British Columbia Securities Commission

Citation: 2013 BCSECCOM 319

Aviawest Resorts Inc., Rob DiCastri, Andrew Pearson, James Pearson, Lawrence Pearson, Susan Pearson, Zulak Financial Group Ltd., Melvin Zulak, and Karla Ann Davis

***Securities Act*, RSBC 1996, c. 418**

Hearing

Panel	Brent W. Aitken	Vice Chair
	Kenneth G. Hanna	Commissioner
Hearing Dates	2012: December 10-14, 17, 18 2013: January 7, April 24	
Submissions Completed	April 24, 2013	
Date of Decision	August 9, 2013	
Appearing		
Joyce M. Johner	For the Executive Director	
Patrick J. Sullivan	For Rob DiCastri, Andrew Pearson, James Pearson, Lawrence Pearson, and Susan Pearson	

Decision

I Introduction

¶ 1 This is a hearing under sections 161(1) and 162 of the *Securities Act*, RSBC 1996, c. 418.

¶ 2 In a notice of hearing dated August 9, 2012 (2012 BCSECCOM 316), the executive director alleges that, from December 2006 through June 2011, Aviawest Resorts Inc., Rob DiCastri, Andrew Pearson, Lawrence Pearson and Susan Pearson contravened section 61(1) of the Act by distributing securities of Aviawest, without filing a prospectus, to 214 investors for proceeds of $12.7 million. Excluding trades for which the executive director concedes exemptions were available, these numbers become 206 investors for proceeds of $11.6 million.

¶ 3 The notice of hearing contained similar allegations against Zulak Financial Group Ltd., Melvin Zulak, and Karla Ann Davis. Before the hearing, these respondents entered into a settlement agreement with the executive director in which they admitted to selling securities with a total value of $770,000 to 14 of their life insurance clients. Melvin Zulak and Davis agreed to pay administrative penalties of $6,000 each.

¶ 4 The individual respondents were represented by counsel. Aviawest was not represented and did not appear at the hearing.

¶ 5 We sometimes refer to the Pearsons by their first names (Andrew goes by "Andy", and James by "Jim").

II Summary of Decision

¶ 6 In this decision we find that Aviawest, all of the Pearsons, except Lawrence, and DiCastri contravened section 61(1). We have made cease-trade orders against Aviawest. We made no orders against the individual respondents

III Background

A Aviawest

¶ 7 Aviawest is a British Columbia corporation incorporated in 1999 that owned and managed timeshare vacation properties. It was a family business. The Pearsons have been Aviawest's directors since its inception.

¶ 8 Aviawest's first and primary property was Pacific Shores, a 15-acre, multi-phase ocean front resort on Vancouver Island. Andy Pearson started the development of Pacific Shores in 1991. His vision was to build a resort that blended into its natural surroundings and provided a secure, peaceful environment for its owners and guests.

¶ 9 His vision was realized. Pacific Shores is recognized by both its timeshare owners and third party evaluators as one of the top resorts of its kind in North America. Timeshare owners at Pacific Shores described the resort using phrases such as "first class", "cream of the crop", "really well run", and "top drawer".

¶ 10 An important feature of timeshare properties is the ability of an owner to exchange time purchased at one property for time at another. Indeed, some buyers of timeshare properties buy primarily because of the exchange feature.

¶ 11 Resort Condominiums International (RCI) is an organization that facilitates the exchange of timeshares between properties. Because there is a considerable range of quality among timeshare properties, RCI regularly evaluates the properties in

its exchange pool. Owners of higher-quality properties get more points to use for exchange than owners of lower-quality properties.

¶ 12 Pacific Shores consistently enjoyed the highest rating in the RCI network.

¶ 13 Aviawest's business was prosperous, profitable, and growing until a combination of events from 2008 through 2011 presented significant challenges to the company.

¶ 14 The first event was the global credit crisis that started in the summer of 2008. One of the eventual consequences of that was a decision by the US company that Aviawest used to monetize vendor financing notes discontinued that business with the company. This had negative implications for Aviawest's cash flow.

