CITATION: Longair v. Akumin Inc. et al., 2024 ONSC 3675
COURT FILE NO.: CV-21-00674081-00CP
DATE: 20240626

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Terry Longair

AND:

Akumin Inc., Riadh Zine-El-Abidine, Mohammad Saleem, Thomas Davies, Stan Dunford, Murray Lee, James Webb and Ernst & Young LLP

BEFORE: J.T. Akbarali J.

COUNSEL: *Paul Guy and Garth Myers*, for the plaintiff

Daniel Murdoch and Brittany Davis, for the defendants Akumin Inc., Riadh Zine-El-Abidine, Mohammad Saleem, Thomas Davies, Stan Dunford, Murray Lee, and James Webb

John Fabello and Colette Koopman, for the defendant Ernst & Young LLP

HEARD: June 5, 6, and 7, 2024

Proceeding under the *Class Proceedings Act, 1992*

ENDORSEMENT

Overview

[1] The plaintiff brings this motion pursuant to Part XXIII.1 of the *Securities Act*, R.S.O. 1990, c. S.5 ("*OSA*"). He seeks leave to commence a global class action against the defendant Akumin Inc. ("Akumin"), certain of its directors and officers (collectively, the "Akumin defendants"), and its auditor, Ernst & Young LLP ("EY"). The plaintiff alleges that there were material misrepresentations in Akumin's public disclosure documents and financial statements.

[2] In addition to the secondary market claim he makes against the defendants, he also makes a primary market misrepresentation claim and a common law negligence claim against the Akumin defendants, for which leave is not required. The plaintiff seeks certification of all his claims.

Brief Background

[3] Akumin is an Ontario corporation that operates outpatient medical imaging clinics in the United States.

[4] Up to Q3 2020, Akumin traded exclusively on the TSX and prepared its financial statements under International Financial Reporting Standards ("IFRS"). On September 4, 2020, Akumin was also listed on the NASDAQ, and beginning in Q4 2020, Akumin adopted U.S. Generally Accepted Accounting Principles ("US GAAP").

[5] On June 25, 2021, Akumin announced an agreement to acquire Alliance HealthCare Services Inc. ("Alliance"), a leading provider of radiology and oncology solutions in the United States. The transaction was significant, valued at $820 million USD. It would transform Akumin's business, expanding its scope and diversity, and roughly tripling its size. The deal was expected to close in Q3 2021, and in fact closed on September 1, 2021.

[6] About six weeks after announcing the Alliance transaction, on August 15, 2021, Akumin announced that it would be late in filing its Q2 2021 financial results that were expected on August 16, 2021, because management, and Akumin's auditor EY, "agreed that additional information and analysis [was] necessary to complete the interim financial report…". The press release disclosed that the additional information and analysis related to "potential additional credit losses with respect to prior years." Akumin indicated that it expected to be able to file the financial report, related management's discussion and analysis ("MD&A") and CEO and CFO certificates within 60 days of the original filing deadline, and that it had applied to the Ontario Securities Commission ("OSC"), as Akumin's principal regulator, for the imposition of Management Cease Trade Orders ("MCTO").

[7] On August 23, 2021, Akumin filed a material change report ("MCR") setting out the information that was contained in its August 15, 2021 press release.

[8] The MCTO was issued by the OSC, and as a condition thereof, Akumin released bi-weekly updates on the MCTO.

[9] One of those bi-weekly updates was released on October 12, 2021, a few days before Akumin had expected to be able to release its (late) Q2 2021 financial results. In the October 12, 2021 disclosure, Akumin advised that in performing the additional review of historical collection rates using Akumin's enhanced reporting and analytics tools, it had identified issues in the recording of write-offs and cash collections on acquired accounts receivable balances impacting current and prior periods. Akumin had noted that estimates of historical implicit price concessions and expected collection rates were not reflective of actual cash collections. Akumin had determined that a material change to historical implicit price concessions for certain prior periods was required. The change was "considered an error for accounting purposes" and thus required a restatement of Akumin's annual financial statements for the periods ended December 31, 2019 and December 31, 2020, and Akumin's interim financial statements for Q1 2021. Akumin announced that the quantum was being finalized, but it was then expected that the changes would result in a negative adjustment of around $25 million - $30 million to accounts receivable.

[10] In the same disclosure, Akumin announced that, following the closing of the Alliance transaction, while integrating the accounting policies and procedures of the two organizations, Akumin identified differences in recording the capitalization, as opposed to the repair and

maintenance expense, of components that are replaced when equipment is repaired. Akumin disclosed its intention to reflect in the restatements the adjustments resulting from the review of the accounting treatment of these components. While cautioning that its review of the impact of these changes remained preliminary, it indicated that the adjustments were expected to be reflected as an adjustment to the net book value of property and equipment ("PPE"), and additional repairs and maintenance costs which are included in operating expenses.

[11] To put it more simply, by October 12, 2021, Akumin had announced two accounting errors that it intended to adjust in restatements for fiscal years ("FY") 2019 and 2020, and for Q1 2021. These were:

a. An error in the calculation of credit losses, or write-offs, which would be expected to reduce accounts receivable, and therefore would have an impact on revenue and shareholder's equity. I refer to this as the "AR error"; and

b. An error in the capitalization of expenses relating to the replacements of some components of equipment which should properly have been captured as maintenance expenses. This error was expected to reduce the value of Akumin's property and equipment, and increase its expenses for the restatement periods. As such, it could have an impact on shareholder's equity. I refer to this as the "PPE error."

[12] The restatements were expected to correct these errors, which everyone agrees were material for accounting purposes. In addition, while the restatements were being finalized, the interim financial results for Q2 2021 continued to be delayed.

[13] On November 8, 2021, in another bi-weekly status update, Akumin advised that, while the quantum of the PPE error was still being finalized, it expected that the restatements would reflect a net book value of property and equipment that was about $19 million less than previously reported.

[14] A week later, on November 15, 2021, Akumin made a press release announcing its Q2 2021 financial results as well as the filing of the restatements.

The Plaintiff's Claim

[15] The plaintiff commenced this action by way of statement of claim dated December 20, 2021. It has been amended twice since then. The plaintiff also made certain concessions during the hearing of this motion that limited the scope of his claim.

[16] The proposed class is now defined as:

> All persons and entities, other than the Excluded Persons, that acquired Akumin Inc. ("Akumin")'s securities during the period from May 15, 2019 at 7.46 a.m. ET to November 15, 2021 at 7:04 a.m. ET.

"Excluded Persons" means:

(a) Akumin and its subsidiaries, affiliates, officers, directors, senior employees, legal representatives, heirs, predecessors, successors and assigns, the Individual Defendants and any member of their families and any entity in which any of them has or had during the Class Period any legal or de facto controlling interest; and

(b) All persons and entities that sold all of their Akumin securities before August 15, 2021.

[17] The claims can be categorized as follows:

Against the Akumin Defendants:

a. Under Part XXIII of the *OSA*, liability for misrepresentation in offering memoranda, on behalf of those who acquired Akumin notes in the primary market except those noteholders who acquired their notes in the primary market in a distribution outside Canada. The offerings are:

i. An offering of $400 million of 7% senior secured notes due on November 1, 2025 that was completed on November 2, 2020;

ii. A private offering of $75 million of 7% notes due November 1, 2025 that was completed on February 11, 2021; and

iii. An offering of $375 million of aggregate principal amount of 7.5% senior notes due August 1, 2028, completed on August 9, 2021.

b. Common law misrepresentation claims on behalf of primary and secondary market purchasers of Akumin securities, except those noteholders who acquired their notes in the primary market in a distribution outside Canada;

Against All Defendants:

c. Under Part XXIII.1 *OSA*, liability for misrepresentation in secondary market disclosure, on behalf of those who purchased Akumin securities, whether notes or shares, in the secondary market.

[18] The plaintiff alleges that the Akumin defendants made six misrepresentations, which I refer to herein collectively as the "Akumin misrepresentations":

a. Overstated accounts receivable;

b. Overstated revenue;

c. Overstated PPE;

d. Overstated shareholders' equity;

e. Failure to comply with accounting standards, that is, the plaintiff claims that Akumin misrepresented that its financial statements complied with IFRS for Q1 2019 to Q3 2020 and with US GAAP for FY 2020 and Q1 2021;

f. Ineffectiveness of its internal controls, that is, the plaintiff claims that Akumin, its CEO, and CFO misrepresented the effectiveness of the company's internal control over financial reporting ("ICFR") and its disclosure controls and procedures ("DC&P"), being the systems of checks and balances within a company to reasonably ensure the integrity of its financial disclosure (collectively, the "Internal Controls").

[19] As against EY, the plaintiff proceeds on the following two alleged misrepresentations, which I refer to collectively as the EY misrepresentations:

a. EY had no reasonable basis for its unqualified audit opinion that Akumin's impugned financial statements fairly presented its financial situation in accordance with applicable accounting standards (the "no reasonable basis" misrepresentation); and

b. EY falsely represented that its audits complied with generally accepted auditing standards in Canada ("Canadian GAAS"), the United States ("US GAAS") and in accordance with the standards promulgated by the Public Company Accounting Oversight Board ("PCAOB Standards") (the "accounting standards" misrepresentation).

[20] The plaintiff acknowledges that the class period in his proposed definition is inappropriate as to EY, as on his theory, the first misrepresentation made by EY was on March 31, 2020. As a result, the plaintiff seeks a class period that begins on March 31, 2020 with respect to his claims against EY.

[21] There are four public corrections alleged, all of which I have already described. They are:

a. The August 15, 2021 disclosure that Akumin's Q2 2021 financial statements would be delayed due to additional information and analysis related to potential additional credit losses with respect to prior years, and an MCTO would be sought.

b. The October 12, 2021 disclosure advising that the potential credit losses were expected to negatively impact AR by about $25-30 million, and advising of the PPE error which had not yet been quantified.

c. The November 8, 2021 disclosure that estimated a downwards adjustment to PPE of about $19 million.

d. The November 15, 2021 disclosure of Akumin's restated financial statements for FY 2019, FY 2020 and Q1 2021.

Issues

[22] The issues that I must determine on this motion are:

a. Should the plaintiff be granted leave to commence a claim under Part XXIII.1 of the *OSA*? This requires me to consider whether the plaintiff has established a reasonable possibility that:

i. The Akumin defendants made untrue statements that were material and that were publicly corrected; and/or

ii. EY made untrue statements that were material and that were publicly corrected.

b. Should the plaintiff's claims be certified? In particular,

i. If leave is not granted with respect to the secondary market claim, should the primary market and common law claims be certified?

ii. Should the primary market claims be certified in any event?

iii. Should the class be limited to Canadian purchasers?

iv. What is the appropriate class period?

Preliminary Issue: Expert Evidence

[23] The parties have all put forward affidavits from proposed expert witnesses. No one has objected to the admission of evidence from any other party's expert. However, the court retains a gatekeeping role, and so I must consider the admissibility of the expert evidence before me.

