Capital Markets Tribunal | Tribunal des marchés financiers | 22nd Floor 20 Queen Street West Toronto ON M5H 3S8 | 22e étage 20, rue Queen ouest Toronto ON M5H 3S8

Citation: *Kitmitto (Re),* 2023 ONCMT 4
Date: 2023-01-20
File No. 2018-70

IN THE MATTER OF
MAJD KITMITTO, STEVEN VANNATTA, CHRISTOPHER CANDUSSO, CLAUDIO CANDUSSO, DONALD ALEXANDER (SANDY) GOSS, JOHN FIELDING AND FRANK FAKHRY

REASONS AND DECISION ON SANCTIONS AND COSTS

(Subsection 127(1) and section 127.1 of the *Securities Act*, RSO 1990, c S.5)

Adjudicators:	M. Cecilia Williams (chair of the panel) Sandra Blake Geoffrey D. Creighton	
Hearing:	By videoconference, October 11 and 13, 2022	
Appearances:	Katrina Gustafson Khrystina McMillan	For Staff of the Ontario Securities Commission
	Andrew Guaglio	For Majd Kitmitto
	Peter Zaduk Kristy Wong	For Steven Vannatta
	Alistair Crawley Alexandra Grishanova	For Christopher Candusso
	Lara Jackson John M. Picone Stephanie Voudouris	For Donald Alexander (Sandy) Goss
	Greg Temelini Janice Wright	For Frank Fakhry

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REASONS AND DECISION

1. BACKGROUND AND DECISION

[1] This was a sanctions and costs hearing before the Tribunal to determine whether it is in the public interest to make an order against Majd Kitmitto (**Kitmitto**), Steven Vannatta (**Vannatta**), Christopher Candusso (**Candusso**), Donald Alexander (Sandy) Goss (**Goss**), and Frank Fakhry (**Fakhry**, and collectively with Kitmitto, Vannatta, Candusso and Goss, the **Respondents**).

[2] Staff requests an order for significant market bans, administrative penalties, disgorgement and costs.

[3] For the reasons that follow, we find it in the public interest to order that:

a. Kitmitto is subject to market participation bans for 10 years, with certain carve-outs, shall pay an administrative penalty of $600,000, and shall pay costs of $147,075;

b. Vannatta is subject to market participation bans for 15 years, with certain carve-outs, shall pay an administrative penalty of $650,000, shall disgorge $54,435, and shall pay costs of $183,844;

c. Candusso is subject to market participation bans for three years, with certain carve-outs, shall pay an administrative penalty of $100,000, shall disgorge $30,782, and shall pay costs of $73,537;

d. Goss is subject to market participation bans for 15 years, with certain carve-outs, shall pay an administrative penalty of $1,000,000, shall disgorge $1,228,509, and shall pay costs of $183,844; and

e. Fakhry is subject to market participation bans for 10 years, with certain carve-outs, shall pay an administrative penalty of $600,000, shall disgorge $126,546, and shall pay costs of $147,075.

2. MERITS DECISION

[4] The Merits Decision, issued on May 26, 2022, dealt with alleged breaches of various sections of the *Securities Act*,[1] (the **Act**) related to insider trading, tipping, and misleading staff of the Ontario Securities Commission (**Staff**). There were also allegations that certain of the Respondents' misconduct engaged the Tribunal's public interest jurisdiction. The majority of the Panel found that:

a. Kitmitto contravened s 76(2) of the Act by tipping Vannatta, Candusso and Goss while he was in possession of material non-public information (**MNPI**) related to Amaya Gaming Group Inc. (**Amaya**);

b. Vannatta contravened s 76(1) of the Act by engaging in insider trading and contravened s 76(2) of the Act by tipping four relatives while in possession of MNPI. Further, he engaged the Tribunal's public interest jurisdiction by concealing his trading from his employer, and contravened s 122(1) of the Act by misleading Staff;

c. Candusso contravened s 76(1) of the Act by engaging in insider trading;

d. Goss contravened s 76(1) of the Act by engaging in insider trading and contravened s 76(2) of the Act by tipping his assistant Fakhry while in possession of MNPI. Further, he engaged the Tribunal's public interest jurisdiction by making recommendations to fifteen of his clients to purchase shares of Amaya while he was in possession of MNPI; and

e. Fakhry contravened s 76(1) of the Act by engaging in insider trading and contravened s 76(1) of the Act by tipping his cousin and a client. He also engaged the Tribunal's public interest jurisdiction by making recommendations to five of his clients to purchase shares of Amaya while he was in possession of MNPI.[2]

[1] RSO 1990, c S.5

[2] *Kitmitto (Re)*, 2022 ONCMT 12 (**Merits Decision**) at para 423

3. LAW ON SANCTIONS

[5] The Act's objectives include, among other things, protecting investors from unfair or fraudulent practices, and fostering confidence in fair and efficient capital markets.[3]

[6] The Tribunal has a public interest jurisdiction to order sanctions that may limit or prohibit participation in the Ontario capital markets in the future by removing "those whose past conduct is so abusive as to warrant apprehension of future conduct detrimental to the integrity of the capital markets".[4] The Tribunal's role when imposing sanctions is not to punish past conduct, but to restrain "future conduct that is likely to be prejudicial to the public interest in having capital markets that are both fair and efficient".[5]

