

BRITISH COLUMBIA SECURITIES COMMISSION

Securities Act, RSBC 1996, c. 418

Citation: Re Forum National, 2020 BCSECCOM 258

Date: 20200713

**Forum National Investments Ltd., Daniel Clozza and
Douglas Corrigan¹**

Panel	Suzanne K. Wiltshire	Commissioner
	George C. Glover, Jr.	Commissioner

Submissions Completed May 12, 2020

Date of Ruling July 8, 2020

Date of Reasons July 13, 2020

Appearing

James Torrance Chris Cairns	For the Executive Director
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Patricia Taylor	For Daniel Clozza
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Reasons for Ruling

I. Introduction

- [1] These are our reasons for our July 8, 2020 ruling (*Re Forum National*, 2020 BCSECCOM 251) with respect to the remainder of the November 18, 2019 application of Daniel Clozza (November application) with respect to his requests for orders for a permanent stay of proceedings and Clozza's further application dated March 26, 2020 (March application) seeking additional disclosure and stay orders.
- [2] At hearing management meetings held on March 27 and April 8, 2020, Clozza confirmed his intention to proceed with the remainder of the November application related to his requests for stay orders. He also confirmed at the April 8, 2020 hearing management meeting that he would not be filing any additional materials to supplement the remainder of the November application. The November application materials consist of the application itself and Clozza's affidavit sworn November 18, 2019 (Clozza affidavit #5).

¹ The style of cause in the amended notice of hearing in this matter was: Forum National Investments Ltd., Daniel Clozza, Robert Logan Dunn, Douglas Corrigan and Mosaic Holdings Ltd. On March 11, 2020 the executive director entered into a settlement agreement with Robert Logan Dunn and Mosaic Holdings Ltd. and discontinued proceedings against them.

- [3] The March application materials consist of the application and two supporting affidavits: an affidavit of Clozza sworn March 26, 2020 (Clozza affidavit #6) and an affidavit sworn April 9, 2020 providing copies of documents referred to in the application (Documents affidavit).
- [4] A schedule was set at the April 8, 2020 hearing management meeting for delivery of written submissions, with the hearing to proceed by way of a hearing in writing. As scheduled, written submissions were to be completed on or before May 12, 2020. Clozza reserved the right to request an oral hearing after review of the executive director's written submissions. The executive director filed written submissions dated May 1, 2020. Clozza did not request an oral hearing nor did he file any reply submissions. The other parties did not file any submissions as to their positions, although given an opportunity to do so.

Procedural background

- [5] On July 2, 2012, the Commission issued the initial investigation order in this matter.
- [6] On July 20, 2012, the executive director issued a temporary order and notice of hearing against Forum National Investments Ltd. (Forum), Clozza and two others (2012 BCSECCOM 294). That notice of hearing did not allege that any of those respondents contravened any specific provisions of the *Securities Act*, RSBC 1996 c. 418 (the Act), instead describing the conduct of those respondents as contrary to the public interest.
- [7] On August 8, 2012, a panel of the Commission dismissed the executive director's application to extend the temporary order against all of those respondents (2012 BCSECCOM 315).
- [8] On June 15, 2018, the executive director issued an amended notice of hearing against Forum, Clozza, Corrigan, Dunn and Mosaic (2018 BCSECCOM 181). The amended notice of hearing alleges that the respondents named in the amended notice of hearing contravened specific provisions of the Act. The allegations relate to events in 2011 and 2012. The proceedings against Dunn and Mosaic were discontinued in March 2020.
- [9] On June 18, 2018, the executive director provided to Clozza and the other respondents named in the amended notice of hearing a letter of particulars together with a list of over 1800 relevant documents and copies of the documents listed.
- [10] On August 8, 2018, hearing dates with respect to the merits of the allegations in the amended notice of hearing were set, with the hearing to commence on February 4, 2019.
- [11] On January 4, 2019, the executive director provided the respondents with a supplemental list of four additional documents and copies of the documents listed, as well as a reliance list.

- [12] On February 22, 2019, Clozza applied pursuant to the *Freedom of Information and Protection of Privacy Act*, RSBC 1996, c. 165 (FIPPA application) for disclosure of all records within the possession of the Commission relating to Clozza (within a date range). The deadline for providing a response to Clozza's FIPPA application was extended several times by the Office of the Information and Privacy Commissioner for British Columbia (OIPC).
- [13] On October 31, 2019, the executive director provided the respondents with further disclosure in response to Clozza's outstanding requests summarized in his letter of June 7, 2019.
- [14] On November 18, 2019, Clozza filed an application seeking various disclosure related orders and orders for permanent stays of the proceedings. The portion of the November application with respect to the disclosure related orders requested was heard orally on December 9, 2019.
- [15] In its March 19, 2020 ruling (*Re Forum National*, 2020 BCSECCOM 93), the panel dismissed that portion of the November application with respect to Clozza's requests for various disclosure related orders, as well as Clozza's oral requests for additional orders made during the oral hearing of the disclosure related portion of the November application.
- [16] On March 26, 2019, Clozza filed the March application seeking further disclosure related orders and orders for stays of the proceedings.
- [17] The liability portion of the hearing on the merits originally scheduled to commence in February 2019 has been adjourned several times for various reasons. The liability portion of the hearing on the merits is currently scheduled to commence on July 28, 2020.

II. November Application

- [18] The remaining orders sought by Clozza under the November application are:
1. An order for a permanent stay of proceedings as a consequence of the withholding of and late disclosure of exculpatory and potentially exculpatory evidence related to the allegations made against the Respondents in the Notice of Hearing and the Amended Notice of Hearing by the Executive Director.
 2. An order for a permanent stay of proceedings as a consequence of the misrepresentation by the Executive Director of the British Columbia Securities Commission to the hearing panel as to the completeness of the disclosure.