[24] Determining whether to admit expert evidence is a two-stage analysis. In the first stage, there are four threshold requirements that must be established (*White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23, at paras. 19 and 23, citing *R. v. Mohan*, [1994] 2 S.C.R. 9, at pp. 20-25; see also *R. v. Abbey*, 2017 ONCA 640, at para. 48):

a. Relevance, which at this stage means logical relevance;

b. Necessity in assisting the trier of fact;

c. Absence of an exclusionary rule; and

d. A properly qualified expert, which includes the requirement that the expert be willing and able to fulfil the expert's duty to the court to provide evidence that is impartial, independent and unbiased.

[25] If the threshold requirements are met, the court moves on to the second stage of the analysis. There, the judge, as gatekeeper, determines whether the benefits of admitting the evidence outweigh its potential risks, considering factors such as legal relevance, necessity, reliability, and absence of bias.

[26] In this case, the plaintiff puts forward the following experts:

a. Dr. Sunita Surana is a Vice President and Senior Economist at Forensic Economics, Inc., an economic consulting firm that specializes in the application of economics and finance to legal issues. Dr. Surana opines on whether Akumin's alleged misrepresentations would be expected to have an effect on the market price of its common stock. She also performed event studies with respect to the periods after each alleged public correction, and opined on whether the alleged public correction corresponded to the alleged misrepresentations.

b. Dr. Ramy Elitzur is a Professor of Accounting in the Rotman School of Management at the University of Toronto. Dr. Elitzur opines on whether Akumin's financial statements contained errors that were material as that is defined under the applicable accounting standards.

c. D. Paul Regan is a Certified Public Accountant since 1970 who is also certified in Financial Forensics since 2008. Mr. Regan gave his opinion on whether, based on publicly available documents, there is a reasonable possibility that EY did not comply with US GAAS or PCAOB Standards during its 2019 and 2020 audits of Akumin.

d. Adam C. Pritchard is the Frances and George Skestos Professor of Law at the University of Michigan Law School in Ann Arbor. Mr. Pritchard's research focuses on securities law, including comparative securities law, securities class actions, and Securities and Exchange Commission ("SEC") enforcement. Mr. Pritchard opines on whether a securities class action has been commenced against Akumin in the United States in relation to the same matters raised in this claim, and whether any applicable limitation period under US law which would apply to such a claim has expired.

[27] Akumin offers expert evidence from the following experts:

a. Steven F. Stanton is a Certified Public Accountant who is also certified in Financial Forensics and is a Certified Fraud Examiner. Mr. Stanton has over 40 years of experience in auditing and forensic accounting. Mr. Stanton opines on Dr. Elitzur's report and Akumin's accounting, financial reporting and internal controls with a focus on the alleged misrepresentations in Akumin's financial statements.

b. Robert Patton is a Managing Director within the Securities and Finance and International Arbitration practice groups of NERA Economic Consulting. He has an MSc in Economics and Economic History, and is a Chartered Financial Analyst. Mr. Patton opines on Dr. Surana's report, and in particular, addresses whether Akumin's alleged misrepresentations would be expected to affect its share price, the impact of a disclosure on September 1, 2021 (relating to the closing of the Alliance transaction) on Akumin's share price, whether Akumin's share price reacted in a statistically significant manner to the alleged public corrective statements, and what can be understood from the analyst commentary about the increase in Akumin's share price on November 15, 2021. Mr. Patton completes his own event studies in his report.

c. Mark A. Nebrig is a lawyer with Moore & Van Allen PLLC in North Carolina who serves as co-head of the firm's litigation group and as a member of the Securities Committee and Governance Committee. He specializes in complex class actions and securities litigation. Mr. Nebrig opines on whether an American court would apply US federal securities laws to claims on behalf of any of the investors in the putative class based on the alleged misstatements in Akumin's filings, while declining to exercise jurisdiction over any claims that may be alleged under Canadian laws or the laws of another foreign jurisdiction. He also opines on whether the allegations in the Amended Statement of Claim state a plausible claim for relief under US securities laws.

[28] EY offers expert evidence from J. Duross O'Bryan, who has been a Certified Public Accountant for over 40 years, and who has significant experience in financial statement audit engagements as the lead engagement partner. His experience includes working within the health care sector. Mr. O'Bryan's report explains in what ways he agrees or disagrees with Mr. Regan's conclusions, and the reasons for Mr. O'Bryan's opinion.

[29] I am satisfied that each of these experts offers evidence that is both necessary and relevant, and each is properly qualified to give evidence on the topics I have laid out above. I have no difficulty in qualifying all of these experts and admitting their evidence on this motion.

Leave under the *OSA*

[30] The secondary market misrepresentation claim arises under s. 138.3(1) of the *OSA* which provides, in part:

> Where a responsible issuer or a person or company with actual, implied or apparent authority to act on behalf of the responsible issuer releases a document that contains a misrepresentation, a person or company who acquires or disposes of the issuer's security during the period between the time when the document was released and the time when the misrepresentation contained in the document was publicly corrected has, without regard to whether the person or company relied on the misrepresentation, a right of action for damages against,

(a) the responsible issuer;

(b) each director of the responsible issuer at the time the document was released;

(c) each officer of the responsible issuer who authorized, permitted or acquiesced in the release of the document;

…

(e) each expert where,

(i) the misrepresentation is also contained in a report, statement or opinion made by the expert,

(ii) the document includes, summarizes or quotes from the report, statement or opinion of the expert, and

(iii) if the document was released by a person or company other than the expert, the expert consented in writing to the use of the report, statement or opinion in the document.

[31] The *OSA* in s. 1(1) defines "misrepresentation" to be "(a) an untrue statement of material fact, or (b) an omission to state a material fact that is required to be stated or that is necessary to make a statement not misleading in the light of the circumstances in which it was made".

[32] "Material fact", when used in relation to securities issued, is defined as "a fact that would reasonably be expected to have a significant effect on the market price or value of the securities".

[33] Under s. 138.8(1), leave is required to commence a claim under s. 138.3(1). Section 138.8(1) provides that the court shall grant leave only where it is satisfied that (a) the action is being brought in good faith, and (b) there is a reasonable possibility that the action will be resolved at trial in favour of the plaintiff. This second criterion requires an analysis of: (i) whether there is an untrue statement; (ii) the materiality of the impugned statement; and (iii) whether the statement has been publicly corrected.

[34] In this case, the defendants do not contest the good faith requirement. They join issue on whether there is a reasonable possibility that the action will be resolved at trial in favour of the plaintiff.

General Principles Applicable to Leave Motions

Approach to the Leave Test

[35] In *Baldwin v. Imperials Metals Corporation*, 2021 ONCA 838, 159 O.R. (3d) 241, at para. 16, the Court of Appeal described the purpose of Part XXIII.1 of the *Securities Act* as being "aimed at deterring corporate nondisclosure, protecting investors, and incentivizing accurate and timely disclosure by public issuers, while avoiding the American experience of predatory 'strike suits'".

[36] In *Theratechnologies Inc. v. 121851 Canada Inc.*, 2015 SCC 18, [2015] 2 S.C.R. 106, at paras. 36-38, the Supreme Court of Canada held that the leave requirement gives courts "an important gatekeeping role" in determining whether an action could be said to have a reasonable possibility of success. The Court found that the threshold should be more than a "speed bump", and the courts must "undertake a reasoned consideration of the evidence to ensure that the action has some merit." The Court described the legislative objective of the leave requirement as creating "a robust deterrent screening mechanism so that cases without merit are prevented from proceeding". In *Bradley v. Eastern Platinum Ltd*., 2016 ONSC 1903, at para. 51, Rady J. held that the leave test "is not a low bar".

[37] Recently in *Drywall Acoustic Lathing and Insulation (Pension Fund, Local 675) v. Barrick Gold Corporation*, 2024 ONCA 105 ("*Barrick CA #2*") at para. 28, the Court of Appeal reiterated that s. 138.8 calls for a qualitative evaluation of the proposed action; it is not enough to show a triable issue.

[38] To establish a reasonable possibility of success, the claimant must "offer both a plausible analysis of the applicable legislative provisions, and some credible evidence in support of the claim." The threshold requires that there be a "reasonable or realistic chance that the action will succeed." However, the leave stage should not be treated as a mini-trial: *Theratechnologies*, at paras. 38-39.

[39] In *Barrick CA #2*, the court held that s. 138.8 does not call for a review in isolation of only the evidence that supports the plaintiff's theory. Rather, the analysis must include some weighing of the evidence that the parties proffer and scrutiny of the entire body of evidence, including an assessment of the credibility and reliability of the evidence: *Barrick CA #2*, at paras. 29, 31-32.

[40] To obtain leave, a plaintiff must thus demonstrate a plausible legal foundation, credible and reliable evidence in support of the plaintiff's claim, and the record must demonstrate that there is a realistic or reasonable chance the action will succeed: *Barrick CA #2*, at paras. 29, 32.

[41] The qualitative analysis as to whether there is a reasonable possibility that the claim will be resolved at trial in favour of the plaintiff must be undertaken for each alleged misrepresentation: *Paniccia v. MDC Partners Inc.*, 2018 ONSC 3470, 142 O.R. (3d) 421, at para. 86; *Kauf v. Colt Resources, Inc.*, 2019 ONSC 2179, at paras. 70-72.

[42] In *Paniccia*, at paras. 89-91, Perell J. held that a judge on a leave motion must be cognizant of the fact that full production has not been made. While the court is entitled to weigh the evidence of both parties having regard to the affidavits and cross-examinations, the court must also take into account that the leave motion "involves merely a paper record and that the statutory leave test sets a low evidentiary threshold."

[43] In *Rahimi v. SouthGobi Resources*, 2017 ONCA 719, 137 O.R. (3d) 241, at para. 48, the Court of Appeal held that the motion judge "is also obligated to consider what evidence is *not* before her." Moreover, where there are contentious issues of credibility that impact on the decision whether to grant leave, "the motion judge must ask herself whether they can be resolved on the existing record": *SouthGobi*, at para. 49.

[44] In *Barrick CA #2*, at paras. 36 – 40, the Court of Appeal described three clear limitations that arise from the prohibition on conducting mini-trials:

a. The motion judge must keep in mind the relatively low merits-based threshold of a realistic or reasonable chance of success;

b. Attempts to resolve realistic and contentious issues arising from conflicting credible evidence will lead a judge to lapse into an impermissible mini-trial; and

c. As I have just noted, the judge must consider the evidence that is not before them. The completeness of the record should affect how a motion judge proceeds.

Untrue Statement

[45] When considering whether there is a reasonable possibility that the plaintiff will establish an untrue statement at trial, each alleged misrepresentation is a discrete misrepresentation claim: *Cappelli v. Nobilis Health Corp.*, 2019 ONSC 2266, at paras. 145-146.

Materiality

[46] Leave will not be granted in respect of a misrepresentation if the materiality of the misrepresentation is not established: *Nobilis*, at paras. 145-146.

[47] Determining materiality is an objective, contextual, and fact-specific inquiry, considered from the perspective of a what a reasonable investor would consider important in deciding to invest, and at what price. If there is a substantial likelihood that a reasonable investor would consider a fact important in deciding whether to invest, and at what price, that fact may be considered material. Determining materiality requires applying a legal standard to specific facts in light of all of the relevant circumstances and the total mix of information: *Nobilis*, at para. 147.

