawji filed no materials by the deadline, or at any point. The Commission may proceed in the absence of a party where that party has been given notice of the hearing.⁸ I am satisfied that Mr. Mawji had adequate notice of this written hearing and that it is appropriate to proceed with this written hearing in his absence.

III. GERMAN COURT PROCEEDINGS

A. Conduct at Issue

- [9] In early 2006, Mr. Mawji acquired almost all of the freely traded shares of a company (**Company D**). Together with another individual (**Individual G**), Mr. Mawji sought to increase the price of Company D's shares through recommendations in the media. Mr. Mawji transferred half of his Company D shares to Individual G in exchange for Individual G marketing the shares through his network of stock exchange journalists.⁹ Between May 15, 2006 and June 15, 2006 (the **Material Time**), Individual G and associates actively promoted and recommended the purchase of the shares of Company D in the media as a lucrative investment based on the involvement of a well-known geologist.¹⁰
- [10] Company D shareholders, including Mr. Mawji, were not disclosed in any publications; there were no disclaimers or warnings regarding Mr. Mawji's shareholdings; letters sent out by email and the respective home pages did not disclose that the publisher and associates may hold positions in the shares discussed in the publications; nor was that information disclosed online.¹¹
- [11] Company D's shares remained virtually inactive following its initial listing in February 2006.¹²
- [12] During the Material Time, the stock exchange price of Company D shares increased from EUR 2.10 to EUR 18.10. Mr. Mawji, having concealed his own shareholdings in Company D and the conflict of interest therein, used the price increases to his advantage and sold his Company D shares for a profit of EUR 25,660,856.02.¹³
- [13] Company D's share price fell following the conclusion of the marketing campaign, closing at EUR 2.92 on June 30, 2006. Over the course of 2006 and 2007, the

⁶ Marked as Exhibit 2 in this proceeding.

⁷ *I.e.*, 28 days after service, pursuant to *Ontario Securities Commission Rules of Procedure and Forms* (2019), 42 OSCB 6528, r 11(3)(g) (**OSC Rules of Procedure**), r 11(3).

⁸ *Statutory Powers Procedure Act*, RSO 1990, c S.22, s 7(2); *OSC Rules of Procedure*, r 21(3).

⁹ Federal Decision, Tab 2 at para 4.

¹⁰ Federal Decision, Tab 2 at para 5.

¹¹ Federal Decision, Tab 2 at para 6.

¹² Federal Decision, Tab 2 at para 7.

¹³ Federal Decision, Tab 2 at para 7.

Company D trading volume and share price continually decreased, and tended towards zero.¹⁴

B. Conviction and Sentencing

- [14] On October 12, 2012, Mr. Mawji was convicted before the Stuttgart District Court of illegal market manipulation, in relation to s.38(2), in conjunction with s.39(1) no. 2, and s.20a(1) no. 3 of the *German Securities Trading Act (WpHG)*; s.4(3) no. 2 of the *German Market Manipulation Definition Regulation (MaKonV)*; and s.25(2) of the *German Criminal Code*.¹⁵
- [15] The Stuttgart District Court sentenced Mr. Mawji to three years and two months imprisonment.¹⁶

C. Appeal

- [16] Mr. Mawji appealed the Stuttgart District Court's judgement to the German Federal Court of Justice (**Federal Court**). On December 4, 2013, the Federal Court denied Mr. Mawji's appeal, except for the District Court's findings regarding the *German Code of Criminal Procedure* s.111i para 2¹⁷, which was held to be inapplicable because it came into effect after the Material Time.¹⁸
- [17] The Federal Court found no errors of law regarding Mr. Mawji's conviction and upheld the Stuttgart District Court's findings that Mr. Mawji had carried out an illegal market manipulation of Company D shares.¹⁹

IV. LAW AND ANALYSIS

A. Has the respondent been convicted in any jurisdiction of an offence arising from a transaction, business or course of conduct related to securities and/or been found by a court in any jurisdiction to have contravened the laws of the jurisdiction respecting the buying or selling of securities?

- [18] The Act s.127(10) facilitates the inter-jurisdictional enforcement of orders following breaches of securities law. It allows the Commission to issue protective and preventative orders to ensure that misconduct that takes place in another jurisdiction will not be repeated in Ontario's capital markets. The Act s.127(10) authorizes an order under s.127(1) where a respondent has been convicted in any jurisdiction of an offence arising from a transaction, business or conduct related to securities. The Act s.127(10) also authorizes an order under s.127(1) where a respondent has been found by a court in any jurisdiction to have contravened the laws of the jurisdiction respecting the buying or selling of securities. The Act s.127(10) does not itself empower the Commission to make an order; rather, if the threshold criterion in s.127(10) is met, then it provides a basis for an order under s.127(1).

¹⁴ Federal Decision, Tab 2 at paras 1 and 4.

¹⁵ Federal Decision, Tab 2 at para 8; District Decision, Tab 4 at IV.

¹⁶ Federal Decision, Tab 2 at paras 1 and 4; District Decision, Tab 4 at I-2 (p 3).

¹⁷ Federal Decision, Tab 2 at Decision para 1 and Reasons paras 48-52. Section 111i paragraph 2 is a provision enacted in January 2007 for the purpose of strengthening enforcement for damages and asset forfeiture.

¹⁸ Federal Decision, Tab 2 at Decision paras 1-3 and Reasons paras 48-53.

¹⁹ Federal Decision, Tab 2 at para 18.

