

CANADA / JUDGMENT

Nature-Control Technologies Inc. v. Li

2014 BCSC 1868

COURT

Supreme Court of British Columbia

DECIDED

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2014 BCSC 1868 Nature-Control Technologies Inc. v. Li

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Nature-Control Technologies Inc. v. Li,

2014 BCSC 1868

Date: 20141002

Docket: S114515

Registry: Vancouver

Between:

Nature-Control Technologies Inc.

Plaintiff

And

Meng Jun Li, Ji Zhen Jiang, SouthMountain Trading Inc.,

and South Sun Holding Ltd.

Defendants

Before: The Honourable Madam Justice Warren

Reasons for Judgment

Counsel for the Plaintiff:

George A. Jones

Kenny Ng

Counsel for the Defendants:

Ken Jang

Place and Date of Trial/Hearing:

Vancouver, B.C.

September 23-27, 30,

October 1-4, 7-10, 28-31,

November 15, December 9-10, 2013

Place and Date of Judgment:

Vancouver, B.C.

October 2, 2014

Overview

- [1] The plaintiff, Nature-Control Technologies Inc. ("Nature-Control"), seeks relief arising from the allegedly wrongful conduct of the defendant Dr. Meng Jun Li, who is one of its directors. Nature-Control asserts that Dr. Li breached the fiduciary duties he owed to it by diverting a business opportunity to the defendant SouthMountain Trading Inc. ("SouthMountain"), a company owned indirectly by Dr. Li and his wife the defendant Ji Zhen Jiang, and that Dr. Li otherwise profited at Nature-Control's expense without disclosure and consent. Nature-Control asserts that SouthMountain and Ms. Jiang are liable on the basis that they knowingly assisted in Dr. Li's breaches or knowingly received the fruits of his misconduct. The claim against the defendant South Sun Holding Ltd. ("South Sun") was abandoned at trial.
- [2] Nature-Control is a British Columbia company that was incorporated in 2003. Initially, Tom Chow owned 36% of the shares of Nature-Control; Chu Ling Lai ("Kobe Lai") owned 34% of the shares, and Dr. Li owned the remaining 30%. In 2006, Kobe Lai sold his shares to Mr. Chow who now owns 70% of Nature-Control. Dr. Li continues to own 30%. Mr. Chow and Dr. Li are the directors and officers of Nature-Control.
- [3] Mr. Chow is a heavy duty mechanic and businessperson.
- [4] Dr. Li is a chemical engineer, research scientist and businessperson. As already noted, Ms. Jiang is Dr. Li's wife. SouthMountain is a British Columbia company that was incorporated by Dr. Li in March of 2004. South Sun was incorporated in February 2010. All the shares of South Sun are owned by Dr. Li and Ms. Jiang. South Sun now owns all the shares of SouthMountain. Dr. Li and Ms. Jiang are the directors and officers of SouthMountain and South Sun.

- [5] Prior to immigrating to Canada from China in 2002, Dr. Li developed several unique chemical products including flocculating agents used in the treatment of contaminated waste water generated in the production of pulp and paper. These waste water treatment products, which came to be known as "Compounds A and B", were patented in China by Dr. Li and manufactured in China by Jiang Xi MaShan Chemical Ltd. ("MaShan"). Dr. Li established a business that sold Compounds A and B to pulp mills in China. He also worked on the development of specialty bleaching and brightening products to be used in the production of pulp.
- [6] Dr. Li met Kobe Lai and Mr. Chow in Vancouver in 2003. The three men agreed to incorporate Nature-Control to market and sell specialty chemicals to pulp mills in Canada. Nature-Control leased premises, hired an employee named Asad Zahir and retained a commissioned salesperson named Ralph Gough.
- [7] One of the most significant factual issues to be determined in this case is the scope of Nature-Control's business and, in particular, whether it included the sale of the specialty bleaching and brightening products. The defendants' position is that while Dr. Li agreed to give Nature-Control certain rights to Compounds A and B, he did not agree to give Nature-Control any rights to his specialty bleaching and brightening products.
- [8] Nature-Control's position is that its business included the sale of all chemicals. Alternatively, Nature-Control says that its business included any technology developed at its laboratory and at its cost, and that the bleaching and brightening products were developed by Dr. Li at its laboratory and at its cost.
- [9] It is not disputed that SouthMountain imported Compounds A and B and that Dr. Li and Mr. Chow agreed that SouthMountain would sell Compounds A and B to Nature-Control at cost. Nature-Control claims that SouthMountain actually profited from those sales.
- [10] By 2004, MaShan was manufacturing some of Dr. Li's specialty bleaching and brightening products. SouthMountain commenced the marketing and sale of the bleaching and brightening products in Canada on its own account.
- [11] It is not disputed that Dr. Li, Mr. Zahir and Mr. Gough were all actively involved in attempting to sell both Compounds A and B and the bleaching and brightening products, and that Nature-Control's premises and other assets were used for both purposes. It is not disputed that Mr. Zahir participated in the preparation of trademark and patent applications for both product lines. The costs of registering the patents were originally borne by SouthMountain but it was agreed that Nature-Control would reimburse SouthMountain for the costs associated with registering some of them. Nature-Control paid the invoices submitted to it by SouthMountain but now claims that SouthMountain actually profited by charging an amount that exceeded its costs.

- [12] The defendants maintain that Mr. Chow and Kobe Lai agreed that SouthMountain could engage in the bleaching product business using Nature-Control's staff, premises and other assets. The defendants submit that Mr. Chow and Kobe Lai did so because Nature-Control had no rights to Dr. Li's bleaching and brightening products and the two product lines did not compete with each other, but rather were complimentary products that would be of interest to the same customer base. The defendants say that both Nature-Control and SouthMountain had to establish credibility in an industry in which both were newcomers and that by working together to promote each other's businesses each could leverage the commercial relationships ultimately established by the other.
- [13] Nature-Control did not ultimately have success with Compounds A and B. However, by late 2008 or early 2009 SouthMountain was selling the bleaching and brightening products in large quantities and generating significant profits.
- [14] Nature-Control denies that Mr. Chow agreed that SouthMountain could sell the bleaching and brightening products on its own account or that Nature-Control's staff, premises and other assets could be used by SouthMountain for that purpose. Nature-Control says that Mr. Chow would never have agreed to such an arrangement because its business included the sale of the bleaching and brightening products. Nature-Control claims that while Mr. Chow knew that Dr. Li, Mr. Zahir and Mr. Gough were attempting to sell the bleaching and brightening products, he thought they were doing so on Nature-Control's account and he did not discover that the business was actually being conducted on SouthMountain's account until 2009.
- [15] While the parties disagree about when Mr. Chow learned that SouthMountain was engaged in the bleaching product business, it is uncontroverted that Mr. Chow did not confront Dr. Li about it until July 2011 when he caused Nature-Control to commence this action. He says he waited two years to do so because he needed time to collect evidence. In the meantime, SouthMountain generated most of the profits which Nature-Control now seeks to have disgorged.

The Issues

- [16] The issues in dispute are:
- a) Did Dr. Li usurp an opportunity belonging to Nature-Control by engaging in the bleaching product business through SouthMountain?
 - b) Did Dr. Li use Nature-Control's employee, commissioned salesperson, premises and/or other assets, to the benefit of SouthMountain, without the knowledge and consent of Mr. Chow?
 - c) Does Nature-Control beneficially own intellectual property registered in SouthMountain's name?
 - d) Did Dr. Li and/or SouthMountain wrongfully profit from transactions between SouthMountain and Nature-Control?

- e) Did SouthMountain and Ms. Jiang knowingly assist in Dr. Li's breach of fiduciary duties or knowingly receive the fruits of those breaches?
- f) If the answer to any of the above is in the affirmative, what is the appropriate remedy?

Credibility

- [17] The trial proceeded over 21 days. Three witnesses were called on behalf of Nature-Control: Mr. Chow, Mr. Zahir and Mr. Gough. Dr. Li was the sole witness for the defence.
- [18] One of the few things the parties agreed on was that the case turns, to a significant extent, on the scope of Nature-Control's business. That depends upon what Mr. Chow and Dr. Li agreed to in that regard. This is a question of fact about which Mr. Chow and Dr. Li gave diametrically opposed evidence. Indeed their evidence conflicted in almost all respects. As emphasized by counsel for Nature-Control in closing submissions, the case is largely a credibility contest between Mr. Chow and Dr. Li.
- [19] The factors to be considered when assessing credibility were summarized in *Bradshaw v. Stenner*, 2010 BCSC 1398, at para. 186, aff'd 2012 BCCA 296. They include the firmness of the witness's memory, the ability of the witness to resist the influence of interest in modifying his recollection, whether the witness's evidence harmonizes with independent evidence that has been accepted, whether the witness changes his evidence during direct examination and cross-examination (or between examination for discovery and trial) or is otherwise inconsistent in his recollections, whether the witness's evidence seems generally unreasonable, impossible, or unlikely, and the witness's demeanour. Fundamentally, the question is whether the witness's evidence is consistent with the probabilities affecting the case as a whole.
- [20] I have significant concerns about the credibility of the testimony given by both Mr. Chow and Dr. Li. I have noted some specific examples below, most of which are addressed more fully as they arise in the course of this judgment.
- [21] The following are some of the problematic aspects of Mr. Chow's evidence:
- (a) Mr. Chow testified that Dr. Li forged his (Mr. Chow's) signature on a document the parties referred to as the "Service Consultant Agreement Contract". For reasons explained later, I found this testimony to be unreasonable and improbable.
 - (b) I find that Mr. Chow understated his own participation in the day to day affairs of Nature-Control's business because he considered doing so would bolster his position. While it is apparent that he was not as involved in the business as was Dr. Li, it is clear from Mr. Gough's testimony and Mr. Zahir's testimony that Mr. Chow attended at Nature-Control's office on a regular basis, had access to its premises, computers and documents, and participated in internal meetings as well as meetings and mill trials with potential customers.

- (c) At trial, Mr. Chow claimed that he was unaware of a misleading marketing strategy embarked upon by Dr. Li, Mr. Gough and Mr. Zahir. However, this was inconsistent with evidence he gave at his examination for discovery where he acknowledged that he was aware of the marketing strategy and was unhappy about it.
- (d) At trial, Mr. Chow denied that Kobe Lai wanted to bring in additional investors and demanded to be bought out when Mr. Chow refused. He maintained that Kobe Lai wanted to be bought out because he did not get along with Dr. Li. However, at his examination for discovery Mr. Chow acknowledged that Kobe Lai wanted to bring in additional investors and he (Mr. Chow) refused.
- (e) I find Mr. Chow's claim that he waited two years to confront Dr. Li because he needed to collect evidence to be implausible because the evidence relevant to the scope of Nature-Control's business already existed and Mr. Chow had access to it. The only reasonable explanation is that he was waiting for SouthMountain to generate more profits that Nature-Control would then seek to have disgorged, while at the same time hedging his bets on Compounds A and B.

[22] The following are some of the problematic aspects of Dr. Li's evidence:

- (a) Dr. Li's insistence that SouthMountain did not profit from its transactions with Nature-Control was unreasonable given that SouthMountain's financial statements recorded revenues that exceeded costs of sales. Further, he did not produce the back-up documents required to verify the costs and admitted that SouthMountain had not actually paid all the costs that it sought to pass on to Nature-Control.
- (b) I find that Dr. Li deliberately understated his English fluency because he considered doing so would bolster his position. During the trial, Dr. Li appeared to be making notes of the testimony of other witnesses which was given in English. Also, on several occasions during his testimony, he corrected the interpreter's choice of words, and he sometimes began to answer the question posed before the translation was completed. Further, a video of a meeting attended by Dr. Li in late 2008 shows Dr. Li serving as interpreter for the meeting participants, some of whom are speaking English and while others appear to be speaking Mandarin.
- (c) Dr. Li's claim that he did not conduct bleaching tests in Nature-Control's laboratory was implausible. While I accept that Nature-Control's laboratory was not adequate for conducting chemical research and development, the documents overwhelmingly support the conclusion that bleaching products were applied to pulp samples in Nature-Control's lab to demonstrate their effectiveness to potential customers.

[23] I also have concerns about the reliability of the evidence of Mr. Gough and Mr. Zahir. They both testified that, in 2009, Mr. Chow told them that Dr. Li had wrongly misappropriated the bleaching product business and that Mr. Chow was planning to sue Dr. Li, yet they both carried on working with Dr. Li for two years, selling the bleaching products through

SouthMountain, submitting expenses to SouthMountain and earning commissions from SouthMountain. They were clearly aligned with Nature-Control and had a tendency to shape their testimony to Nature-Control's benefit. I will set out some examples below.

- [24] Mr. Gough insisted that the bleaching products were generic chemicals and denied that they reflected unique formulations developed by Dr. Li. However, it is clear from his correspondence with potential customers that he was representing the bleaching products as unique specialty products. He also acknowledged knowing that one of the bleaching products was patented by Dr. Li and that Dr. Li was working on a patent application for another.
- [25] Mr. Gough initially implied that he was attempting to sell certain generic chemicals listed on a marketing brochure but in re-examination he acknowledged that no real attempts were made to sell those generic chemicals as the mills had no interest in them.
- [26] Mr. Zahir claimed that he did not recall signing the "Service Consultant Agreement Contract", which is the document that Mr. Chow said was forged. As already noted, I found Mr. Chow's testimony on that point to be implausible and Mr. Zahir's lack of recollection appeared too convenient.
- [27] I found Mr. Zahir's claim that he was surprised to learn, in 2009, that the revenues from the bleaching products were not reported on Nature-Control's financial statements to be unreasonable and implausible, given he acknowledged knowing from the outset that all sales were being conducted in SouthMountain's name and all revenues were being paid to SouthMountain.
- [28] Finally, all the witnesses participated or acquiesced in the creation of marketing documents that contained intentionally false and misleading statements. Mr. Zahir even characterized one of these documents as containing "a good deal of deceit". The inaccuracies in these documents were so blatant and significant that they caused me to question the honesty of all the witnesses.
- [29] Although Kobe Lai almost certainly would have been able to corroborate one or the other version of much of the evidence, he was not called as a witness by either side. In the result it has proved to be very difficult to disentangle the truth from the deceit and embellishment.
- [30] In the circumstances, I must approach Mr. Zahir's evidence and Mr. Gough's evidence with caution. My concerns about the credibility of the evidence of Mr. Chow and Dr. Li are even more pronounced. It would be inappropriate for me to make a general finding that the evidence of one of them should be preferred over the other. Rather, where their evidence is in conflict on a significant issue, the matter will fall to be decided in accordance with the version that is more consistent with documents and the uncontroverted evidence that has been accepted.

The Facts

- [31] Dr. Li was born in China. He was 51 years old at the time of the trial. He is a research scientist and chemical engineer with a BSc in organic chemistry from Jiang Xi University, a Master's degree in petroleum chemical engineering from the South China University of Technology, and a Ph.D. in chemistry from Bayreuth University in Koln, Germany.
- [32] From 1983 to 1986, Dr. Li worked at the Jiang Xi Chemical Institute where he conducted research on chemical compounds known as "surface agents", eventually developing surface agents that bind onto coal, allowing it to be suspended in water and then transported through pipes. Dr. Li later worked as a research scientist for the Chinese government continuing his research on coal and surface agents. He concurrently began to conduct chemical research and development on his own behalf and on his own time.
- [33] Dr. Li undertook his personal research with the assistance of MaShan, a company owned by Dr. Li's brothers. MaShan manufactures chemicals and is also engaged in chemical research and development. It has several subsidiaries and has factories in a number of cities and provinces in China. MaShan also has a well-equipped research laboratory.
- [34] Dr. Li had access to MaShan's laboratory and its testing and production facilities. Over the course of about one year commencing in 1995, Dr. Li worked at the MaShan laboratory developing Compounds A and B.

Waste Water Treatment and Fibre Reclamation Technology

- [35] Mechanical pulp is created through a process of grinding and breaking down wood chips into fibre. Water used in the process becomes contaminated with waste consisting of short fibres that are too small to be filtered out. The short fibre waste is in the form of sludge. The sludge must be removed or "reclaimed" before the water can be returned to the environment. Compounds A and B are flocculating agents which cause the short fibres suspended in the waste water to clump together and shrink in volume, making it easier to filter out the solids and thereby clarify the water.
- [36] After the short fibre is filtered out, the water may still be discoloured due to the presence of organic material. This can be cleared by introducing bacteria to convert the organic material into carbon dioxide and water. However, the bacteria then accumulate in the water. When Compound B combined with a urea additive (which was eventually given the name "SludgeBuster") is added to the water it causes the bacterial cell membranes to break down. Compound B then facilitates the clumping of the residual solid cellular material, making it easier to filter it out, leaving clean water that can be released.