[48] In *Tietz v. Cryptobloc Technologies Corp.*, 2021 BCSC 2275, at para. 27, aff'd 2022 BCCA 307, at paras. 147-148, 150, the court noted that specific evidence on the question of materiality is not always necessary. In appropriate cases, the objective importance of the facts or omissions for the investment decision can be inferred as a matter of common sense. See also *Cornish v. Ontario Securities Commission*, 2013 ONSC 1310, at para. 99.

[49] In *Cornish*, the court held that materiality (there, in the context of material change) is highly contextual, and there is no bright line test. It found that a single factor such as share price movement will not conclusively determine the question of materiality: para. 53.

[50] In *Sharbern Holding Inc. v. Vancouver Airport Centre Ltd.*, 2011 SCC 23, at para. 59, Rothstein J. held that, when considering materiality, the predominant focus must be on a contextual consideration of what information was disclosed, and what facts or information were omitted from the disclosure documents provided by the issuer.

[51] The parties agree that a restatement of financial results indicates that the errors in the original financial statements were material for accounting purposes. However, a restatement does not, on its own, establish materiality for *OSA* purposes: *Nobilis*, at para. 176, *Badesha v. Cronos Group Inc.*, 2022 ONCA 663, at para. 66.

Public Correction

[52] With respect to public correction, in *Baldwin*, at para. 47, the Court of Appeal described the overarching question as being: "whether the alleged public correction was reasonably capable of being understood in the secondary market as correcting what was misleading in the impugned statement."

[53] In *Baldwin*, the Court of Appeal held that focusing on the market's understanding of the alleged public correction is consistent with one of the core purposes of the statutory framework, that is, to incentive fair and accurate disclosure by public issuers. Strathy C.J.O. cautioned that:

> [p]ermitting an issuer to escape liability by making vague or general disclosures ("something has happened and we are looking into it") is inconsistent with that core purpose. It would undermine confidence in the securities market and deprive shareholders of compensation.

[54] In *Drywall Acoustic Lathing and Insulation, Local 675 Pension Fund v. Barrick Gold Corporation*, 2021 ONCA 104 ("*Barrick CA #1"*), at para. 48, the court held that a motion judge is obliged to engage in a reasoned consideration of evidence of the context in which the alleged public correction was made and how it would be understood in the secondary market if it does not, on its face, reveal the existence of the alleged misrepresentation.

[55] In *Barrick CA #1*, at para. 50, the court adopted the approach to public correction described by Perell J. in *Drywall Acoustic Lathing and Insulation, Local 675 Pension Fund (Trustees of) v. SNC-Lavalin*, 2016 ONSC 5784, at para. 45:

> [T]he determination of whether a corrective disclosure is corrective depends not only on a semantic analysis of what the public correction means but also on an analysis of how the words would be understood in an efficient market and also a statistical analysis of the effect of those words on the market's evaluation of the value of the securities that had been misrepresented to the marketplace. Put somewhat differently, a semantic analysis of whether a corrective disclosure was made is necessary, but it is not sufficient to determine the existence or non-existence of a corrective disclosure. What is required is an analysis of the literal meaning of the words, which is in any event not a purely mechanical exercise but one that involves evidence, opinion, and argument, and also an analysis of the perceived or effective meaning of the words in the secondary market, which once again is not a mechanical exercise, but rather one that involves evidence.

[56] The role of public correction in the statutory cause of action has not yet been definitively characterized. However, as the Court of Appeal held in *Baldwin*, at paras. 50-51, misrepresentation

does the heavy lifting in the statutory cause of action. “It is the wrong at issue and it forms part of the context in which the public correction operates and would be understood by the market”. Its role at the leave stage is a modest one.

[57] Very recently, in *Barrick CA #2*, the Court of Appeal reiterated its earlier guidance on public correction, finding that it will serve as a necessary time-post for the cause of action and any eventual damages calculation. The Court of Appeal described a motion judge’s task in relation to public correction as follows:

> In identifying possible public correction dates a motion judge’s ultimate task is to determine if there is a reasonable possibility that a trial court will find that a public disclosure was a public correction, an inquiry that requires a reasoned consideration of the evidence. As I have indicated above, this inquiry may alternatively be profitably framed by asking “whether the alleged public correction was reasonably capable of being understood in the secondary market as correcting what was misleading in the impugned statement”.

[58] With respect to the relationship between the misrepresentation and the alleged public correction, the Court of Appeal held, at para. 79 of *Barrick CA #2*, that a linkage or connection will assist the judge in determining how the alleged corrective disclosure would be understood in the secondary market. A sufficient linkage or connection will exist if the alleged public correction can reasonably be taken as correcting the alleged misrepresentation, but not otherwise. A mere coincidence in subject matter will not suffice.

[59] Both the plaintiff and the Akumin defendants rely on the decision of the Court of Appeal in *Cronos*. Akumin cites para. 66 of that decision, where the court, discussing the decision of the motion judge in that case, wrote:

> The motion judge held that whether a correction is material is not a matter of semantics, but rather requires an understanding of how a specific correction would be understood in an efficient market and also requires a statistical analysis of the effect of the correction.

[60] In the same paragraph, the court then quoted from the motion judge’s decision: *Badesha v. Cronos Group*, 2021 ONSC 4346, at paras. 53-54:

> The Court of Appeal made this very point in [*Barrick CA #1*], at para. 50, quoting approvingly from the motion court’s judgment in *Drywall Acoustic Lathing and Insulation, Local 675 Pension Fund (Trustees of) v. SNC-Lavalin Group Inc.*, 2016 ONSC 5784, at para. 45:
>
> > [T]he determination of whether a corrective disclosure is corrective depends not only on a semantic analysis of how the words would be understood in an efficient market and also a statistical analysis of the effect of those words on the market’s evaluation of the value of the securities that had been misrepresented to the marketplace.

> The impact on the market lies at the heart of the statutory definition of "material fact". It is not just an add-on to be examined in case the public corrections are somehow unclear. The possibility exists that there were misrepresentations in the form of inaccuracies in financial statements, but that they had negligible impact and were not material in the *OSA* sense of the term.

[61] Akumin relies on the passage above to argue that a disclosure that is not accompanied by a statistically significant share price decline cannot be a public correction for purposes of the statutory scheme.

[62] For his part, the plaintiff emphasizes that in *Cronos*, the court held, at para. 78, that:

> …where there was a drop in share prices, and there is credible, complex and competing evidence on whether misrepresentations have a material effect on share prices, the reasonable possibility threshold is met and the issue should be left for trial.

[63] In my view, Akumin's approach muddles the materiality of the representation with the materiality of the correction.

[64] I acknowledge that the Court of Appeal, in para. 66 of its reasons in *Cronos*, referred to the materiality of the correction. With the greatest of respect to the Court of Appeal, it appears that in characterizing the motion judge's reasons, it erred in referring to the materiality of the public correction.

[65] The motion judge's reasons make clear that he was considering the materiality of the misrepresentation. He noted, at para. 51, that assessing materiality includes taking into account the entire circumstances of the company, its industry, and market, and requires an examination of the context in which the alleged public corrections were made and how they would be understood in the secondary market. In other words, the impact of the public correction may assist the court in assessing materiality. Indeed, it is obvious that the impact of the public correction on share price is a factor that can assist the judge in determining whether the representation that is corrected in the public correction is material, but it is the materiality of the misrepresentation at issue, not the materiality of the public correction.

[66] In my view, the distinction is important. If the public correction has to be material — a conclusion not supported by the plain wording of the statute — then the court is encouraged to parse each partial correction in a way that disconnects the circumstances around each public correction from the others. That is how Akumin has approached this motion. It argues that there is no public correction followed by a statistically significant share price decline. There is either a correction or a statistically significant share price decline. In my view, this siloed approach does not support the legislative goal of incentivizing fair and accurate disclosure by issuers. Rather, it incentivizes issuers to do exactly what Strathy C.J.O. rejected in *Baldwin*: disclose that "something has happened and we are looking into it" in the hopes of provoking the expected share price decline, and leaving the clear public correction until later, hoping to minimize or avoid a share price decline following the corrective disclosure.

[67] An approach that involves parsing each alleged partial correction to determine whether it provoked a statistically significant share price decline, and parsing each statistically significant share price decline to determine if it was provoked by a (partial) correction, would encourage the court to limit the contextual analysis it undertakes, when the jurisprudence to date clearly favours a contextual approach to the questions of materiality and public correction.

[68] Another impact of the approach Akumin urges me to take is that it, in effect, elevates the importance of the public correction, inconsistent with the Court of Appeal's finding in *Baldwin* that misrepresentation does the heavy lifting, and that at the leave stage, the role of public correction is modest.

[69] In my view, the approach to public correction that Akumin proposes does not serve the aims of the statutory scheme and is inconsistent with the jurisprudence to date.

[70] As to the plaintiff's reliance on *Cronos*, in order to determine whether the conclusion reached there is warranted in this case, I must turn to an analysis of the evidence.

Is there a reasonable possibility the alleged misrepresentations were untrue?

The Alleged Akumin Misrepresentations

[71] The Akumin defendants do not join issue about whether the misrepresentations they are alleged to have made were untrue. As a result, I consider this requirement only briefly.

[72] As I have already noted, Akumin reported that there were errors in its financial statements which required restatements for FY 2019, FY 2020 and Q1 2021. It also disclosed weaknesses in its internal controls in its MD&A.

[73] Akumin restated its AR, PPE, revenue, and shareholders' equity, from FY 2019 to Q1 2021. Dr. Elitzur gives credible evidence that these restatements were, by definition under US GAAP and IFRS, acknowledgements that the prior financial statements contained errors in those areas that were material for accounting purposes in those time periods. Akumin's expert Mr. Stanton gives consistent evidence on cross-examination.

[74] Moreover, there is evidence in the record from Mr. Stanton that the weaknesses in the design or implementation of Akumin's internal controls were related to, at the very least, the PPE error. Mr. Stanton agreed that the weaknesses in internal controls were present between December 31, 2019, until they were remediated in December 2022.

[75] Dr. Elitzur gives evidence that Akumin's disclosure demonstrates that it recognized revenue when it was not probable that it would collect the receivable, and that doing so violated IFRS 15 *Revenue from Contracts with Customers* which requires that it be probable a receivable will be collected in order to recognize the related revenue. Dr. Elitzur also notes the corresponding provision in US GAAP which similarly requires revenue to be recognized only when the collectability of substantially all of the receivable is probable.

[76] Dr. Elitzur identifies the ways in which the PPE reporting violated IFRS and US GAAP standards. In particular, IAS 16 *Property Plant and Equipment* requires that an entity not recognize in the carrying amount of an item of property, plant and equipment the costs of the day-to-day servicing of the item; such costs are recognized in profit or loss as incurred. By capitalizing these costs rather than expensing them, Dr. Elitzur concludes that Akumin violated IAS 16. To similar effect is US GAAP ASC 360 – Property Plant and Equipment, which requires that if a cost does not extend an asset's useful life, increase its productivity, improve its operating efficiency, or add additional production capacity, the cost should be recognized as an expense as incurred. Dr. Elitzur thus concluded that in capitalizing the costs rather than expensing them, Akumin violated both US GAAP and IFRS.

