ALBERTA SECURITIES COMMISSION

DECISION

Citation: Re Bluforest Inc., 2021 ABASC 25 **Date: 20210315**

Bluforest Inc., Cem (Jim) Can and Charles Michael Miller

Panel:	Tom Cotter Steven Cohen Kari Horn
Representation:	Don Young Carson Pillar for Commission Staff Hardeep Sangha for Cem (Jim) Can and Charles Michael Miller
Submissions Completed:	December 7, 2020
Decision:	March 15, 2021

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I. INTRODUCTION

[1] Following a hearing, we found that Cem (Jim) Can (**Can**), Charles Miller (**Miller**) and Bluforest Inc. (**Bluforest**, together with Can and Miller, the **Respondents**) contravened Alberta securities laws. The proceeding then continued into a second phase to consider what (if any) orders are in the public interest and should be made against the Respondents as a result of our findings. Staff (**Staff**) of the Alberta Securities Commission (the **ASC**), Can and Miller provided written and oral submissions – Bluforest was not represented throughout and made no submissions.

[2] For the reasons set out below, we are ordering that each of the Respondents be subject to permanent market-access bans and that Can and Miller pay monetary sanctions and costs.

II. BACKGROUND

[3] On August 24, 2020, we issued written reasons (the **Merits Decision**, cited as *Re Bluforest*, 2020 ABASC 138) in which we found the following contraventions of the *Securities Act* (Alberta) (the **Act**):

- Can illegally distributed securities contrary to s. 110(1),
- Bluforest made misrepresentations contrary to s. 92(4.1),
- Can engaged in a course of conduct that contributed to an artificial price for Bluforest securities contrary to s. 93(a)(ii), and
- Can and Miller engaged in a fraudulent course of conduct contrary to s. 93(b).

[4] We dismissed allegations that Miller and Bluforest (in relation to one particular) contravened s. 92(4.1) of the Act and that Miller and Bluforest contravened s. 93(a)(ii). In the course of or prior to the proceeding, Staff withdrew certain allegations against the Respondents, and two respondents initially named in the Notice of Hearing entered into settlement agreements to resolve allegations against them.

[5] The following narrative is meant to highlight the salient aspects of the Merits Decision and to provide context for our reasons for sanction and cost-recovery orders. We have not set out the entire factual background underlying the Respondents' misconduct, and the Merits Decision should be read together with these reasons.

[6] The backdrop to the Merits Decision was an elaborate pump and dump scheme involving Bluforest shares, orchestrated by Can and, to a lesser extent, Miller. The scheme originated in December 2010, when Can acquired control over Greenwood Gold Resources Inc. (**Greenwood**), a company whose shares were quoted for trading through US OTC Markets Group Inc. Can maintained control over Greenwood by persuading a friend to act as the company's president and majority shareholder but to follow Can's instructions.

[7] In February 2012, Can and Miller negotiated a framework to repurpose Greenwood as a carbon-credit marketing company. Their plan included the replacement of Greenwood's board of directors (although Can refused to join the board and instead Greenwood retained him as a consultant through one of his companies) and the transfer by Miller of one or more assets into Greenwood that Can could leverage. They also planned to restructure the share capital by

consolidating the company's shares and issuing 100 million new shares – to be split between Can and Miller on a 25/75 basis.

[8] Soon after, Can and Miller executed their plan. Miller became Greenwood's sole director, president and CEO, while Can's company entered into a consulting agreement with Greenwood. The company also consolidated its share capital on a 1:500 basis before issuing 100 million new shares, 25 million of which went to several offshore companies (most of which were controlled by Can), as settlement of an alleged debt. The remaining 75 million shares indirectly went to Miller in exchange for an assignment of certain foreign property rights. Greenwood was then renamed Bluforest to reflect the company's new business in the carbon-offsets market.

[9] With Can and Miller as the guiding minds, Bluforest entered into several transactions in the following months, many of which were not at arm's length or were not seriously pursued. For example, one transaction involved the transfer of property in exchange for Bluforest shares that apparently closed in June 2012, yet the shares remained in escrow more than a year later with no indication that they were ever released to the counterparty. Nevertheless, Bluforest's audited financial statements included the property as one of Bluforest's more significant assets.

[10] As these events occurred, Can (through his company) sold more than 150,000 Greenwood and Bluforest shares to Alberta residents for proceeds of approximately $750,000. We determined that Can was an undisclosed control person at the time of these trades and he therefore engaged in a control distribution of Bluforest shares contrary to s. 110 of the Act. Staff withdrew similar allegations against Miller, although he also sold Greenwood shares to Alberta residents.

[11] In January 2013, Bluforest again consolidated its shares on a 1:30 basis shortly before issuing 100 million new shares, ostensibly to settle debts owed to a Can-controlled company and to Miller. As before, 25 million of these shares were distributed to various offshore companies mostly controlled by Can, although some also went to offshore companies belonging to Miller. The distribution of these shares occurred in amounts designed to avoid US early warning reporting requirements and became free trading in the US based on a false legal opinion letter. Most of the remaining 75 million shares went to Miller or his nominees. We concluded that Bluforest made misrepresentations contrary to s. 92(4.1) of the Act by failing to disclose that Can was a guiding mind of Bluforest and that he controlled most of the company's free-trading shares.

[12] In March 2013, Bluforest publicly disclosed its audited financial statements for the year ended December 31, 2012, which in two instances erroneously reported that the company held tangible assets. We dismissed Staff's allegation that this was a misrepresentation. We also dismissed Staff's allegation that Miller made a similar misrepresentation in an email sent to certain shareholders shortly after filing the audited financial statements.

