BRITISH COLUMBIA SECURITIES COMMISSION

Securities Act, RSBC 1996, c. 418

Citation: Re SPYru Inc., 2015 BCSECCOM 452 Date: 20151214

SPYru Inc., Paradox Distributors (1992) Ltd., Echo Partners Ltd., U-GO Brands Nutritional Products Inc., Peter David Harris, Lorne Neil Cire, Christopher Andrew Burke, Millard Michael Kwasnek, and Joseph Yvan JeanClaude Thibert a.k.a. John Thibert

Panel	Nigel P. Cave	Vice Chair
	Judith Downes	Commissioner
	Audrey T. Ho	Commissioner
Hearing Date	September 16, 2015	
Submissions Completed	September 16, 2015	
Date of Decision	December 14, 2015	

Appearing

Mila Pivnenko James Torrance	For the Executive Director
Tam C. Boyar	For Lorne Neil Cire Millard Michael Kwasnek and Joseph Yvan JeanClaude Thibert a.k.a. John Thibert
	For SPYru Inc.
Peter David Harris	Echo Partners Ltd. and U-GO Brands Nutritional Products Inc. For himself
Lorne Neil Cire	Paradox Distributors (1992) Ltd. Echo Partners Ltd. and U-GO Brands Nutritional Products Inc.
Christopher Andrew Burke	Echo Partners Ltd. and U-GO Brands Nutritional Products Inc. For himself
Millard Michael Kwasnek	Echo Partners Ltd. and U-GO Brands Nutritional Products Inc.

Joseph Yvan JeanClaude Thibert a.k.a. John Thibert	Echo Partners Ltd. and U-GO Brands Nutritional Products Inc.

Decision

I Introduction

[1] This is the sanctions portion of a hearing under sections 161(1) and 162 of the *Securities Act*, RSBC 1996, c. 418. The Findings of this panel on liability dated July 7, 2015 (2015 BCSECCOM 277) are part of this decision. These are the reasons of all panel members on all issues, except for the decision on orders under section 161(1)(g) of the Act. Vice Chair Cave's dissenting reasons on that issue are below.

[2] In the Findings, the panel found that:

a) SPYru breached section 61 of the Act with respect to distributions of SPYru shares totaling $1,347,000;

b) U-GO breached section 61 with respect to distributions of U-GO shares totaling $636,000;

c) Paradox, Cire and Harris breached section 61 with respect to distributions totaling $834,000 of SPYru shares and Cire breached section 61 with respect to distributions totaling $27,500 of U-GO shares;

d) Kwasnek breached section 61 with respect to distributions totaling $238,000 of SPYru shares and $366,000 of U-GO shares;

e) Thibert breached section 61 with respect to distributions totaling $392,000 of SPYru shares and $27,500 of U-GO shares;

f) Burke breached section 61 with respect to distributions totaling $65,000 of SPYru shares and $51,000 of U-GO shares;

g) each of Harris and Cire, as directors of SPYru, is liable under section 168.2(1) of the Act for the contraventions of section 61 by SPYru;

h) each of Harris, Cire, Kwasnek, Thibert and Burke, as directors of U-GO, is liable under section 168.2(1) for the contraventions of section 61 by U-GO;

i) each of U-GO and Harris is liable under section 168.1(1)(b) of the Act in respect of four Exempt Distribution Reports (EDRs) filed by U-GO; and

j) each of Echo, U-GO, Cire and Kwasnek contravened a Temporary Order issued on March 13, 2014 by a panel of the Commission, which order prohibited the respondents from trading in securities and engaging in investor relations activities during the currency of the order.

[3] The panel dismissed allegations against certain of the respondents that they made misrepresentations to investors in contravention of section 50(1)(d) of the Act and against certain of the respondents that they committed fraud in contravention of section 57(b) of the Act. Further the panel dismissed the executive director's request to issue further orders against the respondents on the basis that the conduct of the respondents was contrary to the public interest.

II Position of the Parties

Executive Director

[4] The executive director seeks the following orders against Cire:

a) permanent market prohibitions (with some exemptions);

b) under section 161(1)(g) of the Act, that Cire pay to the Commission $1,983,000;

c) under section 162 of the Act, that Cire pay to the Commission an administrative penalty of $100,000.

[5] The executive director seeks the following orders against Harris:

a) permanent market prohibitions (with some exemptions);

b) under section 161(1)(g) of the Act, that Harris pay to the Commission $1,983,000;

c) under section 162 of the Act, that Harris pay to the Commission an administrative penalty of $100,000.

[6] The executive director seeks the following orders against Thibert:

a) market prohibitions (with some exemptions) lasting 20 years;

b) under section 161(1)(g) of the Act, that Thibert pay to the Commission $1,028,000;

c) under section 162 of the Act, that Thibert pay to the Commission an administrative penalty of $100,000.

[7] The executive director seeks the following orders against Kwasnek:

a) market prohibitions (with some exemptions) lasting 20 years;

b) under section 161(1)(g) of the Act, that Kwasnek pay to the Commission $874,000;

c) under section 162 of the Act, that Kwasnek pay to the Commission an administrative penalty of $100,000.

[8] The executive director seeks the following orders against Burke:

a) permanent market prohibitions (with some exemptions);

b) under section 161(1)(g) of the Act, that Burke pay to the Commission $701,000;

c) under section 162 of the Act, that Burke pay to the Commission an administrative penalty of $60,000.

[9] The executive director seeks a subset of permanent market prohibitions against SPYru.

[10] The executive director seeks the following orders against U-GO:

a) a subset of permanent market prohibitions;

b) under section 161(1)(g) of the Act, that U-GO pay to the Commission $636,000;

c) under section 162 of the Act, that U-GO pay to the Commission an administrative penalty of $100,000.

[11] The executive director seeks the following orders against Paradox:

a) a subset of permanent market prohibitions;

b) under section 161(1)(g) of the Act, that Paradox pay to the Commission $834,000;

c) under section 162 of the Act, that Paradox pay to the Commission an administrative penalty of $100,000.

[12] The executive director seeks the following orders against Echo:

a) a subset of market prohibitions lasting for 5 years;

c) under section 162 of the Act, that Echo pay to the Commission an administrative penalty of $50,000.

[13] During the hearing we asked for clarification from the executive director as to whether any of the orders sought pursuant to section 161(1)(g) were to be joint and several obligations of the respondents and, if so, in what manner those obligations were to be apportioned. The executive director submitted that U-GO, Harris, Cire, Kwasnek, Thibert and Burke should be jointly and severally liable, pursuant to section 161(1)(g) for $636,000 (being the full amount of the illegal distributions of U-GO). The executive director made submissions as to the apportionment of joint and several liability, pursuant to section 161(1)(g), among the respondents in respect of the $1,347,000 in illegal distributions conducted by SPYru. For the reasons set out below, we did not need to consider these submissions.

Respondents

a) Cire, Kwasnek and Thibert

[14] Cire, Kwasnek and Thibert do not contest the market prohibitions proposed by the executive director. However, they submit that the financial sanctions requested by the executive director are excessive, unduly punitive and contrary to the public interest. They propose that no financial sanctions be imposed. In the alternative, if the panel determines that some financial sanction is appropriate, then they suggest that a modest administrative penalty against each of them is the most appropriate financial sanction in the circumstances.