[77] The evidence I have just reviewed is enough to conclude that there is sufficient credible and reliable evidence for me to find a reasonable possibility the plaintiff will prove that each of Akumin's impugned statements were untrue.

The Alleged EY Misrepresentations

[78] It is plain that the case against EY is derivative of the case against Akumin. The bulk of the record before me is focused on proving a reasonable possibility of success against Akumin.

[79] EY does not accept that the representations it made were untrue. EY's expert and the plaintiff's expert agree that a proper audit can be conducted, and a valid, clean audit opinion issued, but a financial statement might still contain an error requiring a restatement. An auditor does not guarantee the company's reported financial results. An audit is conducted under the principle of obtaining reasonable assurance. Errors can still exist even though an auditor adheres to the applicable professional standards.

[80] Mr. Regan, the plaintiff's expert, is clear in his report that he cannot offer an opinion on whether EY complied with the applicable audit standards in this case. He cannot do so because the audit file has not been produced. At this stage in the action, the plaintiff is not entitled to demand it, and EY has no obligation to disclose it. I draw no adverse inference against EY relating to its decision not to produce the audit file. But I have the obligation to keep in mind the evidence that is not before me on this motion, and that includes EY's audit file, which one would expect to be key evidence on the question of whether EY complied with the applicable audit standards.

[81] Mr. Regan's evidence includes an analysis of whether, based on publicly available documents, there is a reasonable possibility that EY did not comply with US GAAS and/or PCAOB Standards, as applicable, during its 2019 audit and 2020 audit. In using the phrase "reasonable possibility", Mr. Regan indicates that he has drawn the definition of that standard from US GAAP's definitions of "reasonably possible" and "probable", where reasonably possible is "the chance of the event or events occurring is more than remote but less than likely", and where probable is "the event or events are likely to occur".

[82] Mr. Regan concludes that it is reasonably possible that EY failed to comply with applicable US GAAS and PCAOB Standards during its audits and did not have an appropriate basis to provide

its unqualified opinions that Akumin's 2019 and 2020 financial statements were fairly presented in all material respects, in conformity with IFRS and US GAAP.

[83] Among his reasons for so concluding, Mr. Regan explains:

a. Akumin's restatement demonstrates that information necessary to detect and prevent material accounting errors in Akumin's financial statements was available during EY's audits. Implicitly, then, there is a reasonable possibility that EY failed to properly obtain or respond to the available information, in violation of applicable standards.

b. The PCAOB acknowledges that restatements similar to those reported by Akumin provide a possible indicator of lapsed audit quality, although this is not conclusive.

c. The quantitative significance and nature of Akumin's acknowledged accounting errors increase the likelihood that EY failed to comply with US GAAS and PCAOB Standards during its audits.

d. The restatements affected specific accounts (revenue and accounts receivable) that were subject to presumed fraud risk and higher risk of material misstatement under US GAAS and PCAOB Standards. The applicable standards required EY to obtain more persuasive audit evidence and perform specific audit procedures in response to such risks. The fact that there were errors in these accounts increases the likelihood that EY failed to (i) appropriately respond to risks that Akumin's financial statements could be materially misstated due to fraud or error, and (ii) comply with US GAAS and PCAOB Standards during its audits.

e. The accounting errors occurred over multiple audit periods, increasing the likelihood that EY failed to comply with applicable standards during its audits.

f. The reported material weaknesses in Akumin's Internal Controls, when combined with EY's requirement to understand the company's Internal Controls, increases the likelihood that EY failed to properly respond to deficiencies in Akumin's Internal Controls and related risks of material misstatement caused by those deficiencies, in violation of applicable standards.

[84] Mr. Regan's opinion involves a certain amount of speculation. He offers some credible evidence that there are factors in Akumin's restatements that raise the prospect that EY failed to comply with applicable standards, but without the audit file, Mr. Regan can go no further.

[85] However, given that (i) EY, while not conceding that its representations were untrue, focused its defence of this motion elsewhere, (ii) I must be cognizant of the evidence that is not before me, including the audit file; and (iii) the low threshold applicable on a leave motion, I conclude that the plaintiff has proven a reasonable possibility that EY's representations will be found at trial to be untrue.

Materiality and Public Correction

[86] The crux of the defence mounted by the Akumin defendants to this motion relates to materiality and public correction. They argue that the first alleged public correction on August 15, 2021 did not correct anything, and that it is the only alleged public correction after which there is a statistically significant share price decline. They argue that without a public correction followed by a statistically significant share price decline, the plaintiff has failed to make out materiality and public correction. Not surprisingly, the plaintiff does not accept Akumin's characterization of the evidence.

[87] Due to the nature of the arguments made by the Akumin defendants, it is necessary, in my view, to consider whether the impugned statements made by Akumin were material at the same time as I consider whether they were publicly corrected.

The Alleged Akumin Misrepresentations

[88] The parties put forth competing narratives about the events that transpired, and in particular, the events between August 12, 2021 and November 15, 2021. Both point to the disclosures at issue, the expert evidence, and the analyst reports in support of their theories.

[89] In brief summary, Akumin argues that the disclosure of August 15, 2021 alerted the market that its Q2 2021 financial report would be delayed, and Akumin would ask the OSC for a MCTO. The market responded to that information with a statistically significant share price decline, largely because of the uncertainty of the delayed current financial results, and the concern that there was risk to the closing of the Alliance deal. Akumin argues that the disclosures of October 12, 2021, November 8, 2021, and November 15, 2021 provided the market with information that corrected information reported in Akumin's financial statements for FY 2019, FY 2020 and Q1 2021, but that the release of this information was either not accompanied by statistically significant share price movement, or it was accompanied by a statistically significant share price increase, because the information was not material, and perhaps was positive. Among other things, Akumin alleges that its credit loss risk was already well-known to the market, and it had, in Q4 2020 shortly before these events, taken an AR write-down, so nothing about the potential additional credit losses disclosed on August 15, 2021 would have taken the market by surprise or been understood as a new risk.

[90] The plaintiff argues that the August 15, 2021 disclosure put the market on notice of several things, including that Akumin was facing potential additional credit losses, which would impact AR, revenue, and shareholders' equity in some fashion. He alleges that, after the October 12, 2021 disclosure, using a two-day event window, there was a statistically significant share price decline. The plaintiff argues that the disclosures of November 8, 2021 and November 15, 2021 were partial corrections that did not lead to a statistically significant share price decline because the market had already impounded the information about Akumin's financial errors. The plaintiff points to the fact that Akumin's share price never recovered to the pre-August 15, 2021 levels, which one would have expected if the share price movement were related to the Alliance deal risk and the delayed

Q2 2021 financial statements, at least once the Alliance deal closed and the Q2 2021 financial statements were released.

[91] The evidence before me indicates that Akumin was understood in the market to have credit loss risk, in particular because one of its significant sources of business at its clinics was for attorney-payors who required medical examinations of their clients, presumably in support of their personal injury claims. The time to payment of those attorney invoices was historically longer than Akumin's other invoices, and inevitably some of those receivables were written off. At the same time, the attorney-payor channel was higher margin than other channels. On the other hand, Akumin also included among its payor clients insurance companies and government, which historically paid accounts faster, albeit at lower profit margins. Akumin had also taken a write down in its AR in Q4 2020.

[92] The evidence before me also indicates that the Alliance transaction would be a significant one for Akumin; as I have indicated, once the transaction closed, Akumin more or less tripled in size. The Alliance transaction would have been relevant to investors when considering whether to invest in Akumin, and at what price.

[93] Akumin's disclosure on August 15, 2021 advised the market of at least three important things:

a. The Q2 2021 financial report would be delayed;

b. The delay was occasioned because additional information and analysis relating to potential additional credit losses with respect to prior years was required to complete the report;

c. Management had applied to the OSC for a MCTO.

[94] In support of its argument that the August 15, 2021 disclosure did not correct anything, Akumin points to the MCR filed shortly thereafter, which, in the "Summary of Material Change", focuses on the delay in reporting Q2 2021 financial results and on the MCTO. I note that in its "Full Description of Material Change", the MCTO makes note of all three important facts from the August 15, 2021 press release.

[95] In any event, the August 15, 2021 disclosure on its face called into question prior financial period reporting as it related to credit losses. It is reasonably possible that the market would have understood this as a correction relating to past reporting of AR, which would have an effect on revenue and could have follow-on effects on shareholder equity. Dr. Surana's evidence is to this effect.

[96] Were I to conclude that this disclosure was not a correction, I would be falling into the error that Strathy J.A. recognized in *Baldwin*, that is, "[p]ermitting an issuer to escape liability by making vague or general disclosures ("something has happened and we are looking into it")."

[97] Following the August 15, 2021 disclosure, Akumin's share price fell. Both Dr. Surana and Mr. Patton produced event studies that demonstrate a statistically significant share price decline. Dr. Patton found a one-day excess return of -20.36%, and a two-day cumulative excess return of -27.16%, both statistically significant at the 5% level. Dr. Surana's event study showed a one-day excess return of -18.5%, and a two-day cumulative excess return of -23.9%, both of which were statistically significant at the 1% level.

[98] Dr. Surana and Mr. Patton disagreed as to why Akumin's share price declined. Dr. Surana's opinion is that the share price decline is due predominantly to the accounting issues that were disclosed. She noted that the accounting issues were also the root cause of the other issues that Akumin argues concerned the market: the delay in the Q2 2021 financial report and the MCTO.

[99] Mr. Patton concluded that there was no economic correspondence between the misrepresentations and the excess decline because the August 15, 2021 disclosure was not understood by the market to relate to an upcoming restatement. However, on cross-examination, he appears to concede that the accounting issue was a "potential candidate" to explain the cause of the share price decline on August 15, 2021.

[100] There are other issues with Akumin's theory that the share price decline was related only to the Alliance deal risk and the delay in releasing Q2 2021 results. First, once the Alliance deal closed on September 1, 2021, Akumin's share price went up, but remained significantly below the share price before the August 2021 disclosure. Second, by the time the financial statements were released on November 15, 2021, the share price went up again, but it had fallen in the interim, and it remained well below the share price before the August 2021 disclosure. This does not mean that Akumin is wrong, but it is evidence that, without other explanation, does not support Akumin's theory.

[101] The analyst reports in the days after the August 15, 2021 disclosure indicate that the analysts that were following Akumin paid attention to the credit losses. National Bank of Canada considered that the credit losses likely related to attorney-payer AR write-downs. It indicated that the credit losses "are not entirely surprising", and at that stage, indicated it would "remain on the sidelines" waiting to see how things developed.