¶ 15 Other events negatively affected revenue, in two ways. First, the impact of the crisis on the US economy also meant that fewer US residents were travelling, which meant fewer bookings for Aviawest. Second, internet-based booking services were putting downward pressure on room rates.

¶ 16 Finally, Aviawest was building a new property in Victoria, and this project fell behind schedule and went over budget.

¶ 17 Ultimately, Aviawest was forced to restructure under the *Companies Creditors Arrangement Act (Canada)*. Under the restructuring, all of Aviawest's assets were sold and most of Aviawest's properties came under the management of another company.

¶ 18 Aviawest still exists, but it has no assets and is inactive.

B The individual respondents

¶ 19 All of the individual respondents testified. We found all of them to be articulate and credible. Their testimony relating to the events relevant to the allegations in the notice of hearing was consistent. The executive director took no issue with their credibility. We have no hesitation in relying on their evidence.

¶ 20 Andy Pearson was Aviawest's president and CEO. He developed Pacific Shores. His role included property development, financing and regulatory disclosure. Andy prepared some of the notes distributed by Aviawest.

¶ 21 Susan Pearson essentially managed Pacific Shores and dealt with all fiscal issues relating to Aviawest's properties. Susan also managed the owners' associations and was in charge of regulatory matters. Susan's responsibilities included general

oversight of the process through which the notes were issued and assigned, and regularly signed notes on behalf of Aviawest.

¶ 22 Jim Pearson was in charge of marketing. His responsibilities did not include corporate finance, regulatory matters or compliance, although he regularly signed notes on behalf of Aviawest.

¶ 23 DiCastri is a chartered accountant and joined Aviawest in 2008 as its CFO. His responsibilities were accounting and corporate finance. DiCastri regularly signed notes on behalf of Aviawest. His responsibilities did not include regulatory matters or compliance. DiCastri became a director of Aviawest shortly after he joined the company.

¶ 24 Lawrence Pearson was responsible for resort operations. His responsibilities did not include corporate finance, regulatory matters or compliance. He had no role in the distribution of notes, other than to occasionally sign notes when others were not available to do so.

C Aviawest's Regulatory Environment

¶ 25 Aviawest's timeshare sales activities were regulated, initially by the *Real Estate Act* and then by the *Real Estate Services Act* and the *Real Estate Development Marketing Act*. Andy and Susan prepared prospectuses or disclosure statements relating to Pacific Shores or Aviawest under that legislation. Andy and Susan also prepared amendments to these documents as required by that legislation whenever a material change occurred. This happened frequently – the initial prospectus was amended 15 times in about 9 years.

¶ 26 An addition to Aviawest's business model in 2004 required regulatory approvals from the British Columbia Financial Institutions Commission (FICOM), as well as regulators in the states of Washington and California.

¶ 27 The disclosure provided to investors through these documents was complex and lengthy. The package ran to hundreds of pages.

¶ 28 Andy and Susan took Aviawest's compliance responsibilities seriously. In addition to the regulatory environment just described in which Aviawest operated, Andy had considerable experience with regulatory matters associated with the development of the property. He was scrupulously attentive to the property development and environmental regulatory requirements in developing Pacific Shores.

¶ 29 Andy's response to a November 2011 letter from FICOM is an illustration of the Pearsons' respectful attitude to compliance. The letter followed Aviawest's filing

under CCAA. In it, FICOM reminded Aviawest that it was required to amend its disclosure statement to disclose changes related to the CCAA process prior to making any further sales. Andy wrote to FICOM as follows:

> "Both projects were removed from active sales prior to our filing under the *Companies Creditor Arrangement Act* on October 24th, 2011 until we have filed appropriate amendments to the Disclosure Statements in question. No sales have closed since filing, nor will there be until after appropriate amendments are made to the Disclosure Statement. As soon as is practicable, and discharge arrangements are made, we will file amendments and circulate to any purchasers with funds in trust."

¶ 30 Similarly, when Aviawest learned from Commission staff that a promissory note could be a security, it immediately stopped issuing notes.

