IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Tietz v. Bridgemark Financial Corp.,*
2024 BCSC 1166

Date: 20240702
Docket: S197731
Registry: Vancouver

Between:

Michael Tietz, Duane Loewen, Robin Lee, Mike Dotto, Grant Greenwood, Malcolm Runkee, Americo Morlani, Greg Lomnes and Stacey Dionne

Plaintiffs

And

Bridgemark Financial Corp., Jackson & Company Professional Corp., Anthony Jackson, Lukor Capital Corp., Justin Edgar Liu, Rockshore Advisors Ltd. (formerly known as Cam Paddock Enterprises Inc.), Cameron Robert Paddock, Konstantin Lichtenwald, Simran Singh Gill, JCN Capital Corp., John Bevilacqua, Essos Corporate Services Inc., Sway Capital Corp., Von Rowell Torres, Detona Capital Corp., Danilen Villanueva, Natasha Jon Emami, Altitude Marketing Corp., Ryan Peter Venier, Platinum Capital Corp., 658111 B.C. Ltd., Jason Christopher Shull, Tryton Financial Corp., Abeir Haddad, Tavistock Capital Corp., Robert John Lawrence, Jarman Capital Inc., Scott Jason Jarman, Northwest Marketing and Management Inc., Rufiza Esmail, Denise Trainor, Aly Babu Mawji, Escher Invest SA, Hunton Advisory Ltd., Randy White, Kendl Capital Limited, 1153307 B.C. Ltd., Russell Grant Van Skiver, Bertho Holdings Ltd., Robert William Boswell, Haight-Ashbury Media Consultants Ltd., Ashkan Shahrokhi, Saiya Capital Corporation, Tara Haddad, Keir Paul MacPherson, Tollstam & Company Chartered Accountants, Albert Kenneth Tollstam, 727 Capital, David Raymond Duggan, Viral Stocks Inc., 10x Capital, Cryptobloc Technologies Corp., Neil William Stevenson-Moore, Kenneth Clifford Phillippe, Brian Biles, Kootenay Zinc Corp., Robert Tindall, Affinor Growers Inc., Nicholas Brusatore, Sam Chaudhry, Green 2 Blue Energy Corp., Slawomir Smulewicz, Michael Young, Glenn Little, Beleave Inc., Andrew Wnek, Bojan Krasic, Citation Growth Corp. (formerly known as Liht Cannabis Corp. and Marapharm Ventures Inc.), Linda Sampson, David Alexander, Yari Alexander Nieken, Blok Technologies Inc., Robert Dawson, James Hyland, Preveceutical Medical Inc., Stephen Van Deventer, Shabira Rajan, Abattis Bioceuticals Corp., Robert Abenante, Kent McParland, Speakeasy Cannabis Club Ltd., Marc Geen, Mervyn Geen, Jeremy Ross, Alexander Kaulins, KOPR Point Ventures Inc. (formerly known as New Point Exploration Corp.), Bryn Gardener-Evans, International Canyon Holdings Ltd., Jatinder Singh Bal, Asahi

Capital Corp., Wilson Su, 1053345 B.C. Ltd., Asiatic Management Consultants Ltd. (NEV.), Asiatic Management Consultants Ltd. (B.C.), 1140258 B.C. Ltd., Arlene Victoria Alexander, 1113300 B.C. Ltd., David Greenway, 1002349 B.C. Ltd., Hanspaul Pannu, Saman Eskarandi, Grant Farkes, Amber Papou, Aida Reed, and Isodoro Alonso

Defendants

Before: The Honourable Madam Justice Wilkinson

Reasons for Judgment

Counsel for the Plaintiffs:	P. Bennett N. Kovak N. Baker
Counsel for the Defendants Tavistock Capital Corp., Robert Lawrence, Sway Capital Corp., Robert Boswell, Bertho Holdings Ltd., Jason C. Shull, Platinum Capital Corp; 658111 BC Ltd, and Majuba Hill Copper Corp (formerly known as New Point Exploration Corp.):	D. Yaverbaum
Appearing as agent for the Defendant Cryptoboc Technologies Corp.:	A. Sood
Appearing on his own behalf:	K. Phillippe
Appearing as agent for the Defendant David Alexander:	T. Roper
No other appearances	
Place and Dates of Hearing:	Vancouver, B.C. December 6-8, 2023
Written Submissions Received:	March 21, 2024 April 8, 2024 May 31, 2024
Place and Date of Judgment:	Vancouver, B.C. July 2, 2024

Table of Contents

BACKGROUND OF THE CLAIMS **6**
THE DEFENDANTS SUBJECT TO THIS APPLICATION FOR CERTIFICATION **8**
THE CLAIMS **10**
CERTIFICATION UNDER THE *CPA* **11**
CAUSES OF ACTION **13**
Unlawful means conspiracy 14
1. An agreement between two or more persons 15
2. Unlawful actions taken pursuant to the agreement 18
3. Knowledge that damage would result 23
4. Damages suffered 25
Does the rule in Foss & Harbottle bar the claim of conspiracy? 25
Conclusion on the claim in conspiracy 26
Disgorgement of profits as an alternative for damages 27
Personal liability 29
Statutory secondary market liability 30
Fraudulent or negligent misrepresentation 31
Fraudulent misrepresentation 31
Negligent misrepresentation 32
ADMISSIBILITY OF EVIDENCE **35**
Costin Affidavit #1 35
New evidence 37
The Liu Commission Settlement Agreement 37
The Jackson Commission Settlement Agreement 39
IDENTIFIABLE CLASS **40**
A global class 42
Early sellers 46
COMMON ISSUES **48**
Conspiracy common Issues 49
Disgorgement common issues 61
Personal liability common issues 63
Secondary market liability common issues 64
Fraudulent or negligent misrepresentation common issues 65

PREFERABLE PROCEDURE 67
Do the common issues predominate? 68
No interest in individual control 70
The claims are not the subject of other proceedings 70
Alternatives are less practical and less efficient 70
A class proceeding will not create greater difficulty 70
SUITABLE REPRESENTATIVE PLAINTIFF 71
CONCLUSION 77

[1] The plaintiffs seek certification of their proposed class proceeding under the *Class Proceedings Act*, R.S.B.C. 1996, c. 50 [*CPA*] on their own behalf and on behalf of all persons, other than the defendants and any other excluded persons, wherever they may reside or be domiciled, who acquired securities in the following companies (collectively, the "Issuers") in the following periods (collectively, the "Class Periods"):

a) in the defendant Kootenay Zinc Corp. ("Kootenay") between January 30, 2018 and November 26, 2018;

b) in the defendant, Affinor Growers Inc. ("Affinor") between March 5, 2018 and November 26, 2018;

c) in the defendant Green 2 Blue Energy Corp. ("Green Corp.") between April 12, 2018 and November 26, 2018;

d) in Beleave Inc. ("Beleave") between April 24, 2018 and November 26, 2018;

e) in the defendant Citation Growth Corp. formerly known as Marapharm Ventures Inc. ("Marapharm") between May 17, 2018 and November 26, 2018;

f) in the defendant Cryptobloc Technologies Corp. ("Cryptobloc"), between May 18, 2018 and November 26, 2018;

g) in the defendant BLOK Technologies Inc. ("BLOK") between June 1, 2018 and November 26, 2018;

h) in PreveCeutical Medical Inc. ("PreveCeutical") between April 9, 2018 and November 26, 2018; and

i) in the defendant KOPR Point Ventures Inc., formerly known as New Point Exploration Corp. and subsequently known as Bam Bam Resources Ltd. and then Majuba Hill Copper Corp. ("New Point"), between July 25, 2018 and November 26, 2018.

[2] A number of named defendants have entered into settlement agreements which have received approval or of which approval is pending. The action against some others has been discontinued. This application was also adjourned against other named defendants.

[3] For the reasons below, I grant the plaintiffs' application for certification with respect to the defendants subject to the application.

Background of the claims

[4] On the start date for each of the above Class Periods, the relevant Issuer announced a private placement for the Issuer's shares. The plaintiffs allege that the private placements, together with an additional private placement in Speakeasy Cannabis Club Ltd. ("Speakeasy"), were each part of a scheme which was conceived in January 2018, by the defendants Anthony Jackson ("Jackson"), Justin Liu ("Liu"), Cameron Paddock ("Paddock") and Aly Babu Mawji ("Mawji"), and which the Issuers participated in with a group of purported consultants.

[5] Pursuant to the alleged scheme, a subset of the purported consultants, operating in concert with each Issuer, agreed to acquire the Issuer's shares in a private placement, on the condition that the Issuer paid the subscribing purported consultants and a subset of associated, non-subscribing purported consultants lump-sum consulting fees from the proceeds of the private placement on the closing of the private placement, or shortly thereafter. The lump-sum payments consumed a significant portion, or, in some cases, substantially all, of the ostensible proceeds of each private placement. The lump-sum consulting fee payments were made pursuant to consulting agreements entered into between the Issuers and the purported consultants, which the plaintiffs allege were a sham and a false pretence. This is because they allege that neither the Issuers nor the purported consultants had any *bona fide* expectation that services of any real value would be provided, and, they allege, no such services were provided.

[6] In public documents released and filed by the Issuers as part of the alleged scheme, each Issuer announced that the private placement had been arranged, and

then completed, at a certain disclosed price for a certain amount of proceeds. The Issuers did not disclose that their receipt of those proceeds was conditional upon the Issuer's agreement to contemporaneously return a significant amount of the proceeds to the purported consultants, pursuant to "sham" consulting agreements, and that, as a result, the subscribing purported consultants obtained the Issuer's shares at a much lower price than the disclosed purchase price, and only a small portion of the proceeds was truly available to the Issuer to use as working capital.

[7] The alleged scheme therefore enabled the subscribing purported consultants to obtain each Issuer's shares for a price that was substantially less than the disclosed purchase price, and substantially less than the price at which each Issuer's shares were then trading. The plaintiffs allege that most of the subscribing purported consultants then sold the subscription shares for a significant profit, at prices lower than the disclosed purchase price but significantly above the effective price paid by the purported consultants. The plaintiffs also allege that some of the subscribing purported consultants sold short shares of the Issuers in the secondary market at prices significantly more than the effective prices they had paid to acquire the shares, and then used the subscription shares to settle their short sales.

[8] There was no public disclosure of the alleged scheme until November 26, 2018, when the BC Securities Commission (the "Commission") issued a news release (the "BCSC News Release"), announcing that it was investigating the scheme, and a Notice of Hearing and Temporary Order (the "Temporary Order") that applied to the Issuers and most of the purported consultants.

[9] The plaintiffs and each member of the proposed class, acquired securities in one of the Issuers after the Issuer announced it had arranged one of the private placements, and before the Commission revealed the general nature of the scheme on November 26, 2018.

[10] The scheme allegedly benefitted the Issuers by enabling them to retain a portion of the private placement proceeds, while falsely informing the market, including the plaintiffs and class members, that there was over-subscribed investor

interest in the Issuers, and that the Issuers had greater capital for use in their operations than was truly the case.

[11] The scheme allegedly damaged the plaintiffs and class members because they claim they either acquired shares in the Issuers that they would otherwise never have purchased, or acquired those shares at a price higher than they would have paid, if the scheme had never been implemented or had been fully and fairly disclosed.

[12] The plaintiffs submit the Issuers' alleged misrepresentations enabled the subscribing purported consultants to sell large volumes of subscription shares in the secondary market in short periods of time, at prices less than the disclosed purchase price, or to use subscription shares to cover secondary market short selling of their private placement allocations, and thus earn a substantial profit at the expense of the plaintiffs and class members. The purported consultants' conduct of selling also allegedly damaged the plaintiffs and class members by causing the trading prices for the Issuers' shares to fall significantly. The secondary market trading price of each Issuer's shares, in the ten days after the disclosure of the scheme, was substantially less than the price the plaintiffs and class members paid for the shares they acquired during the Class Periods.

The defendants subject to this application for certification

[13] The defendants, in the action, are organized into the following four groups (some defendants are in multiple groups, because those defendants are alleged to have participated in the scheme in multiple capacities). For the purposes of this application, they are as follows:

a) The "Defendant Issuers": BLOK, Cryptobloc, Green Corp., Marapharm and New Point.

b) The "Issuer Officers and Directors" refers to the defendants that directed or controlled the Defendant Issuers and other named defendants at the relevant times. This group for the purposes of this application is: David

Alexander, Brian Biles, Bryn Gardener-Evans, James Hyland, Glenn Little, Kenneth Clifford Phillippe, Slawomir Smulewicz, Neil William Stevenson-Moore and Michael Young.

c) The "Purported Consultants" refers to the defendants which the plaintiffs allege participated in the scheme with the Defendant Issuers and other defendants, by either (i) subscribing to shares in an Issuer's private placement and receiving lump-sum consulting fees in connection with the private placement or (ii) entering into consulting agreements with an Issuer, and receiving consulting fees, in connection with the private placement without also subscribing to shares. This group for the purposes of this application is: 1053345 B.C. Ltd., 10X Capital, 1140258 B.C. Ltd., 1153307 B.C. Ltd., 727 Capital, Asahi Capital Corp., Asiatic Management Consultants Ltd. (Nev.), Bertho Holdings Ltd., Detona Capital Corp., Natasha Jon Emami, Escher Invest SA, Saman Eskarandi, Essos Corporate Services Inc., Simran Singh Gill, Haight-Ashbury Media Consultants Ltd., Hunton Advisory Ltd., International Canyon Holdings Ltd., Jarman Capital Inc., JCN Capital Corp., Kendl Capital Limited, Keir Paul MacPherson, Northwest Marketing and Management Inc. ("Northwest"), Paddock, Rockshore Advisors Ltd., Sway Capital Corp., Tavistock Capital Corp., Danilen Villanueva and Viral Stocks Inc.

d) The "Purported Consultants Officers and Directors" refers to the defendants the plaintiffs allege directed or controlled the corporate Purported Consultants, at the material times. For the purposes of this application, these defendants are the following defendants: Robert Abenante, Arlene Victoria Alexander, Jatinder Singh Bal, John Bevilacqua, Robert William Boswell, David Raymond Duggan, Scott Jason Jarman, Robert John Lawrence, Mawji, Paddock, Ashkan Shahrokhi, Wilson Su, Von Rowell Torres, Denise Trainor, Russell Grant Van Skiver, Danilen Villanueva and Randy White.

The claims

[14] The plaintiffs assert the following causes of action on their own behalf and on behalf of the putative class members:

a) Unlawful means conspiracy:

i. The plaintiffs claim damages for unlawful means conspiracy against the Purported Consultants and the Defendant Issuers. The plaintiffs allege that the scheme was dishonest, deceitful and deceptive, and constituted a fraud on the market for the Issuers' shares, contrary to s. 380(1)(a) and (2) of the *Criminal Code*, R.S.C., 1985, c. C-46 [*Criminal Code*] and conduct resulting in or contributing to a misleading appearance of trading activity or insider trading, contrary to ss. 57 and 57.2 of the *Securities Act*, R.C.B.C. 1996, c. 418 [*Securities Act*].

ii. Alternatively, the plaintiffs seek disgorgement of the benefit the Purported Consultants, or some of them, obtained as a result of their tortious conduct, as an alternative remedy for the tort of conspiracy. The plaintiffs allege that, as a result of the scheme, the Purported Consultants who acquired shares in the private placements earned a substantial profit from the sale or short sale of those shares, at the expense of the plaintiffs and the class.

iii. The plaintiffs seek declarations that each of the Purported Consultant Officers and Directors are personally liable for the acts carried out in the unlawful conspiracy by the Purported Consultant for which they acted as officer or director, and that each of the Issuer Officers and Directors are personally liable for the acts carried out in the unlawful conspiracy by the Defendant Issuer for which they acted as officer or director.

b) Statutory claims for secondary market misrepresentations, pursuant to ss. 140.3 and 140.5 of the *Securities Act*, seeking statutory damages against the Defendant Issuers and the Issuer Officers and Directors; and

c) Fraudulent misrepresentation or, in the alternative, negligent misrepresentation, seeking damages against the Defendant Issuers and the Issuer Officers and Directors.

