Ontario Securities Commission
Commission des valeurs mobilières 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
STERLING GRACE & CO. LTD. AND GRAZIANA CASALE

REASONS AND DECISION ON A STAY MOTION
(Subsection 8(4) of the Act)

Hearing:	November 26, 2013	
Decision:	November 27, 2013	
Panel:	Mary G. Condon	- Vice-Chair
Appearances:	Melissa J. MacKewn Natalia Vandervoort	- For Sterling Grace & Co. Ltd. and Graziana Casale
	Michelle Vaillancourt Mark Skuce Michael Denyszyn	- For Staff of the Commission

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REASONS AND DECISION ON A STAY MOTION

I. THE APPLICATION

[1] On November 18, 2013, a Deputy Director of the Compliance and Registrant Regulation branch of the Ontario Securities Commission (the "**Commission**") issued a decision with respect to the registration of Sterling Grace & Co. Ltd. ("**Sterling Grace**") and Graziana Casale ("**Casale**") that:

(a) the registration of Sterling Grace is suspended permanently;

(b) the registration of Casale as ultimate designated person and chief compliance officer is suspended permanently;

(c) the registration of Casale as a dealing representative be suspended, and that she not be permitted to apply for reinstatement for a period of two years;

(d) Casale successfully complete the *Conduct and Practices Handbook Course* before applying for reinstatement of registration;

(e) Casale be subject to one year of strict supervision in the event her registration is reinstated; and

(f) Casale shall not be a permitted individual of a registered firm for a period of five years.

(the "**Director's Decision**")

[2] Sterling Grace and Casale (together, the "**Applicants**") have requested a hearing and review of the Director's Decision by the Commission pursuant to s. 8(2) of the *Securities Act*, R.S.O. 1990, c. S.5, as amended (the "**Act**") (the "**Hearing and Review**") and, pursuant to s. 8(4) of the Act, request a stay of the Director's Decision pending the disposition of the Hearing and Review.

[3] In addition, the Applicants request that an Investor Alert posted on the Commission's website on November 19, 2013 following the issuance of the Director's Decision (the "**Investor Alert**") be taken down from the Commission's website and that a retraction be posted by the Commission.

[4] Staff of the Commission ("**Staff**") opposes the Applicant's request.

[5] These are my reasons and decision on the Applicant's request for (i) an interim stay pending the disposition of the Hearing and Review and (ii) the retraction of the Investor Alert.

II. ANALYSIS

A. Stay of the Director's Decision

[6] Subsection 8(4) of the Act permits the Commission to grant a stay of a decision of the Director pending the disposition of a hearing and review:

> 8. (4) Despite the fact a person or company requests a hearing and review under subsection (2), the decision under review takes effect immediately, but the Commission may grant a stay until disposition of the hearing and review.

[7] Both Staff and the Applicants agree that the test to be applied for consideration of a request for an interim stay is the three-stage test set out by the Supreme Court in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 ("***RJR-MacDonald***"):

1. Is there a serious question to be tried?

2. Would the Applicants suffer irreparable harm if the application were refused?

3. Does the balance of inconvenience favour the granting or refusal of a stay?

[8] I apply these elements of the test below.

1. Is there a serious issue to be tried?

[9] There is a low threshold to be met for this first stage of the test, which requires a preliminary assessment of the merits of the case (*RJR-MacDonald, supra* at para. 49). The Supreme Court directs that "[o]nce satisfied that the application is neither vexatious nor frivolous, the motions judge should proceed to consider the second and third tests, even if of the opinion that the plaintiff is unlikely to succeed at trial" (*RJR-MacDonald, supra* at para. 50).

[10] The Applicants submit that there is a serious issue to be tried in this case. They submit that their application for a hearing and review is neither frivolous nor vexatious and that they are asserting their statutory right for a hearing and review.

[11] Meanwhile, Staff submits that a review of the extent of the deficiencies identified in the Director's Decision leads to a conclusion that there is no serious issue to be tried on Hearing and Review.

[12] The grounds for review asserted by the Applicants' in their request for a hearing and review include, amongst other things, a lack of adequate reasons in the Director's Decision and failure to give due consideration and weight to evidence submitted by the Applicants. Without consideration of the Director's Decision, I find that the grounds asserted by the Applicants for a Hearing and Review establish a basis on which the Director's Decision could be overturned.

[13] I therefore find that the Applicants' request for a hearing and review is not frivolous or vexatious and that there is a serious issue to be tried at the Hearing and Review of the Director's Decision.

2. Will the Applicants suffer irreparable harm if a stay is not granted?

[14] The Applicants argue that they will suffer irreparable harm if a stay is not granted. They submit that the immediate effect of the Director's Decision is to shut down Sterling Grace and that if a stay is not granted, the practical reality is that the Hearing and Review will be rendered a nullity.

[15] The Applicants note that in *RJR-MacDonald*, the Supreme Court considered irreparable harm to include (i) a party being put out of business by the decision and (ii) a party suffering irrevocable damage to its business reputation (at para. 59), both of which the Applicants submit will occur in this case absent a stay of the Director's Decision.

