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
NEW FUTURES TRADING INTERNATIONAL CORPORATION and
FERNANDO HONORATE FAGUNDES also known as HENRY ROCHE

REASONS AND DECISION
(Subsections 127(1) and 127(10) of the *Securities Act*)

Decision:	May 31, 2013	
Panel:	Alan J. Lenczner, Q.C.	- Commissioner and Chair of the Panel
Submissions:	Donna E. Campbell	- For Staff of the Ontario Securities Commission

TABLE OF CONTENTS

REASONS AND DECISION

I. BACKGROUND

[1] This was a hearing, in writing, before the Ontario Securities Commission (the "**Commission**") pursuant to subsections 127(1) and (10) of the *Securities Act*, R.S.O. 1990, c. S.5, as amended (the "**Act**") to consider whether it is in the public interest to make an order imposing sanctions New Futures Trading International Corporation ("**New Futures**") and Fernando Honorate Fagundes, also known as Henry Roche, ("**Fagundes**") (collectively, the "**Respondents**").

[2] A Notice of Hearing was issued by the Commission on March 18, 2013 (the "**Notice of Hearing**"), in relation to a Statement of Allegations filed by Staff of the Commission ("Staff") on the same day (the "**Statement of Allegations**").

[3] Staff relies on the final judgments of the United States District Court of New Hampshire ("**U.S. Court**") dated May 24, 2012 (*Securities and Exchange Commission v. New Futures Trading International Corporation and Henry Roche*, Civil Action No. 11 CV 532-JL (D. N.H. 2012) (the "**U.S. Final Judgments**")), which followed a summary order of April 20, 2012 (*Securities and Exchange Commission v. New Futures Trading International Corporation and Henry Roche*, Civil Action No. 11 CV 532-JL – Opinion No. 2012 DNH 073 (the "**U.S. Summary Order**")). The U.S. Final Judgments accepted as true the factual allegations in the Complaint filed by the United States Securities and Exchange Commission (the "**SEC**") on November 16, 2011 (the "**SEC Complaint**") and imposed sanctions against the Respondents.

[4] Staff relies upon paragraph 3 of subsection 127(10) of the Act to reciprocate the U.S. Court Order and to impose sanctions against the Respondents pursuant to paragraphs 2, 2.1, 3, 7, 8, 8.1, 8.2, 8.4 and 8.5 of subsection 127(1) of the Act.

[5] In this written hearing, I have to decide whether the Respondents have been found by a court in any jurisdiction to have contravened the laws of the jurisdiction respecting the buying or selling of securities or derivatives and whether it is in the public interest to make a reciprocal order in Ontario.

II. PRELIMINARY ISSUES

A. Service

[6] Rule 1.5.3 of Commission's *Rules of Procedure* (2012), 35 O.S.C.B. 10071 (the "*OSC Rules of Procedure"*) provides:

> **1.5.3 Inability to Effect Service – (1)** If a person required to serve a document is unable to serve it by one of the methods described in Rule 1.5.1, the person may apply to a Panel for an order for substituted, validated or waived service.

> **(2) Application for an Order for Substituted, Validated or Waived Service –** The application shall be filed with an affidavit setting out the efforts already made to serve the person and stating:
>
> (a) why the proposed method of substituted service is likely to be successful; or
> (b) why a Panel should validate or waive service on that person.
>
> **(3) Substituted, Validated or Waived Service –** A Panel may give directions for substituted service or, where necessary, may validate or waive service if it considers it appropriate.

[7] On April 3, 2013, I received the service affidavit of Raymond Daubney ("**Daubney**"), sworn on March 22, 2013, outlining his attempts to serve Fagundes. On April 9, 2013, I granted a motion to waive service of process on Fagundes, pursuant to Rule 1.5.3 of the *OSC Rules of Procedure* and gave reasons for my decision on the same day (*Re New Futures Trading International Corporation and Fernando Honorate* (2013), 36 O.S.C.B. 3896 (the "**April 9 Order**") and 3925).

[8] On April 17, 2013, I received the second service affidavit of Daubney, sworn on April 16, 2013, outlining his attempts to serve New Futures. By order of April 18, 2013, I found that New Futures had been served with the Notice of Hearing and Statement of Allegations and acknowledged that counsel accepting service had advised Daubney that he would not respond or file materials on behalf of New Futures in this proceeding (*Re New Futures Trading International Corporation and Fernando Honorate* (2013), 36 O.S.C.B. 4445 (the "**April 18 Order**")). As a result, the April 18 Order waived future service on New Futures, pursuant to subrule 1.5.3(3) of the *OSC Rules of Procedure*.