[15] Notwithstanding that Cire, Kwasnek and Thibert have not contested the market prohibitions proposed by the executive director, it is still incumbent on the panel to consider the appropriateness of those sanctions in the context of the public interest. In other words, the respondents' decision not to challenge those sanctions is not determinative of whether those orders should be made by this panel.

b) Harris

[16] Harris did not provide any submissions on what would be appropriate sanctions in this case. Rather, he provided submissions that highlight his contempt and disrespect for the Commission and these proceedings, and demonstrate his failure to recognize the authority of the Commission. We cannot capture the nature of these submissions any better than to reproduce (in the exact text), the concluding paragraphs to his written submissions:

> As for the penalties and fines, all I can say is: Knock yourselves out!
>
> My having completed disrespect and discontent for the BCSC, I can assure you that I have no intention to ever pay the fines that are levied against me from the BCSC, as for your Life Band, you can put it where the sun don't shine!

c) Burke

[17] Burke did not provide any direct submissions on what would be the appropriate sanctions in this case. Burke's submissions contain a number of complaints regarding Commission staff's conduct of their investigation into the respondents, the conduct of Commission staff during the hearing, the contents of the executive director's submissions and whether the panel has the legal or moral authority to be ordering sanctions against him. We considered each of Burke's submissions and found them either without merit or without relevance to the issue of the appropriate sanction in the matter at hand. We have generally taken his submissions to be that no sanctions are appropriate in the circumstances.

III Analysis

A Factors

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

[19] In *Re Eron Mortgage Corporation* [2000] 7 BCSC Weekly Summary 22, the Commission identified factors relevant to sanction as follows (at page 24):

In making orders under sections 161 and 162 of the Act, the Commission must consider what is in the public interest in the context of its mandate to regulate trading in securities. The circumstances of each case are different, so it is not possible to produce an exhaustive list of all of the factors that the Commission considers in making orders under sections 161 and 162, but the following are usually relevant:

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

B Application of the factors

Seriousness of the Conduct

[20] Breaches of sections 61 are inherently serious. The requirement to provide prospectus disclosure to purchasers of securities is a fundamental tenet of the Act. This provision is critical to ensuring investor protection.

[21] Cire, Kwasnek and Thibert submit that we should view their misconduct as negligence or as mistakes rather than intentional or malicious acts. Similar statements were made by Harris and Burke during the hearing on liability when they were acknowledging their contraventions of section 61.

[22] Specifically, Cire pointed to his lack of experience in capital raising activities and submits that he relied upon the Glusings' business experience when he was told by the Glusings that his capital raising activities on behalf of SPYru were legal. Thibert and Kwasnek, who commenced fundraising on behalf of SPYru after Harris and Cire, say they assumed that Harris and Cire had satisfied themselves that what they were doing was legal.

[23] With respect to their post-SPYru conduct, Cire, Kwasnek and Thibert point to their having retained legal counsel in connection with the distributions carried out by U-GO. They further point to Harris and Cire (on behalf of all five of the individual respondents) having approached the Commission to report their concerns about the Glusings in connection to the use of the

SPYru funds raised from distributions. The respondents say that this is demonstrative of their lack of malicious intent and their clear concern for investors.

[24] We agree with the submissions of the respondents that the evidence during the hearing was generally consistent that all of the individual respondents have been concerned about the well-being of the investors in SPYru and U-GO.

[25] We also agree that there was no evidence to suggest that the illegal distributions arose from a deliberate intent to structure the investments in a manner to subvert securities laws. We find that the capital raising activities of the respondents, including the complete absence of any properly completed due diligence, arose from either (or both) a complete disregard for securities laws or gross negligence.

[26] In this instance, we also have misconduct other than contraventions of section 61. Echo, U-GO, Cire and Kwasnek were found to have breached the Temporary Order issued by the Commission which prohibited the respondents from trading in securities during the currency of the order.

[27] This is serious misconduct. In this case, no securities were actually distributed in contravention of the order. The manner in which this misconduct was admitted by the respondents during the liability hearing suggested a lack of understanding that issuing debt securities would have contravened the order. Given the existence, at the time of the misconduct, of the regulatory proceedings commenced by the notice of hearing, this assumption by the respondents can, at best, be characterized as reckless.

Harm to Investors

[28] Investors have been harmed by the respondents' misconduct. Investors in SPYru have lost all of their investment. There is no evidence as to the status of the investors' investment in U-GO.

[29] Cire, Kwasnek and Thibert submitted that one of the distinguishing characteristics of this case is that, although there were over 400 investors involved in the illegal distributions, the average investment amount was, in their submission, relatively "modest" ($5,000). Further, the respondents note that the small number of victim impact statements tendered by the executive director in evidence do not reveal that the investors have been significantly harmed as a result of the misconduct.

[30] While the amounts raised, on average, from investors is relatively modest, the actual amounts invested do vary. There were some larger investments made in this case. Further, the vast number of investors involved in the illegal distributions is a factor in this case.

[31] There is no evidence that any investor was harmed as a consequence of the contravention of the Temporary Order.

Enrichment

[32] The evidence as to enrichment of the individual respondents with respect to the SPYru illegal distributions, in a general sense, is clear. Paradox received cash commissions from SPYru and those commissions, at least initially, were to be split between Harris and Cire. Harris also started

receiving, at some point, a monthly salary from SPYru. All of the individual respondents received bonus shares from SPYru although the value of those bonus shares, even at the time of issue, is not clear. Those shares are now worthless.

[33] However, the evidence with respect to the exact amount paid by SPYru to the individual respondents, and derived from the illegal distributions (versus other, legal, distributions) is not clear. The evidence is not clear as to the exact amount that Paradox received from SPYru nor is the subsequent split of the amount between Cire and Harris. Harris received a total of $94,934 from SPYru. Again, the evidence is not clear as to whether these funds represented salary or were derived from legal or illegal distributions.

[34] Kwasnek, Cire, Thibert and Burke all received cash payments from U-GO. Kwasnek, Thibert and Burke described these payments as commissions and Cire described his payment as director's fees. Kwasnek received $36,559, Thibert received $2,500, Burke received $5,000 and Cire received $5,000.

Aggravating or mitigating factors; past misconduct

[35] None of the respondents has any history of securities regulatory misconduct.

[36] This case comes with significant aggravating and mitigating factors. The most challenging aspect of determining the appropriate sanctions in this case is how best to balance the competing aggravating and mitigating factors for each of the respondents.

a) Mitigating factors

[37] For all of the respondents, the most significant mitigating factor to consider is that Harris and Cire, on behalf of all the respondents, initially approached the Commission with respect to their concerns about the Glusings. To be clear, this was not a case of "self-reporting"; they did not approach the Commission to deal with their own misconduct. However, in coming to the Commission, we find that they were doing so with the intent of attempting to improve the circumstances of the SPYru shareholders. Approaching the Commission with a view to conducting a dialogue with staff on difficult securities issues is conduct that we wish to encourage from those engaged in our capital markets and our orders must make clear our support for that conduct.

[38] All of the respondents acknowledged at the outset of the hearing contraventions of section 61 and EDRs that contained false information. This is a mitigating factor. In addition, Cire, Kwasnek and Thibert expressed significant remorse at our sanctions hearing. The panel believed these expressions.

