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Securities
Commission

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de l'Ontario

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Citation: Dunk (Re), 2019 ONSEC 6
Date: 2019-01-24
File No. 2018-74

**IN THE MATTER OF
MICHELLE DUNK**

**REASONS AND DECISION
(Subsections 127(1) and 127(10) of the *Securities Act*, RSO 1990, c S.5)**

Hearing: In Writing

Decision: January 24, 2019

Panel: Mark J. Sandler Commissioner and Chair of the Panel

Appearances: Vivian Lee For Staff of the Commission

No submissions made by or on
behalf of Michelle Dunk

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REASONS AND DECISION

I. OVERVIEW

- [1] In April 2018, the respondent Michelle Dunk was convicted in the Ontario Court of Justice for unregistered trading, illegal distribution of securities and fraud in contravention of the *Securities Act* (the **Act**).¹ She was also convicted of contravening the Act by trading in securities while prohibited from doing so by a temporary cease trade order (**TCTO**) issued by the Ontario Securities Commission.
- [2] Enforcement Staff of the Commission (**Staff**) applies for a protective order in the public interest pursuant to ss. 127(10) and 127(1) of the Act. More particularly, Staff relies on paragraph 1 of ss. 127(10) of the Act. It provides that an order may be made under s. 127(1) in respect of a person who has been convicted in any jurisdiction of an offence arising from a transaction, business or course of conduct related to securities or derivatives. Staff submits that this precondition has been met, and that it is in the public interest based on the totality of circumstances, including but not limited to Ms. Dunk's convictions in Ontario for such offences, to make an inter-jurisdictional² enforcement order on the terms proposed.
- [3] This matter was heard in writing. Ms. Dunk chose not to participate in the proceeding. Based on the written submissions, hearing brief and supporting legal precedents filed by Staff, I am satisfied that the precondition for the proposed order has been met, and that it is in the public interest to issue the requested order.
- [4] These are my reasons for so concluding.

II. BACKGROUND

A. Previous Commission Proceedings

- [5] On July 27, 2011, the Commission issued a TCTO against Ms. Dunk arising out of allegations pertaining to an oil investment scheme that ran between October 2010 and April 2011. In 2015, Ms. Dunk entered into a Settlement Agreement with Staff in relation to the above allegations. In its order dated January 6, 2015, approving the Settlement Agreement, the Commission issued an order prohibiting Ms. Dunk from trading in or acquiring securities for a period of eight years. The order included an exception that, in essence, allowed Ms. Dunk to trade and acquire securities through a registrant for personal purposes in her own account, following payment of the administrative penalty and costs orders against her.³

B. Ontario Court of Justice Proceedings

- [6] On February 29, 2016, Ms. Dunk pled guilty before Justice Hearn of the Ontario Court of Justice to unregistered trading and breach of a TCTO. On

¹ RSO 1990, c S.5

² Inter-jurisdictional, in this context, refers to relevant convictions in judicial proceedings, whether or not in Ontario. More frequently, inter-jurisdictional refers to orders made by securities regulatory authorities in jurisdictions other than Ontario.

³ *Ground Wealth Inc. (Re)*, (2015) 38 OSCB 250

March 4, 2016, she was sentenced to a total of 75 days' imprisonment, to be served intermittently, two years of probation and an order of restitution. She had paid partial restitution prior to her plea.