[102] After the closing of the Alliance transaction on September 1, 2021, in an analyst report the following day, Cormark Securities Inc. lowered its target price for Akumin. It commented that the closing of the Alliance deal "puts an end to perceived risks that the takeout and related financings had material closing risk following the delay of [Akumin's] Q2/21 financials." However, it was concerned about certain other aspects of the Alliance transaction. Cormark was also waiting on Akumin's Q2 21 financials and, while it considered that the fact that the Alliance deal closed suggested that there was no material revenue recognition issue at Akumin, it continued to acknowledge the risk that there was such an issue. It concluded that it would revisit its forecast and target metrics once it had improved visibility on some of the issues it had addressed.

[103] In contrast to Cormark, Canaccord Genuity raised its price target for Akumin on September 20, 2021. It noted that the stock would continue to remain "under pressure" until Akumin released

its Q2 21 results. It noted that the accounting issues could result "in either a positive or negative impact on past periods".

[104] Some of the analysts' speculation turned out to be wrong, as the credit losses were not specific to attorney-payors. There is inconsistency in the analyst reports: one analyst raised their target price for Akumin while another lowered it. While deal risk and delayed financials are mentioned as issues in valuing Akumin, the impact of the accounting issues is not discounted in the analyst reports.

[105] On October 12, 2021, Akumin released its bi-weekly MCTO status update in which it disclosed the following relevant information:

a. The credit loss issue was expected to result in a negative adjustment to AR of $25-30 million.

b. Akumin had discovered the PPE error which it had not yet quantified.

c. The financial statements for FY 2019, 2021 and Q1 21 and their related MD&A would have to be restated.

d. The Q2 21 financial results would not be released on October 15, 2021 as previously expected, but were now anticipated to be released prior to November 15, 2021.

[106] Akumin does not dispute that this disclosure is corrective of at least some of the impugned statements. The parties disagree about the impact of the disclosure.

[107] The crux of the disagreement between the plaintiff's and Akumin's experts relates to the appropriate window for the event study. Dr. Surana adopted a contextual approach to the length of the event window. She chose a two-day event window, which she indicated was appropriate to ensure that the market had time to impound the October 12, 2021 disclosure, particularly in view of an analyst report released on October 13, 2021, which I address below. Mr. Patton agrees that, if one uses the two-day event window, there was a statistically significant share price decline following the October 12, 2021 disclosure.

[108] However, Mr. Patton concludes that a one-day event window is appropriate, because in his view, the event window ends on the first day where there is no statistically significant share movement. Using a one-day event window, Mr. Patton finds no statistically significant share price movement. Dr. Surana agrees that a one-day event window does not yield a statistically significant share price movement.

[109] On October 12, 2021, National Bank of Canada released an analyst report in which it identified takeaways from Akumin's disclosure: (i) the expected AR write-down is likely related to the attorney-payor channel; (ii) the final impact of the PPE error has yet to be determined, but higher operating expenses are expected to impact profitability and potentially result in the Alliance acquisition being less accretive than originally thought; and (iii) the higher expenses and write-

down of higher-margin attorney AR will likely impact Akumin's margins in coming quarters. National Bank of Canada made no change to its outlook.

[110] On October 13, 2021, Cormark released a "morning note" in which it lowered its recommendation for Akumin from "buy" to "speculative buy" and reduced its target price from $4.60 to $3.75. Cormark indicated that the details on the accounting issues had "an incrementally negative impact on [its] outlook" for Akumin. Cormark expected Akumin stock to remain "under pressure" but indicated it saw quick re-rate potential if the accounting issues resolved as it forecast they would.

[111] The November 8, 2021 disclosure repeated Akumin's expectation that it would file its restated filings and Q2 21 financial results on November 15, 2021. It also quantified the PPE error, indicating that, although the figure was still being finalized, Akumin expected it would reduce the net book value of property and equipment by approximately $19 million as at June 30, 2021 compared to the March 31, 2021 net book value. Akumin also disclosed that it might not be able to file its interim financial results for Q3 2021 by November 15, 2021, but expected to file them by December 15, 2021.

[112] Dr. Surana and Mr. Patton agree that there was no statistically significant share price movement following the November 8, 2021 disclosure. According to Mr. Patton, the lack of share price movement indicates that the PPE error was not material. Dr. Surana opines that the share price did not move because the market had already incorporated the impact of the information in this disclosure from the earlier disclosures. This theory is referred to as "truth-on-the-market". In other words, Dr. Surana suggests that the market did not wait until full disclosure was made, but rather, investors formed expectations about future incomes which were already reflected in Akumin's share price after the October 12, 2021 disclosure.

[113] A National Bank of Canada analyst report released on November 8, 2021 repriced Akumin's target price at $2.00 from $3.50. It noted the delay in Q3 21 financial statements to December 15, 2021, and the impact of the PPE error that had been disclosed. It described the PPE error as "disappointing", and suggested that, along with the AR error, the margins of Akumin's legacy (i.e. pre-Alliance transaction) operations would decrease in the coming quarters.

[114] Finally, the restatements and Q2 21 financial results were released on November 15, 2021. Akumin's AR, PPE, revenue and shareholder's equity were all lowered in the restatements.

[115] Dr. Surana and Mr. Patton again disagree about the appropriate event window to use to determine whether and how the price of Akumin's shares reacted to this disclosure.

[116] Dr. Surana uses a four-day event window, which results in no statistically significant share price reaction. She attributes the lack of share price movement to the truth-on-the-market theory I have already noted. Mr. Patton uses a one-day event window, which results in statistically significant positive share price movement, which Mr. Patton concludes means that the restatement was considered by the market to be positive as compared to the mix of information immediately preceding the announcement.

[117] In an analyst report released on November 15, 2021, National Bank of Canada left its target price for Akumin unchanged. Of Akumin's Q2 21 financial results, it noted mixed results, "revenues in line, EBITDA miss". It described the AR and PPE errors as having a negative impression associated with improper accounting, and called the resulting financial impacts "mostly negative".

[118] On November 17, 2021, Cormark released an analyst report in which it raised the target price for Akumin to $4.25 from $3.75, concluding that Akumin "presents a deep value opportunity with share price upside well beyond our target".

[119] On November 18, 2021, Canaccord Genuity released an analyst report in which it lowered its price target for Akumin from $5.75 to $5.00, noting the "sizable adjusted EBITDA miss" for Q2 21 along with other Q2 21 period financial results. It also made note of the AR and PPE errors, and in particular, that the cumulative impact of the errors was a decrease in shareholders' equity of $58.2 million as at Q1 21.

[120] Both Akumin and the plaintiff have plausible theories to explain the market's understanding of the information disclosed by Akumin. Both theories are supported by documentary evidence. Both are supported by credible and reliable expert evidence. It is not the role of a judge on a leave motion to resolve the questions on which those experts disagree. I decline to stray into a mini-trial.

[121] I am satisfied that the plaintiff has established a reasonable possibility that he will prove that the impugned statements were material for *OSA* purposes. This is supported by, among other things, Dr. Surana's evidence, the share price movement between August 12, 2021 and up to the period following the November 15, 2021 disclosure, some of the commentary from the analysts, the quantum of the adjustments made in the restatements, and the representations and alleged public corrections themselves.

[122] In reaching this conclusion, I note that the parties have all approached the internal controls statement and the impugned statement that Akumin complied with IFRS and US GAAP as derivative of the primary accounting representations.

[123] I am also satisfied that the plaintiffs have established a reasonable possibility that all four alleged public corrections were partial corrections. A plain reading of the disclosure reveals that they each correct or clarify information about the impugned statements and would have been understood to do so by the market.

[124] Having said that, I have some difficulty with the notion that a public correction that does not result in a statistically significant share price decline, especially when it comes after a public correction associated with a statistically significant share price decline, can be a useful time-post for calculating damages under the *OSA*, and more particularly, how such an interpretation of the *OSA* would serve the goals of the statutory scheme.

[125] However, on a leave motion, I would not go further. The impact of Dr. Surana's evidence about the "truth-on-the-market" theory, and how that theory interacts with the legislative public

correction requirement is for another day. The plaintiff has a plausible legal theory behind his allegation that there are four partial corrective disclosures, and it is supported by some credible evidence. The question of the role of public correction in circumstances like these is best left to be decided on a fully developed record.

[126] There is a separate issue that arises with respect to Akumin's notes that traded in the secondary market, and in respect of which a secondary market claim is advanced under Part XXIII.1 of the *OSA*.

[127] The analysis I have just gone through suffices to establish that, as with the shareholder class members, the noteholder class members who acquired their notes in the secondary market have demonstrated that there is a reasonable possibility that they will prove that Akumin made untrue statements, and those statements were publicly corrected.

[128] Akumin takes issue with respect to whether the noteholders can prove a reasonable possibility that the impugned statements were material as they relate to the notes.

[129] First, there is no event study indicating any statistically significant price impact on the notes following Akumin's corrective disclosure. Everyone acknowledges that, while the Akumin shares traded in an efficient market, the notes did not.

[130] According to Akumin, the statutory scheme requires an efficient market for relief to be available under it.

[131] The plaintiff disagrees, and relies on s. 138.5(1)(2)(ii)(B) of the *OSA* which provides for a calculation of damages in a secondary market misrepresentation claim in the amount the court considers just if there is no published market. The plaintiff states that since the statute itself contemplates assessing damages for securities that are not traded in an efficient market, it cannot be a requirement that there be an event study for the noteholders to prove materiality of the misrepresentations to the notes.

[132] In an argument made briefly in sur-reply, Akumin argues that s. 138.5(1)(2)(ii)(B) only applies where securities are not disposed of within ten days, and denies that the section has relevance.

[133] In my view, the reading of the *OSA* that the plaintiff puts forward is plausible and sufficient to clear the leave bar. I conclude that, for purposes of the leave test, and in view of the current state of the jurisprudence, where securities trade in a market that is not efficient, the court can look to other evidence to determine materiality for purposes of leave. Requiring an event study when one cannot be completed, and thus denying investors who hold securities that do not trade in an efficient market access to the statutory regime is, at this stage of the proceeding, inconsistent with the goals of the *OSA*. To the extent Akumin wishes to advance a different theory of the statute, it is free to do so at trial where the issue can be determined on a full record.

[134] There is evidence of the note price history in the record. It indicates that the note prices dropped following the August 15, 2021 disclosure, and did not return to pre-disclosure levels. But there is no evidence from any expert as to why.

[135] The plaintiff relies on four reports from Moody's Investor Services commenting on the Akumin notes. Moody's reports are not as timely as the analyst reports on Akumin's shares, but nonetheless, they provide some context to the market reaction to Akumin's disclosures:

a. On September 15, 2021, Moody's reported a rating action, in which it affirmed Akumin's corporate family rating, probability of default rating and B senior secured ratings. However, it changed the outlook for Akumin notes from stable to negative, reflecting the continued delay in Akumin's Q2 21 filings, increasing Moody's assessment of Akumin's liquidity and governance risk.

b. The next day, on September 16, 2021, Moody's released an update following the change in its outlook for Akumin to negative. It raised governance risks associated with Akumin's inability to file Q2 21 financial statements on time, high leverage, and other concerns.

c. On October 14, 2021, just after the second corrective disclosure, Moody's released an announcement indicating that Akumin's filing delay and accounting review "are credit negative".

d. On November 23, 2021, about a week after the restatements were filed, Moody's issued an "Issuer Comment" about Akumin. It wrote that the Q2 21 filings and restatements revealed "credit negative corrections that materially reduce historical EBITDA compared to original statements, unveiling a significant increase in leverage for 2019 and 2020". It also made reference to the then-ongoing delay in Q3 21 filings.