[13] In June 2013, the ASC issued a cease-trade order in relation to Bluforest shares. Approximately one month later, the company became the subject of an orchestrated promotional campaign in which dozens of stock promoters disseminated material rife with hyperbole, urging immediate purchase of Bluforest shares. We determined that Can was secretly a catalyst for the promotion, as he had indirectly funded promoters responsible for much of the campaign, and he paid an investment research firm to provide a purportedly independent and highly favourable

report that could be (and was) exploited by promoters at the height of the campaign. The promotional campaign resulted in a dramatic increase in trading volumes and price for Bluforest shares. In the Merits Decision, we found that Can's course of conduct resulted in or contributed to an artificial price for Bluforest's shares contrary to s. 93(a)(ii) of the Act. We dismissed allegations that Miller (and therefore Bluforest) also contributed to an artificial price for Bluforest shares.

[14] During the promotional campaign, Bluforest shares beneficially owned by Can were sold into the inflated market by an offshore brokerage, which traded through an account held at another offshore brokerage. Once the promotional campaign ended, trading volumes for Bluforest shares dropped precipitously and its share price plummeted.

[15] The totality of Can and Miller's actions (as described more fully in the Merits Decision) led us to conclude that they perpetrated a fraud contrary to s. 93(b) of the Act by knowingly engaging in a pump and dump scheme.

III. SANCTION

[16] Staff requested that we order certain sanctions against the Respondents in accordance with ss. 198 and 199 of the Act.

[17] Can and Miller, while repeatedly stating in their submissions that they disagreed with the findings of fact in the Merits Decision, opposed the orders sought by Staff. In some instances, their submissions either ignored relevant factual findings or made assertions that directly contradicted those findings. The Respondents were provided an opportunity to present additional evidence relevant to sanction and while their counsel expressed an intent to file an affidavit, we received no evidence from either Can or Miller. We therefore relied on our findings of fact in the Merits Decision and the evidence earlier admitted in determining whether orders were in the public interest.

A. Law, Rationale and General Principles

[18] The ASC's authority to enforce Alberta securities laws includes a broad discretion to make orders under ss. 198 and 199 of the Act where it is in the public interest to do so. The public interest in this context is focussed on the twin objectives of protecting investors from unfair, improper or fraudulent practices and maintaining the efficiency of, and public confidence in, a fair and efficient capital market. Any sanctions ordered by the ASC pursuant to these provisions are to be preventative in nature and prospective in orientation, rather than punitive or remedial in nature (*Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario Securities Commission*, 2001 SCC 37 at paras. 42-45.)

[19] Factors typically considered by an ASC panel as part of its sanction analysis were reformulated in *Re Homerun International Inc.*, 2016 ABASC 95 (at para. 20):

> In making the requisite sanctioning assessment and determination, several factors are considered. Numerous potential factors have been discussed in past ASC decisions including *Re Lamoureux*, [2002] A.S.C.D. No. 125 at para. 11 (affirmed on other grounds 2002 ABCA 253); *Re Workum and Hennig*, 2008 ABASC 719 at para. 43 (affirmed 2010 ABCA 405); and *Re Hagerty*, 2014 ABASC 348 at para. 11. With a view to clarifying the interaction of principles and factors, it is helpful here to recast the analytical framework by coupling the principles discussed above with a refined enumeration of sanctioning factors:

- the seriousness of the respondent's misconduct;
- the respondent's pertinent characteristics and history;
- any benefit sought or obtained by the respondent; and
- any mitigating or aggravating considerations.

[20] Assessing the seriousness of the misconduct includes consideration of the nature of the misconduct, the respondent's intent and whether the misconduct exposed identifiable investors or the capital market to harm (*Homerun* at para. 22). In this context, harm (or potential harm) encompasses both financial harm and any corresponding loss of confidence in our capital market related to a respondent's misconduct (*Re Aitkens*, 2018 ABASC 121 at para. 21).

[21] A respondent's characteristics and history are also considered important determinants for the degree of risk posed and, in turn, the extent of deterrence required, and may also assist in assessing proportionality (*Homerun* at para. 27). Relevant characteristics include a respondent's education, work experience, registration or other participation in the capital market, and any disciplinary history (*Homerun* at para. 28). A corporate respondent's characteristics may be ascertained by attributing to it those of its guiding minds (*Homerun* at para. 33, *Aitkens* at para. 23).

[22] A compelling indicator of future risk (and therefore the degree to which deterrence may be required) is the extent to which a respondent sought to, and actually was able to, benefit from the capital-market misconduct (*Homerun* at paras. 35-38).

[23] Any other relevant mitigating or aggravating considerations not included within the general sanctioning factors should also factor into the analysis, in part to ensure that any sanction is appropriate and proportional (*Homerun* at para. 39).

[24] Sanction orders from prior decisions and settlements may be helpful to consider, to the extent that they are based on similar circumstances (*Homerun* at para. 16). The measure of an appropriate sanction is whether it is proportionate and reasonable based on the specific circumstances of the misconduct and the particular respondent (*Walton v. Alberta (Securities Commission)*, 2014 ABCA 273 at para. 154). Specific deterrence (deterring future misconduct by a particular respondent) and general deterrence (deterring misconduct by others) are legitimate considerations, although general deterrence does not warrant the imposition of a crushing or unfit sanction (*Re Cartaway Resources Corp.*, 2004 SCC 26 at paras. 52-62, *Walton* at para. 154).

B. Positions of the Parties

1. Staff

[25] Staff's position was that the public interest warranted sanctions consisting of permanent market-access bans against the Respondents. In the case of Can and Miller, Staff also sought monetary orders requiring payment of administrative penalties of $750,000 and $300,000, respectively, and a disgorgement order requiring Can to pay nearly $1.5 million that he obtained from his misconduct.