- [37] Using Compounds A and B and SludgeBuster in the treatment of mechanical pulp waste water not only cleans the water but also renders the sludge lighter, dryer, less voluminous and therefore cheaper to transport. In Canada, the reclaimed short fibre is typically disposed of but in China it is recycled in the production of corrugated cardboard. The residual bacterial sludge can be reused as fertilizer.

Sale of Compounds A and B in China

- [38] After developing the formulations for Compounds A and B, Dr. Li contracted with MaShan to manufacture it. MaShan is also the sole manufacturer of the urea additive used in Sludgebuster.
- [39] Dr. Li and two other men incorporated a company called Wei Li Qing Water Treatment Company ("Wei Li Qing") to sell Compounds A and B to pulp mills in China. The other men each made a capital investment in Wei Li Qing. One of them provided the marketing expertise and the other provided business management. Dr. Li contributed the technological expertise and the right to sell Compounds A and B in China, but did not make a capital investment. Each of the three men owned a third of the shares of Wei Li Qing.
- [40] In 1997, Dr. Li applied for a patent for Compounds A and B in China, which was issued to him in 2002.
- [41] When Dr. Li immigrated to Canada in 2002, he sold his shares in Wei Li Qing to the other shareholders. Wei Li Qing continues to have the exclusive right to sell Compounds A and B in China and continues to be successful doing so, with sales of Compounds A and B averaging approximately \$4 million annually.

Bleaching and Brightening Formulations

- [42] After Dr. Li developed Compounds A and B, he continued to undertake research and development of other technologies. From 1997 onward, his primary research focus was the development of specialty chemical bleaching and brightening products for use in the pulp industry. These are referred to collectively in this judgment as the "bleaching products". Ultimately, Dr. Li developed a number of bleaching products which are described below. These utilized already known or common chemicals, but in unique compositions and combinations.
- [43] In 1997, Dr. Li began researching formadine sulfinic acid ("FAS"), a known chemical, and combining it with the surface agent technology he had previously developed, to suspend the FAS in liquid in what was referred to as a "soliquid" form. This soliquid form of FAS is easier and therefore cheaper to transport. The soliquid form also allows FAS to remain stable up to 30 degrees Celsius and it is therefore safer to use.

- [44] Between 2002 and 2005, Dr. Li conducted research at MaShan on chemicals referred to as fluorescent whitening agents ("FWAs") or optical brightening agents ("OBAs"). These are used to increase the brightness of pulp. While bleaches actually clean the pulp, FWAs and OBAs act like paint, coating the pulp and making it appear whiter. He developed a formulation combining TAED (tetra acetyl ethylene diamine), an oxidizing agent, with 20 to 30 unique FWAs. This formulation was later patented in Canada and came to be known as "T-Bright" or "T-Brite".
- [45] Dr. Li testified that in 2003 and 2004, he conducted research at MaShan on chelants which are compounds that react with dissolved metals. In the pulp bleaching process, peroxide is used as a bleaching agent. The effectiveness of peroxide is reduced if it reacts with dissolved metals. The addition of a chelant prevents the peroxide from reacting with dissolved metals, thereby retaining its effectiveness in the bleaching process. Dr. Li developed a unique formulation of TAED in combination with unique chelants also developed by him. A Canadian patent application for this formulation, which is known as "Newsbright M", was submitted in Dr. Li's name in June 2011.
- [46] The bleaching products developed by Dr. Li were sold in Canada under various trade names. "Optibright" or "NewsBright" was a combination of FAS in the soliquid form with unique FWAs and the common chelant, DTPA. "T-Bright" or "T-Brite" was a combination of unique FWAs and the common bleaching agent, TAED. "NewsBright M" was a combination of TAED and a unique chelant. "Optiqol" was a formulation of unique FWAs that is sprayed directly onto the surface of paper to increase its whiteness or brightness.
- [47] Dr. Li testified that all the research relating to the development of the bleaching products was carried out at MaShan's laboratory and at MaShan's cost, his cost, or SouthMountain's cost, and none was carried out for or on behalf of Nature-Control, at its cost, or in its laboratory. Dr. Li testified that to conduct this research and development he required the sophisticated laboratory equipment and testing facilities that were available to him at MaShan. He said that Nature-Control's very modestly equipped laboratory was inadequate for research and development purposes. In contrast, Nature-Control alleges that after Dr. Li immigrated to Canada, his research and development was conducted at Nature-Control's laboratory. I will address the nature and use of Nature-Control's laboratory in more detail below.

Dr. Li Meets Kobe Lai and Mr. Chow

- [48] In February of 2003, Dr. Li started ESL classes at Vancouver Community College where he met Kobe Lai. Dr. Li described the waste water treatment and fibre reclamation technology to Kobe Lai, explained how Compounds A and B worked, and described the business he had developed through Wei Li Qing. Kobe Lai expressed interest in providing financing for such venture in Canada, but he and Dr. Li considered that they would need to bring in someone with knowledge of the local pulp industry who also spoke English fluently.

- [49] From March to early May 2003, Dr. Li interrupted his ESL studies and returned to China to conduct research on FWAs at MaShan. He resumed his ESL studies on his return from China and shortly thereafter Kobe Lai introduced Dr. Li to Mr. Chow.

Mr. Chow

- [50] Mr. Chow was born in China and immigrated to Canada in 1968. He was 64 at the time of trial. Mr. Chow's first language is Cantonese but he speaks English fluently.
- [51] Mr. Chow worked for a number of years as a heavy duty mechanic at a pulp mill on Vancouver Island. From 1981 to 2006 he worked for Safeway at its highway transport repair division in Burnaby. Mr. Chow also operated a plastics recycling business from 1986 to 2007. In 2006, Mr. Chow bought Double Happiness Foods, a manufacturer of Chinese noodles and dim sum wrappers. He continues to operate that business.

July 17, 2003 Letter of Intent and Incorporation of Nature-Control

- [52] On July 17, 2003, Mr. Chow, Dr. Li and Kobe Lai signed a document titled "Letter of Intent". The evidence of Mr. Chow and Dr. Li concerning the Letter of Intent and the discussions preceding it differed significantly.
- [53] Dr. Li testified that prior to July 17, 2003, he met Mr. Chow briefly about two or three times. Dr. Li said he described Compounds A and B and explained, in general terms, how the waste water treatment and fibre reclamation technology worked. He spoke about Wei Li Qing, its structure, and its experience selling Compounds A and B to pulp mills in China. He testified that these brief conversations were followed by a lengthy meeting on a single day in June 2003, during which the three men discussed and verbally agreed upon the terms of their proposed venture. He said Mr. Chow took notes at that lengthy meeting, in Chinese, which Mr. Chow's daughter typed up in English in the form of the Letter of Intent.
- [54] Dr. Li testified that he was later presented with the Letter of Intent. He said he could not read English well enough to understand its contents. He said Mr. Chow did not translate it but said that it reflected their verbal agreement. He said he signed it because he trusted Mr. Chow. Dr. Li testified that after signing the Letter of Intent he took a copy home and filed it away. He said he did not look at it again until after he was served with the Notice of Civil Claim in this action.
- [55] Mr. Chow said that the parties met about 20 times prior to the Letter of Intent being signed. He said that he translated his Chinese notes into English and gave them to Dr. Li's wife, Ms. Jiang, to type up, but there were so many typing errors that the document was re-typed by Mr. Chow's daughter. He said he provided the typed version to Kobe Lai and Dr. Li, they took it home to review, and the three men got together again about seven to ten days later at which time they all signed it.

[56] The content of the Letter of Intent is important to the determination of the scope of Nature-Control's business, at least at its inception. Accordingly, I have set it out almost in its entirety [grammatical and syntax errors in original]:

1. The intention of this agreement is for an association between Tom W. Chow and Mr. Li Meng Jun and Mr. Lai Chu Ying .
2. The business to be established are for the purposes of Marketing, Distributing and Manufacturing of Environmentally friendly chemical products for water treatment and reclamation of tiny and short fiber from paper mill production sludge waste water.
3. The principle, entrusts to the distributor and manufacturing its exclusive representation for the products in the territory area of Canada, United States of America, Mexico and the Caribbean (Hereafter call Territory).
4. The Company will be incorporated in the Province of BC (British Columbia) the name Nature Control Technologies Inc. has been reserved with the Province and will be used unless the partners will agree to change the name.
5. Agreement in principle with the "Inventor" Mr. Li Meng Jun to use his technologies which he guarantee are invented by him and has patented in China.

This chemical formula call Nature Control Compound "A" & "B" will be patented by Mr. Li Meng Jun (Inventor) within six months commencing from the date this company established and register to incorporated a company in B.C. call Nature Control Technologies Inc. and Mr. Li Meng Jun will be responsible for providing the Technologies formula and assign the patents right to "Nature Control Technologies Inc."

6. Nature Control Technologies Inc. is the sole exclusive distributor and manufacture for this chemical formula, nature control compound "A" & "B" to distribute and manufacturing as it see fit in the territory of North America (Territory)
7. Title, Responsibility and liability for partners.

I) Mr. Lai Chu Ying:

Title: Internal Operation Managing Director

Responsible for internal operation, quality control, manufacturing, shipping and Receiving, account payable and receivable and inventory control.

His contribution amount to or equal to 34% of the company share in the manner As shareholder's loan to the company. Amount (Cnd\$48,571.43)

II) Mr. Li Meng Jun:

Title: Technology Managing Director

Responsible for research and development, chemical, mechanical application and planning.

His contribution to providing and assigning the patent right to the company equal to and/or amount to 30% of the company share as shareholder loan to the company. Amount (Cnd\$42,857.14)

III) Mr. Tom W. Chow

President of the Company

Responsible for sales and marketing, business development and to coordinate with Mr. Li Meng Jun for chemical and mechanical application planning, also, to coordinate with Mr. Lai Chu Ying for budget planning, material purchasing payable and receivable.

His contribution amount to or equal to 36% of the company shares in the manner as shareholder loan to the company. Amount (Cnd\$51,428.57)

8. Initial cash capital investment will be loan by Mr. Tom W Chow Cdn\$51,428.57 and Mr. Lai Chu Ying Cdn\$48,571.43 for the company start up operation cash flow with no interest bearing. Anymore loan hereafter will be subject to interest accruing to the benefit of the lender, equal to the commercial lending rate from Charter Bank's.
9. Shareholder loan payback will be set at not more than 20% of the company NET profit, calculated annually. Net profit payout to the shareholder's will be set at not more than 50% at the remain balance after the loan payback.
10. Terms, Termination and Compensation

This agreement shall enter into effect as from the first day the company has all it's marketing material ready. This commencing date will be signed and dated by all shareholder's, from that day on the company has two years to proof it's marketing capability, if within this two years the company will not be able to enter into any sales agreement to any paper mill or other customers, Mr. Li Meng Jun will have the right to terminated this agreement.

Should Nature Control Technologies Inc. able to landed a solid sales agreement and/or any contract agreement within the two years time frame, Mr. Li Meng Jun will assign his technology and patent's right to the company unconditionally and with indefinite time contract and agreement with Nature Control technologies Inc. Also, Nature Control Technologies Inc. has the first right of refusal for the marketing and manufacturing of all other technologies that's in Mr. Li Meng Jun holding.

11. Any new research and development finding through the Company laboratory are to be the property of the company's and will be at the cost of the company to has it patent or manage.
- [57] At trial, Dr. Li and Mr. Chow both claimed that the Letter of Intent did not accurately reflect their verbal agreement, but they took issue with different aspects of it. Before addressing their differences, I note that they both testified that it was intended that Dr. Li could terminate the agreement and "walk away" if Nature-Control did not obtain a "solid sale" within two years. The parties referred to a "solid sale" as a sale to a customer for the purpose

of the customer using the product in its operations, as opposed to a sale for the purpose of permitting a potential customer to use the product on a trial basis.

- [58] Mr. Chow testified that the Letter of Intent did not capture the entire agreement but rather only reflected the most important concerns. From his perspective the most important concern was securing access to the patented technology (Compounds A and B). He said he thought he would make a lot of money from the patented technology so he was focused on it. He said Dr. Li's primary concern was to ensure that he (Dr. Li) would be free to walk away if Nature-Control did not succeed within two years.
- [59] From Mr. Chow's perspective, the principal deficiency in the Letter of Intent is that it describes Nature-Control's original business in a way that appears to be restricted to the waste water treatment and short fibre reclamation aspects of the production of pulp. He testified that the plan was to use the patented waste water treatment technology as a way to get in the door of the pulp mills. He said that Dr. Li claimed that once they were in the door they would be able to sell other chemicals to the pulp mills as well. He initially said that it was agreed from the outset that Nature-Control would sell these other chemicals as well as Compounds A and B. However, in cross-examination he said that while he and Dr. Li discussed other technologies from the beginning he (Mr. Chow) "didn't press it" because his focus was on securing access to Compounds A and B.
- [60] Dr. Li testified that the agreement reached at the lengthy meeting before the Letter of Intent was drafted reflected the structure and scope of Wei Li Qing. He said several aspects of the Letter of Intent were not agreed to, including the following:
- a) He took issue with the inclusion of the word "manufacturing" in clause 2. He testified that Nature-Control was not capable of manufacturing Compounds A and B and that its sole business was to be the sale of waste water treatment products to pulp mills in Canada.
 - b) He took issue with the scope of the territory referred to in clause 3. He said the agreed territory was Canada and there was no agreement for Nature-Control to sell Compounds A and B in the United States, Mexico or in the Caribbean.
 - c) He took issue with the apparent requirement in clause 5 for him to register the patents for Compounds A and B in Canada within six months. He said it was agreed that Nature-Control would cover the costs associated with getting the patents registered in Canada, that no specific deadline was agreed to, and that there was not enough money, until 2006, to do that. He also testified that he did not agree to assign the patents to Nature-Control. He said this would make no sense because if Nature-Control did not make a solid sale within two years he had the right to walk away. He emphasized that the agreement was limited to giving Nature-Control the exclusive right to use the Compound A and B technology for two years.
 - d) He took issue with the characterization of Kobe Lai's and Mr. Chow's financial contributions as shareholders' loans. He said their contributions were to be investments and not loans.

- e) He took issue with the description of his duties in clause 7. He said that while he agreed to provide technical expertise with respect to Compounds A and B, there was no agreement that he would be responsible for any other research or development. He said there was no discussion that his contribution would be characterized as a shareholder's loan.
- f) He took issue with the stated commencement date being delayed until the marketing material was ready. He testified that the agreement commenced on the date of its execution, July 17, 2003.
- g) He took issue with the second paragraph in clause 10. First, he said he did not agree to assign his technology and patents to Nature-Control although he did acknowledge that if Nature-Control made a solid sale within two years it would have the exclusive right to use the Compound A and B technology indefinitely. He also took issue with the reference to a right of first refusal for his other technologies. He acknowledged that he, Kobe Lai and Mr. Chow discussed the possibility of entering into a new contract with respect to other technologies if Nature-Control achieved success with Compounds A and B within two years, but he insisted that there was no agreement that Nature-Control would have any rights in that regard.
- h) He took issue with clause 11. He testified that he carried out all his research in China. He said there had been some discussion about the possibility of him doing research for Nature-Control but he said he explained to Mr. Chow that it would cost as much as \$2 million to \$3 million for Nature-Control to set up a proper research laboratory and as a result that prospect was not pursued.

[61] Nature-Control was incorporated after the Letter of Intent was signed.

Activities in 2003/04

[62] In October 2003, Nature-Control rented premises on Commerce Parkway in Richmond and set up its offices. The premises consisted of a reception area, a large room with three desks, a meeting room, a washroom and a laboratory.

Visit to Fibreco Pulp Mill

- [63] In early 2004, Dr. Li, Kobe Lai and Mr. Chow travelled to the Fibreco pulp mill near Fort St. John where they observed the waste water treatment plant, explained the Compound A and B technology to Fibreco representatives, and did some testing of Compounds A and B. Mr. Chow and Dr. Li both testified that two major developments came out of the visit to Fibreco.
- [64] First, they realized that the people they met at Fibreco questioned Nature-Control's credibility since it had no manufacturing facility in Canada and no experience with Canadian mills. It also had no presentation materials and Mr. Chow had to translate Dr. Li's verbal explanation of the technology. They concluded they would have to take steps to establish commercial credibility for Nature-Control.

