

2002 BCSECCOM 392

Schedule "A" Settlement Agreement

**Mark Webster Vaughan Foster, Foster First Financial Corporation
M.W. Foster & Associates Ltd., and Falconhouse Investments Inc.**

Securities Act, RSBC 1996, c. 418

[para 1]

The following settlement of issues has been reached between Mark Webster Vaughan Foster (Foster), Foster First Financial Corporation (Foster First), M.W. Foster & Associates Ltd (MW Foster), and Falconhouse Investments Inc. (Falconhouse) and the Executive Director.

Agreed Statement of Facts

[para 2]

As the basis for the undertakings and orders referred to in this settlement, Foster, Foster First, MW Foster and Falconhouse acknowledge the following facts as correct only for securities regulatory purposes here and elsewhere and for no other purpose:

1. Foster was a registrant under the under the *Securities Act, RSBC 1996, c. 418* (the Act).
2. Specialized Surgical Services Inc. (Specialized Surgical) is a non-reporting issuer incorporated in British Columbia on March 8, 1995.
3. Specialized Surgical was attempting to open a private hospital in Coquitlam, British Columbia under the name Croft Clinic.
4. James Swanney (Swanney) was the president and majority shareholder of Specialized Surgical.
5. Specialized Surgical issued an offering memorandum dated June 22, 1995, and raised approximately \$575,000 from 23 investors without an agent by March 7, 1997.
6. Swanney contacted Foster in 1996 seeking capital on behalf of Specialized Surgical.

2002 BCSECCOM 392

7. Foster was employed by Royal Advent Securities Corporation (RASC) and registered as a mutual fund salesperson when he was initially contacted by Swanney.
8. Some time after March 7, 1997, RASC agreed to raise funds for Specialized Surgical in return for a 10% commission on all funds raised and a 5% corporate finance fee. As Specialized Surgical did not have an up to date offering memorandum it was decided to use an offering memorandum of Royal Advent Capital Corporation (RACC), an unregistered affiliate of RASC dated December 11, 1996.
9. Fund raising activities were commenced in the spring of 1997 and RASC, using the RACC offering memorandum, raised approximately \$486,000 of which approximately \$300,000 was raised by Foster from his 11 clients.
10. The RACC shares were not qualified for distribution to the public under section 61 of the Act. Rather, the RACC shares were sold under the exemption from the prospectus requirements of section 61 of the Act contained in section 128 (b) of the *Securities Rules*, B.C. Reg. 194/97 (the Rules).
11. Foster knew or ought to have known that many of his clients did not qualify for the section 128(b) exemption as they were unable to self-assess the investment risk and/or did not have a net worth of \$400,000. Accordingly, Foster participated in an illegal distribution of the RACC shares contrary to section 61 of the Act.
12. Specialized Surgical issued its own offering memorandum (the Transitional OM) on August 26, 1997. The purpose of this offering memorandum was to convert all the previously issued RACC shares into Specialized Surgical Shares and to solicit new investment. By September 30, 1997, approximately \$800,000 was raised by RACC under this offering memorandum. This figure represented the original \$486,000 plus an additional 314,000 in new investment. Foster assisted in converting his original 11 clients and their \$300,000. As well, Foster sold \$25,000 to one additional client. Foster completed these sales by August 28, 1997.

