

Decision

Date of Decision September 30, 2016

Background

1. In the Statement of Allegations by staff of the Financial Consumers Affairs Authority of Saskatchewan (the “Authority”) dated January 11, 2016, Staff alleged that from in or around July 2015 to in or around January 2016 (the “Relevant Time”), Summit acted as a dealer and an adviser, by engaging in the business of trading in and advising on securities or exchange contracts, or by holding itself out as engaging in the business of trading in and advising on securities or exchange contracts in Saskatchewan, without being registered to do so, thereby contravening subsections 27(2)(a) and 27(2)(b) of the Securities Act (“the Act”).

Preliminary matters

2. The only preliminary matter dealt with a question from the Panel concerning the proper service on the Respondents of the Notice of Hearing, given that neither the Respondent nor its agent was present. The issue at hand was that several of the notices had been forwarded to an incorrect address. The Panel determined that proper notice had been given in accordance with the applicable rules of service.

Evidence Presented to the Panel

3. During the course of the hearing in this matter, the Panel heard evidence from one witness, Ms. Deborah Swenson (Ms. Swenson).
4. Ms. Swenson is an investigator, employed with the Securities Division of the Authority, and was assigned by the Securities Division to investigate alleged breaches of Saskatchewan securities laws by the Respondent. Ms. Swenson's investigation and testimony at the hearing established the following:
 - that the investigation was prompted when a resident of Saskatchewan (the “Investor”) contacted the Enforcement Branch of the Securities Division of the Authority, about a cold call he received in July 2015 from someone identifying himself as Brian O'Malley, a representative of the Respondent, to see if he was interested in using options to short the U.S. Dollar;

- that the cold call was followed up by an email on July 22, 2015 to the Investor from Brian O'Malley with two attachments: "Summit International Client Agreement" and "U.S. Dollar Index Chart";
- that in early September 2015 the Investor had again been contacted via telephone by someone identifying himself as Ben Smith, a representative of the Respondent. During this call personal financial questions were directed towards the Investor which he declined to answer;
- that the Investor did not invest any money with the Respondent;
- that Ms. Swenson's investigation revealed that the Respondent maintained during the Relevant Time, and currently still maintains, a website at www.summitcfx.com ("the Summit Website") which sets out the following information:
 - o a "Homepage" section which states that the Respondent is an offshore commodity and forex trading firm dealing in both retail and institutional client arenas for over 12 years;
 - o a "Services" page which states that the Respondent "offers a selection of different financial services including both fully-managed and non-discretionary accounts to commodity and forex traders in most countries";
 - o an "Account Opening" page which states that opening an account is easy by downloading, completing and returning the risk disclosure and application and once the account is funded you are ready to trade ; and a "Contact Us" page which states that the Respondent has an office located in Singapore;
- that Ms. Swenson conducted a WHOIS web search to find out ownership and registrant information for the Summit Website; however, the Summit Website was registered through privacy walls and no details could be identified;
- that, to the best of Ms. Swenson's knowledge, the Respondent is not registered with the Saskatchewan Corporations Branch;
- that the Respondent is not registered in any capacity with the Authority under the Act; and
- that the Respondent is not registered on the National Registration Database.

Analysis

5. The issues for determination for the Panel are (i) whether the instruments offered for sale by Summit International were securities or exchange contracts as defined by the Act, and (ii) did the respondent breach the Act by acting as a dealer and an adviser by engaging in the business of trading in and advising on securities or exchange contracts or holding itself out as engaging in the business of trading in and advising on securities or exchange contracts in Saskatchewan without being registered to do so, thereby contravening sections 27(2)(a) and 27(2)(b) of the Securities Act.
6. Staff argued that the instruments offered for sale by the Respondent were securities by virtue of being investment contracts.
7. During the Relevant Time, the definition of "security" under the Act included the following:
"security" includes:
 (...)

 (xiv) any investment contract;
 (...)
 (xvi) any item or thing not mentioned in sub clauses (i) to (xv) that is a futures contract or option but is not an exchange contract;
whether any of the foregoing relate to an issuer or proposed issuer;
8. The definition of "exchange contract" was provided at subsection 2(1)(s.2) of the Act as follows:

"exchange contract" means a futures contract or an option that:

 (i) has its performance guaranteed by a clearing agency; and

 (ii) is traded on an exchange pursuant to standardized terms and conditions set forth in the bylaws, rules or regulations of that exchange at a price agreed on when the futures contract or option is entered into on the exchange; and includes any instrument or class of instruments that meets the requirements mentioned in subclauses (i) and (ii);
9. The test for an investment contract has been established by the Supreme Court of Canada in *Pacific Coast Coin Exchange v. Ontario Securities Commission*, [1978] 2 SCR 112, 1977 CanLII 37 (SCC) (hereafter *Pacific Coast*).

