

IN THE MATTER OF THE NORTH AMERICAN FREE TRADE AGREEMENT

CHAPTER ELEVEN

NOTICE OF INTENT TO SUBMIT A CLAIM TO ARBITRATION

THE IDENTITY OF THE PARTIES:

DISPUTING INVESTOR: SUN BELT WATER, INC.
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(Herein "SUN BELT")

DISPUTING PARTY: HER MAJESTY THE QUEEN IN RIGHT OF
CANADA
c/o Deputy Attorney General for Canada
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I. THE BREACHES OF THE NORTH AMERICAN FREE TRADE AGREEMENT AND OTHER RELEVANT PROVISIONS:

A. It is respectfully submitted that Canada through and by the actions and conduct of the British Columbia Government (BCG) and, in particular, by the actions and conduct of the Office of the Attorney General of the Province of British Columbia from July, 1996, to November, 1998, have violated the Articles 1102, 1103, 1104 and 1105 of the North American Free Trade Agreement (NAFTA).

B. It is respectfully submitted that Canada through and by the actions of the BCG, with the assistance of the Office of the said Attorney General, from 1989 to 1995 violated Articles 105, 407, and 1602 of the Canada US Free Trade Agreement (CUSFTA) and Article XI of the General Agreement on Tariffs and Trade 1994 (GATT).

C. It is respectfully submitted that the BCG, with the assistance of the Office of the said Attorney General, secretly and contrary to the domestic law of the Province of British Columbia, violated and circumvented the provisions of the Water Act,

II SUN BELT RESPECTFULLY SUBMITS THE FOLLOWING ISSUES AND FACTUAL BASIS IN SUPPORT OF ITS CLAIM:

GOVERNMENT POLICY FAVOURS WATER EXPORT

1. In the early 1980's, the BCG developed and published a policy supporting the export of surplus fresh water in bulk by marine transport. Under the Water Act all water in the province was owned by the Provincial Crown, the BCG. Interested parties were entitled to apply to the Controller of Water Rights for licences to take water from coastal streams and rivers for the purposes of export by marine transport.

BCG SECRETLY FAVOURS ONE B.C. COMPANY

2. In 1986, the BCG made a secret agreement with W.C.W. Western Canada Water Enterprises Ltd. (WCW) giving that company special terms of access to provincial water for export purposes.

3. In 1988-89 southern California was in the sixth year of the worst drought in its recorded history and was in desperate need of additional fresh water supplies. The City of Santa Barbara expressed an interest in water to be delivered from marine tanker. WCW wished to enter this market but the terms of the 1986 agreement made its entry into the bulk water market non-competitive.

4. On September, 25, 1989, the BCG made a new, but still secret, contract with WCW which gave WCW access to water owned by the BCG at prices well below those authorized by the Water Act and secretly set up WCW as the favoured entity to satisfy the emerging bulk water market.

5. The September 25, 1989, agreement was a circumvention of the domestic law of B.C. which governed the granting of licences to take water from streams or rivers for export purposes. The agreement was also a violation of the CUSFTA and the GATT. This opinion has been confirmed by Canada's largest law firm, McCarthy Tétrault, in a legal opinion obtained in December, 1997. The September 25, 1989, agreement was drawn secretly in the offices of the Attorney General in conspiracy with other Ministries of the BCG and remained hidden until identified by a private investigator in May, 1997.

THE VANCOUVER STOCK MARKET PLAY

6. On September 29, 1989, four days after the execution of the secret agreement, there was a private placement of 4.3 million shares and warrants in WCW which witnesses report went to offshore accounts in the Cayman Islands. This was probably insider trading a pay off, or a bribe and most likely all three. There has never been an investigation of these dealings by any Canadian authority or the BCG.

7. The trading pattern of the stock of WCW then followed the classic pattern of "pump and dump" on the notorious Vancouver Stock Exchange (VSE) strongly suggesting that windfall profits were made by those who benefited from the secret agreement. Finally, when WCW filed for bankruptcy in 1993 it was no longer a Canadian owned company and 91 % of its shareholders were US citizens who lost all of their investment.

8. The reputation of the VSE was so bad in 1989 and 1990 that Premier Glen Clark, who was then an member of the opposition in the legislature stated that the "VSE WAS INFESTED WITH CROOKS, CRONIES, DEPOSED, DICTATORS AND THE MAFIA". Mr. Clark became Premier of the province in 1996.

