Ontario Securities Commission
Commission des valeurs mobilières de l'Ontario
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IN THE MATTER OF THE *SECURITIES ACT*
R.S.O. 1990, c. S.5, AS AMENDED

- AND -

IN THE MATTER OF SHANE SUMAN
AND MONIE RAHMAN

REASONS AND DECISION ON A MOTION TO EXCLUDE EVIDENCE AND A NON-SUIT MOTION

Hearing:	August 21, 2009	
Decision:	October 9, 2009	
Panel:	James E. A. Turner	- Vice-Chair and Chair of the Panel
	Paulette L. Kennedy	- Commissioner
Counsel:	Cullen Price Matthew Britton	- For the Ontario Securities Commission
	Shane Suman	- Representing himself
	Randy Bennett Sara Erskine Mario Thomaidis	- For Monie Rahman

I. Introduction

[1] This matter arises out of a Statement of Allegations and Notice of Hearing dated July 24, 2007. Staff of the Commission ("**Staff**") alleges that Shane Suman ("**Suman**"), a former employee of MDS Sciex, a division of MDS Inc. ("**MDS**"), communicated material non-public information about MDS to his wife, Monie Rahman ("**Rahman**"). The information concerned the proposed acquisition by MDS of Molecular Devices Corporation ("**MDCC**"), a U.S. issuer listed on NASDAQ (the "**Acquisition**"). The Acquisition was publicly announced on January 29, 2007.

[2] The hearing on the merits started on July 27, 2009. Suman and Rahman (collectively, the "**Respondents**") and Staff entered into a Statement of Agreed Facts which states that there is no dispute that the Respondents purchased 12,000 MDCC shares and 900 MDCC options contracts between January 24, 2007 and January 26, 2007 and liquidated them by March 16, 2007. Accordingly, the main dispute between the parties is whether Suman and Rahman purchased the securities with knowledge of material non-public information about the proposed Acquisition.

[3] Staff called eight witnesses. Five witnesses from MDS testified about MDS, the events leading up to the Acquisition, Suman's role at MDS and the opportunities Suman allegedly had to acquire material non-public information about the proposed Acquisition. An official from the Chicago Board of Options Exchange (the "**CBOE**") testified about the CBOE investigation of the MDCC trades by the Respondents. Two Staff investigators testified. George Gunn, Manager of Surveillance at the Commission, testified about the opening of the investigation on or about January 30, 2007, and about his involvement in the initial Commission investigation. Colin McCann, a senior investigator at the Commission ("**McCann**"), was the primary investigator in this matter. He testified at length about the investigation, including his examination of the contents of certain computers used by Suman. He testified that he used NetAnalysis, a forensic software program, to reconstruct Suman's internet browser history, and the resulting internet browser schedules were entered into evidence (the "**NetAnalysis Evidence**"). Steven Rogers ("**Rogers**") was qualified by Staff and accepted by the Panel as an expert in computer forensics. He gave lengthy opinion evidence about the conclusions he drew based on the NetAnalysis Evidence and based on his analysis of the contents of Suman's computers.

[4] On August 13, 2009, immediately after Staff closed its case, Rahman brought two motions: a motion to exclude the NetAnalysis Evidence and the entirety of Rogers' expert evidence (the "**Exclusion of Evidence Motion**") and a motion for a non-suit (the "**Non-Suit Motion**"). Suman joined in the motions. Staff and the Respondents agreed on a timetable for the submission of written materials and for the hearing of the motions on August 21, 2009. Following the motions hearing, we reserved our decision.

[5] Upon considering the parties' written and oral submissions, we have concluded that both motions must be dismissed. Our reasons are as follows.

II. The Exclusion of Evidence Motion

[6] The Respondents submit that the NetAnalysis Evidence is hearsay evidence and therefore is presumptively inadmissible. They argue it is inherently unreliable and therefore not admissible under the "principled exception" to the hearsay rule set out in *R. v. Blackman* (2006), 84 O.R. (3d) 292 (Ont. C.A.), affirmed 2008 SCC 37 (S.C.C.), and the cases cited therein. They submit that they have "no opportunity to cross-examine the software", and that Staff's evidence shows that "the software operating in its normal course will produce an inaccurate report". They submit, for example, that neither McCann nor Rogers was able to explain an apparent discrepancy in the NetAnalysis Evidence as to the timing of certain internet searches Suman is alleged to have made prior to the MDS announcement of the Acquisition. Moreover, they submit that the cross-examination of McCann and Rogers showed that the NetAnalysis Evidence "can mislead a person purporting to be an expert in the software, thereby causing that person to in turn mislead the Panel." Finally, they note that there are no reported cases mentioning NetAnalysis in the Quicklaw Canadian database. For these reasons, the Respondents submit that the NetAnalysis Evidence should be excluded as hearsay evidence that has failed the test of threshold reliability.

