

# 2004 BCSECCOM 634

**Edward Andrew Durante aka Ed Simmons, Gillian Hobson,  
Berkshire Capital Partners, Inc., Commonwealth Associates, Ltd.,  
Dottenhoff Financial, Ltd., and Galton Scott & Golett Inc.**

**Sections 161(1) and 162 of the *Securities Act*, RSBC 1996, c. 418**

## **Hearing**

<b>Panel</b>	Brent W. Aitken	Vice Chair
	Robin E. Ford	Commissioner
	Robert J. Milbourne	Commissioner

**Date of Hearing**                      October 5, 2004

**Date of Decision**                      November 10, 2004

## **Appearing**

Peter J. Brady                      For the Executive Director

## **Decision**

### **I            Background**

#### ***Overview***

- ¶ 1 This is a hearing under sections 161(1) and 162 of the *Securities Act*, RSBC 1996, c. 418. On August 17, 2004, the Executive Director issued a notice of hearing alleging that:
- Edward Andrew Durante (also known as Ed Simmons), Berkshire Capital Partners, Inc., Commonwealth Associates, Ltd., Dottenhoff Financial, Ltd., and Galton Scott & Golett Inc. contravened the Act by engaging in market manipulation and fraud, and
  - Gillian Hobson acted contrary to the public interest.
- ¶ 2 We refer to Berkshire, Commonwealth, Dottenhoff and Galton as the offshore corporations. All dollar amounts, other than those in the orders below, are in US dollars.
- ¶ 3 The allegations relate to trading that Durante directed in the shares of three US companies traded over the US Over-the-Counter Bulletin Board quotation system: WAMEX Holdings, Inc., AbsoluteFutures.com, and UN Dollars Corp. The trading

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was made through accounts held by the offshore corporations at Union Securities Ltd., a Vancouver investment dealer.

¶ 4 The Executive Director alleges that:

- Between September 1999 and June 2000, Durante manipulated the market in the shares of Wamex, AbsoluteFutures, and UN Dollars.
- Durante and the offshore corporations received illegal profits of over \$36 million, over \$17 million of which Hobson transferred, at the direction of Durante, to an account (the EBT account) maintained by Exchange Bank and Trust, Inc. (EBT) at a branch of the Bank of Montreal in Vancouver.
- Through these actions, Durante and the offshore corporations perpetrated a fraud in connection with trades made in British Columbia.
- By facilitating Durante's activities, Hobson acted contrary to the public interest.

¶ 5 Durante is a stock promoter and former registered securities professional who resided in the state of New York. While engaging in the activities that are the subject of this hearing, he used the alias Ed Simmons. He is in jail in Pennsylvania.

¶ 6 The offshore corporations are all companies incorporated by Durante under the laws of the Island of Nevis. Hobson was Durante's nominee for the offshore corporations. She was their sole incorporator, director and shareholder.

¶ 7 Hobson was a resident of St. Kitts & Nevis and was operations manager and a member of the board of directors of EBT, a private international bank incorporated in the Republic of Nauru. In addition to working for EBT, Hobson was senior trust officer and operations manager for Nevis American Trust Company. She had worked at EBT since its inception. Prior to that, Hobson was employed by the St. Kitts, Nevis, & Anguilla National Bank. Hobson has a bachelors degree in economics with a concentration in international business, is a graduate of the advanced trust and banking education program from The Chartered Institute of Bankers, London, England, and was a member of the Honors Degree program in financial services with the International Banking Institute.

¶ 8 On Durante's instructions Hobson opened securities trading accounts for the offshore corporations at Union Securities. Hobson was a trading authority on

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these accounts, as was “Ed Simmons”, an alias for Durante, who directed all of the trades connected to the allegations.