9. As part of its background investigation, SUN BELT has identified several individuals connected to criminal activities in the United States who had ties to WCW. These include Mr. Eddie DeBartolo who recently pleaded guilty to engaging in corrupt practices with former Louisiana Governor, Edwin Edwards.

THE SUN BELT - SNOWCAP JOINT VENTURE

10. In 1990, SUN BELT from Santa Barbara, California, and Snowcap Waters Ltd. of Fanny Bay, British Columbia, formed a joint venture partnership to develop opportunities in the emerging bulk water industry. Snowcap held one of six existing export licences for bulk

water. Representatives of the BCG gave SUN BELT false and misleading advice about the terms of its relationship with WCW and encouraged SUN BELT to continue to develop the market for bulk water in California notwithstanding that it secretly favoured WCW.

11. After an international tender process, the City of Santa Barbara decided that it would opt for desalinization but the Mayor, Ms. Sheila Lodge, took the time to comment that the City rejected tankering, in part, because she didn't think the government of BCG could be trusted. Her words were prophetic.

12. The forces behind WCW had lost their first chance to become the big players in the emerging bulk water industry but they soon had another chance when the neighbouring District of Goleta decided to look into the tankered water option.

13. Month after month, the BCG delayed the processing of the application for an expansion of the water export licence held by Snowcap Waters Ltd, SUN BELT's Canadian partner and intended source of water, yet made assurances to SUN BELT, Snowcap, and Goleta that the licence would be granted in time to meet the requirements of Goleta.

14. Documentary evidence exists to prove that the Snowcap application had met all land use and environmental concerns and that all the usual requirements for approval of the

Snowcap licence expansion had been met.

15. On March 14, 1991, Goleta announced that SUN BELT had won its international competition to supply fresh water by tanker. Within days, officials from B.C. told the officials at Goleta that they would not get any water unless they bought it from WCW.

16. On March 18, 1991 the BCG imposed a temporary moratorium on the issuance of new or expanded water export licences, including the Snowcap application, but grandfathered the WCW position leaving WCW as the sole entity able to satisfy Goleta. SUN BELT was told that if it wanted water it must buy from WCW. The moratorium was extended and then made permanent. McCarthy Terrault also advises that the moratorium was a further violation of ^{CUSFTA} NAFTA and GATT.

17. In retrospect it is now evident that forces within the DC government perverted their own domestic law and broke international trade agreements in a covert attempt to confer a monopoly position on WCW.

THE WATER MARKETS - A WORLDWIDE NEED

18. The need for fresh water around the world is evident. Sixty (60%) percent of the

world's population do not have adequate supplies of clean fresh water for drinking purposes and there is ample evidence from the public record of critical needs in specific areas of the world.

19. After the BCG imposed the moratorium, Goleta abandoned the tankered water option stating that it could not trust the BCG and Canada. However, Goleta took alternate measures to address its water issues.

- a. Goleta joined with Santa Barbara to construct the first desalinization plant in the United States at a cost of \$30 million (USD). Although the plant was completed it suffered from costs over-runs and never produced a drop of water due to the high production costs.
- b. Goleta then joined with fifteen surrounding communities to construct a pipeline at an over all cost of \$900 million (USD). The pipeline was completed in 1997, and will not address the local needs if there is another drought.

20. The fact that these expenditures of public funds were made to address its water needs proves that Goleta would have entered a contract with SUN BELT if the BCG had not reversed its policy at the last moment.

21. There are 33 million people in California. It is the fastest growing state in the United States and it is expected to double in population within 25 years. Two thirds of those people live and will live in an area that is a desert where the ground water is depleting and new water resources cannot be found. State officials predict that even with proposed conservation measures there will be a shortfall of 4 million acre feet of fresh water per annum at that time.

22. The market for bottled water in the United States is estimated to have annual retail sales of \$4.6 billion in annual retail sales with one half of that in California. SUN BELT was poised to capture a significant portion of this market with superior quality Canadian water.

23. Several markets had been identified in Asia but could not be developed due to a lack of an adequate source of fresh water.

24. Recent developments in the world wide water market show that the SUN BELT vision was correct. For example . . .
 - a. Enron Corporation, Houston, Texas, paid \$2.1 billion to purchase a private water company in England so that it could position itself in this emerging and important business opportunity.