[39] Cire, Kwasnek and Thibert emphasized their lack of experience with and knowledge of securities laws. Ignorance of the responsibilities associated with capital raising activities is not a mitigating factor. They also indicated that they relied on others to understand and ensure compliance with their securities law responsibilities. Reliance upon others may be appropriate where due diligence is undertaken to ensure that it is reasonable to rely upon others in the circumstances. There was no evidence that Cire, Kwasnek or Thibert undertook reasonable due

diligence measures to determine if it was reasonable to rely upon others to satisfy their legal obligations.

[40] The respondents did engage legal counsel to assist in the U-GO financing, although the evidence provided by the respondents suggests that the respondents either did not understand or did not follow the advice that they received.

b) Aggravating factors

[41] In contrast, there are aggravating factors to consider. Most significantly, as we set out in our findings, we have found that the co-mingling of investor funds with personal funds and the near total lack of proper record keeping by the respondents fall far short of what we expect of directors and officers of issuers that engage in capital raising activities.

[42] In this case, we do not have accurate shareholder registers. Even more significantly, there is no accurate accounting for investor funds and how they were spent or the amounts retained by the individual respondents. There is no excuse for this when money is raised from the public.

[43] In this respect, Harris and Cire are most responsible for these problems as they were directors in both SPYru and U-GO. Harris was largely responsible for the record keeping in the two entities and Cire was responsible for the banking arrangements. However, Kwasnek, Thibert and Burke also bear some responsibility for this as they allowed these problems to continue in U-GO, an entity in which they were also directors. This aggravating factor must be taken into account in our consideration of the length of the market prohibitions, particularly as to the length of prohibition in acting as a director or officer of an issuer.

[44] The executive director says that another aggravating factor in this case, and one that distinguishes it, is the abusive nature of the communications from the respondents, particularly Harris, to Commission staff.

[45] The executive director further suggests that a number of the actions of the individual respondents and some of these communications, particularly those which question the legal or moral authority of the Commission to apply orders against the respondents in the circumstances of this case, make the respondents "ungovernable" – by which we take the executive director to mean one of two things: a) that the individual respondents represent some extraordinary risk to our capital markets as they are unlikely to respect our orders or the securities laws of our province; or b) that the individual respondents' conduct represents the opposite of remorse.

[46] The executive director submits that this aggravating factor should only be considered for the purposes of determining the length of market bans that are appropriate for the individual respondents (i.e. we should not take this into consideration when determining financial sanctions). He submits, however, that this aggravating factor should be considered so significant that we disregard the normal length of market bans applicable to the misconduct which has occurred in this case and that we should order lifetime bans or near lifetime bans against the individual respondents.

[47] The executive director says that the following conduct, in its entirety, is what demonstrates that the individual respondents are ungovernable:

- abusive and offensive communications to Commission staff, largely sent by Harris;
- accusing Commission staff of criminality in its conduct of the investigation of the respondents and during the hearing;
- publicizing and politicizing their complaints about the conduct of Commission staff by: contacting various political figures with their concerns; publishing a blog outlining their concerns; suing the Commission and individual staff members and filing a criminal complaint against individual Commission staff members;
- attempting to contact the panel members directly after they were specifically told not to do so; and
- the publicly stated beliefs (through the blog) of the respondents that: any findings made by the Commission were compromised due to illegal conduct by various members of the Commission; the Commission creates complex regulation with the intent of ensuring non-compliance so that the Commission can achieve its funding goals through fines; that the prospectus exemption rules do harm to the economy and do not serve to protect investors.

[48] The executive director submits that the Ontario Securities Commission decision in *Re Black*, 2015 LNONOSC 85 supports his submissions on this issue. In particular, he says that the OSC in that decision specifically took into account that the respondents demonstrated (at para 141):

> … a total disregard for and indifference to the findings of serious fraud by the U.S. courts… Their attitude with respect to the discharge of their responsibilities as officers and directors of public companies raises serious concerns in our minds relating to their future behavior in Ontario's capital markets.

[49] We have no evidence that the Commission staff engaged in abusive or illegal conduct. However, there are a number of issues raised by the submissions of the executive director in this respect.

[50] First, although the executive director has suggested that this concept of "ungovernability" applies to all of the individual respondents, we do not find that this concept applies uniformly across all of the individual respondents. For example, Cire, Kwasnek and Thibert submit that they disagreed with the abusive nature of the communications with Commission staff and attempted to get Harris to moderate this conduct. They say that they took steps to have the offending blog taken down. Harris confirmed much of these submissions. However, the executive director says that Kwasnek, Cire and Thibert never expressly disavowed themselves of that conduct and should be held to be complicit in it.

[51] Second, a review of the specific conduct complained of by the executive director does not, generally, support a view that the individual respondents represent an undue risk to investor or the capital markets. Much of the conduct reflects an ongoing and, in many respects, distasteful approach to an airing of grievances by the individual respondents (in varying degrees) with respect to how they view themselves to have been treated by the Commission. We are in no way

condoning this behavior but, except as set out below, we do not see that it represents a risk to investors or the capital markets.

[52] The circumstances of this case and that found in the *Black* decision are distinguishable. The OSC panel found that the respondents' failure to acknowledge that the U.S. courts had rightfully found them liable of fraud made them a future risk to the capital markets. However, the individual respondents in this case, in fact, acknowledged throughout the liability and sanction hearings that they had carried out the misconduct that the panel found them to have committed. This is very different from the position taken by the respondents in *Black*.

[53] We do agree with the executive director's submissions that participation in our capital markets is a privilege and not a right. This activity is highly regulated and the Commission is the government agency with the legal authority to regulate its participants. To the extent that Harris and Burke refuse to recognize the Commission's authority to do so, we do accept that such perspective acts as a moderate aggravating factor.

[54] The executive director also submits that the individual respondents obstructed the Commission's investigation of this matter and that that should be considered an aggravating factor in this case. He says the evidence in support of this is the respondents' initial refusal to attend compelled interviews with Commission staff. Secondly, he says that there were communications with investors which prevented Commission staff from obtaining cooperation from those investors.

[55] The Commission has a statutory remedy for a failure to attend a compelled interview, which is to apply to the Supreme Court for a contempt order. That is the appropriate remedy to address issues of attendance or non-attendance at compelled interviews. The executive director's submission that communications with investors by the respondents resulted in a lack of cooperation from those investors was not supported by any evidence. We dismiss the submission that the respondents obstructed the investigation.

Risk to investors and markets

[56] Recklessness or carelessness with respect to compliance with securities laws in the context of an illegal distribution represents a significant risk to our capital markets. This Commission's decision in *Solara Technologies Inc. and William Dorn Beattie* 2010 BCSECCOM 357 (para 23) (also an illegal distribution case) stated:

> Although we did not find that Solara or Beattie knowingly contravened the Act, they were sloppy about ensuring that the exemptions were available. Their carelessness and demonstrated failure to ensure compliance with requirements when raising capital suggests the potential for significant risk to our capital markets were they to continue to participate in them unrestricted.

[57] We agree with those comments as they would apply to the individual respondents in this case.

[58] Much of the applicable analysis of the individual respondents' risk to the capital markets has already been addressed above.

