



Ontario
Securities
Commission

Commission des
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de l'Ontario

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**IN THE MATTER OF THE *SECURITIES ACT*,
R.S.O. 1990, c. S.5, AS AMENDED**

- AND -

**IN THE MATTER OF
GREENSTAR AGRICULTURAL CORPORATION AND LIANYUN GUAN**

**REASONS AND DECISION ON SANCTIONS AND COSTS
(Sections 127 and 127.1 of the Act)**

Hearing: In writing

Decision: January 28, 2016

Panel: Christopher Portner - Commissioner

Submissions: Jed Friedman - For Staff of the Commission

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REASONS AND DECISION ON SANCTIONS AND COSTS

I. INTRODUCTION

- [1] This was a written hearing before the Ontario Securities Commission (the “**Commission**”) pursuant to sections 127 and 127.1 of the Securities Act, R.S.O. 1990, c. S.5, as amended (the “**Act**”) to determine whether it is in the public interest to make an Order with respect to sanctions and costs against GreenStar Agricultural Corporation (“**GreenStar**”) and Lianyun Guan (“**Guan**” and, together with GreenStar, the “**Respondents**”).
- [2] GreenStar is a holding company which conducted substantially all of its business and operations through its subsidiary, Fujian Pucheng Star of Green Foodstuff Co., Ltd. (“**Fujian Pucheng**”). Fujian Pucheng’s management and its farming and food processing operations are located in the People’s Republic of China (the “**PRC**”).
- [3] In the decision on the merits in this matter, (2015) 38 O.S.C.B. 8271 (the “**Merits Decision**”), the Panel found that GreenStar has not complied with Ontario securities law and has acted contrary to the public interest by failing to:
- (a) File audited annual financial statements for the year ended December 31, 2013 as required by section 4.1 and paragraph 4.2(b) of National Instrument 51-102 - *Continuous Disclosure Obligations* (“**NI 51-102**”) and the related Management’s Discussion and Analysis (“**MD&A**”) required by section 5.1 of NI 51-102;
 - (b) File interim financial statements for the three-month periods ended March 31, 2014, June 30, 2014 and September 30, 2014 required by subsections 4.3(1), (2), (2.1) and (3) and paragraph 4.4(b) of NI 51-102, and the related MD&A required by section 5.1 of NI 51-102;
 - (c) File a certification of annual filings required by section 4.1 of National Instrument 52-109 - *Certification of Disclosure in Issuers’ Annual and Interim Filings* (“**NI 52-109**”) for the year ended December 31, 2013;
 - (d) File certifications of interim filings required by section 5.1 of NI 52-109 for the interim periods ended March 31, 2014, June 30, 2014 and September 30, 2014;
 - (e) Maintain an audit committee in accordance with section 2.1 of National Instrument 52-110 - *Audit Committees*;
 - (f) File a change of auditor notice in accordance with subsection 4.11(5)(b) of NI 51-102; and
 - (g) Pay its participation fee for the year ended December 31, 2013 in accordance with sections 2.2 and 2.3 of the Commission’s Rule 13-502 *Fees*.
- [4] The Panel found that Guan did not comply with Ontario securities law and acted contrary to the public interest by failing to:

- (a) File an amended Appointment of Agent for Service of Process following the resignations of Guan's and Fujian Pucheng's agents in accordance with National Instrument 41-101 - *General Prospectus Requirements*;
- (b) Co-operate with the audit of GreenStar's fiscal year ended December 31, 2013, which failure included, in particular, the failure to arrange for the auditors to visit GreenStar's bank and the tax bureau to perform certain audit procedures and the failure to provide copies of official receipts, information and documents to the auditors on a timely basis; and
- (c) Provide sufficient funding to the auditors to complete the 2013 audit and by frustrating the efforts of three law firms in the PRC to conduct an independent investigation on behalf of the Audit Committee of GreenStar.

[5] The Panel also found that, as a director and the Chief Executive Officer of GreenStar and the primary decision maker with respect to GreenStar and its subsidiaries, including Fujian Picheng, Guan is liable pursuant to section 129.2 of the Act for GreenStar's contraventions of Ontario securities law described above.

[6] The Panel found that Guan's conduct, which is described above, shows a complete disregard for the integrity of Ontario's capital markets, was abusive to investors and was contrary to the public interest.

II. POSITIONS OF THE PARTIES

A. Staff

[7] Staff submits that the following sanctions should be imposed on GreenStar:

- (a) An order pursuant to paragraph 2 of subsection 127(1) of the Act, that trading in any securities of GreenStar shall permanently cease;
- (b) An order pursuant to paragraph 2 of subsection 127(1) of the Act, that trading in any securities by GreenStar shall permanently cease;
- (c) An order pursuant to paragraph 2.1 of subsection 127(1) of the Act, that the acquisition of any securities by GreenStar shall be prohibited permanently; and
- (d) An order pursuant to paragraph 3 of subsection 127(1) of the Act, that any exemptions contained in Ontario securities law do not apply to GreenStar permanently.