10. The elements of an investment contract, as set out by the Court in *Pacific Coast*, can be summarized as follows:

- a) the advancement of money by an investor;
- b) with an intention or expectation of profit;
- c) in a common enterprise in which the fortunes of the investor are interwoven with and dependent upon the efforts and success of those who solicit the capital or third parties;
- d) and where the efforts made by those other than the investors are the undeniably significant ones, those essential managerial efforts which affect the failure or success of the enterprise.

11. Staff argued that the commodity and forex options available on the Summit website met the *Pacific Coast* test for an investment contract. The Panel finds that the first two elements were easily met: there was a requirement that the money be advanced by an investor before any investment could be made, and there was a clear intention on the part of an investor to achieve a profit.

12. In *Pacific Coast*, when determining whether the common enterprise element of the test was satisfied, the Court found that Pacific Coast's customers were dependent upon Pacific Coast for the success of their investment and for the existence of a market on which to realize upon their investment. Customers of Pacific Coast could look to no one but Pacific Coast to realize on their contracts. As such, it was clear that the fortunes of the investor were entirely dependent upon those of the seller.

13. With the trading platform present on the Summit website, the relationship between the platform and the investor is similarly one of economic interdependence. The investor is dependent upon the Respondent to provide credit to fund the margin purchases and to honour the trades. The platform is dependent upon the investor for the success of its enterprise. The platform's commissions, spreads, and interest earned on margin accounts are directly proportional to the degree of trading undertaken by investors. These facts essentially satisfy the third element from the *Pacific Coast* decision.

14. With respect to whose efforts are the 'undeniably significant ones', the Court in *Pacific Coast* held that "the key to the success of the venture is the effort is of the promoter alone". In the present matter, the determination of whether and in what amount an investor will be paid is

entirely within the Respondent's control. The Respondent maintains their own website, issues the options, exercises the options, and controls all payments to the appropriate parties. The facts show that all 'managerial efforts' in these transactions were undertaken by the Respondent, thereby satisfying the fourth element from *Pacific Coast*.

15. On the basis of the preceding analysis, the Panel has concluded that the commodity and forex options present in the within matter are investment contracts, and are thus securities under clause 2(1)(ss)(xiv) of the Act.
16. Based on the evidence before it and the analysis outlined above, the Panel has concluded that the Respondent has engaged in the business of trading in and advising on securities in Saskatchewan, while not registered to do so, by soliciting, advertising, and offering advice on the sale of commodity and forex options. The Respondent solicited, advertised, and offered advice to at least one Saskatchewan resident investor through the Summit website, via email, and via telephone. Despite the fact that no actual investment transaction took place, the Panel has determined that the Respondent was clearly soliciting business.
17. The Panel also heard evidence that the Respondent has never been registered with the Authority in any capacity. As such, when it engaged in the business of trading in and advising on securities in Saskatchewan, it did so while not registered as a dealer or adviser in direct contravention of subsections 27(2)(a) and 27(2)(b) of the Act. The Panel has therefore accordingly determined that Summit International, PTE Ltd acted in breach of subsections 27(2)(a) and 27(2)(b) of the Act.
18. Since the sanctions for trading in, advising on and holding itself out in engaging in the business of trading in and advising on exchange contracts and securities in Saskatchewan are the same and in recognition that the legislature has recently removed exchange contracts from the Act, there is no practical need for the Panel to make any determinations in relation to whether the Respondent has engaged in the business of trading in and advising on exchange contracts or holding itself out as engaging in the business of trading in and advising exchange contracts in Saskatchewan.