- [65] The second development was the identification of a potential additional business for Nature-Control, being the purchase of Fibreco's reject or off-grade pulp (which Fibreco was transporting to a landfill and discarding) for resale in China.
- [66] Dr. Li obtained a sample of Fibreco's waste water. He conducted some tests of Compounds A and B on the waste water, at Mr. Chow's house, and it worked well. Dr. Li also arranged to obtain a sample of the Fibreco's reject pulp, which he received in late 2004 or early 2005. He had the sample tested for brightness at an unrelated lab in Vancouver called "Paprican". This was done because the price that would be paid for reject pulp in China depended at least in part on the brightness of it. The brightness is determined with a brightness meter and Nature-Control did not, at that time, have a brightness meter, which is why the brightness assessment was performed at an independent laboratory.

The Blue Brochure and the Website

- [67] After the visit to Fibreco, Mr. Chow, Kobe Lai and Dr. Li developed some marketing materials and established a website to promote Nature-Control. Dr. Li testified that in an effort to enhance Nature-Control's credibility, they decided to present it as a bigger company than it actually was. They created a marketing folder (referred to during the trial as the "blue brochure") that focused on Compounds A and B but also represented Nature-Control as a chemical manufacturer even though it had no manufacturing capability and did no manufacturing. The blue brochure contains photographs of the Fibreco mill even though Nature-Control had no relationship with Fibreco, other than having visited there and obtained the samples mentioned above.
- [68] Dr. Li said Mr. Chow suggested they include in the blue brochure a list of chemicals in common use in the pulp industry to bolster the claim that Nature-Control was a manufacturer. These generic chemicals were referred to in the blue brochure as products manufactured and sold by Nature-Control. Individual information sheets about each of these chemicals were prepared which could be tucked into the brochure.
- [69] Mr. Chow retained someone to develop a website for Nature-Control. Listed on the website was the same collection of generic chemicals, as well as Compounds A and B.
- [70] Dr. Li testified that the list of chemicals (other than Compounds A and B) and the information insert sheets were developed for promotional purposes only and that it was never intended that Nature-Control would actually sell these generic chemicals. He said the information sheets ended up being used for scrap paper.
- [71] Mr. Chow testified that the inclusion of these generic chemicals in the blue brochure and on the website reflected the actual agreement of Nature-Control's shareholders as to the scope of its business. He said Nature-Control was going to sell any and all chemicals.

- [72] The blue brochure was created before Mr. Zahir was hired and before Mr. Gough was retained, but both of them testified as to its subsequent use. Mr. Zahir said that the blue brochure with the information insert sheets were used for marketing but he also said Dr. Li used the insert sheets as scrap paper. Mr. Gough said that he used the blue brochure in his early marketing efforts, but in re-examination he confirmed that no real attempts were made to sell the generic chemicals because the mills had no interest in buying them.
- [73] Counsel for Nature-Control submitted that Dr. Li's evidence that there was no intention to actually sell the generic chemicals was not plausible because Nature-Control would risk losing credibility if a customer attempted to place an order for the generic chemicals. I do not agree with that submission. As discussed in more detail below, the evidence overwhelmingly established that Mr. Chow, Dr. Li, Mr. Zahir and Mr. Gough were all prepared to use very misleading marketing materials, and that they did so for years. They clearly considered the risk of damaging Nature-Control's credibility to be outweighed by the perceived benefit of a marketing strategy that exaggerated, to put it in its best light, the nature of Nature-Control's business.
- [74] Dr. Li's evidence about the blue brochure was corroborated, in part, by Mr. Zahir and Mr. Gough. It is consistent with Mr. Gough's evidence that there were no actual attempts to sell the generic chemicals listed on the blue brochure. For these reasons, I prefer Dr. Li's evidence about the blue brochure over Mr. Chow's evidence.

Nature-Control's Employee and Salesperson

- [75] Following the Fibreco trip, Mr. Chow, Dr. Li and Kobe Lai also determined that Nature-Control should hire a marketing person because Mr. Chow's other business commitments left him with little time to devote to Nature-Control.
- [76] Early in 2004, Nature-Control hired Mr. Zahir at a salary of \$2,000 per month. There was no written employment agreement. Mr. Zahir has a Bachelor of Commerce and an MBA from the University of BC. His duties included the creation of marketing materials and he undertook the majority of the paperwork, including correspondence, invoicing and other office management duties.
- [77] Shortly after Mr. Zahir was hired, Nature-Control retained Mr. Gough as a commissioned salesperson. He received no salary and was to be paid 2% commission on sales by Nature-Control. Mr. Gough has a Bachelor of Commerce from the University of Alberta. He worked for Dow Chemical for more than 30 years in sales and marketing. While with Dow, Mr. Gough sold chemicals to the pulp industry, municipalities and refineries. He retired in 2004 when Dow downsized.

- [78] Mr. Gough had many contacts in the pulp industry. His first order of business was to work through his old contacts, set up meetings and call on mills. Mr. Gough initially focussed on introducing the waste water treatment technology to his contacts and trying to secure agreements to conduct mill trials of Compounds A and B.
- [79] Mr. Gough testified that when he was retained by Nature-Control, he knew that it would take a long time to develop the market for Compounds A and B, which he described as "speciality products". He explained that unlike generic chemicals, which are tried and true, new specialty products like Compounds A and B are unknown and time and effort is required to build up enough credibility to convince the mills to make a change.

Dr. Li's Activities in the First Year

- [80] As noted above, Dr. Li was in China from March to May of 2003 carrying out research on FWAs. From August to December of 2003, Dr. Li was in China conducting FWA chemical trials at various pulp mills. He returned to China between April and August 2004 to continue his research on chelants. By the end of 2004, Dr. Li had developed a formulation combining TAED with unique FWAs which became known as "T-Bright" or "T-Brite".
- [81] Dr. Li testified that by 2004 MaShan had a facility to manufacture the new bleaching products that he had developed, and was continuing to develop. In 2004, MaShan started manufacturing some of these bleaching products in China.

SouthMountain

- [82] Dr. Li testified that Nature-Control could not purchase Compounds A and B directly from MaShan and the product had to be imported through a company owned by him. There was no dispute that he advised Tom Chow of this. However, the reason for this was not made clear, either at the time or during his testimony at trial. He simply testified that he told Mr. Chow that SouthMountain would purchase Compounds A and B from MaShan, import the product to Canada, and then sell it at cost to Nature-Control. Mr. Chow testified that he was not happy about this arrangement and only reluctantly agreed to it on the express condition that SouthMountain would sell the product to Nature-Control at cost. Even though he claimed that he was not happy about this arrangement he apparently did not press Dr. Li for an explanation as to why Nature-Control could not import the product directly.
- [83] Dr. Li testified that in addition to importing Compounds A and B, he planned for SouthMountain to also import and sell the bleaching products which by then were being manufactured by MaShan.
- [84] Dr. Li testified that he told both Mr. Chow and Kobe Lai that he intended to market his bleaching products in Canada through SouthMountain. He said they discussed this aspect of SouthMountain's business often and from the time SouthMountain was incorporated in 2004. He said they expressly agreed that Mr. Zahir and Mr. Gough could be used by SouthMountain to market the bleaching products and that Nature-Control's premises and

other assets could also be used for that purpose. Dr. Li testified that he offered to have SouthMountain pay rent but Mr. Chow refused.

- [85] Dr. Li submitted it was reasonable for Mr. Chow and Kobe Lai to agree that SouthMountain and Nature-Control should work together in this fashion because the two product lines are not substitutes but rather are used in different stages of the pulp making process. He said the product lines are complimentary and not competitive. He said that Mr. Chow and Kobe Lai agreed that if SouthMountain was able to sell the bleaching products to the mills, the relationships thereby developed would make it more likely that the mills would be prepared to purchase Compounds A and B from Nature-Control, and vice versa. Further, the costs associated with running Nature-Control's office, including Mr. Zahir's salary, were being incurred in any event, Mr. Gough was working for straight commissions, and any other expenses incurred in relation to the bleaching formulations would be borne by SouthMountain.
- [86] Mr. Chow vehemently denied any discussion, let alone agreement, that SouthMountain would sell the bleaching products or that Nature-Control's staff, premises and other assets would be used for that purpose. He testified that he had no idea, until 2009, that this was occurring. He said he would never have agreed to this because, according to him, Nature-Control's business extended to the marketing of all chemicals.

Activities in 2004/05

- [87] Throughout 2005, Mr. Gough continued to contact mills attempting to generate interest in Compounds A and B. He was successful in setting up meetings and mill trials.

Marketing the Bleaching Products

- [88] Mr. Zahir testified that when he was hired by Nature-Control he was told that Nature-Control sold chemicals. He said that the business was not characterized narrowly as merely the sale of Compounds A and B. Mr. Gough testified that he understood that the plan was to use Compounds A and B to get in the door and then once Nature-Control had developed some credibility, to sell other chemicals as well.
- [89] It is not disputed that by late 2004 early 2005, Mr. Gough and Mr. Zahir were actively marketing the bleaching products as well as Compounds A and B. This is clear not only from their testimony but also from the many documents they generated in the course of their work including many emails and other forms of correspondence to prospective customers.
- [90] There were some sales of both Compounds A and B and the bleaching products but for trial purposes only. There never was a "solid sale" of Compounds A and B and the first "solid sale" of bleaching products did not occur until late 2008.

- [91] Both Mr. Gough and Mr. Zahir testified that Dr. Li instructed them from the outset to take care to ensure that the costs associated with the bleaching products were charged to and paid by SouthMountain and that the revenues from the sale of bleaching products were paid to SouthMountain, while those for Compounds A and B were to be borne by and paid to Nature-Control. They both testified that Dr. Li told them to ensure that customers understood that purchase orders and cheques for bleaching products had to be addressed to SouthMountain, and invoices for bleaching products had to be issued by SouthMountain. While it is clear that they were not always careful to maintain the distinction in general correspondence, they did ensure that expenses related to bleaching products were charged to SouthMountain, purchase orders for bleaching products were made out to SouthMountain, invoices for the sale of bleaching products were sent in the name of SouthMountain and cheques in payment of those invoices were made payable to SouthMountain.
- [92] Many documents were tendered as exhibits that demonstrate the care that was taken to distinguish between the two companies when it came to expenses and revenues. These included invoices for bleaching products in the name of SouthMountain and correspondence to customers instructing them to make out their purchase orders for bleaching products to SouthMountain. Other documentation confirmed that SouthMountain paid expenses related to the marketing of the bleaching formulations. Further, from as early as 2005, Mr. Zahir and Mr. Gough divided their expense claims as between SouthMountain and Nature-Control, submitting expense reports to SouthMountain for costs they incurred in connection with their efforts to market the bleaching products and separate expense reports to Nature-Control for costs they incurred in connection with their efforts to market Compounds A and B. They confirmed that they were reimbursed by SouthMountain for the bleaching product related expenses.
- [93] Dr. Li testified that around the beginning of 2005, he proposed to Mr. Gough and Mr. Zahir that SouthMountain pay a commission of 2.5% to Mr. Gough and .5% to Mr. Zahir on the sale of the bleaching products. Dr. Li testified that Mr. Gough and Mr. Zahir accepted this proposal. Both Mr. Gough and Mr. Zahir acknowledged having agreed to this arrangement but they both said that they recalled the timing of it as late 2008 or early 2009, and not early 2005.
- [94] Counsel for Nature-Control submitted that Dr. Li fabricated his evidence about the timing of this commission agreement in order to explain or justify the significant amount of time Mr. Gough and Mr. Zahir spent, since 2005, marketing the bleaching products. I am not persuaded that Dr. Li fabricated this evidence, although he may have been mistaken about the timing. As noted above, there is no dispute that Dr. Li instructed Mr. Zahir and Mr. Gough, from the outset, to ensure that the distinction between the two companies was maintained when it came to expenses and revenues. Both Mr. Zahir and Mr. Gough knew that SouthMountain was Dr. Li's company and they both said they assumed there was an arrangement between Dr. Li and Mr. Chow to ultimately share the profits from the sale of all

the products. To be clear, neither one of them testified to having been told by Mr. Chow or Dr. Li of such an agreement. Rather, this was simply their assumption. In the circumstances, until their commission agreements were established with SouthMountain, it was reasonable for them to also assume that the compensation they were receiving from Nature-Control applied to the work they did in respect of both product lines.

- [95] Both Mr. Zahir and Mr. Gough acknowledged that Dr. Li never told them to conceal from Mr. Chow or anyone else, the fact that they were maintaining this distinction between SouthMountain and Nature Control in the allocation of expenses and revenues, or that they had entered into the separate commission agreement with SouthMountain, whether in 2005 or 2008/09.

The Marketing Strategy

- [96] Mr. Gough, Mr. Zahir and Dr. Li all testified, without any apparent compunction, that they intentionally embarked on a misleading marketing strategy designed to inaccurately represent the nature and size of the business.
- [97] Marketing materials were created that characterized the business as a large single entity with two divisions and a direct connection to MaShan as its parent company. One division, referred to as "Nature Control Technologies", was represented as conducting the waste water treatment product business. The other, referred to initially as "Nature Control Chemical" and then as "South Mountain Chemical", was represented as conducting the bleaching product business. At least one marketing document even misrepresented Wei Li Qing as the "sister company".
- [98] Mr. Zahir was primarily responsible for the creation of these materials but Mr. Gough was also involved. Dr. Li testified that he left the creation of marketing materials to Mr. Zahir. However, he did not deny being aware of the misleading content of these materials. In contrast, at trial Mr. Chow claimed that he was not aware of it. However, he gave inconsistent evidence during his examination for discovery when he claimed he was aware of it and strongly objected. Mr. Gough testified that Mr. Chow was aware of the marketing strategy. In the circumstances, I do not accept Mr. Chow's evidence at trial that he was unaware of the marketing strategy. I find that he was aware of it and, in particular, that he was aware the bleaching products were being marketed with the name South Mountain.
- [99] Mr. Gough testified that he did not know what the actual relationship was between Nature-Control and SouthMountain. Mr. Zahir also testified that he had no personal knowledge of the business arrangements between Mr. Chow, Kobe Lai and Dr. Li or between Nature-Control and SouthMountain. Mr. Gough and Mr. Zahir testified that they knew that Nature-Control had no relationship to MaShan in China. However, the strategy was to present Nature-Control as a company having the two divisions with MaShan as its parent. They explained that they thought this would increase Nature-Control's credibility in the market.

- [100] All the witnesses acknowledged that it was inaccurate to represent the business in this manner and they all agreed that the purpose of doing so was to make Nature-Control seem bigger than it really was. However, they had different perspectives on the specific nature of the inaccuracy. From Mr. Chow's, Mr. Zahir's and Mr. Gough's perspective, in reality there was just the single entity, Nature-Control, and the inaccuracy was the suggestion that Nature-Control was large enough to warrant a sophisticated organizational structure comprising separate divisions for different product lines. From Dr. Li's perspective, in reality there were two distinct and unrelated legal entities each with its own business, and the inaccuracy was the suggestion that Nature Control was ultimately the seller of both product lines.
- [101] The marketing materials sometimes blurred the distinction between Nature-Control and SouthMountain. For example, some documents referred to the bleaching products being sold by Nature Control Chemical and others by South Mountain Chemical. While most of the marketing materials expressly referred to a single entity with two divisions there was at least one version of a PowerPoint presentation that was restricted to South Mountain and the bleaching products while another separate version referred only to Nature Control and the waste water treatment technology. One of the documents tendered by Nature-Control is titled "South Mountain Trading Ltd. Business Plan". It is dated 2005 and states, among other things, that South Mountain has "developed a cost effective bleaching technology" and is "looking to supply this technology on a commercial scale to the pulp and paper industry". The same document refers to "South Mountain's bleaching chemicals" but also refers to Nature-Control and is unclear about the relationship between the two.
- [102] Mr. Gough and Mr. Zahir admitted that, in addition to inaccurately representing Nature Control as operating with two distinct divisions with MaShan as its parent, many of the marketing documents they created and used included other information they just made up. As already noted, Mr. Zahir even characterized one of the documents he created as containing "a good deal of deceit". They both testified that Mr. Zahir took from the Internet, impressive looking photographs of an office building, a large and sophisticated laboratory and a large warehouse, and misrepresented them in marketing documents as MaShan's office and Nature-Control's laboratory and warehouse. Some of these documents referred to "our production plant in China" even though neither Nature-Control nor SouthMountain had a production plant in China or elsewhere for that matter. Pine oil is one of the raw materials in some of the products and some marketing materials even included a stock photo of a forest that was referred to as "our mountain pine forest". Neither Nature-Control nor SouthMountain owned a forest.
- [103] Both sides submitted that the marketing materials supported their respective positions as to the scope of Nature-Control's business. The plaintiff emphasized the references to Nature-Control at the top of the organizational structure. The defendants emphasized the express and repeated use of the name "South Mountain" to refer to the bleaching product business. In my view, the marketing materials themselves have little, if any, probative value

because they were intentionally misleading. However, they do establish that the two product lines were marketed together with materials that used the name South Mountain in relation to the bleaching products. Both Mr. Zahir and Mr. Gough acknowledged that Dr. Li never told them to conceal these materials from Mr. Chow or anyone else. Mr. Gough acknowledged using them in meetings attended by Mr. Chow.