[8] Staff submits that the following sanctions should be imposed on Guan:

- (a) An order pursuant to paragraph 2 of subsection 127(1) of the Act, that the trading of any securities by Guan shall be prohibited permanently;
- (b) An order pursuant to paragraph 2.1 of subsection 127(1) of the Act, that the acquisition of any securities by Guan shall be prohibited permanently;
- (c) An order pursuant to paragraph 3 of subsection 127(1) of the Act, that any exemptions contained in Ontario securities law do not apply to Guan permanently;

- (d) An order pursuant to paragraph 7 of subsection 127(1) of the Act, that Guan resign all positions that he may hold as a director or officer of an issuer;
- (e) An order pursuant to paragraphs 8, 8.2, and 8.4 of subsection 127(1) of the Act, that Guan be prohibited permanently from becoming or acting as a director or officer of any issuer, registrant and investment fund manager; and
- (f) An order pursuant to paragraph 8.5 of subsection 127(1) of the Act, that Guan be prohibited permanently from becoming or acting as a registrant, as an investment fund manager and as a promoter.

[9] Staff submits that the proposed sanctions against the Respondents are appropriate and in the public interest. The Respondents have shown an utter disregard for their investors, for the integrity of Ontario capital markets and for the Commission. They acted contrary to the public interest and breached fundamental requirements of Ontario securities law. Accordingly, Staff submits that the public interest requires the removal of the Respondents from Ontario’s capital markets.

[10] Staff further submits that the sanctions sought are consistent with the guidance regarding the importance of continuous disclosure provided by the Commission in *Re Zungui Haixi Corp.*, (2012) 35 O.S.C.B. 8287 (“**Zungui**”) and by the Alberta Securities Commission in *Re Flag Resources (1985) Ltd.*, 2010 ABASC 289, aff’d *Alberta (Securities Commission) v. Flag Resources (1985) Ltd.*, [2011] A.J. No. 858 (CA).

[11] With respect to costs and taking into account Rule 18.2 of the Commission’s *Rules of Procedure* which lists the factors that the Commission may consider in determining costs, Staff requests that the Respondents be ordered to pay \$129,845.66, and submits that such amount represents a portion of Staff’s costs and is reasonable in the circumstances.

B. Respondents

[12] The Respondents did not appear or make submissions, and did not object to the hearing on the merits being determined on the basis of the written record.

[13] The Respondents have similarly not appeared or made submissions, and have not objected to this hearing regarding sanctions and costs being determined on the basis of the written record.

[14] Pursuant to subsection 7(2) of the *Statutory Powers Procedure Act*, R.S.O. c. S. 22, the Commission has jurisdiction to proceed with a hearing in the absence of the Respondents if the Respondents have been given notice but have not appeared. I am satisfied that the Respondents have been given notice and, accordingly, it is appropriate that this hearing proceed in the absence of the Respondents.

III. ANALYSIS WITH RESPECT TO SANCTIONS

A. Overview of the law regarding the appropriate sanctions

[15] In determining what sanctions should be imposed on the Respondents, I am guided by the underlying purposes of the Act set out in section 1.1 of the Act which are to provide protection to investors from unfair, improper or fraudulent practices and to foster fair and efficient capital markets and confidence in those markets.

[16] The purpose of an order imposing sanctions under section 127 of the Act is protective and preventative. It is to restrain future conduct that is likely to be prejudicial to the public interest in fair and efficient capital markets. As stated by the Supreme Court of Canada in *Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, [2001] 2 S.C.R. 132, at para. 43:

... [t]he role of the OSC under s. 127 is to protect the public interest by removing from the capital markets those whose past conduct is so abusive as to warrant apprehension of future conduct detrimental to the integrity of the capital markets.

[17] With respect to the deterrence of the Respondents and other like-minded persons, the Supreme Court of Canada held in *Re Cartaway Resources Corp.*, [2004] 1 S.C.R. 672 (“*Cartaway*”) that the Commission is not prevented from considering general deterrence in making an order with respect to sanctions. The Court further stated that “... it is reasonable to view general deterrence as an appropriate, and perhaps necessary, consideration in making orders that are both protective and preventative.” (*Cartaway, supra* at para. 60.)

[18] In determining the appropriate sanctions, I must ensure that the sanctions are proportionate to both the particular circumstances of the case and the conduct of each of the Respondents (*Re M.C.J.C. Holdings Inc.*, (2002) 25 O.S.C.B. 1133 (“*M.C.J.C. Holdings*”) at 1134). I will also consider the range of sanctions ordered in similar cases.