[26] Staff submitted that Can is deserving of the strongest sanctions for specific and general deterrence for his intentionally deceptive and harmful misconduct. According to Staff, he planned and engaged in the pump and dump scheme for the purpose of enriching himself at the expense of

others and the market, and his misconduct was deliberate, planned and carried on for more than a year. Staff submitted that Can fails to recognize that he engaged in serious securities misconduct, and that he denies having ownership or control over Greenwood/Bluforest or any of the offshore entities, or having any involvement with the promotional campaign.

[27] Staff contended that Can's history reflected his propensity to engage in behaviour similar to his misconduct with Bluforest. In particular, Staff pointed to Can's similar involvement with Greenwood, where he implemented share consolidations and issued inaccurate and misleading public disclosure while concealing his controlling interest in a public company by relying on a nominee to carry out his instructions. Staff also referred to a July 2015 US indictment that alleged Can's involvement (along with other individuals associated with Bluforest) in other fraudulent market manipulation schemes, and submitted that Can had no intention of returning to North America because of these allegations. When asked in oral argument as to the use of such evidence, Staff counsel submitted that the unproven allegations should not be a factor and that the primary reason for the evidence was to demonstrate "where [Can] is now and why he's not here".

[28] Staff also submitted that Can sought to personally benefit from his misconduct, and that he obtained approximately $1.5 million (and possibly more) from market participants. Staff said that he received proceeds from his illegal distribution of Greenwood/Bluforest shares in May through July 2012 (which directly or indirectly financed Can's "fraudulent machinery") and that he also arranged for his offshore companies to receive millions of free-trading Bluforest shares, some of which were later sold during the promotional campaign that he had orchestrated. The financial benefit obtained by Can from his misconduct came directly at the expense of market participants, including Alberta investors.

[29] Staff submitted that Miller was also deserving of significant sanction, having designed the scheme with Can with a view to profiting at the expense of Alberta investors and market participants generally. Staff asserted that Miller was involved in key aspects of the fraudulent pump and dump scheme; he authorized nonsensical debt settlement arrangements that were designed to wipe out the economic interests of existing shareholders, misled Bluforest's auditor and purposely concealed material information from being publicly disclosed. Staff contended that Miller's actions were intentional and that there was no evidence that he has recognized his involvement in any securities-related, fraudulent misconduct.

[30] According to Staff, Miller expected to financially benefit from trading in the promotional campaign, and though his personal gain may not be calculable it was inconceivable for Miller-controlled companies not to have traded during the promotional campaign. Staff also referred to his $1 million annual salary and participation in Bluforest's share consolidations and share-for-debt issuances to himself and companies he controlled.

[31] Staff contended that while there were no mitigating circumstances for either Can or Miller, it was aggravating that they went to considerable efforts to conceal their involvement in the fraud. Staff also submitted that it was particularly aggravating for Can and Miller to have knowingly sold restricted Greenwood/Bluforest shares to Alberta investors at inflated prices while subsequently diluting those shares through the share consolidation and issuance of millions of free-trading shares to settle dubious corporate debt.

[32] Staff viewed Can and Miller as posing a serious, significant ongoing risk to investors and the capital market, and that there was a pronounced need for specific deterrence.

[33] In relation to Bluforest, Staff asserted that it was used as a tool for fraudulent misconduct and that it was not a legitimate business from the outset, which demonstrated a heightened need for specific deterrence. For these reasons, Staff's position was that Bluforest should be permanently barred from the capital market.

[34] While acknowledging that other cases provide limited assistance, Staff offered four sanction decisions as guidance: *Re Workum and Henning*, 2008 ABASC 719, *Re Lim*, 2017 BCSECCOM 319, *Sulja Bros Building Supplies, Ltd.*, 2011 ONSEC 19 and *Re Zeiben*, 2014 ABASC 412.

[35] In *Workum*, an ASC panel imposed permanent market-access bans and a $750,000 administrative penalty against Workum for his contraventions, including market manipulation, misrepresentations and non-compliance with insider trade reporting requirements. His co-respondent, Hennig, received 20-year trading bans, a permanent officer and director ban, and a $400,000 administrative penalty.

[36] *Lim* involved a similar marketing campaign as part of a pump and dump scheme, where the respondents concealed their misconduct through the use of offshore accounts and third party intermediaries. Lim, whose misconduct was central to the scheme, received broad, permanent market prohibitions (with limited carve-outs) and an administrative penalty of $800,000. The abuse of his role as a registrant and attempts to hide his misconduct were treated as aggravating, although his overall misconduct was considered a single contravention and therefore subject to a maximum administrative penalty of $1 million. Lim's co-respondent, whose contribution to the scheme was less significant and who had limited financial means, also received permanent market prohibitions and was ordered to pay an administrative penalty of $375,000.

[37] *Sulja Bros.* involved various types of market misconduct in relation to a pump and dump scheme, including fraud, market manipulation and misrepresentations. The respondents profited from their misconduct and were able to conceal their involvement for almost a year by trading in nominee accounts. Market-access bans were ordered, including permanent bans for those whose misconduct was more culpable and central to the scheme, along with administrative penalties of $750,000 and a significant disgorgement order payable on a joint and several basis.

[38] An ASC panel imposed permanent market-access bans in *Zeiben*, plus an administrative penalty of $250,000, for making several misrepresentations and fraud involving false statements made to stimulate trading volumes and the share price of the issuer.

[39] We also note that another case cited by Staff, *Re Deyrmenjian*, 2019 BCSECCOM 93, in support of their request for permanent market-access bans, involved a market manipulation scheme which created an artificial share price by means of a tout sheet marketing campaign. The panel ordered sanctions including permanent market prohibitions, substantial disgorgement orders and administrative penalties of $850,000 and $700,000 against the two principal respondents.

2. Respondents

[40] Can and Miller contended that they posed no risk to the public interest and ought not be sanctioned. Should sanctions be levied, they submitted that Can's administrative penalty should not exceed $150,000 and that Miller's not exceed $50,000.