Quesnel River Pulp and the WAFER System

- [104] In February 2005, Dr. Li, Mr. Chow and Kobe Lai visited the Quesnel River Pulp ("QRP") mill. While there, they observed that QRP was transporting wood chips, reject pulp, and reclaimed short fibre to a landfill to be discarded. QRP was interested in the prospect of Nature-Control purchasing these waste products for resale in China. This would generate revenue for QRP and reduce their transportation and disposal costs. Nature-Control conceptualized a waste processing plant, referred to as the "WAFER system" (an acronym for "waste water and fibre extraction recycling"), that could be assembled on QRP's site.
- [105] Between March 15 and April 24, 2005, Dr. Li, Kobe Lai and Mr. Chow went to China to investigate the prospect of selling recycled pulp in China and purchasing a drying machine that would be needed as part of the WAFER system. They also purchased a brightness meter which would allow the brightness of recycled pulp (and hence its value) to be determined.
- [106] Dr. Li testified that he had obtained a large pulp sample from Howe Sound Pulp and, on this trip to China, he took it to MaShan so that bleach tests could be conducted on it in MaShan's laboratory. He said he discussed SouthMountain's bleaching business with Mr. Chow and Mr. Lai and told them he was taking the sample to MaShan for testing.
- [107] Mr. Gough prepared a proposal for the WAFER system that included, as a component, Nature-Control supplying Compounds A and B to QRP. He estimated the cost to build a WAFER system at approximately \$2.3 million. He projected annual sales from recycled pulp of between \$3 and \$5 million and from the sale of Compounds A and B to QRP of between \$600,000 and \$700,000 per year, with an expected profit margin of 30% to 40%.

Change in Nature-Control's Ownership

- [108] Dr. Li testified that Kobe Lai was eager to move forward with the WAFER system project at QRP and that he (Kobe Lai) proposed raising \$2 million to build the plant. He would put in \$1 million and he proposed either Mr. Chow do the same or they bring in other interested investors which would reduce Mr. Chow's ownership position. According to Dr. Li, Mr. Chow was not prepared to invest a further \$1 million or to have new investors brought in. Dr. Li said heated arguments ensued between Mr. Chow and Kobe Lai and ultimately Kobe Lai demanded to be bought out by Mr. Chow.

- [109] At trial, Mr. Chow denied that Kobe Lai wanted to bring in new investors. He said that he and Kobe Lai would have financed the WAFER system but QRP simply lost interest. However, during his examination for discovery he said that Kobe Lai did suggest bringing in new investors but Mr. Chow did not think this was realistic and nothing came of it. Mr. Chow testified that Kobe Lai wanted out of the business because he and Dr. Li were constantly arguing. He said that Kobe Lai begged Mr. Chow to buy him out, which Mr. Chow finally agreed to do in November 2005.
- [110] Mr. Gough's evidence was more consistent with Mr. Chow's evidence on the demise of the WAFER system. He said that QRP lost interest in it because they were never satisfied with the trials of Compounds A and B.
- [111] Mr. Zahir's evidence was more consistent with Dr. Li's evidence on this point. Mr. Zahir said he participated in discussions among the owners, including Mr. Chow, about raising the money required to develop the WAFER system by bringing in new investors. He also testified that he overheard what appeared to him to be heated arguments between Mr. Chow and Kobe Lai that may have occurred in the fall of 2005 but he said they spoke in Chinese, so he could not say what the arguments were about.
- [112] On this point, I prefer Dr. Li's account because it was corroborated, in part, by Mr. Zahir and also because it is more plausible. Although the WAFER system proposal, as initially advanced, included Nature-Control supplying Compounds A and B to QRP, the WAFER system itself did not depend upon QRP using Compounds A and B. It is unlikely that the entire concept would fall away simply because QRP was not convinced to purchase Compounds A and B. In any event, a meeting agenda for an internal Nature-Control meeting attended by all the witnesses in November 2006 stated that the main priority for Nature-Control was "QRP water treatment". QRP must have remained interested in Compounds A and B at least up to late 2006.

Colco Soil Remediation

- [113] Mr. Chow knew someone associated with Colco International Industries Ltd. ("Colco"), a chrome manufacturer with a plant in Langley, who advised him that the soil at Colco's plant had become contaminated with chromium. Mr. Chow asked Dr. Li to try to develop a solution. Dr. Li thought that one of his existing FAS technologies could be applied, in a new way, to remediate the soil. This was trialed on the soil at the Colco plant and, while it was at least somewhat successful, it was also costly. Colco ultimately decided to address the problem another way.

- [114] Mr. Chow and Dr. Li nevertheless decided that a patent application should be filed with respect to this new FAS soil remediation application. Mr. Chow agreed that Nature-Control would bear the associated costs. The costs were initially incurred by SouthMountain and then, in September 2006, SouthMountain presented an invoice to Nature-Control for \$22,600 (\$20,000 plus taxes) which Dr. Li said was the amount required to reimburse SouthMountain. Mr. Chow signed the cheque and Nature-Control paid that invoice.

Service Consultant Agreement Contract

- [115] Dr. Li testified that in July or August of 2005, he and Mr. Chow spoke about extending the Letter of Intent which was about to "expire". The Letter of Intent did not actually stipulate an expiry date but it did provide that Dr. Li had the right to terminate it if there was no solid sale within two years. According to Dr. Li, Mr. Chow expressed his continued optimism for Nature-Control's business, and asked Dr. Li to register the patents for Compounds A and B and commit to staying on for another two years.
- [116] Dr. Li testified that Mr. Chow also asked him how much it would cost to register the patents for Compounds A and B. Dr. Li said it was necessary for MaShan to conduct some specific testing for QRP, the results of which were to be included in one of the patent applications, and that the existing Chinese patent had to be translated by a Chinese patent agent into English. Dr. Li testified that he obtained an estimate of \$60,000 and passed this on to Mr. Chow.
- [117] The Letter of Intent required Dr. Li to register the patent for Compounds A and B in Canada but did not expressly stipulate responsibility for the associated costs. Nevertheless, there was no dispute between Dr. Li and Mr. Chow about the fact that Nature-Control was to pay the costs.
- [118] Dr. Li testified that after his July or August 2005 discussion with Mr. Chow, Mr. Zahir presented Dr. Li with a document entitled "Service Consultant Agreement Contract" (the "SCAC") which had already been signed by Mr. Chow. He said he signed it and Mr. Zahir also signed it as witness.
- [119] The SCAC stated that, for a term from August 1, 2005 to December 31, 2007, SouthMountain would provide consulting services to Nature-Control "concerning matters relating to the use of FibreReclaim-A & B Patent Solution Technology to Quesnel River Pulp Company". It provided for payment to SouthMountain of \$60,000 for this work.
- [120] Mr. Zahir testified that he created the SCAC on instructions from Dr. Li. He said Dr. Li gave him these instructions sometime after August 2005 but asked that the document be backdated to August 2005. He testified that after creating it, he gave a blank copy of it to Dr. Li and that was the last he saw of it. He said he does not recall signing it or witnessing anyone else do so. Mr. Chow denied signing it and claimed that his signature was forged by Dr. Li.

- [121] Although the SCAC refers to a payment of \$60,000 to SouthMountain for consulting services, it is not disputed that no consulting fees were ever paid to or claimed by SouthMountain. While \$60,000 was ultimately paid by Nature-Control to SouthMountain in December 2006, both Dr. Li and Mr. Chow testified that those funds were intended to reimburse SouthMountain for the costs of registering the patents for Compounds A and B in Canada. Dr. Li did not claim that SouthMountain was owed a further \$60,000 in consulting fees, or that any portion of the \$60,000 that was paid to SouthMountain was compensation for consulting services provided pursuant to the SCAC.
- [122] Nature-Control's counsel submitted that Dr. Li forged the SCAC for two purposes. First, it was submitted that the SCAC made it appear that Mr. Chow knew SouthMountain was doing more than just importing chemicals for sale at cost to Nature-Control. I do not accept that as a reasonable motivation for Dr. Li to forge the document. Mr. Chow was engaged in other businesses, including a recycling business, and there was nothing preventing Dr. Li from doing the same, provided he breached no duties owed to Nature-Control in doing so. Evidence that Mr. Chow knew that Dr. Li had committed to continue working with Nature-Control until December 2007 by having SouthMountain enter into the SCAC, is not probative of whether SouthMountain was free to conduct the bleaching product business.
- [123] Second, Nature-Control's counsel submitted that the SCAC provided justification for Dr. Li's failure to terminate the Letter of Intent after two years. I do not accept that as a reasonable motivation for Dr. Li to forge the document either. Dr. Li did not require justification for not terminating the Letter of Intent. He did not do so because he remained optimistic about Nature-Control's prospects. That explains why he signed the SCAC and thereby committed to Nature-Control to the end of December 2007, without any expectation that he would actually receive the \$60,000 in consulting fees expressly contemplated by the SCAC.
- [124] Given the continued optimism that all the witnesses had for Nature-Control (as evidenced by the November 20, 2006 meeting agenda that states, among other things, that registering the patents had become a priority), it is reasonable to infer that Mr. Chow would agree to Nature-Control paying the \$60,000 to register the patents for Compounds A and B but only if Dr. Li remained committed to that business. Otherwise, Mr. Chow could have funded the registration of the patents only to have Dr. Li then exercise his right to terminate the Letter of Intent. The most likely explanation is that before Mr. Chow expended the \$60,000 to register the patents, he wanted to secure Dr. Li's continued commitment, and that he did so by asking Mr. Zahir to create a consulting agreement for Dr. Li to sign that would have that effect. This explanation is consistent with the fact that Dr. Li never asserted any right to payment of the \$60,000 in consulting fees expressly provided for in the SCAC.

- [125] While this does, in my view, constitute the most likely explanation for the existence of the SCAC, it does not explain why Mr. Chow would falsely claim that the SCAC was forged by Dr. Li. The SCAC is not, in my view, damaging to Nature-Control's position on the central issues in the case. I find that the only reasonable explanation is that he did so in order to cast doubt on Dr. Li's credibility.

Use of Nature Control's Laboratory

- [126] As already indicated, the research capacity of Nature-Control's laboratory and the work actually performed in it by Dr. Li is in dispute.
- [127] Mr. Chow claimed that Nature-Control's laboratory was used by Dr. Li for testing products and also for new research and development. Nature-Control asserts that the bleaching products were developed in Nature-Control's laboratory and, in accordance with clause 11 of the Letter of Intent, are the property of Nature-Control.
- [128] Dr. Li testified that Nature-Control's laboratory was never intended to be used to conduct research and development and that it was not used for that purpose. He testified that it would cost as much as \$2 million to \$3 million to properly equip a laboratory to conduct chemical research and development. He said that sophisticated equipment such as spectrometers and chromatographs were required to create prototype chemicals and Nature-Control had none of that equipment. Dr. Li testified that all the research and development that resulted in the creation of the bleaching products was performed by him in MaShan's laboratory.
- [129] Mr. Gough and Mr. Zahir corroborated Dr. Li's evidence about the simple nature of Nature-Control's laboratory. Mr. Gough said there was a scale, a brightness meter, dishes, glassware and burners. Mr. Zahir testified that there was no ventilation and the only equipment consisted of an electrical coil burner, beakers and mixing utensils.
- [130] Dr. Li testified that not only could he not conduct research in Nature-Control's lab, he could not even test the bleaching products in that lab because to do so he required detectors, masks and proper ventilation and Nature-Control had none of that equipment. He said Nature-Control's lab was used only to test the brightness of pulp samples with a brightness meter, to dry pulp samples, and to test Compounds A and B.
- [131] Dr. Li testified that the bleach testing on pulp samples was performed in MaShan's laboratory and, on one occasion, at a local independent laboratory called Econotech. He said he only ever received two large samples of pulp on which he performed all bleach testing. One sample, received from Howe Sound, was the sample he said took to China with him and left at MaShan's laboratory. He said that from time to time he would instruct an analyst working in MaShan's laboratory to test that sample under a variety of conditions stipulated by him. The results would be phoned in to him and he would relay them to Mr. Gough and/or Mr. Zahir.

- [132] Dr. Li testified that the second pulp sample he received came from Powell River in the fall of 2005. He said that sample was tested by Econotech because the mill wanted the results quickly and there was not enough time to send the sample to China. However, Mr. Gough testified that the testing was done at Econotech because the mill wanted it to be independent.
- [133] Mr. Zahir acknowledged that Nature-Control's laboratory was inadequate for conducting new chemical research and development but he maintained that it was adequate for, and was used for, testing the bleaching products on pulp samples. Both Mr. Gough and Mr. Zahir acknowledged that while they saw Dr. Li working in Nature-Control's lab, they did not know specifically what he was doing in there. However, they said that he spoke to them about testing the bleaching products in Nature-Control lab's and relayed the results to them which they, in turn, relayed to the mills.
- [134] It appears from correspondence with several of the pulp mills that bleach testing on pulp samples was being performed somewhere. Some of this correspondence made reference to bleaching trials being conducted on pulp samples "in the Nature-Control lab in Richmond". However, given the misleading marketing strategy being employed, the fact that the mills were being told that bleaching trials were being conducted on pulp samples in Nature-Control's lab does not mean that this was actually occurring.
- [135] Some of the correspondence to the mills enclosed bleach testing results showing the brightness of a pulp sample prior to and after treatment with the bleaching products. Some of those results appear to be representative as they pertain to the testing of what is referred to as a "standard pulp from a mill in BC". However, other results state that they apply to specific pulp samples from specific pulp mills such as Slave Lake, Alberta News and Millar Western. On their face, these contradict Dr. Li's evidence that he only ever obtained samples from Howe Sound and Powell River.
- [136] Dr. Li insisted that he did not actually test any pulp samples from Slave Lake, Alberta News Corp. or Millar Western. He explained that he would have Mr. Gough obtain the details of the bleaching conditions in the various pulp mills and Dr. Li would then instruct an analyst at MaShan to test a portion of the Howe Sound sample under those specific conditions. These results would be relayed to potential clients as if they were the results of actually testing their samples.
- [137] Counsel for Dr. Li emphasized that the results for Slave Lake and Alberta News indicate that the original brightness of the samples tested was, in both cases, 56 to 57 brightness points, which matched the Howe Sound sample. He submitted this corroborates Dr. Li's testimony that the same Howe Sound sample was used to conduct these tests. However, the Millar Western results indicate that the original brightness of the Millar Western sample was 61 to 62 brightness points. The Millar Western testing appears to have occurred in the summer of 2005, around the same time that the Alberta News and Slave Lake testing occurred. In the circumstances, I do not accept Dr. Li's evidence that the same Howe Sound sample was used

to conduct all of these tests.

- [138] Further, a January 22, 2006 email from Dr. Li to Mr. Gough indicates that Dr. Li and Mr. Gough were planning to attend at Econotech the following day. The Econotech invoice indicates that the samples to which it pertains were received on January 23, 2006 - the day after Dr. Li's email. The email reads, in part "I had done the test of FWA reducing on Saturday". From this I infer that Dr. Li was himself performing bleach tests the weekend before taking the Powell River sample to Econotech. It is clear from Dr. Li's passports that he was not in China at that time.
- [139] For the forgoing reasons, I do not believe Dr. Li when he says he was not doing bleach testing in Nature-Control's lab. Having said all of that, I do accept that Nature-Control's lab was inadequate for the purpose of conducting chemical research and development. Dr. Li's evidence in this regard was corroborated by Mr. Zahir, who worked in the chemical business for over seven years. As such, I find that the bleaching products were not developed in Nature-Control's lab, although they were applied to pulp samples in Nature-Control's lab for the purpose of demonstrating their effectiveness to potential customers.