- b. US Filter Company, Palm Springs, California, purchased Culligan Water for \$1.2 billion as part of a consolidation program of its plans for growth in this industry.

THE SETTLEMENT OF THE CANADIAN CLAIM

25. In January, 1993, Snowcap and SUN BELT filed a lawsuit claiming damages against the government of B.C. In July, 1995, the B.C. government asked the two companies to submit their claims for an honourable and negotiated settlement.

26. At the request of the B.C. government, the negotiations in regard to the smaller claim by the Canadian entity were handled first and proceeded to a fair and honourable settlement.

27. In July, 1996, the Canadian claimant was settled with a cash payment approved by BCG and representations were made to continue to negotiate with SUN BELT to reach a fair and equitable resolution of the SUN BELT claim on principles similar to those on which we relied on to achieve a settlement of the Snowcap claim.

THE ABUSE OF THE AMERICAN CLAIMANT BY THE BCG

28. Under Premier Glen Clark, who is known for his anti-American tactics, the BCG has

refused to negotiate with the American company and has forced SUN BELT into costly litigation where the BCG has adopted the tactics of delay, harassment, concealment, and obstruction. Examples of these tactics are as follows:

- a. The BCG delayed answering to critical pre-trial interrogatories for a period in excess of six months. The answer finally provided was false and the BCG has ignored all requests that it provide a proper answer.
- b. The BCG identified only 364 documents in two list of documents provided under the Rules of Court while it concealed the existence of a further 8,800 documents. By contrast, SUN BELT Water spent months compiling a list over 55 pages long identifying over 80,000 pages of documents in its files.
- c. Through the BC Freedom of Information Program, SUN BELT learned that the Attorney General had over 6,000 documents related to the matters in issue in the proceedings in its own files, not the 364 documents identified. In addition there were another 2,800 documents located by SUN BELT in other Ministries.
- d. The BCG has refused to comply with its obligations under the Rules Of Court

to identify documents in respect of which privilege is claimed and the grounds for such privilege.

- e. The BCG concealed the critical September 25, 1989, agreement until SUN BELT learned of its existence in May, 1997. The document was located in the files of the Attorney General after false evidence was given as to its existence.
- f. Premier Glen Clark's office has on two occasions, since October, 1996, written to SUN BELT advising the instruction had been given to legal counsel to commence negotiations for settlement or to respond to proposals for settlement. Legal counsel at the Attorney General's Office have ignored the Premier's instructions. Alternatively, Premier Glen Clark is being dishonest with SUN BELT in his representations.
- g. The BCG lawyers applied for and obtained an Order requiring SUN BELT to post a bond as security for costs before it would be permitted to continue legal action. The Order was effective September 30, 1997. The Order requires SUN BELT to lodge security of \$27,800 (CD) but also allows the BCG to make further applications for increased security for costs as the proceedings continue.

- h. On various motions, the BCG has threatened applications for costs against SUN BELT or its Legal Counsel in circumstances where such costs are not warranted at law.

29. The tactics of the BCG in the court proceedings are contrary to governing domestic law, international law and unfair and inequitable to SUN BELT which is seeking a just, fair and expeditious settlement of its claim, the merits of which have been acknowledged by the BCG.

30. The transparent attempt of the BCG to exhaust the resources of SUN BELT in prolonged litigation was revealed when the government lawyer William Pearce, Q.C. stated "*while there is merit in the SUN BELT claim we do not believe that SUN BELT has the resources to litigate*".

31. The wrongdoing by the BCG was admitted by Mr. Timothy Leadem, Barrister & Solicitor, Counsel for the BCG who commented on the dealings of the BCG with WCW "*This file does not pass my smell test*" and Mr. William Pearce, Q.C., who stated there was a "*foul odour*" to those dealings.

32. SUN BELT has met with what appears to be systemic bias against it in the B.C. Courts.

The assigned trial judge has denied every pre-trial motion brought by SUN BELT, including many motions brought to force the production of evidence deemed necessary properly present its case. The assigned trial judge has granted every pre-trial motion brought by the BCG lawyers except for the application in December, 1997, to have the SUN BELT claim dismissed. The assigned trial judge backed off on this motion after he was threatened with a Motion that he be removed as a result of a reasonable apprehension of bias.