[41] In their written submissions, Can and Miller acknowledged that fraud and market manipulation are objectively serious in nature. However, they disputed Staff's characterization of their actions and asserted that Bluforest was meant to be an operating business being developed as a successful business. Can also contested Staff's assertion that the illegal distribution to Alberta investors was meant to finance the "fraudulent machinery", and pointed to other individuals as the actual architects of any illegal conduct, which he said should be taken into account when considering sanction orders.

[42] Miller submitted that his conduct should be assessed from the perspective of a corporate officer who may have unfortunately made mistakes but nevertheless acted in the best interests of his company. He also suggested that he was not a willing active participant in the fraud.

[43] Both Can and Miller indicated that their characteristics and personal history were neutral factors and that they were not a risk to the capital market, seemingly because they were not active participants in the Alberta capital market. They also disputed that they sought or obtained any financial gain at the expense of investors. Can, in particular, suggested that the amounts attributed to him by Staff failed to account for the actual owners of some of the offshore entities and that others would also have benefitted from the sales of shares "by way of commissions, legal fees, and/or offshore entities". Miller submitted that it would be improper to characterize his salary as a benefit, as it had been earned in the course of conducting business.

[44] Can and Miller did not suggest any mitigating circumstances, but submitted that there were no aggravating circumstances.

[45] In addition to the cases cited by Staff, Can and Miller cited *Re Schmidt*, 2013 ABASC 320 and *Walton*. In *Schmidt*, an ASC panel accepted the respondents' admissions of illegal trades and distributions, misrepresentations and fraud, and ordered permanent market-access bans along with monetary sanctions comprised of a $700,000 disgorgement order and a $200,000 administrative penalty. In its analysis, the panel in *Schmidt* (at para. 59) commented on the need for general deterrence and that specific deterrence was also important despite the panel's finding that the respondents did not present a significant future risk.

C. Analysis

1. Application of Sanctioning Principles and Factors

(a) Seriousness of the Misconduct

[46] Fraud and misrepresentation are generally recognized as being among the most serious forms of market misconduct (*Homerun* at para. 23, *Aitkens* at para. 20). Market manipulation has also been viewed as a serious form of misconduct (*Re Lim* at paras. 12 and 24, *Workum* at paras. 58-60). As explained in *Re Poonian*, 2015 BCSECCOM 96 (at para. 15):

> Market manipulation compromises the integrity of the entire market. Its impact extends beyond the victims who lost money to the investing public as a whole. In *De Gouveia, Re*, 2013 ABASC 249 the Alberta Securities Commission concluded that manipulative trading "undermines the integrity of the capital market. It is unfair to investors, and jeopardizes the confidence in the capital market on which legitimate investor interest and capital formation depend."

[47] Illegal distributions can also have serious consequences. Here, Alberta investors paid significant amounts to Can's company for their investment in Greenwood/Bluforest, and received restricted shares that were essentially worthless after being diluted by the concomitant share consolidation and issuance of 100 million shares (most of which to Can and Miller nominees) in January 2013. Some of these investors testified about the consequences of their financial losses, which included adverse effects on their personal relationships and their confidence in the capital market.

[48] Can's and Miller's acknowledgement that the misconduct found in the Merits Decision would objectively be considered to be of a serious nature simply states the obvious.

[49] The seriousness of the misconduct in this case is exacerbated by the deliberation, design and execution of an elaborate scheme extending over a long time period in several jurisdictions. These were not impulsive or inadvertent contraventions of securities laws; rather, both Can and Miller carefully conceived a multifarious stratagem to deceive the market for their personal gain. This raises grave concerns and evinces a compelling need for meaningful specific deterrence and for general deterrence directed to those who might contemplate similar behaviour.

(b) Characteristics and History

[50] The criminal indictment against Can consists of unproven allegations, and counsel agreed that this should not factor into our analysis. On that basis, we gave no weight to evidence of Can's alleged involvement in similar securities fraud elsewhere.

[51] It was evident that Can was conversant with securities regulatory requirements, and that he purposely structured his activities, and those of Bluforest (as a purported consultant), to flout securities laws. He allocated shares to related companies in a manner to avoid reporting obligations and he obtained false legal opinions so that his shares could be freely traded. This demonstrates a heightened need for specific deterrence against him.

[52] Although Miller did not have any relevant capital market history, we did not consider this factor mitigating. As is often observed in ASC decisions, and as seemingly acknowledged by Miller (and Can) in written submissions, fraud is self-evidently wrong.

(c) Benefits Sought or Obtained

[53] We were satisfied that Can engaged in market misconduct with a view to benefitting himself financially. In the Merits Decision, we determined that Can's plan from the outset was to acquire Greenwood as a shell company so that he could engage in a pump and dump scheme, and he (through offshore companies he controlled) received more than US$700,000 from the sale of Bluforest shares during the promotional campaign. Can also received approximately $750,000 from his illegal distribution of Greenwood/Bluforest shares to Alberta investors, through his company.

[54] Can did not adduce any evidence for his contention that others may have benefitted from his misconduct or that commissions or legal fees mitigated this element of his misconduct. Even if we accepted his assertions as fact, they would not have influenced our finding here that Can sought to and did benefit from his misconduct.

[55] Miller also engaged in market misconduct with a view to obtaining financial benefit. He was centrally involved in Bluforest's debt settlements – particularly those in January 2013 – for his benefit. As discussed in the Merits Decision, the dubious nature of the underlying debts together with the grossly distorted share valuations for the debt settlements were among the indicia of a pump and dump scheme. Miller, as one of Bluforest's guiding minds, timed the debt settlements immediately following the share consolidation, which effectively allowed Miller to retain beneficial ownership over the majority of Bluforest shares at the expense of existing shareholders. Also relevant is that five million of Miller's shares became free trading based on the false legal opinion procured by Can. In short, Miller was motivated by self interest to the detriment of other Bluforest shareholders.