[7] The sanctions imposed must be appropriate and proportionate to the circumstances of the case and the conduct of each respondent.[6] Sanctions have to be carefully tailored to the particular breaches of the Act, the role of the perpetrator and the particular circumstances applicable to each respondent.[7] The layering on of sanctions must not aggregate to a result that is punitive rather than protective and deterrent. Punishment is not a permissible goal of sanctions.[8]

[8] The Tribunal has identified a non-exhaustive list of factors to be considered in determining appropriate sanctions, including the seriousness of the misconduct, the experience of the respondent and level of activity in the marketplace, the size of the profit made from the misconduct, remorse of the respondent, any mitigating factors, and the likely effect that any sanction would have on the respondent ("specific deterrence") as well as on others ("general deterrence").[9]

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[3] Act, s 1.1

[4] *Committee for the Equal Treatment of Asbestos Minority Shareholders v Ontario (Securities Commission*), 2001 SCC 37 at para 43

[5] *Mithras Management Ltd (Re),* (1990) 13 OSCB 1600 at 1611

[6] *Bradon Technologies Ltd (Re),* 2016 ONSEC 19 at para 28

[7] *Azeff (Re),* 2015 ONSEC 29 (***Azeff***) at para 10

[8] *Azeff* at para 7

[9] *Belteco Holdings Inc (Re),* (1998) 21 OSCB 7743 at 7746

[9] Before turning to our analysis of the appropriate sanctions and costs in this case we outline the sanctions and costs sought by Staff.

4. SANCTIONS AND COSTS SOUGHT BY STAFF

[10] Staff seeks sanctions and costs for each Respondent as follows:

	Kitmitto	Vannatta	Candusso	Goss	Fakhry
Market bans	15 years	permanent	7 years	permanent	permanent
Administrative penalty	$600,000	$1.25 M	$150,000	$2 M	$653,097
Disgorgement	N/A	$54,435	$30,782	$1,228,509	$126,546
Costs	$217,800	$272,250	$108,900	$272,250	$217,800

[11] Staff submits that the following market bans be imposed upon each of the Respondents:

a. a prohibition from acquiring any securities or from trading in any securities (subject to certain carve-outs);

b. any exemptions contained in Ontario securities law not apply; and

c. resignation from any positions held as a director or officer of an issuer or registrant, and a prohibition from becoming or acting as a director or officer of an issuer or registrant, or from becoming or acting as a registrant or promoter.

[12] We now turn to our analysis of the sanctions appropriate in this case.

5. APPROPRIATE SANCTIONS

[13] Before dealing with the appropriate sanctions for each of the Respondents, we address several issues applicable to more than one of the Respondents.

5.1 Matters relevant to more than one Respondent

5.1.1 Seriousness of the misconduct

[14] The prohibition against insider trading is a "significant component" of the schemes of investor protection and the fostering of fair and efficient capital

markets and confidence in them. Insider trading and tipping strike at the heart of the Act's key objectives by creating a "grossly unfair" informational advantage to the person(s) trading with MNPI. Such conduct undermines investor confidence in the capital markets, potentially causing prospective investors to refuse to purchase securities if they have reason to fear that insiders will be free to trade on the basis of undisclosed information.[10] We therefore view the seriousness of the allegations in this case as an important factor in determining sanctions.

5.1.2 Remorse

[15] Staff submits there is a lack of remorse shown by the Respondents. We acknowledge that there is no obligation to express remorse and failure to express remorse is not an aggravating factor.[11] The courts have also recognized in the criminal context that the right to make full answer and defense and denial of guilt are not aggravating factors.[12] In our view, these principles also apply in the securities regulatory context. A respondent can deny an allegation and defend themselves as considered appropriate.

[16] Certain of the Respondents also submit that they have a statutory right to appeal the Merits Decision and that it should not be considered an aggravating factor that they act in a way to preserve that right. In our view, it is not an aggravating factor for a Respondent to avail themselves of the right to make full answer and defence and/or to behave in a manner consistent with preserving their position in a potential appeal.

[17] However, we also acknowledge that a respondent who does not demonstrate remorse will not receive the mitigating benefit such remorse may bring.

5.1.3 Market bans

[18] The severity of sanctions imposed may depend on whether the respondent is a registrant or non-registrant[13] and the scope of their role and activity within the

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[10] *Finkelstein v Ontario Securities Commission*, 2018 ONCA 61 at paras 22-24

[11] *Black Panther Trading Corporation (Re),* 2017 ONSEC 8 at para 38

[12] *R v Ellacott,* 2017 ONCA 681 at paras 30 and 31

[13] *Azeff* at para 8

capital markets. In our view, removal from the capital markets provides future protection for investors and the markets. Market bans, (for trading, acting as a director or officer, acting as a registrant, etc.) enhance that protective shield, while administrative penalties mainly serve the elements of specific and general deterrence.