- [19] The Stuttgart District Court found that Mr. Mawji engaged in illegal market manipulation through a “pump and dump” scheme with respect to Company D shares. Company D’s share trading price increased from EUR 2.10 to EUR 18.10 with the support of a marketing campaign with which Mr. Mawji was associated when he had a conflict of interest due to undisclosed shareholdings in the company being marketed. Mr. Mawji took advantage of the trading price increases for the advantageous sale of his shares, which trades were also not disclosed to the investing public. Following the conclusion of the marketing campaign, Company D’s trading volume and price decreased, and eventually tended towards zero.²⁰
- [20] Mr. Mawji was convicted before the Stuttgart District Court of illegal market manipulation and the conviction was upheld by the Federal Court on appeal. Having regard to the nature of the offences, I am satisfied that Mr. Mawji’s conviction arose from a transaction, business or course of conduct related to securities and that he has been found by a court in Germany to have contravened the laws of Germany respecting the selling of securities. The threshold test under the Act s.127(10) is therefore satisfied.

B. Should the Commission exercise its jurisdiction to make the requested order in the public interest?

- [21] I must now consider whether it is in the public interest to issue an order under the Act s.127(1). Orders made under the Act s.127(1) are “protective and preventative” and are made to restrain potential conduct that could be detrimental to the integrity of the capital markets and are therefore prejudicial to the public interest.²¹
- [22] Mr. Mawji is a resident of British Columbia and holds no securities registration in Ontario. However, the Commission does not require a pre-existing connection to Ontario before exercising its jurisdiction to make an order in reliance on the Act s.127(10).²²
- [23] Staff submits that Mr. Mawji’s conduct warrants imposing significant protective sanctions to restrain future conduct. In determining specific sanctions, the Commission may consider a number of factors including the seriousness of the misconduct, and specific and general deterrence.²³ Staff submits that significant weight should be given to the serious nature of the misconduct in this case, given that Mr. Mawji’s offence warranted a criminal sentence of three years and two months imprisonment in Germany.
- [24] Where respondents have been convicted before criminal courts for securities-related misconduct, the Commission has consistently held that the threshold requirements of the Act s.127(10)1 have been met, and orders pursuant to the Act s.127(1) will be in the public interest.²⁴ The Commission has determined

²⁰ Federal Decision, Tab 2 at paras 5-7.

²¹ *Committee for the Equal Treatment of Asbestos Minority Shareholders v Ontario (Securities Commission)*, 2001 SCC 37 at paras 42-43.

²² *Euston Capital Corp*, 2009 ONSEC 23, (2009) 32 OSCB 6313 at para 45, citing *Biller (Re)*, 2005 ONSEC 15, (2005) 28 OSCB 10131 at paras 32-35.

²³ *Belteco Holdings Inc (Re)*, (1998) 21 OSCB 7743 at 7746.

²⁴ *Lech (Re)*, 2010 ONSEC 9, (2010) 33 OSCB 4795 (**Lech**) at paras 57-58; *Yoannou (Re)*, 2014 ONSEC 38, (2014) 37 OSCB 10762 at paras 17 and 32-33; *Dinardo (Re)*, 2016 ONSEC 1, (2016) 39 OSCB 953 at para 30; *Reeve (Re)*, 2018 ONSEC 55, (2018) 41 OSCB 9433 at paras 3, 16 and 23.

sanctions under the Act are warranted to provide both specific and general deterrence and to protect the investing public.²⁵

- [25] Company D's stock, which had been relatively inactive from its initial listing date until the marketing program started, saw a 761% increase in trading price in one month during the marketing program. Mr. Mawji sold Company D shares, which he had not adequately disclosed his ownership interest in, during this time frame at a substantial profit. The sharp rise and subsequent fall in trading volumes and price following the marketing campaign, and Mr. Mawji's opportunist share sales, is evidence that the campaign was manipulative in that Company D itself did not have the intrinsic value to support the high share valuation.²⁶ Market manipulation such as this poses significant harm to capital markets and investors' confidence in them.²⁷ Consequently, the Commission has recognized that contraventions will generally warrant severe sanctions.²⁸ I accept Staff's submission that the sanctions requested are proportionate to Mr. Mawji's level of misconduct and serve to protect Ontario investors and Ontario's capital markets from potential future misconduct by Mr. Mawji.

V. CONCLUSION

- [26] For the reasons set out above, I will make the following order:
- a. pursuant to the Act s.127(1)2, trading in any securities or derivatives by Mr. Mawji cease permanently;
 - b. pursuant to the Act s.127(1)2.1, acquisition of any securities by Mr. Mawji be prohibited permanently;
 - c. pursuant to the Act s.127(1)3, any exemptions contained in Ontario securities law do not apply to Mr. Mawji permanently;
 - d. pursuant to the Act s.127(1)7 and s.127(1)8.1, Mr. Mawji resign any positions that he holds as a director or officer of any issuer or registrant;
 - e. pursuant to the Act s.127(1)8 and s.127(1)8.2, Mr. Mawji be prohibited permanently from becoming or acting as a director or officer of any issuer or registrant; and
 - f. pursuant to the Act s.127(1)8.5, Mr. Mawji be prohibited permanently from becoming or acting as a registrant or promoter.

Dated at Toronto this 3rd day of December, 2019.

"Heather Zordel"
Heather Zordel

²⁵ *Lech* at para 67.

²⁶ Federal Court Decision, Tab 2 at para 43.

²⁷ *Lim (Re)*, 2018 ONSEC 39, (2018) 41 OSCB 6045 at para 1; *Boulieris (Re)*, 2004 ONSEC 1, (2004) 27 OSCB 1597 (***Boulieris***) at para 50.

²⁸ *Boulieris* at para 50.