[136] Given the price decline of the notes, and Moody's stated concerns about Akumin's accounting review, I conclude that the plaintiff has established a reasonable possibility that he will prove that the impugned statements were material with respect to the notes.

[137] It follows from this analysis that leave shall be granted to the plaintiff to pursue the secondary market misrepresentation claims against the Akumin defendants.

The Alleged EY Misrepresentations

[138] EY argues that its impugned statements were neither material nor publicly corrected.

[139] It is common ground that EY did not withdraw its audit opinions. It is also common ground that an auditor can perform an audit in accordance with applicable standards, issue a clean audit opinion, and there can still be errors in the audited financial statements that require restatement.

[140] The plaintiff argues that once Akumin stated that its prior financial reporting was no longer accurate, that statement cast doubt on EY's audit opinion that the financial statements fairly presented the company's financial situation, and that it had conducted its audit in accordance with applicable standards. Thus, the plaintiff argues that all the statements that I have found to be reasonably possible public corrections are also corrective of EY's impugned statements.

[141] The plaintiff argues that materiality can be inferred as a matter of common sense. People rely on audited financial statements because they are audited. In the plaintiff's view, the market response to Akumin's disclosure is more than sufficiently linked to EY's representations.

[142] I have difficulty with the plaintiff's argument as it relates to EY. The case against EY is largely derivative of the case against Akumin, and seeks to make EY responsible by association, not by evidence.

[143] There is very little evidence in the record that speaks directly to EY's impugned statements, and how they would be perceived in the market. Dr. Surana and Mr. Regan comment briefly on the general importance of audits and auditor's opinions. But there is nothing particular to EY, the Akumin audits, or the Akumin restatements that address the criteria of materiality and public corrections with respect to EY. Mr. Regan's evidence is focused on the potential for EY's statements to be untrue, not on their materiality or public correction.

[144] Nor do I find that an inference of materiality can be drawn. A finding that an auditor's opinion or its statement that it complied with applicable standards is material and corrected by virtue of disclosure and correction of accounting errors in an issuer's financial statements would be inconsistent with the jurisprudence in Ontario to the effect that a restatement alone is not sufficient to prove *OSA* materiality. There has to be something more. The "something more" cannot be that people pay attention to audited statements more than they do to unaudited statements; that is always true. Here, there is nothing more in the record to support a finding or an inference of materiality.

[145] The evidence on this record does not support a conclusion that it is reasonably possible that the plaintiff will prove that the four corrective disclosures corrected EY's impugned statements. Moreover, without any evidence of economic or other materiality of EY's impugned statements, there is no reasonable possibility that the plaintiff will prove materiality with respect to EY's statements.

[146] It follows that I do not grant leave to the plaintiff to pursue his claim against EY. The claim against EY must be dismissed.

Certification

[147] Having granted leave to the plaintiff to pursue the secondary market misrepresentation claims against the Akumin defendants, I turn next to consider certification of all of the plaintiff's claims, that is, the secondary market claims, the primary market claims, and the common law negligence claims.

[148] Pursuant to s. 5(1) of the *CPA*, the court shall certify a class proceeding if: (a) the pleadings or the notice of application disclose a cause of action; (b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff; (c) the claims or defences of the class members raise common issues; (d) a class proceeding would be the preferable procedure for the resolution of the common issues; and (e) there is a representative plaintiff who would fairly and adequately represent the interests of the class, has produced a workable plan for the proceeding, and does not have an interest in conflict with the interests of other class members.

[149] In *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57, [2013] 3 S.C.R. 477, the Supreme Court of Canada provided guidance on the proper approach to the standard of proof and evidence on a certification motion.

[150] The Court noted that Canadian courts do not engage in a robust analysis of the merits of a claim at the certification stage; the outcome of a certification motion is thus not predictive of the success of the common issues trial. However, neither does the certification motion "involve such a superficial level of analysis into the sufficiency of the evidence that it would amount to nothing more than symbolic scrutiny": *Pro-Sys*, at paras. 103, 105.

[151] On a certification motion, the class representative is required to show some basis in fact for each of the certification requirements set out in the *CPA*, other than the requirement that the pleadings disclose a cause of action. The focus is on whether the form of the action is such that it can proceed as a class action. Thus, the question is not whether there is some basis in fact for the claim itself, but whether there is some basis in fact that establishes the certification requirements: *Pro-Sys*, at paras. 99-100.

[152] In cases where a plaintiff seeks leave under Part XXIII.1 of the *OSA*, it is common for parties to agree that a case where leave is granted shall be certified. In this case, however, the Akumin defendants raise particular objections to the plaintiff's motion for certification. These are:

a. The secondary market claim should be limited to Canadian purchasers;

b. The primary market claim should not be certified; and

c. The proposed class period should be narrowed.

[153] I will review each element of the certification test, with particular focus on the issues raised by the Akumin defendants. First, however, I turn to consider the issues the defendants raise with respect to the American purchasers. Those issues impact different aspects of the certification analysis, but I find it most convenient to address them together, after which I turn to the individual branches of the certification test separately to address the remaining arguments raised that are specific to each.

Should the claims of the American purchasers be certified?

[154] Akumin argues that any certified class ought to exclude purchasers of Akumin securities in the United States or who purchased on American exchanges. The plaintiff has withdrawn the

claims made on behalf of primary market purchasers who purchased outside of Canada. The question thus relates to whether secondary market purchasers who purchased outside Canada are properly included in the class.

[155] Forty-three percent of the total secondary market volume of shares traded during the proposed class period were traded in the United States. The defendants have pleaded that American law applies to American shareholders, but American law is not pleaded in the Statement of Claim.

[156] Akumin and the plaintiff each adduced expert evidence on American law. In summary, Akumin's expert deposes that an American court would exercise jurisdiction over, and apply United States federal securities laws to, claims asserted on behalf of investors who are considered U.S. purchasers of Akumin securities during the relevant period. There is a reasonable prospect that an American court would exercise its discretion to decline to assert jurisdiction over any claims asserted on behalf of non-American purchasers of Akumin securities under Canadian laws or another jurisdiction's laws. Moreover, he opines that not all the facts needed to establish liability under American securities law have been pleaded in the statement of claim.

[157] The plaintiff's expert deposes that the limitation period under American law has expired. There is no proceeding ongoing in the United States. Accordingly, American purchasers will have no recourse if they are excluded from the class in this action.

[158] Akumin argues that the certified class in this case ought to be limited to purchasers on Canadian exchanges in order to extend comity to the assertion of exclusive jurisdiction under American securities law over trades within US territory, in accordance with the reasonable expectations of purchasers on foreign exchanges. However, Akumin has brought neither a *forum non conveniens* motion nor a jurisdiction motion.

[159] I begin with the non-controversial statement that the statutory cause of action under Part XXIII.1 of the *OSA* does not have a place of trading qualification. It has been accepted that the Ontario court has long-arm jurisdiction when Ontario has a real and substantial connection to the defendant. As a result, when Part XXIII.1 of the *OSA* applies extra-territorially, an Ontario court is obliged to apply Ontario law to an appropriate extra-territorial claim: *Piniccia*, at para. 90.

[160] Akumin relies on *Kaynes v. BP, PLC*, 2014 ONCA 580, at paras. 50, 52, where Sharpe J.A., considering a *forum non conveniens* motion, held that "order and fairness will be achieved by adhering to the prevailing international standard tying jurisdiction to the place where the securities were traded and a multiplicity of proceedings involving the same claims or class of claims will be avoided". He found that purchasers on foreign exchanges would reasonably have expected to litigate their claims in the foreign jurisdiction. As a result, the court stayed the claim of an Ontario purchaser who purchased on an American exchange.

[161] In *Kaynes*, the court noted that the principle that shareholders who use foreign exchanges should look to the foreign court to litigate their claims was applied in *Silver v. Imax*, 2013 ONSC 1667, where the court amended the certified class definition to carve out class members who were covered by a settlement of similar claims in an American proceeding.

[162] However, a couple of years later, the same panel of the Court of Appeal lifted the stay in *Kaynes*. The lead plaintiff in the American proceeding had limited the scope of the American class action in a way that excluded Kaynes' claim, limiting the Ontario plaintiff to an individual action in the United States: *Kaynes v. BP, LP*, 2016 ONCA 601, at para. 18. The Court of Appeal found it significant that the defendant acknowledged on the return of the issue in 2016 that the plaintiff's claim was governed by Ontario law, and did not assert that it fell within the exclusive jurisdiction of the American courts. It noted that the claim of exclusive jurisdiction of the American court was a significant factor in its assessment in 2014 of comity and *forum non conveniens*.

[163] The plaintiff notes that there are now six examples (including *Kaynes*) of the Ontario court taking jurisdiction over secondary market *OSA* claims advanced on behalf of American exchange purchasers with no ensuing unfairness or comity problems. The other five are described below.

a. In *Silver v. Imax Corporation*, 2009 CanLII 72334 (Ont. S.C.), Justice van Rensburg (as she then was) certified a global class in circumstances where 85% of trading was on the U.S. exchange and 15% in Canada. At paras. 133-134, she found that the fact that another parallel proceeding was pending in the United States was not an obstacle to certifying a class including non-resident members in Ontario. Certification orders are not final judgments, but interlocutory procedural orders that may be amended at any time as the case proceeds.

b. In *Dyck v. Tahoe Resources Inc.*, 2021 ONSC 5712, a cross-listed issuer with a majority of its trading volume on an American exchange was a defendant in class proceedings in Canada and in the United States. Justice Glustein certified a global class including American purchasers, concluding that any modifications to class members would be subsequently addressed if required: at para. 25.

c. In *Paniccia*, the defendants argued that the court should assume the jurisdiction *simpliciter* but decline to include as putative class members Canadians who purchased shares on the Nasdaq. Perell J. considered both *forum non conveniens* and choice of law arguments. He noted that Canadian law accepts that where there is jurisdiction *simpliciter*, Canadian law can apply extra-territorially to secondary market trading; the case law thus accepts an intrusion on comity in appropriate cases.

d. In *Abdula v. Canadian Solar*, 2012 ONCA 211, at para. 88, the Court of Appeal held that Part XXIII.1 of the *OSA* was intended to have extra-territorial effect. In that case, the issuer's shares traded only on a U.S. exchange, but the court found that a class comprised entirely of U.S. exchange purchasers could proceed because extra-territorial application is specifically envisioned by Part XXIII.1.

e. In *Cronos*, defendants brought a partial *forum non conveniens* motion (seeking to stay only the US shareholders' claims in that case). Morgan J. found it undeniable that the defendants had a real and substantial connection to Ontario. He rejected the contention that there was an international norm of hearing a secondary market

securities claim in the place where the securities traded, as the defendants in that case did not demonstrate a widespread state practice of following the norm. He found that the most that could be said is that the "place of trade" rule is an American norm. After a lengthy discussion on comity, Morgan J. concluded that s. 10(b)-(5) of the American *Securities and Exchange Act* respects foreign sovereignty and cooperation by restricting membership in its class actions to US shareholders only, while s. 138.3 of the *OSA* "respects sovereignty and international cooperation by allowing access to justice for a class that includes all shareholders regardless of where they purchased their shares." The result was that US shareholders were permitted to remain in the class even though there was a parallel American case ongoing. Adopting the same approach as van Rensburg J. in *Silver* and Glustein J. in *Dyck*, Morgan J. held that it will be for the court in the event of a future settlement or judgment to keep in mind that no class member should get two bites at the apple.

