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Citation: *Rosborough (Re)*, 2022 ONCMT 11  
Date: 2022-05-25  
File No. 2020-33

**IN THE MATTER OF  
TREVOR ROSBOROUGH, TAYLOR CARR, and DIMITRI GRAHAM**

**REASONS AND DECISION**

**(Subsection 127(1) of the *Securities Act*, RSO 1990, c S.5)**

**Adjudicators:** Timothy Moseley (chair of the panel)  
Frances Kordyback  
Cathy Singer

**Hearing:** November 8 and 11, 2021; written submissions delivered November 26 and December 31, 2021

**Appearances:** Alvin Qian For Staff of the Ontario Securities Commission  
Dimitri Graham For himself  
Philip Millar For Taylor Carr  
Luke Reidy

## TABLE OF CONTENTS

1.	OVERVIEW .....	1
2.	BACKGROUND FACTS.....	2
2.1	Introduction .....	2
2.2	WeedMD’s planned announcement that it would expand .....	2
2.3	Carr’s communication to Rosborough .....	3
2.4	Rosborough’s communication to a client.....	3
2.5	WeedMD’s delay of the announcement .....	4
3.	ANALYSIS.....	4
3.1	Introduction .....	4
3.2	Illegal tipping and trading .....	4
3.2.1	WeedMD’s planned expansion was a material fact.....	4
3.2.2	Carr illegally tipped Rosborough about WeedMD’s planned expansion.....	5
3.2.3	Carr illegally traded shares of WeedMD with knowledge of a material undisclosed fact .....	5
3.2.4	Staff’s allegation that Graham illegally traded shares of WeedMD with knowledge of a material undisclosed fact.....	6
3.3	Did Graham make materially misleading statements to Staff?.....	16
3.3.1	Introduction.....	16
3.3.2	Timing of Graham working with Rosborough.....	17
3.3.3	Whose idea it was for Graham to move to Sterling.....	20
3.3.4	Graham engaging in “stealth advising activities” with Rosborough.....	21
4.	CONCLUSION.....	23

## REASONS AND DECISION

### 1. OVERVIEW

- [1] The three respondents are alleged to have engaged in insider trading in shares of WeedMD Inc. while in possession of material non-public information about WeedMD relating to a planned expansion.
- [2] Taylor Carr was an employee of WeedMD who was aware of the planned expansion. In this hearing, Carr admitted that the planned expansion was a material fact and that he traded in shares of WeedMD while that information had not yet been generally disclosed. He also admitted that he illegally tipped his family friend Trevor Rosborough, who was a registered mutual fund dealing representative. We accept Carr's admissions and find that he contravened s. 76 of the *Securities Act* (the **Act**).<sup>1</sup>
- [3] Before this hearing, Rosborough reached a settlement with Staff of the Ontario Securities Commission in which he admitted to having been tipped and to having traded while in possession of the material non-public information. The Tribunal approved that settlement. Rosborough testified at this hearing for Staff.
- [4] Staff alleges that Rosborough in turn illegally tipped the remaining respondent Dimitri Graham, who executed trades in shares of WeedMD before and immediately after the announcement of the planned expansion. Staff asks us to conclude on the basis of circumstantial evidence that Graham knew of the planned expansion from Rosborough, a fact that is denied by both Graham and Rosborough. While the timing of Graham's trades is suspicious, we cannot conclude on a balance of probabilities that Graham knew the material non-public information at the time he purchased WeedMD shares, particularly in the face of Rosborough's denial and the fact that while Rosborough implicated Graham in other respects in his settlement agreement, he did not implicate Graham on this point. We therefore dismiss the insider trading allegations against Graham.

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<sup>1</sup> RSO 1990, c S.5

[5] Finally, Staff alleges that during its examination of Graham as part of the investigation, Graham misled Staff in three areas. We conclude that Graham misled Staff in one of those areas, *i.e.*, with respect to whether Graham assisted Rosborough with work-related activities at a time when Rosborough was not registered. In so doing, Graham contravened s. 122(1)(a) of the Act.

## **2. BACKGROUND FACTS**

### **2.1 Introduction**

[6] We set out here the background facts about WeedMD's planned expansion, the announcement of that expansion, and how Rosborough learned of that news from Carr and communicated it to a former client.

[7] The facts in this background section are drawn from:

- a. the settlement agreement entered into between Staff and Rosborough, the contents of which Rosborough adopted when testifying at this hearing; and
- b. an Agreed Statement of Facts and Admissions filed by Carr, against whom the proceeding still exists, but who did not participate in the oral portion of the hearing, having submitted those admissions of fact and law.

[8] Graham contests Staff's allegations, but he does not dispute any of the facts contained in this section.

[9] Following this background section, we begin our analysis of the allegations against Carr and Graham. In that analysis section, we examine the contested evidence that relates to Graham.

### **2.2 WeedMD's planned announcement that it would expand**

[10] Staff's allegations relate to trading in securities of WeedMD in November of 2017. At the time, WeedMD was a reporting issuer in Ontario, listed on the TSX Venture Exchange. WeedMD was a producer and distributor of cannabis and cannabis extracts.

