

2012 BCSECCOM 315

**Forum National Investments Ltd., Daniel Clozza,
Martin Tutschek, and Grant Curtis**

Securities Act, RSBC 1996, c. 418

Panel	Brent W. Aitken Kenneth G. Hanna Shelley C. Williams	Vice Chair Commissioner Commissioner
Dates of hearing	July 31 and August 1, 2012	
Date of Decision	August 8, 2012	
Appearing		
Ryan Carrier	For the Executive Director	
Patricia A. A. Taylor	For Forum National Investments Ltd. and Daniel Clozza	
Sean K. Boyle Laura Cundari	For Martin Tutschek	
H. Roderick Anderson	For Grant Curtis	

Ruling

I Introduction

- ¶ 1 On July 20, 2012 the Executive Director issued a temporary order and a notice of hearing under section 161(2) of the Securities Act, RSBC 1996, c. 418 against Forum National Investments Ltd., Daniel Clozza, Martin Tutschek, and Grant Curtis (2012 BCSECCOM 294).
- ¶ 2 The temporary order prohibited all persons from trading in the securities of Forum National and prohibited Forum National, Clozza, Tutschek and Curtis from engaging in investor relations activities.
- ¶ 3 The temporary order also purported to prohibit all persons from transferring, or facilitating the transfer, of Forum National shares “in any way.

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- ¶ 4 On July 31 the executive director applied to the Commission for the temporary order to be extended until a hearing is held and a decision is rendered.
- ¶ 5 At the conclusion of that hearing, we reserved our decision and extended the temporary order until a hearing is held and decision is rendered.

II Background

A The Respondents

- ¶ 6 Forum National is an Ontario company whose shares are quoted on the Over-the-Counter Bulletin Board in the United States. Its principal office is in Richmond, British Columbia. Its shares are not listed or quoted on any market in Canada. Forum National is an “OTC issuer” under BC Instrument 51-509 *Issuers Quoted in the US Over-The-Counter-Markets* and is thereby a reporting issuer in British Columbia.
- ¶ 7 Forum National operates a yacht charter business through its ownership of a 120’ motor yacht, for which it incurred construction costs of about US\$5 million. Forum National’s book value for the yacht is not clear from the evidence, but it appears the company’s intention is to sell it.
- ¶ 8 The company has made a modest foray into the life settlement business. As of the end of its most recent financial year (September 30, 2011), it had paid a total of \$1.8 million to acquire life settlement contracts. It says it intends to expand this business, contingent on raising the necessary capital.
- ¶ 9 In its last five financial years, Forum National reported annual revenues ranging from about \$3 million to \$4 million. The company is not profitable. During the same period, it reported operating losses. For its three most recent financial years, those losses were \$5.3 million (2009), \$3.5 million (2010), \$1 million (2011). Its accumulated deficit is \$26.5 million.
- ¶ 10 Clozza is Forum National’s President and CEO and a director. Tutschek is Forum National’s CFO and a director. Curtis is a shareholder of Forum National. He is not an officer, director or insider of the company. Clozza, Tutschek and Curtis are all British Columbia residents.

B Relevant Events

Internet promotion, news releases, trading price and volume

- ¶ 11 Between May 21 and June 28 Forum National was the subject of five promotions through the internet. The promotions made unsubstantiated and outrageous claims about the company’s future prospects, including statements that Forum National’s stock price would reach \$10 per share “this summer.” (On May 21 the stock

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closed at 68 cents US.) The promotions stated that the touts were paid \$650,000 for the promotions.

- ¶ 12 Between May 15 and June 25, 2012 Forum National issued six news releases as follows:
- May 15, stating it was in formal merger negotiations with Aliya Lifespan LLC
 - May 22, announcing the execution of a non-disclosure agreement with Aliya and the commencement of due diligence in connection with the proposed merger.
 - May 23, announcing the development of “world class” proprietary software for the tracking of life settlements.
 - May 29, announcing the appointment of Frederick Schlosser as a director of the company
 - June 12, announcing the offering of a US\$ 9 million convertible bond secured by life settlements
 - June 19, announcing the execution of a letter of intent with Aliya to merge their businesses
 - June 25, announcing that the offer of the convertible bonds was “sold out”
- ¶ 13 During the period that the internet promotion was going on, and Forum National was issuing its news releases, the trading volume and price of its shares increased significantly. On May 14, the day before the news release announcing the proposed deal with Aliya, the Forum National shares closed at a price of 36 cents on a volume of 14,500 shares traded. From then until June 28, the day the executive director issued a halt trade order, the closing price rose to \$1.42 (having traded as high as \$2.17) on daily trading volumes as high as 568,765. On the 31 trading days during this period, daily trading volumes were between 100,000 and 400,000 shares on 12 days, and over 400,000 shares on 7 days.
- ¶ 14 The only apparent correlation between price and trading activity and the issue of Forum National’s news releases occurred:
- on May 16 and 17, when the price and volume increased modestly after the news release about the intended merger with Aliya
 - on June 12 and 13, when the price rose from \$1.12 to \$1.47 on a two-day volume of over 900,000 shares after the news release about the convertible bond issue
 - on June 19 and 20, when the price rose from \$1.82 to \$2.17 on a two-day volume of 532,000 shares after the news release about the letter of intent with Aliya