Activities in 2006

- [140] In 2006, SouthMountain began importing Compounds A and B which it resold to Nature-Control. It also started to import the various bleaching products.
- [141] In February or March of 2006, Mr. Zahir, Mr. Chow, Mr. Gough and Dr. Li went to QRP's mill to perform a trial of Compounds A or B. The trial was not entirely successful because problems were encountered in the mixing of the product. Nevertheless, QRP remained interested and over the next two years, four or five additional trials of Compounds A and B were performed there.
- [142] In June or July of 2006, a trial of Optibright was conducted at Howe Sound Pulp. Some of the test product was left out in the sun when the trial was terminated, and then stored in the basement at the mill. It later exploded causing fumes to travel throughout the mill and resulting in the hospitalization of some mill staff. Howe Sound blamed Mr. Gough and banned him from the mill, but remained interested in the bleaching products and scheduled additional trials. SouthMountain was required to retain a firm called Obrovac to conduct those trials because Mr. Gough had been banned. SouthMountain paid Obrovac's fees.

Activities in 2007 and 2008

- [143] Mr. Gough continued to be successful in getting mills to conduct trials of Compounds A and B. He also succeeded in interesting several mills in the bleaching products. SouthMountain was importing the bleaching products in significant quantities.

Storage of Product

- [144] Between 2006 and 2008, product imported by SouthMountain including both Compounds A and B and bleaching products, was stored at a warehouse on River Road in Delta that was owned by Mr. Chow. Dr. Li said that Mr. Chow offered to let Dr. Li store the bleaching products there, without charge. Dr. Li said that he did not have a key to the warehouse so Mr. Chow had to be present whenever product arrived or was being removed for a mill trial.
- [145] In 2008, Nature-Control moved to new premises on Viking Way in Richmond, which included warehouse space. The chemicals that had been stored at Mr. Chow's River Road warehouse were moved to the Viking Way warehouse. Dr. Li testified that Mr. Chow again agreed that Dr. Li could store the bleaching products at the Viking Way warehouse, without charge, because they were good friends and because Mr. Chow recognized that the two businesses were complimentary.
- [146] Dr. Li testified that the only product being imported by SouthMountain which was not stored at the Viking Way warehouse was NewsBright M. This product is dangerous and so SouthMountain arranged for a commercial shipper, Kimberly Transport, to store it and transport it directly to the customer's site. All of Kimberly Transport's invoices were paid by SouthMountain.
- [147] Dr. Li also testified that Mr. Chow agreed he could have a heater installed in the Viking Way warehouse because the Optiqol had to be mixed with warm water. He said Mr. Chow located an electrician to do the installation, who was paid by SouthMountain.
- [148] Mr. Chow testified that he did not agree that Dr. Li or SouthMountain could store chemicals in either his River Road warehouse or Nature-Control's warehouse on Viking Way. Not only did Mr. Chow deny any such agreement, he also denied having seen significant quantities of the bleaching products at either location.
- [149] Mr. Gough and Mr. Zahir confirmed that bleaching products were stored at both the River Road property and the Viking Way warehouse although their recollections with respect to the quantity of the products stored were unclear. Mr. Gough acknowledged that he was never told to hide from Mr. Chow the fact that these products were being stored at the River Road property and subsequently at the Viking Way warehouse.

Intellectual Property

- [150] There are four patents in issue and one patent application that remains pending:
- (a) The patent for the FAS soil remediation application (the "FAS Patent") was issued on May 5, 2009. The application for it was filed on September 7, 2006.
 - (b) Two patents for the waste water treatment technology (the "Compounds A and B Patents") were issued on June 22, 2010. The applications for them were filed on April 17, 2007.

- (c) A patent for T-Bright (the "T-Bright Patent") was issued on May 3, 2011. The application for it was filed on January 25, 2007.
- (d) An application for a patent for NewsBright M (the "NewsBright M Patent Application") was filed on June 20, 2011 and, at the time of the trial, it remained pending.
- [151] All the patents identify Dr. Li as owner. The NewsBright M Patent Application was submitted in his name as well.
- [152] Mr. Zahir testified that he did some background work for each of the patent applications. He said the application for the FAS Patent was originally submitted in Nature-Control's name but he was later advised that the registration costs could be reduced if the application was submitted in Dr. Li's name, as he was also named as the inventor. Mr. Zahir testified that the application was then changed, on Dr. Li's instructions, and resubmitted in Dr. Li's name. He said the applications for the subsequent patents were then submitted the same way, that is in Dr. Li's name.
- [153] As already noted, Nature-Control paid SouthMountain \$20,000 and \$60,000 for the costs associated with registering the FAS Patent and the Compounds A and B Patents, respectively.
- [154] Mr. Chow testified that he knew the applications were being filed for the FAS Patent and the Compounds A and B Patents. He said he eventually found out that these patents had been registered in Dr. Li's name. He said he asked Dr. Li about that and Dr. Li promised to change the registrations to Nature-Control's name.
- [155] Dr. Li said it was always intended that Nature-Control would acquire a right to use the patents for Compounds A and B pursuant to the Letter of Intent, but that he would retain beneficial ownership of them. He said this was made clear in the original discussions with Mr. Chow and Kobe Lai and he submits the Letter of Intent supports that conclusion. His position is that Nature-Control had an indefinite right to use the FAS Patent, but that he should retain beneficial ownership of it because he always maintained ownership of technology that he invented. He said there was never any agreement that Nature-Control would have any rights to any bleaching product patents.
- [156] Mr. Zahir coined several names which were registered as trademarks. In November 2007, he applied to register "Nature Control Chemical", "NewsBright", "T- Bright" and "FibreReclaim", and trademarks for each of those names were registered in December 2008. The trademarks for Nature Control Chemical, NewsBright and T- Bright were registered in SouthMountain's name, while that for FibreReclaim was registered in Nature-Control's name. In September 2009, Mr. Zahir applied to register "South Mountain Chemical". A trademark for South Mountain Chemical was registered in South Mountain's name in November 2010.

[157] There is no dispute that "NewsBright" and "T- Bright" were used to market bleaching products and "FibreReclaim" was used to market Compounds A and B.

[158] As already indicated, Dr. Li, Mr. Gough and Mr. Zahir all testified that they used the names "Nature Control Chemical" and then "South Mountain Chemical" for marketing the bleaching products.

Catalyst

[159] Catalyst appeared to be interested in the bleaching products and Mr. Gough used that opportunity to promote Compounds A and B as well. For example, a letter he wrote to Catalyst in late September 2008 deals primarily with the bleaching products offered by "South Mountain Chemical" but also states "our sister company, Nature-Control Technologies, serves the waste water treatment market".

[160] Catalyst representatives were going to China to visit another supplier and wanted to also visit MaShan and tour its manufacturing facilities. Dr. Li planned to travel to China so that he could be at MaShan at the same time.

[161] A meeting with the Catalyst representatives, at Nature-Control's offices, was scheduled for October 10, 2008 to provide them with information for their upcoming trip to China. Dr. Li testified that prior to the meeting, he, Mr. Chow, Mr. Zahir and Mr. Gough all met to prepare materials for presentation to Catalyst at the October 10 meeting. Dr. Li testified that Catalyst's focus at the time was on the bleaching products but he thought they could use this opportunity to also promote the waste water treatment technology to Catalyst. He said he and Mr. Chow discussed this prospect and the plan was for both Mr. Chow and Dr. Li to attend the October 10 meeting.

[162] Dr. Li said that two PowerPoint presentations were prepared for the October 10 meeting: one referred to "Nature Control" and explained the waste water treatment technology, while the other referred to "SouthMountain Chemical" and discussed the bleaching products.

[163] Dr. Li testified that, at Catalyst's request, the October 10 meeting had to be rescheduled and Mr. Chow was not available to attend the rescheduled date. As a result, only Dr. Li, Mr. Zahir and Mr. Gough attended the meeting. Dr. Li. said both PowerPoint presentations were shown to the Catalyst representatives at the meeting.

[164] Dr. Li also testified that he, Mr. Zahir, Mr. Gough and Mr. Chow worked on the preparation of an information handout which they intended Dr. Li to provide to the Catalyst representatives while at MaShan. That document refers to the bleaching products division as "Southmountain Chemical".

[165] Mr. Chow acknowledged that he was involved in the preparations for the Catalyst meeting but he denied seeing two different versions of the PowerPoint presentation. He said he did not look at the final version of the meeting materials because he expected to watch the presentation at the meeting. He said that prior to the October 10 meeting he received a call

from Mr. Zahir who told him that Dr. Li said it was not necessary for him to attend the meeting. He was confident that Dr. Li, Mr. Zahir and Mr. Gough could handle it and so he did not attend. He said he does not recall that the original meeting date was rescheduled. He also did not recall whether he saw the document Dr. Li planned to hand out while at MaShan.

- [166] Mr. Zahir testified that the only PowerPoint presentation shown at the October 10 meeting was the one for the bleaching products and that Mr. Chow did not attend because Dr. Li said it was not necessary for him to be there.
- [167] Mr. Gough corroborated Dr. Li's evidence about the original meeting date being rescheduled. He did not recall which PowerPoint presentation or presentations were shown to Catalyst at the October 10 meeting. He testified that it was not uncommon for him to use two separate PowerPoint presentations, one for bleaching formulations and one for Compounds A and B.
- [168] After the October 10 meeting, Dr. Li traveled to China so that he could accompany the Catalyst representatives to MaShan. A video of the visit to MaShan shows the various Catalyst and MaShan representatives sitting around a boardroom table with Dr. Li serving as translator. The dialogue on the video is somewhat difficult to understand, in part because of Dr. Li's accent, but it is apparent that the focus of the meeting is to provide the Catalyst representatives with information about MaShan's capacity, facilities and operations. It is also apparent that Catalyst was primarily interested in the bleaching products but the prospect of expanding the relationship to include other products was discussed. During the meeting, a presentation is shown on a large screen. Most of it is in Chinese, but one slide is a diagram of what appears to be MaShan's organizational structure that includes a reference to both South Mountain and Nature-Control. At one point, a Catalyst representative refers to buying a bleaching product from "South Mountain Chemical".
- [169] When Dr. Li returned from this China trip he showed the video to Mr. Chow. Mr. Chow acknowledged that he watched it. He also acknowledged that he noticed the references to "South Mountain" on the video but he said he was not concerned because SouthMountain was the importer of the chemicals for Nature-Control. Mr. Chow testified that he, Dr. Li, Mr. Zahir and Mr. Gough were all excited about the prospect of securing significant business with Catalyst. They all went out to lunch to celebrate.
- [170] Dr. Li agreed that they were excited and that they all went out for lunch. However, he said that the excitement stemmed from the prospect of Catalyst purchasing bleaching products from SouthMountain. Dr. Li said that Mr. Chow was hopeful that after SouthMountain had proved itself, Catalyst would then place orders for Compounds A and B with Nature-Control.
- [171] In December 2008, Catalyst started ordering large quantities of bleaching products from SouthMountain.

Mr. Chow Claims to Learn of SouthMountain's Sales

- [172] Mr. Chow testified that he first learned, in 2009, that SouthMountain was selling bleaching products to Catalyst on its own account. He said he learned this from Mr. Zahir.
- [173] Mr. Zahir testified that in approximately August 2009, in the course of a discussion with an accountant about Nature-Control's financial statements, the accountant mentioned that Nature-Control had experienced yet another year without significant revenues. Mr. Zahir said he was surprised by this because he knew Catalyst had been purchasing significant amounts of bleaching products. He testified he was concerned and so he told Mr. Chow about this.
- [174] Mr. Chow did not confront Dr. Li about this for approximately two years. He testified that he did not do so because he needed to first collect evidence. Mr. Chow told Mr. Zahir and Mr. Gough that Dr. Li was misappropriating Nature-Control's business and asked them to keep back up documents and files.
- [175] In his direct examination, Mr. Zahir testified that when he told Mr. Chow what he had learned from the accountant, Mr. Chow said that if the bleaching business was being taken by Dr. Li they would need to collect evidence to prove it and that Mr. Zahir should keep his eyes and ears open. However, in cross-examination, when pressed to explain what he was keeping his eyes and ears open for, he said "just for routine business". He said that Mr. Chow did not ask him to look for anything in particular and that he was not actively collecting evidence. He said he just carried on business as he had in the past, conducting the bleaching product business in SouthMountain's name, and the evidence of SouthMountain doing so materialized in his computer like it always had.
- [176] Mr. Gough testified that Mr. Chow did not ask him to collect evidence. He pointed out that Mr. Zahir ran the computers and Nature-Control was Mr. Chow's company, so he already had access to all the information. He said Mr. Chow simply told him to keep the business running and not to disrupt the customers.
- [177] Mr. Chow never confronted Dr. Li directly. Rather, he commenced the action on July 5, 2011 and Dr. Li found out when he was served with the Notice of Civil Claim shortly thereafter.
- [178] Dr. Li testified that on many occasions between 2009 and 2011, he had discussions with Mr. Chow and told him that SouthMountain was doing well and making sales to Catalyst. He said Mr. Chow appeared to be happy for Dr. Li.
- [179] Mr. Chow's evidence about his optimism for Compounds A and B during this period of time was inconsistent. At one point during cross-examination, he agreed that he remained optimistic about Compounds A and B throughout this period. However, he later claimed that from 2005 or 2006 he thought the bleaching products were the only hope, but that is inconsistent with his decision to pay \$60,000 to register the Compounds A and B patents in late 2006. Still later he agreed that, in fact, he continued to have hope for Compounds A and B, but had come to the conclusion that it was not going to be as easy to develop the business

as he had originally thought.

- [180] In the years up to and including 2008, Mr. Chow invested almost \$350,000 in Nature-Control in the form of shareholder loans. He invested another \$78,000 in 2009, a further \$82,000 in 2010, and another \$114,000 in 2011. In other words, he invested at least another \$200,000 after, on his evidence, he learned that SouthMountain was selling the bleaching products on its own account.
- [181] In the period through to 2013, SouthMountain's sales to Catalyst totalled \$3,882,268; the cost of sales was \$2,764,784, and the profit to SouthMountain was \$1,117,484.00.
- [182] I do not believe that Mr. Chow and Mr. Zahir discovered, for the first time in 2009, that SouthMountain was selling the bleaching products on its own account. Mr. Zahir's professed "surprise" on learning that revenues from the sale of bleaching products were not being reported on Nature-Control's financial statements is not plausible. He had been instructed by Dr. Li from as far back as 2005 to ensure that all sales of bleaching products be accounted for in SouthMountain's name. He had been charging expenses related to the bleaching products to SouthMountain for years. He had a commission agreement with SouthMountain for the sale of the bleaching products and had received payments from SouthMountain pursuant to that agreement. He knew that all payments for bleaching products had been received by SouthMountain and in SouthMountain's name. He is an experienced business person and has an MBA. He must have some knowledge of corporate accounting. In the circumstances, I do not accept that he was surprised to learn that the revenues from the sale of bleaching products were not being reported as revenues on Nature-Control's financial statements.
- [183] For reasons explained in the discussion section of this judgment, I find that Mr. Chow knew SouthMountain had been attempting to sell the bleaching products from the outset.
- [184] I also do not believe that Mr. Chow waited two years to commence the lawsuit because he thought he needed to collect evidence. Neither he nor Mr. Zahir was able to explain what evidence they were seeking to secure. Indeed, Mr. Zahir ultimately acknowledged that he did not collect any evidence but rather just carried on business as usual. The evidence, such as the Letter of Intent, the invoices in SouthMountain's name and the marketing materials, could have been collected in a very short period of time. Much of it was in Mr. Zahir's computer.
- [185] I find that Mr. Chow was not collecting evidence for the purpose of establishing Dr. Li's liability. Rather, he was waiting for South-Mountain to sell more of the bleaching products and thereby expand the profits that Nature-Control could then seek to have disgorged, while at the same time hedging his bets on Compounds A and B. The SCAC had expired and so it no longer committed Dr. Li to Nature-Control. Had Mr. Chow confronted Dr. Li in early 2009 (or at any other time after the summer of 2005) with the claim that the bleaching product business belonged to Nature-Control, Dr. Li would have almost certainly disagreed and terminated the Letter of Intent immediately given there had been no solid sale of

Compounds A and B.

