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Citation: *Aux Cayes Fintech Co Ltd (Re)*, 2022 ONCMT 30

Date: 2022-10-12

File No. 2021-29

**IN THE MATTER OF
AUX CAYES FINTECH CO. LTD.**

**ORAL REASONS FOR APPROVAL OF A SETTLEMENT
(Subsection 127(1) and section 127.1 of the *Securities Act*, RSO 1990, c S.5)**

Adjudicators: Timothy Moseley (chair of the panel)
Russell Juriansz
Sandra Blake

Hearing: By videoconference, October 12, 2022

Appearances: Aaron Dantowitz For Staff of the Ontario Securities
Vincent Amartey Commission
Brad Moore For Aux Cayes Fintech Co. Ltd.
Tina Cody

ORAL REASONS FOR APPROVAL OF A SETTLEMENT

The following reasons have been prepared for publication, based on the reasons delivered orally at the hearing, as edited and approved by the panel, to provide a public record of the oral reasons.

- [1] Staff of the Ontario Securities Commission has alleged that Aux Cayes Fintech Co. Ltd. contravened the *Securities Act*¹ (the **Act**) by engaging in the business of trading in securities without the necessary registration or an applicable exemption from the registration requirement. Staff also alleges that Aux Cayes engaged in trades of securities that were distributions under the Act, without complying with or being exempt from the prospectus requirements.
- [2] Staff and Aux Cayes seek approval of a settlement agreement they have entered into regarding these allegations. We conclude that it would be in the public interest to approve the settlement, for the following reasons.
- [3] The factual background is set out in more detail in the settlement agreement, but we summarize the most important facts here.
- [4] Aux Cayes operates an online crypto asset trading platform. Investors can open an account, and can trade in securities and derivatives based on exposure to underlying assets that include crypto assets. Whether the investor deposits crypto assets or uses fiat currency to purchase crypto assets, those assets are held in a wallet that Aux Cayes controls.
- [5] The investors have neither possession of, nor control over, the crypto assets. Aux Cayes maintains custody. An investor who wants to take possession of their crypto assets must ask Aux Cayes for the assets and then transfer those assets to a wallet that the investor controls. What Aux Cayes actually provides to an investor is an instrument or contract involving crypto assets (e.g., crypto asset futures contracts, swap and options contracts), as opposed to the crypto assets themselves. Aux Cayes admits that these instruments or contracts are securities and derivatives.
- [6] From the time that Aux Cayes launched its platform on October 1, 2017, to June 20, 2022, Aux Cayes opened more than 21,000 accounts for Ontario investors.

¹ RSO 1990, c S.5

Ontario investors deposited crypto assets into 1,534 of these accounts, from which Aux Cayes obtained revenue of approximately 514,950 US dollars. The remaining accounts received no deposits, and no trading was conducted in them.

- [7] Canadian securities regulators, including the Ontario Securities Commission, have publicized their concerns about unregistered crypto asset trading platforms. The Commission issued a news release in March 2021 advising that those platforms must bring their operations into compliance with Ontario securities law or they may face regulatory action. The press release included a deadline of April 19, 2021, for such platforms to begin registration discussions.
- [8] Aux Cayes did not contact the Commission by the deadline set out in that news release. In May 2021, the Commission took steps to inform Aux Cayes that it may be conducting registrable activity in Ontario. Aux Cayes responded to the Commission in June 2021 and advised that Aux Cayes would identify and close its Ontario accounts.
- [9] Aux Cayes's misconduct was compounded by the fact that in later communications with the Commission, Aux Cayes made incorrect representations about what information was available regarding its Ontario accounts. Aux Cayes later corrected those misrepresentations.
- [10] There are also mitigating factors. After being contacted by the Commission in May 2021, Aux Cayes took various steps aimed at limiting Ontario investors' access to their platform, including amending its Terms of Service to include Ontario in the list of restricted locations, and by adopting technology solutions to attempt to block Ontario investors.
- [11] In addition, since late June 2022, Aux Cayes has maintained an open dialogue, expressed an interest in reaching a negotiated resolution and has provided all requested information promptly and in a transparent manner, making a disgorgement order possible. Aux Cayes is taking steps to explore the registration and compliance process with the Commission and has provided an undertaking to the Commission to restrict its business while it pursues registration and to leave Ontario in an orderly fashion if registration discussions terminate.
- [12] The written undertaking provides, among other things, that until Aux Cayes either becomes registered or has wound down its operations, Aux Cayes will

donate ongoing revenues from Ontario accounts to a payee named in the undertaking.

- [13] Aux Cayes has admitted that its conduct breached the registration and prospectus requirements and that it thereby contravened ss. 25(1) and 53(1) of the Act. Staff and Aux Cayes have agreed that Aux Cayes will pay an administrative penalty of 600,000 Canadian dollars, will disgorge to the Commission the 514,950 US dollars that it obtained in the form of revenue, and will pay 25,000 Canadian dollars for costs of the Commission's investigation. Aux Cayes paid those amounts to the Commission before this hearing, and they are being held in escrow pending approval of the settlement.
- [14] We have reviewed the settlement agreement in detail. In addition, we had the benefit of a confidential settlement conference with counsel for both parties.
- [15] Our role at this settlement hearing is to determine whether the negotiated result falls within a range of reasonable outcomes, and whether it would be in the public interest to approve the settlement.
- [16] We have considered Aux Cayes's failure to obtain registration and to comply with the prospectus requirements, both of which requirements are cornerstones of securities regulation in Ontario. We have also considered the aggravating and mitigating factors I have mentioned.
- [17] This Tribunal respects the negotiation process and accords significant deference to the resolution reached by the parties. In our view, given all the circumstances, including the avoidance of significant resource consumption that would be required for a contested hearing, it is in the public interest for us to approve the settlement.
- [18] We will therefore issue an order substantially in the form of the draft attached to the settlement agreement.

Dated at Toronto this 12th day of October, 2022

"Timothy Moseley"

Timothy Moseley

"Russell Juriansz"

Russell Juriansz

"Sandra Blake"

Sandra Blake