[19] The Commission has considered the following non-exhaustive list of factors in determining the appropriate sanctions:

- (a) The seriousness of the conduct and the breaches of the Act;
- (b) The respondent’s experience in the marketplace;
- (c) The level of a respondent’s activity in the marketplace;
- (d) Whether or not there has been a recognition by a respondent of the seriousness of the improprieties;
- (e) Whether or not the sanctions imposed may serve to deter not only those involved in the case being considered but any like-minded people from engaging in similar abuses of the capital markets;
- (f) The size of any profit made or loss avoided from the illegal conduct;
- (g) The size of any financial sanction or voluntary payment when considering other factors;
- (h) The reputation and prestige of the respondent;
- (i) The shame or financial pain that any sanction would reasonably cause to the respondent;
- (j) The effect any sanction might have on the livelihood of the respondent;
- (k) The restraint any sanction may have on the ability of a respondent to participate without check in the capital markets; and

- (l) Any mitigating factors, including the remorse of the respondent.

(*Re Belteco Holdings Inc.*, (1998) 21 O.S.C.B. 7743 at 7746; *M.C.J.C. Holdings, supra* at 1136.)

B. Appropriate sanctions

1. Seriousness of the Respondents' conduct

- [20] Financial disclosure in accordance with the requirements of Ontario securities law is essential to the operation of Ontario's capital markets. As stated by the Commission in *Re Phillip Services Corp.*, (2006) 29 O.S.C.B. 3941 at para. 7, "Disclosure is the cornerstone principle of securities regulation. All persons investing in securities should have equal access to information that may affect their investment decisions."
- [21] As noted in paragraphs 8 to 11 of the Merits Decision, despite GreenStar's shares having been cease-traded, GreenStar did not comply with its disclosure requirements. In GreenStar's press release dated September 4, 2014, which followed the Commission's order that GreenStar's shares be ceased-traded, GreenStar stated that its Board of Directors had been unable to confirm numerous material facts concerning the status of GreenStar's business operations due to numerous conflicting representations by GreenStar's China-based management team.
- [22] In a further press release dated September 11, 2014, GreenStar stated that its Canadian management team had recently discovered that the real property of Fujian Pucheng had been put up for auction by a Chinese financial institution as the result of a judgment granted by the local courts and that its Audit Committee and the Canadian directors and management had strong concerns about unauthorized activities in China and their failure to receive further information, documentation and funding from Guan notwithstanding repeated requests.
- [23] Guan was the President, Chief Executive Officer and Chairman of the Board of Directors of GreenStar, and was responsible for ensuring that GreenStar met its disclosure requirements.¹ As noted above, the Panel found that Guan had not only failed to ensure that GreenStar met its disclosure requirements, he also frustrated and failed to co-operate with the audit of GreenStar's fiscal year ended December 31, 2013, failed to provide sufficient funding to the auditors to complete the 2013 audit, and frustrated the efforts of three law firms to conduct an independent investigation on behalf of GreenStar's Audit Committee.
- [24] The Panel found that Guan's conduct showed a complete disregard for the integrity of Ontario's capital markets, was abusive to investors and was contrary to the public interest.

2. The Respondents' activity in the marketplace

- [25] The Respondents were significant market participants. GreenStar participated in Ontario's capital markets by completing a reverse take-over of Aquarius Capital Corp. on May 31, 2011 and by listing its common shares on the TSX Venture Exchange on June 7,

¹ *Re Standard Trustco Ltd.* (1992), 15 O.S.C.B. 4322 at 4364.

2011.² GreenStar has been a reporting issuer since May 31, 2011 and, as noted above, Guan has been the President, Chief Executive Officer and Chairman of the Board of Directors of GreenStar since it became a reporting issuer (Merits Decision at para. 1).

3. Specific and general deterrence

[26] Like the respondents in *Zungui*, the Respondents have totally absented themselves from this jurisdiction and have demonstrated by their conduct that they are fundamentally ungovernable. The sanctions imposed as a result of the Respondents' conduct should preclude them from similar activity in Ontario's capital markets in the future. The following statements from *Zungui* apply equally to the Respondents:

... compliance with financial reporting requirements is essential to the functioning of capital markets. Failure to comply with these requirements will result in serious consequences for investors and for public confidence in the capital markets. Sanctioning of such conduct should send a clear message of deterrence to those who participate in the capital markets and should strongly discourage market participants from ignoring their obligations to maintain an audit committee and provide accurate and timely financial disclosure.³

4. Mitigating factors

[27] The Respondents did not participate in this hearing and there was no evidence before me of any mitigating factors.