### *Related Proceedings*

- ¶ 9 In October 2001, the US Securities and Exchange Commission filed complaints initiating three civil actions in the US courts in connection with stock manipulations orchestrated by Durante, including the manipulations alleged in the notice of hearing. The SEC received default judgments in the actions, under which Durante was ordered to pay disgorgement and pre-judgment interest. Under US law, a default judgment is an admission of the facts alleged in the complaint.
- ¶ 10 A declaration made by an SEC attorney supported each default judgment. Under US law, the declarations are made under penalty of perjury.
- ¶ 11 In addition, the US Attorney’s Office laid criminal charges against Durante in October 2001. He pled guilty to several counts of securities fraud (including counts arising from the manipulations alleged in the notice of hearing), wire fraud, and conspiracy to commit money laundering. He was sentenced to 60 months in jail for securities and wire fraud and 121 months for conspiracy to commit money laundering, those sentences to run concurrently. In addition, he was sentenced to 3 years’ post-release probation, and ordered to make restitution.
- ¶ 12 At his plea hearing, Durante admitted to involvement “in several schemes to manipulate the securities markets of various companies” including Wamex, AbsoluteFutures and UN Dollars. He said:

In each of these schemes, I conspired with officers of these companies as well as other people including people from [Commonwealth], the firm in which I worked, which is located in Manhattan. We made false filings with the Securities and Exchange Commission, issued misleading press releases, placed stock in brokerage accounts opened under other people’s names and conducted stock trades to manipulate the price involving those stocks. When the price and volume rose sufficiently, we bought and sold stock to manipulate the market to our benefit.

To disguise the nature of these profits and to hide our activities from US law enforcement, we funneled these monies through accounts in other countries. . . . To carry out our schemes, we made use of national exchanges and stock trading systems, the US mails and telephone calls and wires across state lines and between the US and foreign countries.

. . .

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While committing all the various crimes charged in the information, I knew that what I was doing was wrong.

### *Wamex*

- ¶ 13 Between December 1999 and June 2000, Durante and others caused Berkshire, Commonwealth and Dottenhoff to trade Wamex stock with designated market makers that allowed these market-makers to trade Wamex stock for guaranteed profits. In response, the market-makers increased the bid quotations for Wamex stock and bought it at increasingly high prices. Durante and others traded the stock at the artificially high prices through the Union Securities accounts of Berkshire, Commonwealth and Dottenhoff. Wamex's trading volume increased and its stock price rose from \$1.375 in December 1999 to a high of \$19.50 in February 2000. Between December 1999 and June 2000, Wamex's market capitalization increased from \$250,000 to over \$185 million.
- ¶ 14 In addition, Wamex issued false and misleading press releases that also artificially inflated the price of Wamex stock.
- ¶ 15 As a result of these activities, Berkshire, Commonwealth and Dottenhoff received profits of just under \$32.6 million, \$14.7 million of which Hobson, at Durante's direction, deposited to the EBT account.

### *Absolutefutures*

- ¶ 16 Between November 1999 and April 2000, Durante ran a scheme with another stock promoter and the CEO of Absolutefutures to increase the stock price of Absolutefutures.
- ¶ 17 The CEO caused Absolutefutures to issue improperly 4.1 million shares, 3 million of which were issued to Berkshire, Dottenhoff and Galton. Durante and the other promoter then manipulated the price of Absolutefutures stock by selling the 4.1 million shares using secret discounts and by trading in the open market. The trades were executed through the Union Securities accounts of all of the offshore corporations. Meanwhile, the CEO, on the instructions of Durante and the other promoter, issued false and misleading press releases that also artificially increased the price of the Absolutefutures stock.
- ¶ 18 The Absolutefutures stock price rose from \$0.21 in December 1999 to a high of \$6.00 in March 2000.
- ¶ 19 Through these activities Berkshire received profits of \$1.6 million, which Hobson, at Durante's direction, deposited to the EBT account.

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### *UN Dollars*

- ¶ 20 Between September 1999 and March 2000, Durante ran a scheme with others, including the CEO and another executive of UN Dollars, to increase the stock price of UN Dollars.
- ¶ 21 Through a series of transactions, the CEO caused UN Dollars to issue illegally 10 million shares to an entity controlled by Durante, giving Durante and related parties control of about 80% of UN Dollar's public float.
- ¶ 22 Durante then manipulated the price of UN Dollar stock by trading the 10 million shares among the Union Securities accounts of all of the offshore corporations. Meanwhile, the CEO, on Durante's instructions, issued false and misleading press releases. The two UN Dollar executives also made false and misleading statements on the UN Dollar website.
- ¶ 23 The UN Dollar stock price rose from \$0.01 in September 1999 to a high of \$1.25 in March 2000.
- ¶ 24 Through these activities Berkshire, Dottenhoff and Galton received profits of over \$1.9 million, just over \$1 million of which Hobson, at Durante's direction, deposited to the EBT account.