33. The proceedings in British Columbia were initiated in the Supreme Court which is administered by the Attorney General. Former employees of the Office of the Attorney General are now members of the Supreme Court of British Columbia. The trial judge assigned by the Attorney General to handle the case has refused SUN BELT the opportunity to examine former employees of the Attorney General's Office including some who are now members of the judiciary in that province thereby denying SUN BELT to opportunity to obtain the evidence necessary to pursue a fair and equitable hearing in the Supreme Court of British Columbia.

34. The treatment provided to SUN BELT by the BCG and by the B.C. court system administered by the BCG is neither fair nor equitable, especially when examined in contrast to open and rational approach that was adopted by the BCG in relation to the Canadian entity, Snowcap Waters Ltd. This treatment violates Articles 1102, 1103, 1104, and 1105 of the

NAFTA.

THE SUN BELT INVESTMENT PROGRAM:

35. In 1990, SUN BELT was established as a single purpose company and represented a private enterprise initiative to address the critical need for additional supplies of fresh water in Southern California, Nevada, Arizona and Baja California - Mexico. This initiative also relied on the clearly articulated BCG policy to support the export of its surplus fresh water by marine transport. As of 1990, the BCG had confirmed its policy by issuing six licences to export water and a further nineteen¹⁹ were under consideration.

36. In addition to its relationship to its Canadian joint venture partner, SUN BELT entered a number of strategic corporate alliances to address the large scale capital and infrastructure requirements necessary to deliver water from Canada by marine tanker to the United States and Mexico.

37. SUN BELT Chairman and Chief Executive Officer, Jack B. Lindsey, of Santa Barbara, California, is an engineering graduate from USC (Berkeley) and holds an MBA from Stanford University. Mr. Lindsey had extensive business and government experience which uniquely qualified him to assemble the team of corporate allies. This experience included service as an Officer in the US Navy and as Legislative Secretary to Governor Ronald Regan. SUN BELT's

President, Richard P. Schuler, an engineer and economist with extensive experience in the oil industry, was uniquely qualified to transfer the technology in respect to the marine transport of liquids from the oil industry to the emerging water industry. Mr. Schuler is now the President of Plasma Inc. a high-tech energy development company located in Butte, Montana.

38. In co-operation with The Bank of America, SUN BELT developed a business and financial plan. The Bank of America had committed itself to financing the venture and expressed a serious interest in an equity position.

39. Among the corporate allies were notable companies such as Montgomery Engineering of Pasadena, California, T.K Shipping, an NYSE Company with world headquarters in Vancouver, B.C. and Scientific America International Corp (SAIC) of Santa Barbara, California a major environmental assessment group. Several prominent US businessmen agreed to sit on the board of directors of SUN BELT to provide guidance as the company moved forward.

40. In a documented briefing submitted to the BCG in December, 1995, SUN BELT estimated that its investment loss including cash expenditures, credit card debt, accrued salaries and obligations was \$3.4 million (USD). This figure did not include interest on the lost use of the funds, managerial time and expense in pursuing the claim for compensation and legal

fees and disbursements, lost profits on the contract awarded by Goleta, the lost opportunity identified in 30 target markets in various stages of negotiation, the lost bottled water opportunity with superior Canadian water and the market opportunities in the Pacific Rim.

U.S. POLITICAL SUPPORT:

41. In the interests of obtaining an fair and honourable resolution without the expense and delay of litigation SUN BELT sought and received the support of Senators Diane Feinstein and Barbara Boxer of California, and Senators Ted Stevens and Frank Murkowski of Alaska. All of these Senators have asked the White House to look into the obvious unfair and inequitable treatment of an American corporation by the BCG in contrast to the honourable and decent manner in which the BCG treated its Canadian counterpart which was in the identical factual and legal situation.

42. In response to the political intervention of the Executive Office of the President of the United States, the Office of the United States Trade Representative in the White House has advised SUN BELT that the matter would be raised on the bilateral agenda with Canada. To date, there has been no response from the Canadian government.

43. In August, 1998, SUN BELT and its legal Counsel gave a briefing to staff with the United States Senate Foreign Relations Committee outlining how Canada, through the

actions and conduct of the BCG, had violated the CUSFTA, the NAFTA and the GATT and thereby caused harm to a US Corporate Citizen and its shareholders and creditors.

44. Due to the fact that the circumstances strongly suggest a crime was committed by persons connected with the BCG, SUN BELT reported to facts to the Attorney General for British Columbia, the Honourable Mr. Ujjal Dossanjh but, to the knowledge of SUN BELT, no investigation has been initiated.