[16] The Applicants further refer to a stay decision of the Ontario Licence Appeal Tribunal, *Re Abdul-Hussein (c.o.b. B & A Auto Sale),* [2001] O.L.A.T.D. No. 248 ("***Abdul-Hussein***"). In that case, the applicant applied for a stay of a decision to revoke his registration as a motor vehicle dealer pending an appeal. In considering the second factor of the *RJR-MacDonald* test, the tribunal stated, "… a stay should be granted in cases where a decision in effect shuts down a business, and a stay should be granted to preserve the business as an ongoing concern until such time as the Applicant has had his appeal heard. To decide otherwise would be to render the Applicant's right to appeal moot" (*Abdul-Hussein, supra* at para. 25). The Applicants submit that for their statutory right to a hearing and review to be meaningful, a stay should be granted to prevent the effective shutdown of the business of Sterling Grace prior to the Hearing and Review.

[17] Staff submits that the Applicants will not suffer irreparable harm for the following reasons:

(a) The Applicants' trading history is short – Sterling Grace only began carrying on business as a dealer in recent years and Casale effectively started working through an exempt market dealer in 2011;

(b) Casale has other marketable skills and will be able to engage in remunerative activity that does not require her to be registered, as she did prior to her registration, as well as subsequent to the establishment of her active dealership business in 2011; and

(c) It should not be presumed that the Applicants will suffer irreparable harm due to a loss of clients. Sterling Grace sells illiquid investment products that clients hold until maturity and the client relationship in many cases will be a one-time transaction, as opposed to the type of ongoing interaction and provision of investment services typical of portfolio managers.

[18] Staff further submits that the Applicants have not provided sufficient evidence to support their claim that refusal to grant a stay would eliminate Casale's livelihood. Staff refers to the decision of the British Columbia Securities Commission (the "**BCSC**") in *Re Hauchecorne,* 1999 LNBCSC 52 ("***Hauchecorne***"), in which the BCSC considered an application to stay penalties imposed by a hearing panel of the Vancouver Stock Exchange pending a hearing and review. Relying on a British Columbia Court of Appeal Decision, *Huber v. British Columbia (Securities*

Commission) (1993), 3 C.C.L.S. 88, the BCSC found that the vague description in the applicant's affidavit of the harm that would be caused by loss of employment fell below the level of evidence required to determine whether there would be irreparable harm. On the question of irreparable harm, the BCSC concluded:

> We have received no evidence whatsoever about Hauchecorne's assets, liabilities, expenses, other sources of income, skills or other employment prospects. As a result, because of a lack of evidence, we are unable to conclude that not granting the stay would cause him irreparable harm.
>
> (*Hauchecorne, supra* at pages 4-5)

[19] I am mindful of the Supreme Court's direction regarding assessment of irreparable harm in *RJR-MacDonald* at paragraphs 58 and 59:

> At this stage, the only issue to be decided is whether a refusal to grant relief could so adversely affect the applicants' own interests that the harm could not be remedied if the eventual decision on the merits does not accord with the result of the interlocutory application.
>
> "Irreparable" refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other. …

[20] In the present circumstances I accept the Applicants' submission that immediate enforcement of the permanent suspension of their registration will have a deleterious effect on Casale's income and ability to earn a living. I note that, in addition to being the ultimate designated person and chief compliance officer, Casale is the sole dealing representative and sole shareholder of Sterling Grace. While it is possible that the Applicants may be able to recover their clients following a positive outcome of the Hearing and Review, I am prepared to accept their submission that referring current clients to competitor exempt market dealers for the period of time before the Hearing and Review could have a significant effect on their continuing business.

3. The balance of inconvenience and public interest considerations

[21] This limb of the test requires a consideration of which of the parties will suffer the greater harm from the granting or refusal to grant a stay pending the Hearing and Review. *RJR-MacDonald* establishes that, as far as Staff is concerned, the onus of demonstrating irreparable harm to the public interest is less than that of a private applicant in cases involving a public authority (*RJR-MacDonald, supra* at paras. 62 and 71).

[22] The Applicants point to a number of factors that they submit support a finding that the balance of convenience favours the granting of a stay, including:

(a) Sterling Grace does not take custody of client funds;

(b) For the 11 months between the initiation of a compliance review and the issuance of the Director's Decision, no terms or conditions were placed on the Applicant's registration;

(c) The Applicants are unaware of any investor complaints or losses;

(d) Sterling Grace has had no capital deficiencies since May 2012; and

(c) The Applicants have undertaken positive changes with a view to addressing compliance issues, including revisions to Sterling Grace's Know-Your-Client form.

[23] The Applicants assert that harm to their reputation has already occurred as a result of the posting of the Investor Alert and resulting media coverage. They submit that a consideration of the relative harm to the Applicants and to the public interest should result in the granting of a stay to prevent further irreparable harm to the Applicants, and to prevent their right to a hearing and review from being rendered moot. Further, the Applicants submit that their clients will be both prejudiced and disrupted if the Director's Decision is not stayed for a brief period of time.