[11] The impugned trading surrounds a news release issued by WeedMD on November 22, 2017, entitled "WeedMD Launches Major Production Expansion with 610,000 Square Foot State-of-the-Art Greenhouse". The news release

announced that WeedMD had entered into a definitive lease and purchase agreement with a large-scale modern greenhouse cultivator.

- [12] The release described the plan as a “transformational expansion” and contemplated that WeedMD’s annual production would grow initially from 1200kg to more than 21,000kg, and ultimately to more than 50,000kg.
- [13] On November 2, about three weeks prior to the announcement, WeedMD’s board authorized management to execute the necessary agreements. WeedMD planned to make the announcement on November 16, although that was later deferred by a week.

### **2.3 Carr’s communication to Rosborough**

- [14] In November 2017, Carr was a Production Technician at WeedMD, having worked at the company since 2016.
- [15] Carr knew Rosborough through a family connection. After their initial meeting, Rosborough contacted Carr on numerous occasions to ask about the status of WeedMD.
- [16] On or before November 10, Carr learned about WeedMD’s planned expansion. On or about that same day, he told Rosborough about the plan, which had not been disclosed to the public.

### **2.4 Rosborough’s communication to a client**

- [17] Rosborough was a registered mutual fund dealing representative with Quadrus Investment Services Ltd. until October 31, 2017, when Quadrus terminated him, thereby suspending his registration. He restored his status as a mutual fund dealing representative when he began working with Sterling Mutuals Inc. in July 2018.
- [18] On November 10, the same day on which Carr told Rosborough about WeedMD’s planned expansion, Rosborough sent an email to an individual who had been a client of his at Quadrus. Rosborough stated that he had a friend who was the head grower at WeedMD, and that the friend had told Rosborough “off the record” that WeedMD would be announcing a “huge new facility”. Rosborough’s friend and source of information was Carr, although the email did not identify Carr by name.

[19] Rosborough told the former client that “we need to buy that stock” before November 17 and sell it on November 17, the day after the planned announcement.

## **2.5 WeedMD’s delay of the announcement**

[20] On November 11, WeedMD decided to delay the announcement to November 22.

## **3. ANALYSIS**

### **3.1 Introduction**

[21] Staff’s allegations fall into two main categories:

- a. illegal tipping by Carr, and insider trading by Carr and Graham; and
- b. Graham misleading Staff when he testified in examinations during Staff’s investigation.

[22] We begin with the allegations of illegal tipping and trading.

### **3.2 Illegal tipping and trading**

#### **3.2.1 WeedMD’s planned expansion was a material fact**

[23] For Staff to prove its allegations of illegal tipping and insider trading, Staff must show, among other things, that WeedMD’s planned expansion was a material fact about WeedMD.

[24] The term “material fact” is defined in s. 1(1) of the Act to be “a fact that would reasonably be expected to have a significant effect on the market price or value of the securities”. Carr admits that the planned expansion, as authorized by WeedMD’s board, was a material fact. Graham does not dispute that it was.

[25] We agree with Carr’s admission. The planned expansion was expected to increase WeedMD’s production by almost 20 times initially, and ultimately by more than 40 times its pre-expansion level. There is no doubt that this was a material and positive fact, a conclusion that is supported by the approximately 33% increase in the closing price of WeedMD’s shares (from \$1.56 to \$2.08 per share) following the public announcement of the planned expansion.

### **3.2.2 Carr illegally tipped Rosborough about WeedMD's planned expansion**

- [26] We turn to Staff's allegation that Carr illegally tipped Rosborough about the expansion, contrary to s. 76(2) of the Act. To prove that allegation, Staff must show:
- a. the existence of a material fact or material change about WeedMD;
  - b. that the material fact or material change had not been generally disclosed;
  - c. that Carr was "in a special relationship with" WeedMD; and
  - d. that Carr communicated the material fact or material change other than in the necessary course of business.
- [27] As noted above, the first element is established. Carr admits, and we find, that the board-authorized planned expansion was a material fact about WeedMD.
- [28] Carr also admits each of the other elements. Specifically, as a WeedMD employee he was a person "in a special relationship with" WeedMD, pursuant to s. 76(5)(c)(i) of the Act. He told Rosborough about the planned expansion before that information had been generally disclosed. His communication was not in the necessary course of business.
- [29] Accordingly, we accept Carr's admission that he breached s. 76(2) of the Act by communicating the material fact to Rosborough, and we so find.

### **3.2.3 Carr illegally traded shares of WeedMD with knowledge of a material undisclosed fact**

- [30] Staff alleges that with knowledge of the undisclosed planned expansion, Carr and Graham illegally traded shares of WeedMD. We begin with Carr.
- [31] Subsection 76(1) of the Act prohibits any person in a special relationship with an issuer from purchasing or selling securities of the issuer while in possession of an undisclosed material fact about the issuer.
- [32] We have already found that Carr was in a special relationship with WeedMD, and that he knew of the undisclosed planned expansion. The remaining element is that Carr purchased or sold WeedMD shares at that time, which Carr admits having done.