## **II Analysis and Findings**

### *The evidence*

- ¶ 25 Our findings of fact, as set out in the background above, are based in part on the facts as set forth in the declarations of the SEC attorneys filed in support of the default judgments in the SEC civil actions. The declarations are in the nature of sworn statements, since, if false, they attract the penalty of perjury. In addition, the makers of the declarations are attorneys who are professionally bound to tell the truth as officers of the court.
- ¶ 26 Under US law, the effect of the default judgments is that Durante is taken to have admitted the allegations in the SEC complaints. Furthermore, Durante's plea agreement in the criminal proceeding, although it does not corroborate all of the facts in the declarations, is consistent with those facts.

### *Manipulation and fraud by Durante and the offshore corporations*

- ¶ 27 The Executive Director alleges that Durante and the offshore corporations contravened section 57(a) and (c) of the Act. Those sections read as follows:

57. A person in or outside British Columbia must not, directly or indirectly, engage in or participate in a transaction or series of transactions

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relating to a trade in securities . . . if the person knows, or ought reasonably to know, that the transaction or series of transactions

(a) results in or contributes to a misleading appearance of trading activity in, or an artificial price for, any security . . . traded in British Columbia, . . . or

. . .

(c) perpetrates a fraud on any person anywhere in connection with trading in or acquiring securities . . . in British Columbia.

### 1. Manipulation

¶ 28 The evidence is clear and unambiguous that Durante and the offshore corporations knowingly participated in a series of transactions relating to trades in the shares of Wamex, AbsoluteFutures, and UN Dollar: they were all made by one or more of the offshore corporations, which operated under Durante's direction. Durante admitted he knew what he was doing, and that it was wrong. The offshore corporations are fixed with this knowledge because Durante was their directing mind and will.

¶ 29 The prohibitions in sections 57 (a) and (c) apply to all trades made in British Columbia, so it does not matter that there is no evidence of Durante's presence in British Columbia, or of the offshore corporations' residency.

¶ 30 It is clear that the securities were traded in British Columbia because the trades in the shares of Wamex, AbsoluteFutures and UN Dollar all occurred through the offshore corporations' accounts at Union Securities in Vancouver.

¶ 31 The evidence clearly establishes that the trades resulted in both a misleading appearance of trading activity and an artificial price for the shares of Wamex, AbsoluteFutures and UN Dollar. The facts supporting this are set out above and we need not repeat them here.

¶ 32 We therefore find that Durante and the offshore corporations contravened section 57(a).

### 2. Fraud

¶ 33 The elements of fraud are set out in *R. v. Théroux*, [1993] 2 S.C.R. 5 at page 20:

. . . the actus reus of the offence of fraud will be established by proof of:

1. the prohibited act, be it an act of deceit, a falsehood or some other fraudulent means; and
2. deprivation caused by the prohibited act, which may consist in actual loss or the placing of the victim's pecuniary interests at risk.

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Correspondingly, the mens rea of fraud is established by proof of:

1. subjective knowledge of the prohibited act; and
2. subjective knowledge that the prohibited act could have as a consequence the deprivation of another (which deprivation may consist in knowledge that the victim's pecuniary interests are put at risk).

¶ 34 In *R. v. Long* (1990), 61 C.C.C. (3d) 156 at page 174 (BCCA), the court said:

. . . the mental element of the offence of fraud must not be based on what the accused thought about the honesty or otherwise of his conduct and its consequences. Rather, it must be based on what the accused knew were the facts of the transaction, the circumstances in which it was undertaken and what the consequences might be of carrying it to a conclusion.

¶ 35 *Théroux* and *Long* are criminal law cases. In *Anderson v. British Columbia (Securities Commission)*, 2004 BCCA 7, the court, having cited the excerpts above from those cases, said:

29 Fraud is a very serious allegation which carries a stigma and requires a high standard of proof. While proof in a civil or regulatory case does not have to meet the criminal standard of proof beyond a reasonable doubt, it does require evidence that is clear and convincing proof of the elements of fraud, including the mental element.