D Aviawest's distributions of securities

¶ 31 Aviawest issued three types of promissory note in its business – "direct notes", "assigned notes", and "vendor incentive notes".

¶ 32 Direct notes were notes payable to investors and issued by Aviawest to raise capital.

¶ 33 Aviawest offered timeshare purchasers vendor financing in the form of a note payable to Aviawest. These notes became the assigned notes. Holders of the notes received a stream of payments funded by the timeshare purchasers' payments on the notes. As part of the assignment to an investor, Aviawest guaranteed payment of the notes.

¶ 34 Vendor incentive notes were notes that Aviawest issued to investors who wished to exchange their existing time-share interest for another that offered more time. To provide existing timeshare owners with an incentive to do so, Aviawest offered up to $20,000 in incentives to sweeten the deal. The incentives took various forms, including airline tickets, vacations and discounts. Some discounts were structured as a promissory note from Aviawest to the timeshare owner. Of the $11.6 million alleged to have been raised illegally by Aviawest, $1.5 million were vendor incentive notes.

¶ 35 It is not disputed that the direct notes and assigned notes were securities, but the individual respondents say the vendor incentive notes were not securities.

¶ 36 The investors in all of the notes were all existing Aviawest timeshare owners, apart from a few of the 14 investors who invested through Zulak Group, which had approached Aviawest in 2009 to see if it could sell notes to its clients.

¶ 37 Aviawest did little to promote the distribution of notes. Once owners became aware that notes were sometimes available for investment, they would call Aviawest from time to time to ask whether any notes were currently available. Many of the notes were placed as a result of these inquiries.

¶ 38 The use of direct and assigned notes was not unique to Aviawest; it was common practice in the timeshare industry. In developing the form of note for use by Aviawest, Andy used precedents from other well-known, and well-regarded, British Columbia timeshare operators.

¶ 39 The evidence is that until Aviawest's financial difficulties impaired its ability to meet its obligations, the notes held by investors performed as promised, with the exception of a few instances where Aviawest was called on its guarantee of the assigned notes. In those instances, Aviawest met its obligations.

E Legal Advice

¶ 40 Throughout its history, Aviawest had the benefit of outside counsel to assist it with the legal requirements associated with its business. Aviawest did not ask for securities law advice from this counsel (having no reason, it thought, to do so) and there is no evidence that counsel volunteered any such advice.

¶ 41 Towards the end of 2008, the Pearsons decided that the business had grown in size and complexity to the point where Aviawest would benefit from having its own inside counsel.

¶ 42 The Pearsons began discussions with Randall Walford, a purported expert in real estate, condominium, and timeshare law.

¶ 43 When Aviawest approached Walford, he provided a resume that included these descriptions of his experience and capabilities:

- Proven recreational real estate lawyer and General Counsel with well-tested executive and international capabilities
- Proven expertise in strategic planning, product development, pricing, marketing, Staff development, and project execution
- Organized and managed day-to-day legal operations in a billion-dollar business

¶ 44 In a biography he prepared after joining Aviawest, Walford described his skills and experience. These excerpts give the flavour of his self-assessment:

> ". . . involved in creating and bringing to market thousands of lots, condos, fractionals, and timeshare interests over the past nine years in the industry
>
> Enjoying the challenge of projects without obvious solutions, Randall is known for his creativity in sidestepping provincial red tape . . .
>
> Prior to joining Aviawest, Randall's career as a lawyer saw him argue cases successfully all the way to the Supreme Court of Canada. More recently, he practised as a lawyer exclusively focused on developing financing, and sale of resort and recreational property. Randall draws on a background of working internationally . . . where his work involved geo-political risk analysis, cross-cultural communications skills, and international logistics. He is particularly interested in acquisition, franchising, and other scalable models as vehicles for expanding resort brands with vacation ownership and fractional components to meet the needs of the world's growing middle class.
>
> Randall writes the regular *Resortlaw* column for *Western Canadian Resort and Investment Property* magazine and is a source of comment for national radio, various newspapers and trade magazines on matters concerning the recreational property and vacation ownership industry."