Certification under the *CPA*

[15] Section 4(1) of the *CPA* establishes the requirements for the certification of class proceedings. The court must certify the proceeding if the plaintiff establishes that:

> (a) the pleadings disclose a cause of action;
>
> (b) there is an identifiable class of 2 or more persons;
>
> (c) the claims of the class members raise common issues, whether or not those common issues predominate over issues affecting only individual members;
>
> (d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues;
>
> (e) there is a representative plaintiff who
>
> (i) would fairly and adequately represent the interests of the class,
>
> (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
>
> (iii) does not have, on the common issues, an interest that is in conflict with the interests of other class members.

[16] The court must construe the provisions of the *CPA* generously in order to achieve its well-settled objectives of judicial economy, access to justice and behaviour modification. As the Court of Appeal for British Columbia succinctly summarized in *Pro-Sys Consultants Ltd. v. Infineon Technologies AG*, 2009 BCCA 503, leave to appeal ref'd, [2010] S.C.C.A. No. 32:

> [64] The provisions of the *CPA* should be construed generously in order to achieve its objects: judicial economy (by combining similar actions and avoiding unnecessary duplication in fact-finding and legal analysis); access to justice (by spreading litigation costs over a large number of plaintiffs, thereby

> making economical the prosecution of otherwise unaffordable claims); and behavior modification (by deterring wrongdoers and potential wrongdoers through disabusing them of the assumption that minor but widespread harm will not result in litigation): *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46, [2001] 2 S.C.R. 534 at paras. 26-29 [*Western Canadian Shopping Centres*]; *Hollick v. Toronto (City)*, 2001 SCC 68, [2001] 3 S.C.R. 158 at para. 15 [*Hollick*].

[17] Certification is a procedural step that "is decidedly not meant to be a test of the merits of the action": *Hollick v. Toronto (City)*, 2001 SCC 68 at para. 16. The certification stage focuses on the form of the action; the question "is not whether the claim is likely to succeed, but whether the suit is appropriately prosecuted as a class action": *Hollick* at para. 16; *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 at para. 102 [*Microsoft*]; *Finkel v. Coast Capital Savings Credit Union*, 2017 BCCA 361 at paras. 19–20.

[18] The evidentiary burden on a certification motion is low. The first requirement, that the pleadings disclose a cause of action, is decided solely on the pleadings.

[19] For the remaining requirements, in s. 4(1)(b)–(e), the plaintiffs need only show "some basis in fact" that the requirements are met. Again, this does not involve an assessment of the merits of the action. The purpose of evidence at this stage is to establish a minimum factual basis for the certification criteria, not for the claim itself: *Hollick* at para. 25; *Microsoft* at paras. 99–100; and *Mentor Worldwide LLC v. Bosco*, 2023 BCCA 127 at paras. 33–34 [*Mentor*].

[20] The certification test places the court in the role of a gatekeeper. The court must screen out claims that are not appropriate for resolution as class proceedings, recognizing that the goal of the *CPA* is to be fair to both plaintiffs and defendants and that "it is imperative to have a scrupulous and effective screening process, so that the court does not sacrifice the ultimate goal of a just determination between the parties on the altar of expediency": *Thorburn v. British Columbia (Public Safety and Attorney General)*, 2012 BCSC 1585 at para. 117, aff'd 2013 BCCA 480. See also *676083 B.C. Ltd. v. Revolution Resource Recovery Inc.*, 2021 BCCA 85 at para. 31 and *Pro-Sys* at para. 103.

[21] Class proceedings can impose unnecessary burdens on the parties and the courts, and "the process may be seen as an extortion through the exercise of the power of strength in numbers": *Sun-Rype Products Ltd. v. Archer Daniels Midland Company*, 2010 BCSC 922 at para. 18, rev'd on other grounds 2011 BCCA 187, rev'd in part 2013 SCC 58.

Causes of action

[22] The first requirement for certification under s. 4(1) is that the pleadings disclose a cause of action. The court must assess this requirement on the same standard that applies to an application to strike pleadings under R. 9-5(1)(a) of the *Supreme Court Civil Rules*, B.C. Reg 168/2009—that is, "whether, assuming the pleaded facts are true, it is plain and obvious the action cannot succeed": *Finkel* at para. 16. In other words, the court can only refuse to certify an action on the basis of failing to meet the requirement of s. 4(1)(a) if, based solely on the pleadings, the claim has no reasonable prospect of success: *Situmorang v. Google, LLC*, 2024 BCCA 9 at para. 54, citing *Pearce v. 4 Pillars Consulting Group Inc.*, 2021 BCCA 198.

[23] In assessing the pleadings, the court must read the claim "generously, and accommodate inadequacies that are merely the result of drafting deficiencies": *Situmorang* at para. 55, citing *FORCOMP Forestry Consulting Ltd. v. British Columbia*, 2021 BCCA 465 at para. 22 [*FORCOMP*], leave to appeal to SCC ref'd, 40051 (30 June 2022). The fact that a claim is novel or unsettled at law is not a bar to certification, nor is the court obligated to permit such claims to proceed. Rather, the court must consider whether, when the facts pleaded are taken as true, it would recognize the cause of action. If not, the claim is bound to fail and the court must deny certification: *Atlantic Lottery Corp. Inc. v. Babstock*, 2020 SCC 19 at paras. 18–19 [*Atlantic Lottery*]; *Pearce* at para. 56.

Unlawful means conspiracy

[24] The plaintiffs seek damages for unlawful conspiracy against the Purported Consultants and the Defendant Issuers, as set out at para. 302 of their further amended notice of civil claim ("FANCC").

[25] The Court of Appeal summarized the elements of the tort of civil conspiracy in *Can-Dive Services Ltd. v. Pacific Coast Energy Corp*. (1993), 96 B.C.L.R. (2d) 156, 1993 CanLII 6870 at para. 5 [*Can-Dive*] as follows:

> [4] According to *Canada Cement LaFarge v. B.C. Lightweight Aggregate*, [1983] 1 S.C.R. 452, at pp. 471-2, the tort of conspiracy exists if:
>
> (1) whether the means used by the defendants are lawful or unlawful, the predominant purpose of the defendants' conduct is to cause injury to the plaintiff; or,
>
> (2) where the conduct of the defendants is unlawful, the conduct is directed towards the plaintiff (alone or together with others), and the defendants should know in the circumstances that injury to the plaintiff is likely to and does result.
>
> [5] Accordingly, the following elements must be proved:
>
> 1. an agreement between two or more persons;
> 2. concerted action taken pursuant to the agreement;
> 3. (i) if the action is lawful, there must be evidence that the conspirators intended to cause damage to the plaintiff;
>
> (ii) if the action is unlawful, there must at least be evidence that the conspirators knew or ought to have known that their action would injure the plaintiff (i.e., constructive intent);
>
> 4. actual damage suffered by the plaintiff.

[26] Pleadings alleging conspiracy must be as specific as possible, having regard to the scope of information that is reasonably available to the plaintiffs: *Can-Dive* at para. 9; *Watson v. Bank of America Corporation*, 2015 BCCA 362 at paras. 132–133. In claims of conspiracy, the existence of the agreement is often inferred from circumstantial evidence because direct evidence of an agreement is rarely available: *FORCOMP* at para. 54.

[27] Before me, the plaintiffs more specifically allege that each of the Purported Consultants and Defendant Issuers engaged in unlawful means conspiracy.

1. An agreement between two or more persons

[28] The FANCC alleges that, in or around January 2018, the defendants Jackson, Liu, Paddock and Mawji conceived of and agreed to participate in a scheme whereby certain of the Purported Consultants would subscribe to shares in an Issuer's private placement, on the following terms:

a) shortly before or contemporaneously with the private placement, the Issuer would enter into consulting agreements with the Purported Consultants who were acquiring shares under the private placement as a condition of them doing so, and also with certain other Purported Consultants who were not acquiring shares under the private placement, as a further condition of the participation in the private placement of the Purported Consultants who were acquiring shares;

b) the consulting agreements entered into with the Issuers would provide for payment of lump-sum consultant fees to the Purported Consultants who entered in the consulting agreements, and it was a further condition of the participation in the private placement of the Purported Consultants who were acquiring shares that all the fees payable under all the consulting agreements would be paid from the proceeds of the private placement upon their receipt or on the closing of the private placement or shortly thereafter;

c) on or before the closing of the private placement, the Purported Consultants who were acquiring shares under the private placement would pay an amount to the Issuer for those shares at the price per share publicly disclosed by the Issuer to be the purchase price for shares issued under the private placement (the "Disclosed Share Price");

d) the Issuers distributed the shares to Purported Consultants who were acquiring them under the private placement pursuant to the consultant exemption to the prospectus requirement in s. 2.24 of the Canadian Securities Administrators' National Instrument 45-106 Prospectus Exemption (the "Consultant Exemption");

e) on or before private placement closed, or shortly thereafter, the Issuer paid the lump-sum consultant fees payable under the consulting agreement to the Purported Consultants who entered into those agreements from the proceeds of the private placement; and

f) the total amount paid to the Purported Consultants under the consulting agreements consisted of a significant portion, and in some cases, substantially all of the proceeds of the private placement.

[29] As alleged, the predominant purpose of the scheme was to maintain the share price of each Issuer, through the deception that each private placement had resulted in significant capital financing for the Issuer, and to enable the Purported Consultants to profit from that deception, at the expense of the plaintiffs and class members.

[30] The FANCC pleads that Jackson, Liu, Paddock and Mawji first implemented the scheme in early February 2018 with the private placement in Kootenay, for which Jackson was, at the time, both a director and the chief financial officer. Jackson, Liu, Paddock and Mawji then allegedly promoted the scheme to the other Purported Consultants and, acting in concert with some of them, arranged for the subsequent private placements to be carried out pursuant to the scheme.

[31] Each of the other Purported Consultants agreed to join the scheme, the FANCC alleges, either when they (i) entered into a consulting agreement with an Issuer and obtained shares in that Issuer as part of one of the private placements in the scheme, or (ii) entered into a consulting agreement with an Issuer as part of the private placement transaction, but did not acquire shares in the Issuer. For each of the Purported Consultants, the FANCC sets out, in as much detail as possible, when each of the Purported Consultants is alleged to have agreed to participate in the scheme, the private placement in relation to which they agreed to participate and how they evidenced that agreement.

[32] The claim alleges that each of the Defendant Issuers became a party to the conspiracy when they agreed to undertake a private placement in accordance with the terms of the scheme. For each Defendant Issuer, the FANCC describes the private placements in question, including the dates on which they were announced and closed and, in some detail, the terms of the agreements with the Purported Consultants.

[33] These allegations assert an overarching conspiracy across the private placements, at least in respect of the four defendants who are alleged to have conceived of the scheme and arranged for its implementation in the various private placements.

[34] The fact that the scheme ultimately involved 12 different private placements, with some involving different participants, does not change the nature of the alleged overarching conspiracy into 12 separate conspiracies. As alleged, the scheme expanded as the series of steps were carried out over and over again in the various private placements, sometimes picking up and sometimes leaving participants as it rolled from Issuer to Issuer. Despite these changes in participants, the plaintiffs claim the predominant purpose of the scheme, as described above, remained the same throughout its implementation across Issuers.

[35] The Purported Consultants and Issuers are linked in the facts as pleaded through their concerted action to carry out the private placement in which they agreed to participate in accordance with the terms of the scheme.

[36] Despite the position of defendants to the contrary, it is not necessary for the plaintiffs to allege and prove that all of the participants knew each other or were aware of all of the details as to how the conspiracy was carried out with other Issuers or were involved in the scheme with all of the Issuers. It is sufficient that each participant was aware of the general nature of the common design and adhered to it: *R. v. Barra*, 2021 ONCA 568 at paras. 179–181.

[37] With regard to the consequences of such participation, it is a settled principle that "[all] participants in a conspiracy are jointly liable for the damages resulting from the conspiracy, regardless of the degree of their participation or the date on which they joined the conspiracy": *Mancinelli v. Royal Bank of Canada*, 2020 ONSC 1646 at para. 141. Whether this principle is somehow circumscribed by a defendant's participation in one or more but not all private placements carried out in the scheme is not an issue that can be resolved on the pleadings, as it cannot be said that it is plain and obvious that the principle expressed in *Mancinelli* does not apply to the conspiracy as it is alleged in the FANCC.

[38] The authorities referred to me by some defendants concerning joint and several liability—namely, *Carcillo v. Canadian Hockey League*, 2023 ONSC 886 and *I.C.B.C. v. Stanley Cup Rioters*, 2016 BCSC 1108—are not applicable to this application as those cases involved attempts to impose collective liability in the absence of any allegation of conspiracy: *Carcillo* at para. 276; and *Stanley Cup Rioters* at para. 32. In *Carcillo*, Justice Perell noted that, in contrast to the claim in that case, collective liability is imposed in cases of conspiracy based on the personal fault of each party "who agrees to join the conspiracy and who actually contributes to the planning, financing, and execution of the conspiracy", at para. 276. This is the premise of the plaintiffs' claim of joint and several liability in this case, and it cannot be said, on the basis of the allegations in the FANCC, that this claim is bound to fail.

2. Unlawful actions taken pursuant to the agreement

[39] The unlawful means element of the tort is met if the defendants engage in conduct that is wrong in law: *Mancinelli* at para. 138.

[40] Conduct that is wrong in law, for the purposes of the tort of civil conspiracy, can encompass conduct that is actionable as a matter of private law, such as deceit. It can also involve illegal conduct that is not actionable at private law, such as criminal conduct, quasi-criminal conduct or breach of a statute: *XY, LLC v. Zhu*, 2013 BCCA 352 at paras. 49–50, citing *Agribrands Purina Canada Inc. v.*

Kasamekas, 2011 ONCA 460 at paras. 36–38, leave to appeal to SCC ref'd, 35555 (20 February 2014); and *Pioneer Corp. v. Godfrey*, 2019 SCC 42 at para. 83.

[41] Where the pleadings allege that certain means are unlawful, the court is to accept those pleadings as factual. The pleadings stage is not the time to assess whether each alleged act was unlawful in the circumstances: *H.M.B. Holdings Limited v. Replay Resorts Inc.*, 2021 BCCA 142 at para. 80.

[42] The statement of facts section of the FANCC sets out—first in summary and then in chronological order for each private placement—the actions allegedly taken by each of the Defendant Issuers and Purported Consultants in furtherance of the agreed upon scheme.

[43] Briefly, the FANCC alleges that each of the Defendant Issuers, in furtherance of the scheme, (i) entered into the sham consulting agreements as a condition for the subscribing Purported Consultants' participation in their respective private placements, (ii) issued shares to the subscribing Purported Consultants, (iii) contemporaneously repaid a substantial portion of the private placement proceeds to the Purported Consultants in lump-sum payments and (iv) misrepresented the material facts of the private placement in various public documents. Some of the Defendant Issuers, namely Kootenay, Affinor and Cryptobloc, also allegedly misrepresented the reason for the increased trading activity in their shares following the private placement.