5.1.4 Appropriate Trading Ban Carve-outs

[19] Staff proposes that the trading bans be subject to the following carve-outs:

a. mutual funds, exchange-traded funds, government bonds and/or guaranteed investment certificates;

b. for the account of any registered retirement savings plan, registered retirement income fund and tax-free savings account, as defined in the *Income Tax Act*,[14] in which the Respondent has sole legal and beneficial ownership; and

c. provided those trades are conducted solely through a registered dealer in Ontario, to whom the Respondent must have given a copy of the sanctions and costs order.

[20] All the Respondents, except Fakhry, seek further carve-outs for their unique circumstances including, trading in non-registered accounts, trading without the use of a third-party registered dealer, acquiring shares through compensation from work, and trading in any securities on certain conditions.

[21] Goss submits that the risk of investor harm and to the integrity of the capital markets is protected by limiting the types of securities traded to those proposed by Staff. Therefore, Goss submits he ought to be able to trade without using a registered dealer. Alternatively, the risks are removed if trading through a registered dealer so any securities should be permitted for trading. Goss also submits that it is irrelevant whether the trading is conducted in a registered or non-registered account. Goss's submissions were adopted by Kitmitto and Vannatta.

[14] RSC 1985, c 1 (5th Supp)

[22] We do not agree with introducing further carve-outs for any of the Respondents for the following reasons. "Participation in the capital markets is a privilege, not a right".[15] The Respondents have demonstrated that they should not be permitted to participate without check in the capital markets. Without the use of a registered dealer, there is no certainty of compliance with the permitted carve-outs. Trading bans are imposed to keep wrongdoers from participating in the capital markets in light of the seriousness of their breaches of the Act. Restricting the type of account also serves a regulatory purpose. Trading bans protect the public, while limited carve-outs with respect to type of account and type of security are intended to address the public policy goal of allowing financial planning for retirement and other life savings.

[23] We note that none of the Respondents provided submissions or objected to the condition that the trading carve-outs only take effect after the full payment of the applicable administrative penalty, disgorgement and costs. In *VRK Forex and Investments Inc (Re)*[16] at paragraph 39*,* the panel commented that "such a term might be punitive, especially in a case where the respondents assert impecuniosity." However, the panel went on to say, "we leave it to panels in future cases to determine whether a similar term is in the public interest where it is requested by Staff but contested by a respondent."[17] In this case, the term has not been contested by any of the Respondents. We therefore adopt the condition proposed by Staff and make no further comment on this condition.

[24] We deal with the length of trading bans when we address sanctions for each Respondent specifically below.

5.1.5 Director and Officer Bans

[25] Staff asks that the market bans ordered include restricting the Respondents' ability to act as a director or officer of a registrant or issuer. Certain Respondents submit that such an order would be inappropriate as there is no connection between the findings in the Merit Decision and being a director or officer.

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[15] *Erikson v Ontario (Securities Commission)*, 2003 CanLII 2451 (ONSC) at para 55

[16] 2022 ONCMT 28 (***VRK***)

[17] *VRK* at para 39

[26] Directors and officers are in elevated positions of trust due to the integrity and expertise required of such roles. In addition, these types of positions often involve access to MNPI. In our view, individuals holding leadership positions in issuers and registrants must demonstrate integrity and trustworthiness. The Respondents have demonstrated through their misconduct that they cannot be trusted with MNPI. We therefore find that director and officer bans are appropriate for all Respondents.

5.1.6 Calculation of Administrative Penalties

[27] There is no formula for determining the quantum of an administrative penalty. Factors to consider in determining an appropriate administrative penalty include: the seriousness of the misconduct; whether there were multiple and/or repeated breaches of the Act; whether the respondent realized any profit because of their misconduct; the amount of money raised or obtained from investors; and the level of administrative penalties imposed in other cases.[18] In our view, this list of factors is non-exhaustive and the importance of any factor will vary depending on the circumstances present in each case.

[28] Staff has taken two different approaches with respect to the calculation of administrative penalties sought in this proceeding, both of which approaches have been used in previous Tribunal decisions. For Kitmitto, Vannatta and Candusso they employ an amount per breach approach. They propose the following amounts: $200,000 for insider trading in breach of s 76(1) (regardless of the number of trades), $200,000 for each tip of MNPI in breach of s 76(2), and $250,000 for misleading Staff in breach of s 122(1). However, for Goss and Fakhry they base the administrative penalty sought on a multiple of the amount of profit each earned, proposing in each instance that double the profit would be an appropriate administrative penalty.

[29] Staff submits that for Kitmitto, Vannatta and Candusso a multiple of profit would be insufficient to address specific and general deterrence given the small amount of profit each earned from their misconduct (and in Kitmitto's case no profit was earned). Goss submits that profit should not be the focus for administrative

[18] *Agueci (Re),* 2015 ONSEC 19 (***Agueci***) at para 12

penalties, but rather the nature and extent of the misconduct in question should be the basis of our decision on the appropriate administrative penalty.