2002 BCSECCOM 392

13. The Specialized Surgical shares were not qualified for distribution to the public under section 61 of the Act. Rather, the Specialized Surgical shares were sold under the exemption from the prospectus requirements of section 61 of the Act contained in section 128 (b) of the Rules.
14. Foster knew or ought to have known that many of his clients did not qualify for the section 128(b) exemption as they were unable to self-assess the investment risk and/or did not have a net worth of \$400,000. Accordingly, Foster participated in an illegal distribution of the Specialized Surgical shares contrary to section 61 of the Act.
15. Foster became a director of Specialized Surgical on September 9, 1997.
16. Foster sold \$25,000 of Specialized Surgical to a client on September 15, 1997, and again on September 26, 1997.
17. The Transitional OM disclosed that Foster was a director of Specialized Surgical but contained misrepresentations including:
 - (a) not disclosing that Specialized Surgical was paying commissions to the agents of RASC for the exercise of the rescission in favour of Specialized Surgical; and
 - (b) not disclosing the conflict of interest Foster had as an agent of RASC and as a director of Specialized Surgical.
18. Foster, as a director of Specialized Surgical authorized, permitted or acquiesced in the misrepresentations made in the Transitional OM, contrary to section 50(1)(d) of the Act and the public interest.
19. Foster, by means of the conduct described in paragraphs 17 and 18 above, was in breach of his duties as a director of Specialized Surgical contrary to section 118 of the *Company Act*, RSBC 1996, c. 62 (the Company Act).
20. Foster First was incorporated on September 15, 1997. Foster was the president and majority shareholder of Foster First. Swanney was a director and minority shareholder of Foster First.
21. Swanney signed a subordination agreement in favour of Foster First on September 23, 1997, for \$100,000 that represented the statutory working capital requirement for Foster First.

2002 BCSECCOM 392

22. Foster purchased 25,001 shares of Specialized Surgical on September 30, 1997.
23. Specialized Surgical issued an offering memorandum dated November 12, 1997, (the Specialized Surgical OM). This offering memorandum did not disclose that:
 - (a) Swanney was a director of Foster First;
 - (b) Foster was a director of Specialized Surgical;
 - (c) Swanney provided the operating capital for Foster First;
 - (d) Foster and Swanney each owned shares in each others companies; and
 - (e) there were more recent audited financial statements, dated November 1, 1997, than the statements disclosed dated May 31, 1997. The audited financial statements of November 1, 1997, which were left out of the November 12, 1997, offering memorandum contained stern warnings about the financial viability of Specialized Surgical. These warnings did not appear in the May 31, 1997, financial statements which were attached to the November 12, 1997, offering memorandum.
24. Foster, as a director of Specialized Surgical at the time of the Specialized Surgical OM, authorized, permitted or acquiesced in the misrepresentations made in the Specialized Surgical OM, contrary to section 50(1)(d) of the Act and the public interest.
25. Foster, by means of the conduct described in paragraphs 23 and 24 above, was in breach of his duties as a director of Specialized Surgical contrary to section 118 of the Company Act and the public interest.
26. RASC did not renew Foster's contract of employment when it expired on November 30, 1997.
27. Foster First was registered as a securities dealer on December 18, 1997.
28. Foster was employed by Foster First on December 22, 1997, as a mutual fund salesman.

2002 BCSECCOM 392

29. Foster, at the suggestion of staff of the British Columbia Securities Commission (the Commission), resigned as a director of Specialized Surgical on December 31, 1997.
30. Foster First and Specialized Surgical entered into a contract on January 2, 1998, whereby Foster First was the sole financing agent for Specialized Surgical in return for a 10% commission and a 5% corporate finance fee.
31. Foster was appointed Vice-President of Marketing for Specialized Surgical in February of 1998 and remained in that capacity until June 1999. This was not reported to the Commission.
32. Specialized Surgical defaulted entirely on its February 1998 mortgage payment for the Croft Clinic land and building.
33. On or about March 27, 1998, Foster received a transfer of 100,000 shares of Specialized Surgical from Swanney as partial compensation for past services rendered to Specialized Surgical.
34. Foster acquired 300,000 shares of Specialized Surgical from another director free of charge on April 8, 1998.
35. On or about June 1, 1998, Foster First entered into a contract with Specialized Surgical to provide administrative services to Specialized Surgical and those services were provided by Foster, Foster First, MW Foster, and its employees until about June 1999.
36. MW Foster is a non-reporting issuer incorporated in British Columbia on April 8, 1993. At all material times, the sole director and officer of MW Foster was Foster.
37. Robert Murray, an employee of Foster First was appointed a director of Specialized Surgical on or about May 21, 1998, to replace Foster and acted in such a capacity until May 31, 1999.
38. A judgment was entered against the Croft Clinic land and property on August 27, 1998.
39. A certificate of Pending Litigation was filed against the property on January 8, 1999.