[44] In relation to the Purported Consultants, the FANCC alleges that (i) each Purported Consultant entered into one or more sham consulting agreements with one or more Issuers, which were a condition for the subscribing Purported Consultants' participation in the respective private placements, (ii) certain of the Purported Consultants subscribed to shares in one or more of the private placements, (iii) contemporaneously with the closing of each private placement, the Purported Consultants who had entered into consulting agreements with the Issuer received lump-sump payments from the proceeds of the private placement, the payment of which was a condition for the subscribing Purported Consultants'

participation in the private placement and (iv) in the days and weeks following each private placement, some or all of the subscribing Purported Consultants sold or short sold the Issuer's shares—or transferred the shares to other Purported Consultants who then sold or short sold the shares—in the secondary market at prices that were less than the disclosed purchase price, but significantly above the effective price the Purported Consultants had actually paid for the shares, when the contemporaneously returned payments are taken into account. At the time the subscribing Purported Consultants engaged in the share transactions, they each knew that the Issuer's representations regarding the private placement were false, in that they omitted material facts about the private placement.

[45] The FANCC asserts multiple different bases for the unlawfulness of the actions taken by the Purported Consultants and Defendant Issuers.

[46] The FANCC alleges that the consulting agreements were a sham and false pretence, in that neither the Issuers nor the Purported Consultants had any expectation services of any real value would be provided, and no such services were provided. Therefore, as set out, the Purported Consultants had no right to receive, and the Issuers had no right to issue, the shares pursuant to the Consultant Exemption, which defines a "consultant" at s. 2.22 as a person that:

> (a) is engaged to provide services to the issuer or a related entity of the issuer, other than services provided in relation to a distribution,
>
> (b) provides the services under a written contract with the issuer or a related entity of the issuer, and
>
> (c) spends or will spend a significant amount of time and attention on the affairs and business of the issuer or a related entity of the issuer.

[47] The FANCC alleges that, in furtherance of the conspiracy, for each of the private placements, the relevant Issuer returned a substantial portion of the proceeds to the Purported Consultants as lump-sum consulting fee payments. The plaintiffs claim the Purported Consultants therefore knew that they had been issued shares that had not been fully paid. The issuance and receipt of the shares in this manner was unlawful because, the FANCC alleges, statutory provisions prohibit the issuance of shares for future services. Section 64(2) of the *Business Corporations*

Act, S.B.C. 2002, c. 57, for example, states that "[a] share must not be issued until it is fully paid", and then provides in s. 64(3) that:

> 64 (3) A share is fully paid when
>
> (a) consideration is provided to the company for the issue of the share by one or more of the following:
>
> (i) past services performed for the company;
>
> (ii) property;
>
> (iii) money, and
>
> (b) the value of the consideration received by the company equals or exceeds the issue price set for the share under section 63.

(See also *Canada Business Corporation Act*, R.S.C. 1985, c. C-44, s. 25(3) and *Union Bank v. Morris*, [1900] O.R. No. 396 (C.A.), appeal to SCC ref'd, 31 S.C.R. 594.)

[48] The FANCC also alleges that, in furtherance of the conspiracy, the Issuers made misrepresentations regarding the private placements, with the knowledge and with the agreement and acquiescence of the Purported Consultants. These misrepresentations were, the FANCC alleges, unlawful both pursuant to the *Securities Act* and at common law as fraudulent or, in the alternative, negligent misrepresentations.

[49] The FANCC further alleges that the Purported Consultants who acquired shares in one or more of the private placements sold or short sold all of more of those shares for a significant profit, while knowing that the material facts of the private placements had not been disclosed to the market. That conduct was, the FANCC alleges, dishonest, deceitful and deceptive, as well as contrary to the *Securities Act*. As persons engaged in, or proposing to engage in, business or professional activity with an issuer, and who knew material facts with respect to the issuers, the Purported Consultants were in a "special relationship" with each Issuer within the meaning of s. 3 of the *Securities Act*, which states, in part:

> 3 For the purposes of sections 57.2 and 136, a person is in a special relationship with an issuer if the person

> …
>
> (b) has engaged in, is engaging in or is considering or proposing to engage in any business or professional activity with or on behalf of the issuer or with or on behalf of a person described in paragraph (a) (ii) or (iii), [or]
>
> …
>
> (d) knows of a material fact or of a material change with respect to the issuer, having acquired the knowledge while in a relationship described in paragraph (a), (b) or (c) with the issuer

[50] The Purported Consultants' sales of each Issuer's shares, while in the special relationship with the Issuer, and while knowing material facts that had not been disclosed, allegedly contravened the insider trading prohibitions set out in s. 57.2 of the *Securities Act*, which states, in part:

> 57.2 (2) A person must not enter into a transaction involving a security of an issuer, or a related financial instrument of a security of an issuer, if the person
>
> (a) is in a special relationship with the issuer, and
>
> (b) knows of a material fact or material change with respect to the issuer, which material fact or material change has not been generally disclosed.

[51] The plaintiffs also allege that each of the above acts contravened, individually and collectively, the prohibition in the *Securities Act* against manipulation and fraud in the securities market. Section 57 states, in part:

> 57 (1) A person must not, directly or indirectly, engage in or participate in conduct relating to a security, derivative or underlying interest of a derivative if the person knows, or reasonably should know, that the conduct
>
> (a) results in or contributes to a misleading appearance of trading activity in, or an artificial price for, a security,
>
> (b) contributes to a fraud perpetrated by another person, or contributes to another person's attempt to commit a fraud, relating to a security, derivative or underlying interest, or
>
> (c) results in or contributes to a misleading appearance of trading activity in, or an artificial price for, a derivative or an underlying interest of a derivative.
>
> (2) A person must not, in relation to a security, derivative or benchmark,
>
> (a) perpetrate a fraud, or
>
> (b) attempt to perpetrate a fraud.

[52] Assuming the facts alleged in the FANCC are true, the allegation that each of the Purported Consultants and the Issuers engaged in conduct that resulted in a misleading appearance of trading in, or an artificial price for, a security, or either perpetrated a fraud or contributed to a fraud perpetrated by another person, relating to a security, contrary to s. 57, is not bound to fail.

[53] Similarly, the FANCC alleges that the actions taken by the Defendant Issuers and Purported Consultants in furtherance of the scheme amounted, individually and collectively, to criminal conduct, in contravention of both the fraud and fraud affecting the public market offences set out in s. 380(1)(a) and (2) of the *Criminal Code*:

> 380 (1) Every one who, by deceit, falsehood or other fraudulent means, whether or not it is a false pretence within the meaning of this Act, defrauds the public or any person, whether ascertained or not, of any property, money or valuable security or any service,
>
> (a) is guilty of an indictable offence and liable to a term of imprisonment not exceeding fourteen years, where the subject-matter of the offence is a testamentary instrument or the value of the subject-matter of the offence exceeds five thousand dollars;
>
> …
>
> (2) Every one who, by deceit, falsehood or other fraudulent means, whether or not it is a false pretence within the meaning of this Act, with intent to defraud, affects the public market price of stocks, shares, merchandise or anything that is offered for sale to the public is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.

[54] Assuming, as required, that all of the facts alleged in the FANCC are true, it is not plain and obvious to me that the claim that each of the Purported Consultants and Issuers engaged in unlawful acts in furtherance of the agreed upon scheme is bound to fail.

3. Knowledge that damage would result

[55] The plaintiffs allege that the scheme was directed towards the plaintiffs and class members, and the Purported Consultants and Defendant Issuers knew that their actions would result in harm to the plaintiffs and class members.

[56] Specifically, the FANCC alleges the following:

a) Neither the Purported Consultants nor the Defendant Issuers had any *bona fide* expectation that services of any real value would be provided under the consulting agreements. The consulting agreements were a sham and were entered into in order to provide a false pretence (i) for the Issuers to use the Consultant Exemption to distribute shares to the Purported Consultants, (ii) for the Issuers to repay part of the purchase price to the Purported Consultants and (iii) for the Issuers to state they had received the full proceeds from the private placements, when it was always understood and intended, by each of the Issuers and the Purported Consultants who acquired shares, that part of the purchase price would be returned to the Purported Consultants and would never be available to the Issuer for any other purpose;

b) Each of the Defendant Issuers and the Purported Consultants who participated in the private placements knew that the true facts regarding the private placements were not disclosed to the investing public (including the plaintiffs and class members), and knew that the Issuers' representations regarding the private placement were false; and

c) While knowing that the material facts had either been misrepresented or not been disclosed to the market, the Purported Consultants who acquired shares in the Issuers in the private placements sold or short sold most or all of the Issuers' shares, or transferred their shares to other Purported Consultants to be sold or short sold, in the secondary market (i.e. to the plaintiffs and class members) at prices that were discounted from the Disclosed Share Price, and significantly in excess of the effective price the Purported Consultants had actually paid for the shares.

[57] As alleged, the unlawful conspiracy was directed at the plaintiffs and class members as the purchasers of shares in the Issuers after each private placement was carried out. Each of the Issuers and the Purported Consultants allegedly knew that the plaintiffs and class members, after each private placement, would purchase

shares in each Issuer that the plaintiffs and class members either never would have purchased, or would only have purchased at substantially lower prices, had the conspiracy never been carried out or had the true nature of the private placements been disclosed to the market.

4. Damages suffered

[58] The plaintiffs and class members allegedly suffered actual damages which are causally connected to the conspiracy. The FANCC alleges that the unlawful conspiracy caused loss and damage to the plaintiffs and class members through:

a) The purchase by them of shares or additional shares in the Issuers which they either never would have purchased, or would have only purchased at a lower price, had the unlawful conspiracy and the private placements never been carried out or had the true nature of the private placements been disclosed; and

b) The erosion in the trading price of the shares in an Issuer acquired by the plaintiffs and the class members, resulting from the sale or short sale by the Purported Consultants of the Issuer's shares at prices discounted to the trading price of the shares, but at a substantial profit to the Purported Consultants.

Does the rule in* Foss & Harbottle *bar the claim of conspiracy?

[59] Some defendants submit the plaintiffs' claim in conspiracy is barred by the rule in *Foss v. Harbottle*. Pursuant to the rule, shareholders do not have a claim against a third party for wrongs done to a corporation: *Foss v. Harbottle* (1843), 67 E.R. 189 (U.K.H.L.); *Hercules Management v. Ernst & Young*, [1997] 2 S.C.R. 163, 1997 CanLII 345 at para. 59. They say that such a claim is rightly to be made by the Issuers, if anyone.

[60] In the FANCC, the plaintiffs claim the consulting agreements were a sham, in that neither the Purported Consultants nor the Issuers expected that services of any real value would be provided under them. For the purpose of s. 4(1)(a) of the *CPA*

and assessing whether the claim offends the rule in *Foss v. Harbottle*, this allegation must be taken as true. I do not read the FANCC as asserting a claim against the Purported Consultants for a breach of their consulting agreements with the Issuers.

[61] The plaintiffs are seeking to recover from the Purported Consultants and the Issuers for the fraud on the market for the Issuers' shares carried out by the Purported Consultants and the Issuers. I do not view the rule in *Foss v. Harbottle* as precluding the plaintiffs' claim against the Purported Consultants for that fraud, simply because the fraud was allegedly designed to and resulted in secondary market purchases of shares in the Issuers by the plaintiffs and class members. The loss suffered by them because of these share purchases is not alleged to be a consequence of a wrong done to the Issuers, but rather is the consequence of the fraud on the market carried out by Purported Consultants and the Issuers of which the plaintiffs and class members were the intended victims.

[62] There are allegations asserting the direct connection between the Purported Consultants' action and the harm suffered by the plaintiffs. This avoids the rule in *Foss v. Harbottle*, as the loss is not derivative of any loss suffered by the Issuers and does not involve a claim that properly belongs them. As well, no breach of fiduciary duty owed to any of the corporations involved is alleged as a basis for the plaintiffs' claims.

[63] The rule does not bar the claim.

Conclusion on the claim in conspiracy

[64] I find that the FANCC pleads all of the requisite elements for a claim of unlawful means conspiracy as against each of the Defendant Issuers and Purported Consultants. Assuming all of the pleaded facts are true, it is not plain and obvious that the claim for unlawful means conspiracy is bound to fail.

Disgorgement of profits as an alternative for damages

[65] In the alternative to damages, as against the Purported Consultants, the plaintiffs and class members seek disgorgement of the benefit the Purported Consultants obtained as a result of the unlawful conspiracy.

[66] Disgorgement of profit is a gain-based remedy which may be available as an alternative remedy for certain forms of tortious conduct, which includes deceit. Disgorgement is a remedy, not a standalone cause of action, which should no longer be referred to as "waiver of tort" because the term is confusing: *Atlantic Lottery* at paras. 23–30.

[67] In reviewing the tortious wrongdoing for which disgorgement may be an available remedy in *Atlantic Lottery*, Justice Brown explicitly referred to deceit:

> [36] … While disgorgement for tortious wrongdoing was initially applied only in the context of proprietary torts, including conversion, deceit, and trespass, it found broader application in the late 20th century….

[68] Similarly, in *Reid v. Ford Motor Company et al*, 2006 BCSC 712, Justice Gerow observed, using the now out-dated terminology, that waiver of tort:

> [15] … has been utilized to prevent unjust enrichment and has been applied to property torts such as conversion, trespass and misappropriation of goods or property through deceit, usurpation of office and fraud.

(See also *Amertek Inc. v. Canadian Commercial Corp.* (2003), 229 D.L.R. (4th) 419, 2003 CanLII 49369 (Ont. S.C.J.) at para. 372, rev'd on other grounds 76 O.R. (3d) 241, 2005 CanLII 23220 (C.A.), leave to appeal to SCC ref'd, 31141 (16 February 2006).)

[69] The availability of disgorgement as an alternative remedy for fraud reflects the longstanding principle that fraudulent wrongdoers should not be permitted to retain the profits of their deceit. As the Court of Appeal explained in *Huff v. Price,* (1990), 51 B.C.L.R. (2d) 282, 1990 CanLII 5402 (C.A.) at 8:

> Certainly it is part of the principles applicable to the assessment of damages for fraud or for breach of fiduciary duty to deprive the wrongdoer of the fruits of the fraudulent acts …

[70] Similar reasoning applies when a wrongdoer accumulates profits by way of a civil conspiracy that is implemented through fraudulent and deceitful acts. For example, in *Canadian National Railway Company v. Holmes*, 2022 ONSC 1682 [*Holmes*], one of the defendants, Mr. Holmes, an employee of the plaintiff ("CN"), diverted millions of dollars in CN contracts to companies he secretly owned. The Ontario Superior Court of Justice found Mr. Holmes liable for, among other things, breach of fiduciary duty, breach of confidence and deceit. Mr. Holmes had also diverted the profits from the scheme to his common law spouse, Ms. Flynn, who had assisted in the scheme by serving as director and officer for the various companies. The Court found Ms. Flynn liable for conspiracy, concluding that she had engaged in deceitful conduct to further the scheme, including signing numerous corporate documents with a pseudonym, which attested to her having attended meetings that never occurred: *Holmes* at para. 13. As a remedy, the Court ordered both defendants, and their corporations and trusts, to disgorge the over $10-million profit they had earned as a result of the scheme: *Holmes* at para. 545. Importantly, Ms. Flynn was never an employee of CN and did not owe CN any fiduciary duties, yet she was still ordered to disgorge the profits earned as a result of the conspiracy.

[71] Here, the FANCC discloses a claim for the profits accrued by the Purported Consultants as a result of the tortious conspiracy, as an alternative remedy to damages. The FANCC alleges that the Purported Consultants who subscribed to shares in each private placement earned a significant profit by short selling or selling the subscription shares, often at prices below the Disclosed Share Price, and below the secondary market price of the shares at the time, and always significantly in excess of the effective price the Purported Consultants had actually paid for the shares.