Specific and general deterrence

[59] The sanctions we impose must be sufficient to ensure that the respondents and others will be deterred from engaging in similar misconduct.

[60] Cire, Kwasnek and Thibert all made submissions that related to their individual circumstances and what orders were appropriate in light of those circumstances. In particular, those submissions went to health problems that they have each suffered, they say, as a consequence of the investigation and hearing relating to this matter. They also described their current financial circumstances and their inability to pay any financial sanctions. Lastly, they submit that we should consider that they have dependents who would suffer if material financial sanctions were imposed. There was no conflicting evidence on any of these points.

IV Previous Orders

[61] The executive director directed us to three previous decisions of this Commission relating to illegal distributions. The respondents directed us to two additional decisions.

[62] Of the three decisions referred to by the executive director, we find the decisions in *VerifySmart et al.*, 2012 BCSECCOM 176 and *Pacific Ocean*, 2012 BCSECCOM 104 as the most applicable to the case before us.

[63] In *VerifySmart*, the Commission found that the respondents had raised over $1.2 million from 99 investors through illegal distributions. The Commission banned the individual respondents from the capital markets for five years, ordered each of them to pay an administrative penalty of $50,000, and ordered them and the corporate respondents to pay to the Commission the $1.2 million raised.

[64] In *Pacific Ocean*, the Commission found that the respondents had raised US$836,658 from 93 investors through illegal distributions. The Commission found, as an aggravating factor, that the transactions were specifically structured with a view to avoiding the prospectus and registration requirements of the Act. The Commission imposed a $60,000 administrative penalty and a 10-year market prohibition against the individual respondent. With respect to the executive director's request that the panel order disgorgement of the funds raised, the panel said the following at para. 27:

> The executive director also seeks the return of the US$836,658 to the investors. In illegal distribution cases such an order would normally be made. In this instance, however, none of the proceeds went to either of the respondents. The proceeds went to Global 8. Neither of the respondents has control over Global 8. We are not making an order that this amount be paid to the Commission.

[65] Kwasnek, Cire and Thibert referred us to the decisions in *Photo Violation Technologies Corp. et al.*, 2013 BCSECCOM 96 and *Saafnet Canada Inc. et al.*, 2014 BCSECCOM96.

[66] In *Photo Violation*, the Commission found that the corporate respondent and the individual respondents raised $3,571,604 from 272 investors through illegal distributions. The Commission imposed a five year market ban (with some exemptions) on the individual respondents. The

panel declined to order any financial sanctions against the respondents. In so doing, the panel took into consideration that the individual respondents had not been personally enriched and had, in fact, lost substantial sums in investing in the corporate respondent. The panel further found, as mitigating factors, that the respondents had retained legal counsel to assist in completing the financings and that one of the respondents admitted to their misconduct at the commencement of the proceedings.

[67] In *Saafnet*, the Commission found that the respondents raised just over US$610,000. The Commission imposed one year market bans on the individual respondents. The panel ordered an administrative penalty against each of the individual respondents in the amount of $10,000. The panel made a disgorgement order against the corporate respondent in the amount of illegal distributions but declined to make a disgorgement order against the individual respondents. The panel found that the individual respondents had not been enriched by the contraventions. The panel further found, as mitigating factors, that the respondents were remorseful and had sought legal advice to ensure compliance with the Act. In declining to make and order against the individual respondents for disgorgement, the panel said the following at para. 50:

> Even where disgorgement is ordered against an issuer, it does not necessarily follow that the order will be made against individual respondents. Here, we do not think it appropriate to order disgorgement against Dean and Sami because the evidence is clear that their entire efforts in association with Saafnet were to strive to make it a commercial success, that they endeavoured to comply with regulatory requirements, that they did not profit from their efforts, and that they did not misuse investor funds in any way.

V Orders

A Market Prohibitions

[68] With respect to SPYru and U-GO, permanent cease trade orders are appropriate. SPYru is inactive in any event. This order is in the public interest with respect to U-GO due to the poor record keeping with respect to accurate shareholder lists and lack of accounting for funds already invested in the company.

[69] With respect to Echo, it has been found to have contravened the Temporary Order issued in the case. Its role in that contravention was tangential at best and no securities were actually issued in contravention of the order. A short market prohibition of 6 months is appropriate in the circumstances.

[70] In our findings, we concluded that Paradox was effectively the corporate alter-ego of Cire. As a result, the market prohibitions that are appropriate with respect to Cire (discussed below) will also apply to Paradox.

[71] A review of the prior orders set out above, suggests that the misconduct, as it relates to contraventions of section 61, of the individual respondents most closely aligns with that found in *VerifySmart* and *Photo Violation*. We do not draw material distinctions between the five individual respondents as it relates to contraventions of section 61. Each had substantial and significant involvement in the capital raising activity. This suggests that the starting point for the length of appropriate market prohibitions for the individual respondents is five years.

[72] All five of the respondents have a significant mitigating factor through having approached the Commission with respect to the SPYru shareholders. Kwasnek, Cire and Thibert also have shown considerable remorse for their misconduct.

[73] All five of the respondents have a significant aggravating factor arising from their responsibility for the poor record keeping and co-mingling of investor funds. Harris and Cire, in particular, must bear the largest part of the responsibility for this. Harris and Burke have demonstrated (through their submissions during this hearing) a disregard for the Commission which raises concerns about their posing some higher risk than the other individual respondents in what is a highly regulated industry.

[74] Finally, Kwasnek and Cire also have participated in additional misconduct through their contravention of the Temporary Order.

[75] Weighing all of these factors, we consider the following length of market prohibitions to be appropriate:

a) Harris – 10 year ban on being a director or officer of an issuer and 5 year general market prohibitions;
b) Cire – 7 year ban on being a director or officer of an issuer and 3 year general market prohibitions;
c) Burke - 5 year ban on being a director or officer of an issuer and 5 year general market prohibitions;
d) Kwasnek – 4 year ban on being a director or officer of an issuer and 3 year general market prohibitions; and
e) Thibert - 3 year ban on being an officer or director of an issuer and 3 year general market prohibitions.

B Disgorgement

Orders under section 161(1)(g)

[76] An order under section 161(1)(g) (sometimes referred to as a "disgorgement order") requires a person who has not complied with the Act to

> (g) … pay to the Commission *any amount obtained*, or payment or loss avoided, *directly or indirectly, as a result of the failure to comply or the contravention*; (emphasis added)

[77] In *VerifySmart Corp.*, the respondents raised over $1.2 million from 99 investors through illegal distributions. The Commission ordered two individual respondents and the corporate respondents to pay the full amounts raised under section 161(1)(g). The panel stated:

> As a matter of principle, we agree that if capital is raised in contravention of the Act, it follows that it is appropriate that the amount raised be disgorged to the Commission.

[78] This Commission, in a number of recent decisions, considered the breadth of the orders that may be made under section 161(1)(g), in circumstances where the money obtained by an individual respondent as a result of his contraventions of the Act was not used for his personal benefit or gain.

[79] In *Oriens Travel & Hotel Management Corp., Alexander Anderson and Ken Chua* 2014 BCSECCOM 352, the panel rejected Chua's argument that the Commission does not have authority to order him to pay the amount illegally raised from investors under section 161(1)(g) on the basis that the amounts were obtained by Oriens Travel and used for its legitimate expenses. Although the panel disagreed with Chua on the interpretation of the factual evidence, the panel said section 161(1)(g) is clearly worded and there is no limitation on the Commission to only order a respondent to pay an amount that is obtained *by that respondent*.