[56] Miller's own emails made his motives obvious. We noted in the Merits Decision that Miller stated that his financial concerns would be resolved once Can "gets his magic going and starts to TRADE which he is saying this will be soon". Although the record did not clearly show that Miller actually received funds from the liquidation of Bluforest shares during the promotional campaign, his statement reflected his expectation of financial benefit from his misconduct.

[57] There was no evidence that Bluforest sought or obtained a benefit from its misconduct.

(d) Mitigating or Aggravating Considerations

[58] Can's and Miller's efforts to conceal their involvement was aggravating, as it reinforced our concerns about the seriousness of the misconduct.

[59] The Merits Decision is replete with examples of Can's subterfuge to conceal his role with Bluforest and its activities, including:

- he acquired control over Greenwood through a nominee, who accepted Can's instructions in managing the company;
- Can structured Bluforest in a way that allowed him to directly influence all significant corporate decisions without any apparent affiliation with the company; according to a Bluforest director, Can would "gleefully state that he had purposely ensured that his name" would not be linked with management of the company even though he had a "very, very strong impact" on company decisions;
- his offshore companies were created by a Belizean company which, as part of its services, appointed nominees to mask the identity of the companies' beneficial owners;
- he transferred Bluforest shares in electronic form to a Belizean brokerage (in amounts designed to avoid regulatory reporting obligations), where they were traded in an omnibus account held through another brokerage;

- he used an email account with an alias to instruct the movement of funds from various offshore accounts that he controlled, including to stock promoters and others involved in the promotional campaign; and
- he used the identities of friends and associates without their knowledge or consent, including his lawyer's home address on an invoice for a Can-controlled company and associates' company names to give the appearance that touts sent during the promotional campaign were paid for by non-affiliated third parties.

[60] These and other actions taken by Can reflected a carefully contrived effort to camouflage his involvement with Greenwood and Bluforest and the associated promotion and share liquidation. That conduct is clearly aggravating, as it reflects a degree of calculation and cunning that poses a clear danger to investors and the capital markets.

[61] Although not as pronounced, we also found Miller's attempts to conceal his role in the scheme aggravating, specifically his role in the non-arm's length Bluforest transactions. It was clear that Miller acquiesced to Can's clandestine control over Bluforest and caused Bluforest to enter into undisclosed, non-arm's length agreements while misleading Bluforest's auditor on the true nature of these transactions. In the Merits Decision, we discussed concerns about non-arm's length transactions and the importance of adequate disclosure. We repeat the observation in *Re Aitkens*, 2018 ABASC 27 at paras. 215-16:

> . . . related party transactions are susceptible to abuse and can undermine the public's confidence that capital markets are operating efficiently, fairly and with integrity (see s. 1.1 of Companion Policy 61-101).
>
> Candour around self-dealing is important to investors in assessing the integrity of an issuer's management – determining whether those managing the business will act in the best interests of the issuer and its security holders, or will prefer their own interests. This consideration is fundamental to the sound corporate governance of any issuer . . . .

[62] As Bluforest's guiding mind, and an officer and director, Miller was responsible for the company's deficient disclosure. As mentioned, he misled Bluforest's auditor into thinking that the company's most significant acquisition was at arm's-length. Miller's contention that he acted in the best interests of "his corporation" was undermined by his self-dealing, and we concluded that the deficient public disclosure was deliberate in concealing his role in, and the benefits he derived from, material corporate acquisitions.

[63] We also took into account that Miller misled investors when they inquired about the 2013 share consolidation that made their Bluforest investment virtually worthless.

[64] Staff also asserted that it was particularly aggravating that Can and Miller sold restricted shares to Albertans at prices thousands of times higher than the ascribed value of the free-trading shares they issued to themselves in debt settlement.

[65] We agree that this element of Can's and Miller's misconduct is an aggravating factor, and that it reflects the profound risk they pose. However, we were careful not to overemphasize this factor, given the overlap with considerations on the harm resulting from their misconduct and the benefits sought or obtained.

2. Outcomes in Other Proceedings

[66] Our assessment of the various sanctioning factors, and the particular orders, take into account the cases cited to us by Staff and by counsel for Can and Miller.

3. Sanctions Ordered

[67] Taking into account the various factors discussed above, the Respondents unquestionably present a significant risk to the capital markets. Fraud and market manipulation are particularly abhorrent forms of capital market misconduct that go to the core of the ASC's public interest mandate. As mentioned, the individual Respondents actions were deliberate, carefully planned and executed, and their misconduct caused demonstrable harm to Alberta investors and the capital market. In our view, any sanctions must provide a forceful and unmistakable message delivering the necessary specific and general deterrence commensurate with the magnitude of risk posed by the Respondents. Consistent with other decisions, in our view it is in the public interest that the Respondents be subject to permanent market-access bans, and that the individual Respondents be ordered to pay significant monetary sanctions.

(a) Market-Access Bans

[68] As observed in *Re Fauth*, 2019 ABASC 102 at para. 68:

> Different bans addressing different types of activity in the Alberta capital market are available under s. 198(1). They may be temporary or permanent, and subject to exceptions (the aforementioned "carve-outs") or not. Such orders prohibit those who contravene Alberta securities laws from future participation in the market, and make it apparent to others that they risk losing the privilege of participation if they undertake similar misconduct (see *Planned Legacies* at para. 63 and *Mandyland* at para. 51).

[69] In this instance, nothing short of permanent market bans can contribute appropriately to the objectives of specific and general deterrence.

