Capital Markets Tribunal
Tribunal des marchés financiers
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Citation: *Agar (Re)*, 2024 ONCMT 6
Date: January 26, 2024
File No. 2024-1

IN THE MATTER OF
NICHOLAS AGAR AND PAUL UNGERMAN

REASONS FOR APPROVAL OF A SETTLEMENT

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

Adjudicators:	Andrea Burke (chair of the panel) Mary Condon	
Hearing:	By videoconference, January 26, 2024	
Appearances:	Khrystina McMillan Amethyst Haighton	For Staff of the Ontario Securities Commission
	Eli Lederman Brian Kolenda Madison Robins	For Nicholas Agar
	Wendy Berman Andrew Matheson Natalie V. Kolos	For Paul Ungerman

REASONS FOR APPROVAL OF A SETTLEMENT

1. OVERVIEW

[1] Staff of the Ontario Securities Commission alleges that Nicholas Agar and Paul Ungerman (the **Respondents**) contravened the *Securities Act*[1] (the **Act**) in connection with cryptocurrency or blockchain digital tokens by making misleading promotional statements, engaging in the business of trading in securities without the necessary registration or an applicable exemption from the registration requirement, and engaging in distributions of securities without filing a prospectus and without being exempt from the prospectus requirement. Staff also alleges that the Respondents made misleading statements to Staff, they authorized, permitted or acquiesced in breaches of Ontario securities law by corporations under their control, namely, Axia Operations Ltd. (**Axia Operations**), Axia Foundation Inc. (**Axia Foundation**), Axia Capital Ltd. (**Axia Capital**), Axia Issuer Inc. (**Axia Issuer**), AXC Issuer Corp.(**AXC Issuer**), and Axia Systems Inc. (**Axia Systems**) (collectively, the **Axia Corporations**) and engaged in conduct contrary to the public interest.

[2] Staff and the Respondents seek approval of a settlement agreement dated January 10, 2024 they have entered into regarding these allegations (the **Settlement Agreement**). After considering the Settlement Agreement and the submissions of the parties, we concluded that it would be in the public interest to approve the Settlement Agreement. These are our reasons.

2. FACTS AND ADMISSIONS

[3] The relevant factual background and admissions are set out in more detail in the Settlement Agreement, but we summarize the most important agreed facts and admissions here.

[4] Beginning in or around April 2018 and continuing to at least October 2022 (the **Solicitation Period**), the Respondents and the corporate entities they controlled (collectively, the **Axia Project** or **Axia**), created and raised approximately US$9 million dollars through the sale of cryptocurrency tokens to over 200 Ontario investors. Approximately US$41 million was raised from investors worldwide for

[1] RSO 1990, c S.5

the Axia Project. The cryptocurrency tokens had various names, and are collectively referred to in these reasons as the "**Axia Coin**".

[5] The Axia Project was initially operated through an Ontario company, Axia Operations, of which the Respondents were the sole shareholders, directors and officers.

[6] The Axia Project was moved offshore in 2019. The Respondents created or acquired, or caused to be created or acquired, approximately thirty entities worldwide (**Axia Entities**) that were involved in the Axia Project. These entities included: (i) multiple "foundation entities", including Axia Capital and Axia Foundation, (ii) two "issuer entities", namely Axia Issuer and AXC Issuer, and (iii) Axia Systems. Under the supervision of the foundation entities, an issuer entity was responsible for the issuance of Axia Coin for distribution. Axia Systems was responsible for software and technological services to the entire Axia Project.

[7] The Respondents were the controlling minds, directly or indirectly, of the Axia Entities and the Axia Project as a whole, including but not limited to the Axia Corporations.

[8] The Respondents, through various Axia Entities, facilitated the sale of the Axia Coin or future entitlements to the Axia Coin to Ontario investors in three different offerings (**Offerings**). These included: (i) Axia Operations raising money from investors in exchange for future tokens and options to purchase future tokens by entering into Simple Agreements for Future Tokens (or **SAFTs**), (ii) the Axia issuer entities (namely, Axia Issuer and AXC Issuer) raising money through token subscription agreements providing the right to receive Axia Coin at a later date, and (iii) the Axia issuer entities making Axia Coin available for purchase from Axia Capital Bank Ltd.

[9] The Axia Project was started by the Respondents with the vision of creating a decentralized blockchain network on which participants could store and transfer value and that would provide utility on an online platform with access to applications and services using the Axia Coin as digital currency (the **Axia Ecosystem**). Axia Coin was traded on third party exchanges, with promises of

listings on further exchanges, and purported or future utility in the Axia Ecosystem that was to be built.