[72] The Purported Consultants allegedly sold, or short sold, those shares while knowing that the material facts of the private placements had not been disclosed to the market, and that the plaintiffs and the class members would not have purchased those shares, or would have purchased them for a significantly lower price, had the

scheme never been carried out or had the true nature of the private placements been disclosed.

[73] The FANCC alleges that the Purported Consultants who acquired shares in the Issuers, as part of the private placements, earned a substantial profit by means of a scheme which was implemented through fraudulent and deceitful acts, by both the Purported Consultants and the Issuers. If proven, it would be unjust to permit the Purported Consultants to retain those profits.

[74] It is not plain and obvious that the claim for disgorgement of those profits, as an alternative remedy for the tortious wrongdoing, is bound to fail.

Personal liability

[75] The plaintiffs and class members seek declarations that:

a) The Purported Consultant Officers and Directors are personally liable for any damages or disgorgement for unlawful conspiracy awarded against the Purported Consultant for which they acted as an officer or director; and

b) The Issuer Officers and Directors are personally liable for any damages for unlawful conspiracy awarded against the Defendant Issuer for which they acted as an officer or director.

[76] Courts have long recognized that when those in control of a company direct the company to do something that is wrong, the individuals as well as the company are responsible for the consequences: *Tracy (Representative ad litem of) v. Instaloans Financial Solution Centres (B.C.) Ltd.*, 2009 BCCA 110 at para. 18.

[77] Further, the court may pierce the corporate veil when those directing the corporation have used it to engage in fraudulent conduct: *Port Coquitlam Building Supplies Ltd. v. 494743 B.C. Ltd.*, 2018 BCSC 2146 at paras. 163–165.

[78] The plaintiffs allege that (i) each of the Purported Consultant Officers and Directors directed and controlled the Purported Consultant for which they acted as an officer or director to commit the acts which the Purported Consultant carried out

in the unlawful conspiracy, and (ii) each of the Purported Consultant Officers and Directors knew that, or were recklessly or wilfully blind to whether, those acts were dishonest, deceitful and deceptive, and contrary to s. 380(1)(a) and (2) of the *Criminal Code* and to ss. 57 or 57.2 of the *Securities Act*.

[79] The claim also alleges that (i) each of the Issuer Officers and Directors directed and controlled the Defendant Issuer for which they acted as an officer or director to commit the acts which the Issuer carried out in the unlawful conspiracy, and (ii) each of the Issuer Officers and Directors knew that, or were recklessly or wilfully blind to whether, those acts were dishonest, deceitful and deceptive, and contrary to s. 380(1)(a) and (2) of the *Criminal Code* and to ss. 57 or 57.2 of the *Securities Act*.

[80] Thus, the FANCC alleges that each of the Purported Consultant Officers and Directors and each of the Issuer Officers and Directors directed their respective corporations to undertake deceitful, unlawful and criminal actions, while either knowing, or being recklessly or wilfully blind to, the deceitful and unlawful nature of those actions.

[81] It is not plain and obvious that the claims for personal liability are bound to fail.

Statutory secondary market liability

[82] The plaintiffs have already obtained leave to pursue their statutory claims for secondary market misrepresentations pursuant to s. 140.3 of the *Securities Act*, as against the Defendant Issuers and their respective Issuer Officers and Directors: *Tietz v. Cryptobloc Technologies Corp.*, 2021 BCSC 2275 [*Leave Decision*], rev'd in part 2022 BCCA 307 [*Leave Appeal*]; *Tietz v. Global Etsimate Capital Corp.*, oral reasons pronounced March 20, 2023.

[83] Given that the leave determination included a judicial finding that the statutory claims have a reasonable chance of succeeding at trial (*Leave Decision* at paras.

52–56; *Leave Appeal* at para. 157), I find the FANCC discloses viable statutory causes of action for misrepresentations on the secondary market.

Fraudulent or negligent misrepresentation

[84] The FANCC pleads causes of action against the Defendant Issuers and their respective Issuer Officers and Directors for fraudulent misrepresentation or, in the alternative, negligent misrepresentation, in relation to the misrepresentations made in the private placement news releases and the Form 9s.

Fraudulent misrepresentation

[85] The Supreme Court of Canada summarized the elements of the tort of fraudulent misrepresentation, or civil fraud, in *Bruno Appliance and Furniture, Inc. v. Hryniak*, 2014 SCC 8 at para. 21 as follows:

a) a false representation made by the defendant;

b) some level of knowledge of the falsehood of the representation on the part of the defendant (whether through knowledge or recklessness);

c) the false representation caused the plaintiff to act; and

d) the plaintiff's actions resulted in a loss.

(See also *Century Services Inc. v. LeRoy*, 2015 BCCA 120 at paras. 24–25.)

[86] The FANCC alleges that each of the Defendant Issuers released, and their respective Issuer Officers and Directors authorized, permitted or acquiesced in the release of, private placement news releases and Form 9s that contained misrepresentations regarding the material facts of the private placements. The claim further alleges that each of the Issuers, and their respective Issuer Officers and Directors, knew, at the time those documents were released or filed, that the misrepresentations were false, or acted with reckless disregard as to whether those misrepresentations were true.

[87] The plaintiffs further allege that the Defendant Issuers made the misrepresentations, and the respective Issuer Officers and Directors authorized, permitted or acquiesced in the release of the misrepresentations, with the intention that the plaintiffs and class members would rely on the misrepresentations in determining whether to purchase shares in the Defendant Issuer, and to induce the plaintiffs and class members to purchase the shares.

[88] Finally, the FANCC alleges that the plaintiffs and class members reasonably relied, directly or indirectly, on the misrepresentations in the news releases and the Form 9s in making their decision to purchase shares in the relevant Issuer. As a result, the plaintiffs and class members suffered a loss because they each purchased shares in the Issuer that they would not have purchased, or would have only purchased for a significantly lesser price, had the private placements never occurred or had the misrepresentations never been made and the true circumstances of the private placements been disclosed.

[89] I find the FANCC pleads all of the required elements for viable claims in fraudulent misrepresentation, against the Defendant Issuers and their Issuer Officers and Directors. As such, it is not plain and obvious that the claim for fraudulent misrepresentation is bound to fail.

Negligent misrepresentation

[90] The elements for a claim in negligent misrepresentation are summarised by the Supreme Court of Canada in *Queen v. Cognos Inc.*, [1993] S.C.R. No. 87, 1993 CanLII 146 at 110:

a) there must be a duty of care based on a “special relationship” between the representor and the representee;

b) the representation in question must be untrue, inaccurate or misleading;

c) the representor must have acted negligently in making said misrepresentation;

d) the representee must have relied, in a reasonable manner, on said negligent misrepresentation; and

e) the reliance must have been detrimental to the representee in the sense that damages resulted.

[91] In relation to the duty of care, it is not plain and obvious that there is no special relationship between issuers and secondary market purchasers, or between the participating officers and directors who approved the representations and the secondary market purchasers, when the secondary market purchasers' reliance on the representations was both foreseeable and reasonable in the circumstances: *Dugal v. Manulife Financial*, 2013 ONSC 4083 at para. 83, leave to appeal ref'd 2014 ONSC 1347; *Silver v. Imax Corporation* (2009), 86 C.P.C. (6th) 273, 2009 CanLII 72334 (Ont. S.C.J.) at paras. 25–55.

[92] Here, the FANCC alleges at para. 334 that each of the Issuer Officers and Directors knew and understood, at the time the private placement news releases and the Form 9s were released, that those documents were released to comply with the Defendant Issuers' disclosure obligations, and that those documents were released with the intention they would be reasonably relied upon by the plaintiffs and class members in making their decision to invest in the Defendant Issuers.

[93] As the Ontario Superior Court of Justice stated in *Silver*, in relation to the Ontario equivalent of the *Securities Act*, "[t]he continuous disclosure obligations of a reporting issuer are prescribed by and under the OSA, and the intended recipients of such disclosure are the investing public": at para. 47.

[94] The FANCC also alleges the Issuer Officers and Directors knew and understood that the information in the private placement news releases and Form 9s would be, and was, incorporated into the trading price of the Defendant Issuers' shares.

[95] Given these pleadings, it is not plain and obvious that the Defendant Issuers and their respective Issuer Officers and Directors did not owe the plaintiffs and the

class members, as the intended recipients of the misrepresentations, a duty of care to take reasonable steps to ensure the representations were accurate.

[96] The FANCC further alleges that each of the Issuer Officers and Directors breached the duty of care by:

a) Failing to review the consulting agreements used to purportedly justify the use of the Consultant Exemption to distribute shares under the private placements; and

b) Failing to require that the private placement news releases and Form 9s disclose:

i. the consulting agreements the Purported Consultants entered into contemporaneously with and as a condition of the private placement;

ii. the amount of the proceeds of the private placement which would be immediately used to pay lump-sum consulting fees under the consulting agreements;

iii. the impact of those payments on the effective share price paid by the Purported Consultants who acquired shares in the private placement; and

iv. the true amount of the proceeds of the private placement available to the Defendant Issuer to use as working capital.

[97] The FANCC goes on to allege that if the Issuer Officers and Directors had not breached their duty of care, the private placements in each Defendant Issuer would either not have been carried out, or the misrepresentations in the private placement news releases and Form 9s would not have been made.

[98] The FANCC goes on to allege that the plaintiffs and class members reasonably relied, directly or indirectly, on the misrepresentations in the private placement news releases and the Form 9s in making the decision to acquire shares

in the Defendant Issuers, and that each of the plaintiffs and class members suffered loss as a result.

[99] Given these pleadings, it is not plain and obvious that the claim for negligent misrepresentation, against the Defendant Issuers and their respective Issuer Officers and Directors, in relation to the misrepresentations in the private placement news releases and Form 9s, is bound to fail.

Admissibility of evidence

Costin Affidavit #1

[100] Included in the evidentiary record for consideration on the application is a partially redacted affidavit sworn by a lead investigator for the Commission, Alan Costin, on November 21, 2018 (“Costin Affidavit #1”). This affidavit, prepared for use by the Commission, sets out the information Mr. Costin gathered investigating the scheme for the Commission. The plaintiffs downloaded the affidavit from a link provided by the Commission and attached it as Exhibit A to the Affidavit #1 of Joanne Hung, sworn December 8, 2022.

[101] The appearing defendants submitted their position on the application does not turn on whether the affidavit is admitted into evidence or not, although concerns were raised as to the admissibility and reliability of the hearsay content both in the body of the affidavit as an exhibit itself and the documents exhibited to Mr. Costin’s affidavit.

[102] Many of the paragraphs which are objected to by some defendants are not referenced by the plaintiffs in their certification argument, and the plaintiffs have no objection to the exclusion of these paragraphs from the evidentiary record. These are paragraphs 8, 9, 29, 30, 32, 39–41, 62, 68(c) and (d), 84, 92, 100, 107, 209, 211, 216, 218 and 221. The plaintiffs also have no objection to the exclusion from the record of subparagraphs 13(e), 13(g), 13(p) and 13(dd). The first three subparagraphs refer to information provided to Mr. Costin by Konstantin Lichtenwald about some of the defendants. The plaintiffs have not expressly referenced that

information and have no objection to the exclusion of these subparagraphs. Subparagraph 13(dd) is referenced in the plaintiffs' argument, as it contains information obtained about the relationship between defendants Mawji, Denise Trainor, Rufiza Esmail and Northwest that Mr. Costin obtained from a review of the transcripts of evidence given by Mawji and Trainor in compelled interviews with the Alberta Securities Commission.

[103] While the plaintiffs do not accept that this is evidence which could not be included in the evidentiary record, they are content not to rely on this evidence. As such, I will not make a decision on the admissibility of the portions of Costin Affidavit #1 referred to in the above paragraph.

[104] The admissibility of the Costin Affidavit #1 was one subject of appeal in the *Leave Appeal*. The Court of Appeal held that Mr. Costin's evidence that the records attached to Costin Affidavit #1, including some consulting agreements, were obtained from the Issuers or their counsel is admissible pursuant to R. 22-2(13), which allows for hearsay evidence on an interlocutory application, such as the application for leave under the *Securities Act*: *Leave Appeal* at paras. 90–91, 105–112.

[105] I find that just as the records attached to Costin Affidavit #1 were admissible on the leave application to show a reasonable possibility of success for the statutory secondary market misrepresentation claims asserted by the plaintiffs, those records are admissible here to show some basis in fact for the common issues arising out of the claims the plaintiffs seek to have certified: *Liptrot v. Vancouver College Limited*, 2022 BCSC 1851 at para 39.

[106] I agree with the plaintiffs that it would be a strange result if these records were admissible on the merits-based reasonable possibility of success test applied on the statutory leave application, but somehow are not admissible on the lower standard of some basis in fact for the common issues, which does not involve any assessment of the merits of the claim: *MM Fund v. Americas Gold and Silver Corp*., 2022 ONSC 6515 at para. 57.

[107] With regard to objections to para. 84 of Costin Affidavit #1, in which Mr. Costin sets out a summary of his telephone conversation in September 2018 with the defendant Michael Young, then the CEO of the defendant Green 2 Blue, I find that this is a record by Mr. Costin of an admission made by Young and Green 2 Blue and is admissible on that basis.

[108] With regard to objections to paras. 49 and 50, in which Mr. Costin describes both the software system he used to obtain electronic trading records and the reports generated by that software, some defendants submit this is improper opinion evidence. However, Mr. Costin is not expressing an opinion but rather is stating his personal knowledge and understanding of how the software works and the kind of reports it produces. This evidence is properly admissible pursuant to R. 22-2(13).

[109] Costin Affidavit #1 is admissible for the purposes of this interlocutory application and I will consider the content referred to by the plaintiffs when examining the evidentiary record.

New evidence

[110] On March 13, 2024, I granted leave to the plaintiffs to file an affidavit exhibiting two orders with related settlement agreements made by the Commission on February 21 and 24, 2024. The settlement agreements contain admissions by defendants in this action concerning the alleged scheme. I provided the parties with the opportunity to provide supplemental submissions on the treatment of this evidence.

The Liu Commission Settlement Agreement

[111] An order of the Commission dated February 21, 2024, approving a settlement agreement (the “Liu Commission Settlement Agreement”) with Liu, Lukor Capital Corp. and Asiatic Management Consultants Ltd. (collectively, the “Liu Defendants”) dated February 20, 2024, and a copy of that settlement agreement, were published by the Commission at 2024 BCSECCOM 73 and 2024 BCSECCOM 74,

respectively. The agreed statements of facts in the settlement includes admissions that:

a) The Liu Defendants participated in a scheme in which individuals and companies entered into consulting agreements with certain Canadian Securities Exchange (“CSE”) Issuers and received prepaid consulting fees from the Issuers. The consultants performed little or no consulting work. Some consultants purchased free trading shares of the Issuers through private placements, for which placements the issuers relied on the Consultant Exemption. The issuers retained only a portion of the funds raised because they paid most of the private placement funds to the consultants as prepaid consulting fees shortly before or after the private placements and the places, in most instances, sold their shares shortly after the purchase, generally below the private placement price;

b) Liu promoted the scheme to several Issuers. Liu and Lukor Capital Corp. (“Lukor”) participated as placees for a total of $5,635,000 worth of units in three private placements by two Issuers. In each instance, Liu and Lukor received free trading shares because of the Consultant Exemption and sold the shares either before they received them or shortly after receiving them. Liu obtained free trading shares from other places and sold them shortly after receiving them;

c) In additional to obtaining private placements shares in their own names, the Liu Defendants also paid $12,370,500 to other places who used the funds to purchase other private placement shares as part of the scheme; and

d) One or more of the Liu Defendants directly received consulting fees which collectively totaled $4,543,750 from all nine issuers. One or more of the Liu Defendants or other entities associated to Liu indirectly received additional amounts from other consultants.