[186] I find that Mr. Chow remained optimistic that once Catalyst had acquired confidence in SouthMountain, it would commence placing significant orders of Compounds A and B. That is why he continued to invest money in Nature-Control. However, I also find that when he realized SouthMountain had secured a solid sale with Catalyst he formulated a backup plan to recoup some of his investment in the event it turned out that his optimism was misplaced. In other words, he waited to see how things played out and it was only when another year or more passed without Nature-Control achieving a solid sale of Compounds A and B that he put his backup plan into action by commencing the action.

Events Subsequent to the Commencement of the Lawsuit

[187] When Dr. Li was served with the Notice of Civil Claim in July 2011, he approached Mr. Gough and then Mr. Zahir and asked them for advice. He testified that it soon became apparent to him that they were supportive of Nature-Control's position.

[188] In August or September, 2011, Dr. Li learned from Catalyst that Mr. Zahir had advised Catalyst to start sending future purchase orders to his Nature-Control email account. He had previously used a SouthMountain email account to conduct SouthMountain's business. As a result, Dr. Li caused SouthMountain to terminate Mr. Zahir's consulting services.

[189] Mr. Zahir testified that in July or August 2011, after Dr. Li had been served with the Notice of Civil Claim, Dr. Li and Ms. Jiang came into Nature-Control's office and presented him with an agreement they wanted him to sign. He said they looked nervous. The agreement provided that Mr. Zahir would use only his personal time and assets to carry out his services for SouthMountain. Mr. Zahir said he refused to sign the agreement because he did his work for SouthMountain at Nature Control's office during regular business hours. Mr. Zahir expressed considerable indignation at having been asked to sign this agreement and said he rebuffed Dr. Li's repeated attempts to get him to change his mind. A copy of the unsigned agreement was produced in the litigation by Nature-Control. Mr. Zahir was not asked in either direct or cross-examination to explain how the copy came to remain in his possession.

[190] Dr. Li denied any role in the creation of this agreement and specifically denied asking Mr. Zahir to sign it.

[191] Mr. Zahir also testified that around the same time, Dr. Li also asked Mr. Zahir to create an invoice for Nature-Control to charge SouthMountain for the warehouse space that was being used to store the bleaching products. He said he intended to create the invoice but Dr. Li then stopped coming into the office and so the invoice was never created. Dr. Li denied asking Mr. Zahir to create such an invoice.

- [192] Counsel for Nature-Control submitted that Dr. Li was lying when he denied asking Mr. Zahir to sign the agreement and create the invoice, because he belatedly realized that this conduct was inconsistent with his evidence that Mr. Chow agreed that he could use Nature-Control's staff, premises and other assets to assist SouthMountain to sell the bleaching products.
- [193] It is very difficult to determine whose evidence to prefer on this point. On the one hand, it is unlikely that Dr. Li would have left a copy of the agreement with Mr. Zahir in the circumstances, particularly if he was nervous about approaching Mr. Zahir and if Mr. Zahir rebuffed him in the manner in which Mr. Zahir claimed to have done. Further, I can discern no material benefit to Dr. Li in lying about these events at trial because, in my view, neither the agreement nor the request for an invoice for storage fees is inconsistent with Dr. Li's evidence that Mr. Chow previously agreed that Nature-Control's staff, premises and other assets could be used to assist SouthMountain. There was no evidence that Dr. Li sought to backdate the agreement or the storage invoice. In fact, the unsigned agreement states that it will take effect "on the day of the signing of this document" and there is a blank space for the date to be written in. It is plausible that once Dr. Li was served with the Notice of Civil Claim, he was put on notice that Mr. Chow was no longer agreeing to SouthMountain's use of Nature-Control's assets and so he took steps to secure alternate arrangements that would permit SouthMountain to continue with its business uninterrupted.
- [194] Equally, however, because I do not think these events assist in determining whether Mr. Chow previously agreed to SouthMountain's use of Nature-Control's assets, I can discern no material benefit to Nature-Control flowing from Mr. Zahir fabricating his evidence on this point.
- [195] I have concluded that it is not necessary to make a specific finding on this point because I have concluded that these events do not assist in resolving the central factual issues. While they go to credibility, there are already enough problematic aspects of the evidence of all of the witnesses to cause me to conclude that I must approach all the testimony with caution.

General Legal Principles

Nature-Control's Claim Against Dr. Li

- [196] A director of a company owes fiduciary duties to the company which require him or her to act honestly, loyally and in good faith, with a view to the best interests of the company, and to avoid conflicts of interest. As such, subject to a fundamental qualification, a director may not profit through his position by entering into contracts with the company, using corporate assets for non-corporate purposes, or obtaining for himself or herself any property or business advantage belonging to the company.

- [197] The fundamental qualification is that a fiduciary may act in his or her own self-interest provided he or she first fully discloses all material facts and obtains the beneficiary's consent: *Sharbern Holding Inc. v. Vancouver Airport Centre Ltd.*, 2011 SCC 23 at para. 150; *Canadian Aero Service Ltd. v. O'Malley*, [1974] S.C.R. 592 at 606 [Canaero].
- [198] A director's gain through a conflict of interest will be permitted only where the director fully discloses the conflict, abstains from involvement in any permissible mechanism whereby the corporation allows him to take advantage of the conflict (as, for example, abstaining from a vote in that regard), and ensures appropriate corporate approval. However, this does not mean that a director may only take up a corporate opportunity or realize a gain through a conflict of interest where there has been a formal shareholders' resolution or a formal meeting of directors: *Canadian Metals Exploration Ltd. v. Wiese*, 2007 BCCA 318, para. 29. The failure to observe such formalities is not determinative.
- [199] Thus, in a small closely held corporation, it is sufficient if the evidence supports the conclusion that the majority shareholder gave informed consent.

Nature-Control's Claims Against SouthMountain and Ms. Jiang

- [200] Nature-Control bases its claims against SouthMountain and Ms. Jiang on the footing that a party who knowingly assists in another's breach of fiduciary duty or knowingly receives fiduciary property is also liable for the breach.
- [201] To succeed in a claim against a third party on the basis of knowing assistance, Nature-Control must establish: (1) it is the beneficiary of a fiduciary relationship; (2) the fiduciary has breached his or her duty; (3) the third party has actual knowledge of the breach; and (4) the third-party assists the fiduciary in carrying out the breach: *Air Canada v. M & L Travel Ltd.*, [1993] 3 S.C.R. 787; *Citadel General Assurance Co. v. Lloyds Bank Canada*, [1997] 3 S.C.R. 805 [Citadel]; *Gold v. Rosenberg*, [1997] 3 S.C.R. 767.
- [202] The same jurisprudence establishes that to succeed in a claim against a third party on the basis of knowing receipt, Nature-Control must establish: (1) it is the beneficiary of the fiduciary relationship; (2) the third-party received property from the fiduciary in his or her personal capacity; and (3) the third-party has actual or constructive knowledge that the property was transferred in breach of fiduciary duty.
- [203] Thus, while actual knowledge (including recklessness or willful blindness) is required to establish "knowing assistance", a lower threshold of knowledge is sufficient to establish "knowing receipt". For "knowing receipt", it is sufficient to grant relief if a third-party "having received trust property for his or her own benefit and having knowledge of facts which would put a reasonable person on inquiry, actually fails to inquire as to the possible misapplication of trust property": *Citadel* at para. 49.

Discussion

[204] I turn back now to the specific issues in dispute, which for ease of reference are repeated here:

- a) Did Dr. Li usurp an opportunity belonging to Nature-Control by engaging in the bleaching product business through SouthMountain?
- b) Did Dr. Li use Nature-Control's employee, commissioned salesperson, premises and/or other assets, to the benefit of SouthMountain, without the knowledge and consent of Mr. Chow?
- c) Does Nature-Control beneficially own intellectual property registered in SouthMountain's name?
- d) Did Dr. Li and/or SouthMountain wrongfully profit from transactions between SouthMountain and Nature-Control?
- e) Did SouthMountain and Ms. Jiang knowingly assist in Dr. Li's breach of fiduciary duties or knowingly receive the fruits of those breaches?
- f) If the answer to any of the above is in the affirmative, what is the appropriate remedy?

Did Dr. Li usurp an opportunity belonging to Nature-Control by engaging in the bleaching product business through SouthMountain?

[205] Nature-Control relies on Canaero as authority for the well-known proposition that directors cannot take for themselves, business opportunities which belong to the company, citing in particular the following passage at pp. 606-607:

the fiduciary relationship goes at least this far: a director is precluded from obtaining for himself, either secretly or without the approval of the company (which would have to be properly manifested upon full disclosure of the facts), any property or business advantage either belonging to the company or for which it has been negotiating; and especially is this so where the director is a participant in the negotiations on behalf of the company.

An examination of the case law in this Court and in the Courts of other like jurisdictions on the fiduciary duties of directors shows the pervasiveness of a strict ethic in this area of the law. In my opinion, this ethic disqualifies a director from usurping for himself or diverting to another person or company with whom or with which he is associated a maturing business opportunity which the company is actively pursuing .

[206] The determination of whether a director has taken an opportunity belonging to the company is a particularly fact-intensive exercise. As stated by Mark Ellis in *Fiduciary Duties in Canada* (Toronto, Ont: Carswell, A Division of Thomson Reuters Canada Limited, 2004) at p. 15-25 "the complexity of factual analysis [in corporate opportunity cases] contrasts with the simplicity of the statement that a corporate director may not usurp a corporate opportunity."

[207] In this case, the particular difficulty is in determining whether the bleaching product business "belonged to" Nature-Control. Unfortunately, few if any submissions were made by counsel for Nature-Control on this question.

[208] In *Fiduciary Law* (Toronto, Thomson Carswell, 2005) at p. 435, the author refers to an American case, *Miller v. Miller*, 222 N.W. 2d 71 (Minn.S.C., 1974) [Miller], as outlining "three primary formulations" for determining whether an opportunity "belongs to" the company, as follows:

it appears that courts have opened or closed the business opportunity door to corporate managers upon the facts and circumstances of each and by application of one or more of three variant but often overlapping tests or standards: (1) The "interest or expectancy" test, which precludes acquisition by corporate officers of the property of a business opportunity in which the corporation has a "beachhead" in the sense of a legal or equitable interest or expectancy growing out of a pre-existing right or relationship; (2) the "line of business" test, which characterizes an opportunity as corporate whenever a managing officer becomes involved in an activity intimately or closely associated with the existing or prospective activities of the corporation; and (3) the "fairness" test, which determines the existence of a corporate opportunity by applying ethical standards of what is fair and equitable under the circumstances.

[209] Miller identified the most significant facts and circumstances relevant to the question, as follows:

Whether the business opportunity presented is one in which the complaining corporation has an interest or an expectancy growing out of an existing contractual right; the relationship of the opportunity to the corporation's business purposes and current activities-whether essential, necessary, or merely desirable to its reasonable needs and aspirations-; whether, within or without its corporate powers, the opportunity embraces areas adaptable to its business and into which the corporation might easily, naturally, or logically expand; the competitive nature of the opportunity-whether prospectively harmful or unfair-; whether the corporation, by reason of insolvency or lack of resources, has the financial ability to acquire the opportunity; and whether the opportunity includes activities as to which the corporation has fundamental knowledge, practical experience, facilities, equipment, personnel, and the ability to pursue. The fact that the opportunity is not within the scope of the corporation's powers, while a factor to be considered, should not be determinative, especially where the corporate fiduciary dominates the board of directors or is the majority shareholder.

[210] In my view, in determining whether the sale of bleaching products was an opportunity belonging to Nature-Control, the approach reflected in Miller has much to commend it. I note that in *Canaero*, at p. 612, Laskin J. cited with approval the approach taken in another American decision, *Burg v. Horn* (1967), 380 F. 2d 897, which reflected the "line of business" test referred to in Miller. (See also *Mountain-West Resources Ltd. v. Fitzgerald*, 2005 BCCA 48 at para. 17.)

- [211] Applying this approach, I will first consider whether Nature-Control had an interest in or expectancy to the bleaching product business arising out of an existing contractual right. In other words, did Nature-Control have the right to market the bleaching products either pursuant to the Letter of Intent or a subsequent agreement?
- [212] As already explained, Dr. Li's and Mr. Chow's testimony as to the agreed scope of Nature-Control's business directly conflicted. Mr. Chow said that it was agreed from the beginning that Nature-Control would sell all chemicals. Alternatively, Nature-Control submitted that the bleaching products were developed in Nature-Control's laboratory and at its cost and as such fell within clause 11 of the Letter of Intent. For ease of reference, clause 11 reads as follows:
- Any new research and development finding through the Company laboratory are to be the property of the company's and will be at the cost of the company to has it patent or manage.
- [213] On the other hand, Dr. Li said that Nature-Control's business was originally restricted to the marketing of Compounds A and B. While he acknowledged that it was subsequently expanded to include the potential for selling recycled pulp in China and marketing the FAS soil remediation application, he maintained that it never included the sale of the bleaching products.
- [214] In my view, the Letter of Intent and the evidence of subsequent conduct, including all the documents expressly referring to SouthMountain conducting the bleaching product business that were openly generated over the years, support Dr. Li's version.
- [215] The evidence establishes that the bleaching products were specialty products. Dr. Li testified that they were unique formulations and although I have concerns about his credibility, Nature-Control could have called evidence from a chemist or other expert to contradict Dr. Li's evidence on this point and did not do so. Although Mr. Gough denied that the bleaching products were unique formulations developed by Dr. Li, he clearly marketed them as such. Further, one of them has now been patented and a patent application has been submitted for another.
- [216] For the reasons already discussed, I have found that the bleaching products were developed at MaShan by Dr. Li. They were not developed at Nature-Control's lab or at its cost. As such, Nature-Control did not acquire any rights with respect to the bleaching products pursuant to clause 11 of the Letter of Intent.
- [217] As already noted, Dr. Li and Mr. Chow both claimed that the Letter of Intent did not accurately reflect their agreement. However, their testimony contradicts the express words of the Letter of Intent. For example, Mr. Chow's evidence that the Letter of Intent described Nature-Control's business inaccurately directly contradicts clause 2. Dr. Li's evidence that he did not agree to a right of first refusal directly contradicts clause 10.

- [218] Mr. Chow acknowledges that the document originated with his notes, which he translated into English, and that his daughter typed at least the final version. In the circumstances, it is not open to him to now say it should not be viewed as expressing his intentions.
- [219] Dr. Li claims he could not read the Letter of Intent and simply trusted that it reflected the verbal agreement. He is highly educated and an experienced businessperson. He was not forced to sign it. He was not prevented from ensuring he understood it before he signed it. He did not know Mr. Chow well at the time. A person exercising ordinary prudence would have taken steps to ensure that they understood it before signing it. In the circumstances, it is not open to him to now say it should not be viewed as expressing his intentions.
- [220] While the Letter of Intent is somewhat cumbersome to read due to the grammatical errors in it, it is not, in my view ambiguous. In clause 2, it plainly expresses Nature-Control's business as "[e]nvironmentally friendly chemical products for water treatment and reclamation of tiny and short fibre from paper mill production sludge waste water". The fact that it provided Nature-Control with a right of first refusal in respect of Dr. Li's other technologies supports the conclusion that, unless and until the right of first refusal was triggered, the scope of the business was limited to waste water treatment products and Dr. Li was free to exploit his other technologies on his own account. The bleaching products are not waste water treatment products. They are not used for water treatment or the reclamation of fibre from waste water.
- [221] Under the terms of the Letter of Intent, Nature-Control obtained certain rights to sell Compounds A and B. It did not oblige Dr. Li to give Nature-Control any rights to the bleaching products or any of his other technologies, unless and until the right of first refusal was triggered. That occurred only if Nature-Control achieved a solid sale of waste water treatment products within two years. This construction is consistent with Mr. Chow's evidence that while he, Dr. Li and Kobe Lai discussed Dr. Li's other technologies prior to finalizing the Letter of Intent, he (Mr. Chow) did not "press it" because his focus was on securing rights to Compounds A and B.
- [222] Mr. Zahir testified that when he was hired by Nature-Control, he was simply told Nature-Control sold chemicals. Mr. Gough testified that he understood the plan was to use Compounds A and B to get in the door, and then once Nature-Control had established relationships and developed some credibility in the market place, to sell other chemicals as well. In my view, this evidence is not inconsistent with the conclusion that the original agreement among Mr. Chow, Dr. Li and Kobe Lai, as documented in the Letter of Intent, was that Nature-Control's business be limited to waste water treatment products. Both Dr. Li and Mr. Chow testified that they discussed the prospect of broadening the scope of the business if success was achieved with Compounds A and B. That was ultimately reflected in the right of first refusal which would have been triggered in the event of success with Compounds A and B.