3. Further and in the alternative, an order for a permanent stay of proceedings as a consequence of the failure of the Freedom of Information Officer of the British Columbia Securities Commission to provide records in stages to the Respondent, Mr. Clozza, as directed by the Office of the Information and Privacy Commissioner for British Columbia on May 15, 2019.

- [19] The executive director opposes the granting of the requested stay orders on the grounds that they are baseless. He submits that the stay orders requested were contingent on the success of the disclosure related portions of the November application and other orders requested orally at the hearing of that portion of the November application, all of which were dismissed, and because Clozza has provided no legal basis for a stay.
- [20] In this regard we note that other than setting out the orders requested, the application does not speak further to the applicable law that might provide a basis for any of the requested orders.
- [21] The first stay order is requested “as a consequence of the withholding of and late disclosure of exculpatory and potentially exculpatory evidence...”.
- [22] The March 19, 2020 ruling dismissed all of the disclosure related requests for orders in the November 2019 application, as well as Clozza’s additional requests at the oral hearing of that application. The additional requests included the request for permission to examine the lead investigator based on allegations that the lead investigator had restricted Clozza’s ability to obtain relevant evidence, did not provide all relevant evidence and that this was the second instance where the lead investigator’s disclosure was deficient.
- [23] In that ruling, the panel stated the following at paragraphs 92 and 93:

[92] Overall[,] disclosure subsequent to the extensive disclosure provided in June 2018 and January 2019 has been responsive to requests made by Clozza through the provision of a few further documents of potential relevance and the provision of a few additional documents brought to the executive director’s attention in response to another respondent’s FIPPA application. This is in keeping with the disclosure requirements in *Stinchcombe*². It does not in our view represent a too restrictive view of relevance or deficient disclosure but rather the fact that the disclosure obligation is an ongoing one, as it should be, with disclosure of any potentially relevant documents that come to light as the case proceeds.

² *R. v. Stinchcombe*, [1991] 3 SCR 326

[93] As noted in *Canaco*³, while the Commission’s disclosure standard is akin to the *Stinchcombe* standard, the standard for administrative tribunals is not *Stinchcombe* but whether the hearing process as a whole satisfies the requirements of procedural fairness. It is our view that disclosure at this point has met the *Stinchcombe* standard. While the earlier disclosure in June 2018 and January 2019 may not have been entirely complete, that is not the standard. The question is whether the disclosure will result in a hearing that is fair. The extensive disclosure and the letter of particulars and reliance list, together with the further disclosures in October and November 2019 have provided sufficient information for Clozza to know the case he will have to meet. In the context of these proceedings, which are now scheduled to proceed to a hearing on the merits in the latter half of April 2020, Clozza has and will have ample time to consider all of this disclosure in responding to the case he will have to meet.

- [24] At paragraph 98 of the March 19, 2020 ruling, the panel wrote, “...we find Clozza has failed to establish the existence of additional identified and existing material that ought to have been produced beyond that produced by the executive director in June 2018 through to the oral hearing of this matter in December 2019.”
- [25] In the March 19, 2020 ruling at paragraph 110 the panel also found the allegations against the lead investigator to be entirely unfounded and dismissed the request for an order permitting examination of the lead investigator.
- [26] As stated in the March 19, 2020 ruling, the executive director has met his disclosure obligations, and with the most recent adjournment of the hearing on the merits of the allegations in the Amended Notice of Hearing to late July 2020, Clozza has even further time to consider the extensive disclosure he has received in responding to the case he will have to meet.
- [27] Given the above, there is no basis for us to make the first stay order requested at paragraph 4 of the November application. We deny the request for that order.
- [28] The second stay order is requested “as a consequence of the misrepresentation by the Executive Director...as to the completeness of disclosure”.
- [29] The misrepresentation allegation made by Clozza regarding the executive director was considered at paragraphs 80 through 84 of the March 19, 2020 ruling in connection with Clozza’s request for an order to require the executive director to provide a “Laporte” type list. The request for such an order was dismissed. In that ruling, the panel concluded at paragraph 84 that it did not consider the executive director’s statements to be misrepresentations.

³ *Canaco Resources Inc. (Re)*, 2012 BCSECCOM 493

- [30] Thus, our conclusion with respect to the application for a stay based upon the misrepresentation allegation is the same. We do not consider the executive director's statements to be misrepresentations. Accordingly, there is no basis for us to make the second stay order requested at paragraph 5 of the November application. We deny the request for that order.
- [31] The third stay order is requested "as a consequence of the failure of the Freedom of Information Officer of the British Columbia Securities Commission to provide records in stages to ... Clozza, as directed by the Office of the Information and Privacy Commissioner for British Columbia on May 15, 2019".
- [32] As noted in the March 19, 2020 ruling at paragraph 111, Clozza's FIPPA application is speculative in that it is general in nature and does not specify relevant documents (or types of documents) that Clozza says have not been disclosed to the respondents in this matter. Thus the FIPPA application may or may not result in the location of further documents that are potentially relevant to this matter.
- [33] And as stated by the panel at paragraph 112 of that ruling, the proper process to address matters pertaining to Clozza's FIPPA application is through the OIPC.
- [34] On May 15, 2019, the OIPC extended the deadline for the BCSC to respond to the FIPPA application to December 27, 2019. That extension included the following as one of the terms of the extension:
3. The public body should release records to the applicant in stages as its review progresses. The public body should not delay releasing records merely to permit a "bulk release" unless it is absolutely necessary for a global consideration of the disclosure package.
- [35] On May 17, 2019, the OIPC informed Clozza of the extension and that he could expect a response to his request "by December 27, 2019, sooner if possible". The OIPC also advised Clozza of his right to make a complaint to the OIPC about the time extension if he wished to do so.
- [36] On October 22, 2019, Clozza wrote to the OIPC, advising he had not yet received any disclosure and had not received any reason for the delay, asserting the British Columbia Securities Commission (BCSC) was in breach of the OIPC direction to release documents in stages. Clozza requested an investigation of and review of the BCSC's failure to comply with the duty imposed on the BCSC by the May 15, 2019 OIPC extension order to release records in stages.