[112] The Liu Commission Settlement Agreement is the first admission by any defendant that most of the private placements at issue were carried out as part of the scheme alleged by the plaintiffs. The "scheme" as defined in the settlement agreement is substantially similar to the scheme alleged in the FANCC.

[113] This settlement agreement is also the first admission by one of the Purported Consultants that the consultants who entered into consulting agreements with the Defendant Issuers as part of the scheme and received prepaid consulting fees from the private placement funds performed "little or no consulting work". The Liu Defendants collectively entered into consulting agreements with each of the Defendant Issuers.

[114] The Liu Defendants also admit that Liu promoted the scheme to several Issuers and paid over $12 million to other places who used the funds to purchase other private placement shares as part of the scheme.

The Jackson Commission Settlement Agreement

[115] An Order of the Commission dated February 26, 2024, approving a settlement agreement (the "Jackson Commission Settlement Agreement") with Jackson, BridgeMark Financial Corp. ("Bridgemark") and Jackson & Company Professional Corp. (collectively, the "Jackson Defendants") dated March 1, 2024, and a copy of that settlement agreement, were published by the Commission at 2024 BCSECCOM 81 and 2024 BCSECCOM 82, respectively. The agreed statement of facts in the settlement includes admissions that:

a) As part of a scheme, nine issuers publicly announced gross proceeds of $50,854,671 through 12 private placements between February and August 2018, but only retained $7,892,722 of that amount. Jackson met with some of the Issuers to explain the Consultant Exemption. Jackson facilitated the delivery of paperwork, including subscription agreements, consulting contracts and private placement cheques for some of the Issuers; and

b) BridgeMark participated as a placee for a total of $2,000,002 worth of units in a private placement by one issuer. BridgeMark received free trading shares because of the Consultant Exemption and sold the shares shortly before and after it received them. BridgeMark and Jackson & Company Professional Corp. acted as consultants for eight issuers for gross proceeds of $3,358,750.

[116] I agree with the settled law in Ontario that the admissions of fact in settlement agreements with securities regulators, despite inclusion of a limiting use clause, are admissible in subsequent civil proceedings: *Fischer v. IG Investment Management*, 2023 ONSC 915 at para. 194. While they may be inadmissible at trial against any defendants who are not parties to the agreements, this does not preclude their use in an application for certification to show some basis in fact for the plaintiffs' proposed common issues relating to the conspiracy: *Leave Appeal* at paras. 106–112.

Identifiable class

[117] The second requirement for certification as a class proceeding is that there be an identifiable class of two or more persons: *CPA*, s. 4(1)(b). The principles governing this requirement are summarized in *Jiang v. Peoples Trust Company*, 2017 BCCA 119 at para. 82:

> • the purposes of the identifiable class requirement are to determine who is entitled to notice, who is entitled to relief, and who is bound by the final judgment;
>
> • the class must be defined with reference to objective criteria that do not depend on the merits of the claim;
>
> • the class definition must bear a rational relationship to the common issues — it should not be unnecessarily broad, but nor should it arbitrarily exclude potential class members; and
>
> • the evidence adduced by the plaintiff must be such that it establishes some basis in fact that at least two persons could self-identify as class members and could later prove they are members of the class.
>
> [Emphasis in original.]

[118] The proposed class includes all persons, other than the defendants and any other Excluded Persons, wherever they may reside or be domiciled, who acquired securities in the Issuers during the Class Period defined for each Issuer, each of which runs from the date the Issuer announced its first private placement to November 26, 2018, as set out earlier in these reasons. “Excluded Persons” are currently defined in the FANCC at para. 101 as follows:

> a) any other persons or entities who entered into consulting agreements with any of the Issuers in the time periods set out in paragraphs 100(a) through 100(k) [of the FANCC] (the “Unnamed Consultants”);
>
> b) the past and present subsidiaries, affiliates, officers, directors, senior employees, partners, legal representatives, heirs, predecessors, successors and assigns of the defendants or any Unnamed Consultants; and
>
> c) any family members of any of the individual defendants, or of any individual person who otherwise falls within (a) and (b) above.

[119] The object of this definition of Excluded Persons is to ensure that those affiliated with the defendants do not benefit from their unlawful conduct through participation in the class. To ensure that end is achieved, the plaintiffs propose to amend the definition of Excluded Persons to include the following as subparagraph (d):

> d) any entities which are controlled by, or are under common control with, an individual defendant, or any family member of either an individual defendant or any individual person who falls within (a) and (b) above.

[120] This will preclude a corporation controlled by an individual Excluded Person from participating in the class.

[121] Membership in the proposed class is defined by objective criteria which do not depend on the merits of the claim. If a person purchased securities in one of the

Issuers during the Class Period defined for that Issuer and is neither a defendant nor an Excluded Person, then they are a member of the class. Each of the plaintiffs purchased securities in an Issuer during the relevant Class Period and, as a result, is a member of the proposed class.

[122] The class definition also bears a rational relationship to the proposed common issues because it includes persons who purchased each Issuer's shares during the period within which the alleged conspiracy, and its attendant misrepresentations, were operative.

[123] I therefore accept the plaintiffs' new proposed amended definition of Excluded Persons.

[124] I must also consider whether the proposed class is overbroad. In particular, in the present case, is it appropriate, as proposed by the plaintiffs, to (i) certify a global class and (ii) include so-called "early sellers", i.e. persons who sold their securities prior to November 26, 2018, within the class?

A global class

[125] The proposed class is global, in that it includes investors who reside outside of British Columbia, as well as outside of Canada. It is also not limited to investors who acquired the Issuers' securities on the CSE. While each of the Issuer's securities traded on the CSE, their securities also traded on certain other exchanges, in particular (i) the securities of every Issuer except for Beleave were also listed on the Frankfurt Stock Exchange, and (ii) the securities of every Issuer (not including Speakeasy) were also quoted on the OTC Markets Group ("OTC") in the United States.

[126] There are, as noted in *Bergen v. WestJet Airlines Ltd*., 2021 BCSC 12 at para. 58, aff'd 2022 BCCA 22 [*Trotman*], numerous examples of Canadian courts certifying class actions that include non-resident class members. In *Airia Brands Inc. v. Air Canada*, 2017 ONCA 792 [*Airia*], leave to appeal to SCC ref'd, 37887 (25 October 2018), the Court of Appeal for Ontario, in dismissing a jurisdictional

challenge to a proposed global class in a class proceeding arising from a conspiracy to fix prices for freight shipping services, concluded at para. 107 that jurisdiction over non-resident class members may be established where:

a) there is a real and substantial connection between the subject matter of the action and Ontario, and jurisdiction exists over the representative plaintiff and the defendants;

b) there are common issues between the claims of the representative plaintiff and the non-resident class members; and

c) the procedural safeguards of adequacy of representation, adequacy of notice, and the right to opt out are provided.

[127] I agree that a real and substantial connection exists, in the present case, between the subject matter of the action and British Columbia, and that jurisdiction exists over the representative plaintiffs and the defendants. Pursuant to s. 10 of the *Court Jurisdiction and Proceedings Transfer Act*, S.B.C. 2003, c. 28, a real and substantial connection between British Columbia and the facts on which a proceeding is based is presumed to exist if the proceeding:

a) concerns restitutionary obligations that, to a substantial extent, arose in British Columbia;

b) concerns a tort committed in British Columbia; or

c) concerns a business carried on in British Columbia.

[128] The Court has already granted leave to bring the statutory claims, in British Columbia, against the Defendant Issuers and their respective Defendant Issuer Officers and Directors. None of the Defendant Issuers or the Issuer Officers and Directors objected to the Court's jurisdiction to determine the plaintiffs' statutory claims. There must, therefore, be a real and substantial connection between British Columbia and the subject matter of the statutory claims. The common law claims, for conspiracy and misrepresentation, arise from the exact same constellation of facts,

and also concern torts committed in British Columbia. The alleged conspiracy was implemented through the private placements in the Issuers, and the alleged misrepresentations pertained to material facts about the private placements in the Issuers. Each of those Issuers are, or were, “reporting issuers” in British Columbia for the purposes of the *Securities Act*.

[129] Further, all of the Defendant Issuers, and indeed, all of the Issuers except for Beleave, have their registered offices in British Columbia. Jackson, Liu, Paddock and Mawji, the Defendants who are alleged to have conceived of the scheme, initiated its implementation, promoted the scheme to the other Purported Consultants and arranged for the private placements in the other Issuers, are all residents of British Columbia, and the corporate Purported Consultants that they each direct or control are all BC companies. Indeed, nearly all of the Purported Consultants and the Purported Consultants Officers and Directors are, to the best of the plaintiffs’ knowledge, either residents of or have their registered offices in BC. Only eight of them, based on the currently available evidence, appear to reside, or be registered, outside of BC. The proposed representative plaintiffs, for their part, have plainly all consented to the jurisdiction of this Court.

[130] In short, a real and substantial connection exists between British Columbia and the subject matter of the present claim, and jurisdiction exists, by reasons of presence, consent and the subject matter of the action, over the defendants and the plaintiffs. This is, presumably, why none of the defendants have directly challenged the Court’s jurisdiction to hear the claim.

[131] Turning to the last two factors set out by the Court of Appeal for Ontario in *Airia*, there are common issues between the proposed representative plaintiffs and any non-resident members of the proposed class. The claims asserted on behalf of the resident and non-resident investors are the same, and the resident and non-resident class members have the same interest in the common issues. In relation to safeguards, as discussed below, the notice and litigation plan set out reasonable and workable procedures for providing class members, both resident and non-

resident, with notice of the claim and a corresponding opportunity to opt out. The proposed representative plaintiffs will, as also discussed below, capably and fairly represent the interests of the class, including its non-resident members; in this regard, it is also notable that several of the proposed representative plaintiffs are also non-residents.

[132] Analogous global classes have been certified in other class actions involving alleged misrepresentations on the secondary market. For example, in *Abdula v. Canadian Solar Inc.*, 2015 ONSC 53, leave to appeal ref'd, 2015 ONSC 4322 (Div. Ct.), the Ontario Superior Court of Justice certified a class proceeding in relation to claims for statutory misrepresentations, negligent misrepresentation and oppression, for a global class that included investors, wherever they may reside or be domiciled, who acquired securities in the defendant, Canadian Solar, on the NASDAQ, during the class period. Notably, in *Abdula*, the defendant's securities were not traded on a Canadian exchange. Justice G.E. Taylor rejected the defendant's argument that the class, for the negligent misrepresentation and oppression claims, should be limited to Ontario residents. There was a real and substantial connection between the claims and Ontario, largely because the defendant was a Canadian company which, although its principal place of business was in China, maintained an executive office in Ontario and disseminated information from Ontario to its shareholders and prospective shareholders. Conversely, while there had been a parallel action in the United States, it had been finally dismissed; as a result, the only avenues for recovery for the non-resident shareholders were the Ontario proceeding or individual lawsuits. Justice Taylor therefore concluded that certifying a global class furthered the objectives of class proceedings legislation by providing access to justice for claimants who would otherwise have no practical way to obtain compensation: *Abdulla* at paras. 46–63; see also *Dyck v. Tahoe Resources Inc.*, 2021 ONSC 5712 at paras. 322–334; *Green v. Canadian Imperial Bank of Commerce*, 2012 ONSC 3637 at paras. 587–592 [*Green ONSC*], rev'd on other grounds 2014 ONCA 90 [*Green ONCA*], aff'd 2015 SCC 60 [*Green SCC*].

[133] Defendants challenge the appropriateness of a global class. They submit that in a securities class action, it is inappropriate to certify a class that includes purchasers of shares from exchanges that are outside of Canada. That was the result in the proposed class in the statutory claim brought in *Pearson v. Boliden Ltd*., 2002 BCCA 624. Madam Justice Newbury explained that the requirements for disclosure in provincial securities legislation did not apply to distributions outside of Canada:

> [70] Outside Purchasers: Similar reasoning applies to exclude those (the "outside purchasers") who bought their shares pursuant to distributions occurring in the Territories of Canada or outside of Canada, where no provincial *Securities Act* has application and where no prospectus (as defined in any of the *Acts*) was or could be required to be circulated. Instead, the laws of those jurisdictions must be looked to establish disclosure and filing requirements and the consequences of non-compliance. As submitted by counsel for Nesbitt Burns, the *Acts* of the provinces do not attach civil consequences to offering documents prepared in and pursuant to the laws of a foreign state.
>
> [Emphasis in original.]

[134] As such, they submit, the statutory provisions relied on have no application to shares that were distributed on the Frankfurt Stock Exchange or through the OTC Markets Group in the United States: see *Kaynes v. BP, PLC*, 2014 ONCA 580 at paras. 47–48, leave to appeal to SCC ref'd, 36127(26 March 2015). I agree.

[135] However, I do not agree that the same follows for the non-statutory claims.

[136] A sub-class of purchasers through the CSE will be required with respect to the statutory claims.

[137] Apart from that sub-class, certification of a global class is appropriate and consistent with the objectives of the *CPA* in the present case.

Early sellers

[138] The proposed class includes "early sellers", i.e. persons who acquired one or more of the Issuers' securities after the Issuer(s) announced a private placement and then sold some or all of those securities before November 26, 2018, when the Commission announced it was investigating the scheme.

[139] It is not uncommon for “early sellers” to be excluded from the class in claims for misrepresentations to investors where they have sold all of their shares before the trigger date. In *Pearson*, the plaintiffs alleged that the defendant had, in a prospectus, misrepresented the status of a tailings dam at one of its mines, and they sought compensation for the loss in share value that occurred after the tailings dam collapsed. The Court of Appeal for British Columbia held that the “early sellers”, i.e. investors who purchased in the distribution but sold before the dam collapsed, must be excluded from the class because any depreciation in the value of their shares resulted from the sale, not the misrepresentation: “As for the argument … that the ‘early sellers’ may have paid too much for their shares, if that is correct then they also sold their shares for ‘too much’”: *Pearson* at para. 92 (emphasis in original).

[140] However, “early sellers” are not universally excluded from securities class actions. For example, in *McKenna v. Gammon Gold Inc.*, 2010 ONSC 1591, rev’d on other grounds 2011 ONSC 3782 (Div. Ct.), Justice Strathy opined that, while it may be appropriate, as a general rule, to exclude “early sellers” from the class, it was not appropriate to exclude them in the case before him because the defendants alleged that there had been partially corrective disclosures during the class period. He noted that in such circumstances, the onus of proving that the “early sellers” could not have suffered a loss should be on the defendants at trial: at para. 122. The Ontario Superior Court of Justice also, for example, decided to keep “early sellers” in the class in *Green ONSC* at paras. 580–583 and in *Dobbie v. Arctic Glacier Income Fund et al*, 2011 ONSC 25 at paras. 203–207, leave to appeal granted, 2012 ONSC 25.

[141] Of these cases, I am bound only by *Pearson*. In any event, I do not see the facts in the present case as being complicated—in that there were no alleged partially corrective disclosures during the Class Periods—nor do I see facts pleaded to support a claim that an early seller suffered a loss.

[142] The class definition will exclude early sellers who sold all of their shares prior to November 26, 2018.

Common issues

[143] The third requirement for certification is that "the claims of the class members raise common issues, whether or not those common issues predominate over issues affecting only individual members": *CPA*, s. 4(1)(c). The *CPA* defines "common issues" in s. 1 as "common but not necessarily identical issues of fact" or "common but not necessarily identical issues of law that arise from common but not necessarily identical facts".