[70] Staff proposed an array of permanent market-access bans against Can and Miller, consisting of cease-trade orders (without exemptions or carve-outs), director and officer bans, as well as a ban from acting as a registrant, promoter or in any investor relations or consultative capacity with any Alberta issuer. Staff also requested that Bluforest be permanently barred from the capital market so that it will not again be used as a vehicle for future fraud.

[71] Can and Miller submitted that market bans should be imposed in serious circumstances where they serve as a deterrent. Can indicated that he no longer resides in Alberta and has not been an active participant in the Alberta capital market since Bluforest, implying that we ought not to order market-access bans against him. We note that Can's capital market misconduct occurred through his Alberta-incorporated company, including the illegal distributions to Alberta investors and the consulting agreement with Bluforest, while he was at times residing in Belize. In other words, Can's domicile has not constrained the geographic reach of his activity.

[72] Miller similarly argued that bans were not necessary to protect Alberta's capital market and investors as he had never been an active market participant and his role was more limited to business operations.

[73] We are satisfied that Can and Miller should be permanently banned from the capital market. Neither are fit to participate in the capital market in any capacity, whether as director, officer or another role. Accordingly, we consider the bans proposed by Staff as reasonable and appropriate in the circumstances.

[74] We also agree that Bluforest, as the instrument of a somewhat sophisticated pump and dump scheme, should be permanently banned from the capital market. Although Bluforest is subject to a cease trade order, we would expand the orders requested by Staff in relation to Bluforest to include an order under s. 198(1)(a) directing that trading in or purchasing of Bluforest shares cease.

(b) Monetary Sanctions

[75] In addition to market-access bans, necessary specific and general deterrence demand meaningful monetary sanctions against each of Can and Miller, including a disgorgement order against Can so that he does not benefit from his misconduct.

[76] Staff did not request monetary sanctions be imposed on Bluforest, and we have therefore not made such an order.

(i) Administrative Penalty

[77] Staff submitted that both general and specific deterrence warrant significant sanctions including administrative penalties against both Can ($750,000) and Miller ($300,000).

[78] An ASC panel may, notwithstanding the imposition of other sanctions, order a person or company to pay an administrative penalty of not more than $1 million for each contravention or failure to comply with Alberta securities laws (s. 199(1) of the Act). An administrative penalty represents an important sanctioning measure that delivers specific and general deterrence (*Workum* at paras. 135-36). While an administrative penalty should not be so low that it amounts to nothing more than another cost of doing business (*Alberta Securities Commission v. Brost*, 2008 ABCA 326 at para. 54), the amount must be "proportionate to the offence, and fit and proper for the individual offender", after taking into account any disgorgement order (*Walton* at para. 156). In *Maitland Capital Ltd. v. Alberta (Securities Commission)*, 2009 ABCA 186 (at para. 21), the Alberta Court of Appeal observed that "[i]f sanctions under this legislation are so low as to communicate too mild a rebuke to the misconduct, or perhaps a licensing fee for its occurrence, the opposite to deterrence may result".

[79] Staff contended that the $750,000 administrative penalty ordered for the main respondent in *Workum* was instructive in deciding an appropriate administrative penalty for Can. We believe that *Lim* is also comparable, where the misconduct involved a similar pump and dump scheme in which trading was conducted through offshore accounts and third-party intermediaries, as an attempt to hide the misconduct. The British Columbia Securities Commission assessed an administrative penalty of $800,000. While Can was not a registrant (an aggravating factor for Lim), his misconduct involved multiple contraventions of the Act, whereas Lim was sanctioned for a single contravention. As mentioned, we also took note of the administrative penalties ordered in another British Columbia Securities Commission decision, *Re Deyrmenjian*.

[80] Staff referred to Zeiben as a potential comparison to Miller's misconduct, although his misconduct involved additional planning and ongoing deception that was more egregious than was the case in *Zeiben*. Staff submitted that an administrative penalty against Miller should reflect this distinction.

[81] Can and Miller argued that the previous decisions cited by Staff offered limited direction and submitted that the orders sought by Staff were "excessive, improper and unjustified and exceedingly harsh, from a perspective of specific and general deterrence". While their position was that they should not be subject to any administrative penalty, they indicated that if administrative penalties were ordered, Can should not be ordered to pay more than $150,000 and Miller should not be ordered to pay more than $50,000.

[82] We consider the administrative penalties proposed by Staff to be proportionate, consistent with administrative penalties imposed in other cases and necessary to provide sufficient specific and general deterrence commensurate with the gravity of the contraventions. We are therefore ordering that Can pay an administrative penalty of $750,000 and that Miller pay an administrative penalty of $300,000.

(ii) Disgorgement

[83] Section 198(1)(i) authorizes an ASC panel to make what is commonly referred to as a disgorgement order – where a person or company has not complied with Alberta securities laws – to pay the ASC any amounts obtained or payments or losses avoided as a result of the non-compliance.

[84] As discussed in *Fauth*, a disgorgement order provides an additional element of specific and general deterrence by removing the incentive to profit from one's misconduct (para. 77). The accepted analysis considers (a) whether a respondent directly or indirectly obtained amounts (or avoided any payments or losses) from the misconduct, and (b) whether it is in the public interest to make a disgorgement order.

[85] Staff must first prove on a balance of probabilities the amount alleged to have been obtained as a result of the misconduct. The burden then shifts to the respondent to disprove the reasonableness of that amount, so that any risk of uncertainty in calculating disgorgement falls on the wrongdoer whose non-compliance gave rise to the uncertainty (*Fauth* at para. 81).

[86] The amount of a disgorgement order is based on the amounts obtained by a respondent from the misconduct and is not limited to the respondent's profit, although there remains a discretion to deduct amounts such as payments made to victims. As observed by the Alberta Court of Appeal, a disgorgement order based only on profits is no true deterrent and sends a message that wrongdoers are permitted to at worst break even (*Walton* at para. 156).