2002 BCSECCOM 392

40. Foster and Foster First sold approximately \$530,000 of Specialized Surgical shares to non-directors under the Specialized Surgical OM between November 12, 1997, and November 25, 1998.
41. The Specialized Surgical shares were not qualified for distribution to the public under section 61 of the Act. Rather, the Specialized Surgical shares were sold under the exemption from the prospectus requirements of section 61 of the Act contained in section 128 (b) of the Rules.
42. Foster knew or ought to have known that many of his clients did not qualify for the section 128(b) exemption as they were unable to self-assess the investment risk and/or did not have a net worth of \$400,000. Accordingly, Foster participated in an illegal distribution of the Specialized Surgical shares contrary to section 61 of the Act.
43. The Specialized Surgical OM of November 12, 1997, was never amended to reflect any of the material changes described in paragraphs 26 to 40 above.
44. Foster, as a director of Specialized Surgical authorized, permitted or acquiesced in the misrepresentations made in the Specialized Surgical OM as a result of the failure to amend for the material changes described in paragraphs 26 to 40 above, contrary to section 50(1)(d) of the Act and the public interest.
45. Foster, by means of the conduct described in paragraphs 44 and 45 above, was in breach of his duties as a director of Specialized Surgical contrary to section 118 of the Company Act and the public interest.
46. Specialized Surgical raised approximately \$725,000 from non-directors during the time Foster was a director. These funds were raised pursuant to the sophisticated purchaser exemption in section 128(b) of the Rules.
47. The Form 20s that were filed with the Commission by Specialized Surgical contained misrepresentations that the distributions were made to sophisticated purchasers when many of the investors did not meet the self-assessment of financial risk or net worth requirements of section 128(b) of the Rules.

2002 BCSECCOM 392

48. Foster, while a director of Specialized Surgical, authorized, permitted or acquiesced in these misrepresentations, contrary to section 50(1)(d) of the Act, sections 135 and 139 of the Rules, and the public interest.
49. Foster, on numerous occasions, did not complete, completed improperly, or did not forward Know Your Client (KYC) documents for compliance review prior to investors purchasing shares of RACC or Specialized Surgical.
50. Foster did not make reasonable inquiries of his clients to determine and understand their essential and current financial and personal circumstances, financial sophistication and investment experience, investment objectives and risk tolerance.
51. Foster's behaviour described in paragraphs 50 and 51 was contrary to section 14 and 48 of the Rules.
52. The securities of RACC and Specialized Surgical were risky, illiquid, and speculative. Foster did not understand the nature and risks of the investment or if he did understand, he did not convey this information to his clients, contrary to sections 14 and 48 of the Rules.
53. Many of Foster's clients were unsophisticated investors who relied heavily on the professional advice and judgment of Foster. In some instances the clients, encouraged by Foster, transferred funds from money markets or T-bill accounts, and redeemed mutual funds, in order to complete purchases of RACC and Specialized Surgical, as recommended by Foster. Many of these clients had low risk tolerance, a need for short-term income and an unsuitably high percentage of such holdings in their portfolio. Foster knew or should have known these investments were unsuitable and failed to convey this information to his clients, contrary to sections 14 and 48 of the Rules.
54. Foster relied upon the exemption from the prospectus requirements found in sections 128(b) of the Rules. Foster failed to ensure his clients met all the conditions of the exemptions, contrary to sections 14 and 48 of the Rules.