[7] In the second part of the Exclusion of Evidence Motion, the Respondents submit that Rogers' expert evidence should be excluded on the basis that it does not satisfy the criteria for admissibility established in *R. v. Mohan* [1994] 2 S.C.R. 9 and the cases following it. The Respondents did not object to Rogers' qualification as an expert at the outset of his testimony, but did reserve the right to cross-examine him on certain areas of his knowledge. In their motion, the Respondents submit that Rogers' testimony demonstrated that he was not a properly qualified expert on a number of specific matters to which he testified, and that he was not independent or impartial. For example, the Respondents submit that in cross-examination Rogers was led to retract evidence he had given in chief with respect to the timing of the delivery of certain emails, the timing of certain internet searches, and whether attempts had been made to delete certain emails, internet searches and other evidence from the computers' log files. The Respondents submit that Rogers did not undertake the investigations to be expected from a witness giving neutral, unbiased testimony and did not provide material facts that were necessary to give his opinion context. In summary, the Respondents submit that Rogers' evidence is compromised and unreliable and should be excluded.

[8] Staff submits that the Exclusion of Evidence Motion should be dismissed on the basis that it was brought belatedly, after the NetAnalysis Evidence and Rogers' expert evidence had been admitted without objection, and on the basis that this evidence is reliable and properly admitted.

[9] With respect to the NetAnalysis Evidence, Staff submits that it is not hearsay, since McCann, who testified before us, was the person who generated the results from what is described as an "industry-leading software tool". Alternatively, if it is hearsay, Staff submits that hearsay is admissible by administrative tribunals and questions of reliability go to the weight to be given such evidence.

[10] Turning to Rogers' evidence, Staff submits that he was properly qualified as an expert and that he demonstrated his neutrality by highlighting any areas of uncertainty in his opinions and acknowledged errors in his conclusions that were established on cross-examination. Staff submits that after a "rigorous cross-examination", Rogers' evidence leaves no doubt that three

critical pieces of evidence were found on Suman's computers – evidence of relevant internet searches, selective use of a data "washing" software tool, and fragments of calendar entries of other MDS employees related to the proposed Acquisition. Staff submits that Rogers' expert evidence is reliable and that it is necessary because analysis of the raw data presented on the forensic copies of Suman's computers is likely outside the experience and knowledge of the Panel.

Analysis and Conclusion on the Exclusion of Evidence Motion

[11] We note that if the NetAnalysis evidence is hearsay evidence, it is hearsay that can be assessed and challenged by the Respondents through their own analysis of the information on Suman's computers and by themselves running NetAnalysis on those computers. The Respondents have been able to do that and have made a number of important points in cross-examination as a result. In our view, the Respondents' vigorous testing of the NetAnalysis Evidence through cross-examination of McCann and Rogers shows that the NetAnalysis Evidence possesses sufficient threshold reliability to be admitted under the principled exception to the hearsay rule. We also find that the NetAnalysis evidence is necessary because analysis of the raw data presented on the forensic copies of Suman's computers is outside our experience and knowledge.

[12] The Commission has stated that: "Although hearsay evidence is admissible under [subsection 15(1) of the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22], the weight to be accorded to such evidence must be determined by the panel. Care must be taken to avoid placing undue reliance on uncorroborated evidence that lacks sufficient indicia of reliability" (*Re Sunwide Finance Inc.* (2009), 32 O.S.C.B. 4671, at para. 22). It is for us to decide the relevance and weight to be given to the NetAnalysis Evidence and, in doing so, we will take into account the matters that the Respondents have successfully challenged through cross-examination.

[13] We are not satisfied that the Respondents have shown that Rogers is biased or that his evidence is inherently unreliable. He has modified his evidence and conclusions where the Respondents' cross-examination has raised questions. While he was admitted by us as an expert, he has also acknowledged those areas where he does not have expertise. The Panel will carefully consider the relevance and weight to be given to Rogers' expert evidence and, in doing so, we will take into consideration the submissions made to us by the Respondents with respect to the weaknesses of that evidence demonstrated by cross-examination.

[14] Staff has argued that the Exclusion of Evidence Motion is not in order because any challenge to the introduction of evidence must be made at the time such evidence is introduced and not after Staff has closed its case. In the circumstances, we have not found it necessary to determine whether the Respondents' Exclusion of Evidence Motion can be properly brought by the Respondents at the close of Staff's case as occurred here.