[30] In our view, consistency of approach is important as it permits a clearer reflection of the relative seriousness of the misconduct among the Respondents in this case. In assessing the administrative penalties we take an amount per breach approach, rather than considering the amount of profit, if any, earned. We then adjust the dollar amount of the initial calculation of the administrative penalty up or down to reflect the seriousness of the conduct, the conduct relative to the other Respondents, and any aggravating or mitigating factors. Considering past cases[19], and the passage of time,[20] we accept the per breach amounts proposed by Staff as summarized in paragraph 28 above.

5.1.7 Disgorgement

[31] Paragraph 10 of s 127(1) of the Act provides that, if a person or company has not complied with Ontario securities law, the Commission may order the person or company to disgorge to the Commission "any amounts obtained as a result of the non-compliance."

[32] Except for the amount of disgorgement for Goss, none of the Respondents with respect to whom Staff is seeking an order of disgorgement contested the appropriateness of such an order. The panel finds that amounts obtained by Respondents who traded on MNPI shall be disgorged. We deal with Goss's submission about whether it is appropriate to order disgorgement of profits earned in family accounts over which he had trading authority below in the section dealing with Goss.

5.2 Appropriate sanctions for each Respondent

5.2.1 Kitmitto

[33] Kitmitto was a senior analyst at Aston Hill Asset Management Inc. (**Aston Asset Management**). He submits that, compared to other Respondents, he was young, inexperienced, a junior employee and a non-registrant. We find,

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[19] *Azeff; Agueci*

[20] *Fiorillo v Ontario Securities Commission*, 2016 ONSC 6559 at para 295

however, that he occupied a position of trust and was an access person with regular access to MNPI.

[34] Considering the sanctioning factors set out in *Belteco*, the following facts are relevant to our determination of appropriate sanctions. Kitmitto initiated the course of conduct that led to multiple violations of Ontario securities law by himself and the other Respondents. Without his tipping, the other Respondents could not have engaged in insider trading, tipping, misleading Staff and abusive conduct in concealing trades from an employer, and recommending Amaya to their clients while in possession of MNPI. Although Kitmitto did not profit from his violations of the Act, large profits were made by those he tipped. He was responsible for tipping three separate individuals, not a single isolated act. Those three tippees then tipped a further seven individuals, made recommendations based on MNPI to 20 others, and traded on MNPI. The market impact of Kitmitto's breaches was widespread and amounted to approximately $1.5 million of illegally obtained profits.

[35] Kitmitto has no prior record of breaching Ontario securities law. It has been about eight years since the events that gave rise to this proceeding. There is no evidence that Kitmitto has contravened Ontario securities law in that time.

[36] Kitmitto submits that appropriate sanctions include market bans for seven years, subject to carve-outs including the right to purchase and sell shares acquired as compensation from work, and an administrative penalty of $90,000.

[37] For the reasons already discussed above, we disagree with providing further carve-outs to the trading bans other than those proposed by Staff. With respect to Kitmitto's submission for a carve-out to allow equity compensation, we conclude that it is not appropriate to grant such a carve-out without any specific details that would allow us to assess its appropriateness.

[38] We give weight to the fact that this case involved one piece of MNPI, rather than in other cases where MNPI was sought out on numerous occasions for the purpose of insider trading.

[39] Having regard to all the factors noted above, in particular the seriousness of the allegations, the need for both specific and general deterrence, and the fact that Kitmitto initiated the course of conduct, providing the opportunity for others to

breach Ontario securities law, we find that market bans for a period of 10 years are appropriate.

[40] Kitmitto committed three breaches of the Act by tipping three individuals. Applying the amount per breach of $200,000 for each tip, we find that an administrative penalty in the amount of $600,000 is appropriate, given the significant market impact of his conduct. We conclude that there are no mitigating factors to adjust the amount down nor aggravating factors to adjust the amount up.

5.2.2 Vannatta

[41] Vannatta was a portfolio manager and access person at Aston Asset Management, and a registrant with the Commission. He engaged in insider trading and tipped four of his relatives with MNPI (each of whom then traded in Amaya shares). Vannatta's insider trading earned him $54,435.

[42] Having regard to the sanctioning factors, and in particular considering the seriousness of the allegations, Vannatta's status as a registrant at the time, his experience in the market, his attempts to mislead Staff, and his attempts to conceal his trading from his employer, we find that market participation bans for 15 years are appropriate.

[43] With respect to the appropriate administrative penalty for Vannatta, we consider the appropriate penalties relating to his tipping, his trading and his misleading of Staff. We then turn to his submissions regarding his ability to pay and that Staff's proposed administrative penalty offends s 12 of the Charter.

[44] Vannatta submits that there is no finding that his relatives were tipped individually or all at once. There is no finding whether a single relative, having received a tip from Vannatta, did not tip the others on their own initiative. The finding that the trading was "timely, profitable and either uncharacteristic or opportunistic" does not preclude these possibilities and in fact is entirely consistent with them. We agree that this calls for an administrative penalty based on one tip rather than four discrete breaches of the Act, and therefore $200,000 is an appropriate administrative penalty for engaging in tipping while in possession of MNPI.

[45] The Merits Panel found that Vannatta engaged in insider trading and we find that $200,000 is an appropriate administrative penalty for this breach.