2002 BCSECCOM 392

55. Between September 1997 and September 2000, while a director of Foster First, Foster effected fifteen distributions of shares of Foster First to 12 of his clients for a total of approximately \$400,000. The shares of Foster First were not qualified for distribution to the public under section 61 of the Act and no exemption from the prospectus requirement of the Act was available. Accordingly, Foster participated in an illegal distribution of Foster First shares contrary to section 61 of the Act.
56. Between September 1997 and June 2000, while the sole director and officer of MW Foster, Foster effected fourteen distributions of shares of MW Foster to 12 of his clients for a total of approximately \$285,000. The shares of MW Foster were not qualified for distribution to the public under section 61 of the Act and no exemption from the prospectus requirement of the Act was available. Accordingly, Foster participated in an illegal distribution of MW Foster shares contrary to section 61 of the Act.
57. Foster was in a conflict of interest as his own financial success was dependent upon the sale and promotion of Specialized Surgical, Foster First, and MW Foster. He consistently failed to provide his clients with material negative information about these investments and failed to inform them of the real risk associated with their investments.
58. By consistently preferring his own interests to the prejudice of those to whom he owed a duty to act fairly, honestly and in good faith he breached his fiduciary duties to his clients, acted contrary to Rule 14 and contrary to the public interest.

Mitigating Factors

[para 3]

The Executive Director has taken into account the following facts as factors mitigating the sanctions which would otherwise have applied in the public interest:

1. Foster invested and lost \$40,000 of his own money in Specialized Surgical.

2002 BCSECCOM 392

Undertakings

[para 4]

Foster undertakes:

1. to pay to the British Columbia Securities Commission the sum of \$35,000 of which \$5,000 represents costs of the investigation;
2. to comply fully with the Act, Rules, and applicable regulations; and
3. not to say anything, in writing or orally, which may contradict the terms of this settlement or call those terms into question.

Order

[para 5]

Foster, Foster First, MW Foster and Falconhouse consent to an order by the Executive Director (the Order) that:

1. under section 161(1)(b) of the Act, Foster cease trading in any security;
2. under section 161(1)(c) that any or all of the exemptions described in sections 44 to 47, 74, 75, 98, or 99 do not apply to Foster, Foster First, MW Foster and Falconhouse;
3. under section 161(1)(d) of the Act, Foster resign any position that he holds as a director and officer of any issuer and is prohibited from becoming or acting as a director or officer of any issuer;
4. under section 161(1)(d) of the Act, Foster be prohibited from engaging in investor relations activities;

until the later of:

- (a) twelve years from the date of this Order;
- (b) the date Foster successfully completes a course of study satisfactory to the Executive Director concerning the duties and responsibilities of directors and officers; and
- (c) the date Foster complies with his undertaking to pay to the Commission the sum of \$35,000 as set out in paragraph four, item one.

2002 BCSECCOM 392

Waiver

[para 6]

Foster, Foster First, MW Foster, and Falconhouse waive any rights they may have, under the Act or otherwise, to a hearing, hearing and review, judicial review or appeal related to, in connection with, or incidental to this settlement.

[para 7]

This Settlement Agreement may be signed in one or more counterparts, which together, shall constitute a binding agreement and a facsimile copy of any signature shall be as effective as an original signature.

[para 8]

May 10, 2002

“M. Foster”

Mark Webster Vaughan Foster

“D.L. Armstrong)
Witness Signature)
D. Laurence Armstrong)
Witness Name (please print))
_____)
_____)
Address)
_____)
Occupation)

2002 BCSECCOM 392

[para 9]
May 10, 2002

“M. Foster”
Per: Foster First Financial Corporation
(Signing Authority)

“D.L. Armstrong)
Witness Signature)
D. Laurence Armstrong)
Witness Name (please print))
_____)
_____)
Address)
_____)
Occupation)

[para 10]
May 10, 2002

“M. Foster”
Per: M.W. Foster & Associates Ltd.
(Signing Authority)

“D.L. Armstrong)
Witness Signature)
D. Laurence Armstrong)
Witness Name (please print))
_____)
_____)
Address)
_____)
Occupation)

2002 BCSECCOM 392

[para 11]
May 10, 2002

“M. Foster”
Per: Falconhouse Investments Inc.
(Signing Authority)

“D.L. Armstrong)
Witness Signature)
D. Laurence Armstrong)
Witness Name (please print))
_____)
_____)
Address)
_____)
Occupation)

[para 12]
May 13, 2002

Steve Wilson
Executive Director