- [223] Counsel for Nature-Control submitted that it would not be reasonable to conclude that Mr. Chow agreed "to contribute \$51,428.57 to a new venture to sell only one product, which he had just been informed of, and had no background in, to be purchased from one company, which he had no familiarity with, and with no way to prevent Li, a stranger, from walking away should the product be successful".
- [224] I disagree. Mr. Chow himself testified that his primary concern at the time the Letter of Intent was negotiated was to secure rights to Compounds A and B because they had been patented. He said he thought he would make a lot of money from the patented technology so he was focused on it. Mr. Chow did have a way to prevent Dr. Li from walking away in the event there was success. The Letter of Intent expressly provided, in clause 10, that if Nature-Control made a solid sale within two years it would not only have the right to use Dr. Li's waste water treatment technology indefinitely but it would also have a right of first refusal with respect to his other technologies. In the circumstances, the reasonable inference is that Mr. Chow considered a two-year opportunity to exploit the patented technology, with the chance of acquiring the rights to the technology indefinitely, to be worth \$50,000.
- [225] For these reasons, I find that, as originally conceived, the scope of Nature-Control's business was restricted to chemical products used to treat and reclaim fibre from waste water generated by pulp mills and, in particular, it did not extend to give Nature-Control any rights to Dr. Li's bleaching product technology. The next question is whether the scope of the business subsequently expanded to include the sale of that technology. For the following reasons, I find that it did not.
- [226] While the evidence clearly supports the conclusion that the scope of Nature-Control's business did expand to include the potential for selling recycled pulp in China and marketing the FAS soil remediation application, there was no evidence of any subsequent agreement by Dr. Li to give Nature-Control any rights in relation to the bleaching product technology. While Mr. Chow gave somewhat vague testimony about the focus of the business shifting to the bleaching products in about 2006, he did not say that he and Dr. Li actually agreed, subsequent to the Letter of Intent, to expand Nature-Control's business to include the bleaching products. Rather, his evidence, which I do not accept, was that Nature-Control had the right to sell all the chemicals from the beginning.
- [227] Further, it would not be reasonable to conclude that Dr. Li would have given up rights to the bleaching product technology without documenting the terms on which he was doing so. As Mr. Chow said, at the time the Letter of Intent was entered into, Dr. Li was concerned to ensure that he could walk away if Nature-Control did not prove itself within two years. It is not plausible that, after taking pains to ensure he could reclaim his rights to Compounds A and B, he would give up his rights to the bleaching products without similar protection.

- [228] The evidence of subsequent conduct, including all the documents expressly referring to SouthMountain conducting the bleaching product business that were openly generated by Mr. Zahir and Mr. Gough over the years, support the conclusion that Dr. Li never agreed to give up to Nature-Control any rights to the bleaching product technology. As already outlined in detail, Dr. Li instructed Mr. Gough and Mr. Zahir to keep SouthMountain's bleaching product business separate from Nature-Control's business and they did so. This is clearly borne out by the documents including correspondence, purchase orders, invoices, expense reports and commission payments which were created openly at Nature-Control's office.
- [229] Mr. Chow claimed that he was not involved in the day to day affairs of the office. Even if that were so, he had the right to attend at the office and to inspect any of the documents kept there. He could have appeared there at any time to do so. On his own evidence, he did attend at the office from time to time, he participated in both internal and external meetings, and he was in contact with Mr. Zahir and Mr. Gough. In these circumstances, it is extremely unlikely that Dr. Li would have instructed Mr. Gough and Mr. Zahir as he did and conducted SouthMountain's business openly at Nature-Control's office, if he had agreed to give Nature-Control the right to that business.
- [230] Nature-Control submitted that there was evidence of Dr. Li attempting to hide SouthMountain's business from Mr. Chow. The evidence Nature-Control points to is a difference in the format of the invoices SouthMountain sent to Nature-Control and those sent to customers such as Catalyst. The invoices sent to Catalyst refer to "Nature Control Chemical" or "South Mountain Chemical" but then identify SouthMountain Trading Inc. as the invoicing party. The invoices to Nature-Control refer only to SouthMountain Trading Inc. without any mention of "Nature Control Chemical" or "South Mountain Chemical". Nature-Control submits that if it had been invoiced with the form of invoice used for SouthMountain's customers, Mr. Chow would have been alerted to the fact that SouthMountain was doing something other than importing chemicals for Nature-Control.
- [231] I disagree that the format of the invoices suggests Dr. Li was attempting to hide SouthMountain's business. The more likely explanation for the difference in the format is that the invoices to customers were drafted to align with the marketing strategy embarked on by Mr. Zahir and Mr. Gough, which used the trade names "Nature Control Chemical" and "South Mountain Chemical" to market the bleaching products. It was entirely unnecessary to employ that marketing strategy with Nature-Control. However, Nature-Control's submission that the form of invoice used by SouthMountain for its customers would have been enough to alert Mr. Chow to what SouthMountain was doing, underscores how unlikely it is that Dr. Li would have been so open about what SouthMountain was doing if in fact he had agreed to give Nature-Control the right to the bleaching product technology.

- [232] Nature-Control also suggested that Dr. Li discouraged Mr. Chow from attending the October 10, 2008 Catalyst meeting in order to conceal from him the fact that the bleaching product business was being presented to Catalyst as SouthMountain's business.
- [233] Again, I disagree with that submission. Mr. Gough corroborated Dr. Li's testimony that the meeting was rescheduled by Catalyst. More importantly, the best the evidence got for Nature-Control on this point, was that Mr. Zahir phoned Mr. Chow and said it was not necessary for him to attend. That obviously did not guarantee that Mr. Chow would stay away. In any event, by October 10, 2008, there was a significant quantity of documentary evidence of SouthMountain conducting the business openly available at Nature-Control's office. If Dr. Li wanted to hide what SouthMountain was doing, he would have had to do far more than discourage Mr. Chow from attending a single meeting.
- [234] For the forgoing reasons, I find that there was no agreement, either at the outset or subsequently, that Nature-Control would have any right to sell the bleaching products.
- [235] The next factor for consideration suggested in Miller is whether the bleaching product business was essential to Nature-Control's current activities, or whether it was merely desirable.
- [236] It almost goes without saying that the bleaching product business was desirable. However, there was no evidence upon which it could be concluded that it was essential to Nature-Control's business. While Nature-Control did not achieve success with Compounds A and B, there was no evidence that the failure of Compounds A and B in Canada was caused by or linked to the fact that Nature-Control did not also market the bleaching products. To the contrary, the marketing strategy that was employed linked the two product lines and still did not lead to success for Nature-Control.
- [237] Further, Dr. Li's evidence was that Wei Li Qing achieved great success in China with a business restricted to the sale of Compounds A and B. While I do have concerns about Dr. Li's credibility generally, Dr. Li's evidence about Wei Li Qing's success was not challenged on cross-examination and Nature-Control did not lead any evidence to the contrary.
- [238] I next turn to consider whether the bleaching product business embraced areas adaptable to Nature-Control's business and into which it might easily, naturally, or logically have expanded. It makes sense, at this stage, to also consider whether the bleaching product business included activities as to which the Nature-Control had knowledge, practical experience, facilities, equipment, personnel, and the ability to pursue.
- [239] The evidence as a whole establishes that the bleaching product business would have been a natural extension of Nature-Control's business and, with one exception, Nature-Control did have the knowledge, experience, facilities, equipment, personnel and ability to pursue it. The one exception, however, is an important one. It did not have the rights to the bleaching product technology and, in the absence of a solid sale of Compounds A and B, Dr. Li was not obliged to offer Nature-Control any rights to any of his other technologies.

- [240] The competitive nature of the opportunity should be considered; that is, whether the conduct of the bleaching product business by SouthMountain was harmful to Nature-Control. It clearly was not. As already explained, the two product lines were used in different aspects of the pulp manufacturing process. They were complimentary and not competitive product lines.
- [241] While there is no basis upon which I could conclude that Nature-Control lacked the financial ability to embark on the bleaching product business, in my view it is relevant to consider whether there were other barriers to its acquisition of the opportunity. As already explained, there was a barrier to its acquisition of the opportunity. It could not force Dr. Li to provide it with the right to market the bleaching products. There is nothing unfair about that. Mr. Chow was free to operate other businesses. The existence of the right of first refusal in the Letter of Intent establishes that Mr. Chow was content for Dr. Li to continue to pursue opportunities with his other technologies unless or until Nature-Control proved itself by making a solid sale of Compounds A and B.
- [242] Having considered all the factors noted above, I conclude that the bleaching product business cannot be characterized as an opportunity belonging to Nature-Control. Even if that were not the case, for the following reasons, I find that Mr. Chow agreed that SouthMountain could take up the opportunity and could use Nature-Control's staff, premises and other assets for that purpose.
- [243] Again, Dr. Li testified that from the time SouthMountain was incorporated he often discussed with Mr. Chow the fact that SouthMountain was pursuing the bleaching product business. He testified that they had discussions about SouthMountain using the services of Mr. Gough and Mr. Zahir as well as Nature-Control's premises and other assets for that purpose. He said Mr. Chow specifically agreed. Mr. Chow evidence was directly opposed. He testified that he did not agree to such an arrangement and would never have agreed to it. He said he did not find out that SouthMountain was engaging in the bleaching product business on its own account until 2009.
- [244] For the reasons already given, it is not possible to simply prefer one version of the testimony over the other on the basis of who is the more credible witness. However, I have concluded that Dr. Li's version is more consistent with the uncontroverted evidence and the documents.
- [245] The following facts are uncontroverted:
- (a) Mr. Chow knew that bleaching products were being marketed by Mr. Gough and Mr. Zahir and that they were doing so using Nature-Control's premises and other assets. He acknowledged attending meetings with potential customers where bleaching products were discussed. He acknowledged, at least during his examination for discovery, that he was aware of the marketing strategy developed by Mr. Zahir and Mr. Gough that included the production of marketing documents that expressly referred to the bleaching products. He knew bleaching products were to be discussed at the October 10, 2008 meeting with Catalyst

representatives and he saw the video of a meeting at MaShan which made express reference to bleaching products.

- (b) Mr. Chow knew that SouthMountain's name was being used in association with the sale of the bleaching products. He admitted in his examination for discovery that he knew this was one aspect of the marketing strategy, although he claimed to be unhappy about it.
- (c) Dr. Li was upfront with Mr. Zahir and Mr. Gough, as well as the potential customers, about the fact that SouthMountain was selling the bleaching products. He told Mr. Gough and Mr. Zahir to keep the two product lines separate when it came to expenses and revenues.
- (d) As already discussed, many documents showing that SouthMountain was selling the bleaching products were created by Mr. Gough and Mr. Zahir and kept openly at Nature-Control's office.
- (e) SouthMountain paid the external costs incurred in relation to the marketing of the bleaching products such as the costs of:
 - (i) obtaining the patent for T-Bright and applying for the patent for NewsBright M;
 - (ii) retaining Econotech to perform bleach testing;
 - (iii) retaining Obrovac to assist with the Howe Sound mill trial after Mr. Gough was banned from the property;
 - (iv) retaining Kimberly Transport to store and transport NewsBright M;
 - (v) installing the water heater in the warehouse so that the Optiqol could be mixed; and
 - (vi) Mr. Zahir's and Mr. Gough's expenses and commissions related to the bleaching products.

[246] Mr. Chow knew that Nature-Control staff, premises and assets were being used to market the bleaching products in SouthMountain's name. The only rational conclusions are that Nature-Control had the right to the business or Mr. Chow agreed that SouthMountain could pursue it. I have already found that Nature-Control did not have the right to the business.

[247] It is not reasonable to conclude that Dr. Li would have openly conducted the business at Nature-Control's office, through SouthMountain and on its own account, without Mr. Chow's agreement because at any time, Mr. Chow could have been alerted to what SouthMountain was doing through a casual comment by Mr. Zahir, Mr. Gough or by coming across a document such as a purchase order, invoice, expense report, cheque or letter.

[248] I find that Mr. Chow remained optimistic about Compounds A and B even beyond 2009. As already discussed, I find that he was content with the bargain he made as reflected in the Letter of Intent. On his own evidence, at that time he thought he was going to make a lot of money marketing Compounds A and B. He was prepared to buy out Kobe Lai in late 2005. The logical inference is that he remained optimistic at that time. In late 2006, he caused Nature-Control to pay SouthMountain \$60,000 to get the patents registered. He must have

still been optimistic. In late 2008, Catalyst indicated interest in expanding their relationship beyond the bleaching products. Mr. Chow continued to invest significant funds in Nature-Control even after 2009 when he claims that he first learned that SouthMountain was selling the bleaching products on its own account. As already discussed, the two product lines did not compete but rather were complimentary.

[249] The costs associated with running Nature-Control's office were being incurred in any event. Any additional costs associated with the bleaching product business were borne by SouthMountain.

[250] For these reasons, it is more consistent with the probabilities affecting the case as a whole that Mr. Chow agreed that Dr. Li could sell the bleaching products through SouthMountain on his own account and that he could use Nature-Control's staff and assets in the course of doing so. He did so because he knew Nature-Control had no rights to the bleaching products and he recognized that by working together to promote each other's businesses, each of Nature-Control and SouthMountain could leverage the commercial relationships ultimately established by the other.

[251] For these reasons, even if the bleaching product business could be characterized as an opportunity belonging to Nature-Control, I find that Dr. Li did not breach the duties that he owed to Nature-Control by diverting that business to SouthMountain because, before doing so, he obtained Mr. Chow's informed consent.

Did Dr. Li use Nature-Control's employee, commissioned salesperson, premises and/or other assets, to the benefit of SouthMountain, without the knowledge and consent of Mr. Chow?

[252] For the reasons already expressed, I find that Mr. Chow agreed that Dr. Li could sell the bleaching products through SouthMountain on his own account and that he could use Nature-Control's staff and assets in the course of doing so. As such, I find that Dr. Li did not breach any duties he owed to Nature-Control by using corporate assets for non-corporate purposes because, before doing so, he obtained Mr. Chow's informed consent.

Does Nature-Control beneficially own intellectual property registered in SouthMountain's name?

[253] Nature-Control's position is that it is the beneficial owner of all the patents. Its submissions on this point were brief, but its position appears to be based on the following:

- (a) pursuant to the Letter of Intent, Dr. Li was obliged to transfer ownership of the Compounds A and B technology to Nature-Control;
- (b) T-Bright was developed in its lab and at its cost and therefore, pursuant to the Letter of Intent, Nature-Control beneficially owns the associated patent; and
- (c) Nature-Control paid the costs associated with registering the FAS Patent and therefore beneficially owns it.

No submissions were advanced by Nature-Control with respect to the NewsBright M Patent Application.

[254] Dr. Li's position is as follows:

- (a) He maintains that Nature-Control has an exclusive (and presumably indefinite) right to use the FAS Patent because the idea for that technology emerged from the Colco opportunity which originated with Mr. Chow, and because all expenses associated with obtaining the patent were paid by Nature-Control. However, he maintains that he should continue to own the FAS Patent because "he has always maintained ownership of his patents".
- (b) He maintains that Nature-Control has no rights with respect to the Compounds A and B Patents. He acknowledges that Nature-Control paid the costs associated with getting these patents registered but he maintains that Nature-Control was obliged to do so under the terms of the original agreement pursuant to which it was established. He says that he only agreed that Nature-Control could use these patents and submits this is borne out by the fact that he had the right to terminate the Letter of Intent if there was no solid sale of Compounds A and B within two years. This right would be meaningless if, pursuant to the Letter of Intent, Nature-Control acquired beneficial ownership of the technology. He submits that Nature-Control has no continuing rights to the Compounds A and B Patents because there was no solid sale of Compounds A and B and the SCAC has expired.
- (c) He maintains that the T-Bright Patent and the NewsBright M Patent Application relate to technology he developed between 2002 and 2005 through research he conducted at MaShan's laboratory. He testified that all associated expenses were paid by MaShan and by him personally, and that Nature-Control did not pay any of the associated expenses. He submits that in these circumstances, Nature-Control has no claim to the T-Bright Patent or any patent that may result from the NewsBright M Patent Application.