[46] The Merits Panel found that Vannatta misled the Commission during its investigation.[21] Misleading Commission investigators hinders the Commission's ability to monitor and enforce compliance with Ontario securities law, and impedes effective regulation of the capital markets.[22] As held by the Court of Appeal for Ontario, "[i]t is difficult to imagine anything that could be more important to protecting the integrity of [the] capital markets than ensuring that those involved in those markets ... provide full and accurate information to the [Commission]."[23] As a result, we find that $250,000 is the appropriate administrative penalty for this breach.

[47] Vannatta submits that an important consideration in fixing an administrative penalty is the Respondent's ability to pay. The administrative penalty should not be so crushing as to cripple the respondent financially and place him under a permanent monetary burden. He submits that this applies here to the cumulative effect of the administrative penalty, costs, disgorgement, and the fact that he has effectively been banned from the industry since February 2018. This effective ban came about, he submits, because the allegations in this matter resulted in his suspension from his job at Purpose Investments and have deprived him since then of the livelihood he has pursued since 2008.

[48] We do not accept Vannatta's submissions regarding the relevance of ability to pay to our decision about the appropriate administrative penalty, for the following reasons. Vannatta has not been subject to any market bans for the past eight years. In addition, we have little financial information other than his Canada Revenue Agency Notice of Assessments for 2019 and 2020. There is no evidence of his financial condition over the past two years, including any bank statements. The onus of demonstrating impecuniosity as a mitigating factor lies upon the respondent who asserts it. Vannatta has not produced clear and complete evidence and has therefore failed to meet the onus upon him. In any

[21] See Merits Decision at paras 212 to 218

[22] *Da Silva (Re),* 2012 ONSEC 32 at para 7

[23] *Wilder v Ontario Securities Commission*, 2001 CanLII 24072 (ONCA) at para 22

event, this Tribunal has repeatedly held that a respondent's ability to pay is not determinative or even a predominant factor in determining the appropriate financial sanction for a respondent to pay.[24]

[49] Vannatta submits that Staff's proposed sanctions would offend s 12 of the Charter[25] in that the quantum of the penalty and Vannatta's alleged inability to pay amounts to cruel and unusual punishment. In support, Vannatta cites the recent Supreme Court of Canada case *R v Bissonnette*.[26] That case dealt with the constitutionality of consecutive periods of parole ineligibility for multiple murders. The court held that "[t]o determine whether a punishment is intrinsically incompatible with dignity, the court must determine whether the punishment is, by its very nature, degrading or dehumanizing"[27] and a punishment that can never be carried out is contrary to the fundamental values of Canadian society.[28]

[50] Vannatta submits that he has no prospect of ever paying off the monetary sanctions of the magnitude proposed by Staff. According to Vannatta, Staff is asking for a "punishment that can never be carried out," a punishment which therefore is "contrary to the fundamental values of Canadian society" and one that is "intrinsically incompatible with human dignity."

[51] We disagree with Vannatta's submission on this issue. The threshold for a breach of s 12 is extremely high, only met where the punishment is "grossly disproportionate" to what is appropriate or is "intrinsically incompatible with human dignity" because it would "outrage our standards of decency".[29] That threshold has not been met because in our view a financial penalty alone cannot be equated to imprisonment with consecutive periods of parole ineligibility. As held by the Court of Appeal for Ontario, ability to pay was "immaterial" to a s 12

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[24] See for example, *Sabourin (Re)*, 2010 ONSEC 10 at para 60*; Factorcorp Inc (Re)*, 2013 ONSEC 34 at para 35; *Rezwealth Financial Services Inc (Re)*, 2014 ONSEC 18 at para 69

[25] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act,* 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 (the **Charter**)

[26] 2022 SCC 23 (***Bissonnette***)

[27] *Bissonnette* at para 67

[28] *Bissonnette* at para 95

[29] *R v Pham*, 2002 CanLII 41969 (ONCA) at para 11 citing *R v MacDonald*, 1998 CanLII 13327 (ON CA) at para 68; *Bissonnette* at para 69

analysis even in the criminal context where default of payment could result in imprisonment.[30]

[52] We conclude that an administrative penalty in the amount of $650,000 is appropriate. The administrative penalty represents $200,000 for insider trading, $200,000 for tipping and $250,000 for misleading Staff. We take guidance from *Agueci* in determining the appropriate penalty for misleading Staff where repeated attempts to mislead resulted in an administrative penalty of $250,000. Additionally, Vannatta shall disgorge $54,435, and this amount was not contested by Vannatta.

5.2.3 Candusso

[53] Candusso was Kitmitto's roommate. Unlike the other Respondents, he did not work at Aston Asset Management nor Aston Hill Securities. He is not a registrant or market participant.

[54] Candusso engaged in one violation of the Act by trading in Amaya shares while in possession of MNPI and earned a profit of $30,782.

[55] Candusso submits that no basis exists to impose a director and officer ban as he has not abused his position as a market participant or registrant that would justify such bans against him. For the reasons articulated above, we disagree with this submission and find that director and officer bans are appropriate.

[56] Candusso also seeks further trading carve-outs due to his alleged limited access to MNPI, including the ability to trade in any securities as long as he does not own greater than one percent of the outstanding securities of an issuer. We reject these submissions for the reasons previously outlined.