[144] The principles governing the common issues requirement are summarised in *N&C Transportation Ltd. v. Navistar International Corporation*, 2018 BCCA 312 [*Navistar*], leave to appeal to SCC ref'd, 38327 (28 March 2019) as follows:

> [92] … To be a "common issue", an issue must be a substantial and necessary ingredient of the claim of each member of the class: *Hollick* at para. 18. Resolution of the common issue need not, however, be determinative of liability. It is sufficient if the proposed common issue is an issue of fact or law common to all claims and its resolution will move the litigation forward: *Jones* at para. 4. In some cases, there may need to be further individual actions on certain issues, such as damages or causation (see, e.g., *Rumley v. British Columbia*, 2001 SCC 69 at para. 36; *CPA*, ss. 7(a), 27).

[145] Courts must assess the common issues requirement in light of the purposes of class proceedings, including judicial economy. Resolving common issues on a class-wide basis avoids duplication of fact-finding and legal analysis: *Kirk v. Executive Flight Centre Fuel Services Ltd*., 2019 BCCA 111 at para. 65, leave to appeal to SCC ref'd, 38678 (17 October 2019); *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46 at para. 39.

[146] The answers to the common issues need not be the same for each class member. The commonality requirement does not mean that an identical answer is necessary for all class members, or even that the answer must benefit each of them to the same extent: *Vivendi Canada Inc. v. Dell'Aniello*, 2014 SCC 1 at paras. 45–46. As Justice Saunders explained in *Watson*, at para. 152, while all class members must have the same qualitative stake in the answer, the common issues need not

have the same importance for each class member: “In other words, they cannot pull in opposite directions on the issue”.

[147] The plaintiffs must provide “some basis in fact” to support the fulfilment of the common issue requirement. The court’s inquiry at this stage does not require an assessment of the merits of the claim; rather, it focuses on the suitability of the action as a class proceeding: *Watson* at para. 145. Thus, as the Court of Appeal reiterated in *Mentor*, “the plaintiff must show some basis in fact that the issues are common to all class members, not some basis in fact that the acts alleged actually occurred”: at para. 33. See also *Pro-Sys* at paras. 103–105, 110.

[148] As the Court of Appeal explained in *Nissan Canada Inc. v. Mueller*, 2022 BCCA 338, the purpose for requiring some basis in fact to support the common issues is to provide the certification judge “with some level of confidence that certification will be of practical benefit when, in the future, the claims reach trial, as opposed to being simply a procedural complication for claims that are not truly common”: at para. 139.

Conspiracy common Issues

[149] The first group of proposed common issues, issues one to four, addresses the conspiracy claim:

1) Did the Purported Consultants and the Issuers, or any of them, conspire to implement and carry out a scheme for the distribution of shares of the Issuers pursuant to the Private Placements that was contrary to s. 380 of the *Criminal Code* and to s. 57 of the *Securities Act*?

2) If the answer to (1) is yes, was the unlawful conspiracy directed at the Class members as purchasers of securities of an Issuer subsequent to the Private Placement in that Issuer through which the unlawful conspiracy was carried out?

3) If the answer to (1) is yes, in respect of one or more of the Purported Consultants and Defendant Issuers, did those Purported Consultants and Defendant Issuers know, or ought they to have known, that the unlawful conspiracy would cause loss and damage to the Class members?

4) If the answer to (3) is yes, are those Purported Consultants and Defendant Issuers jointly and severally liable to the Class members for all losses suffered by the Class members as a result of the unlawful conspiracy?

[150] Each of the above issues addresses the actions and knowledge of the Issuers and Purported Consultants in conceiving and implementing the scheme and the legal significance of that conduct. The scheme, as alleged by the plaintiffs, was implemented by a large, but defined, set of defendants, namely the Issuers and the Purported Consultants, through a defined set of private placements and relied upon a standard set of misrepresentations set out in a defined set of documents. Whether or not some or all of the Issuers and Purported Consultants took the actions alleged and whether or not those actions amount to a civil conspiracy are inquiries that can be done on a common basis, without the need for evidence from individual class members.

[151] Those defendants who have responded to the certification application have opposed the proposed common issues primarily on the grounds that, in their view, there is insufficient evidence that the proposed issues are common across the Issuers. Some submit that almost all of the common issues improperly include separate issues relating to separate Issuers in the same proposed common issue.

[152] An issue can be common even if the answer to the issue may not be the same for each class member: *Vivendi* at paras. 45–46; *Watson* at para. 152. It is possible, for example, that the Court will find that certain Purported Consultants only conspired to carry out a scheme in relation to the distribution of shares in a subset, rather than all, of the Issuers. The proposed common issues on conspiracy are

common because the answers address substantial and necessary ingredients of each class member's claim in conspiracy.

[153] The evidentiary record establishes an ample basis in fact that resolving the proposed issues on conspiracy on a common basis (i.e. in a single inquiry for all of the private placements) will avoid considerable duplication of fact-finding and legal analysis. As stated by the Commission in its further extension of the Temporary Order on May 29, 2019, there is "a striking similarity in the transactions which are at the heart of the matters…": *Re BridgeMark Financial Corp*., 2019 BCSECCOM 191 at para. 41.

[154] First, the evidentiary record establishes that a substantial majority of the Purported Consultants participated in the private placements at two or more of the Issuers, either as subscribing consultants or as associated consultants who entered into consulting agreements with the Issuer as part of the private placement transaction. In brief, the evidence establishes at least some basis in fact that:

a) Liu, either directly or through his corporation, Lukor, participated as a subscribing consultant in three private placements at three of the Issuers, namely Kootenay, Speakeasy and New Point, and as an associated consultant in six other private placements, those at Green Corp., Cryptobloc, BLOK and PreveCeutical, and the first private placements at both Beleave and Marapharm.

b) Detona Corp., whose sole director is Danilen Villanueva, participated as a subscribing consultant in eight private placements at seven of the Issuers, namely Kootenay, Affinor, Green Corp., Beleave, Marapharm, Cryptobloc, BLOK and PreveCeutical, and as an associated consultant in the New Point private placement.

c) Paddock, either directly or through Paddock Inc., participated as a subscribing consultant in nine private placements in eight of the Issuers, namely Kootenay, Affinor, Green Corp., Beleave, Marapharm, Cryptobloc,

PreveCeutical and Speakeasy, and as an associated consultant in the BLOK private placement.

d) Northwest, which the plaintiffs allege is managed and controlled by Mawji, participated as a subscribing consultant in eight private placements at seven of the Issuers, namely Kootenay, Affinor, Marapharm, Beleave, PreveCeutical, Speakeasy and New Point, and as an associated consultant in the first Beleave private placement.

e) JCN Capital Corp., whose sole director is John Bevilacqua, participated as a subscribing consultant in four private placements, at Affinor, Cryptobloc, BLOK and Marapharm, and as an associate consultant in at least three private placements, at Green Corp., Beleave and PreveCeutical. The plaintiffs allege JCN Capital Corp. also participated as an associated consultant in the first Marapharm private placement.

f) Escher Invest SA, Hunton Advisory Ltd. and Kendl Capital Ltd. are each either owned or directed by Randy White and participated in the private placements as follows:

    i. Escher Invest SA participated as a subscribing consultant in the private placements at New Point and Marapharm, and as an associated consultant in at least two private placements, in Beleave and PreveCeutical.

    ii. Hunton Advisory Ltd. participated as a subscribing consultant in four private placements, at Green Corp., BLOK, Marapharm and New Point, and as an associated consultant in at least two private placements, at Cryptobloc and Beleave.

    iii. Kendl Capital Ltd. participated as a subscribing consultant in three private placements, at Green Corp., BLOK and Marapharm, and as an associated consultant in at least three private placements, at Beleave, PreveCeutical and New Point. The plaintiffs allege Kendl Ltd. also

participated as an associated consultant in the first Marapharm private placement.

g) Sway Capital Corp. and Essos Corporate Services Inc. are each solely directed by Von Rowell Torres, who was also a director of Kootenay, and participated in the private placements as follows:

   i. Sway Capital Corp. participated as a subscribing consultant in three private placements at two Issuers, namely Marapharm and Beleave, and as an associated consultant in at least three private placements, at Beleave, BLOK and PreveCeutical.

   ii. Essos Corporate Services Inc. participated as a subscribing consultant in one private placement, at Cryptobloc, and as an associated consultant in three private placements, at BLOK, Marapharm and PreveCeutical.

h) 727 Capital, 10X Capital and Viral Stocks Inc. are each registered in the Cayman Islands, and each participated as associated consultants in the same three private placements, at BLOK, Beleave and New Point.

i) Tavistock Capital Corp., whose sole director is Robert John Lawrence, participated as a subscribing consultant in three private placements at two issuers, namely Marapharm and New Point.

j) Simran Singh Gill is the sole director of a company called BridgeMark Management Ltd. and an employee of BridgeMark, and participated in two private placements as a subscribing consultant, with Marapharm and Cryptobloc, and as an associated consultant in at least one private placement, in Beleave.

k) Keir Paul MacPherson participated as a subscribing consultant in two private placements, in BLOK and Beleave, and as an associated consultant in at least one private placement, in Marapharm.

l) Saiya Capital Corp., whose sole director is Tara Haddad, participated as a subscribing consultant in one private placement, in Beleave, and as an associated consultant in at least two private placements, in Green Corp. and Marapharm.

m) Albert Kenneth Tollstam or Tollstam & Company Chartered Accountants participated as a subscribing consultant in two private placements, Green Corp. and Beleave. The plaintiffs allege Albert Kenneth Tollstam also participated as an associated consultant in the first Marapharm private placement.

n) Tryton Financial Corp., whose sole director is Abeir Haddad, participated as an associated consultant in at least three private placements, in Marapharm, Cryptobloc and PreveCeutical.

o) 1053345 B.C. Ltd., whose sole director is Robert Abenante, participated as an associated consultant in two private placements, at Marapharm and Beleave.

p) Asahi Capital Corp., whose sole director is Wilson Su, participated as an associated consultant in two private placements, in Marapharm and Beleave.

q) Natasha Jon Emami is an employee of Jackson & Company Professional Corp., and participated as an associated consultant in two private placements, at Green Corp. and Beleave.

r) International Canyon Holdings Ltd., whose sole director is Jatinder Singh Bal, participated as an associated consultant in two private placements, at Beleave and Marapharm.

s) Jarman Capital Inc., whose sole director is Scott Jason Jarman, participated as a subscribing consultant in two private placements, at PreveCeutical and New Point.

t) 1140258 B.C. Ltd., whose sole director is Arlene Victoria Alexander (who, the plaintiffs allege, is the spouse of David Alexander, a director of Marapharm and a CFO of BLOK), participated as a subscribing consultant in two private placements, in BLOK and Marapharm.

[155] In comparison, there are only about 14 Purported Consultants for which there is evidence, at present (as the plaintiffs do not yet know the identity of all the Purported Consultants who entered into consulting agreements with Kootenay, Affinor and Speakeasy), that they participated in only one of the private placements. Notably, apart from Asiatic Management Consultants Ltd., each of the 13 other Purported Consultants participated as a subscribing consultant, and seven of these are the Alexander group which subscribed to the BLOK private placement.

[156] In addition, the evidence only indicates that Altitude Marketing Corp., whose sole director is Ryan Peter Venier, participated as a subscribing consultant in the Cryptobloc private placement. However, the plaintiffs also allege that Altitude Marketing Corp. participated as an associated consultant in the first Marapharm private placement.

[157] That said, there is a considerable overlap in the identities of the participating Purported Consultants for each private placement, which, in turn, provides a basis in fact to support the conclusion that resolving the proposed issues regarding conspiracy on a common basis, across the Issuers, will avoid a substantial duplication of fact-finding or legal analysis.

[158] Further, the “striking similarity” across the private placements is not limited to the identities of the participating Purported Consultants. The evidence also establishes some basis in fact that the Purported Consultants engaged in the same conduct across multiple private placements. In particular:

a) There is, indisputably, evidence that each of the Issuers, including the Defendant Issuers, released similar documents in relation to their respective private placements (in each case, at least two news releases and a Form

9), in which they each made substantively similar representations, setting out the price of the units in the private placement, the proceeds which were expected or received and how the Issuer intended to use the proceeds. There is no dispute that, in those documents, none of the Issuers disclosed that the Issuer had either agreed to or had already paid substantial consulting fees in relation to the private placement.

b) For multiple private placements, there is evidence that the participation of the subscribing Purported Consultants was conditional upon the Issuer entering into consulting agreements with a group of the Purported Consultants which included the subscribing Purported Consultants. For example, according to Bojan Krasic, Beleave's former CFO, entry into the consulting agreements was a condition for the subscribing Purported Consultants' participation in both Beleave private placements. Similarly, in their cross-examinations in the petition proceedings resulting in the *Leave Decision* (the "Leave Petition"), (i) Cryptobloc's former CEO, Neil William Stevenson-Moore, (ii) PreveCeutical's former CEO, Stephen Van Deventer, and (iii) New Point's former CEO, Bryn Gardener-Evans, each stated that the subscribing Purported Consultants' participation in their respective private placements was conditional upon each Issuer entering into the consulting agreements. According to Affinor's former CEO, Nicholas Brusatore, the Affinor private placement was presented, by Liu and Jackson, as an offering "for four million dollars on which consulting fees would be paid".

c) For many of the private placements, there is evidence that the consulting agreements entered into with the Purported Consultants were essentially identical and contained the same contractual terms, apart from the services to be provided and the amount of the fee. Moreover, the evidence indicates that the consulting agreements were essentially the same not just for each private placement, but across multiple private placements. For the Green Corp., Cryptobloc, New Point and BLOK private placements, Costin

obtained copies of the consulting agreements entered into with the Purported Consultants and attached them to his affidavit. BLOK also disclosed consulting agreements on SEDAR. Krasic attached two of the consulting agreements, with Detona Capital Corp. and Northwest, to his affidavit. In addition, a number of the Purported Consultants have disclosed the consulting agreements they entered into with one or more of the Issuers at the time of the Issuer's private placement, including agreements with Marapharm, Cryptobloc, PreveCeutical, Green Corp. and Beleave. All of these consulting agreements contain essentially the same terms, except for the description of the services to be provided and the compensation, and nearly all of them provide for lump-sum, non-refundable consulting fees (the exception is the consulting agreement between Cryptobloc and Paddock Inc., which contemplates a consulting fee payment of $15,000/month).

d) For most of the private placements, there is evidence the Issuer paid the participating Purported Consultants substantial lump-sum consulting fees contemporaneously with the Issuer's receipt of the private placement proceeds. For example:

    i. According to Affinor's later financial disclosures, Affinor paid out $3,500,000 in consulting fees from the $3,996,667 in private placement proceeds it received on March 8, 2018, pursuant to 14 three-month consulting agreements it entered into on March 1, 2018.

    ii. According to Costin's review of Green Corp.'s banking records, Green Corp. received the $4,280,000 in private placement proceeds between April 12, 2018 and April 17, 2018, and paid $3,540,500 to the eleven Purported Consultants from April 16, 2018 to April 23, 2018.

    iii. Similarly, Beleave's first private placement closed on April 27, 2018, for $5 million in proceeds, and, according to Krasic, Beleave paid lump-sum consulting fees totalling $3,750,000 to the 12 participating Purported Consultants on April 25, 2018. Similarly, Beleave's second

private placement closed on June 12, 2018, for $5 million in gross proceeds, and, according to Krasic, Beleave paid the 13 participating Purported Consultants lump-sum consulting fees totalling $3,750,000 on June 1, 2018.

iv. According to Marapharm's later financial disclosures, Marapharm paid $3,647,000 in aggregate consulting fees to the subscribers in its first private placement and $3,848,000 to certain subscribers to its second private placement—in both cases, "[i]n conjunction with the closing of the private placement".