[164] Based on this review of the law, I note the following:

a. There is no doubt that Akumin has a real and substantial connection to Ontario, such that the *OSA* may apply to it extra-territorially.

b. The comity concerns that sometimes arise in the context of *forum non conveniens* motions when there are competing class actions (as in *Kaynes* in 2014) do not have the same force when there is no, and can be no, competing foreign proceeding. Rather, especially in such circumstances, the statutory scheme under the *OSA* respects sovereignty and international cooperation by allowing access to justice for a class that includes all shareholders regardless of where they purchased their shares.

c. Even when there are competing proceedings, the "cross that bridge when we come to it" approach adopted in *Silver*, *Dyck*, and *Cronos* is consistent with the nature of certification as a procedural step, and allows the court to ensure that no class member can recover twice against the same defendant.

d. There is no evidence before me of an international "place of trading" norm to which comity would demand I accede in deciding whether and what to certify in this case.

e. To the extent Akumin relies on reasonable expectations of purchasers on foreign markets, there is no evidence of that either. If I am asked to draw conclusions based on common sense, I agree that one can make a practical case for an American purchaser of shares on the Nasdaq expecting that they would be able to assert their rights under American law. However, one can also make a practical case that a shareholder residing in the United States who purchases shares of an Ontario company on the Nasdaq would expect to be able to hold the company responsible for its actions based on the law of its home jurisdiction, especially when the jurisprudence in Ontario has endorsed global classes in securities litigation.

[165] I thus would not give effect to Akumin's argument that comity requires me to limit the class to Canadian purchasers. Nor does comity require me to conclude this class action is not the preferable procedure to resolve the claims of American purchasers. There is no other process available to them, given the expiry of the limitation period, that would be preferable.

[166] But that does not end the enquiry. There is another argument, raised by EY and adopted by Akumin, related to choice of law. Choice of law is pleaded by the defendants. They argue that I ought to decide the choice of law issue for American purchasers at this stage in the proceeding. I describe this argument below.

[167] The defendants argue that Ontario law does not apply to all proposed class members, and that by pleading securities legislation of each Province and Territory, the plaintiff has in fact acknowledged this. However, the plaintiff has not pleaded legislation applicable to non-Canadian investors, including American investors.

[168] EY argues that American law governs the claims of investors who are American residents, and since neither the law nor the facts needed to sustain claims under it have been pleaded, they should be excluded from the class.

[169] EY urges me to create a new choice of law rule to deal with the choice of law in secondary market securities transactions. It argues that the choice of law rule applicable to primary markets, where the law of the place where a public company distributes its securities to purchasers governs, is based on the idea that once a provincial statute regulates the distribution, it should also regulate the civil claims flowing from it.

[170] EY argues that secondary market claims are different than primary market claims, because securities are bought and sold by investors, typically through a securities exchange. Because Akumin was listed on the TSX and the Nasdaq, it was subject to continuous disclosure requirements under the laws of multiple jurisdictions.

[171] The choice of law for primary market claims was addressed in *Pearson v. Boliden*, 2002 BCCA 624. The court concluded that the *lex loci delicti* rule is not directly applicable to the question of which provincial statutes may found a statutory cause of action for misrepresentation in a prospectus. Rather, once the Act of a province applies to regulate the distribution of securities within the province's boundaries, the same Act must be looked to for any statutory cause of action for misrepresentation in the document: at para. 64. The court noted that there are practical reasons that support this choice of law, at para. 66:

> In an industry in which certainty and predictability are important, it avoids the complexity and uncertainty of rules such as the *lex loci delicti* rule applied to torts and the "most substantial connection" rule applied to contracts. It provides a principled way through the thicket of the many extra-provincial aspects that will be involved in any national securities distribution – the vagaries of where the issuer carries on business or maintains its share register, where the prospectus was prepared, where the issuer's directors reside, where the stock exchange… is located… or where a particular plaintiff or defendant resided or carried on business

> at any particular time. …As well, it comports with what a reasonable investor would expect – that when he or she purchases shares offered under a distribution taking place in a province, the securities legislation of that province will govern the filing of the prospectus, its contents, and the rights and obligations of the parties thereunder.

[172] The plaintiff argues that *Boliden* holds that statutory interpretation, not *lex loci delicti*, guides the analysis for the availability of a statutory right of action.

[173] The plaintiff also relies on *Abdula*, where the Court of Appeal confirmed, as I have already noted, that Part XXIII.1 of the *OSA* envisages extra-territorial application.

[174] In *Paniccia*, at para. 88, Perell J. noted that there are several discrete choice of law problems in a global or partial-global proposed securities misrepresentation class action about trading in a domestic and foreign stock exchange. In the case before him, he had to determine only the choice of law that applies to Canadian purchasers on the Nasdaq.

[175] As I have already noted, Perell J. found that the statutory cause of action under Part XXIII.1 of the *OSA* does not have a place of trading qualification, thus the Ontario court has long-arm jurisdiction when Ontario has a real and substantial connection the defendant. As a result, when Part XXIII.1 of the *OSA* applies extra-territorially, an Ontario court is obliged to apply Ontario law to an appropriate extra-territorial claim: *Paniccia*, at para. 90. Perell J. thus concluded that the law for Canadian purchasers who purchased shares on the Nasdaq is the *OSA*.

[176] In reaching his conclusion, Perell J. noted the inconsistency that would arise if a court could conclude on the one hand that Part XXIII.1 of the *OSA* applies extra-territorially but to conclude on the other hand that choice of law mandates that it does not apply with respect to the defendant's shares that traded outside Ontario: *Paniccia*, at para. 92.

[177] In contrast to the plaintiff's analysis of the issue, the defendants argue that the choice of law rule for secondary market securities misrepresentation claims has not been definitively pronounced upon.

[178] EY argues that the choice of law decision in this instance, for American purchasers who purchased on the Nasdaq, needs to be decided according to generally accepted conflict of laws principles:

a. Reasonable expectations: it argues that a foreign investor trading shares on a secondary market would reasonably expect any claims related to that purchase to be governed by the law of the jurisdiction in which they reside and/or purchased their securities. I note that, given the state of technology today, a purchaser resident in the United States could purchase securities on the Nasdaq from anywhere in the world. Moreover, as I have already noted, such a purchaser might also reasonably expect to be able to hold an issuer whose home jurisdiction is Ontario to the laws applicable to it in that jurisdiction. In any event, there is no evidence before me of shareholders' expectations at all.

b. Comity: EY argues that if an Ontario court will apply Ontario law to Ontario purchasers, it makes sense for American law to apply to American purchasers. I have already reviewed the choice made by the legislature in creating long-arm jurisdiction where a company has a real and substantial connection to Ontario.

c. Analogous Tort Choice of Law Principles: EY argues that common law misrepresentation claims follow the general choice of law for torts, that is, *lex loci delicti*. The place of the misrepresentation should thus be the place where the misrepresentation was received and relied upon, which, for foreign investors, is where they reside or the location of the exchange on which they traded the securities. I note that EY offers these two choices up as if they are equivalent, when in fact they may not be the same, and could create competing choices of law between them.

[179] As a result, EY argues that the choice of law rule for secondary market claims should be the law of the place the purchaser resided or the place of the exchange on which they traded the securities at issue. This provides no certainty in circumstances where the place a purchaser resides is different from the place of the exchange.

[180] This approach also assumes that the "place of trade" international norm that was rejected in *Cronos* ought to be applied or adopted, but without any evidence before me of such a norm.

[181] Applying its proposed choice of law rule, EY argues that American purchasers should be excluded from the class, since the pleading does not plead the facts necessary to support claims under US law. It argues that the claims of American purchasers fail s. 5(1)(a) on this analysis. Moreover, EY states that to the extent there are non-American foreign purchasers, applying a myriad of foreign laws in a single proceeding would present unnecessary complexity. The putative class should thus, on EY's analysis, be limited to Canadian purchasers only.

[182] I cannot accede to EY's argument. Fundamentally, I agree with the plaintiff that when determining the application of a statutory remedy, one must look to the statute in question. Here, Part XXIII.1 envisions extra-territorial application where the company has a real and substantial connection to Ontario. That is the choice made by our legislature, which can be presumed to understand the importance of comity. Thus, a purchaser who wishes to assert a cause of action based on Part XXIII.1 of the *OSA* may do so, subject to questions of jurisdiction and *forum non conveniens*.

[183] I am bolstered in this conclusion by the fact that the analysis EY offers up does not lead to a choice of law rule that would yield a consistent, predictable result. Recalling the words of the British Columbia Court of Appeal in *Boliden*, "[i]n an industry in which certainty and predictability are important", practicality weighs in favour of avoiding the complexity and uncertainty of rules such as *lex loci delicti*.

[184] I would thus not give effect to the defendants' argument that choice of law for American purchasers demands that they be excluded from the class definition, or that there is no claim made out with respect to them.

[185] Having concluded that the arguments raised with respect to American purchasers are not an impediment to certification, I now turn to review the individual criteria for certification with reference to the other arguments made by the defendants.

Section 5(1)(a): The pleadings disclose a cause of action.

[186] Certification will not be denied under s. 5(1)(a) unless it is plain and obvious that the pleadings disclose no cause of action: *Hollick v. Toronto (City)*, 2001 SCC 68, [2001] 3 S.C.R. 158, at para. 25.

[187] As I have noted, the claim alleges (i) secondary market misrepresentation under part XXIII.1 of the *OSA*; (ii) primary market misrepresentation under the *OSA*; and (iii) common law negligence.

[188] The Akumin defendants argue that the claim does not properly plead the noteholders' claims because it fails to adequately plead that the noteholders suffered damages as a result of any alleged public correction.

[189] The claim contains a general pleading that Akumin's shares and "other securities" declined in value. In the context of negligent misrepresentation, it pleads that the plaintiff and other class members suffered damages when the falsity of Akumin's misrepresentations was revealed.

[190] There is no specific pleading of damages suffered by noteholders in the context of the *OSA* claims. However, that is a technical issue that can be corrected by way of a pleading amendment. The plaintiff has proposed one in its reply factum on certification.

[191] In my view, this technical issue is not a basis on which to deny certification.

[192] There is no other basis on which the defendant resists certification under s. 5(1)(a), [1] and in fact the claim properly pleads the other elements of the causes of action alleged.