¶ 36 Therefore, to make a finding of fraud under section 57, the elements of fraud as set out in *Théroux* and *Long* must be established to the standard of proof set out in *Anderson*.

¶ 37 The evidence clearly establishes the act of fraud:

- We have found that Durante and the offshore corporations contravened section 57(a) by participating in market manipulation, by definition deceitful conduct.
- Under section 57(c) the victim of the fraud need not be in British Columbia, but the trading connected with the fraud must be here. We have found that the trading in question took place in British Columbia.
- In addition, Durante instructed officers of AbsoluteFutures and UN Dollar to issue false and misleading press releases.
- We do not have direct evidence of actual loss. However, Durante and the offshore corporations could not have been successful to the tune of \$36 million unless others had lost money. A successful market manipulation

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results in losses to buyers because it cannot succeed unless money passes to the perpetrator from those who buy stock at prices that are over-valued as a result of deceitful activity. This means at the very least that those buyers' pecuniary interests are at risk.

- ¶ 38 As for the mental element, the evidence is clear that Durante admitted in his guilty plea that he committed "crimes" and that he knew what he was doing was wrong. Furthermore, he had to have known the consequences of carrying his conduct to a conclusion: that a successful manipulation results in losses to some buyers and puts at risk the pecuniary interests of other buyers. This excerpt from his guilty plea shows his "guilty mind":

To disguise the nature of these profits and to hide our activities from US law enforcement, we funneled these monies through accounts in other countries . . .

- ¶ 39 As we noted in finding a contravention of section 57(a), the offshore corporations are fixed with Durante's knowledge because he was their directing mind and will.
- ¶ 40 The evidence contains clear and convincing proof of the elements of fraud. We therefore find that Durante and the offshore corporations contravened section 57(c).

### ***Conduct contrary to the public interest by Hobson***

- ¶ 41 The Executive Director alleges that Hobson acted contrary to the public interest by:
- organizing the offshore corporations,
  - opening the offshore corporations' Union Securities accounts and effecting trades and transfers of securities in them, and
  - wiring trading profits from the Union Securities accounts to the EBT account.
- ¶ 42 Hobson opened the Union Securities accounts for Durante. She knew he was concealing his involvement because she knew that his alias "Ed Simmons" was a named trading authority on the account. In addition, she caused trades to be made in the accounts on Durante's instructions.
- ¶ 43 Hobson's participation as nominee and her facilitation of Durante's use of an alias allowed Durante to conceal his true identity, which helped him to commit manipulation and fraud, and to hide those activities from gatekeepers and regulators.



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- ¶ 44 Hobson has advanced education in banking and financial services, and significant experience in the field. There is no evidence of Hobson's knowledge of Durante's intentions, but with her knowledge and experience, she ought to have known that her acting as Durante's nominee and his use of an alias could facilitate illegal conduct.
- ¶ 45 We therefore find that Hobson acted contrary to the public interest in opening the Union Securities accounts, knowing that Durante's involvement was concealed through her conduct as a nominee and his use of an alias, and by fostering the appearance that she was directing the trading in those accounts when in fact the trades were being directed by Durante.

### III Decision

- ¶ 46 In *Re Eron Mortgage Corp.*, [2000] 7 BCSC Weekly Summary 22, the Commission cited a non-exhaustive list of factors that are usually relevant to making orders under sections 161(1) and 162:
- the seriousness of person's conduct,
  - the harm suffered by investors as a result of the person's conduct,
  - the damage done to the integrity of the capital markets in British Columbia by the person's conduct,
  - the extent to which the person was enriched,
  - factors that mitigate the person's conduct,
  - the person's past conduct,
  - the risk to investors and the capital markets posed by the person's continued participation in the capital markets of British Columbia,
  - the person's fitness to be a registrant or to bear the responsibilities associated with being a director, officer or adviser to issuers,
  - the need to demonstrate the consequences of inappropriate conduct to those who enjoy the benefits of access to the 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.

#### *Durante and the offshore corporations*

- ¶ 47 Manipulation and fraud is serious misconduct. Durante and the offshore corporations knowingly manipulated markets in the US, and committed fraud, through trading accounts at an investment dealer registered in British Columbia. They were significantly enriched by their misconduct. Their illegal profits amounted to more than \$36 million. Although we have no direct evidence of investor losses, the magnitude of this profit is indicative of the overall scope of those losses.