[255] Dr. Li submitted that because the names Nature Control Chemical, NewsBright, T-Bright and South Mountain Chemical were used to market the bleaching products, those trademarks were properly registered in SouthMountain's name. He submitted that because the name FibreReclaim was used to market the waste water treatment technology, that trademark was properly registered in Nature-Control's name.

[256] Nature-Control submits that all the trademarks ought to have been registered in its name because the marketing of the bleaching products fell within the scope of its business. Nature-Control submits this conclusion is supported by the fact that all the trademarks were developed and registered by Mr. Zahir, who was a Nature-Control employee.

- [257] It follows from my findings with respect to the scope of Nature-Control's business and Mr. Chow's agreement regarding the conduct of the bleaching product business by SouthMountain, that the T-Bright Patent, the NewsBright Patent Application and the trademarks for Nature Control Chemical, NewsBright, T-Bright and South Mountain Chemical are beneficially owned by SouthMountain. That leaves the ownership of the Compounds A and B Patents and the FAS Patent to be determined.
- [258] There is a presumption that an inventor, even one who is an employee, is entitled to the benefit of his or her own invention: *Comstock Canada v. Electec Ltd.* (1991), 38 C.P.R. (3d) 29 (FC) at para. 76 [Comstock]; *Spiroll v. Putti*, (1975) 22 C.P.R. (2d) 261 (B.C.S.C.) aff'd (1976) 77 D.L.R. (3d) 761 (B.C.C.A.). The presumption can apply even if the employee's invention is useful for the employer's business; the employee made use of his employer's time, co-employees, and material; and the employee allowed the employer to use the invention. There are only two exceptions to this presumption: where there is an express contract to the contrary or where the person was employed for the express purpose of inventing or innovating (meaning that the parties impliedly intended otherwise): *Comstock* at paras. 77-79.
- [259] There are several factors that a court should consider when determining whether the parties impliedly intended for the employer to own the invention. These include whether the conduct of the employee once the invention had been created suggested ownership was held by the employer, and whether the invention was the product of a problem the employee was instructed to solve. Although the relationship between Dr. Li and Nature-Control was not one of employment, it is my view that the same factors are helpful in assessing the parties' intentions in this case.
- [260] I agree with the submissions advanced by Dr. Li with respect to the Compounds A and B Patents. The waste water treatment technology had already been patented in China by Dr. Li before the parties entered into the Letter of Intent. The Letter of Intent did not contemplate Dr. Li developing that technology. To the contrary, as already discussed, the only reasonable implication from the fact that Dr. Li had the right to terminate the Letter of Intent if there was no solid sale within two years, is that it was intended that Dr. Li was to retain beneficial ownership of the Compounds A and B Patents.
- [261] Ownership of the FAS Patent is more difficult to determine. If the FAS Patent reflected technology developed in Nature-Control's lab then, in my view, it would clearly be beneficially owned by Nature-Control pursuant to clause 11 of the Letter of Intent. Such a finding would be consistent with the first exception to the presumption that applies in the employment context. However, there was no evidence that the technology was developed in Nature-Control's lab. To the contrary, the evidence supported the conclusion that the patent reflected a new application of pre-existing technology developed by Dr. Li.

[262] Nevertheless, considering the factors outlined in Comstock, I have concluded that the parties impliedly intended for Nature-Control to own the FAS Patent. First, the patent was the product of an opportunity identified by Mr. Chow and it was Mr. Chow who asked Dr. Li to attempt to come up with a solution. It is clear from the correspondence with Colco that both Mr. Chow and Dr. Li considered that the Colco opportunity belonged to Nature-Control. The subsequent conduct of Dr. Li and Nature-Control also supports the conclusion that it was intended that Nature-Control beneficially own the patent. Nature-Control paid all the costs associated with registering the patent. Dr. Li acknowledged that Nature-Control has an exclusive right to use the patent and did not provide any adequate explanation for the distinction he draws between Nature-Control's right to exclusive (and presumably infinite) use and his right to beneficial ownership of it.

[263] For these reasons, I find that Nature-Control is the beneficial owner of the FAS Patent.

Did Dr. Li and/or SouthMountain wrongfully profit from transactions between SouthMountain and Nature-Control?

[264] Although Nature-Control never did succeed in obtaining a solid sale of Compounds A and B, it did sell smaller quantities of the product to various mills for trial purposes. This product was imported by SouthMountain and sold to Nature-Control. In addition, in the course of attempting to secure the Colco business, SouthMountain imported and sold to Nature-Control some of the FAS soil remediation product. SouthMountain also charged Nature-Control a total of \$80,000 in relation to the registration of the FAS Patent and the Compounds A and B Patents.

[265] Both Dr. Li and Mr. Chow testified that there was an express agreement that SouthMountain was to charge Nature-Control no more than the amount paid by SouthMountain to acquire and import the product and to get the patents registered. Nature-Control asserts that SouthMountain overcharged Nature-Control in both the sale of product and the patent costs. Dr. Li expressly denied this.

[266] The relevant invoices were issued between 2006 and 2009. The total amount charged to Nature-Control as reflected in these invoices was \$181,241.20, which comprised \$101,241.29 for product and \$80,000 for the patent registrations.

[267] Nature-Control seeks judgment of:

- (a) 60% of the \$101,241.29 it paid for product "or such other amount as the court may find"; and
- (b) \$67,340.23 of the \$80,000 it paid to get the patents registered (which represents the \$80,000 paid less \$2,659.77 which it accepts were legitimate costs actually incurred by SouthMountain for this purpose).

- [268] The basis for Nature-Control's claim of 60% of the amount it paid for product was not clear. Further, the resolution of this aspect of the case was made particularly difficult due to the failure of SouthMountain to produce some of the underlying documentation or "backup" evidence for the invoices that would have established its actual costs.
- [269] Having considered the evidence that was available, I conclude that SouthMountain did charge Nature-Control amounts that exceeded its costs. That conclusion is supported by two sources of evidence. First, Dr. Li's testimony supports the conclusion that SouthMountain has not actually incurred all the costs it purported to pass on to Nature-Control. Second, the "sales" and "cost of sales" figures reported in SouthMountain's financial statements demonstrate that in each year between 2006 and 2009, SouthMountain's sales exceeded its cost of sales by 43% when expressed as a weighted average.
- [270] Invoice #800009 reflects the sale of product to Nature-Control. It is in the amount of \$64,920 plus tax. Dr. Li produced what he said was the backup documentation to support that amount. However, approximately \$14,000 of the \$64,920 (roughly 22%) was not documented. Dr. Li claimed that this amount represented costs incurred by MaShan to test the product and for hotel expenses and meals for the persons conducting the tests, but no sensible explanation was given by him as to why the product needed to be tested and why it was necessary for MaShan to pay meal and hotel costs to the person doing the testing. Dr. Li claimed he paid MaShan for these costs in cash and that he had receipts, but no receipts were produced. In the circumstances I conclude that SouthMountain actually incurred costs of less than \$64,920 in acquiring and importing the product reflected in invoice #800009.
- [271] Dr. Li's evidence concerning the \$80,000 charged to Nature-Control to register the patents was also unsatisfactory.
- [272] Dr. Li testified that the \$20,000 to register the FAS Patent related to the cost of putting the FAS into a liquid form. However, the "backup" invoice that was produced was for only \$2,459.77. Dr. Li testified that the difference of more than \$17,000 between what SouthMountain paid to put the FAS into solution and what it charged Nature-Control, related to costs incurred by MaShan for work it had done on the FAS Patent. Dr. Li testified that the \$60,000 to register the Compounds A and B Patents reflected costs incurred by MaShan for work it had done on the Compounds A and B Patents.
- [273] Dr. Li was asked on discovery to produce all documentation relating to the cost of registering the patents. He produced 2 invoices from MaShan in a cumulative amount of 600,000 RMB. It appears he applied what he considered to be an appropriate conversion rate and charged Nature-Control \$77,000 (\$17,000 in relation to the FAS Patent and \$60,000 in relation to the Compounds A and B Patents). However, he testified that SouthMountain has paid MaShan only one-third of the amount he recovered from Nature-Control. The MaShan invoices are dated December 2005 and December 2006. Dr. Li provided no

explanation as to why they have not yet been paid in full. The only reasonable inference is that Dr. Li does not intend, and is not required, to pay them. In the circumstances, I conclude that SouthMountain actually incurred costs of less than \$80,000 to register the FAS Patent and the Compounds A and B Patents.

- [274] Given the deficiencies in Dr. Li's evidence, as highlighted above, it is difficult to quantify the amount by which SouthMountain over-charged Nature-Control. However, that is made easier through an analysis of the second source of evidence referred to above, namely the "sales" and "cost of sales" figures reported in SouthMountain's financial statements.
- [275] In 2006, SouthMountain's only "customer" was Nature-Control and in that year total sales exceeded the cost of sales by 39%. In 2007, 2008 and 2009, the total sales reported on SouthMountain's financial statements included sales of bleaching products to purchasers other than Nature-Control, including Catalyst and Howe Sound, and in those years total sales exceeded the cost of sales by 56%, 71% and 12% respectively. There is no evidentiary basis upon which to allocate the markup as between Nature-Control and the other purchasers, but the fact that a 39% markup can be isolated to Nature-Control for 2006 supports the conclusion that SouthMountain did not ensure that markups were applied only on sales to other customers.
- [276] Expressed as a weighted average, SouthMountain's markup or profit was 43% over the years in question. (Gross profit over the period from 2006 to 2009 of \$111,280 divided by total sales over the same period of \$256,349).
- [277] I am satisfied that Nature-Control has established that SouthMountain profited on its transactions with Nature-Control. The only way for Nature-Control to prove the quantum of SouthMountain's profit is through evidence that is within SouthMountain's control. SouthMountain has not produced all backup documentation required to substantiate the amounts Dr. Li claimed were costs SouthMountain incurred. SouthMountain's own financial statements establish total gross profits over the relevant time period of 43%.
- [278] In the circumstances, I find this evidence sufficient to establish that SouthMountain overcharged Nature-Control on the products sold to it and on the costs associated with registering the FAS Patent and the Compounds A and B Patents by approximately 43%, or \$78,000 on total charges of \$181,241.89.
- [279] I find that Dr. Li breached his fiduciary duties to Nature-Control by causing SouthMountain to earn secret profits of \$78,000.

Did SouthMountain and Ms. Jiang knowingly assist in Dr. Li's breach of fiduciary duties or knowingly receive the fruits from those breaches?

- [280] I have found that Dr. Li breached the fiduciary duties he owed to Nature-Control by causing SouthMountain to earn secret profits of \$78,000 on its transactions with Nature-Control. The next question is whether SouthMountain and Ms. Jiang are liable on the basis that they knowingly assisted in Dr. Li's breach of fiduciary duty or knowingly received some or all of the secret profits.
- [281] The secret profits were earned by SouthMountain from funds paid to it by Nature-Control. There is no doubt that SouthMountain received the secret profits. It is uncontroverted that Dr. Li was the directing mind of SouthMountain. In the circumstances, the knowledge requirement of both knowing assistance and knowing receipt has been met with respect to SouthMountain. I have no difficulty concluding that SouthMountain both knowingly assisted and knowingly received the secret profits and is therefore liable.
- [282] To impose liability on Ms. Jiang, Nature-Control must establish, among other things, that she had either actual knowledge, including recklessness or willful blindness, of Dr. Li's breach of duty (to establish "knowing assistance") or knowledge of facts which would put a reasonable person on inquiry (to establish "knowing receipt").
- [283] The only evidence Nature-Control referred to in its written submission to establish actual or constructive knowledge on the part of Ms. Jiang was that she said, in her examination for discovery, that she was responsible for acting as SouthMountain's bookkeeper and, in the course of doing so, she paid accounts and performed some invoicing, and that she also helped out on occasion cleaning the totes in which chemicals were stored and preparing them for shipping. She also said she left the running of SouthMountain to her husband.
- [284] Nature-Control referred to no evidence that would support the conclusion that Ms. Jiang had any knowledge of the nature of the relationship between Nature-Control and Dr. Li, or the dealings and agreements between Mr. Chow and Dr. Li. The evidence Nature-Control relies on simply does not establish that Ms. Jiang knew that SouthMountain was not entitled to profit on its transactions with Nature-Control or even that SouthMountain was in fact earning such profit. It does not establish that she was willfully blind or that she had knowledge of facts that would have caused a reasonable person to inquire as to the possibility that Dr. Li was breaching his fiduciary duties to Nature-Control.
- [285] In the circumstances, the claim against Ms. Jiang is dismissed.

What is the appropriate remedy?

- [286] It follows from the above conclusions that judgment be granted against Dr. Li and SouthMountain in the amount of \$78,000 and that Dr. Li be ordered to take all required steps to assign the FAS Patent to Nature-Control and to cause it to be registered in Nature-Control's name.

- [287] In its Notice of Civil Claim, Nature-Control also sought proprietary relief with respect to a house purchased by Dr. Li and Ms. Jiang, including a declaration that they hold the house in trust for Nature-Control, a declaration that Nature-Control is the beneficial owner of the house, and a declaration that Nature-Control holds a lien and charge on other assets owned by the defendants to the extent of the benefits which accrued to them by way of their wrongful conduct.
- [288] A person whose funds have been wrongly taken in breach of fiduciary duty can maintain a proprietary claim against an asset in relation to which the funds can be traced, even if the asset was acquired with mixed funds only part of which belonged to the beneficiary: *Ruwenzori Enterprises Ltd. v. Walji*, 2006 BCCA 448 [Ruwenzori]. As stated by Mr. Justice Hall in *Ruwenzori* at para. 44 (dissenting in part, but not on this point) "I see no principled reason why a person whose monies were in part used to buy an asset cannot obtain a proportional proprietary interest in the asset".
- [289] The question is whether Nature-Control has established that the secret profits earned by SouthMountain were applied towards the acquisition of any particular asset. The only asset Nature-Control referred to in its written submissions is the house. The only evidence linking the secret profits earned by SouthMountain to the house was Dr. Li's acknowledgment that he has paid the mortgage out of his earnings from SouthMountain.
- [290] SouthMountain earned significant legitimate profits over the years from the bleaching product business. In the circumstances, it is my view that Nature-Control has not laid the foundation required to establish that the secret profits earned by SouthMountain were applied toward the acquisition of the house. It appears that Nature-Control concedes this because in the list of "orders sought" in the final section of its written submissions, it did not include a claim for any particular proprietary relief. Rather, it sought only "a tracing order against the profits and assets of the Defendants, Jiang, Li and Southmountain".
- [291] Tracing is neither a claim nor remedy. The nature of tracing was described by Lord Millett in the House of Lords decision of *Foskett v. McKeown*, [2003] 3 ALL E.R. 97 at p. 120 as follows:

Tracing is thus neither a claim nor a remedy. It is merely the process by which a claimant demonstrates what has happened to his property, identifies its proceeds and the persons who have handled or received them, and justifies his claim that the proceeds can properly be regarded as representing his property. Tracing is also distinct from claiming. It identifies the traceable proceeds of the claimant's property. It enables the claimant to substitute the traceable proceeds for the original asset as the subject matter of his claim. But it does not affect or establish his claim.

- [292] Similarly, in the trial judgment in *Ruwenzori*, 2004 BCSC 741 at para. 241, Mr. Justice Pitfield said:

It follows that tracing is the process employed to identify and particularize the manner in which funds have been applied. The results of the tracing permit a claimant to determine whether it will opt for a proprietary remedy in respect of funds derived from it, or a monetary judgment in respect thereof.

[293] In the circumstances, it is appropriate to grant a tracing order to enable Nature-Control, if it chooses, to determine what has happened to the secret profits. If Nature-Control elects to pursue that process, upon completion of it, Nature-Control may elect a proprietary remedy in the place of the monetary judgments granted above.

Conclusion

[294] In conclusion, I grant the following orders:

- (a) Nature-Control shall have judgment against Dr. Li and SouthMountain in the amount of \$78,000 plus interest pursuant to the Court Order Interest Act, R.S.B.C. 1996, c .79;
- (b) Dr. Li and SouthMountain shall take all steps required to assign the FAS Patent (Patent CA 2559331) to Nature-Control and cause it to be registered in Nature-Control's name; and
- (c) Nature-Control is entitled to trace the secret profits of \$78,000 received by SouthMountain.

[295] If the parties wish to speak to costs they may arrange to do so by contacting the registry.

"Warren J."

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