[10] During the Solicitation Period, the Respondents continuously disseminated or caused to be disseminated on behalf of the Axia Entities promotional materials with respect to the Axia Coin. The Respondents actively and regularly promoted Axia Coin as a means to profit or obtain increased value. The Respondents promoted the unique "tokenomics" that purported to give the Axia Coin increasing value over time. One of Axia Coin's key "tokenomics" features promoted by the Respondents was its purported asset reserve. The Respondents promoted the Axia Coin as the world's first asset supported or backed global cryptocurrency.

[11] Promotional materials also represented that demand for Axia Coin would rise and that Axia Coin would be tradeable on a trading platform to be built on the Axia network. This trading platform never became operational.

[12] The parties agree in the Settlement Agreement that: (i) the Axia Coin are securities; (ii) the Respondents and a number of the Axia Corporations engaged in the distributions of securities without filing a preliminary prospectus or prospectus and without an applicable exemption from the prospectus requirement; and (iii) the Respondents and a number of the Axia Corporations engaged in, and held themselves out as engaging in, the business of trading in securities without being registered to do so and without an applicable exemption from the registration requirement.

[13] The Respondents authorized the payment of and received over $368,686.19 in fiat compensation in "Director's Fees" from the Axia Project between February 2021 and September 2022, as follows: (i) Ungerman received $318,686.19 between February 2021 and September 2022; and (ii) Agar received $50,000 between July 2021 and February 2022.

[14] In or about August 2022, Axia Foundation advanced US$1.2 million to Agar's legal counsel, in trust, further to a legal indemnity in favour of Agar (the **Indemnity Funds**). The Respondents authorized, on behalf of Axia Foundation, the payment of the Indemnity Funds. To date, the Indemnity Funds have only

been applied to pay for legal fees and disbursements of Agar's counsel, with the balance still held in trust.

[15] On or about October 5, 2022, Axia announced the suspension of all Axia Coin sales pending a review of the Axia Project by a third party governance and compliance firm. On or about March 10, 2023, Axia announced that the review of the Axia Project was complete and Axia was beginning efforts to wind down the Axia Project. Of the approximately US$41 million raised, less than US$10 million remains for distribution to investors as part of the wind down.

[16] The Respondents acknowledge and admit to the following breaches of the Act:

a. they and the Axia Corporations made misleading or untrue statements, including that Axia held over US$29 billion of audited assets in a reserve to support the value of the Axia Coin and the Respondents would not draw any form of fiat currency compensation from the Axia Project, and they thereby contravened ss. 126.2(1) of the Act;

b. they and Axia Operations, Axia Foundation, Axia Capital, Axia Issuer and AXC Issuer breached the registration and prospectus requirements under ss. 25(1) and s. 53 of the Act;

c. in 2020 they and Axia Operations made a number of misleading, incomplete or untrue statements to Staff about the nature and extent of the business activities of the Axia Project, thereby preventing early detection of the Respondents' unlawful conduct and interfering with the Commission's ability to enforce compliance with Ontario securities laws, and they thereby contravened paragraph 122(1)(a) of the Act;

d. as legal or *de facto* directors and officers of the Axia Corporations, they authorized, permitted or acquiesced in the Axia Corporations' non-compliance, and they thereby contravened section 129.2 of the Act; and

e. they engaged in conduct contrary to the public interest.

3. THE SETTLEMENT AGREEMENT

3.1 Key Terms of the Settlement Agreement

[17] Staff and the Respondents have agreed that: (i) each of the Respondents will pay an administrative penalty of $550,000 to the Commission, (ii) Ungerman will disgorge to the Commission $318,686.19, (iii) Agar will disgorge to the Commission $50,000, and (iv) each of the Respondents will pay $50,000 for costs of the Commission's investigation.

[18] In accordance with the terms of the Settlement Agreement, Ungerman paid these amounts to the Commission before this hearing and Agar paid $200,000 of these amounts to the Commission before this hearing, with the balance of the funds payable by him to be paid in nine monthly payments of $50,000 by the last business day of each subsequent calendar month.

[19] Agar has also provided to the Commission an executed, irrevocable direction to his legal counsel providing for the transfer to Axia Foundation, or such other entity as may be designated to receive funds for collection and distribution as part of the Axia Project wind down, of US$500,000 of the balance of the Indemnity Funds held in trust by his legal counsel forthwith upon approval of the Settlement Agreement. This is intended to facilitate the objective of investor loss redress.

