Ontario Securities Commission | Commission des valeurs mobilières de l'Ontario | P.O. Box 55, 19th Floor 20 Queen Street West Toronto ON M5H 3S8 | CP 55, 19e étage 20, rue queen ouest Toronto ON M5H 3S8

IN THE MATTER OF THE *SECURITIES ACT*,
R.S.O. 1990, c. S. 5, AS AMENDED

- AND -

IN THE MATTER OF EDA MARIE AGUECI, DENNIS WING, SANTO IACONO, JOSEPHINE RAPONI, KIMBERLEY STEPHANY, HENRY FIORILLO, GIUSEPPE (JOSEPH) FIORINI, JOHN SERPA, IAN TELFER, JACOB GORNITZKI and POLLEN SERVICES LIMITED

REASONS AND DECISIONS ON DISCLOSURE AND CONFIDENTIALITY MOTIONS

Hearing:	November 13, 2012	
Decision:	December 14, 2012	
Panel:	James E.A. Turner	- Vice-Chair
Counsel:	Sean Horgan Usman Sheikh	- For Staff of the Ontario Securities Commission
	Peter Daigle Patricia McLean	- For Dennis Wing
	Ellen Snow Peter Howard	- For Henry Fiorillo

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REASONS AND DECISION

I. BACKGROUND

[1] On February 7, 2012, the Ontario Securities Commission (the "**Commission**") issued a Notice of Hearing and Statement of Allegations of Staff of the Commission ("**Staff**") in respect of Eda Marie Agueci ("**Agueci**"), Dennis Wing ("**Wing**" or the "**Respondent**"), Santo Iacono ("**Iacono**"), Josephine Raponi, Kimberley Stephany, Henry Fiorillo ("**Fiorillo**"), Giuseppe (Joseph) Fiorini, John Serpa, Ian Telfer, Jacob Gornitzki ("**Gornitzki**") and Pollen Services Limited ("**Pollen Services**") (collectively, the "**Respondents**"). On September 12, 2012, the Commission ordered that the hearing on the merits will commence on September 16, 2013 and continue until December 20, 2013 with the exception of September 24, 2013 and every second Tuesday thereafter, or such other dates as may be agreed to by the parties and fixed by the Office of the Secretary to the Commission.

[2] In the proceeding, Staff makes allegations against a number of the Respondents of illegal insider trading and tipping in respect of five material corporate transactions, contrary to subsections 76(1) and (2) of the *Securities Act*, R.S.O. 1990, c.S.5, as amended (the "**Act**"). Staff has made additional allegations against certain of the Respondents, including allegations of misleading Staff against Agueci and Wing, contrary to section 122 of the Act; breaching the confidentiality of Staff's investigation by Agueci, contrary to section 16 of the Act; and engaging in other conduct contrary to the public interest, such as attempting to circumvent dealer monitoring of trading, facilitating falsified transactions and trading in a secret account.

[3] On February 16, 2012, Staff began to provide disclosure to the Respondents in electronic format on a rolling basis. Within two months, by April 4, 2012, the Respondents had been provided with electronic disclosure in 11 tranches comprising approximately 379,099 records (the "**Database**"). The confidentiality of all that disclosure material is protected by the implied undertaking rule and section 16 of the Act.

[4] On November 13, 2012, Wing brought a motion (the "**Disclosure Motion**") for an order that Staff "make proper and meaningful disclosure in respect of the allegations made against Wing", including:

(i) an order requiring Staff to prepare a disclosure brief for each of the nine categories of allegations, each disclosure brief including the documents in Staff's possession relevant to each category of allegations;

(ii) an order requiring Staff to deliver to Wing the five disclosure briefs relevant to the five categories of allegations against him and to each other Respondent, the disclosure brief relevant to the categories of allegations against such other Respondent; and

(iii) an order requiring Staff to meet its ongoing disclosure obligations by disclosing additional relevant documents and adding those documents

> to the appropriate disclosure brief and then delivering the amended disclosure brief to the Respondents as set out in clause (ii) above.

[5] Wing also brought a motion (the "**Confidentiality Motion**") for an order that the transcripts of the Disclosure Motion and the parties' motion records and factums be kept confidential.

[6] Gornitzki and Pollen Services did not appear or make submissions on the motion; however, they communicated that they agree with the relief being sought by Wing.

[7] Counsel for Fiorillo made written and oral submissions at the motion hearing described below.

[8] Wing filed written motion materials and we heard his oral submissions at the motion hearing held on November 13, 2012.