Sanctions

19. In determining the appropriate sanctions to be imposed on the Respondents found to be in contravention of the Act, panels have consistently relied on the criteria set out in a previous decision of the Saskatchewan Financial Services Commission, the predecessor to the Financial and Consumer Affairs Authority. *In the Matter of The Securities Act, 1988 and in*

the Matter of Darcy Lee Bergen (Bergen), the hearing panel outlined a non-exhaustive list of factors that would influence the imposition of sanctions on a respondent:

- the seriousness of the respondent's conduct;
- the harm suffered by investors as a result of the respondent's conduct;
- the damage done to the integrity of the capital markets in the province by the respondent's conduct;
- the extent to which the respondent was enriched;
- factors that mitigate the respondent's conduct;
- the respondent's past conduct;
- the risk to investors and the capital markets posed by the respondent's continued participation in the capital markets of the province;
- the respondent's fitness to be a registrant or to bear the responsibilities associated with being a director, officer or advisor to investors;
- the need to demonstrate the consequences of inappropriate conduct to those who enjoy the benefits of access to capital markets;
- the need to deter those who participate in the capital markets from engaging in inappropriate conduct; and
- orders made by the Commission in similar circumstances in the past.

20. Staff drew the Panel's attention to two previous decisions by Panels of the predecessor of the Financial and Consumer Affairs Authority: *In the Matter of The Securities Act, 1988, SS 1988, c S-42.2 and In The Matter of Ocean International Ltd. et. al.* ("Ocean") and *In the Matter of The Securities Act, 1988, SS 1988, c S-42.2 and In the Matter of I.W F Incorporated also known as I.W.F. Inc. et. al.* ("IWF") that relied on the principles outlined in Bergen. The circumstances in these matters and the current matter are strikingly similar.

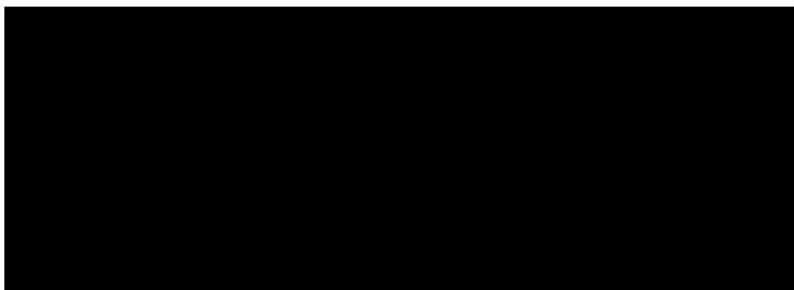
21. In *Ocean* and *IWF*, the respondents called Saskatchewan residents to solicit a securities transaction. The agents offered securities for sale, and asked for money in return. The calls were followed by emails, purportedly from company email addresses, attaching official documents in furtherance of the sales. While there was no investment however the modus operandi was similar to *Ocean* and *IWF*. The panels in both *Ocean* and *IWF*, sent a strong message to the respondents and others contemplating similar actions that the integrity of the capital markets in the province must be preserved. In both *Ocean* and *IWF*, the respondents were permanently banned from participation in the securities industry in Saskatchewan, assessed an administrative penalty of \$10,000 and required to pay the costs related to the hearing.

22. The Panel feels strongly that it should attempt to promote consistency by considering orders made by other panels in similar circumstances in the past and that the penalties assessed in

Ocean and *IWF* are appropriate comparators to the current matter involving Summit International.

23. On February 10, 2016, amendments to the Act were proclaimed. The amendments provide a framework for derivatives regulation and remove all references to exchange contracts. When making these orders in this matter, the Panel needs to ensure they conform to the amended Act, as such references to exchange contracts have been removed and references to derivatives have been added in the consequential orders.
24. Accordingly, the Panel will issue consequential Orders in due course, that reflects the following determinations on sanctions in a manner consistent with the public interest:
 - a) Pursuant to subsection 134(1)(a) of the Act, all of the exemptions in Saskatchewan securities law do not apply to the Respondents, permanently;
 - b) Pursuant to subsection 134(1)(d) of the Act, the Respondents shall cease trading in any securities and derivatives, in Saskatchewan, permanently;
 - c) Pursuant to subsection 134(1)(d.1) of the Act, the Respondents shall cease acquiring securities and derivatives, for and on behalf of residents of Saskatchewan, permanently;
 - d) Pursuant to subsection 134(1)(e) of the Act, the Respondents shall cease giving advice respecting securities and derivatives, for and on behalf of residents of Saskatchewan, permanently;
 - e) Pursuant to section 135.1 of the Act, the Respondents shall pay an administrative penalty to the Financial and Consumer Affairs Authority of Saskatchewan in the amount of \$10,000;
 - f) Pursuant to section 161(1) of the Act, the Respondents shall pay the costs of or relating to the hearing in this matter.

This is a unanimous decision of the Panel.



Peter Carton, Hearing Panel Chairperson



Gordon Hamilton, Hearing Panel Member



Paul Robinson, Hearing Panel Member