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Regulatory actions; Forum National response

- ¶ 15 On June 28, 2012 the executive director issued an order halting the trading of Forum National shares until July 20. On July 20 he issued the temporary order that is the subject of this hearing. Between the halt trade order and the temporary order Forum National's share price reached a high of \$3.01.
- ¶ 16 The executive director also sought and obtained two Commission orders under section 151(1) issued July 9 and 12 freezing accounts holding the individual respondents' Forum National shares and a bank account held by Curtis.
- ¶ 17 During the period up to the halt trade order Commission staff requested interviews with the individual respondents and demanded that Forum National put out a news release signed by all of its directors stating that they had no involvement with the internet promotion and were not aware of it until it occurred.
- ¶ 18 On July 30 Forum National issued a news release containing these statements:
- "Other than as a result of the public's favourable reaction to information contained in press releases issued by the Company since May 15, 2012, the directors and management of the Company are not aware of any reason for increased market activity and trading price since early April 2012."
 - "The British Columbia Securities Commission has provided the Company with promotional material respecting the Company published on certain internet websites. The Company and its directors and management do not endorse or agree with the statements made in the materials, except where the statements repeat information previously disclosed by the Company or are statements of verifiable fact. The Company has no knowledge of the source of funding for the creation and dissemination of the internet materials. The Company does not currently engage investor relations or publicity agents."
- ¶ 19 In the hearing, Clozza filed an affidavit deposing that he and, based on advice he received from each of the other directors of Forum National, they:
- did not, directly or indirectly cause the material used in the internet promotion to be prepared or to be published on the websites identified to him by Commission staff
 - did not, directly or indirectly, cause any payment to be made to anyone in connection with the material used in the internet promotion
 - had no knowledge of the content of the material used in the internet promotion or of its publication until discovery of its publication on the internet (except, as to his knowledge, where the statements repeat information previously disclosed by the Company or are statements of verifiable fact)

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III Analysis

¶ 20 Section 161(3) says:

“161(3) If the commission . . . considers it necessary and in the public interest, the commission . . . may . . . make an order extending a temporary order until a hearing is held and a decision rendered.”

¶ 21 In *Fairtide Capital Corp.* 2002 BCSECCOM 993 the Commission said that for the Commission to conclude that it is necessary and in the public interest to extend a temporary order, the executive director must produce *prima facie* evidence of the misconduct alleged and that the extension order was necessary and in the public interest.

¶ 22 In *Hypo Alpe-Adria-Bank (Lichtenstein) AG* 2007 BCSECCOM 622, the Commission considered *Fairtide* in circumstances where the evidence required to meet that test is not available. The Commission said that although the *prima facie* evidence standard is useful when the circumstances involve a known respondent and clearly defined alleged misconduct, it does not work for cases involving misconduct by persons unknown and, because they are unknown, it is not possible to gather the information necessary to meet the *prima facie* evidence standard:

“21 In considering whether it is necessary and in the public interest to extend a temporary order, the commission must assess the risk to the capital markets. If that risk assessment is hampered because commission staff cannot obtain information on a timely basis about the trading of individuals whose identities are protected by foreign banking secrecy laws, the balance of interests must be tilted in favour of protecting our capital markets. . . .”

¶ 23 The executive director has provided some evidence of suspicious activity by someone. There was a significant increase in both the trading volume and the price of the Forum National shares concurrent with the internet promotion. The trading pattern is suspicious (it has some of the earmarks of a manipulation) and although Forum National’s news releases may have contributed somewhat to the rise in price and volume, they could not alone account for a stock price of \$2.17, the highest price during the relevant period. That price would generate a market capitalization for Forum National of between \$69 million and \$93 million (Forum National had somewhere between 32 million and 43 million shares outstanding during the internet promotion period – the evidence is not entirely clear as to the correct number). That is not a credible value for a company with a nascent business and a history of no profits and significant losses.