- [33] Before November 2017, Carr owned 900 shares of WeedMD. On November 14, after Carr knew of the material fact but before it had been generally disclosed, Carr:
- a. purchased an additional 1,500 shares at \$1.56 per share, for a total cost of \$2,355.30;
  - b. sold his 2,400 shares at \$1.50 per share, for proceeds of \$3,581.65; and then
  - c. purchased 2,500 shares at \$1.49 per share, for a total cost of \$3,643.70.
- [34] Carr did not purchase or sell any more WeedMD shares until after the expansion was announced. On November 22, following that announcement, Carr sold all 2,500 of his shares at \$1.82 per share, for proceeds of \$4,531.30 and a profit of \$1,215.03.
- [35] Carr admits, and we find, that his November 14 transactions in WeedMD shares breached s. 76(1) of the Act.

### **3.2.4 Staff's allegation that Graham illegally traded shares of WeedMD with knowledge of a material undisclosed fact**

#### **3.2.4.a Introduction**

- [36] We turn now to Staff's allegation that Graham similarly breached s. 76(1) of the Act by purchasing WeedMD shares while he knew about the planned expansion and at a time when that planned expansion had not been generally disclosed.
- [37] Staff's allegations against Graham relate to the following transactions:
- a. a November 15 purchase of 3,185 shares at \$1.57 per share, for a total cost of \$5,010.44; and
  - b. a November 21 purchase of 1,300 shares at \$1.52 per share, for a total cost of \$1,985.99.
- [38] On November 22, after WeedMD issued the news release, Graham sold all 4,485 shares at \$1.77 per share, for proceeds of \$7,928.46 and a profit of \$932.03.
- [39] Graham does not dispute these transactions. It is also undisputed that the purchases on November 15 and 21 were at a time when news of the planned expansion had not been generally disclosed. Accordingly, to prove that in



completing those purchases, Graham breached s. 76(1) of the Act, Staff must show that at the time of the purchases, Graham:

- a. had knowledge of the planned expansion; and
- b. if so, was in a special relationship with WeedMD.

[40] We begin with whether he had knowledge of the planned expansion.

### **3.2.4.b Did Graham know about the planned expansion before it was generally disclosed?**

#### **3.2.4.b.i Staff relies on circumstantial evidence**

[41] Graham denies Staff's allegation that he knew about the planned expansion before it was generally disclosed. There is no direct evidence that he did. Instead, Staff relies on circumstantial evidence in support of its allegation.

[42] We start by reviewing that circumstantial evidence. We then consider whether the evidence is sufficient to conclude that it is more likely than not that Staff's allegation about Graham's knowledge is correct.

[43] The circumstantial evidence on which Staff relies relates primarily to:

- a. Graham's opportunities to learn the material fact;
- b. the allegedly uncharacteristic nature of Graham's purchases, given Graham's financial circumstances and trading history; and
- c. the timeliness of Graham's purchases.

[44] As a general matter, each of these factors, if supported by the evidence, can reasonably support an inference that a respondent engaged in illegal insider trading.<sup>2</sup>

#### **3.2.4.b.ii Graham's opportunities to learn the material fact**

[45] The first category of circumstantial evidence relied on by Staff is Graham's opportunities to acquire knowledge of the material fact from Rosborough.

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<sup>2</sup> *Suman (Re)*, 2012 ONSEC 7, (2012) 35 OSCB 809 at para 307; *Azeff (Re)*, 2015 ONSEC 11, (2015) 38 OSCB 2983 at para 45

- [46] It is undisputed that the two knew each other, and that they communicated a number of times in the weeks leading up to the announcement, including by telephone and text message, and in person. Graham and Rosborough differ about exactly when they first spoke in 2017, although the difference is between October and early November, and is immaterial for our purposes.
- [47] Graham and Rosborough also differ somewhat in their descriptions of the communications, although both agree that they discussed trading as well as Rosborough's efforts to move to a different firm following his October 31 termination from Quadrus. Once again, the difference in their testimony is immaterial.
- [48] Rosborough testified that during that time, he and Graham talked about individual stocks, but that those discussions were "minimal". He said he believed they discussed WeedMD once or twice because its operations were in Rosborough's home town, but he testified that he did not specifically recall a particular discussion.
- [49] Rosborough testified that he didn't "think" he had a discussion with Graham before November 22, in which Rosborough told Graham that WeedMD would be announcing "a huge new facility".<sup>3</sup> Rosborough did recall a text from Graham in which Graham emphatically urged Rosborough to buy WeedMD shares. Rosborough did not recall when he received the text, but believes that it was before the November 22 announcement.
- [50] We attach little weight to the fact that Graham had opportunities to learn of the material fact from Rosborough. Graham and Rosborough had legitimate reasons to communicate with each other in that time period, including about trading in securities. They freely admit that they did so. In this case, the existence of those opportunities, by itself, is neutral as to whether or not Graham acquired knowledge of the material fact from Rosborough.