[87] When assessing whether amounts were obtained by an individual respondent, it is appropriate to include amounts obtained through companies under their direction and control, even if they were not named as respondents to the enforcement proceeding (*Fauth* at paras. 79-80).

[88] In the Merits Decision, we found that Can sold Greenwood and Bluforest shares to Alberta investors as part of an illegal distribution. In making that finding, there was no dispute that Can, through his company, sold those shares to Alberta investors. On at least one occasion he communicated directly with the investor, provided a share purchase agreement and obtained a mailing address for the share certificate. Can's culpability depended on whether he was a control person within the meaning of the Act, and we found that he was. As a result, Can's illegal distribution enabled him to obtain $640,000 and US$110,750. Staff applied an appropriate foreign exchange rate to the latter, and calculated the aggregate amount he obtained from his illegal distributions to be $752,293.

[89] We also found in the Merits Decision that Can's fraud included market sales of Bluforest shares in June and July 2013. These trades – with aggregate proceeds of US$706,097 – were made indirectly through an offshore brokerage, though Staff were able to trace the trades to companies controlled by Can. We also found in the Merits Decision that these companies obtained Bluforest shares in January 2013 from the debt settlements, and that Can paid for a false opinion letter to remove US resale restrictions. The Canadian dollar equivalent of proceeds from these trades was $733,541.

[90] We are satisfied on a balance of probabilities that Can obtained at least $1,485,834 from his non-compliance with Alberta securities laws. Although Can suggested that others benefitted by way of commissions and legal fees, he tendered no evidence for those assertions. Can also contended that Staff's calculations did not take into account the actual owners of some of the offshore entities and failed to meet the onus to show that Can actually profited as alleged. We reject these contentions – our disgorgement order applies to amounts obtained by companies under Can's control.

[91] We are also of the view that the disgorgement order against Can should be based on the amounts he obtained, not just his profit. In the Merits Decision, we determined that the impugned trades occurred through a secondary brokerage account, which was one of the many ways in which Can attempted to hide his role in the fraud. It would be incongruous to reduce the amount of the disgorgement order by deducting commissions and related fees that were incurred to conceal Can's misconduct.

[92] We are satisfied that it is the public interest to order Can to disgorge $1,485,834 to the ASC. A disgorgement order of this magnitude should send a clear message to Can and others that those who contravene Alberta securities laws will not benefit from their misconduct.

IV. COSTS

A. Law

[93] Section 202(1) of the Act provides that a person or company who has contravened Alberta securities laws or acted contrary to the public interest may be ordered to pay "costs of or related to the hearing or the investigation that led to the hearing, or both". A costs order differs from a sanction, and is a means of recovering from a respondent certain investigation and hearing costs that would otherwise would be borne by law-abiding market participants who fund the ASC's operations.

[94] *Homerun* (at paras. 49-53) described the manner in which costs are assessed pursuant to s. 202 of the Act:

> . . . the relevant costs will be those related to the investigation into the misconduct found, and the hearing in which that misconduct was proved. It would be inappropriate to assess costs attributable to allegations ultimately withdrawn or dismissed. A panel will therefore be mindful of which allegations were proved and which were withdrawn by Staff or dismissed by the panel. Where a cost item can be readily ascribed to a particular respondent and particular allegation, the task is straightforward. More often, however, it would be impractical for Staff's supporting documentation and submissions to make such plain distinctions, given the complexity and evolving nature of the investigation process or the scope of a particular hearing. In those cases the panel faces the task of estimating the proportion of claimed costs fairly attributable to specific respondents and specific allegations.
>
> In assessing the reasonableness of claimed costs, the panel also considers aspects such as time spent by Staff on a matter; indications of duplicated effort for which some reduction might be warranted; the nature and scale of claimed disbursements; and any prior recovery of costs arising from the same matter (for example, through settlement with another respondent). Through that process the panel determines the amount of costs prima facie recoverable.
>
> The panel must also make an allocation of recoverable costs based on its assessment of which respondents should bear responsibility, and in what respective proportions. In this task the panel will focus on the extent to which investigation and hearing resources (as reflected in the recoverable costs) were applied to proving the respective respondents' misconduct. Other considerations may lead the panel to conclude that cost responsibility is properly allocated wholly among one of multiple classes of respondents (for example, wholly among individual respondents for whom corporate respondents were mere vehicles for the misconduct found).
>
> Having made that allocation, the panel then considers the efficiency (or inefficiency) that each party brought to the proceeding as a whole, and the associated contribution to the broader public interest objectives of our regulatory system. This factor may argue for moderation – sometimes substantial – in the extent of cost recovery to be ordered against a particular respondent (and therefore may result in less than full recovery of the prima facie aggregate amount).
>
> Finally, there may be concern that a cost-recovery order could diminish prospects of recovery for investor victims. This, too, may warrant moderating the amounts of cost recovery ordered against certain respondents, or wholly foregoing cost recovery in a particular case.

B. Positions of the Parties

1. Staff

[95] Staff sought orders for the recovery of investigation and hearing costs against Can and Miller in the amount of $80,000 and $50,000 respectively. Staff advised that they were not seeking costs against Bluforest, as the company was directed by Can and Miller as its guiding minds, who should therefore bear the burden of Bluforest's share of the costs.

[96] In support of their request, Staff provided documentation indicating that the investigation and hearing costs were $273,478. Staff acknowledged that these costs included allegations against two individual respondents who entered into settlements (dated February 15 and March 7, 2019) in which they each agreed to pay costs of $20,000. Staff also acknowledged that a cost order should reflect that certain allegations were either withdrawn by Staff or dismissed in the Merits Decision.