[80] In *David Michael Michaels and 509802 BC Ltd. doing business as Michaels Wealth Management Group*, 2014 BCSECCOM 457, paragraph 42, the panel concluded that section 161(1)(g) should be read broadly to achieve the purposes of:

a) compelling a respondent to pay any amounts obtained from contraventions of the Act, and

b) not focus on compensation or restitution or act as a punitive or deterrent measure over and above compelling the respondent to pay any amounts obtained from the contraventions of the Act, and

section 161(1)(g) should not be read narrowly to either limit orders:

c) to amounts obtained, directly or indirectly, *by that respondent*, or

d) to a narrower concept of "benefits" or "profits",

although that may be the nature of the order in individual circumstances.

[81] In *Re Streamline Properties Inc.*2015 BCSECCOM 66, the panel members came to two very different views on the breadth of section 161(1)(g).

[82] A majority of the panel concurred with the analysis in *Oriens Travel*, and held that an order under section 161(1)(g) is not limited to personal gains enjoyed by a respondent or to some notion of profits. An order may be made against a respondent with respect to all the money raised as a result of that respondent's misconduct even if all or some of the money raised was not kept by that respondent for personal gain.

[83] The dissent in *Streamline* concluded that an order under section 161(1)(g) is limited to the *ill-gotten benefits* that each individual respondent obtained directly or indirectly (emphasis added). The Commission has no authority to make an order against a respondent with respect to the benefits that were obtained by a co-respondent.

[84] We concur with the interpretation and analysis expressed by the panel in *Oriens Travel* and by the majority in *Streamline*.

[85] The purpose of section 161(1)(g) is to remove from a respondent any amounts obtained through a violation of the Act. Notably, section 161(1)(g) does not limit an order to any amount ***obtained by a respondent***. In our view, this omission is intentional and makes clear that we can make an order against a respondent with respect to all the money illegally obtained from investors as a result of that respondent's misconduct, and we are not limited to the ill-gotten gains obtained by that specific respondent. The plain wording of section 161(1)(g) supports our interpretation. To hold otherwise would be tantamount to importing into section 161(1)(g) a requirement that payment be limited to benefits, personal gains or some notion of profits enjoyed by a respondent.

[86] Whether the money obtained was used for the stated purpose or not, the end result is the same – the investors have been denied the protections required by our securities laws and were harmed as a result of the misconduct. In light of the critical importance of investor protection, the fact that capital was obtained and used for the stated purpose of the investments, and not used for personal gains, should not limit the scope of section 161(1)(g), nor should it automatically reduce the size of an order under section161(1)(g).

[87] Having concluded that we have the authority to order payment beyond any personal benefits or gains obtained by each respondent, we next consider if we should do so in the circumstances of this case.

[88] Applying *VerifySmart*, we begin with the general principle that the full amount obtained from an illegal distribution should be paid to the Commission under section 161(1)(g). We then consider if it is in the public interest and not punitive to order payment of the full amount obtained, as supposed to a lesser amount or no payment at all.

[89] As a matter of general principle, we do not find payment of the full amount obtained to be inequitable or punitive in circumstances where the proceeds were used for the purpose of the investments and not kept for personal gain by the respondents.

SPYru-related misconduct

[90] SPYru raised $1,347,000 in contravention of the Act. There is no evidence that the investors will recover any amount.

[91] Clearly, we have the authority to order SPYru to pay that entire amount to the Commission under section 161(1)(g), and that is not disputed by the respondents. However, the executive director is not seeking a section 161(1)(g) order against SPYru.

[92] In two prior decisions, the Commission did not order payment under section 161(1)(g) against individual respondents who were not personally enriched. In *Pacific Ocean*, the respondents did not control the issuer who did receive the money. In *Oriens Travel*, although the respondent Anderson was a director and officer of Oriens Travel, he had a limited role and had no control over Oriens Travel who received the investors' money.

[93] In this case, Harris and Cire were directors of SPYru from November 2010 through March 2013. SPYru had two additional directors, Klaus Glusing and Mark Glusing. Mark Glusing died in October 2011 and Klaus Glusing died in October 2013. Kwasnek, Thibert and Burke were never directors of SPYru.

[94] According to the evidence, SPYru was owned by the Glusings. Harris and Cire sent the investors' money to the Glusings in Turks and Caicos on their instructions. There is no (or insufficient) evidence that any of that money went to Paradox or the Sales Group, except for sales commissions, director fees, and employment income paid and bonus shares issued to some of them. If any investor money were misappropriated by the Glusings (which has not been proven), the Sales Group was not involved.

[95] The amounts that Kwasnek, Thibert and Burke obtained in violation of the Act with respect to SPYru were the respective amounts that they each raised for SPYru in breach of section 61, as listed in paragraph 188 of the Findings. Under our interpretation of section 161(1)(g), we may order them to pay those amounts to the Commission.

[96] But these three respondents were, in essence, finders. They were not directors of SPYru and did not otherwise have any authority to direct or supervise the affairs of SPYru. Their role was limited to capital raising; they relied on Harris and Cire to deal with the money raised and the record-keeping. In these circumstances, we find that it would be excessive to require them to pay the amounts raised for and received by a corporate issuer that they did not control or influence and to whom they turned over all of the money. It would be appropriate to order Kwasnek, Thibert and Burke to pay, under section 161(1)(g), the commissions and other payments they personally received for the illegal distributions attributable to them. However, we do not have before us sufficient evidence to establish the quantum of those amounts.

[97] For those reasons, we are not making any orders under section 161(1)(g) against Kwasnek, Burke and Thibert with respect to their SPYru-related misconduct.

[98] Unlike Kwasnek, Burke and Thibert, Harris and Cire were directors of SPYru, together with the Glusings. We have found that, as directors, Harris and Cire are each liable for the contraventions of section 61 by SPYru.

[99] Applying our interpretation of section 161(1)(g), the entire amount raised by SPYru was obtained as a result of each of Harris' and Cire's contraventions of section 61 directly and through section 168.2(1) of the Act, and we have the authority to order them to pay the entire $1,347,000.

[100] Cire made extensive submissions with regard to section 161(1)(g) and filed affidavit evidence in support of those submissions. Those submissions are summarized and discussed in the next section with respect to U-GO-related misconduct. We have also taken them into account (to the extent applicable) in our deliberations with respect to the SPYru-related misconduct.

[101] In addition, Harris and Cire said their roles in SPYru were limited to capital raising, that the Glusings were the majority shareholders in SPYru and had threatened to remove Harris and Cire

as directors when they tried to question the Glusings about the investors' funds and SPYru's commercial activities.

[102] Cire said that like the respondents Dyer in *Pacific Ocean* and Anderson in *Oriens Travel*, he should not be subject to any section 161(1)(g) order. Dyer illegally distributed securities in Global 8 but had no control over Global 8. Anderson was marginally involved in the capital raising activities and affairs of Oriens Travel and had no real control or influence over Oriens Travel.