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<sup>3</sup> Hearing Transcript, *Rosborough (Re)*, November 8, 2021, at 65 line 28

### **3.2.4.b.iii Allegedly uncharacteristic nature of the purchases**

- [51] The second category of circumstantial evidence relates to Graham's trading history and the allegedly uncharacteristic nature of his purchases of WeedMD shares.
- [52] Graham was an irregular trader. In the first three months and the last four months of 2017, he traded actively. However, he did not conduct any trades between March 22 and August 29.
- [53] Graham preferred to trade active sectors. He entered the cannabis sector in early 2017 because it was active. He had never owned WeedMD shares before his impugned purchase on November 15, although in February 2017 he had purchased shares of another issuer in the sector. He sold those shares in March 2017. WeedMD was his first investment in a cannabis cultivation company, although we do not accept Staff's submission that we should attach any importance to the distinction between a cannabis cultivation company and companies in the sector more generally.
- [54] Staff also highlights that WeedMD's price per share was well above \$1.00, unlike the vast majority of shares that Graham purchased of other issuers in 2017. Before his November 15 purchase of WeedMD, Graham had purchased shares in 2017 with a per share price of more than \$1.00 only four times out of the approximately 70 purchases he made. Graham agreed with Staff's suggestion that there were cheaper cannabis stocks available.
- [55] Staff also submits that Graham's purchases of WeedMD shares were uncharacteristic and risky for Graham in that their size (totaling \$6,996.43) was significant relative to his income and assets.
- [56] Graham's annual income in 2017 was \$44,855.60. His only asset at the end of October 2017 was approximately \$8,200 in cash held in his brokerage account. He had approximately \$10,700 before his November 15 purchase of \$5,010.44 worth of WeedMD shares, and approximately \$4,470 before his November 21 purchase of \$1,985.99 worth of WeedMD shares.
- [57] Staff concedes that Graham had made other significant securities purchases earlier in 2017. Indeed, Graham made at least 20 individual share purchases

throughout 2017 with total amounts greater than his November 15 WeedMD purchase for \$5,010.44. He made almost 30 more purchases with total amounts between \$3,000 and \$5,000 during 2017. The WeedMD purchases were therefore well within a normal range for Graham from an absolute value perspective.

- [58] In any event, while Staff acknowledges these purchases, Staff submits that the fact that the WeedMD purchases were significant relative to Graham's assets and income at the time, combined with the fact that WeedMD was his first investment in a cannabis cultivation company, should lead us to conclude that Graham knew about the planned expansion and upcoming announcement when he bought the WeedMD shares.
- [59] We cannot accept this submission. When viewed as a percentage of his total assets, the WeedMD purchases were at the higher end, but they were not uncharacteristic. Graham traded actively in November 2017, and in that month he made similarly large purchases of other unrelated securities. On each occasion when Graham purchased WeedMD, his cost represented approximately 50% of the market value of his account. Other unrelated purchases in that month were riskier as a percentage of assets, since they cost him the full market value of his account at the time.
- [60] Further, and as we noted above, we do not attach significance to the fact that WeedMD was Graham's first purchase of securities in a cannabis cultivation company. He was following the sector, an emerging and active sector at the time, and he had previously invested in a cannabis issuer.
- [61] Similarly, we do not find the absolute price of WeedMD shares to be significant. In general, we place more weight on the total cost of an investment, and the relationship between that cost and a purchaser's financial circumstances, including their assets and income. It is much more important that a purchase costs the investor \$5,000 than whether that is made up of 10,000 shares at \$0.50 each, or 100 shares at \$50 each. Most of Graham's purchases in 2017 had been of shares at a price less than \$1.00 per share, but some were not. His WeedMD purchase was not unprecedented in this regard.

[62] In summary, Staff has failed to persuade us that the impugned trades were suspiciously uncharacteristic in any of: (i) the type of issuer; (ii) the price of the shares; or (iii) the ratio of the purchase cost to Graham's assets, as compared to other purchases he had made in 2017, and in particular in November 2017.

#### **3.2.4.b.iv Timeliness of the purchases**

[63] The third category of circumstantial evidence relates to the timeliness of Graham's trades. He did not purchase WeedMD shares until November 15, which was:

- a. after the price of WeedMD shares had climbed steadily through the first half of November, from a closing price of \$1.12 per share on November 1, suggesting according to Staff that Graham's purchase was not a result of his following the stock;
- b. after Rosborough already knew the non-public material fact;
- c. one day after Carr purchased WeedMD shares; and
- d. one day before the originally planned date for the announcement.

[64] Graham held the shares he purchased on November 15 and made his second purchase one day before the revised announcement date.

[65] Immediately following the announcement, Graham sold all his shares, which Staff submits helps to demonstrate that Graham acquired the shares with the intention of selling them once the expansion plan was publicly disclosed.

[66] We accept Staff's submission that for all these reasons, the timing of Graham's purchases is suspicious. We consider this fact together with the other relevant facts below, to determine whether they combine to lead to an appropriate inference that Graham was in possession of the material fact when he traded.