[97] In their submissions, Staff estimated that Can and Miller's respective share of the costs was approximately $93,000 each. Their approximation allocated each a 25% share of the costs up to March 7, 2019 (representing the four individual respondents, at $43,721 each), and adding half of the costs after that date (for the two remaining individual respondents, at $49,295 each). Taking into account that certain allegations were either withdrawn or not proved, that neither Can nor Miller contributed to an efficient hearing process, and that Can should bear more costs than Miller because more allegations were proved against him, Staff proposed that Can pay $80,000 and Miller pay $50,000.

2. Respondents

[98] Can and Miller paraphrased Staff's submissions concerning the withdrawn and unproved allegations warranting a discount from the total costs incurred, however they did not make any cogent argument on how that principle should be applied to these facts, other than to propose that Can pay $50,000 and Miller pay $25,000.

C. Analysis and Conclusion on Costs

[99] We agree that Bluforest should not be subject to a cost-recovery order, as it acted through Can and Miller as its guiding minds and that they should therefore bear the costs.

[100] Can and Miller did not contest the reasonableness of Staff's bill of costs, and we saw no basis to question the costs claimed in the supporting material. Staff's investigation would have been complex; the underlying misconduct occurred in several jurisdictions, and involved multiple companies employing reasonably sophisticated means to conceal the identities of the principal protagonists.

[101] We agree with Staff's proposal that Can should incur more of the costs associated with the hearing and investigation. While the fraud allegations were the focus of the Notice of Hearing, the time necessary to investigate the market manipulation and illegal distribution allegations was likely significant. Both Can and Miller hid their involvement in the fraudulent scheme, but Can's efforts in that regard were far more convoluted and certainly involved more resources to adequately investigate.

[102] Neither Can nor Miller contributed to an efficient hearing. Both failed to comply with their prehearing disclosure obligations, professed an intention to testify remotely before changing their minds, and requested that the hearing be reopened to include additional (mostly irrelevant) evidence. Miller also indicated at times throughout the hearing that he wanted to call various witnesses in different jurisdictions before deciding to only call a single witness who testified via Skype. These and other actions contributed to an increase in the resources required for the hearing.

[103] Taking into account the foregoing factors, we find Staff's proposed cost-recovery orders are reasonable. We therefore conclude that Can should be ordered to pay costs of $80,000 and Miller should be ordered to pay costs of $50,000.

V. CONCLUSION

[104] For the reasons given, we make the orders set out below.

Can

[105] Against Can, we order that:

- under s. 198(1)(d) of the Act, he must resign all positions he holds as a director or officer (or both) of any issuer, registrant, investment fund manager, recognized exchange, recognized self-regulatory organization, recognized clearing agency, recognized trade repository, designated rating organization or designated benchmark administrator;
- with permanent effect:
    - under s. 198(1)(b), he must cease trading in or purchasing any securities or derivatives;
    - under s. 198(1)(c), all of the exemptions contained in Alberta securities laws do not apply to him;
    - under s. 198(1)(c.1), he is prohibited from engaging in investor relations activities;
    - under s. 198(1)(e), he is prohibited from becoming or acting as a director or officer (or both) of:
        - any issuer or other person or company that is authorized to issue securities; or
        - a registrant, investment fund manager, recognized exchange, recognized self-regulatory organization, recognized clearing agency, recognized trade repository, designated rating organization or designated benchmark administrator;
    - under s. 198(1)(e.1), he is prohibited from advising in securities or derivatives;
    - under s. 198(1)(e.2), he is prohibited from becoming or acting as a registrant, investment fund manager or promoter; and
    - under s. 198(1)(e.3), he is prohibited from acting in a management or consultative capacity in connection with activities in the securities market;
- under s.198(1)(i), he must pay to the ASC $1,485,834 obtained as a result of his non-compliance with Alberta securities laws;
- under s. 199, he must pay an administrative penalty of $750,000; and
- under s. 202, he must pay $80,000 of the costs of the investigation and hearing.

Miller

[106] Against Miller, we order that:

- under s. 198(1)(d) of the Act, he must resign all positions he holds as a director or officer (or both) of any issuer, registrant, investment fund manager, recognized exchange, recognized self-regulatory organization, recognized clearing agency, recognized trade repository, designated rating organization or designated benchmark administrator;
- with permanent effect:
    - under s. 198(1)(b), he must cease trading in or purchasing any securities or derivatives;
    - under s. 198(1)(c), all of the exemptions contained in Alberta securities laws do not apply to him;
    - under s. 198(1)(c.1), he is prohibited from engaging in investor relations activities;
    - under s. 198(1)(e), he is prohibited from becoming or acting as a director or officer (or both) of:
        - any issuer or other person or company that is authorized to issue securities; or
        - a registrant, investment fund manager, recognized exchange, recognized self-regulatory organization, recognized clearing agency, recognized trade repository, designated rating organization or designated benchmark administrator;
    - under s. 198(1)(e.1), he is prohibited from advising in securities or derivatives;
    - under s. 198(1)(e.2), he is prohibited from becoming or acting as a registrant, investment fund manager or promoter; and
    - under s. 198(1)(e.3), he is prohibited from acting in a management or consultative capacity in connection with activities in the securities market;
- under s. 199, he must pay an administrative penalty of $300,000; and
- under s. 202, he must pay $50,000 of the costs of the investigation and hearing.

Bluforest

[107] Against Bluforest, we order that, with permanent effect:

- under s. 198(1)(a) of the Act, all trading in or purchasing of securities or derivatives of Bluforest must cease;
- under s. 198(1)(b), Bluforest must cease trading in or purchasing any securities or derivatives; and
- under s. 198(1)(c), all of the exemptions contained in Alberta securities laws do not apply to Bluforest.

[108] This proceeding is concluded.

March 15, 2021

For the Commission:

"original signed by"
Tom Cotter

"original signed by"
Steven Cohen

"original signed by"
Kari Horn