[57] We find that Candusso's experience in the market, level of activity in the market, and size of profit, put him at the lower end of the range in terms of potential risk to the capital markets. While Candusso's conduct is serious, we do not find any aggravating behaviour. We therefore determine that market bans of three years are appropriate.

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[30] *R v Pham*, 2002 CanLII 41969 (ONCA) at para 17

[58] In this case, we considered the fact that Candusso's conduct had less of a market impact compared to the other Respondents as a mitigating factor. We find that adjusting the per breach amount that we have used for other respondents of $200,000 down to $100,000 is the appropriate administrative penalty.

[59] Disgorgement in the amount of $30,782 is appropriate and this was not contested by Candusso.

5.2.4 Goss

[60] Goss has been registered with the Commission since 1993 and has decades of experience in the securities industry. During the relevant period, he was a registered investment advisor at Aston Hill Securities, an affiliate of Aston Asset Management's parent company.

[61] We find that Goss's conduct was among the most serious at issue in these proceedings. He engaged in insider trading on a large scale, repeatedly, in his own and his family's accounts, as well as recommending significant trading in client accounts while in possession of MNPI, leading to significant profits. During the relevant period, he purchased 95,400 Amaya shares for himself, 14,040 Amaya shares for his family members' accounts, and nearly a half million for his clients. In total, he earned over $1.2 million through insider trading in his own account and his family accounts.

[62] Goss also tipped his assistant Fakhry, which led to further violations of securities laws.

[63] Goss submits that permanent market bans should only be ordered where there are attempts to mislead Staff or conceal information. He relies on *Agueci* as an example to support this position where misleading Staff was found to be an aggravating factor.[31] However, we note that there have been other Tribunal cases where permanent bans have been imposed where there was no finding of the respondent misleading Staff.[32] In our view, it is appropriate to take a holistic approach where the length of any market ban reflects the overall misconduct of

[31] *Agueci* at paras 20 and 34

[32] *Bradon Technologies Ltd (Re),* 2016 ONSEC 19

the respondent in question and is sufficient to provide specific and general deterrence.

[64] As mentioned above, the seriousness of the misconduct is an important factor to consider and especially when considering the magnitude of Goss's trading (on his own behalf and on behalf of his family members), his tip to Fakhry, and his recommendations to clients because this misconduct created additional unfair trading advantages, further undermined investor confidence, and jeopardized the integrity of our capital markets.

[65] Taking into consideration Goss's extensive personal trading, his tip to Fakhry and his recommendation to 15 clients to trade Amaya, all while in possession of MNPI, we conclude that market bans of 15 years are appropriate.

[66] In determining the appropriate administrative penalty, and applying the above factors to Goss, we have already noted that the breaches of s 76(1) and (2), tipping and insider trading, are serious. Goss breached two sections of the Act. The market impact of his breaches was approximately $1.2 million in ill-gained profits. We also consider Goss's status as a registrant at the time, experience in the market, level of activity in the market, the size of the profit, and both specific and general deterrence. We are mindful that the breaches occurred approximately eight years ago, and Goss has not suffered a permanent loss of employment over that period.

[67] Applying the per breach approach we have used for the other Respondents, our initial calculation of the appropriate administrative penalty is $400,000 ($200,000 for insider trading plus $200,000 for the tip of MNPI to Fakhry). We conclude that this initial calculation should be adjusted up by a significant amount to appropriately reflect the extent and impact of Goss's misconduct, as described in paragraph 66, our conclusion that his misconduct was among the most serious in this proceeding, and to achieve appropriate specific and general deterrence. We conclude, therefore, that an administrative penalty of $1 million is appropriate.

[68] Regarding disgorgement, Goss submits that he should only be required to disgorge the amounts earned in his trading accounts and not the amounts earned by trading on behalf of his family. The issue of whether disgorgement

orders should be limited to the amount that the respondents obtained personally, either directly or indirectly through corporate entities, has been litigated and lost. Goss relies on *Azeff*[33] for his submission that a respondent should not be required to disgorge amounts earned in his family accounts. Subsequently, the Tribunal determined that it may order a particular respondent to disgorge funds obtained in contravention of the Act regardless of whether that respondent personally obtained the funds.[34]

[69] While this is not a case of trading in a corporate account, we conclude the same reasoning applies in this instance. Goss, using MNPI, made the decision to trade Amaya in the accounts of his family members. Trading in those accounts with the benefit of MNPI, resulting in profits, would not have happened but for Goss having MNPI and making the decision to trade Amaya in the family accounts.

[70] In addition, from a policy perspective, it would undermine confidence in the capital markets if those trading with the inappropriate advantage of MNPI were able to shelter their misconduct by deciding to conduct their insider trades in the accounts of others over which they have trading authority.

[71] We conclude that the profits in Goss's family's accounts are funds that were obtained in contravention of the Act. Goss is, therefore, required to disgorge $1,228,509, being the total amount of profits earned in his personal accounts and the accounts of his family members.