#### **3.2.4.b.v Graham's testimony**

[67] In his testimony, Graham was adamant that he would not jeopardize his career for the sake of the small profit he realized on the WeedMD trades. Further, he said that he would never buy shares based on what someone else tells him, whether or not they were privy to information about the issuer. He asserted that he would most certainly not do anything that would contravene securities law.

[68] He specifically denied being tipped by Rosborough or acting on inside information. He says that no one influenced his decision to buy the WeedMD shares. He had been following it for some time before he bought the shares, because it had been in the news.

[69] When asked on cross-examination what, if anything, Rosborough told Graham about Rosborough knowing people within WeedMD, Graham gave answers that evolved:

Q. Now, Mr. Rosborough had told you that he knew people within WeedMD, isn't that the case?

A. I never knew anything about him knowing anyone specifically.

Q. But Mr. Rosborough told you he knew someone within WeedMD.

A. He never told me who he knew in WeedMD, no.

Q. Just to be clear, I'm not asking you about the specific identify of the person but you knew that he knew somebody at WeedMD, correct?

A. I have no idea.

[...]

CHAIR: Sorry, Mr. Graham, I want you to answer the question directly. Did Mr. Rosborough tell you he knew someone at WeedMD?

MR. GRAHAM: No.<sup>4</sup>

[70] In his interview with Staff in April 2020, Graham was less definitive. He stated that he may have been told that Rosborough knew people within WeedMD.

[71] We find Graham's answer on his April 2020 examination to be the most reliable. It was closer in time to the events in question, and it came before he had further opportunity to consider his position and his answers. We find his answers above to be internally inconsistent, with the first two being carefully framed, before he

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<sup>4</sup> Hearing Transcript, *Rosborough (Re)*, November 8, 2021, at p 45 line 27 - p 46 line 14

gave an answer (“I have no idea”) close to his April 2020 answer, and before he then finally made a definitive assertion. We find that by Graham’s own admission, Rosborough may have told him that he knew someone within WeedMD.

[72] As for Graham selling his shares on November 22, Graham testified that when he sold he was not aware that WeedMD had announced that it was expanding. He says that he sold the shares because the price moved up and this triggered an automated filter on a trading-related website he used. The alert was caused by a greater than 15% increase in the share price from when he purchased on November 21 (\$1.52 per share) to just before he sold on November 22 (\$1.77 per share). He asserts that had he been aware of the announcement, he would have held on to the shares, since the entire sector was moving up.

[73] As we noted above, WeedMD’s closing price on November 22 was \$2.08 per share. The fact that Graham sold at \$1.77 per share is consistent with his testimony that he was unaware of the announcement before he sold, and that his sale was prompted by his automated filter.

#### **3.2.4.b.vi Rosborough’s testimony**

[74] Each of Rosborough’s and Graham’s testimony aligns with the other’s in denying that Rosborough tipped Graham.

[75] Graham has a possible incentive to lie, as would any respondent who had engaged in the alleged misconduct.

[76] Significantly, though, we are aware of no similar incentive for Rosborough to lie about this point, and Staff offered no persuasive basis for us to conclude that he did. Staff relies on Rosborough’s testimony for much of its case, but the finding Staff asks us to make with respect to Graham necessarily requires that we disbelieve Rosborough’s testimony that he didn’t think he told Graham about “a huge new facility” before November 22. Staff’s requested conclusion is not an impossibility, since witnesses may be credible about some parts of their testimony and not credible about others.<sup>5</sup>

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<sup>5</sup> *Hutchinson (Re)*, 2019 ONSEC 36, (2019) 42 OSCB 8543 (***Hutchinson***) at para 78

[77] However, in its submissions, Staff does not address that specific and pivotal element of Rosborough’s testimony. Staff asks us to discount Rosborough’s testimony about opportunities for Rosborough and Graham to have communicated generally, due to Rosborough’s general lack of capacity to remember communications with Graham. We do not accept the implication that Rosborough has any greater difficulty than the average witness with remembering the dates and details of telephone conversations or coffee meetings that took place four years earlier. Staff does not, though, explain why we should reject Rosborough’s denial that he tipped Graham.

[78] We note that in Rosborough’s settlement, he implicated Graham with respect to Staff’s “stealth advising” allegation, but not with respect to insider trading. Further, it was clear from the testimony before us that there is some acrimony in the relationship between Rosborough and Graham, so if Rosborough had any motivation to shade the truth on this point, that motivation would likely operate in the direction opposite from what Staff asks us to conclude.

[79] We have no principled reason to disbelieve Rosborough’s testimony. We accept it.

#### **3.2.4.b.vii Analysis and conclusion about whether Graham knew about the planned expansion**

[80] We now tie together the above circumstantial evidence, some of which points toward Graham having engaged in insider trading, and some of which does not support our making that finding.

[81] For us to conclude that Graham knew about the planned expansion before he traded, we need not necessarily find that his trading was “highly uncharacteristic, risky and highly profitable”.<sup>6</sup> Each of those considerations, as well as others cited by Staff (*e.g.*, opportunities to learn of the material fact), can by itself contribute to a finding of trading while in possession of an undisclosed material fact.