B. Written Hearing

[9] Rule 11 of the *OSC Rules of Procedure* permits the Commission to conduct a proceeding by means of a written hearing. On April 3, 2013, the panel heard an application by Staff to convert the matter to a written hearing, in accordance with Rule 11.5 of the *OSC Rules of Procedure* and subsection 5.1(2) of the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22, as amended (the "**SPPA**"). In the April 9 Order, I granted the application to proceed by way of written hearing, established a schedule for filing materials and permitted the Respondents the opportunity to serve and file a response by May 17, 2013.

C. Failure of the Respondents to Participate

[10] Neither of the Respondents filed evidence or made submissions. Section 7 of the SPPA authorizes a tribunal to proceed in the absence of a party when that party has been given notice of the hearing. I note that the Notice of Hearing and the Statement of Allegations were posted on the Commission's website, as were the Commission orders which set out the dates for service and filing of materials. Having waived service on Fagundes and finding that New Futures was served with the Notice of Hearing and Statement of Allegations, but chose not to participate in

the proceeding, I am satisfied that I may proceed in the absence of the Respondents in accordance with section 7 of the SPPA.

III. FINAL JUDGMENTS OF THE U.S. COURT

[11] The U.S. Court accepted that between December 1, 2010 and May 11, 2011 (the "**Material Time**") the Fagundes raised $1.3 million from the offer and sale of high-yield promissory notes in the name of New Futures to at least fourteen investors, including residents of Ontario (SEC Complaint at para. 1). Furthermore, the U.S. Court accepted that the Respondents engaged in:

(i) fraud in the offer and sale of securities in violation of section 17(a) of the United States *Securities Act of 1933* (the "**U.S. Securities Act**") [15 U.S.C. §§ 17q(a)];

(ii) fraudulent or deceptive conduct in connection with the purchase or sale of securities in violation of section 10(b) of the Untied States *Securities and Exchange Act of 1934* (the "**U.S. Exchange Act**") [15 U.S.C. § 78j(b)] and Rule 10b-5 thereunder [17 C.F.R. § 240.10b-5]; and

(iii) the offer and sale of unregistered securities in violation of sections 5(a) and (c) of the U.S. Securities Act [15 U.S.C. §§ 77e(a) and (c)].

(U.S. Final Judgments, *supra* at 2; SEC Complaint at para. 2)

[12] The U.S. Final Judgments impose the following sanctions on the Respondents:

1. the Respondents are permanently restrained from violating, directly or indirectly, section 10(b) of the U.S. Exchange Act [15 U.S.C. § 78j(b)] and Rule 10b-5 promulgated thereunder [17 C.F.R. § 240.10b-5], by using any means in connection with the purchase and sale of any security to: (a) defraud, (b) make an untrue statement of a material fact or to omit to state a material fact, or (c) engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person;

2. the Respondents are permanently restrained from violating section 17(a) of the U.S. Securities Act [15 U.S.C. § 77q(a)] in the offer and sale of a security by the use of any means, directly or indirectly, to: (a) defraud, (b) obtain money or property by means of any untrue statement of a material fact pr any omission of a material fact, or (c) engage in any transaction, practice or course of business which operates or would operate as a fraud or deceit upon the purchaser;

3. the Respondents are permanently restrained from violating section 5 of the U.S. Securities Act [15 U.S.C. § 77e] by, directly or indirectly, in the absence of an exemption: (a) unless a registration statement is in effect as to a security, making use of any means to sell such security, (b) unless a registration statement is in effect as to a security, carrying or causing to be carried, by any means, any such security for the purpose of sale or for

delivery after sale, or (c) making use of any means to offer to sell or offer to buy any security, unless a registration statement was filed with the SEC as to such security or while the registration statement is the subject of a refusal order or stop order or any public proceeding or examination under section 8 of the U.S. Securities Act [15 U.S.C. § 77h];

4. the Respondents are liable for disgorgement of $1,242,972, representing profits gained as a result of the conduct alleged in the SEC Complaint, together with prejudgment interest of $40,917.47 and a civil penalty of $150,000 pursuant to section 20(d)(2) of the U.S. Securities Act [15 U.S.C. § 77t(d)(2)] and section 21(d)(3) of the U.S. Exchange Act [15 U.S.C. § 78(u)(d)(3)].

