

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

**- and -**

**IN THE MATTER OF  
FOUNDATION EQUITY CORPORATION**

**SETTLEMENT AGREEMENT**

**I. INTRODUCTION**

1. By Notice of Hearing dated September 27, 2002 (the “Notice of Hearing”), the Ontario Securities Commission (the “Commission”) announced that it proposed to hold a hearing to consider whether, pursuant to sections 127(1) and 127.1 of the *Securities Act*, R.S.O. 1990, c. S.5, as amended (the “Act”), it is in the public interest for the Commission to make an order that the Respondent submit to a review of its practices and procedures and institute such changes as may be ordered by the Commission, be reprimanded, and pay the Commission’s costs of its investigation and hearing into this matter.

**II. JOINT SETTLEMENT RECOMMENDATION**

2. Staff of the Commission (“Staff”) agree to recommend settlement of the proceeding initiated in respect of the Respondent by the Notice of Hearing in accordance with the terms and conditions set out in this settlement agreement (the “Settlement Agreement”). The Respondent consents to the making of an order against it in the form attached as Schedule “A” on the basis of the facts set out below in Part III.

### **III. AGREED STATEMENT OF FACTS**

3. The Respondent agrees, for the purposes of this proceeding, with the following facts:
4. The Respondent, Foundation Equity Corporation (“Foundation”) is a private company which was incorporated pursuant to the laws of Alberta on May 24, 1990. Foundation is a venture capital company which invests in other companies. Currently, its shareholders consist of approximately 20 individuals, each of whom has contributed varying amounts of capital. Foundation has a trading account at CIBC Wood Gundy Inc. (“Wood Gundy”).
5. At the material time, Kerry Brown (“Brown”), who resides in St. Albert, Alberta, was a shareholder in Foundation and its President, CEO and Chairman.
6. Global Thermoelectric Inc. (“GLE”) is a company which was initially incorporated, under a different name, in Alberta in 1975 and is currently situated in Calgary. GLE’s primary line of business is designing and manufacturing fuel cells intended to supplement or replace gasoline engines. At the material time, Brown was a director of GLE, in addition to being an officer and director of Foundation.
7. GLE was one of the ventures in which Foundation invested. As of the close of business on April 15, 1999, Foundation owned 6,019,151 (or 37%) of the 16,173,184 common shares of GLE then issued and outstanding.

#### **Reporting Issuer Status of GLE**

8. GLE became a reporting issuer in Alberta on August 3, 1994 and obtained a listing on the Alberta Stock Exchange on September 30, 1996.
9. GLE became a reporting issuer in Ontario on October 8, 1998, the date on which GLE obtained a listing on the Toronto Stock Exchange (“TSE”).
10. In addition to Alberta and Ontario, GLE also has reporting issuer status in British Columbia and Manitoba.

#### **Improper Distribution from Control Block**

11. Between October 8, 1998, the date on which GLE obtained reporting issuer status in Ontario, and April 7, 1999, the shares of GLE traded on the TSE at prices ranging from \$.86 to \$1.20.
12. On April 8, 1999, GLE issued a press release in which it announced that “it has achieved record power output in the first test of a new proprietary design solid oxide fuel cell”.
13. On Friday, April 16, 1999, the opening price of GLE shares on the TSE was \$3.60. At approximately 10:44 a.m., trading in the shares of GLE was halted at the request of GLE pending a further announcement. At approximately 11:20 a.m., GLE issued a news release announcing a major contract. At approximately 12:30 p.m., trading in the shares of GLE resumed at a price of \$9 per share. Over the remainder of April 16, 1999, the shares of GLE traded as high as \$16 per share and closed the day at a price of \$10.70 per share.
14. On the morning of Friday, April 16, 1999, Brown, on behalf of Foundation’s board of directors, instructed Foundation’s broker at the Edmonton branch office of Wood Gundy to sell one million shares of GLE from Foundation’s account. The Edmonton office relayed the order to Wood Gundy’s office in Toronto, which placed the order with its retail block desk. The retail block desk in Toronto began placing the shares for sale after trading resumed at 12:30 p.m. The entire block of one million GLE shares was sold on April 16, 1999 at an average price of \$11.83 per share.
15. On Monday, April 19, 1999, Brown instructed Foundation’s broker at the Edmonton office of Wood Gundy to sell an additional one million shares of GLE from the account of Foundation at an average price of \$10.42. The retail block desk in Toronto began placing the shares for sale at approximately 9:50 a.m. A total of 226,200 shares of GLE were sold that day before Brown gave instructions to cancel the order at approximately 3:00 p.m.
16. Brown states that he cancelled the order because, during the course of the day on Monday, April 19, 1999, he learned, as a result of discussions with a representative of Sprott Securities in Toronto with whom he was dealing, that Foundation should have filed a Form 23 with the Commission prior to selling its shares of GLE. Brown states that upon being so advised, he immediately contacted Foundation’s counsel, Parlee