45. Due to the fact that it appears that US Citizens may have been engaged in corrupt practices with the BCG, in violation of the Foreign Corrupt Practices Act, SUN BELT recently reported the matter to the United States Secret Service of the Office of the United States Treasurer and the Federal Bureau of Investigation an arm of the Attorney General of the United States. SUN BELT has been informed that an investigation is in a preliminary stage.

46. SUN BELT thereby believes that it has exhausted every reasonable avenue of recourse except the investor dispute mechanism under the NAFTA and therefore delivers this Notice of Intent to Submit a Claim for Arbitration under Chapter 11, Article 1119 of the NAFTA.

III. THE RELIEF SOUGHT AND THE AMOUNT OF THE DAMAGES CLAIMED.

1. SUN BELT proposes that a resolution can be reached through "principled" negotiations leading to a monetary settlement that recognizes the interests of both parties in accomplishing a fair and equitable settlement to the controversy.

2. SUN BELT proposes that a resolution of the dispute should be based on a principled basis and submits that Canada should honourably acknowledge that the actions of the BCG have resulted in a loss in value to SUN BELT that, in principle, should be measured by reference to the value of the business that would have arisen had the actions of the BCG not taken place. The value of the business should be assessed on sound financial principle by measuring the likely value of the business at this time, 1998, had SUN BELT proceeded with the plan which was relied upon by its investors and the Bank of America in assessing the value of the business in 1991. Based on this principle the value of the business is determined as follows:

- a. The SUN BELT Ten Year business plan as finalized in the report dated June 9, 1991 using the Bank of America approved financial model demonstrated an average net after tax annual earnings of US \$26.3 million in the fifth year.

- b. In addition, the forecast net after tax annual earnings for the bottled water corporation operations demonstrate US \$20.5 million for a total of US \$46.8 million in the fifth year.
- c. As an indication of "good faith" in negotiations and in the interest of advancing our efforts to find an amicable resolution SUN BELT will withdraw the bottled water portion of the claim reserving the right to re-introduce same if the matter proceeds to arbitration. Further, for the same reason no claim has been made for the lost opportunity in the Pacific Rim markets a viable market waiting to be developed.
- d. The value of the business in the capital markets would be measured on a multiple of earnings basis. SUN BELT believes that the approximate earnings multiple ranges between twelve (12) times net after tax earnings on the low end and twenty five (25) times earnings at the high end. These multiples produce a value range of between US \$315.6 million and US \$657.8 million.
- e. The actual claim against the BCG was revised when the BCG refused to negotiate and is in excess of \$468 (USD) based in the inclusion of the bottled water opportunity, the Pacific Rim markets and an earnings multiple of ten (10)

times earnings.

3. SUN BELT acknowledges that its loss or damage should reflect the percentage of the value of the business that would have been its net equity interest in the business having regard to the need to obtain outside capital to finance the business.

e. The Bank of America model estimated the capital required for the business approximately US \$115.5 Million would have been financed with a debt to total capital ratio of 0.85 with the resultant required equity and subordinate debt of approximately US \$16.4 Million.

f. SUN BELT estimates that its interest in the business would have been diluted by approximately sixty seven percent (67%) leaving a net equity position of thirty three percent (33%).

g. The present value of the present SUN BELT interest in the business that would have been created had the BCG action not been taken ranges between US \$105.2 and US \$219.5.

3. SUN BELT has received legal opinions that the moratorium on the granting of

licences for the export of fresh water imposed by the BCG under an Order In Council was illegal and a violation of the CUSFTA and that the restrictions on the size of containers in which water may be exported from British Columbia imposed by the BCG with the enactment of the Water Protection Act in June, 1995, are a violation of NAFTA and the GATT but, at this stage, is not seeking that those provisions be set aside.

4. SUN BELT respectfully requests from CANADA no less favourable treatment than it accords, in like circumstances, to investments of its own investors as CANADA agreed it would provide under the provisions of Article 1102 of the NAFTA.

5. SUN BELT respectfully requests from CANADA no less favourable treatment than it accords, in like circumstances, to investments of its own investors as CANADA agreed it would provide under the provisions of Article 1103 of the NAFTA.

6. Finally, SUN BELT respectfully requests from Canada the fair and equitable treatment that CANADA agreed it would provide under the provisions of Article 1105 of the NAFTA.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED THIS 27TH DAY OF NOVEMBER, 1998.

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