[193] I conclude that this element of the certification test is made out.

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[1] I note that, in one sentence in its factum, Akumin states that the noteholders provided releases of the Akumin defendants in Akumin's chapter 11 proceedings in the United States. In support, it cites to an order of an American judge approving the chapter 11 plan that is hundreds of pages long, but it provides no pinpoint. For his part, the plaintiff cites language from the order that reflects the fact that the plaintiff, Akumin and EY negotiated language carving out the claims asserted in this action from the releases, subject to limiting any recovery from the Akumin defendants to responsive insurance policies. Akumin did not develop its argument as to the alleged releases. I thus conclude that there are no operative releases that are relevant to this analysis.

Section 5(1)(b): There is an identifiable class of two or more persons that would be represented by the representative plaintiff.

[194] In determining whether there is an identifiable class, the court asks whether the plaintiff has defined the class by reference to objective criteria such that a person can be identified to be a class member without reference to the merits of the action. The class must be bounded, and not of unlimited membership, or unnecessarily broad, and have some rational relationship with the common issues: *Hollick*, at para. 17, *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 (C.A.), at para. 45. The class definition needs to identify all those who may have a claim, will be bound by the result of the litigation, and are entitled to notice: *Bywater Toronto Transit Commission*, [1998] O.J. No. 4913 (Gen. Div.). Defining the class is a technical, rather than a substantive challenge: *Waldman v. Thomson Reuters Corp.*, 2012 ONSC 1138, at para. 122.

Identification of a Noteholder

[195] Akumin argues, without authority, that by failing to identify any noteholder that purchased notes on the primary market from a Canadian underwriter, the plaintiff has failed to satisfy the s. 5(1)(b) criterion.

[196] In *Keatley Surveying Ltd. v. Teranet Inc.*, 2014 ONSC 1677, at para. 84, the Divisional Court held that s. 5(1)(b) of the *CPA* does not require evidence of a desire among class members to pursue an action. It requires there is an identifiable class of two or more persons that would be represented by the representative plaintiff.

[197] The Divisional Court went on in *Keatley* to identify reasons why requiring evidence from class members could be problematic, for example, in an employment case where class members may not wish to identify themselves due to fear of retaliation from an employer: paras. 86-90. There is no need for evidence from other class members where the existence of the class is not dependent on personal or subjective criteria, as is the case here.

[198] Moreover, I note that the legislation requires an identifiable class, not an identified class. An identifiable class is one that meets the requirements I reviewed above, including where membership is defined objectively, and without regard to the merits of the claim. We do not need to know the names of the class members, or any of them; we need to be sure we can identify whether someone falls into the class or not such that they are bound by the result of the proceeding (subject to opt-out rights). The objective nature of the class definition proposed provides some basis in fact to conclude that at least two class members can be (not are) identified.

Appropriate Class Period

[199] Akumin also argues that the class period should be narrowed. Akumin argues that any class period should start on March 31, 2020, the date on which Akumin's 2019 annual financial statements were released, and end on October 13, 2021, following the October 12, 2021 disclosure.

[200] Akumin relies on the fact that the interim financial reports for Q1-Q3 2019 were not restated, and the evidence of Mr. Stanton indicates that they did not need to be. Akumin argues

that there is no expert evidence that even attempts to establish that the line-item revisions in Akumin's interim financial statements for 2019 were material. In the absence of this evidence, Akumin argues that there is no basis in fact for a class period that begins before March 31, 2020.

[201] There is evidence in the record that indicates that Akumin's financial results were misstated as early as the release of its Q1 2019 financial report. Although the interim financial results were not restated, the relevant individual line items for the financial periods Q1-Q3 2019 were corrected in the FY 2019 restatement. According to Mr. Elitzur, this amounts to a re-statement. Mr. Stanton gave evidence that Akumin was not required to restate its interim financial results for Q1-Q3 2019, but he did not disagree with Mr. Elitzur's conclusion that at least certain items were restated. Moreover, on cross-examination, Mr. Stanton indicated that he was not opining that the financial statements, beginning in Q1 2019, were not materially misstated.

[202] The actual changes to the line items in Q1-Q3 2019 appear significant. For example, Q1 2019 revenue was decreased by 13.29%, while Q2 and Q3 2019 revenue were decreased by around 9.5% in each quarter.

[203] In a qualitative sense, the misstatements in Q1-Q3 2019 are the same type of misstatement that Dr. Surana concluded would have impacted the market.

[204] Whether the claim for damages beginning prior to the FY 2019 financial reports is ultimately successful, in these circumstances, I am not inclined to pre-judge it. Were I to shorten the class period, I would, in effect, be reaching conclusions on the merits of the materiality assessment of the Q1-Q3 statements which, in my view, ought to be made at trial on a full record.

[205] Akumin further argues that the class period ought to end after the August 15, 2021 disclosure which, in its submission, is the only disclosure that resulted in a statistically significant share price decline.

[206] I have already expressed some reservations about the potential role of the November 8 and 15, 2021 disclosures as public corrections in the statutory scheme given the lack of statistically significant share price decline associated with those dates. However, there is some basis in the evidence for the truth-on-the-market theory, and a plausible legal theory put forward by the plaintiff as to why all of the identified statements are public corrections. I am not inclined to pre-determine that question under the guise of shortening the class period, especially when, as the law currently stands, there is uncertainty with respect to the role of public correction in the statute.

Conclusion on s. 5(1)(b): Class Definition

[207] In my view, the proposed class has been defined by reference to objective criteria, without reference to the merits of the action. Moreover, it is bounded, not unnecessarily broad, and bears some relationship to the proposed common issues.

Section 5(1)(c): The claims raise common issues.

[208] When considering whether a claim raises a common issue, the court asks whether it is necessary to resolve the issue in order to resolve each class member's claim, and whether the issue is a substantial ingredient of each of the class members' claims. The issue is a substantial ingredient of each claim if its resolution will advance the case or move the litigation forward, and if it is capable of extrapolation to all class members: *Vivendi Canada Inc. v. Dell'Aniello*, 2014 SCC 1, [2014] 1 S.C.R. 3, at para. 46.

[209] Akumin argues that the plaintiff has failed to show some basis in fact that there are common issues among the primary market purchasers. I disagree.

[210] The common issues identified include issues of fact that are common to all class members:

> Did the Misleading Documents contain misrepresentations within the meaning of the *OSA* and the Securities Legislation? If so, who made these representations, when, and how?

[211] The common issues also identify issues relating to the primary market claims under Part XXIII of the *OSA* which are common to the primary market purchasers:

> Do the misrepresentations in the Misleading Documents that are Offering Memoranda give rise to liability against Akumin on behalf of purchasers who purchased securities by the Offering Memoranda pursuant to section 130.1 of Part XXIII of the *OSA* and the Securities Legislation?
>
> What is the method of calculating the damages payable to the Class Members in respect of Part XXIII of the *OSA* and the Securities Legislation?

[212] It also raises questions of law common to the secondary market purchasers:

> Do the misrepresentations in the Misleading Documents give rise to liability on behalf of the Class for damages against the Defendants pursuant to section 138.3 of Part XXIII.1 of the *OSA* and the Securities Legislation? If so, for which Defendants?
>
> What is the method of calculating the damages payable to the Class Members in respect of Part XXIII.1 of the *OSA* and the Securities Legislation?

[213] Finally, the plaintiff identifies issues of fact and law common to all class members with respect to the negligent misrepresentation claims:

> Did Akumin and the Individual Defendants owe a duty of care to the Class Members?
>
> Did Akumin and the Individual Defendants make representations in the Misleading Documents that were untrue, inaccurate or misleading?

Did Akumin and the Individual Defendants act negligently in making those representations?

Was it reasonable for the Class to rely on those representations?

What is the method of calculating damages for negligent misrepresentation?

[214] The resolution of these questions will substantially advance the claims of all class members. In my view, this criterion is satisfied.

Section 5(1)(d): Preferable Procedure

[215] This branch of the test requires that the court be satisfied that a class proceeding would be the preferable procedure for the resolution of the common issues. This inquiry is directed at two questions: first, whether the class proceeding would be a fair, efficient, and manageable way to advance the claim, and second, whether the class proceeding would be preferable to other procedures for resolving the common issues. Section 5(1.1) of the *CPA* adds two further criteria for the court to consider: superiority and predominance.

[216] Preferable procedure is addressed through the lens of the three goals of class proceedings, that is, access to justice, behaviour modification, and judicial economy: *Hollick*, at para. 27.

[217] I find that a class proceeding is the preferable procedure in this case.

[218] There is a long history of this court concluding that statutory causes of action for misrepresentation in the primary and secondary market are fairly, efficiently, and manageably adjudicated in class proceedings: see, for example, *Silver v. Imax Corporation*, 2009 CanLII 72334 (Ont. S.C.J.), at para. 216.

[219] The cost for any individual investor to advance their claim against the defendants would be out of proportion to their losses, making it inefficient from an economic perspective to advance an individual action. By aggregating the claims of the class members into one proceeding, the three goals of class proceedings are met.

[220] The common issues predominate in this litigation, and there is no superior procedure that has been identified which could address the class members' claims.

[221] I thus find that a class proceeding is the preferable procedure in this case.

Section 5(1)(e): There is an adequate representative plaintiff.

[222] To be an adequate representative plaintiff, a proposed plaintiff must be able to fairly and adequately represent the class, have developed a plan for proceeding, and not have a conflict with the class. She must be prepared and able to vigorously represent the interests of the class: *Rosen v. BMO Nesbitt Burns Inc.,* 2013 ONSC 2144, at para. 73.

[223] Akumin argues that the plaintiff has failed to establish that he, as a secondary market purchaser of shares, can appropriately represent the interests of primary market noteholders. It relies on s. 5(2) of the *CPA* which provides that, where a class includes a subclass whose members have claims or defences that raise common issues not shared by all the class members so that the protection of the interests of the subclass members requires that they be separately represented, a representative plaintiff for that class is required.

[224] However, a representative plaintiff is permitted to advance claims on behalf of class members that she does not have herself, as long as it shares common issues of fact or law with the claim she does have, and there is no conflict in doing so: *Poirier v. Silver Wheaton Corp. et al. v.*, 2022 ONSC 80, at para. 139, citing *Ragoonanan Estate v. Imperial Tobacco Canada Ltd*., 2000 CanLII 22719 (Ont. S.C.).

[225] Here, no conflict is alleged. Akumin relies on s. 5(2) but does not explain why the interests of the primary market claimants diverge from the interests of the secondary market claimants such that they require separate representation for the protection of their interests. The statutory scheme is different, but the claims of the primary market purchasers raise issues of fact and law that are common to the claims of the secondary market purchasers. Accordingly, I find that the proposed representative plaintiff can adequately represent all class members in this case. This criterion is satisfied.

Costs

[226] The parties were not in a position to agree on costs or make costs submissions before the release of these reasons. I encourage the parties to reach an agreement on costs. If that is not possible, the parties shall write to me to propose a consent schedule for the exchange of brief costs submissions for my approval.

J.T. Akbarali J.

Date: June 26, 2024