[15] We therefore dismiss the Exclusion of Evidence Motion.

III. The Non-Suit Motion

[16] The Respondents also bring a separate motion for non-suit.

[17] The parties agree that the test for a non-suit motion is "whether there is any evidence which, taken at its highest, establishes or gives rise to a reasonable inference in favour of the party responding to the motion. Any doubts in that respect are to be resolved in favour of the responding party" (*Toronto (City) v. Toronto Civic Employees' Union, Local 416 (Espinola Grievance)* (2000), 93 L.A.C. (4th) 372 (QL) at para. 22) and *ATI Technologies Inc.* (2005), 28 O.S.C.B. 9667 at paras. 23 and 24 ("***ATI***").

[18] We also note that in *ATI*, the Commission held that a non-suit motion may be brought in Commission proceedings and that the Commission has discretion whether to put the moving party to an election whether he or she will call evidence before the Commission considers the non-suit motion.

[19] The Respondents submit that Staff's evidence does not establish a *prima facie* case to be met, and therefore, the Respondents should not be required to present evidence in response to Staff's allegations. The Respondents submit that a non-suit motion should be granted if Staff has failed to make out a *prima facie* case with respect to any of the elements of the allegations. In this case, those allegations include that: (i) Suman had actual knowledge of material non-public information about the proposed Acquisition; (ii) he informed Rahman about it; and (iii) Suman and Rahman traded in MDCC securities with actual knowledge of the proposed Acquisition.

[20] The Respondents submit that Staff has failed to make out a *prima facie* case with respect to any of these three elements. They submit that Staff has not called any witness who can attest that Suman had actual knowledge of the proposed Acquisition and that Staff's evidence in this respect is entirely circumstantial. They submit that Staff's case is speculative and consists entirely of a chain of inferences that are not founded on established facts. They submit that those inferences rest entirely on the forensic computer evidence, introduced through McCann and Rogers, which the Respondents submit is inherently unreliable. Further, the Respondents submit that Staff cannot resist a non-suit motion in the hope that the Respondents' evidence will bolster Staff's case.

[21] Staff submits that where the allegations rest on circumstantial evidence, and there is no direct evidence on point, the Panel must engage in limited weighing of the circumstantial evidence because, by definition, there is an inferential gap between the circumstantial evidence and the matter to be proven. The Panel must weigh the evidence to determine whether, if believed, it is reasonably capable of supporting the inferences that Staff asks us to draw (*R. v. Arcuri*, [2001] S.C.J. No. 52 (S.C.C.) at para. 23).

[22] Applying these principles, Staff submits that, in an insider trading and tipping case, Staff will rarely be able to prove actual knowledge of material non-public information by direct evidence, and the matter will often turn on circumstantial evidence. Such circumstantial evidence will relate to such matters as the opportunity to obtain the material information, contacts between the alleged tipper and tippee, and the circumstances surrounding the particular trading. In this case, Staff submits there is ample circumstantial evidence that Suman possessed material non-public information about the proposed Acquisition, that he communicated that information to Rahman, and that they acquired MDCC securities or options to acquire such securities while in possession of that information.

Analysis and Conclusion on the Non-Suit Motion

[23] In this case, we do not find it appropriate to put the Respondents to an election whether to call evidence before we consider the Non-Suit Motion. The Respondents have raised legitimate questions based on the evidence and testimony before us and are not simply taking a tactical position.

[24] We accept that the test for a non-suit motion is whether there is some evidence which, taken at its highest, gives rise to reasonable inferences in favour of Staff, and that any doubts in that respect are to be resolved in favour of Staff. In this case, we conclude that Staff's evidence, if believed, gives rise to reasonable inferences capable of supporting Staff's allegations referred to in paragraph 19 of these reasons. Whether ultimately we conclude that Staff has proven its case on a balance of probabilities is a matter to be decided at the conclusion of the hearing on the merits based on all of the evidence then before us. All we are deciding here is that Staff has shown a sufficient case to survive a non-suit motion.

[25] We therefore dismiss the Non-Suit Motion.

IV. Decision

[26] The Exclusion of Evidence Motion and the Non-Suit Motion are dismissed.

[27] The hearing on the merits will resume on a date to be fixed by the Office of the Secretary. The parties are requested to immediately contact the Office of the Secretary to arrange an agreed date for proceeding.

DATED in Toronto this 9th day of October, 2009.

"James E. A. Turner"	*"Paulette L. Kennedy"*
James E. A. Turner	Paulette L. Kennedy