[20] The parties have also agreed that:

a. the Respondents shall be permanently prohibited from trading in any securities or derivatives, or acquiring any securities, with specific carve-outs that apply to a Respondent only after the amounts referenced above have been paid in full by that Respondent. The specific carve-outs permit the Respondents to trade securities or derivatives and acquire securities in registered savings plans, through a registered dealer in Ontario to whom a copy of the Settlement Agreement and the Tribunal's order approving the Settlement Agreement was given;

b. the Respondents will immediately resign any position they may hold as directors or officers of any issuer and will be permanently prohibited from

becoming directors or officers of any reporting or non-reporting issuer, with specific carve-outs pertaining to personal family holding companies;

c. the Respondents will immediately resign any positions they may hold as directors or officers of any registrant and will be permanently prohibited from becoming or acting as directors or officers of any registrant;

d. the Respondents shall be permanently prohibited from becoming or acting as registrants, including as promoters or as investment fund managers; and

e. any exemptions contained in Ontario securities law will not apply to the Respondents permanently.

[21] The parties also agree that the Respondents shall be reprimanded.

3.2 Our Consideration of the Settlement Agreement

[22] We have reviewed the Settlement Agreement in detail. In addition, we had the benefit of a confidential settlement conference with OSC Staff and Respondents' counsel. We asked questions of counsel and heard their submissions.

[23] Our role at this settlement hearing was to determine whether the negotiated result in the Settlement Agreement falls within a range of reasonable outcomes, and whether it would be in the public interest to approve the settlement.[2] The Settlement Agreement is the product of negotiation between Staff and the Respondents. When considering settlements for approval, the Tribunal respects the negotiation process and accords significant deference to the resolution reached by the parties.[3] We have done so in this case.

[24] We recognize that the Settlement Agreement is novel in that it represents the first time the Commission is settling allegations relating to the promotion and sale of cryptocurrency tokens. It also arises in the context that the Tribunal has not decided any contested matters in relation to the promotion and sale of cryptocurrency tokens or the circumstances in which they may be considered a security.

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[2] *Stableview Asset Management Inc (Re)*, 2022 ONCMT 17 at para 6, citing *Research in Motion Limited (Re)*, 2009 ONSEC 19 at paras 44-46

[3] *Royal Bank of Canada (Re)*, 2023 ONCMT 40 at para 12; *Katanga Mining Limited (Re)*, 2018 ONSEC 59 at para 18; *Rosborough (Re)*, 2021 ONSEC 20 at para 9, citing *The Toronto-Dominion Bank (Re)*, 2019 ONSEC 29 at para 6

[25] We have considered the parties' agreement that the Axia Coin is a security. While we have not had the benefit of detailed argument concerning the attributes of the Axia Coin, we are satisfied that the parties to this Settlement Agreement have admitted and agreed to circumstances that justify the imposition in the public interest of sanctions related to the promotion and sale of the coin and rights to receive the coin in future.

[26] We have also considered the failure to obtain registration and to comply with the prospectus requirements, both of which requirements are cornerstones of securities regulation in Ontario. In addition, the agreed-upon breaches of the Act relating to misleading investors and Staff of the Commission are serious since they caused significant financial losses to investors and interfered with the Commission's ability to enforce compliance with Ontario securities laws and protect Ontario investors.

[27] We have also taken into consideration the following mitigating factors: (i) the Respondents have never been registered with the Commission, (ii) the Respondents cooperated during the Commission's investigation, (iii) the Respondents accepted responsibility for their actions without the need for and expense of protracted proceedings; and (iv) the Respondents took proactive steps to facilitate an independent review and orderly wind-down of the Axia Project.

[28] In our view, given the mitigating factors, the significant financial sanctions, the permanent market bans, Agar's irrevocable direction, and the avoidance of the time and expense required for a contested hearing, it is in the public interest for us to approve the settlement. In arriving at our decision, we have applied the relevant factors from the non-exhaustive list of factors the Tribunal has identified as relevant to sanctions orders in general.[4] The settlement will, in our view, achieve specific and general deterrence and convey a strong message to market participants that compliance with Ontario securities laws is required in the context of the promotion and sale of cryptocurrency tokens.

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[4] *Belteco Holdings Inc. (Re)* (1998), 21 OSCB 7743 at paras 23-26; *MCJC Holdings Inc. (Re)* (2002), 25 OSCB 1133 at para 55

4. CONCLUSION

[29] In our view, the terms of the Settlement Agreement fall within a range of reasonable outcomes in the circumstances. The Settlement Agreement also properly reflects the principles underlying the application of sanctions, including recognition of the seriousness of the misconduct and the importance of fostering investor protection and confidence in the capital markets.

[30] For these reasons we conclude that it is in the public interest to approve the Settlement Agreement.

[31] We will therefore issue an order substantially in the form of the draft attached to the Settlement Agreement.

Dated at Toronto this 26th day of January, 2024

"Andrea Burke"	*"Mary Condon"*
Andrea Burke	Mary Condon