¶ 45 During the recruitment process, Walford sold Aviawest on the idea of hiring him as general counsel, rather than as a lawyer. He explained to Susan that a lawyer was "someone you instructed and then he did what you asked. He might give you advice, but it would be in respect of what you asked him specifically."

¶ 46 On the other hand, he said a general counsel was "someone who was in charge of all of your legal affairs. A general counsel would be responsible for the hiring and retaining of other legal services, the review of your whole business and how you operated and what laws you should be following."

¶ 47 Aviawest hired Walford as general counsel in February 2009 and appointed him to the board. As general counsel, he was responsible for risk management and compliance, regulatory filings, and for hiring other counsel when required in areas in which he did not have expertise.

¶ 48 Walford and Aviawest parted company in February 2011. While he was there, he identified securities law issues related to a new project, for which he hired appropriately-qualified counsel. Walford did not, however, identify to any of the individual respondents any securities law issues related to the notes, nor did he give them any advice about the securities law implications of Aviawest's use of notes in its business.

IV Analysis and Findings

A Issues

¶ 49 Section 61(1) says ". . . a person must not distribute a security unless . . . a preliminary prospectus and a prospectus respecting the security have been filed with the executive director" and the executive director has issued receipts for them.

¶ 50 Section 1(1) defines "security" to include a "note or other evidence of indebtedness."

¶ 51 Section 1(1) defines "trade" to include "(a) a disposition of a security for valuable consideration" and "(f) any act, advertisement, solicitation, conduct or negotiation directly or indirectly in furtherance of any of the activities specified in paragraphs (a) to (e)".

¶ 52 Section 1(1) defines "distribution" as "a trade in a security of an issuer that has not been previously issued".

¶ 53 The executive director alleges that all of the respondents contravened section 61(1) of the Act by engaging in conduct that constituted a trade that was a distribution. He also alleges that the individual respondents also contravened that section through the application of 168.2(1), which we cite below.

¶ 54 It is not disputed that Aviawest has never filed a prospectus under the Act, that the direct notes and the assigned notes are securities, and that Aviawest distributed those securities.

¶ 55 The issues are:

- whether the vendor incentive notes are securities,
- what prospectus exemptions, if any, were available to Aviawest in connection with its distributions of the notes, and
- whether the individual respondents contravened section 61(1).

B Discussion

Vendor Incentive Notes

¶ 56 The individual respondents say the vendor incentive notes are in the nature of commercial notes, and not securities.

¶ 57 The executive director says the vendor incentive notes are just another form of direct notes and are therefore securities.

¶ 58 In *British Columbia (Securities Commission) v Gill* 2003 BCCA 169, the British Columbia Court of Appeal confirmed that to be a security, a note or evidence of indebtedness must have the attributes of a security.

¶ 59 *Gill* was an appeal of a decision of the Commission that held that loan agreements relating to loans to a registrant from former clients were securities. The BC Court of Appeal adopted the analysis of the US Supreme Court in *Bob Reves v Ernst & Young* 494 US 56 (1990) holding that "note" is a broad term that encompasses instruments used for both investment and commercial purposes.

¶ 60 The Court in *Reves* set out four factors to consider in order to determine whether a note is for investment or commercial purposes (at para. 27):

> "First, we examine the transaction to assess the motivations that would prompt a reasonable seller and buyer to enter into it. If the seller's purpose is to raise money for the general use of a business enterprise or to finance substantial investments and the buyer is interested primarily in the profit the note is expected to generate, the instrument is likely to be a 'security.' If the note is exchanged to facilitate the purchase and sale of a minor asset or consumer good, to correct for the seller's cash-flow difficulties, or to advance some other commercial or consumer purpose, on the other hand, the note is less sensibly described as a 'security.' . . .
>
> Second, we examine the 'plan of distribution' of the instrument . . . to determine whether it is an instrument in which there is "common trading for speculation or investment . . .'.
>
> Third, we examine the reasonable expectations of the investing public: The Court will consider instruments to be 'securities' on the basis of such public expectations, even where an economic analysis of the circumstances of the particular transaction might suggest that the instruments are not 'securities' as used in that transaction. . . .