[24] Staff raises public interest concerns in permitting the Applicants to continue to trade in the interim period before the Hearing and Review and submits that no evidence has been provided that Sterling Grace's clients will be prejudiced or harmed in any way if a stay is not granted. They submit that given the deficiencies found by the Director, investor protection considerations require that the balance of convenience favours not granting a stay.

[25] Staff refutes the Applicant's assertions that a stay is required to prevent irreparable harm and submits that if a stay is not granted Casale will still be able to pursue other business activities in the capital markets, as she has done in the past, and will be able to provide services to her clients not requiring registration. Staff refers to the BCSC's decision in *Re Foresight Capital Corp.*, 2001 LNBCSC 765 in which the BCSC found that the company requesting a stay of a director's decision "… is, of course, entitled to have the Director's decision reviewed, but, to obtain a stay, it must show something more than mere inconvenience or disruption of its business" (at para. 13). In that case, the BCSC found that the applicant had not met that standard and determined that the balance of convenience favoured leaving the decision in place.

[26] I am guided by a Commission decision of earlier this year in which the Commission granted a request for a stay pending a hearing and review, subject to certain terms and conditions which were intended to protect the investors in that firm; *Re White* (2013), 36 O.S.C.B. 1063 ("***White***"). The Applicants submit that, similar to this case, the *White* matter concerned a Director's decision on issues of Know-Your-Client, suitability and compliance deficiencies. Staff urges me to distinguish *White* from the case at hand on the grounds that the Director's Decision in the present case included findings of misleading Staff, which were not part of the decision in *White,* as well as serious findings with respect to the Know-Your-Product requirements.

[27] While I understand Staff's public interest concerns based on the findings in the Director's Decision, I note that these findings will be the subject matter of the Hearing and Review. In the circumstances of this case, I am not satisfied that there is sufficient harm to the public interest to outweigh the harm that may be suffered by the Applicants in the short term if an interim stay is not granted. My conclusion here is based in part on the Applicants' assurances that they are

prepared to include a link to the Director's Decision on the Sterling Grace website and to direct new and existing clients to it so that those clients will be aware of the Director's findings.

[28] Further, I note that the parties submitted at the hearing that they are seeking to schedule dates for the Hearing and Review in January or February of 2014. Given that the Director's Decision would be stayed for a period of less than three months, and given the specific circumstances of the Applicants and the assurances they have provided, I find that the balance of inconvenience and public interest considerations weigh in favour of granting a stay.

4. Conclusion with respect to the stay request

[29] Having considered the three issues above, I conclude that a conditional interim stay should be granted in this case. My decision to order that the Director's Decision be stayed pending the Hearing and Review is conditional on the Applicants providing a link on the Sterling Grace website to the Director's Decision as well as their providing all new and existing clients with a copy of the Director's Decision.

B. The Investor Alert

[30] The Investor Alert notes that effective the date of the Director's Decision, the Applicants' registration has been suspended and the Applicants may no longer sell securities to investors. The Investor Alert alerts investors not to purchase securities from the Applicants.

[31] The Applicants have expressed concern that the Investor Alert has already caused reputational damage. They seek its removal from the Commission website along with the posting of a retraction noting the Investor Alert has been retracted and a stay has been issued pending the Hearing and Review.

[32] The effect of the Director's Decision was immediate and the Investor Alert correctly characterizes the status of the Applicants' registration at the date of its issuance. However, as acknowledged by Staff at the stay hearing, the removal of the Investor Alert from the Commission's website flows from a decision to grant a conditional stay of the Director's Decision pending the Hearing and Review, inasmuch as the Applicants' registration is not suspended in the interim period.

[33] I therefore find that the Investor Alert should be removed from the Commission's website forthwith upon release of this Decision. I do not find there are grounds to issue a retraction of the Investor Alert, as requested by the Applicants.

III. CONCLUSION AND ORDER

[34] Pursuant to s. 8(4) of the Act, I order that the Director's Decision is stayed, subject to the following conditions:

1. The stay order shall continue in force until the parties have the opportunity at the Hearing and Review to address the issuance of a further stay order by the Panel presiding over the Hearing and Review, and in any event shall continue in force no later than February 20, 2014;

2. The Applicants shall post a link to the Director's Decision on the Sterling Grace website forthwith; and

3. The Applicants shall provide a copy of the Director's Decision to all new and existing clients.

[35] Sterling Grace may state on its website and when providing the Director's Decision to clients that "The decision to suspend the registration of Sterling Grace and Casale was stayed pursuant to the decision of the Commission dated November 27, 2013. An application for a hearing and review of the Director's Decision under section 8 of the Act has been requested and will be scheduled to be heard by a panel of the Commission in early 2014".

[36] Given my finding above, I further direct that the Investor Alert be removed from the Commission's website.

Dated at Toronto this 27th day of November, 2013.

"Mary G. Condon"

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Mary G. Condon