[37] On October 23, 2019 the OIPC responded stating, “While we always encourage public bodies to provide a release of records in stages, it may not be possible for a variety of reasons.” The OIPC advised Clozza he could contact the BCSC if he had any questions or if he would like to prioritize certain records. Or, he could request a reconsideration of the OIPC’s May 15, 2019 extension order.

[38] It would appear from the above that Clozza was fully aware that the avenue to pursue his request for records under the FIPPA application was through the OIPC.

[39] There is no basis for us to make the third stay order requested at paragraph 6 of the November application. We deny the request for that order.

III. March Application

A. Orders sought

[40] Both Parts 1 and 5 of the March application set out orders sought by Clozza. In each Part, Clozza seeks one order related to disclosure and another order related to a stay of proceedings. The orders requested are not the same. We considered all the orders requested.

[41] The disclosure related orders Clozza seeks are at paragraphs 1 and 33 of the March application, as follows:

1. An Order that the Executive Director disclose the following documents not previously disclosed to the applicant by the Executive Director:
 - a. The transcript of the interview of Theresa Fette by the United States Securities and Exchange Commission (the “SEC”);
 - b. All notes, emails, records or communications of staff of the SEC with Theresa Fette;
 - c. All notes, emails records or communications of staff of the BCSC with Theresa Fette;
 - d. All notes, emails, records or communications of staff of the SEC with Robert Benson;
 - e. All notes, emails records or communications of staff of the BCSC with Robert Benson;
 - f. The transcript of the interview of Fred Schlosser by the SEC;
 - g. All notes, emails records or communications of staff of the SEC with Fred Schlosser;
 - h. All notes, emails records or communications of staff of the BCSC with Fred Schlosser;
 - i. The transcript of any interview of the following directors of Forum National Investments by the SEC:
 - i. Jeff Teeny;
 - ii. Michael Barrett;
 - iii. Kazunari Kohno;

- iv. Chris Yergensen
- v. Fred Schlosser
- j. All notes of telephone calls of Staff of the SEC with the following directors of Forum National Investments Ltd:
 - i. Scott McManus;
 - ii. Jeff Teeny;
 - iii. Mike Barrett;
 - iv. Kazunari Kohno;
 - v. Chris Yergensen;
 - vi. Fred Schlosser.
- k. All notes of discussions and other communications of Staff of the BCSC with the following directors of Forum National Investments Ltd.:
 - i. Scott McManus;
 - ii. Jeff Teeny;
 - iii. Mike Barrett;
 - iv. Kazunari Kohno;
 - v. Chris Yergensen;
 - vi. Fred Schlosser.
- l. All notes of discussions and other communications of Staff of the SEC with representatives of Aliya LifeSpan LLC (Aliya).
- m. All notes of discussions and other communications of Staff of the SEC with representatives of Provident Trust (Provident).

33. The Applicant seeks an order requiring the Executive Director to take the necessary steps to obtain the information from the SEC Investigators referred to in paragraph 1 herein.

[42] Turning to Clozza’s requests for a stay of proceedings, in Part 1 Clozza seeks “An order for a permanent stay of proceedings as a consequence of the withholding of disclosure of exculpatory and potentially exculpatory evidence related to the allegations made against the Respondents in the Notice of Hearing and the Amended Notice of Hearing gathered by the SEC upon the appointment of [the two SEC staff members named] as investigators in the BCSC investigation.”

[43] In Part 5 of the application the request is for “an order for a permanent stay of proceedings due to the refusal of the SEC Investigators to provide relevant information gathered by the SEC Investigators in the BCSC investigation”.

[44] The executive director’s position is that the March application should be dismissed as the orders requested are not supported factually or legally.

B. Background

[45] The initial BCSC investigation order was amended several times. On November 7, 2013, the BCSC lead investigator requested the most recently amended investigation order be

further amended to appoint two named SEC staff members under section 142(1) of the Act, stating:

The BCSC and SEC are conducting parallel investigations involving a potential market manipulation by individuals in their respective jurisdictions. The SEC has requested the attendance of two staff members at upcoming BCSC investigative interviews.

There are no other changes to the parties or to the nature of the investigation.

- [46] Pursuant to the SEC request, on November 15, 2013, the Third Amended Investigation Order (November 2013 amended investigation order) added the two SEC staff members to the persons appointed under section 142(1) of the Act to investigate, enquire into, inspect and examine any person, company or other entity on any matter reasonably relating to: Forum and its directors, officers, subsidiaries, agents, insiders, employees, and their inter-relationships; the trading or distribution of shares of Forum or its subsidiaries; records of any transfer of Forum shares or any accounts related to Forum shares; and the operations and affairs of the parties (including Clozza and Forum) named in the order and of any other person or entity related to or associated with the parties.
- [47] In November 2014, the SEC filed a complaint against Clozza and others and provided Clozza with disclosure (the SEC disclosure) relating to that complaint. Clozza settled the allegations in the complaint with the SEC in December 2015.
- [48] In Clozza affidavit #6, Clozza states that he did not retain the SEC disclosure after he settled with the SEC. He also states that his computers were compromised and the information was lost to him.
- [49] In Clozza affidavit #6, Clozza also states that after he received the BCSC disclosure list in June 2018, he recognized some of the same documents on the BCSC list that he had seen when he received the SEC disclosure in 2014, but that not all of the documents disclosed to him by the SEC were included in the BCSC disclosure package to him and he believes the SEC may have the information he seeks. In the March application, Clozza submits that information relating to his defence may not have been provided by the SEC to the BCSC.
- [50] On November 18, 2019, Clozza requested that the executive director disclose the transcript of Theresa Fette's interview with the SEC. On the same date, the executive director advised that the BCSC did not have a transcript of that interview.
- [51] On November 19, 2019, Clozza requested that the executive director retrieve the Fette interview transcript from the SEC. On the same date, the executive director requested confirmation that Clozza was not in possession of the Fette interview transcript as a result

of any disclosure he may have received in the SEC matter and advised that upon such confirmation the BCSC would make the request to the SEC.