(U.S. Final Judgments, *supra* at 2-5)

III. LAW AND ANALYSIS

A. Subsection 127(10) of the Act

[13] Staff relies upon the inter-jurisdictional enforcement provisions of the Act, specifically paragraph 3 of subsection 127(10) of the Act and seeks an order from the Commission imposing what Staff submits are similar sanctions and terms as were made against the Respondents by the U.S. Court.

[14] Subsection 127(1) of the Act provides:

> The Commission may make one or more of the following orders if in its opinion it is in the public interest to make the order or orders […]

[15] Subsection 127(10)3 of the Act provides:

> Without limiting the generality of subsections (1) and (5), an order may be made under subsection (1) or (5) in respect of a person or company if any of the following circumstances exists:
>
> […]
>
> 3. The person or company has been found by a court in any jurisdiction to have contravened the laws of the jurisdiction respecting the buying or selling of securities or derivatives […]

[16] From a review of the U.S. Final Judgments, the U.S. Summary Order and the SEC Complaint, I am satisfied that the U.S. Court had jurisdiction over the Respondents. I am also satisfied that the requirements of paragraph 3 of subsection 127(10) of the Act have been met. The U.S. Court has found that both of the Respondents contravened the U.S. Securities Act and U.S. Exchanges Act respecting the buying or selling of securities.

[17] What is left to be determined is whether it is in the public interest in Ontario for a reciprocal order to be made against the Respondents. The decision of a foreign jurisdiction stands as a

determination of fact for the purpose of the Commission's considerations under subsection 127(10) of the Act. The Commission's task is then to determine whether, based on those findings of fact, the sanctions proposed by Staff would be in the public interest in Ontario. An important factor to consider is, if the facts had occurred in Ontario, whether the respondent's conduct would have constituted a breach of the Act and been considered to be contrary to the public interest, such that it would attract the same or similar sanctions.

[18] As decided by the Supreme Court of Canada (the "**SCC**"), the purpose of an order under section 127 of the Act is protective and prospective. It is to restrain future conduct that is likely to be prejudicial to the public interest in fair and efficient capital markets. The SCC went on to state that "the role of the OSC under s. 127 is to protect the public interest by removing from capital markets those whose past conduct is so abusive as to warrant apprehension of future conduct detrimental to the integrity of the capital markets" (*Committee for Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, [2001] 2 S.C.R. 132, at para. 43; *Re Mithras Management Ltd.* (1990), 13 O.S.C.B. 1600).

B. Relevant Findings of the U.S Final Judgments

[19] The U.S. Final Judgments accepted as true the factual allegations in the SEC Complaint against the Respondents, who had defaulted. I note from the SEC Complaint the following:

> 1. From at least December 2010, Roche raised at least $1.3 million from the offer and sale of high-yield promissory notes (5% to 10% monthly return) in the name of New Futures to at least fourteen investors, most of which has now been dissipated. The fourteen investors included residents of nine states: California, Florida, Massachusetts, Kansas, South Carolina, Washington, Colorado, Illinois and Texas as well Ontario, Canada. The vast majority of the funds raised by Roche were funneled into a Ponzi scheme he was running. Roche represented to some investors that funds supplied would be invested in bonds, treasury notes and/or 10 year Treasury note futures contracts, while representing to others that the funds would be invested directly in New Futures, an on-line futures day-trading education and training business Roche operated out of Canada. Instead of using the funds in either manner, Roche used approximately $937,000 provided by investors to make Ponzi "interest" payments to prior investors in the scheme. In addition, Roche misappropriated another $359,000 to support his lifestyle and to operate a horse breeding ranch in Kendal, Ontario, Canada.
>
> […]
>
> 8. New Futures Trading International Corporation is a New Hampshire corporation formed in November 2010 with a principal place of business in Bedford, NH.
>
> 9. Henry Roche, age approximately 51, is a resident of Kendal, Ontario, Canada. Although not listed as an officer of New Futures, he controlled the business by directing the actions of Vice President and Treasurer, Ryan Fontaine. Roche solicited funds on behalf of New Futures.
>
> […]

12. Roche operated the online training program using at least three different names. Beginning in 2009, the program was offered through Masters Palace, Inc. Sometime in 2010, Roche changed the name ofthe entity or otherwise created a successor entity called Third Realm, Inc. Online Third Realm is also referred to as the "Third Realm Institute." Finally, in the fall of 20 I 0, Roche created New Futures Trading after soliciting a former student of his program, Ryan Fontaine ("Fontaine"), to form a New Hampshire-based corporation "New Futures Trading International, Corporation."