5.2.5 Fakhry

[72] Fakhry was Goss's assistant at Aston Hill Securities, having followed Goss there from their previous employer. He had been registered with the Commission since 1999, and at the time had 8 clients of his own. Fakhry is no longer registered and has not been registered in any capacity since September 11, 2020.

[73] Fakhry made five purchases of Amaya shares while in possession of MNPI earning a profit of $126,546, contrary to s 76(1).

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[33] *Azeff (Re)*, 2015 ONSEC 29 at paras 43 and 44

[34] *Phillips (Re),* 2015 ONSEC 36 at para 20

[74] Fakhry also tipped two other individuals about MNPI, contrary to s 76(2) of the Act.

[75] Fakhry submits that he should not be subject to harsher sanctions than is merited. He did not engage in deceptive behavior and there is no prospect of him returning to the industry. The objectives of specific and general deterrence, he submits, are fully achieved with 10-year market prohibitions.

[76] Applying the sanctioning factors to Fakhry, we considered the seriousness of the allegations, his status as a registrant at the time, his experience in the marketplace, the level of his personal activity, and his recommendations to his clients. We also considered as mitigating factors that Fakhry did not engage in deceptive behaviour and that he is unlikely to return to the industry. We determine that market bans of 10 years are appropriate.

[77] We conclude that an administrative penalty of $600,000 is appropriate. This is based on applying a $200,000 per breach approach to Fakhry's three breaches of the Act (one breach of s 76(1) and two breaches of s 76(2)), and considering the seriousness of the misconduct, his status as a registrant at the time, his experience in the market and the level of his activity. In the circumstances, we see no compelling aggravating or mitigating evidence to adjust the initial calculation of $600,000.

[78] Fakhry is also required to disgorge the amount of his profit earned, $126,546, which he agreed was appropriate.

6. COSTS

[79] Section 127.1 of the Act gives the Tribunal discretion to order a respondent to pay the costs of the investigation and hearing if the Tribunal is satisfied that the person or company has not complied with the Act or has not acted in the public interest.

[80] Costs are not intended to penalize respondents or discourage them from bringing matters before the Tribunal that they wish to contest in good faith.[35]

[35] *Doulis (Re),* 2014 ONSEC 40 at para 89

[81] In determining costs, the respective conduct and responsibilities of each of the respondents in the circumstances are factors to consider.

[82] Insider trading and tipping is difficult to establish and requires, as in this case, extensive investigation and forensic skill. Staff, in our view has been responsible in being conservative in its costs request of $1,089,000. This amount represents a 20% reduction from the total costs of approximately $1,362,234 (which includes total investigation costs sought by Staff in the amount of $344,573, total litigation costs in the amount of $883,651, and disbursements in the amount of $134,010).

[83] However, we find that Staff has not clearly established the investigative costs related to this hearing. This was a complex investigation that began as three separate files and resulted in two separate proceedings, this proceeding and the *Cheng et al* proceeding. Due to the investigations starting in a combined fashion it is difficult to parse out costs related to this investigation as opposed to the *Cheng et al.* investigation.

[84] To address this difficulty, Staff indicated that they included only 50% of the time recorded by its two investigators for one portion of the investigation in its Bill of Costs. Based on each of their hours worked and hourly rate, including only claiming 50% of their time for the specified portion, Staff has requested a total of $273,215 for this phase of its investigation. We do not find that Staff's discounted time adequately addresses the possibility of "double dipping" and co-mingling of the investigations at the same time. The amount of $273,215 should be reduced again by 50% to $136,607. Considering this further reduction, we find that the investigation costs sought by Staff of $344,573 should be reduced by $136,607 for a total of $207,965.

[85] Staff sought litigation costs of $883,651. We find that this number is appropriate.

[86] With respect to the disbursements, Staff sought an expert report in response to some of the respondents indicating that they were planning to file an expert report. Experts were never called at the merits hearing yet Staff is claiming this expense. Several Respondents submit that the cost of Staff's responding expert report from Forensic Economics Inc. in the approximate amount of $100,000

should not be included in the costs requested by Staff. They submit that if it is included, no portion should be attributed to them as they did not request the initial expert report. We disagree. The report is an expense incurred by Staff who were acting prudently in preparing to respond to a Respondent's expert. The fact that neither report was submitted into evidence does not negate the legitimacy of the expense in preparing for the hearing. The appropriate disbursement costs remain at $134,010.

[87] Based on the above, the appropriate total amount of costs sought by Staff is $1,225,626 before accounting for the divided success Staff achieved at the merits hearing.

[88] Seven allegations against the Respondents were not proven. Staff proposed a 20% discount to reflect that they did not succeed in proving all of the allegations. In our view, not enough weight has been afforded to the divided success of Staff at the merits hearing and a 40% reduction of the total costs and disbursements would be more appropriate. We therefore award costs to Staff in the amount of $735,376.

[89] We find that the allocation of costs payable by each Respondent as proposed by Staff is fair.

[90] Not all Respondents were involved in all the allegations. The volume of evidence adduced for each Respondent varied significantly, as did the time taken by their respective cases. Notably, Staff did not prove the allegations against two respondents (John Fielding and Claudio Candusso) who are therefore not a part of this sanctions and costs hearing.