- [52] On November 20, 2019, Clozza confirmed that he was not in possession of the Fette interview transcript. Clozza also requested “all notes of telephone calls or interview records for the 7 directors of record for FORUM in both Canada and the USA that we are not in possession of.”
- [53] On December 27, 2019, the executive director advised Clozza that: the BCSC had requested, on Clozza’s behalf, that the SEC provide copies of the transcript of its interview of Theresa Fette and of all notes of telephone calls or interview records for the seven directors of Forum; and, the SEC had advised they would not be providing the material.

C. Law Disclosure

- [54] The requirement for disclosure by the executive director is set out in section 3.6 (b), formerly section 2.6 (b), of BC Policy 15-601 *Hearings* (the Hearings policy), as follows:

In an enforcement hearing, the executive director must disclose to each respondent all relevant information that is not privileged.

- [55] This disclosure obligation is based on that articulated in *Stinchcombe* as the disclosure standard for criminal proceedings and considered in *Fernback (Re)*, 2004 BCSECCOM 378 as the appropriate standard to apply in connection with enforcement hearings under the Act.
- [56] The documents to be disclosed are relevant documents in the possession or control of the executive director. *Stinchcombe* refers at paragraphs 12, 30 and 33 to relevant documents “in the possession” of the Crown. Justice Sopinka in the subsequent decision of *R. v. Stinchcombe*, [1995] 1 SCR 754 states at paragraph 2, “The Crown can only produce what is in its possession or control.” Also, the Court in *R. v. Chaplin*, [1995] 1 SCR 727 states at para. 21: “This Court has clearly established that the Crown is under a general duty to disclose all information, whether inculpatory or exculpatory, except evidence that is beyond the control of the prosecution, clearly irrelevant, or privileged.”

Section 142 (1)

- [57] Section 142 of the Act (as it then was) provided:

(1)The commission may, by order, appoint a person to make an investigation the commission considers expedient

(a) for the administration of this Act,

- (b) to assist in the administration of the securities ... laws of another jurisdiction,
- (c) in respect of matters relating to trading in securities ... in British Columbia, or
- (d) in respect of matters in British Columbia relating to trading in securities ... in another jurisdiction.

(2) In its order, the commission must specify the scope of an investigation to be carried out under subsection (1).

[58] Section 143 (as it then was) provided that an investigator appointed under section 142 may with respect to a person who is the subject of the investigation, investigate, inquire into, inspect and examine, among other things, the affairs of that person; any records, negotiations, transactions, investigations, investments, loans, borrowings and payments to, by, on behalf of, in relation to or connected with that person; and, the relationship that may at any time exist or have existed between that person and any other person for a variety of reasons.

Decision in *Hu*

[59] A previous decision of the Commission, *Hu (Re)*, 2009 BCSECCOM 506, was brought to the panel's attention by the executive director. In that case, the panel found that the BCSC and the Alberta Securities Commission (ASC) were conducting a joint investigation. A BCSC investigation order named BCSC staff and ASC staff added at the request of the ASC. The BCSC investigation order was substantially the same as an ASC investigation order relating to the same parties and the same facts.

[60] The panel in *Hu* directed the executive director to ask the ASC to provide the BCSC with all information gathered under the ASC investigation relevant to the allegations against *Hu* in the BCSC notice of hearing and disclose it to *Hu*.

[61] The panel in *Hu* stated in its ruling:

...A person appointed by the Commission in an investigation order is an agent of the Commission for the purposes of the investigation. It follows that all information gathered by everyone named in an investigation order belongs to the Commission, and BCSC staff must disclose that information to respondents in a notice of hearing on the *Stinchcombe* standard, as set out in *Fernback*...

...we deal with information gathered in a joint investigation...BSCS staff received some information gathered by the ASC relevant to the allegation in the notice of hearing and disclosed it to *Hu*. Is there more?

We cannot be sure. However, when persons are subject to allegations in a notice of hearing, they are entitled to disclosure of all relevant information gathered in the course of the investigation. Regulators have established, appropriately,

flexible and cooperative mutual-assistance and information-sharing arrangements in order to promote effective investigation and prosecution of securities market misconduct. It is inconsistent with that regime for respondents to face technical barriers when seeking the disclosure to which they are entitled.

[62] The executive director takes the position that the decision in *Hu* can be distinguished legally and factually.

[63] *Hu* appealed the above ruling and a later ruling. In *Hu v. British Columbia Securities Commission*, 2010 BCCA 306, the Court of Appeal, while dealing with the issue of relevancy raised on the appeal, stated:

[12] ...I also agree with the appellant that, although the B.C. Commission may not have jurisdiction to compel the Alberta Commission to provide disclosure of its investigation file, its request for cooperation of the Alberta Commission should not have left the determination of relevancy to the staff of the Alberta Commission.

[13] Rather, the B.C. Commission should have requested the Alberta Commission to provide copies of all documents in its investigation file to counsel for the executive director of the B.C. Commission. ... If the Alberta Commission were to refuse to give counsel for the executive director of the B.C. Commission access to its investigation file, then such refusal should be disclosed to the appellant so that other avenues to compel production could be pursued by the appellant (see *R. v. McNeil*, [2009 SCC 3](#), [2009] 1 S.C.R. 66 at para. 49, quoting with approval from *R. v. Arsenault* (1994), [1994 CanLII 5244 \(NB CA\)](#), 153 N.B.R. (2d) 81 (C.A.)).