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- ¶ 24 What the executive director has not provided is *prima facie* evidence, or indeed any evidence, that any of the respondents had anything to do with either the internet promotion or the suspicious trading that occurred during the internet promotion period.
- ¶ 25 The executive director acknowledges that, and says he is relying primarily on the *Hypo Bank* test, as opposed to the *Fairtide* test, in this application.
- ¶ 26 Indeed, the executive director has not alleged in the notice of hearing any contravention of the Act.
- ¶ 27 The executive director says we should apply the *Hypo Bank* test to determine that it is necessary and in the public interest to extend the temporary order because the respondents Forum National, Clozza and Tutschek engaged in conduct contrary to the public interest by, he says:
- engaging in conduct which they should reasonably have known would contribute to an artificial price for the Forum National shares (that conduct being their failure to issue a news release in a timely manner disclosing their involvement with the internet promotion, and Clozza's and Tutschek's refusal to be interviewed by Commission staff)
 - in the case of Clozza and Tutschek, engaging in conduct "apparently aimed at circumventing or violating" the halt trade order when they attempted to transfer shares out of the jurisdiction, and directed Forum National's transfer agent to issue new shares
 - in the case of Curtis, by trading Forum National shares between April 26 and June 28 "for a gross profit of \$738,000"
- ¶ 28 There is no basis on these facts to extend the temporary orders. The executive director has provided no evidence that the individual respondents had anything to do in connection with the internet promotion or the suspicious trading associated with it.
- ¶ 29 *Hypo Bank* does not apply here. In that case, the Commission panel found that there was evidence of suspicious trading through Hypo Bank's account at a British Columbia dealer by unknown clients of the Bank, and that the identities of the beneficial owners of the shares being traded were not available to commission staff due to secrecy laws in Lichtenstein. The panel extended the temporary order against the Bank until a hearing is held and a decision is rendered. In other words, Hypo had the information, but was refusing to divulge it. There is no evidence of that here.

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- ¶ 30 The executive director also cites *Sungro Minerals Inc.* 2009 BCSECCOM 585 and *Kunekt* 2011 BCSECCOM 225 as authorities, two cases in which Commission panels applied *Hypo Bank* in extending temporary orders against issuers. Neither of these cases assists the executive director here. In both of those cases there was evidence linking persons associated with the issuers to the impugned trading. There is no evidence of that here.
- ¶ 31 The individual respondents' conduct that the executive director says was contrary to the public interest, although not exemplary, is not a basis for the continuation of temporary orders against respondents against whom no allegations have been made to date and in respect of whom there has been no evidence produced that shows any connection whatsoever between them and the suspicious trading.
- ¶ 32 Although Forum National did not issue the news release demanded by staff as early as it ought to have, it has now done so. Its failure to do so may well have contributed to the continued rise in its stock price between the halt trade order and the temporary order. That said, that failure alone is not a basis for continuing a cease trade order against a public company that is a reporting issuer in British Columbia in the absence of any allegations against it and in respect of whom there has been no evidence produced that shows any connection whatsoever between it and the suspicious trading. The publicity surrounding the issuance of the halt trade order, the temporary order, and this hearing will serve to prevent the establishment of an artificial price for Forum National's shares.
- ¶ 33 The evidence at the hearing was that the individual respondents were given very short notice to appear for interviews (in Curtis' case, less than a day). When they did appear on short notice without counsel, they refused to answer questions until they had retained counsel, hardly surprising in the circumstances. They have all committed on the record to make themselves available for interviews on a timely basis.
- ¶ 34 The executive director's suggestion that Clozza's and Tutschek's intention, in attempting to transfer shares and instructing the transfer agent to issue treasury shares, was to "circumvent or violate" the halt trade order was gratuitous. There is no evidence whatsoever that was their intention.
- ¶ 35 Curtis, who is a shareholder of Forum National but not a director, officer or an insider, traded the company's shares during the internet promotion.
- ¶ 36 The executive director also states that Clozza's mother sold Forum National shares between April 20 and June 22 "for a gross profit of \$122,000".

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- ¶ 37 The fact of this trading is not relevant to the application in the absence of any other evidence about it.
- ¶ 38 We find that it is not necessary and in the public interest that the temporary order be extended. We revoke the extension of the order we made at the hearing.
- ¶ 39 August 8, 2012

For the Commission

Brent W. Aitken
Vice Chair

Kenneth G. Hanna
Commissioner

Shelley C. Williams
Commissioner