v. According to Costin's review of Cryptobloc's banking records, the private placement proceeds of $4,500,000 were deposited between May 24, 2018 and June 5, 2018 and then, from May 24, 2018 to June 8, 2018, Cryptobloc paid funds totalling $3,909,500 to the participating Purported Consultants.

vi. According to BLOK's later financial disclosures, BLOK paid consulting fees totalling $4,107,500 in cash, in advance, concurrently with its private placement, which was for gross proceeds of $4,857,500.

vii. According to evidence given in the Leave Petition by Van Deventer, PreveCeutical paid consulting fees totalling $2,775,000 to the participating Purported Consultants, on June 26, 2018, from the $4 million in subscription proceeds PreveCeutical received from the subscribing Purported Consultants.

viii. In its settlement agreement with the Commission, Speakeasy agreed that, between July 24, 2018, the day Speakeasy announced the closing of its private placement, and August 2, 2018, Speakeasy returned $1,450,000 of the $3,000,000 in private placements proceeds to eight Purported Consultants.

ix. According to Costin's review of New Point's banking information, between July 31, 2018 and August 16, 2018, the private placement proceeds of $4,647,500 were deposited into New Point's account and then, between July 31, 2018 and August 21, 2018, New Point paid a total of $3,972,500 to the participating Purported Consultants.

e) In addition to the admissions of fact from the Liu Commission Settlement Agreement that little or no consulting services were provided, there is similar additional evidence with respect to some of the specific private placements at issue. According to Costin, Green's CEO, Young, stated that "the consultants had definitely underperformed" and that the company had not received good value from the consultants. In Beleave's settlement agreement with the Commission, Beleave agreed that, for both of its private placements, the consultants provided no consulting services. According to Krasic, the facts Beleave agreed to in the settlement agreement are true, to the best of his knowledge. In BLOK's later financial disclosures, BLOK stated that it had been "unable to identify any significant services" provided by the consultants under the consulting agreements, other than the subscriptions to the private placement. Similarly, in financial disclosures released in 2019, PreveCeutical stated that its current management did not believe that value-for-money was provided by the consultants and did not anticipate that the consulting agreements would be fulfilled. And, in its settlement agreement with the Commission, Speakeasy agreed that no services were provided by the purported consultant group. Further, in its June 2020 decision partially extending the Temporary Order, the Commission stated that the further evidence before it indicated that "Liu, Lukor and another related company received $4.2 million in consulting fees" from eight Issuers "and provided minimal evidence that consulting services were provided" and, similarly, that Bridgemark and Jackson & Company Professional Corp. "received over $3.3 million in consulting fees" from eight issuers "and provided minimal evidence that consulting services were provided".

f) Finally, as reviewed above, there is evidence that for most of the private placements (all but Kootenay, Affinor and PreveCeutical), most or all of the subscribing Purported Consultants sold most, and usually all, of the Issuer's shares shortly after the private placement, for an average price-per-share below the disclosed purchase price. In total, across all the private placements, 20 different subscribing Purported Consultants quickly sold shares acquired for a purported total cost of over $36.5 million for a loss of over $10.3 million.

[159] In short, the evidentiary record establishes some basis in fact that overlapping groups of the same Purported Consultants employed the same actions at each private placement. Most of the Purported Consultants participated in multiple private placements and, for most of those private placements, there is some evidence that the Purported Consultants, together with each Issuer, followed the same pattern of conduct. This "striking similarity" in the participants and the steps taken at each private placement provides a strong basis in fact that the proposed issues on conspiracy meet the requirements for certification as common issues, because trying the conspiracy issues on a common basis, across the Issuers, will avoid substantial duplication of fact-finding and legal analysis. If the present action were, as some of the defendants appear to be advocating, divided into separate actions for each Issuer, the court in each of those actions would have to ascertain whether many of the same Purported Consultants engaged in the same alleged conduct and determine, in each proceeding, whether that conduct constituted a conspiracy at law. Each of those separate proceedings would be considering essentially the same body of evidence, because evidence of how the same Purported Consultants engaged in the same alleged conduct at other private placements would be highly relevant to each proceeding.

[160] The reasoning of the Court of Appeal in the *Leave Appeal* further demonstrates the commonality of the factual and legal issues across the private placements at each Issuer. The question in the *Leave Appeal* was whether, for the Affinor private placement, the evidence was sufficient to establish a reasonable

possibility the secondary market misrepresentation claims against Affinor would succeed at trial. The Court of Appeal determined that the evidence from Krasic, regarding the Beleave private placements, was relevant to assessing the merits of the claims in relation to the Affinor private placement, because three of the four Purported Consultants who subscribed to the Affinor private placement also participated in the Beleave private placement: "While the Krasic Affidavit was evidence of the conduct of a third-party issuer, these three subscribers to the Beleave private placement were not third parties to Affinor's part in the alleged conspiracy": *Leave Appeal* at para. 101.

[161] Similarly, the Court of Appeal concluded that there was "substantial merit" to the argument that evidence of the Affinor subscribers' participation in other private placements, for which there was evidence that entry into the consulting agreements was a condition for the private placement, supported the inference that the same condition was employed in the Affinor private placement: *Leave Appeal* at paras. 130–136.

[162] In conclusion, there is basis in fact that determining the proposed issues on conspiracy as common issues, across the Issuers, will substantially advance each class member's claim and avoid substantial duplication of fact-finding and legal analysis.

Disgorgement common issues

[163] The next set of proposed common issues, issues five to seven, addresses the availability of the remedy of disgorgement:

> 5. Did the Purported Consultants, or any of them, accrue a benefit from the sale of some or all of the shares they acquired in the Issuers pursuant to the unlawful conspiracy, either [as] a subscriber in one of the Private Placements or as a recipient of shares transferred to them from such a subscriber?

6. If the answer to (5) is yes, are the Class members who acquired securities in those Issuers entitled to disgorgement of those accrued benefits, as a remedy for the unlawful conspiracy?

7. If the answer to (6) is yes, what is the amount of the accrued benefit which each of the Purported Consultants must disgorge to the Class members?

[164] Each of these issues focuses on the conduct of the Purported Consultants and the legal significance of that conduct. They can be determined without the need for evidence from individual class members, and their resolution will substantially advance the claims of all class members.

[165] There is a basis in fact, in the evidence, that the question of whether the Purported Consultants accrued a benefit can be determined as a common issue. For his investigation of the scheme for the Commission, Costin obtained electronic trading records which indicate that nearly all of the subscribing Purported Consultants sold most or all of the Issuer's shares shortly after each private placement.

[166] Several of the subscribing Purported Consultants have also confirmed their sale of the Issuer's shares.

[167] Further, as described above, there is evidence that numerous subscribing Purported Consultants accrued a considerable cumulative benefit over numerous private placements, such that the disgorgement issues can, and should, be resolved on a common basis across the Issuers. Moreover, based upon the available evidence, in particular the admissions in the Liu Commission Settlement Agreement, it is probable that the benefits accrued from the share sales for one private placement were used to finance the repetition of the scheme at other private placements.

[168] The disgorgement issues meet the requirements for certification as common issues.

Personal liability common issues

[169] The next set of common issues, issues eight and nine, addresses the alleged personal liability of the Purported Consultants Officers and Directors and the Issuer Officers and Directors:

> 8. Are the Purported Consultants Officers and Directors, or any of them, personally liable for the acts carried out in furtherance of the unlawful conspiracy by the Purported Consultant for which they acted as an officer or director, or both?
>
> 9. Are the Issuer Officers and Directors, or any of them, personally liable for the acts carried out in furtherance of the unlawful conspiracy by the Defendant Issuer for which they acted as an officer or director, or both?

[170] These proposed issues address only the conduct of the defendant Purported Consultants Officers and Directors and the Issuer Officers and Directors and the legal significance of that conduct. They can be resolved without reference to evidence from individual class members. The resolution of these questions will substantially advance each class member's claim.

[171] The evidence establishes a basis in fact that these questions can be resolved on a common basis. As reviewed above, each of the Purported Consultants Officers and Directors and each of the Issuer Officers and Directors directed or managed a Purported Consultant or Issuer which took steps in furtherance of the conspiracy, and most of those Purported Consultants participated in multiple private placements. Notably, the evidence also demonstrates some overlap in the participation of certain Purported Consultants Officers and Directors, and certain Issuer Officers and Directors, across the private placements.

[172] There is basis in fact that the proposed common issues on personal liability can be determined on a common basis and that resolving these questions in a single proceeding, across the Issuers, will avoid a substantial duplication of fact-finding and legal analysis.

Secondary market liability common issues

[173] The next set of proposed common issues, issues ten to 24, address the statutory claims for misrepresentation on the secondary market.

[174] Each of these issues addresses the conduct and knowledge of the Defendant Issuers and Issuer Officers and Directors and the legal significance of that conduct in relation to the statutory cause of action. Common issues 22, 23 and 24 address the calculation of damages, the application of the statutory limit on damages and the proportionate liability of any or all of the Defendant Issuers or Issuer Officers and Directors for those damages. These issues can be determined on a common basis because the *Securities Act* prescribes a fixed formula for the calculation of damages which does not depend on any subjective evidence from class members regarding, for example, reliance on the misrepresentations: *Securities Act*, ss. 140.5–140.7.

[175] There is basis in fact in the evidentiary record that these issues can be resolved on a common basis, across the Defendant Issuers. As reviewed above, there is evidence that most Purported Consultants participated in multiple private placements, in addition to evidence of striking similarity in many of the actions taken across the private placements. The Court of Appeal's reasoning in the *Leave Appeal* strongly underscores that, for the determination of whether the alleged misrepresentations occurred in relation to one Defendant Issuer's private placement, evidence that many or all of the same participants engaged in the same alleged conduct at other private placements will be highly relevant. For example, the Court of Appeal concluded that the evidence of Krasic, regarding the Beleave private placements, was relevant to the determination of whether there was a reasonable possibility the alleged misrepresentations occurred in the Affinor private placement, because most of the same Purported Consultants participated in both private placements. Justice Willcock explained:

> [104] I would not accede to the argument of the Affinor Respondents that the case management judge correctly determined that the Krasic Affidavit was not probative because it did not speak to the statutory misrepresentations described in the notice of civil claim. The alleged conspiracy was pleaded and while, as the judge found, there was no allegation in the secondary market

> claims that there were misrepresentations with respect to the legitimacy of the consulting contracts, evidence of a scheme to defraud investors is still some evidence that there was a misrepresentation as to price or the proceeds of the placement. It is also, indirectly, evidence of the materiality of the representations in the impugned press releases and Form 9s, demonstrating an intent to release documents or public oral statements that would affect the market and therefore be material. In short, evidence of the existence of a scheme or plan to manipulate the market was not irrelevant to the allegation that the Issuers misrepresented the price paid for the shares or the proceeds of the private placements.
>
> [Emphasis added.]

[176] The proposed common issues addressing the statutory cause of action for secondary market misrepresentation meet the requirements for certification as common issues.

Fraudulent or negligent misrepresentation common issues

[177] The last set of proposed common issues, issues 25 to 30, addresses the common law misrepresentation claims for fraudulent or negligent misrepresentation.

[178] The proposed issues only address the existence of the misrepresentations, the Defendant Issuers' or Issuer Officers and Directors' knowledge of the falsity of the misrepresentations and the existence and breach of the duty of care, which is relevant for the negligent misrepresentation claims. Because they are individual determinations, the common issues do not address the reliance or damages components of the common law misrepresentation claims.

[179] Similar common issues in relation to negligent misrepresentation have been certified as common issues in other class proceedings where leave to bring a secondary market claim has also been granted. For example, in *Green ONCA*, the plaintiffs obtained leave to pursue their secondary market claims, and, in relation to the common law misrepresentation claims, the Court of Appeal for Ontario found, at para. 99, that "certifying issues other than reliance that are common to the negligent misrepresentation claims would significantly advance those claims." Justice Feldman noted, for example, that investors who are entitled to a recovery beyond the limits set for the statutory claim could use the findings on the negligent misrepresentation

common issues to advance their individual claims. As a result, the Court of Appeal for Ontario certified common issues on negligent misrepresentation that related to the conduct and intent of the issuer, noting that the trial judge could order individual trials to determine the issues of reliance and damages, if necessary: *Green ONCA* at para. 104. The Supreme Court of Canada affirmed the Court of Appeal's certification of the five issues on negligent misrepresentation: *Green SCC* at paras. 124–128; see also *Dugal* at para. 93; *LBP Holdings Ltd. v. Hycroft Gold Corporation,* 2020 ONSC 59 at paras. 31–32 [*Hycroft Gold*].

[180] I agree that certifying common issues on negligent misrepresentation is appropriate when, as here, it achieves judicial economy and advances the litigation, even if individual reliance may remain as an outstanding issue. In *Navistar*, for example, the Court of Appeal concluded that certain common issues relating to negligent misrepresentation regarding the defendant's conduct and intent in making the representations were appropriate for certification because "they can be determined on a class-wide basis without requiring individual evidence from class members. In addition, the resolution of these issues will move the litigation forward": at para. 133. See also *Navistar* at paras. 146–149; *Jones v. Zimmer GMBH*, 2011 BCSC 1198 at paras. 87–88, aff'd 2013 BCCA 21.

[181] The evidence provides basis in fact that the proposed common issues on fraudulent and negligent misrepresentation can be resolved as common issues, across the Defendant Issuers. Again, as discussed above, the evidence demonstrates a substantial commonality in both the participants and the substantive actions taken by those participants across the private placements at each Issuer, such that the determination of whether the conduct underlying the alleged misrepresentations occurred at one Defendant Issuer will, necessarily, require consideration of evidence indicating that all or some of the same participants engaged in the same alleged conduct in other private placements. The Court of Appeal's reasoning in the *Leave Appeal* underscores this conclusion, in that evidence regarding the same participants engaging in the same conduct in other private placements was determined to be relevant to assessing the likelihood the

same conduct occurred in relation to the Affinor private placement: *Leave Appeal* at paras. 101–104 and 130–136.

[182] I find that the proposed common issues on common law misrepresentation meet the requirements for certification as common issues.

Preferable procedure

[183] Next, the court must be satisfied that a class proceeding is the preferable procedure for the fair and efficient resolution of the common issues: *CPA*, s. 4(1)(d).

[184] Section 4(2) of the *CPA* provides a non-exhaustive list of considerations that must inform the preferability analysis.

[185] Two questions dominate the preferability analysis, namely "(a) whether a class proceeding would be a fair, efficient and manageable method of advancing the claims and (b) whether a class proceeding would be preferable compared with other realistically available means for their resolution": *Finkel* at para. 25. The overarching concern for the preferability analysis is "the three principle goals of class actions, namely judicial economy, behaviour modification and access to justice": *AIC Limited v. Fischer*, 2013 SCC 69 at para. 22, citing *Hollick* at para. 27.

[186] In the present case, there can be no dispute that a class proceeding is the most, if not the only, effective procedure for resolving the statutory claims for secondary market misrepresentation, for which the plaintiffs have obtained leave to pursue against the Defendant Issuers and the Issuer Officers and Directors: *Green ONSC* at para. 611; *Green SCC* at para. 182.

[187] The remainder of the common issues arise from the same factual narrative, engage very similar issues of fact and law as the secondary market misrepresentation claims and involve the same participants. When there is substantial overlap between different legal claims advanced in the same proceeding, and each claim raises common issues, a decision to certify one of the claims weighs heavily in favour of certifying the other: *Fantl v. Transamerica Life Canada*, 2016

ONCA 633 at para. 39, citing *Carom v. Bre-X Minerals Ltd*. (2000), 51 O.R. (3d) 236, 2000 CanLII 16886 (C.A.) at paras. 42–47, leave to appeal to SCC ref'd, 37258 (23 February 2017). As the Court of Appeal explained in *Trotman* at para. 61, "one cannot ignore the fact that a class proceeding is otherwise going forward when assessing the relative judicial economy of resolving the additional [common] issues via that class proceeding." Also see the reasoning in *Hycroft Gold* at paras. 19 and 22. The same reasoning applies in the present case.