[82] However, the law does not require, and Tribunal decisions have not previously found, that Staff must prove all these factors as opposed to some of them. As

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<sup>6</sup> *Agueci (Re)*, 2015 ONSEC 2, (2015) 38 OSCB 1573 (***Agueci***) at para 68



Staff correctly submits, the more facts that support an inference, the more compelling that inference will be. It is still an inference, and by its nature it is not the same as direct evidence. That gap, though, does not preclude the making of the inference.

- [83] Having said that, the requested inference must flow logically and reasonably from the facts cited in support of it.<sup>7</sup> Speculation cannot be a step along the path to the requested inference. We must take all the facts together and examine the larger picture, but it does not necessarily follow that because the outcome may be consistent with the proposed inference, we should draw that inference. Instead, we must find that it is more likely than not that the inference actually flows from the facts.
- [84] In this case, Staff was reasonable in its suspicion that Graham traded while in possession of the material fact about the planned expansion. The circumstances, and particularly the timing of Graham's trading, are consistent with that conclusion.
- [85] However, those circumstances are not sufficiently compelling for us to find that it is more likely than not that the suggested fact is true. There was nothing suspicious about the timing or length of communications between Graham and Rosborough, given all the circumstances. The timeliness of the purchases could be seen as suspicious, although they may also be explained by Graham's method of trading securities generally and by market movement in the WeedMD shares combined with his automated filter. We cannot accept Staff's submission that Graham's purchases of WeedMD were uncharacteristically risky either in their amount or in their proportion of Graham's assets. Finally, and significantly, we accept Rosborough's testimony that he did not tip Graham.
- [86] Accordingly, we are unable to conclude, on a balance of probabilities, that at the time of his WeedMD purchases, Graham was in possession of the material non-public information.

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<sup>7</sup> *Hutchinson* at para 62

[87] Because Staff has failed to prove that Graham knew of the planned expansion at the time he purchased, the allegation of insider trading is dismissed. We now turn to the allegation that Graham misled Staff during the investigation.

### **3.3 Did Graham make materially misleading statements to Staff?**

#### **3.3.1 Introduction**

[88] That brings us to Staff's second principal allegation, which is that Graham misled Staff during his April and May 2020 examinations.

[89] Staff points to s. 122(1)(a) of the Act, which provides that it is an offence to make a statement to any person appointed to make an investigation under the Act that, in a material respect and at the time and in light of the circumstances under which it is made, is misleading or untrue, including by omission. An allegation about such a statement may be the subject of a proceeding before this tribunal.<sup>8</sup>

[90] Graham's examinations were conducted pursuant to a summons issued under s. 13 of the Act by a person appointed under s. 11 of the Act to conduct the investigation. Staff must therefore prove the remaining element, *i.e.*, that Graham made one or more misleading or untrue statements during the examination.

[91] To succeed in establishing an alleged misstatement, Staff need not prove a specific mental element, *e.g.*, intention, wilful blindness or recklessness.<sup>9</sup> However, in deciding whether a misstatement rises to the level contemplated by s. 122(1)(a) of the Act, we must be mindful of the words "in a material respect". We should give those words meaning consistent with the remedial nature of the section, but we should also distinguish between, on the one hand, misstatements that are evasive or designed to obfuscate, and on the other hand, inadvertent errors that are the product of confusion or poor recollection.

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<sup>8</sup> *Wilder v Ontario (Securities Commission)*, 2001 CanLII 24072 (ON CA) at para 23; *Agueci* at para 635

<sup>9</sup> *Black Panther (Re)*, 2017 ONSEC 1, (2017) 40 OSCB 1115 at para 154

[92] Staff alleges that Graham made misstatements in three areas, each of which we address separately. For all three, Staff contends that Graham was attempting to minimize his relationship with Rosborough.

### **3.3.2 Timing of Graham working with Rosborough**

[93] The first of the three alleged areas of misstatement is about when Graham began working with Rosborough. Staff contends that on his examination, Graham stated that he started doing so in or around March 2018, when in fact the two began working together in November 2017.

[94] Consideration of this allegation requires close scrutiny of the answers that Graham gave on his examination. Before we quote the first relevant passage, we note that earlier in the examination, Staff had shown Graham an excerpt of the registration database, which showed that Graham was employed by Sterling from November 2017 (not March 2018) to August 2018. We also observe that in the following passage, Graham gives answers but qualifies them with some uncertainty about dates:

Q. How long did you work under Masterpiece [Rosborough's business name] or with Trevor Rosborough?

A. That would have been from when -- from the period that you currently have that showed from Leede Jones Gable from Quadrus, that would have been that period. I believe that would have been in the new year of 2018, I believe I received my license. I believe it was March. I can't remember exactly, March 2018 there when it was issued back over. You have to remember, there was a lapse between Quadrus, London Life, and going to Sterling Mutuals.

[...]