McLaws located in Edmonton, Alberta, which subsequently resulted in Brown instructing Wood Gundy to cancel the order he had given earlier that morning to sell additional shares of GLE.

17. By way of letter dated April 20, 1999, transmitted by fax on that date, Foundation filed a Form 23 (“Notice of Intention to Sell”) with the Commission, as contemplated by section 72(7) of the Act. The Form 23 was signed by Brown and filed on behalf of Foundation by its counsel, Parlee McLaws. The Form 23 and attached covering letter acknowledged that 1,226,000 shares of GLE had already been sold by Foundation on April 16 and 19, 1999.
18. Item #2 of Form 23 under the Act required Foundation to certify the “Date issuer became a reporting issuer:”. Although Form 23 is promulgated pursuant to the (Ontario) Act and is required to be filed only by reporting issuers in Ontario, Item #2 does not specifically state the jurisdiction in respect of which that information is required. The Form 23 filed by Foundation incorrectly stated that: “Global Thermoelectric Inc. became a reporting issuer on August 3, 1994”- the date on which GLE became a reporting issuer in Alberta. As set out above, GLE did not become a reporting issuer in Ontario until October 8, 1998.
19. Brown states that he understood Item #2 on Form 23 to refer to the date on which GLE *first* became a reporting issuer in Alberta, as distinct from the date on which GLE became a reporting issuer in Ontario. Brown states that he relied upon Parlee McLaws, Foundation’s corporate counsel, to prepare the Form 23.
20. Under cover of a separate letter dated April 20, 1999, Foundation filed a second Form 23 with the Commission in respect of the proposed sale on or about April 30, 1999 of a further two million shares of GLE through the facilities of the TSE. Thereafter, Brown states that Foundation sought further clarification of its position, as a result of which Foundation advised the Commission on or about July 12, 1999 that it did not intend to pursue its plans to sell the additional two million shares of GLE.

### **The Relevant Provisions of the Act**

21. Clause (c) of section 1(1) of the Act defines a “distribution”, where used in relation to trading in securities, to mean:

(c) a trade in previously issued securities of an issuer from the holdings of any person, company or combination of persons or companies holding a sufficient number of any securities of that issuer to affect materially the control of that issuer, but any holding of any person, company or combination of persons or companies holding more than 20% of the outstanding voting securities of an issuer shall, in the absence of evidence to the contrary, be deemed to affect materially the control of that issuer.

22. Section 53(1) of the Act provides that:

(1) No person or company shall trade in a security on his, her or its own account or on behalf of any other person or company where such trade would be a distribution of such security, unless a preliminary prospectus and a prospectus have been filed and receipts therefor obtained from the Director.

23. Section 72(7) of the Act provides an exemption from the prospectus requirements of section 53 of the Act with respect to a “distribution” within the meaning of clause (c) of the definition of “distribution” in subsection 1(1) of the Act if (emphasis added),

(b) the issuer of the security is a reporting issuer and has been a reporting issuer for at least 18 months and is not in default of any requirement of this Act or the regulations and the seller, unless exempted by the regulations,

(i) files with the Commission and any stock exchange recognized by the Commission for this purpose on which the securities are listed at least seven days and not more than 14 days prior to the first trade made to carry out the distribution,

(A) a notice of intention to sell in the form prescribed by the regulations [Form 23] disclosing particulars of the control position known to the seller, the number of securities to be sold and the method of distribution, and

(B) a declaration signed by each seller as at a date not more than 24 hours prior to filing and prepared and executed in accordance with the regulations.