[103] Harris and Cire were primarily responsible for the capital raising process for SPYru. They authorized and, to a large extent, directed the illegal distributions of SPYru securities in contravention of the Act. However, their actual control over SPYru was limited. The executive director did not dispute the respondents' evidence that SPYru and its business belonged to the Glusings: the Glusings were the majority owners of SPYru who approached Harris to raise money for them in Canada, that Harris and Cire did not have much say over SPYru's operations, commercial activities or the use of the investors' funds, and that the Glusings threatened to remove Harris and Cire as directors when they tried to question the Glusings about the investors' funds and SPYru's commercial activities. Unlike the respondent Chua in *Oriens Travel*, Harris and Cire were not the alter ego of SPYru.

[104] We are not suggesting that a section 161(1)(g) order is inappropriate whenever a director found liable for an illegal distribution does not control or direct all aspects of the affairs of an issuer. But in the circumstances of this case, given the relative involvement and powers of the Glusings versus that of Harris and Cire, we find Harris' and Cire's roles to be closer to those of Dyer in *Pacific Ocean* than of Chua in *Oriens Travel*, or of the respondents Knight and Weigel in *Streamline* who controlled and directed the affairs and businesses of the corporate respondents. In these circumstances, we find that it is not necessary for deterrence purposes to require Harris or Cire to pay the amounts raised by SPYru under section 161(1)(g).

[105] As stated above, we have concluded that Paradox was effectively the corporate alter-ego of Cire. Cire is the sole director and shareholder of Paradox. For the same reasons we are not making a section 161(1)(g) order against Cire, there is no need to make a section 161(1)(g) order against Paradox.

U-GO-related misconduct

[106] U-GO raised $636,000 in contravention of the Act. There is no evidence that the investors will recover any amount.

[107] Clearly, we have the authority to order U-GO to pay the entire amount raised to the Commission under section 161(1)(g), and that is not disputed by the respondents. We have no credible evidence that U-GO will have any greater prospect of achieving commercial viability if there is no section 161(1)(g) order against it. We are making a section 161(1)(g) order against U-GO in order to provide investors with the mechanism intended by the Act to facilitate recovery of their investments.

[108] As directors, the individual respondents directed the affairs of U-GO. We have found that they were the corporate entity, and each is liable for the contraventions of section 61 by U-GO.

[109] Applying our interpretation of section 161(1)(g), the entire amount raised by U-GO was obtained as a result of each individual respondent's contraventions of section 61 and 168.2(1) of the Act, and we have the authority to order them to pay the entire $636,000.

[110] Kwasnek, Thibert and Cire made extensive submissions with regard to section 161(1)(g) and filed affidavit evidence in support of those submissions. They argued that the Commission has no authority to make a section 161(1)(g) order against them, on three grounds:

a) First, the money raised was obtained by U-GO and they did not personally benefit by their contraventions. In essence, they adopted the view in the *Streamline* dissent. We have already addressed that analysis above.

b) Second, to establish that the money was obtained as a result of the breach, the executive director must prove that the investors would have acted differently and not invested in U-GO if they had received a prospectus. There is no legal support for this position. Reliance by investors is not a required element to a breach of section 61 and, therefore, is not a pre-requisite to a sanction for that breach.

c) Third, an order under section 161(1)(g) would be excessive and punitive against these respondents and contrary to the public interest. They said relevant considerations include:

i. They made good faith efforts to comply with the Act. They hired a reputable law firm for legal advice and the law firm prepared drafts of subscription agreements and an offering memorandum. However, these respondents relied on Harris and did not deal directly with the law firm nor understand their legal obligations.

ii. Their conduct was aimed at producing and selling the health drinks developed by U-GO and making it a commercial success. They cited *Saafnet* for the proposition that commitment to the commercial success of the company is a relevant factor.

iii. They voluntarily approached the Commission to report the Glusings and incorporated U-GO to protect the SPYru investors from the loss of their investments.

iv. They care deeply about their investors. After the cease trade order, Thibert made a $70,000 shareholder loan to U-GO to fund its operations. Few investors complained and the average investment was a modest amount.

v. They did not have a hand in the abusive and offensive e-mails that Harris sent to Commission staff and they begged him to stop sending them.

vi. The personal circumstances of the respondents including their age, health and financial circumstances. They are genuinely remorseful. All three respondents have

suffered health issues as a result of the stress and none have any significant assets that could be used to satisfy more than a small administrative penalty.

[111] We expect participants in the capital market to be individually responsible for ensuring they act in compliance with applicable securities laws. Although the individual respondents relied on Harris, those are their individual obligations as directors and officers of U-GO and they are not lessened by assigning to Harris the task of liaising with lawyers.

[112] Although reliance on legal advice could be a mitigating factor, these respondents' efforts in ensuring legal compliance were inadequate. They were not comparable to the efforts of the individual respondents in *Saafnet* or in *Photo Violation*. The *Saafnet* respondents consulted three sets of lawyers in their repeated attempts to comply with the Act. They were personally involved and diligent in taking steps to ensure compliance. The *Photo Violation* respondents also took considerable steps to obtain the necessary legal advice to ensure compliance with the Act. They hired successive law firms from the outset to assist. One of the individual respondents took a course at university to better understand his responsibilities as a director and officer.

[113] Although the respondents in this case proactively reported the Glusings to the Commission with respect to SPYru, they did not self-report their contraventions with respect to raising money for U-GO. Cire and Kwasnek also engaged in fund-raising activities even though they were warned by Commission staff that to do so could violate a temporary order.

[114] As noted above, we believe that Kwasnek, Thibert and Cire are genuinely remorseful. We have no evidence of remorse from Harris or Burke.

[115] We believe that Kwasnek, Thibert and Cire have limited financial resources and there is no indication that will materially change in the future given their age and limited work prospects.

[116] In prior decisions, the Commission has stated that a respondent's ability to pay is not relevant for the purpose of sanctions. See: *Streamline*, *Oriens Travel*, *Re Lathigee* 2015 BCSECCOM 78, *Re Mesidor* 2014 BCSECCOM 6, and *Re Samji* 2015 BCSECCOM 29.

[117] For the purpose of general deterrence, when the amount involved is not so astronomically high as to make its payment punitive, a respondent's ability to pay is generally not relevant when considering orders under section 161(1)(g), which purpose is to remove from a respondent any amounts obtained as a result of his violation of the Act.

[118] We weighed the relevant factors relied on by Kwasnek and Cire, but find they are not sufficient to justify a payment of less than the full amount obtained as a result of their misconduct with respect to U-GO. We come to a similar conclusion with respect to Harris and Burke.

[119] We are persuaded by Thibert's evidence that he has developed dire health issues as a result of these proceedings and the issuance of financial sanctions in any significant amount has a grave risk of exacerbating those issues and lead to a consequence that far outweighs any evidence of harm suffered by the investors. Such an outcome would be excessive in our view. Given that, we find that such an order is not necessary for the public interest.

[120] Accordingly, we order U-GO, Harris, Cire, Kwasnek and Burke, jointly, to pay to the Commission the sum of $636,000.

C Administrative Penalties

[121] The executive director is not seeking an administrative penalty against SPYru. He is seeking a range of penalties from $50,000 to $100,000 against the other corporate and individual respondents.