[188] I note that the Securities Commission has recently held in *Re PreveCeutical Medical Inc. and Stephen Deventer*, 2024 BCSECCOM 19 that findings of materiality are determined with respect to the circumstances of the specific Issuer, a conclusion with which I agree. However, I do not see such an exercise as being a significant obstacle for proceeding by way of a class action. While resolving the materiality question may require the consideration of some evidence that is unique to each Issuer, a considerable portion of the relevant evidence, including on the materiality question itself, will concern the common context of the alleged scheme within which the alleged misrepresentations were made.

[189] The only efficient and fair procedure for resolving the secondary market claims is a class proceeding and, given that the remaining common issues arise from the exact same set of facts and engage very similar questions of fact and law, judicial economy weighs heavily in favour of resolving those issues as part of the of the same class proceeding.

Do the common issues predominate?

[190] If the common issues on the statutory claims are resolved in favour of some or all of the class members, those claims will be essentially complete, apart from the individual determinations of each investor's individual damages (if any), in accordance with the formulas set out in the *Securities Act*. Those individual determinations cannot be regarded as predominant, over the liability issues, or class actions would never be feasible for the statutory cause of action. For the common law claims, success on the common issues would considerably advance the action,

even if individual issues may remain in relation to reliance or damages: *Navistar* at paras. 147–149; *Fantl* at paras. 40–44.

[191] The defendants who have responded to the certification application primarily assert that the common issues do not predominate because, in their view, the action is not properly brought as a single claim, but rather must be divided into separate actions for each Issuer.

[192] However, there is ample basis in fact, in the evidentiary record, of substantial commonality across the private placements, both in the participants and in the actions taken by those participants. There is a strong basis in fact which indicates that trying the proposed claims in a single proceeding, rather than in separate proceedings for each Issuer, would achieve considerable judicial economy by avoiding a substantial repetition in fact-finding and legal analysis: *Sherry Good v. Toronto Police Services Board*, 2014 ONSC 4583, aff'd 2016 ONCA 250, leave to appeal to SCC ref'd, 37050 (10 November 2016).

[193] The plaintiffs allege a single overarching conspiracy, and there is a significant and substantial overlap in the participation of the Purported Consultants at each private placement and evidence of strikingly similar conduct by the Purported Consultants at those private placements.

[194] It is this commonality which also strongly distinguishes the present claim from the authorities relied upon by the responding defendants. For example, in *MacKinnon v. National Money Mart Company et al*, 2005 BCSC 271, the plaintiffs sought to bring a class action against 18 different payday lending businesses, alleging that each business charged interest at a criminal rate. This Court refused to certify the claim on the grounds that there was insufficient commonality in the claims across the proposed defendants. The defendants operated separate businesses, with different contracts and business practices, such that, in Justice Brown's words, "the fact finding would not be common to the class" and the potential findings of fact and legal analysis for one lender would have little or no application to the other lenders and other borrowers: at para. 26. Here, there is considerable basis in fact

indicating that the findings of fact and legal analysis in relation to the private placement at one Issuer will substantially advance the claims of each class member, and that trying the claims in a single proceeding is the most fair and efficient option.

No interest in individual control

[195] There is no evidence that any prospective class member has an interest in individually controlling the prosecution of his or her own action.

The claims are not the subject of other proceedings

[196] The plaintiffs submit they are not aware of any other proceedings advancing the same or similar claims on behalf of the class members. The subject matter of the action has been, and continues to be, the subject of several proceedings before the Commission, as well as a number of hearings before the Investment Industry Regulatory Organization of Canada. However, there is no reason that these regulatory proceedings, which do not seek any compensation for investors, should preclude the certification of the present action.

Alternatives are less practical and less efficient

[197] There are no more practical or efficient procedures for resolving these claims. Individual actions are not a practical option because most class members' individual claims are for a modest amount. The plaintiff Michael Tietz, for example, only purchased $4,000 worth of New Point shares, which he sold on January 10, 2019, for $1,243. A loss of this size is, plainly, not sufficient to justify retaining counsel to pursue an individual claim.

[198] As discussed above, separate proceedings divided by Issuer are also not a more efficient option because of the considerable overlap in the factual and legal issues that would have to be addressed at each of those separate claims.

A class proceeding will not create greater difficulty

[199] Resolving the class members' claims in a class proceeding will not create greater difficulties than those likely to be experienced if relief is sought through other

means. Again, individual actions would clearly create more difficulty, and separating the action into different actions, for each Issuer, would require the court to repeatedly adjudicate many of the same factual and legal issues.

[200] The proposed class proceeding provides a fair and efficient procedure for advancing the class members' claims, and there is no other realistically available procedure for resolving the claims. Certification will advance the policy objectives of the *CPA* by promoting access to justice, judicial economy and behavioural modification.

Suitable representative plaintiff

[201] Finally, certification as a class proceeding requires the presence of a suitable representative plaintiff. Section 4(1)(e) of the *CPA* provides:

> (e) there is a representative plaintiff who
>
> (i) would fairly and adequately represent the interests of the class,
>
> (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
>
> (iii) does not have, on the common issues, an interest that is in conflict with the interests of other class members.

[202] There are multiple proposed representative plaintiffs in the present case. Three proposed representatives reside in British Columbia. The other six reside outside of the province. Pursuant to s. 4(1)(e), there need only be one qualified representative plaintiff for the court to grant certification. In this case, additional plaintiffs have been added to meet the requirement that the claims for secondary market misrepresentation under the *Securities Act* against the Defendant Issuers can only be brought by a person who acquired shares in the Issuer.

[203] However, one plaintiff is sufficient to represent the overall class, particularly since in this case, the class members are united by the claims each of them have against all the defendants in respect of the alleged conspiracy. The *CPA* does not require all representative plaintiffs to be BC residents, nor does it prohibit non-

residents from serving as representative plaintiffs: *CPA*, s. 4.1; *Dominguez v. Northland Properties Corporation*, 2012 BCSC 539 at para. 12. There are several cases where non-residents have been appointed as representative plaintiffs alongside resident representative plaintiffs: *Cheung v. NHK Spring Co., Ltd*, 2022 BCSC 1738 at paras. 8–9, aff'd 2023 BCCA 230; *Olsen v. Behr Process Corporation*, 2003 BCSC 1252 at paras. 5, 30, 37–38; *Stanway v. Wyeth Canada Inc.*, 2011 BCSC 1057 at paras. 36, 81, aff'd 2012 BCCA 260; and *Tucci v. Peoples Trust Co*., 2017 BCSC 1525 at paras. 5, 7–8, 276–277, 283, 285, rev'd in part on other grounds 2020 BCCA 246.

[204] The Alberta Court of Appeal summarized the basic requirements for a representative plaintiff in *Warner v. Smith & Nephew Inc.*, 2016 ABCA 223 at para. 43, leave to appeal to SCC ref'd, 37229 (2 February 2017)—albeit with respect to Alberta's class proceedings legislation—as follows:

> … With respect, one is not required to be a lawyer or a sophisticated litigant to assume the role of representative plaintiff. The person must be willing and able to assume the role as delineated in the statute, and most importantly, must appreciate the role being played; to work to benefit the class as a whole and not to further her individual claim at the expense of the class. …

[205] Our Court of Appeal expressed in *Miller v. Merck Frosst Canada Ltd.*, 2015 BCCA 353, leave to appeal to SCC ref'd, 36668 (14 April 2016) that "[t]he representative plaintiff represents the class, but need not be representative *of* the class…. He or she need not have a claim typical of the class, or be the 'best' possible representative": at para. 75.

[206] In relation to conflicts, the analysis focuses entirely on the common issues, and whether the representative plaintiff has an interest in the common issues that conflicts with the interests of other class members, as Justice Gerow explained in *Fakhri et al v. Alfalfa's Canada Inc. cba Capers*, 2003 BCSC 1717, aff'd 2004 BCCA 549:

> [75] The inquiry about whether the representative plaintiff adequately and appropriately represents class members and potential conflicts of interest is focused on the proposed common issues. If differences between the representative plaintiff and the proposed class do not impact on the common

> issues then they do not affect the representative plaintiff's ability to adequately and fairly represent the class, nor do they create a conflict of interest.

[207] A conflict of interest does not arise merely because a representative plaintiff has a different interest in the common issues than other members of the class, such that, for example, there is a possibility the representative plaintiff could succeed on a common issue while other members of the class fail. A conflict only arises if success for the representative plaintiff means failure for other class members: "The possibility of a judgment that results in success for some but not all class members does not amount to a conflict that disentitles [the plaintiff] to act as the representative plaintiff": *Keatley Surveying Ltd. v. Teranet Inc.*, 2015 ONCA 248 at para. 66, see also paras. 60–68.

[208] The plaintiffs meet the requirements for appointment as representative plaintiffs:

a) They each purchased shares in one of the Issuers during the relevant Class Period and are not Excluded Persons, and they are therefore members of the class.

b) They are each prepared to devote the necessary time and effort toward representing the class. They have demonstrated their willingness and ability to vigorously prosecute the action on behalf of the class by, for example, retaining and instructing counsel and swearing multiple affidavits in support of both the applications for leave and for certification. Most of the plaintiffs have also submitted to cross-examination on their affidavits for the Leave Petition.

c) The Court has also found that each of the plaintiffs who obtained leave to bring their statutory claims is acting in good faith in bringing those claims: *Leave Decision* at paras. 100–102, 164–167, 203–205, 258–260, and 321–323;

d) None of the plaintiffs is aware of any conflicts that would prevent him or her from acting as representative plaintiff, and none of the plaintiffs has an interest in the common issues that conflicts with the interests of other class members.

[209] It is possible that the court will ultimately find that the conspiracy was only implemented at some, but not all, of the private placements. In that case, some of the proposed representative plaintiffs and class members will succeed on the common issues, while other proposed representative plaintiffs and class members fail. No conflict of interest arises from this possibility. There would appear to be no risk that establishing the claim in relation to one or more of the private placements will come at the expense of the claims arising from the other private placements.

[210] Apart from the foreign exchange limitation for the statutory claim, there is an alignment of interests. That limitation does not create a conflict.

[211] Section 6 of the *CPA* addresses subclasses as follows:

> 6 (1) Despite section 4 (1), if a class includes a subclass whose members have claims that raise common issues not shared by all the class members so that, in the opinion of the court, the protection of the interests of the subclass members requires that they be separately represented, the court must not certify the proceeding as a class proceeding unless there is, in addition to the representative plaintiff for the class, a representative plaintiff who
>
> (a) would fairly and adequately represent the interests of the subclass,
>
> (b) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the subclass and of notifying subclass members of the proceeding, and
>
> (c) does not have, on the common issues for the subclass, an interest that is in conflict with the interests of other subclass members.

[212] Due to the commonality in the issues across the private placements, apart from the statutory claims, there is no need to appoint separate representative plaintiffs to represent separate groups of investors.

[213] The representative plaintiffs for the statutory claims sub-class will be the proposed representative plaintiffs who purchased their shares on the CSE. They are all of the proposed representative plaintiffs except Robin Lee, who is a resident of Hawaii and purchased his shares by way of an exchange in the United States of America.

[214] Finally, the plaintiffs have put forward a workable litigation plan and reasonable notice plan.

[215] The Court of Appeal recently explained, in *Godfrey v. Sony Corporation*, 2017 BCCA 302, aff'd 2019 SCC 42, that "[a]t the certification stage, the standard that a litigation plan must meet is not one of perfection": at para. 255. Justice Savage quoted, at para. 253, the following passage from *Fakhri*:

> [77] The purpose of the plan for proceeding at the certification stage is to aid the court by providing a framework within which the case may proceed and to demonstrate that the representative plaintiff and class counsel have a clear grasp of the complexities involved in the case which are apparent at the time of certification and a plan to address them. The court does not scrutinize the plan at the certification hearing to ensure that it will be capable of carrying the case through to trial and resolution of the common issues without amendment. It is anticipated that plans will require amendments as the case proceeds and the nature of the individual issues are demonstrated by the class members.

[216] The notice plan and litigation plan proposed by the plaintiffs provide a practical and workable procedure for notifying the class and advancing the litigation:

a) Pursuant to the proposed Certification Notice Plan, attached as Schedule B to the application for certification, the notice of certification will be distributed and published by class counsel (i) posting it on the dedicated website for the action, (ii) directly sending it to any class member who has contacted class counsel or anyone who requests the notice, (iii) disseminating it once across Canada NewsWire, with distribution points in North American financial media where possible and (iv) sending it to the people who are listed as non-objecting beneficial owners of the Defendant Issuer's shares ("the NOBO List") for each of the Defendant Issuer's 2018 and 2019 AGMs,

within 30 days of the receipt by class counsel of those NOBO Lists from the Issuers, who are to provide the NOBO Lists within 21 days of the order authorising the notice.

b) Class members will have 120 days following the certification order to opt out of the proceedings by providing written notice to class counsel by mail or e-mail.

c) The proposed Litigation Plan, sets out, among other things, a plan for completing document discovery and examinations for discovery, following certification, and exchanging expert reports. The plan proposes that the common issues trial be held between 18 and 24 months after the certification decision. In relation to any individual issues remaining after certification, the plan proposes that following judgment on the common issues, the parties convene for argument under ss. 27 and 28 of the *CPA* to determine the appropriate procedure. At this time the plaintiffs submit they intend to propose the court appoint an assessor to resolve any individual issues of liability that remain and to assess damages for each claiming class member. This has been a successful process approved and executed pursuant to the settlement agreement with Beleave approved by the Court on April 8, 2022.

[217] The plan sets out a workable procedure, with timelines, for advancing the proceeding. The procedure for resolving individual issues will need to be adapted to reflect the type and amount of individual issues that actually remain, following the common issues trial. However, it is understood and expected that litigation plans are something of a “work in progress” and, as the Court of Appeal emphasized in *Jiang v. Vancouver City Savings Credit Union*, 2019 BCCA 149, leave to appeal to SCC ref’d, 38738 (14 November 2019), the purpose of the litigation plan “is not to resolve all procedural issues before certification has taken place”: at para. 57.

[218] I find that the plaintiffs are suitable representative plaintiffs with a workable litigation plan, and as a result, the final requirement for certification is met.

Conclusion

[219] This action is certified as a class proceeding.

[220] The class definition as set out in para. 1 above is approved with the following amendments:

a) it incorporates the definition of Excluded Persons set out in paras. 118 and 119 above; and

b) it further excludes persons who sold, prior to November 26, 2018, all of the Issuers' securities they had purchased during the applicable Class Period.

[221] Two sub-classes are approved, defined as:

a) The "CSE Sub-Class": All persons as set out in para. 1 above who purchased their shares through a Canadian stock exchange; and

b) The "Foreign Sub-Class": All persons as set out in para. 1 above who purchased their shares through a non-Canadian stock exchange.

[222] The common issues 1–30 are approved for the CSE Sub-Class.

[223] The common issues 1–9 and 25–30 are approved for the Foreign Sub-Class.

[224] All representative plaintiffs are approved for the Foreign Sub-Class, and all, excluding Mr. Lee, are also approved for the CSE Sub-Class.

[225] The litigation plan is approved. Class members will have 120 days following this certification order to opt out of the proceedings by providing written notice to class counsel by mail or e-mail.

"Wilkinson J."