24. On April 16, 1999, the first date on which Foundation sold shares of GLE, Foundation owned 37% of the issued and outstanding shares of GLE and therefore was in a position to affect materially the control of GLE within the meaning of clause (c) of section 1(1) of the Act. The sale of shares from Foundation's "control block" in GLE therefore constituted a "distribution" as that term is defined in the Act.
25. As a result, Foundation was not permitted to sell its shares of GLE unless it had first: (i) complied with the prospectus requirements of section 53 of the Act; or (ii) qualified for and relied upon an exemption specified under the Act, such as the exemption provided for in section 72(7) of the Act; or (iii) presented evidence to the Commission establishing that the sale from Foundation's control block was not a "distribution" within the meaning of clause (c) of section 1(1) of the Act; or (iv) applied for and obtained an exemption order from the Commission.
26. The Form 23 "Notice of Intention to Sell" filed by Foundation after it had already sold approximately 1.2 million shares of GLE from its control block was invalid for two reasons:

(i) Foundation did not qualify for the exemption under section 72(7) of the Act in the first place since GLE, the issuer of the securities which were the subject of the sale, had not been a reporting issuer in Ontario for at least 18 months. At the time of Foundation's sale of the GLE shares on April 16 and 19, 1999, GLE had only been a reporting in Ontario for approximately six months (since October 8, 1998).

(ii) even assuming that Foundation qualified for the exemption under section 72(7) of the Act, which it did not, Foundation failed to comply with the timing requirements prescribed under section 72(7) of the Act, which requires a Form 23 to be filed "at least seven days, and not more than 14 days" in advance of the first trade commencing the distribution.

27. Foundation's sale of its shares of GLE therefore constituted an unlawful distribution which resulted in approximately 1.2 million shares of GLE being sold through the TSE without notice to the market that the 1.2 million shares were in fact from a control block.
28. By engaging in the conduct set out above, Foundation admits that it contravened the Act.

### **Representations by Foundation**

29. Brown states that he was not aware that Foundation's holdings of GLE constituted a "control block" and that, as such, those shares were subject to certain restrictions under the Act, including specifically the 18 month hold period with respect to their sale through the TSE. Brown also states that he was not aware that a Form 23 was required to be filed in respect of sales from a control block. Brown states that he relied on Foundation's broker, Wood Gundy, to carry out the sale of the GLE shares in a lawful manner. Brown states that he immediately cancelled the outstanding order at Wood Gundy once the issue of the control block was brought to his attention and attempted to rectify the situation by filing the Form 23.

### **Related Proceedings**

30. David Arthur Jones ("Jones") was the registered representative in the Edmonton office of CIBC Wood Gundy responsible for Foundation's account. Jones was one of the approximately twenty investors in Foundation.
31. By Settlement Agreement, dated March 7, 2000, the TSE found that Jones had engaged in conduct unbecoming an Approved Person by acting as the agent for the seller of shares (Foundation) from a control block through the TSE, contrary to applicable securities laws and the policies of the TSE. The TSE found that Jones had failed to exercise sufficient due diligence to determine whether the sale by Foundation of the GLE sales constituted a sale from a control block. Under the terms of the settlement, Jones paid a fine of \$15,000, disgorged the commissions he had earned on the unlawful sales in the amount of \$27,589 and paid \$3000 in satisfaction of the TSE's costs of its investigation.
32. By Settlement Agreement, dated December 18, 1999, with the Alberta Securities Commission, Foundation and Brown jointly agreed to pay an administrative penalty of \$28,000, as well as \$2000 in satisfaction of the ASC's costs of its investigation.