Mutual assistance agreements

[64] Clozza's March application refers to two memoranda of understanding providing for mutual assistance among securities regulators, one between the BCSC and the SEC dated June 10, 2010 and the other a multilateral memorandum of understanding of the International Organization of Securities Commissions (the IOSCO MMoU).

[65] Clozza's reference to a memorandum of understanding between the BCSC and the SEC dated June 10, 2010 relating to the supervision of cross-border regulated entities appears to be an incorrect reference in the context of mutual assistance with respect to enforcement related matters. An earlier memorandum of understanding between the SEC and certain Canadian securities regulators, including the BCSC, dated January 7, 1988 with respect to requests for assistance in matters relating to the administration and enforcement of United States and Canadian securities laws (the SEC MOU) is the document to which we have had reference in connection with Clozza's March application.

- [66] The SEC MOU and the IOSCO MMoU arose out of increasing international activity in securities and derivatives markets and the corresponding need for cooperation and consultation among regulatory authorities to ensure compliance with, and enforcement of, their securities and derivatives laws and regulations.
- [67] The SEC MOU calls on the parties to provide the fullest mutual assistance to facilitate the performance of securities market oversight functions and the conduct of investigations, litigation or prosecution in cases where information located within the jurisdiction of one party is needed to determine whether, or prove that, the laws or regulations of the party making the request may have been violated.
- [68] The stated purpose of the IOSCO MMoU is for signatories “to provide one another with the fullest mutual assistance possible to facilitate the performance of the functions with which they are entrusted within their respective jurisdictions to enforce or secure compliance with their securities and derivatives laws and regulations”.
- [69] Subsection 3 of Article 3, “General Principles”, of the SEC MOU provides that “The provisions of this Memorandum of Understanding will not give rise to a right, directly or indirectly, on the part of any person, other than the Authorities, to obtain... any information...”. Similarly, section 6 of the IOSCO MMoU, concerning general principles regarding mutual assistance and the exchange of information, provides in subsection (d) that “This Memorandum of Understanding does not confer upon any Person not an Authority, the right or ability, directly or indirectly to obtain...any information...”.

D. Submissions

Clozza

- [70] Clozza claims that upon their appointment to the BCSC investigation, the SEC staff named in the November 2013 amended investigation order received information from and in relation to the persons Clozza has identified as having information relevant or potentially relevant to his defence.
- [71] Clozza submits that having named two SEC staff to the BCSC investigation as of November 15, 2013, the executive director is required to produce all relevant information gathered by the SEC investigators, citing *Stinchcombe*, *Fernback* at paragraph 39, “*Ironside Re*, 2005 Carswell Alta 2362, at para 29, aff’d 2009 ABCA 134” and the Hearings Policy .
- [72] Clozza says that the executive director failed to provide him with the relevant information obtained by the SEC investigators appointed under the November 2013 amended investigation order.

- [73] Clozza submits the refusal of the SEC to provide the BCSC with the information is contrary to the obligations of the SEC investigators as named investigators in the BCSC investigation and that the SEC is therefore in breach of its obligations under the Act, as well as its obligations under the SEC MOU and the IOSCO MMoU.
- [74] Clozza submits the executive director is required to take all steps available to him to obtain the SEC information pursuant to the Act, the SEC MOU and the IOSCO MMoU, to ensure compliance with the disclosure obligations identified in *Stinchcombe*.
- [75] Clozza made no submissions with respect to the disclosure sought at subparagraphs 1(c), (e), (h), and (k) respecting notes, emails, records or communications of BCSC staff members with the persons named in those subparagraphs.

Executive director

- [76] The executive director submits that the requests related to disclosure should be dismissed for the following reasons:
- (i) The BCSC has already requested some of the information from the SEC on behalf of Clozza and the request has been refused.
 - (ii) The BCSC and SEC were conducting independent, parallel investigations, not a joint investigation. There is no legal basis to extend the BCSC disclosure obligation to information in the possession of a foreign regulator.
 - (iii) There is no reliable evidence that the information sought exists.
 - (iv) The information Clozza seeks from the Fette transcript is available from other sources.
 - (v) The BCSC disclosure obligation relates to information in its possession, not information in the possession of the SEC.
 - (vi) Clozza has no rights under the IOSCO MMoU and SEC MOU.
- [77] With respect to the first reason above, the executive director submits that there would be no utility in making another request for the same information that the SEC had refused to provide in late 2019 following the executive director's request for the information on Clozza's behalf.
- [78] With respect to the second reason above, the executive director points to the memorandum of November 7, 2013 in support of the November 15, 2013 amended investigation order, noting Clozza did not put this memorandum before the panel in the March application. The executive director submits that the November 7, 2013

memorandum is significant as Clozza's application is premised on the BCSC and SEC conducting a joint investigation, but the evidence demonstrates that it was not a joint investigation. Rather the BCSC and SEC were conducting independent investigations.