Q. Okay. When did you start working for [Masterpiece]? Was it 2016 or 2017?

A. It would have been Sterling Mutuals, that is when I was working with Sterling Mutuals, and that would have been March, sometime in March when my licensing came over and I was licensed to resume what I was doing formerly at London Life, Quadrus.

Q. I am trying to clarify when you worked with Trevor Rosborough. Was it in November 2017 or March 2018 that you started with him?

A. It would have been March 2018. I don't know the date it might have been. It is when the licensing came over, so it could have been March, could have been a month prior. I know it was in 2018.<sup>10</sup>

[95] Staff focuses on Graham's repeated reference to March 2018. We think it is fairer to Graham to focus on his repeated and unqualified statement that he started working for Masterpiece (*i.e.*, with Rosborough) "when [his] licensing came over" to Sterling from Quadrus.

[96] Three times in the passage quoted above, Graham links the timing of his starting work with Rosborough to when he was "licensed" to resume work with Sterling Mutuals. His definitive connection of those two events is natural and credible, and it shows no signs of being evasive. We have no reason to conclude that Graham thought he could persuade Staff that he became registered on a date other than the one Staff had in its records.

[97] In our view, Graham's answers are inconsistent with an attempt to mislead or obfuscate. He was clear that two events happened approximately at the same time – his beginning to work with Rosborough, and his becoming registered with Sterling. His answers are more consistent with a faulty recollection as to when that happened. He did not suggest that Staff's records were incorrect, and he did not suggest that he only began to work with Rosborough some months after Graham had already been working at Sterling. We do not conclude from the above answers that Graham misstated events in a material respect. Rather, Staff's submission is overly selective about which portion of Graham's answer should form the basis for this allegation.

[98] We are no more persuaded by the above exchange than we are by a later exchange:

Q. Dmitri, just to circle back, on the summary it shows that you finished at Quadrus in October 2017, and then there is a

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<sup>10</sup> Exhibit 2, Affidavit of Stuart Mills sworn October 5, 2021 (**Mills Affidavit**), Graham Interview Transcript dated April 24, 2020, at p 21 line 25 – p 23 line 8

space between October 2017 and March 2018. What was happening in that period?

A. I don't recall. All I remember is the period from London Life. There was a lag point. I finished in London Life. It is hard recollecting these dates. I don't keep them in my head, and I haven't written them down in advance because I wasn't aware I was going to be asked these questions. The lag is -- I was doing nothing in between. I was in search of a new firm, and Sterling Mutuals was the opportunity.<sup>11</sup>

[99] We do not know what "the summary" is that is referred to in the question as having a space between October 2017 and March 2018. The portion of the examination transcript that was put into evidence does not specify or assist. We do not know whether it was a document prepared by Staff, or by Graham, or otherwise. We have trouble reconciling the dates in Staff's question with the fact that earlier in the examination, Staff showed Graham the registration database excerpt that disclosed Graham's November 2017 start date with Sterling.

[100] In any event, what comes through for us in Graham's answer quoted above is that he had great difficulty recalling specific dates, and that he did not come to the examination prepared to give the requested information. It is more likely than not that the difference is attributable to Graham's inability to recall the specific date.

[101] Finally on this point, we do not accept Staff's contention that by giving this testimony about dates, Graham was attempting to distance himself from Rosborough because of the insider trading allegations. However, given that Rosborough and Graham both freely admitted that they were communicating with each other in October and November of 2017, including about trading securities, we see no advantage to Graham in trying to mislead Staff on this point, again especially given that to Graham's knowledge, Staff had records of the relevant dates.

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<sup>11</sup> Exhibit 2, Mills Affidavit, Graham Interview Transcript dated April 24, 2020, at p 23 line 17 – p 24 line 6

### 3.3.3 Whose idea it was for Graham to move to Sterling

[102] The second area in which Staff says Graham made misstatements relates to whether it was Rosborough's or Graham's idea for Graham to move to Sterling. We preface our analysis by rejecting the binary premise of the allegation. The idea for Graham to move to Sterling might have been Graham's alone, or Rosborough's alone, or both of theirs, in equal or unequal proportions.

[103] In his April 2020 examination, Graham said that it was his own idea to join the firm. Staff contends that this answer is contradicted by Rosborough's testimony, although Rosborough did concede some uncertainty, saying that he "believed" he contacted Graham first about the idea.

[104] Staff also contends that Graham himself gave inconsistent answers. His testimony before us included the following:

Q. And Mr. Stanley did not introduce you to Sterling Mutuals, isn't that the case?

A. Trevor did.

Q. That's Trevor Rosborough?

A. Yes.

Q. So, when you said it was your own idea to join Sterling Mutual, that was false, wasn't it?

A. No, because it was my own idea as well...

Q. Wasn't it the case that Mr. Rosborough brought the opportunity of Sterling Mutuals to you?

A. I've already said yes.<sup>12</sup>

[105] Staff also refers us to Graham's May 2020 examination, in which Graham testified that Rosborough filled Graham in about what Rosborough was doing with Sterling, and that it was an opportunity for Graham to come over to Sterling.