[122] A review of the previous orders, suggests that the range of administrative penalties for illegal distributions of the magnitude found in this case ranges from no penalty to $60,000. Again, the misconduct here is not of the magnitude found in *Pacific Ocean*. The $50,000 amount in *VerifySmart* is an appropriate starting point for our analysis.

[123] With respect to the corporate respondents, as noted above, the executive director has not asked for an administrative penalty against SPYru. An administrative penalty against U-GO, might do damage to the very investors who were the subject of the misconduct. A penalty against U-GO is not in the public interest. Echo's misconduct related to the Temporary Order. Again, Echo's role in that misconduct was relatively nominal. We order a $5,000 penalty against Echo. Paradox is the corporate alter-ego of Cire and we would not order a separate administrative penalty against it.

[124] With respect to the individual respondents, the executive director has conceded that the aggravating factor of the respondents' ungovernability should not be considered in the context of administrative penalties. Taking this into account, Kwasnek and Cire's additional misconduct of breaching the Temporary Order and using the same balancing of aggravating and mitigating factors described above, we consider the following administrative penalties to be in the public interest and proportionate to the individual respondents' misconduct: Harris - $50,000; Cire - $50,000; Kwasnek - $35,000; Burke - $20,000 and Thibert - $20,000.

D Orders

[125] Considering it to be in the public interest, and pursuant to sections 161 and 162 of the Act, we order that:

Cire

1. under sections 161(1)(b), (c) and (d)(iii) to (v),

    a) Cire cease trading in, and be prohibited from purchasing, any securities, except he may trade and purchase securities for his own account through a registrant, if he gives the registrant a copy of this decision;

    b) the exemptions set out in the Act, the regulations or any decision as defined in the Act, do not apply to Cire, except for those exemptions necessary to enable Cire to trade or purchase securities in his own account;

    c) Cire is prohibited from becoming or acting as a registrant or promoter;

d) Cire is prohibited from acting in a management or consultative capacity in connection with the activities in the securities market; and

e) Cire is prohibited from engaging in investor relations activities;

until December 14, 2018;

2. under section 161(1)(d)(i), that Cire resign any position he holds as a director or officer of an issuer or registrant, except he may continue to remain a director and officer of Paradox, provided Paradox does not issue securities;

3. under section 161(1)(d)(ii), that Cire is prohibited from becoming or acting as a director or officer of any issuer or registrant until December 14, 2022, except he may continue to remain a director and officer of Paradox provided Paradox does not issue securities;

4. under section 161(1)(g) of the Act, that Cire pay to the Commission $636,000; and

5. under section 162 of the Act, that Cire pay to the Commission an administrative penalty of $50,000.

Harris

6. under sections 161(1)(b), (c) and (d)(iii) to (v),

a) Harris cease trading in, and be prohibited from purchasing, any securities, except he may trade and purchase securities for his own account through a registrant, if he gives the registrant a copy of this decision;

b) the exemptions set out in the Act, the regulations or any decision as defined in the Act, do not apply to Harris, except for those exemptions necessary to enable Harris to trade or purchase securities in his own account;

c) Harris is prohibited from becoming or acting as a registrant or promoter;

d) Harris is prohibited from acting in a management or consultative capacity in connection with the activities in the securities market; and

e) Harris is prohibited from engaging in investor relations activities;

until December 14, 2020;

7. under section 161(1)(d)(i), that Harris resign any position he holds as a director or officer of an issuer or registrant;

8. under section 161(1)(d)(ii), that Harris is prohibited from becoming or acting as a director or officer of any issuer or registrant until December 14, 2025;

9. under section 161(1)(g) of the Act, that Harris pay to the Commission $636,000; and

10. under section 162 of the Act, that Harris pay to the Commission an administrative penalty of $50,000.

Thibert

11. under sections 161(1)(b), (c) and (d)(ii) to (v),

    a) Thibert cease trading in, and be prohibited from purchasing, any securities, except he may trade and purchase securities for his own account through a registrant, if he gives the registrant a copy of this decision;

    b) the exemptions set out in the Act, the regulations or any decision as defined in the Act, do not apply to Thibert, except for those exemptions necessary to enable Thibert to trade or purchase securities in his own account;

    c) Thibert is prohibited from becoming or acting as a director or officer of any issuer or registrant;

    d) Thibert is prohibited from becoming or acting as a registrant or promoter;

    e) Thibert is prohibited from acting in a management or consultative capacity in connection with the activities in the securities market; and

    f) Thibert is prohibited from engaging in investor relations activities;

    until December 14, 2018;

12. under section 161(1)(d)(i), that Thibert resign any position he holds as a director or officer of an issuer or registrant; and

13. under section 162 of the Act, that Thibert pay to the Commission an administrative penalty of $20,000.

Kwasnek

14. under sections 161(1)(b), (c), (d)(iii) to (v),

    a) Kwasnek cease trading in, and be prohibited from purchasing, any securities, except he may trade and purchase securities for his own account through a registrant, if he gives the registrant a copy of this decision;

    b) the exemptions set out in the Act, the regulations or any decision as defined in the Act, do not apply to Kwasnek, except for those exemptions necessary to enable Kwasnek to trade or purchase securities in his own account;

c) Kwasnek is prohibited from becoming or acting as a registrant or promoter;

d) Kwasnek is prohibited from acting in a management or consultative capacity in connection with the activities in the securities market; and

e) Kwasnek is prohibited from engaging in investor relations activities;

until December 14, 2018;

15. under section 161(1)(d)(i), that Kwasnek resign any position he holds as a director or officer of an issuer or registrant;

16. under section 161(1)(d)(ii), that Kwasnek prohibited from becoming or acting as a director or officer of any issuer or registrant until December 14, 2019;

17. under section 161(1)(g) of the Act, that Kwasnek pay to the Commission $636,000; and

18. under section 162 of the Act, that Kwasnek pay to the Commission an administrative penalty of $35,000.

Burke

19. under sections 161(1)(b), (c), (d)(ii) to (v),

a) Burke cease trading in, and be prohibited from purchasing, any securities, except he may trade and purchase securities for his own account through a registrant, if he gives the registrant a copy of this decision;

b) the exemptions set out in the Act, the regulations or any decision as defined in the Act, do not apply to Burke, except for those exemptions necessary to enable Burke to trade or purchase securities in his own account;

c) Burke is prohibited from becoming or acting as a director or officer of any issuer or registrant;

d) Burke is prohibited from becoming or acting as a registrant or promoter;

e) Burke is prohibited from acting in a management or consultative capacity in connection with the activities in the securities market; and

f) Burke is prohibited from engaging in investor relations activities;

until December 14, 2020;

20. under section 161(1)(d)(i), that Burke resign any position he holds as a director or officer of an issuer or registrant;

21. under section 161(1)(g) of the Act, that Burke pay to the Commission $636,000; and

22. under section 162 of the Act, that Burke pay to the Commission an administrative penalty of $20,000.

SPYru

23. under sections 161(1)(b), (c) and (d)(v),

    a) SPYru cease trading in, and be prohibited from purchasing, any securities, permanently;

    b) the exemptions set out in the Act, the regulations or any decision as defined in the Act, do not apply to SPYru, on a permanent basis; and

    c) SPYru is permanently prohibited from engaging in investor relations activities.