13. While Roche was not listed as an officer or director in New Futures' incorporation documents, Roche directed Fontaine to form the corporation and serve as its Vice President and Secretary, while naming Roche's wife, Emilia Elnasin (a/k/a Emilia Elnasin Roche or Lian Roche) (hereinafter "Elnasin") as a shareholder and officer along with Fontaine. Roche retained *defacto* control over the operation. Such control included directing Fontaine to pay various expenses related to his horse-breeding business as well as paying "interest" to investors in prior entities. Fontaine also provided Roche with blank New Futures checks that Roche could use for any purpose.

[…]

15. Students in Roche's training seminars had the option of viewing online presentations or attending in-person training sessions in Toronto, Canada. Certain students who participated in the training sessions were later contacted by Roche and solicited to make additional, more substantive investments in either the online stock and futures day-trading business or were solicited by Roche to invest additional money with him.

16. Roche represented to investors that he would trade stocks and bonds or futures contracts for them on an individual basis through his New Futures business. He would pay them "interest" out of the net profits obtained through the trading.

17. In return for the investment, in many instances Roche had promissory notes drafted, executed and issued to the investors.

(SEC Complaint, *supra* at paras. 1, 8-9, 12-13 and 15-17)

[20] I also note from the SEC Complaint that:

20. From December 1, 2010 to May 11,2011, Roche and New Futures issued at least eighteen promissory notes to fourteen investors in the amount of $1.3 million. The promissory notes were similar to one another and typically included an interest or return provision that would pay investors between 5-10% per month. The promissory notes also included a provision whereby the investor could demand the principal and/or any accrued interest be returned within 45 days. In some, but not all, there was an additional provision in which the investor could choose to leave the investment in place for a definitive period of time (usually 14 months) whereby the investor would then be awarded a 200% return in addition to the original investment amount.

[…]

> 22. Much of New Futures investors' money was used for two primary purposes: payments to persons who are likely investors in one of Roche's prior schemes (Masters Palace and/or Third Realm) or Roche's equestrian related expenses. In total, from November 2010 to June 2011, at least $884,000 was paid out to individuals who are, on information and belief, prior investors in Roche-related entities, while at least another $350,000 was used to pay the costs of Roche's horse breeding ranch in Kendal, Ontario, Canada-Majestic Horses. Monies were also sent directly to Third Realm, one of Roche's prior entities.
>
> (SEC Complaint, *supra* at paras. 20 and 22)

C. Appropriate Sanctions

[21] In my view, the conduct of the Respondents described above was abusive of the capital markets fully warranting the sanctions imposed by the U.S. Court. Had such conduct occurred in Ontario, it would have constituted contraventions of the Act. Given the past conduct, the absence of mitigating factors and the failure to provide any rational explanation, it is appropriate to make an order in the public interest to prevent the Respondents from accessing the capital markets in Ontario.

[22] The threshold for determining whether it is in the public interest to reciprocate an order from another regulatory authority is a low threshold. I agree with the Commission's conclusion in *Euston* that subsection 127(10) of the Act can be grounds for an order in the public interest under subsection 127(1) of the Act, based on the decision and order in another jurisdiction (*Re Euston Capital Corp.* (2009), 32 O.S.C.B. 6313 ("***Euston***") at para. 46).

[23] It is important that the Commission be aware of and responsive to an increasingly complex and interconnected cross-border securities industry. For some time, the courts have been attuned to the needs of business and inter-jurisdictional comity. In 1990, the SCC expounded new principles and a new approach to the recognition and enforcement of judgments between Canadian provinces. The SCC stated:

> The business community operates in a world economy and we correctly speak of a world community even in the face of decentralized political and legal power. Accommodating the flow of wealth, skills and people across state lines has now become imperative. Under these circumstances, our approach to the recognition and enforcement of foreign judgments would appear ripe for reappraisal. Certainly, other countries, notably the United States and members of the European Economic Community, have adopted more generous rules for the recognition and enforcement of foreign judgments to the general advantage of litigants.
>
> (*Morguard Investments Ltd. v. De Savoye*, [1990] S.C.J. No. 135, ("***Morguard***") at para. 34)

[24] The SCC determined the issue in this way:

> As discussed, fair process is not an issue within the Canadian federation. The question that remains, then, is when has a court exercised its jurisdiction appropriately for the purposes of recognition by a court in another province? This poses no difficulty where the court has acted on the basis of some ground traditionally accepted by courts as permitting the recognition and enforcement of foreign judgments -- in the case of judgments in personam where the defendant was within the jurisdiction at the time of the action or when he submitted to its judgment whether by agreement or attornment. In the first case, the court had jurisdiction over the person, and in the second case by virtue of the agreement. No injustice results.
>
> (*Ibid*. at para. 43)