> Finally, we examine whether some factor such as the existence of another regulatory scheme significantly reduces the risk of the instrument, thereby rendering application of the Securities Acts unnecessary."

¶ 61 The vendor incentive notes were part of a commercial transaction. Existing timeshare owners were motivated by the opportunity to exchange their existing timeshare for a product that suited them better. They were further motivated by the discount offered by Aviawest in the form of the promissory note. Aviawest was motivated by the desire to sell more product to existing owners.

¶ 62 The vendor incentive notes were not intended as a general distribution for the purpose of raising capital.

¶ 63 The investing public (in this case, the timeshare owners) did not view the transaction as an investment in Aviawest but as a financial benefit offered by Aviawest as part of the exchange transaction.

¶ 64 The notes were issued only to existing timeshare owners, who had had full disclosure of Aviawest's business through the disclosure documents they received from Aviawest under real estate legislation.

¶ 65 In our opinion, the essence of the transaction that gave rise to the vendor incentive notes was commercial, not investment. We find that the vender incentive notes are not securities.

Prospectus exemptions

General

¶ 66 In *Solara* 2010 BCSECCOM 163, the Commission panel explained the obligations on those who seek to rely on the exemptions under the Act. It said:

- the person relying on an exemption has the onus of proving that the exemption is available,
- the issuer must establish and document the facts that demonstrate that the investor falls in the category that triggers the exemption (for example, a close business associate of a director of the issuer), and
- lack of documentation will make it difficult for the person to meet that onus.

¶ 67 The panel also noted that, whether or not an issuer documented the eligibility of a trade to qualify for the exemption at the time of the trade, the trade can still qualify for the exemption if the issuer can establish by other means that the trade, as a matter of fact and law, did meet the requirements of the exemption at the time it was made.

¶ 68 These are the circumstances here. Aviawest kept no documents to prove compliance with the exemption, for the simple reason that it had not turned its mind at all to the requirements of the Act, not realizing that promissory notes could be securities. At the time it distributed the notes, it was not contemplating the use of any of the exemptions.

Business Associates Exemption

¶ 69 Section 2.5(1)(e) of National Instrument 45-106 *Prospectus and Registration Exemptions* removes the prospectus requirement if the purchaser is a close business associate of a director of the issuer. The individual respondents rely primarily on this exemption on the basis that many of those who invested in notes were close business associates of one or more members of the Pearson family, all of whom were directors of Aviawest.

¶ 70 In *Solara*, the Commission approved the interpretations in the companion policy to NI45-106 of the meaning of "close business associate." These policies say that the relationship must, at the time of the trade, be of a nature that the investor can assess the person's capabilities and trustworthiness. An investor purportedly a close business associate must have had sufficient prior business dealings with the person to make the assessment.

¶ 71 The policy also says this about customer relationships:

> "An individual is not a close business associate solely because the individual is . . . a client, customer, former client or former customer."

¶ 72 It is apparent from the use of the word "solely" that the suggested interpretation is that an investor's status as a customer of the issuer is not of itself sufficient to establish that the investor is a close business associate. We find that to be an appropriate interpretation of the exemption.

¶ 73 That said, a customer relationship can form the basis of a business associate relationship if there are other factors present that puts the investor in a position to assess the person's capabilities and trustworthiness. For example, a long-standing, repeat customer could well have sufficient prior business dealings with a director of the issuer to make the assessment, based on first-hand observations, on a continuous basis, of how the business was run, and of the role played by the individual known to the investor in the running of the business. This interpretation is consistent with the policy basis behind the exemption.

¶ 74 The individual respondents entered affidavits into evidence describing over 40 investors and, to some extent, those investors' relationships to the Pearsons and how that relationship influenced their decision to purchase notes.

¶ 75 The executive director says we should give no weight to these affidavits because they are not "best evidence".