U-GO

24. under sections 161(1)(b), (c) and (d)(v),

    a) U-GO cease trading in, and be prohibited from purchasing, any securities, permanently;

    b) the exemptions set out in the Act, the regulations or any decision as defined in the Act, do not apply to U-GO, on a permanent basis;

    c) U-GO is permanently prohibited from engaging in investor relations activities; and

25. under section 161(1)(g) of the Act, that U-GO pay to the Commission $636,000.

Paradox

26. under sections 161(1)(b), (c) and (d)(v),

    a) Paradox cease trading in, and be prohibited from purchasing, any securities;

    b) the exemptions set out in the Act, the regulations or any decision as defined in the Act, do not apply to Paradox; and

    c) Paradox is prohibited from engaging in investor relations activities;

    until December 14, 2018; and

27. under section 162 of the Act, that Paradox be joint and severally liable for the administrative penalty applicable to Cire;

Echo

28. under sections 161(1)(b), (c) and (d)(v),

    a) Echo cease trading in, and be prohibited from purchasing, any securities;

    b) the exemptions set out in the Act, the regulations or any decision as defined in the Act, do not apply to Echo; and

    c) Echo is prohibited from engaging in investor relations activities;

    until June 14, 2016; and

29. under section 162 of the Act, that Echo pay to the Commission an administrative penalty of $5,000.

30. The respondents' respective obligations to pay under paragraphs 125(4), (9), (17), (21) and (25) shall not exceed $636,000, on a joint and several basis.

December 14, 2015

For the Commission

Judith Downes
Commissioner

Audrey T. Ho
Commissioner

Reasons for Decision of Nigel P. Cave, Vice Chair

I Introduction

[126] I concur with the majority decision in all respects other than the reasoning and decision associated with the disgorgement orders against the respondents under section 161(1)(g).

[127] For the reasons below, I would make different disgorgement orders pursuant to section 161(1)(g).

[128] I also make one comment below about the role of aggravating factors in determining the appropriate sanctions.

II Analysis

A Two Step approach to disgorgement orders

[129] In considering whether disgorgement orders are appropriate against the respective respondents, I approach the question in the manner set out in my dissent in *Streamline Properties Inc. (Re)*, 2015 BCSECCOM 66.

[130] The key tenet of that analysis is to view section 161(1)(g) as a disgorgement provision and not a compensation provision – the intent of a disgorgement order is to take away ill-gotten financial benefits from a wrongdoer, not compensate victims.

[131] The first step is to determine whether a respondent, directly or indirectly, obtained amounts arising from his or her contraventions of the Act. This determination is necessary in order to determine if an order can be made, at all, under section 161(1)(g).

[132] The second step of my analysis is to determine if it is in the public interest to make such an order. It is clear from the discretionary language of section 161(1)(g) that we must consider the public interest, including issues of specific and general deterrence.

B Application of two step approach

i) Corporate Respondents

[133] In this case, the evidence is clear that SPYru obtained $1,347,000 arising from its misconduct. Similarly, U-GO obtained $636,000 arising from its misconduct. Echo did not obtain any funds from its misconduct. As is discussed in more detail below with respect to Cire, the executive director has not established the amounts obtained by Paradox as a result of its misconduct. Therefore, a disgorgement order could only be made against SPYru and U-Go.

[134] The executive director has not asked for a disgorgement order with respect to SPYru as it is inactive. A disgorgement order against SPYru is unnecessary in the circumstances. There is no evidence of there being any assets to satisfy any amount ordered. With respect to U-GO, I would not make a disgorgement order against it. There is no evidence to suggest that U-GO used the funds raised from the illegal distributions in any manner that is inconsistent with investor expectations. Secondarily, a disgorgement order against U-GO would only potentially harm the very investors who were the subject of the misconduct, as the respondents do not have a large

economic interest in U-GO. Therefore, it is not in the public interest to make a disgorgement order against U-GO.

ii) Individual Respondents

[135] Although there was general evidence that Paradox/Cire received cash commissions from SPYru the executive director has not satisfied the evidentiary onus of establishing the quantum of those payments.

[136] With respect to the individual respondents, the evidence is clear that: Harris received $94,934 from SPYru; Cire received $5,000 from U-GO; Kwasnek received $36,559 from U-GO; Thibert received $2,500 from U-GO and Burke received $5,000 from U-GO.

[137] Other than the amounts set out above, the individual respondents did not obtain, directly or indirectly, any other amounts from *their* contraventions of the Act. Therefore, these are the only amounts that could be subject to disgorgement orders.

[138] While it is clear that Harris received $94,934 from SPYru, the evidence was clear that he received payments for both commissions and monthly salary. Further, with respect to the commissions, we do not know what portion of the commissions is attributable to illegal distributions.

[139] This Commission in *Re Zhong*, 2015 BCSECCOM 383 (para 51 and 52) recently considered the question of the onus of proving amounts obtained by respondents in determining the amount of orders under section 161(1)(g):

> However, we find that the executive director has not proven the appropriate amount of commissions to be paid under section 161(1)(g). In our view, under section 161(1)(g), the executive director must prove, on a balance of probabilities, a reasonable approximation of the amount obtained by a respondent as a result of misconduct. The respondent may then attempt to prove that that amount is unreasonable. Any ambiguity is resolved in favour of the executive director, since a respondent should not benefit from any ambiguity when his or her wrong-doing gave rise to the uncertainty.
>
> As the Ontario Securities Commission stated in *Re Limelight Entertainment*, (2008) 31 OSCB 12030 (paragraph 53), which was quoted with approval in *Re Ground Wealth Inc.*, (2015) 38 OSCB 9835 (paragraph 28):
>
> > Staff has the onus to prove on a balance of probabilities the amount obtained by a respondent as a result of his or her non-compliance with the Act. Subject to that onus, we agree that any risk of uncertainty in calculating disgorgement should fall on the wrongdoer whose non-compliance with the Act gave rise to the uncertainty

[140] The executive director has the onus of proving a reasonable approximation of the amount obtained through misconduct. I do not find that the $94,934 represents a reasonable approximation of the amount Harris obtained through misconduct, as it does not attempt to

distinguish between commissions, salaries or any other source of payment, legitimate or not, from SPYru. Therefore, I am unable to determine the appropriate basis for a disgorgement order.

[141] I would find that the payments made by U-GO to Cire, Kwasnek, Thibert and Burke do represent reasonable amounts obtained by them respectively. The respondents did not prove that such amounts were unreasonable.

[142] In my view, it is in the public interest to order disgorgement of these amounts in order to deter these respondents and others who would receive compensation in connection with illegal distributions. Therefore, I would order disgorgement of all of the amounts obtained by the individual respondents listed in paragraph 141.

C Comment on aggravating factors

[143] I do not agree with the executive director's submission that an aggravating factor could be applied such that the appropriate sanction is fundamentally disproportionate to the misconduct for which the respondents have been found liable for. To put it more simply, in this case the executive director asked for permanent (or near permanent) market bans but the underlying misconduct of the respondents was illegal distributions which would not normally carry sanctions close to that suggested by the executive director. In my view, no aggravating factor could be applied such that the appropriate sanction for illegal distributions should be the same as that ordered for the most serious misconduct under the Act.

December 14, 2015

Nigel P. Cave
Vice Chair