[25] Thirteen years later, in 2003, the SCC revisited the issue of recognition and enforcement of foreign judgments, including those from other countries. The SCC stated:

> The importance of comity was analysed at length in *Morguard, supra*. This doctrine must be permitted to evolve concomitantly with international business relations, cross-border transactions, as well as mobility. The doctrine of comity is:
>
> > grounded in the need in modern times to facilitate the flow of wealth, skills and people across state lines in a fair and orderly manner.
> >
> > (*Morguard, supra*, at p. 1096)
>
> This doctrine is of particular importance viewed internationally. The principles of order and fairness ensure security of transactions, which necessarily underlie the modern concept of private international law. Although *Morguard* recognized that the considerations underlying the doctrine of comity apply with greater force between the units of a federal state, the reality of international commerce and the movement of people continue to be "directly relevant to determining the appropriate response of private international law to particular issues, such as the enforcement of monetary judgments" (J. Blom, "The Enforcement of Foreign Judgments: *Morguard* Goes Forth Into the World" (1997), 28 *Can. Bus. L.J.* 373, at p. 375).
>
> […]
>
> Like comity, the notion of reciprocity is equally compelling both in the international and interprovincial context. La Forest J. discussed interprovincial reciprocity in *Morguard, supra*. He stated (at p. 1107):
>
> > ... if this Court thinks it inherently reasonable for a court to exercise jurisdiction under circumstances like those described, it would be odd indeed if it did not also consider it reasonable for the courts of another province to recognize and enforce that court's judgment.
>
> In light of the principles of international comity, La Forest J.'s discussion of reciprocity is also equally applicable to judgments made by courts outside Canada. In the absence of a different statutory approach, it is reasonable that a

> domestic court recognize and enforce a foreign judgment where the foreign court assumed jurisdiction on the same basis as the domestic court would, for example, on the basis of a "real and substantial connection" test.
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> (*Beals v. Saldanha*, [2003] S.C.J. No. 77, ("***Beals***") at paras. 27 and 29)

[26] Most provinces now have legislation whereby judgments rendered in one common law province will be enforced in another common law province by the simple act of registration (*Reciprocal Enforcement of Judgments Act*, R.S.O. 1990, c. R.5).

[27] Although the application of subsection 127(10) of the Act does not involve the direct enforcement of a foreign judgment, the principles of comity and reciprocity espoused in *Morguard* and in *Beals*, underlying the enforcement of interprovincial and foreign judgments should equally apply to securities regulators. I acknowledge that the Commission's orders in the public interest involve more than monetary judgment enforcement. The Commission has the authority to impose a number of market prohibitions on the Respondents, only when it is in the public interest to do so. Comity requires that there not be barriers to recognizing and reciprocating the orders of other regulatory authorities when the findings of the foreign jurisdiction qualify under subsection 127(10) of the Act as a judgment that invokes the public interest. For comity to be effective and the public interest to be protected, the threshold for reciprocity must be low. The onus will rest with the Respondents to show that there was no substantial connection between the Respondent and the originating jurisdiction, that the order of the foreign regulatory authority was procured by fraud or that there was a denial of natural justice in the foreign jurisdiction.

IV. CONCLUSION

[28] For the reasons stated above, it is in the public interest to issue the following orders:

(a) pursuant to paragraph 2 of subsection 127(1) of the Act, trading in any securities of New Futures cease permanently;

(b) pursuant to paragraph 2 of subsection 127(1) of the Act, trading in any securities or derivatives by the Respondents cease permanently;

(c) pursuant to paragraph 2.1 of subsection 127(1) of the Act, the acquisition of any securities by the Respondents cease permanently;

(d) pursuant to paragraph 3 of subsection 127(1) of the Act, that any exemptions contained in Ontario securities law do not apply to the Respondents permanently;

(e) pursuant to paragraphs 7, 8.1 and 8.3 of subsection 127(1) of the Act, that Fagundes shall resign any positions that he holds as director or officer of an issuer, registrant or investment fund manager;

(f) pursuant to paragraphs 8, 8.2 and 8.4 of subsection 127(1) of the Act, that Fagundes is prohibited permanently from becoming or acting as director or officer of any issuer, registrant or investment fund manager; and

(g) pursuant to paragraph 8.5 of subsection 127(1) of the Act, that Fagundes is prohibited permanently from becoming or acting as a registrant, investment fund manager or as a promoter.

Dated at Toronto this 31st day of May, 2013.

Alan Lenczner

Alan J. Lenczner, Q.C.