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¶ 48 The manipulations and fraud that we found contravened sections 57(a) and (c) shows, on the part of Durante and the offshore corporations, a pattern of deceit and disregard of securities regulatory requirements. Their conduct is serious; they have harmed investors, and have damaged the integrity of British Columbia's capital markets. They are not fit to participate in our capital markets. We must also make orders that will have an appropriate deterrent effect.

¶ 49 We do not have evidence about who, if anyone, is currently directing the affairs of the offshore corporations, or about their financial circumstances. However, in making orders, we must ensure that those corporations can no longer be put to improper purposes in British Columbia.

### *Hobson*

¶ 50 Although the Commission has no jurisdiction to make an order under section 162 in the absence of a contravention of the legislation, it is well established that we need find no contravention of the legislation to make orders under section 161(1).

¶ 51 Hobson was in a position where her conduct could have either assisted or frustrated Durante's activities. She chose to conduct herself in a manner that assisted him. The impact on others as a result of her conduct appears to have been indirect, but her conduct was essential to the manipulation and fraud.

### **IV Orders**

¶ 52 Therefore, considering it to be in the public interest, we order:

#### *Durante*

1. under section 161(1)(b) of the Act, that Durante is prohibited from trading any securities or exchange contracts;
2. under section 161(1)(c), that the exemptions described in sections 45 to 47, 74, 75, 98 and 99 do not apply to Durante;
3. under section 161(1)(d)(i), that Durante resign any position he holds as a director or officer of any issuer;
4. under section 161(1)(d)(ii), that Durante is prohibited from becoming or acting as a director or officer of any issuer;
5. under section 161(1)(d)(iii), that Durante is prohibited from engaging in investor relations activities;
6. under section 162, that Durante pay an administrative penalty of \$250,000;

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7. under section 174, that Durante pay, jointly and severally with Hobson, Berkshire, Commonwealth, Dottenhoff and Galton, the costs of or related to the hearing in an amount of \$26,361;

### ***Berkshire, Commonwealth, Dottenhoff and Galton***

8. under section 161(1)(b), that all persons cease trading in, and are prohibited from purchasing, the securities or exchange contracts of Berkshire, Commonwealth, Dottenhoff and Galton;
9. under section 161(1)(c), that the exemptions described in sections 45 to 47, 74, 75, 98 and 99 do not apply to Berkshire, Commonwealth, Dottenhoff and Galton;
10. under section 162, that Berkshire, Commonwealth, Dottenhoff and Galton each pay an administrative penalty of \$500,000;
11. under section 174, that Berkshire, Commonwealth, Dottenhoff and Galton each pay, jointly and severally with each other, Durante and Hobson, the costs of or related to the hearing in an amount of \$26,361;

### ***Hobson***

12. under section 161(1)(b), that Hobson is prohibited from trading any securities or exchange contracts for a period of 5 years expiring on November 9, 2009, subject to paragraph 17 of these orders;
13. under section 161(1)(c), that the exemptions described in sections 45 to 47, 74, 75, 98 and 99 do not apply to Hobson for a period of 5 years expiring on November 9, 2009, subject to paragraph 17 of these orders;
14. under section 161(1)(d)(i), that Hobson resign any position she holds as a director or officer of any issuer;
15. under section 161(1)(d)(ii), that Hobson is prohibited from becoming or acting as a director or officer of any issuer for a period of 5 years expiring on November 9, 2009, subject to paragraph 17 of these orders;
16. under section 161(1)(d)(iii), that Hobson is prohibited from engaging in investor relations activities for a period of 5 years expiring on November 9, 2009, subject to paragraph 17 of these orders;

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17. paragraphs 12, 13, 15 and 16 of these orders remain in force until Hobson pays the amount due from her under paragraph 18 of these orders; and
18. under section 174, that Hobson pay, jointly and severally with Durante, Berkshire, Commonwealth, Dottenhoff and Galton, the costs of or related to the hearing in an amount of \$26,361, except that Hobson's portion will not exceed \$6,590.

¶ 53 November 10, 2004

¶ 54 **For the Commission**

Brent W. Aitken  
Vice Chair

Robin E. Ford  
Commissioner

Robert J. Milbourne  
Commissioner