5. Conclusion regarding the appropriate sanctions

[28] The circumstances of the Respondents' conduct is similar to that of the respondents in *Zungui*. In *Zungui*, the Panel described the seriousness of the conduct in question as follows:

Zungui and its management, the Individual Respondents, have failed to comply with basic requirements relating to the maintenance of an audit committee and public disclosure through the filing of audited financial statements. Their conduct is harmful to Ontario's capital markets and public confidence in the capital markets. *Zungui* shareholders are left with shares of a company for which complete financial information is not available, and without any current prospect that this information will be forthcoming.⁴

[29] In *Zungui*, the Panel found that the protection of Ontario's capital markets and public confidence in those markets required that *Zungui* and its principals be permanently prohibited from future participation in Ontario's capital markets.⁵

[30] In light of the foregoing, I find that it is in the public interest that GreenStar and Guan be removed from Ontario's capital markets and agree that the sanctions requested by Staff should be imposed on them.

² Affidavit of Marcel Tillie, sworn May 22, 2015, at para. 7.

³ *Zungui*, *supra* at para. 33.

⁴ *Zungui*, *supra* at para. 27.

⁵ *Zungui*, *supra* at paras. 34-35, 38 and 47.

IV. ANALYSIS WITH RESPECT TO COSTS

- [31] Staff submits that the Respondents should be ordered to pay \$129,845.66 and, in support of its submission, Staff provided the Affidavit of Yolanda Leung, sworn October 9, 2015, attaching a Bill of Costs, time docket and invoices for disbursements (the “**Leung Affidavit**”). In preparing its Bill of Costs, Staff has limited the costs to the time recorded in relation to issues that became the subject of the Statement of Allegations in this matter and to the costs of the lead investigator and lead litigator.⁶
- [32] Staff incurred fees of \$143,362.50 but only seek the recovery of \$123,682.50. Staff incurred disbursements of \$6,163.16 and seek the full recovery of that amount.
- [33] In exercising my discretion to order costs, I considered the factors set out in Rule 18.2 of the Commission’s *Rules of Procedure* (2014) 37 OSCB 4168 and the factors cited by the Commission in *Re Ochnik*, (2016) 29 O.S.C.B. 5917 (“*Ochnik*”) at para. 29. Of particular relevance to the determination of costs are (i) the failure of the Respondents to co-operate with Staff; (ii) the failure of the Respondents to participate in the proceeding; and (iii) the seriousness of the findings relating to the Respondents’ failure to comply with Ontario securities laws.
- [34] I note that the costs in the matter were reduced from what they would have otherwise been as a result of the hearing on the merits being conducted in writing.
- [35] In the circumstances, I am satisfied that the costs requested by Staff are reasonable.

V. CONCLUSION

- [36] For the reasons stated above, I find that it is in the public interest to order the following, and will issue a separate order to that effect:
- (a) Pursuant to paragraph 2 of subsection 127(1) of the Act, trading in any securities of GreenStar shall permanently cease;
 - (b) Pursuant to paragraph 2 of subsection 127(1) of the Act, trading in any securities by GreenStar shall permanently cease;
 - (c) Pursuant to paragraph 2.1 of subsection 127(1) of the Act, the acquisition of any securities by GreenStar is prohibited permanently;
 - (d) Pursuant to paragraph 3 of subsection 127(1) of the Act, any exemptions contained in Ontario securities law do not apply to GreenStar permanently;
 - (e) Pursuant to paragraph 2 of subsection 127(1) of the Act, the trading of any securities by Guan is prohibited permanently;
 - (f) Pursuant to paragraph 2.1 of subsection 127(1) of the Act, the acquisition of any securities by Guan is prohibited permanently;
 - (g) Pursuant to paragraph 3 of subsection 127(1) of the Act, any exemptions contained in Ontario securities law do not apply to Guan permanently;
 - (h) Pursuant to paragraph 7 of subsection 127(1) of the Act, Guan shall resign all positions that he may hold as a director or officer of an issuer;

⁶ Leung Affidavit at paras. 4 to 6.

- (i) Pursuant to paragraphs 8, 8.2 and 8.4 of subsection 127(1) of the Act, Guan is prohibited permanently from becoming or acting as a director or officer of any issuer, registrant, and investment fund manager;
- (j) Pursuant to paragraph 8.5 of subsection 127(1) of the Act, Guan is prohibited permanently from becoming or acting as a registrant, as an investment fund manager and as a promoter; and
- (k) Pursuant to section 127.1 of the Act, Guan shall pay the investigation and hearing costs incurred in this matter in the amount of \$129,845.66.

Dated at Toronto this 28th day of January, 2016.

“Christopher Portner”

Christopher Portner