- [7] On June 23, 2016, Ms. Dunk was charged with multiple offences, relating to conduct that pre-dated the subject matter of her earlier guilty plea. These offences related to another investment scheme and were as follows:
- a. unregistered trading, contrary to s. 25(1) of the Act,
 - b. illegal distribution of securities, contrary to s. 53(1) of the Act,
 - c. fraud, contrary to s. 126.1(1)(b) of the Act, and
 - d. contravening Ontario securities law by trading in securities while prohibited from doing so by a TCTO, contrary to s. 122(1)(c) of the Act.
- [8] On April 23, 2018, following a 12-day contested trial, Justice Sopinka convicted Ms. Dunk on all counts.⁴ The trial judge found that between May 1, 2012, and May 30, 2016, Ms. Dunk traded in securities without being registered, illegally distributed securities and traded in securities while prohibited from doing so. The trial judge also found that Ms. Dunk's actions "constituted conduct relating to securities that perpetrated a fraud on four different individuals."⁵ The complainants suffered losses in the total amount of \$87,000 (Cdn.) and \$70,000 (U.S.), little of which was recovered.
- [9] Ms. Dunk's multiple false statements and misrepresentations to the investors constituted fraud. These included:
- a. failing to disclose to investors that Ms. Dunk was subject to a TCTO,
 - b. misrepresenting to an investor that her funds were being directed to an investment when they were instead retained by Ms. Dunk, allegedly for payment of a commission without notice to the investor,
 - c. misrepresenting to investors that their investments were 100% secure and that their funds were secured by liens, and
 - d. misrepresenting to another investor that he was investing in a company called Rocky Point when in fact there was no such investment and his funds were directed to another entity.
- [10] On October 17, 2018, Justice Sopinka sentenced Ms. Dunk to imprisonment for two years less a day, prohibited her from trading in securities permanently and ordered the payment of restitution to multiple complainants.⁶
- [11] Staff relies upon the convictions registered by Justice Sopinka in support of this application for an inter-jurisdictional enforcement order.
- III. RESPONDENT'S NON-PARTICIPATION**
- [12] In this proceeding, Staff served Ms. Dunk personally on December 6, 2018, with the Notice of Hearing, the Statement of Allegations and Staff's Hearing Brief,

⁴ *Ontario Securities Commission v Dunk*, Reasons for Judgment released on April 23, 2018 (OCJ) at para 194 (**Reasons for Judgment**)

⁵ *Ontario Securities Commission v Dunk*, Reasons for Sentence released on October 17, 2018 (OCJ) (**Reasons for Sentence**) at para 1

⁶ Reasons for Sentence at paras 46-47

Written Submissions and Brief of Authorities. Staff filed an Affidavit of Service sworn on December 7, 2018. I find that Staff properly effected service on the respondent.

[13] In its Statement of Allegations, Staff elected to proceed using the expedited procedure for inter-jurisdictional proceedings set out in Rule 11(3) of the *Ontario Securities Commission Rules of Procedure and Forms*.⁷ Pursuant to Rule 11(3)(g), Ms. Dunk had 28 days following service to deliver a hearing brief and written submissions. Although properly served, Ms. Dunk filed no materials by the deadline, or at any point.

[14] I am satisfied that the respondent was provided with adequate notice of this written hearing and that, pursuant to the *Statutory Powers Procedure Act*⁸ and the *OSC Rules of Procedure*,⁹ it is appropriate to proceed in her absence.

IV. LAW AND ANALYSIS

A. Did Ms. Dunk's conviction arise from a transaction, business or course of conduct related to securities?

[15] I turn now to the substantive issues raised in Staff's application. As previously indicated, s. 127(10) of the Act authorizes an order under s. 127(1) where a respondent has been convicted in any jurisdiction of an offence arising from a transaction, business or course of conduct related to securities.

[16] That precondition has been met here. The trial judge applied the test articulated in *Reves v Ernst & Young*, 494 US 56 (1990) (which has been adopted by Canadian courts) in finding that the promissory notes sold by Ms. Dunk were securities.¹⁰ Ms. Dunk's sale of securities and related activities resulted in convictions for breaching ss. 25(1), 53(1), 122 and 126.1(1)(b) of the Act. Having regard to both the nature of the offences that were the subject of convictions, and the trial judge's findings of fact, I am satisfied that Ms. Dunk's convictions were for offences arising from transactions, business and a course of conduct related to securities.