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<sup>12</sup> Hearing Transcript, *Rosborough (Re)*, November 11, 2021, at 69 lines 15-28

[106] There is imprecision and inconsistency in Graham's various answers on this topic. Can these answers properly be said to include misstatements of the kind envisioned by s. 122(1)(a)? We think not. The materiality of the answer is not evident, and to sustain an allegation of misleading Staff, there should be clarity in the question and answer to a degree that makes Staff's proposed conclusion compelling. We do not see that degree of clarity here, and we are not persuaded by Staff's submission that we ought to give weight to the fact that Rosborough took some steps to get Graham registered. We see no correlation between Rosborough's natural and understandable efforts regarding Graham's registration, and the question of whose idea it was for Graham to move.

### **3.3.4 Graham engaging in "stealth advising activities" with Rosborough**

[107] The third area of Graham's alleged misstatements relates to whether Graham engaged in what Staff describes as "stealth advising" on Rosborough's behalf.

[108] Staff relies on the following excerpt from Graham's April 2020 examination:

Q. Did you have much interaction with Mr. Rosborough during this time?

A. What kind of levels?

Q. Let's start with work?

A. On a business level, not too much. It was just talking about mutual funds, talking about the business. There wasn't really any much discussion, as I said, because he was never a close friend. He is really like an acquaintance.

Q. You never assisted him with anything for work?

A. No, just besides his advice on what I was putting together.<sup>13</sup>

[109] Our ability to assess the importance of this passage is impaired by uncertainty about what time period is referred to in the first question. The excerpt from the examination transcript that was filed with us does not disclose the answer. In

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<sup>13</sup> Exhibit 2, Mills Affidavit, Graham Interview Transcript dated April 24, 2020, at 26 lines 11-24

particular, it is unclear whether Graham is referring to preparatory work (“what I was putting together”) before November 2017 or after.

[110] Staff then selects one question and answer from Graham’s May 2020 examination:

Q. So in your first interview you told us that you never assisted Mr. Rosborough with anything at work. But that wasn’t necessarily true?

A. Correct.<sup>14</sup>

[111] The excerpt tendered does not show what precedes or follows that question and answer. Without context, we are not prepared to rely on that question and answer to conclude that Graham’s initial answers were misstatements.

[112] However, in his testimony before us, Graham agreed with the accuracy of the following statement contained in Rosborough’s first settlement, *i.e.*, with staff of the Commission’s Compliance and Registration Regulation branch:

Rosborough stealth-advised approximately 16 to 18 individuals through [Graham]... Rosborough would provide investment advice to former clients or receive unsolicited directions from them to process mutual fund transactions, and would supply the former clients with Sterling investment documents bearing [Graham]'s name as the responsible registrant and his representative code. Once these documents had been signed by the client, Rosborough gave them to [Graham] to sign, and they were then sent by one of Rosborough's assistants to Sterling for processing.<sup>15</sup>

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<sup>14</sup> Exhibit 2, Mills Affidavit, Graham Interview Transcript dated May 15, 2020, at 122 lines 19-23

<sup>15</sup> Exhibit 2, Mills Affidavit, In the Matter of an Opportunity to be Heard Requested by Trevor Rosborough, Decision of the Director dated May 4, 2020, at Appendix “A”, para 25



[113] Graham also agreed that:

- a. he had Masterpiece business cards with his name on them, at the time he became registered with Sterling; and
- b. he was helping Rosborough process applications for his former clients.

[114] We find that Graham's own evidence on this point, as set out in the previous two paragraphs, supports Staff's allegation. It is inconsistent with the answer he gave on his examination during the investigation, when he said that he never assisted Rosborough with work. The inconsistency is material, in that his answer was the direct opposite of the truth and directly related to whether Rosborough and/or Graham may have violated Ontario securities law. In giving his answer, Graham contravened s. 122(1)(a) of the Act.

#### **4. CONCLUSION**

[115] For the above reasons, we find that:

- a. Carr contravened s. 76(2) of the Act by communicating the material information to Rosborough, and contravened s. 76(1) of the Act by trading in shares of WeedMD while in possession of the undisclosed material information; and
- b. Graham contravened s. 122(1)(a) of the Act by misleading Staff as to whether he had ever assisted Rosborough.

[116] We therefore require that the parties contact the Registrar by 4:30pm on June 17, 2022, to arrange an attendance, the purpose of which is to schedule a hearing regarding sanctions and costs, and the delivery of materials in advance of that hearing. The attendance is to take place on a mutually convenient date that is fixed by the Governance & Tribunal Secretariat, and that is no later than July 8, 2022.

[117] If the parties are unable to present a mutually convenient date to the Registrar, each party may submit to the Registrar, for consideration by a panel of the

Tribunal, a one-page written submission regarding a date for the attendance.  
Any such submission shall be submitted by 4:30pm on June 17, 2022.

Dated at Toronto this 25th day of May, 2022.

*"Timothy Moseley"*

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Timothy Moseley

*"Frances Kordyback"*

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Frances Kordyback

*"Cathy Singer"*

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Cathy Singer