- [79] With respect to the third reason above that there is no reliable evidence that the information sought exists, the executive director makes two submissions. The first is that the panel can draw the conclusion that Clozza is either uninformed about his own disclosure or he is being untruthful given that both Clozza affidavit #6 and the Documents affidavit speak to two of the documents as being redacted when the documents had previously been provided to Clozza unredacted. The executive director argues that this undermines Clozza's assertions in Clozza affidavit #6 about documents he claims were provided by the SEC. The second is that (other than with respect to the Fette transcript) Clozza does not provide any detail as to the items he requests, nor a basis on which the panel could conclude that the items even exist, leaving the panel to speculate what may or may not have been in the SEC disclosure that Clozza says he no longer has. The executive director also notes that there is no review or analysis of the disclosure Clozza has received from the executive director.
- [80] With respect to the fourth reason above, the executive director submits that Clozza only seeks a very specific piece of evidence from the Fette transcript relating to a statement Fette made at a September 2012 conference in Las Vegas (set out in paragraph 41 of Clozza affidavit #6) that "Aliya through Provident had recently closed a \$100,000,000 bond offering". The executive director submits that there is no evidence that Clozza has made any effort to obtain this discrete piece of evidence from any of the people he says were at the conference (see paragraphs 38 and 39 of Clozza affidavit #6), from Ms. Fette, or from others at the conference.
- [81] With respect to the fifth reason above, the executive director states that the BCSC does not possess the documents that Clozza seeks and that, if the documents exist, they are beyond the BCSC's control.
- [82] With respect to the sixth reason above, the executive director points out that Clozza has failed to address subsection 6(d) of the IOSCO MMoU and the comparable subsection⁴ of the SEC MOU, each of which clarifies that persons such as Clozza do not have rights under those documents.
- [83] Additionally, the executive director submits that the statements in Clozza affidavit #6 provide no explanation for his not retaining the disclosure he received from the SEC in November 2014 with respect to the SEC complaint. The executive director argues Clozza should have taken steps to securely retain these documents, in particular those pertinent to his defence. Now in 2020, two years after he says he realized he lost

⁴ Subsection 3 of Article 3 of the SEC MOU

documents key to his defence, he makes an application for extraordinary orders that either a foreign jurisdiction provide him for a second time documents he lost or that the matter be stayed, with no explanation for why he did not securely store these documents when he had them in his possession

- [84] The executive director notes that while most of the items sought in paragraph 1 of the March application relate to the SEC, the items listed at subparagraphs 1 (c), (e), (h) and (k) relate to the BCSC. In relation to those requests, the executive director's position is that the BCSC has complied with its disclosure obligations.
- [85] With respect to applicable law, the executive director agrees that its disclosure obligation is that set out in section 3.6(b) of the Hearings Policy but submits that such disclosure is limited to the relevant documents it has in its possession or control.
- [86] The executive director submits that none of the authorities relied upon by Clozza provides precedent for the relief that Clozza is seeking.
- [87] The executive director submits that there is no support for Clozza's proposition that adding two SEC staff members to the November 2013 amended investigation order broadens the BCSC disclosure obligation to not only relevant evidence in its possession, but to evidence not in its possession.
- [88] The executive director says the decision in *Hu* can be distinguished, as, although it deals with a similar issue, it involves different facts.
- [89] The executive director argues that the panel in *Hu* provided no legal analysis, nor authority, to support that any non-BCSC person appointed under a BCSC investigation order is automatically an agent of the BCSC and that where that person works for a different securities regulator, the BCSC's disclosure obligation expands to information that is solely within the control of that other securities regulator. The executive director says this was wrongly decided and that the *Stinchcombe* decisions are explicit that disclosure only applies to documents in the possession of the Crown.
- [90] With respect to the reference in *Hu* to "mutual-assistance and information-sharing agreements", the executive director submits that those arrangements must be applied within the context of governing laws of each jurisdiction.
- [91] The executive director submits that *Hu* can also be distinguished on the facts. In *Hu*, the executive director had not asked the ASC to provide the documents and when the executive director subsequently asked, after being directed to do so, the ASC provided the BCSC with the documents. In the present case, the executive director has asked, on behalf of Clozza, that the SEC provide the items requested by Clozza in November 2019

and the SEC advised it would not be providing the material. The executive director argues that even if *Hu* were followed, it is not a precedent where requested documents were not provided by the other regulator, particularly when that other regulator is a foreign agency.

E. Analysis

Disclosure

[92] In paragraph 1 of the March application Clozza requests the disclosure of three different categories of information:

- (i) *Information previously requested from the SEC* - The information requested in items a, f, g, i, and j of paragraph 1 of the March application, consisting of transcripts of the SEC's interviews of Fette, Schlosser and any other directors of Forum and notes, emails, records and communications of staff of the SEC with Schlosser and other directors of Forum, is essentially the same information requested by Clozza on November 18 and 20, 2019. This is the information that the executive director, on Clozza's behalf, asked the SEC to provide and the SEC stated it would not be providing. Clozza was informed of the SEC response in late December 2019.
- (ii) *Additional information now sought from the SEC* - The information requested in items b, d, l, and m of paragraph 1 of the March application relates to notes, emails, records or communications of staff of the SEC with Theresa Fette, Robert Benson and other representatives of Aliya and Provident.
- (iii) *BCSC information* - The information requested in items c, e, h and k of paragraph 1 of the March application relates to notes, emails, records or communications of staff of the BCSC with Theresa Fette, Robert Benson, Fred Schlosser and other directors of Forum.

[93] Clozza's application in relation to the SEC information he seeks is premised on his "belief" that not all the information disclosed to him by the SEC in 2014 in connection with the SEC complaint against him was included in the BCSC disclosure he received in relation to the allegations against him in the BCSC amended notice of hearing.

[94] In his affidavit #6, Clozza addresses his belief that the SEC may have the SEC information he seeks in the March application. Clozza states he specifically recalls having been provided a copy of the SEC interview transcript of Theresa Fette and that she confirmed to the SEC investigator that she represented to the attendees of the September 2012 conference that Aliya through Provident had recently closed a \$100 million bond offering. However, Clozza does not specifically identify any of the other documents he seeks that were in the SEC disclosure that he says are documents he no longer has. Instead, he states that he recalls exchanging emails and communicating with

directors and officers of Forum and representatives of Aliya regarding the business of Forum as well as Forum's May, June and July 2012 news releases and that he believes he received documents as part of the SEC disclosure to him evidencing his communications with his fellow directors and officers of Forum and "our" communications with representatives of Aliya, but without providing any details. He also states that he "noticed" that documents previously disclosed to him by the SEC relating to the arrangements between Aliya, Provident and Forum were not included in the BCSC disclosure, but again without providing any detail.