B. Is it in the public interest to order sanctions against Ms. Dunk?

[17] Both s. 127(10) and existing jurisprudence make clear that where the above precondition has been met, the Commission has the discretion to grant an application for an inter-jurisdictional enforcement order and, if granted, as to the terms to be imposed. In exercising that discretion, I rely on the following summary of relevant principles from the Act and the existing jurisprudence:¹¹

- a. The Commission must be satisfied that the requested order is in the public interest;
- b. The Commission should consider, in determining whether the requested order is in the public interest, whether the order is necessary to protect investors in Ontario and for the integrity of Ontario's capital markets;

⁷ (2017) 40 OSCB 8988 (**OSC Rules of Procedure**)

⁸ RSO 1990, c S.22, s 7(2)

⁹ OSC Rules of Procedure, r 21(3)

¹⁰ Reasons for Judgment at paras 37-67

¹¹ *Global 8 Environmental Technologies Inc (Re)*, 2017 ONSEC 31, (2017) 40 OSCB 7127 at paras 12-14 (together with the cases referred to therein)

- c. The purpose of the Commission’s public interest jurisdiction is “neither remedial nor punitive; it is protective and preventative”; the purpose “is to restrain future conduct that is likely to be prejudicial to the public interest in fair and efficient capital markets;”
- d. Put another way, the purpose of a s. 127(1) order “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;”
- e. Findings of fact made by a court stand as determinations of fact for the purpose of the Commission’s exercise of discretion under s. 127(10);¹²
- f. Deterrence, both specific and general, is a relevant consideration in whether a protective and preventative order should be made and what that order should include. Deterrence “is prospective in orientation and aims at preventing future conduct;” and
- g. In determining what sanctions are appropriate to incorporate into a s. 127 order, the Commission must consider the particular circumstances as they relate to each respondent.

[18] Ms. Dunk’s misconduct was extremely serious. She solicited substantial funds from trusting investors of modest means through multiple fraudulent misrepresentations. The trial judge found that her actions were motivated solely by personal financial gain, without regard for the financial devastation she caused.¹³ She exploited her personal relationships with investors. She was aware when she sold the investments that she was the subject of a TCTO, and forged ahead nonetheless, deliberately failing to disclose that fact to investors.¹⁴ The trial judge found her conduct so serious as to compel a substantial term of imprisonment, as well as an order prohibiting Ms. Dunk from trading in securities permanently.

[19] In my view, it is in the public interest to impose strong protective sanctions in this matter to protect investors in Ontario and the integrity of Ontario’s capital markets. The proposed order complements the order made by Justice Sopinka. It is proportionate to Ms. Dunk’s misconduct and appropriate in the circumstances.

V. DISPOSITION

[20] For the above reasons, the application is granted and an order will be issued in relation to the respondent on the following terms:

- a. pursuant to paragraph 2 of s. 127(1) of the Act, trading in any securities or derivatives by Ms. Dunk shall cease permanently;
- b. pursuant to paragraph 2.1 of s. 127(1) of the Act, acquisition of any securities by Ms. Dunk shall be prohibited permanently;

¹² *Reeve (Re)*, 2018 ONSEC 55, (2018) 41 OSCB 9433 at para 19

¹³ Reasons for Sentence at para 44

¹⁴ Reasons for Sentence at para 7(4)

- c. pursuant to paragraph 3 of s. 127(1) of the Act, any exemptions contained in Ontario securities law shall not apply to Ms. Dunk permanently;
- d. pursuant to paragraphs 7, 8.1 and 8.3 of s. 127(1) of the Act, Ms. Dunk shall resign any positions that she holds as a director or officer of any issuer or registrant;
- e. pursuant to paragraphs 8, 8.2 and 8.4 of s. 127(1) of the Act, Ms. Dunk shall be prohibited permanently from becoming or acting as a director or officer of any issuer or registrant; and
- f. pursuant to paragraph 8.5 of s. 127(1) of the Act, Ms. Dunk shall be prohibited permanently from becoming or acting as a registrant or promoter.

Dated at Toronto this 24th day of January, 2019.

"Mark J. Sandler"

Mark J. Sandler