¶ 76 We accepted the affidavits and accorded normal weight because they are sworn evidence, the affiants are not respondents and are not subject to any apparent motive not to tell the truth, the evidence they gave is consistent with the other evidence in the hearing, and the executive director did not apply to cross-examine them.

¶ 77 The affidavits present a general profile of those who invested in the notes, essentially all of whom were Aviawest timeshare owners. These investors were familiar with the property and had ample opportunity to observe how it was maintained and operated. Most were long-standing Aviawest timeshare owners.

¶ 78 For some, the affidavit evidence shows that they had a relationship sufficient to qualify them as close business associates for the purposes of the exemption because of their relationship with one or more members of the Pearson family.

¶ 79 However, many of the affidavits do not establish a direct relationship with any member of the Pearson family (a necessary element of the exemption), or fail to establish that their relationship was sufficient to show that they qualified as close business associates.

¶ 80 Although the individual respondents did not present evidence sufficient to establish that all of these investors qualified under the close business associates exemption, the relationship they had with the Pearsons and Aviawest is relevant to the issue of sanctions, which we discuss below.

Other Exemptions

¶ 81 Commission staff conceded that either the accredited investor exemption (section 2.3(1) of NI45-106) or the minimum amount exemption (section 2.1(10)(1)) was available for trades to eight of the investors who invested through Zulak Group, representing $1.1 million of the amount raised in the distribution.

¶ 82 The individual respondents also entered evidence showing that trades to nine more investors qualified under the accredited investor exemption, the minimum amount exemption, or the employee exemption (section 2.24(1) of NI45-106).

Impact of exemptions

¶ 83 Although the individual respondents established that exemptions were available for some of the trades of notes, there was no evidence that an exemption was available for trades to at least 150 investors, whose investments totalled several million dollars.

C Findings

¶ 84 We find that Aviawest distributed, without filing a prospectus, several million dollars' worth of direct notes and assigned notes to at least 150 investors, and in so doing contravened section 61(1).

¶ 85 The notice of hearing alleges that the individual respondents contravened section 61(1) "by distributing securities for which a prospectus has not been filed". The notice of hearing also alleges that the individual respondents contravened section 61 of the Act through section 168.2, which says that when a company contravenes the Act, a director who "authorizes, permits or acquiesces" in the contravention also contravenes the same provision.

¶ 86 The definition of trade includes acts in furtherance of a trade, which in this case includes the preparation and signing of notes, and participation in the distribution of the notes. The evidence is clear that Andy, Susan, Jim, and DiCastri prepared notes, signed them, or participated in their distribution. The evidence is that Lawrence had no role at all in the issue or assignment of notes, other than to sign the occasional note on behalf of Aviawest when none of the other individual respondents was available to do so.

¶ 87 The individual respondents argued that a due diligence defence is available against an allegation under section 61(1). We disagree. We agree generally with the submissions of the executive director on this point. In particular, the case law is clear that due diligence, although it is relevant to the issue of sanction, is not a defence against an allegation under section 61(1) (see *Gordon Capital Corp. v. OSC* [1991 O.J. No. 934).

¶ 88 We find that Andrew Pearson, Susan Pearson, James Pearson, and DiCastri contravened section 61(1).

¶ 89 We do not find that Lawrence Pearson contravened the Act.

¶ 90 Having made those findings, we need not consider the allegation against the individual respondents based on section 168.2.

V Decision

A General

¶ 91 This was the liability portion of the hearing. Normally, after finding that the respondents had contravened the Act, we would hear the parties on the subject of what sanctions would be in the public interest.

¶ 92 Here, however, based on the evidence before us, and considering the public interest, it is our opinion that, although limited orders are appropriate regarding Aviawest, no orders are necessary in relation to the individual respondents.

B Aviawest

¶ 93 We are making orders against Aviawest. Because it has no assets and is dormant, those orders are limited to cease trade orders.

C The Individual Respondents

¶ 94 Although we have found that the individual respondents (other than Lawrence Pearson) contravened section 61(1), the evidence is that orders against them are not necessary to protect the public interest.