- [95] In the March application and Clozza affidavit #6, Clozza also refers to his belief that communications between Bruce Blechman, William Anguka and others relating to the orchestration of Forum's internet promotion and communications between Blechman, Clozza and others relating to Blechman's and his clients' interest in "the Life Settlement business" may have been included in the SEC disclosure he received in 2014 but were not included in the BCSC disclosure he received. We note the application does not request a disclosure related order with respect to any such documents.
- [96] The BCSC and the SEC were each conducting their own separate and independent investigations into the conduct of Clozza and others prior to and after the appointment of the two SEC staff members under the November 2013 amended investigation order. In Clozza affidavit #6, Clozza refers to an affidavit of a Forum shareholder to the effect that the investigation of Forum was initiated by the SEC. The November 7, 2013 memorandum requesting the appointment of the two SEC staff members states that the BCSC and SEC were conducting parallel investigations involving a potential market manipulation by individuals in their respective jurisdictions. The appointment of the two SEC staff members under section 142 was made at the request of the SEC to permit the SEC staff members to attend upcoming BCSC investigative interviews. It is reasonable to infer, from the statement in the memorandum, that the SEC wanted to attend the interviews as part of the SEC investigation. The respective investigations did not proceed in the same timeframe. The SEC investigation resulted in the SEC filing a complaint against Clozza and others in 2014 and providing Clozza with the SEC disclosure at that time. The SEC complaint was then settled in 2015 as against Clozza. The BCSC investigation began with the issuance of the initial investigation order in July 2012, followed by the BCSC notice of hearing later in July 2012 and then the amended notice of hearing and majority of the BCSC disclosure in June 2018. The BCSC matter has yet to proceed to a hearing on the merits. While the investigations were "parallel" in the sense that they were both ongoing for a portion of time during the same period, this was not a joint investigation.
- [97] Clozza also refers to SEC documents obtained by the BCSC from the SEC under the SEC MOU and the IOSCO MMoU prior to the appointment of the two SEC staff members named in the November 2013 amended investigation order. The fact that these documents were obtained by the BCSC prior to November 2013 serves to confirm that

the SEC prior to that time was conducting its own independent investigation into the conduct of Clozza and others pursuant to its own investigatory powers.

- [98] Any documents obtained by the SEC pursuant to its own investigatory powers and not under the investigatory powers given to the two SEC staff members pursuant to sections 142 and 143 of the Act are not documents obtained by the SEC in connection with the BCSC investigation.
- [99] The executive director is under no obligation to disclose documents that are not in the possession and control of the BCSC. Documents obtained by the BCSC in the course of the BCSC investigation, such as the documents it obtained from the SEC prior to November 2013, are disclosable by the BCSC, if relevant and not privileged. The documents so obtained prior to November 2013 were disclosed by the executive director in keeping with his disclosure obligation because they had become documents in the possession of the BCSC.
- [100] In the March application Clozza refers to his belief that information relating to his defence may not have been provided by the SEC to the BCSC. The executive director has confirmed that the BCSC does not have the SEC documents Clozza seeks and that if the documents exist, they are beyond the BCSC's control.
- [101] We agree with the executive director that the cases cited by Clozza do not support his submission that having named the SEC staff members to the BCSC investigation as of November 15, 2013, the executive director is required to produce all relevant information gathered by the SEC investigators (emphasis added).
- [102] The purpose and extent of the appointment of the two SEC staff members named in the November 2013 investigation order is set out in the November 7, 2013 memorandum provided by BCSC staff requesting that order. That purpose was limited to the attendance of the two SEC staff members at upcoming BCSC investigative interviews.
- [103] The remedy suggested by *Hu*, that the executive director request the SEC to provide the documents Clozza now seeks, has already been carried out by the executive director with respect to the previously requested SEC documents but was met with a refusal. We agree with the executive director that there would be no utility in ordering him to seek these documents again.
- [104] More importantly, we read the statement in *Hu* that "when persons are subject to allegations in a notice of hearing, they are entitled to disclosure of all relevant information gathered in the course of the investigation", to mean in the course of the BCSC's investigation of the particular matter, including information gathered pursuant to a BCSC investigation order with respect to that investigation and the powers granted investigators under sections 142 and 143 of the Act.

[105] The memorandum of November 7, 2013 in support of the appointment of the two SEC staff named in the November 2013 amended investigation order makes it clear that their appointment was at the request of the SEC and for the limited purpose of sitting in on some BCSC investigative interviews. There is no evidence that the two SEC staff members appointed under the November 2013 amended investigation order utilized the powers given them under sections 142 and 143 of the Act to do anything beyond their attendance at upcoming BCSC interviews. The transcripts of any such interviews are not in issue in this application. There is no evidence to support that the SEC obtained any of the information Clozza now seeks pursuant to the powers granted to its two staff members consequent upon their appointment under the BCSC November 2013 amended investigation order.

[106] Given the evidence we have, we conclude the SEC information Clozza seeks under the March application is information related to the independent investigation conducted by the SEC with respect to its own complaint against Clozza and not information obtained by the SEC pursuant to the appointment of the two staff members under the November 2013 amended investigation order. Neither the executive director's *Stinchcombe* disclosure obligation nor the remedy suggested by *Hu* that the executive director request the SEC to provide the information Clozza seeks extend to information not in the BCSC's possession or control that was obtained by the SEC under its own investigatory powers under US law in connection with its own independent investigation.

[107] Accordingly, there is no basis for us to make the disclosure orders requested in paragraph 1 of the March application in respect of any of the SEC information requested by Clozza, whether such information was previously requested by the executive director from the SEC or not.

[108] The purpose of the SEC MOU and the IOSCO MMoU is to enable regulatory authorities who are signatories to seek information and assistance from other signatories.