#### **IV. TERMS OF SETTLEMENT**

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33. Foundation agrees to the following terms of settlement:

(a) effective from the date the settlement is approved, Foundation will retain and instruct counsel in Ontario to effect all filings required to be made by Foundation with the TSE, the Commission, or any other securities regulatory body in Ontario;

(b) effective from the date the settlement is approved, Foundation will complete and deliver, on an annual basis within two weeks of the anniversary of the approval of this settlement, an up-to-date “Know Your Client” form to all brokers through which it effects trades through a recognized exchange in Ontario and to all Ontario counsel retained by Foundation in accordance with (a) above. Foundation will prepare and attach a schedule to this “Know Your Client” form listing, by issuer, all of Foundation’s shareholdings and identifying those issuers in which Foundation owns or controls more than 20% of the outstanding voting securities of the issuer;

(c) commencing 6 months from the date the settlement is approved and continuing thereafter, Foundation agrees that at least one of its directors at any given time will have completed and passed the Partners, Directors and Officers course of the Canadian Securities Institute;

(d) Foundation will be reprimanded;

(e) Foundation will pay \$2000 in satisfaction of the costs of the Commission’s investigation and hearing in this matter.

#### **V. PROCEDURE FOR APPROVAL OF SETTLEMENT**

34. Staff and Foundation shall seek approval of the Settlement Agreement at a public hearing of the Commission (the “Hearing”) scheduled for such date as may be agreed to by Staff and Foundation, in accordance with the procedures described in this Settlement Agreement.

35. Staff and Foundation may refer to any part, or all, of the Settlement Agreement at the Hearing. Staff and Foundation agree that the Settlement Agreement will constitute the entirety of the evidence to be submitted at the Hearing.

## **VI. COMMITMENTS BY STAFF AND FOUNDATION**

36. If the Settlement Agreement is approved by the Commission, then Staff will not:
- i) initiate any complaint to the Commission concerning Foundation;
  - ii) request that the Commission hold a hearing or issue any other order against Foundation; or
  - iii) initiate any other proceeding against Foundation;
- in relation to the facts set out in Part III of the Settlement Agreement.
37. If the Settlement Agreement is approved by the Commission, then Foundation agrees to waive its right to a full hearing, judicial review and appeal of this matter under the Act.
38. If the Settlement Agreement is approved by the Commission, then neither Staff nor Foundation will make any public statement inconsistent with the Settlement Agreement.
39. If, at the conclusion of the settlement hearing, and for any reason whatsoever, the Settlement Agreement is not approved by the Commission, or an order in the form attached as Schedule “A” is not made by the Commission, then:
- (a) the Settlement Agreement, including all discussions and negotiations leading up to its presentation at the settlement hearing, and all negotiations between Staff and counsel for Foundation concerning the matter of the sanctions proposed for Foundation, shall be without prejudice to Staff and to Foundation. Staff and Foundation will be entitled to all available proceedings, remedies and challenges, including proceeding to a hearing of the allegations in the Notice of Hearing and Statement of Allegations, unaffected by the Settlement Agreement and the settlement negotiations;

- (b) the terms of the Settlement Agreement will not be referred to in any subsequent proceeding, or disclosed to any person, except with the written consent of Staff and Foundation, or as may be required by law; and
- (c) Foundation agrees that it will not, in any proceeding, refer to or rely upon the Settlement Agreement or the negotiation or process of approval of the Settlement Agreement as the basis for any attack on the Commission's jurisdiction, alleged bias, appearance of bias, alleged unfairness or any other remedies or challenges that may otherwise be available.

## **VII. DISCLOSURE OF AGREEMENT**

- 40. Staff and Foundation may refer to any part or all of the Settlement Agreement in the course of the Hearing. Otherwise, the Settlement Agreement and its terms shall be treated as confidential by Staff and Foundation until approved by the Commission, and forever if, for any reason whatsoever, the Settlement Agreement is not approved by the Commission, except with the written consent of both Staff and Foundation or as may be required by law.
- 41. Any obligations of confidentiality concerning the terms of the Settlement Agreement shall terminate upon approval of the Settlement Agreement by the Commission.

## **III. EXECUTION OF AGREEMENT**

- 42. The Settlement Agreement may be signed in one or more counterparts which together shall constitute a binding agreement. A facsimile copy of any signature shall be as effective as an original signature.

Dated this 30th day of September, 2002.

**FOUNDATION EQUITY CORPORATION**

Per:

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Kerry Brown, Authorized Signing Officer

**STAFF OF THE ONTARIO SECURITIES  
COMMISSION**

Per:

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Michael Watson

Director of Enforcement