¶ 95 Orders under sections 161(1) and 162 of the Act are protective and preventative, intended to be exercised to prevent future harm (*Committee for Equal Treatment of Asbestos Minority Shareholders v Ontario (Securities Commission*) 2001 SCC 37).

¶ 96 In Re Eron Mortgage Corporation [2000] 7 BCSC Weekly Summary 22, the Commission discussed the factors relevant to sanction.

¶ 97 Of the factors identified in *Eron*, we consider these to be most relevant to the circumstances of this case:

- the seriousness of respondents' conduct,
- the respondents' past conduct
- the extent to which the respondents were enriched,
- factors that mitigate the respondents' conduct,
- the harm suffered by investors as a result of the respondents' conduct,
- the damage done to the integrity of the capital markets in British Columbia by the respondents' conduct,
- the risk to investors and the capital markets posed by the respondents' continued participation in the capital markets of British Columbia, and
- the need to deter those who participate in the capital markets from engaging in inappropriate conduct.

Seriousness of the conduct

¶ 98 Aviawest's distribution of notes was limited, with a few exceptions, to its existing timeshare owners. Not all of these owners had a relationship with the individual respondents that qualified them as close business associates, but they were all familiar with one or more of the Aviawest properties and knew they were well maintained and operated. They knew that Pacific Shores enjoyed the highest RCI rating. They would have believed they were investing in a reliable, high-quality operation.

¶ 99 There is no evidence that Aviawest marketed the notes in any serious way or otherwise induced investors to purchase them. Indeed, many notes were sold as a result of investor inquiries.

Respondents' past conduct; enrichment; mitigation

¶ 100 Aviawest was a long-established, highly successful, and highly regarded business. Measured by their results, the Pearsons and DiCastri appear to be honest, ethical and capable people who demonstrated a high degree of competence and experience in their management of the business.

¶ 101 The individual respondents also treat regulatory compliance matters seriously and with respect. At the first sign that there might be trouble with the notes under the Act, they caused Aviawest to stop distributing notes immediately.

¶ 102 Their conduct carries no whiff of dishonesty, of any intent to deceive, or of any intent to profit by avoiding the rules.

¶ 103 There is no evidence of any unjust enrichment.

¶ 104 The Pearsons hired Walford as general counsel with a view to ensuring their operations would be in compliance with all legal requirements. Given the description of skills and experience that Walford held out, it was reasonable for them to assume that he was fulfilling his role as general counsel as he described it to Susan. Unfortunately, although he identified securities issues in another matter, he gave them no advice about the potential securities law implications of Aviawest's use of notes in its business.

¶ 105 Without that advice, they did not realize that the notes, a common business financing instrument that they had been using for years, could be a security.

Harm suffered by investors;

¶ 106 This Commission has held that even in the absence of direct evidence of investor harm, some harm may be inferred from the contravention of the Act. That said,

direct evidence of serious investor harm is relevant to sanction. There was no evidence of that here.

Capital market integrity; risk to investors

¶ 107 In our opinion, the conduct of the individual respondents in this case did not compromise the integrity of our capital markets. Neither do we believe that their continued participation in our markets poses any threat to those markets or to investors.

Deterrence

¶ 108 It is also clear from the evidence, including the respondents' testimony, that there is no need to issue orders to deter them from future misconduct. Neither is there any need to do so for the purposes of general deterrence: the facts in this case are unique.

Conclusion

¶ 109 Considering all of these factors, and the public interest, in our opinion it is not necessary to make orders against the individual respondents. In particular, we are satisfied that they pose no threat to investors or markets, and that orders are not required to deter them from future misconduct.

VI Order

¶ 110 Considering it to be in the public interest, we order, under section 161(1)(b) of the Act, that:

1. all persons cease trading in, and are prohibited from purchasing, securities of Aviawest, permanently; and

2. Aviawest cease trading in, and is prohibited from purchasing, securities and exchange contracts, permanently.

¶ 111 August 9, 2013

¶ 112 **For the Commission**

Brent W. Aitken
Vice Chair

Kenneth G. Hanna
Commissioner