[91] Kitmitto tipped three individuals. Vannatta traded, tipped and misled Staff. Goss traded extensively, tipped and recommended Amaya to his clients. Fakhry traded, tipped and recommended Amaya to his clients. Conversely, Candusso traded, and Staff were not successful in all their allegations against him. We determine that the costs should be allocated as follows: Kitmitto is responsible for 20% ($147,075), Vannatta for 25% ($183,844), Candusso for 10% ($73,538), Goss for 25% ($183,844) and Fakhry for 20% ($147,075).

7. CONCLUSION

[92] We conclude that sanctions which include market participation bans, disgorgement and administrative penalties are appropriate and proportionate to the circumstances and conduct of each of the Respondents and that it is in the public interest to make these orders.

[93] We will issue a separate order giving effect to our decision on sanctions and costs. In summary, we order:

1. With respect to Kitmitto:
    a. the acquisition of any securities and trading in any securities by Kitmitto shall cease for 10 years from the date of this order, subject to carve-outs and only after the amounts ordered in subparagraphs 1(d) and 1(e) are paid in full;
    b. any exemptions contained in Ontario securities law do not apply to Kitmitto for a period of 10 years;
    c. Kitmitto shall immediately resign from any positions that he holds as a director or officer of an issuer or registrant and is prohibited for a period of 10 years from the date of this order from becoming or acting as a director or an officer of any issuer or registrant, or from becoming or acting as a registrant or promoter;
    d. Kitmitto shall pay an administrative penalty in the amount of $600,000 to the Commission; and
    e. Kitmitto shall pay $147,075, for the costs of the investigation and hearing.
2. With respect to Vannatta:
    a. the acquisition of any securities and trading in any securities by Vannatta shall cease for 15 years from the date of this order, subject to carve-outs and only after the amounts ordered in subparagraphs 2(d) through 2(f) have been paid in full;
    b. any exemptions contained in Ontario securities law do not apply to Vannatta for a period of 15 years;

c. Vannatta shall immediately resign any positions that he holds as a director or officer of an issuer or registrant and is prohibited for a period of 15 years from the date of this order from becoming or acting as a director or an officer of any issuer or registrant, or from becoming or acting as a registrant or promoter;

d. Vannatta shall pay an administrative penalty in the amount of $650,000 to the Commission;

e. Vannatta shall disgorge to the Commission the amount of $54,435; and

f. Vannatta shall pay $183,844, for the costs of the investigation and hearing.

3. With respect to Candusso:

a. the acquisition of any securities and trading in any securities by Candusso shall cease for three years from the date of this order, subject to carve-outs and only after the amounts ordered in subparagraphs 3(d) through 3(f) are paid in full;

b. any exemptions contained in Ontario securities law do not apply to Candusso for a period of three years;

c. Candusso shall immediately resign any positions that he holds as a director or officer of an issuer or registrant and is prohibited for a period of three years from the date of this order from becoming or acting as a director or an officer of any issuer or registrant, or from becoming or acting as a registrant or promoter;

d. Candusso shall pay an administrative penalty in the amount of $100,000 to the Commission;

e. Candusso shall disgorge to the Commission the amount of $30,782; and

f. Candusso shall pay $73,537, for the costs of the investigation and hearing.

4. With respect to Goss:

a. the acquisition of any securities and trading in any securities by Goss shall cease for 15 years from the date of this order, subject to carve-outs and

only after the amounts ordered in subparagraphs 4(d) through 4 (f) are paid in full;

b. any exemptions contained in Ontario securities law do not apply to Goss for a period of 15 years;

c. Goss shall immediately resign any positions that he holds as a director or officer of an issuer or registrant and is prohibited for a period of 15 years from the date of this order from becoming or acting as a director or an officer of any issuer or registrant, and from becoming or acting as a registrant or as a promoter;

d. Goss shall pay an administrative penalty in the amount of $1,000,000 to the Commission;

e. Goss shall disgorge to the Commission the amount of $1,228,509; and

f. Goss shall pay $183,844, for the costs of the investigation and hearing.

5. With respect to Fakhry:

a. the acquisition of any securities and trading in any securities by Fakhry shall cease for 10 years from the date of this order, subject to carve-outs and only after the amounts ordered in subparagraphs 5(d) through 5(f) are paid in full;

b. any exemptions contained in Ontario securities law do not apply to Fakhry for a period of 10 years;

c. Fakhry shall immediately resign any positions that he holds as a director or officer of an issuer or registrant and is prohibited for a period of 10 years from the date of this order from becoming or acting as a director or an officer of any issuer or registrant, and from becoming or acting as a registrant or as a promoter;

d. Fakhry shall pay an administrative penalty in the amount of $600,000 to the Commission;

e. Fakhry shall disgorge to the Commission the amount of $126,546; and

f. Fakhry shall pay $147,075, for the costs of the investigation and hearing.

Dated at Toronto this 20th day of January, 2023

"M. Cecilia Williams"

M. Cecilia Williams

"Sandra Blake"

Sandra Blake

"Geoffrey D. Creighton"

Geoffrey D. Creighton