[109] As the executive director points out these mutual assistance memoranda have not been put in place for the purpose of obtaining information for third parties but to enable a signatory such as the BCSC to obtain information from another signatory such as the SEC for the purpose of the BCSC's own enforcement investigations.

[110] In effect, Clozza is seeking orders from the BCSC to obtain the SEC documents he had but no longer has, presumably through use of these mutual assistance memoranda. These are documents that we have determined are not required to be disclosed pursuant to the executive director's *Stinchcombe* disclosure obligation because they are not in the executive director's possession or control. Rather, they are documents which were in Clozza's own possession having been received by him directly from the SEC, a foreign regulator, in connection with the SEC's independent and now settled complaint against Clozza. The fact that Clozza failed to retain them does not place the executive director

under an obligation to request these documents from the SEC for the purpose of Clozza's defence.

[111] The IOSCO MMoU and SEC MOU while providing for mutual assistance and the exchange of information, do so for the purpose of enforcing and securing compliance with the securities laws and regulations applicable in the jurisdiction of the requesting regulatory authority. The provisions of the memoranda of understanding are not intended to create legally binding obligations or supersede domestic laws. Nor do the memoranda of understanding confer on any person not a regulatory authority the right or ability, directly or indirectly, to obtain any information under the memoranda of understanding.

[112] The order sought by Clozza requiring the executive director to take the necessary steps to obtain the documents he now seeks again from the SEC is not the purpose of these mutual assistance memoranda and it would be improper for us to make such an order.

[113] Clozza has been aware of the SEC disclosure documents since 2014 and has for some time been aware that they may not have been provided by the SEC to the BCSC following the BCSC's document disclosure commencing in June 2018. Clozza has long had the opportunity to seek these documents himself directly from the SEC or to obtain the evidence he seeks for his defence directly from other sources.

[114] There is no basis for us to make the requested disclosure orders with respect to documents obtained by the SEC in connection with the SEC's independent investigation of its complaint against Clozza and previously disclosed to him in relation to that complaint.

[115] With respect to the BCSC information sought in items (c), (e), (h), and (k) of paragraph 1 of the March application, the executive director states he has fulfilled his disclosure obligations. Neither in his March application nor in Clozza affidavit #6 does Clozza refer to specific documents of the nature requested that he says the BCSC has failed to disclose. Rather, all references in Clozza affidavit #6 are to information that Clozza says he believes he received as part of the SEC disclosure to him in 2014.

[116] There is no basis for us to make any order for disclosure with respect to the BCSC information sought in paragraph 1 of the March application.

[117] The applicant has not requested any disclosure related orders with respect to the references in the March application and Clozza affidavit #6 concerning the possibility of information having been included in the SEC disclosure with respect to Blechman and Anguka that was not included in the BCSC disclosure. The executive director points out that Clozza provides no detail as to what he says is missing. The executive director advises that the BCSC has disclosed transcripts of SEC interviews of Blechman and Anguka and documents related to both Blechman and Anguka as listed in the executive

director's submissions. If the disclosure orders requested in the March application had included a request for information included in the SEC disclosure but not in the BCSC disclosure with respect to Blechman and Anguka, we would have denied the request for such orders for the same reasons as stated above with respect to the disclosure related orders actually requested in the March application.

Stay Order Requests

[118] Clozza makes two different requests for an order for a permanent stay of proceedings.

[119] The first such order at paragraph 2 of the March application is requested “as a consequence of the withholding of disclosure of exculpatory and potentially exculpatory evidence” related to the allegations in the Amended Notice of Hearing “gathered by the SEC upon the appointment of [the two SEC staff members named in the investigation order] as investigators in the BCSC investigation”.

[120] The second order requested at paragraph 5 of the March application is based on “the refusal of the SEC investigators to provide relevant information gathered by them in the BSCS investigation”.

[121] The evidence does not support that the executive director has failed in his obligation to disclose relevant materials in his possession or under his control as required by the Hearings policy which is itself based on the disclosure obligation articulated in *Stinchcombe*. Indeed the information Clozza seeks is acknowledged to be information that may not have been provided by the SEC to the BCSC.

[122] Nor does the evidence support that the SEC information Clozza seeks was obtained by the SEC pursuant to the BCSC November 2013 amended investigation order. While the executive director attempted to assist the applicant by making a request on Clozza’s behalf to the SEC for those materials requested by Clozza in November 2019, we have found there was no requirement for the executive director to do so.

[123] As the executive director has pointed out, the foundation of the March application is that Clozza “did not retain” disclosure provided to him by the SEC and thus it is Clozza’s own conduct that has caused him to request that the BCSC request SEC disclosure for him for a second time. Clozza says he is aware of the existence of these documents and knows where they are. He can request the documents from the SEC himself.

[124] The executive director also points to the considerable time that has passed between the time Clozza became concerned that all of the SEC disclosure to him may not have been included in the BCSC disclosure in June 2018 and his pursuit of those documents in the March application or from other sources. The executive director also points to the lack of specificity about the items he says are missing.

[125] The executive director characterizes Clozza's request for a permanent stay of proceedings in these circumstances as an extraordinary remedy. We agree.

[126] We find no factual or legal basis to order the extraordinary remedy of a permanent stay of proceedings as requested in the March application.

IV. Conclusion

[127] We dismissed Clozza's November application. The disclosure orders Clozza requested in the November application and the other orders Clozza requested orally during the hearing of the disclosure portion of the November application were denied in the panel's March 19, 2020 ruling. As we have found above, Clozza has failed to establish any basis that would support our making any order for a permanent stay of proceedings as requested in the remainder of the November application.

[128] We dismissed Clozza's March application. The panel has denied all requests in the March application for disclosure orders and orders for a permanent stay of proceedings for the reasons stated above.

July 13, 2020

For the Commission:

Suzanne K. Wiltshire
Commissioner

George C. Glover, Jr.
Commissioner