II. THE POSITIONS OF THE PARTIES

A. Wing's Submissions

[9] Wing submits that Staff's disclosure obligation is set out in Rule 4.3(2) of the Commission's *Rules of Procedure* (the "***Rules of Procedure***"), which states:

> In the case of a hearing under section 127 of the *Securities Act* …, Staff of the Commission shall, as soon as is reasonably practicable after service of the notice of hearing, and in any case at least 10 days before the commencement of the hearing, make available for inspection by every other party all other documents and things which are in the possession or control of staff that are relevant to the hearing and provide copies, or permit the inspecting party to make copies, of the documents at the inspecting party's expense.
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> *Rules of Procedure*, Rule 4.3(2).

[10] Wing submits that, because of the risk of harm to his reputation as a result of this proceeding, section 8 of the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S. 22, ("***SPPA***") applies. That section states:

> Where the good character, propriety of conduct or competence of a party is an issue in a proceeding, the party is entitled to be furnished prior to the hearing with reasonable information of any allegations with respect thereto.
>
> *SPPA,* section 8.

[11] Rule 4.4 of the *Rules of Procedure* imposes more onerous disclosure obligations where section 8 of the *SPPA* applies:

> . . . if the good character, propriety of conduct or competence of a party is an issue in a proceeding, the party making the allegations shall, as soon as is reasonably practicable after service of the notice of hearing, and in any case at least 20 days before the commencement of the hearing, provide particulars of the allegations and disclose to the party against whom the allegations are made all documents and things in the party's possession or control relevant to the allegations including [witness statements and experts' reports].
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> *Rules of Procedure*, Rule 4.4.

[12] Wing's main submission is that Staff has failed to make meaningful disclosure of relevant documents and material in accordance with the standard established in *R. v. Stinchcombe*, [1991] 3 S.C.R. 326 (SCC) ("***Stinchcombe***").

[13] Wing submits that Staff has a broad duty of disclosure akin to the *Stinchcombe* standard. The *Stinchcombe* standard requires the Crown to disclose all relevant information, whether inculpatory or exculpatory, subject to the discretion of the Crown, which discretion is reviewable by a court. While the Crown must err on the side of inclusion, clearly irrelevant documents should be excluded, and the initial obligation to separate "the wheat from the chaff" rests with the Crown. Documents should not be withheld if there is a reasonable possibility that doing so would impair the right of the accused to make full answer and defence.

> *Stinchcombe*, *supra*, at paras. 20 and 29.
>
> *Deloitte & Touche LLP v. Ontario (Securities Commission)*, [2003] 2 S.C.R. 713 (SCC), at para. 26, aff'g [2002] O.J. No. 2350 (Ont. CA) ("***Deloitte SCC***"), at para. 39-44.

I agree with that summary of Staff's obligations (see paragraph 29 of these reasons).

[14] Wing submits that Staff has failed to make meaningful disclosure to him such that he may exercise his right to make full answer and defence. He submits that Staff has simply made "dump truck" disclosure of an enormous number of documents, and has not fulfilled their obligation to cull the documents in its possession for relevance. He submits that the obligation is on Staff to conduct relevant searches, electronic or manual, of the documents in its possession and assess which documents or categories of documents identified in this manner may be relevant to the allegations against Wing.

[15] According to Wing, Staff's disclosure is deficient in that:

(a) it contains documents that are irrelevant to the allegations against him;

(b) it contains documents that are irrelevant to any of the issues in this proceeding; and

(c) the coding of the Database for "relevance" is unreliable.

[16] Further, Wing submits that Staff is also required pursuant to *Stinchcombe* to make effective disclosure which is adequate for Wing's use. Staff must provide disclosure in a form that is organized in a manner that renders it reasonably accessible.

B. Submissions of the Other Respondents

[17] Gornitzki and Pollen Services adopt Wing's submissions.

C. Fiorillo's Submissions

[18] To the extent that Wing seeks an order on the Disclosure Motion requiring Staff to produce documents which are separated into the nine categories of allegations set out in the Statement of Allegations, Fiorillo takes no position on that relief.

[19] However, Fiorillo submits that it is neither appropriate nor permissible to limit disclosure in the manner requested by Wing. Fiorillo submits that, if the Commission orders Staff to produce separate categories of documents, all such disclosure should be delivered to all of the Respondents.

[20] Fiorillo submits that Staff's obligation to provide disclosure is a matter of fundamental fairness to the Respondents. Fiorillo submits that full disclosure to each Respondent is necessary in order to facilitate a Respondent's ability to make full answer and defence. If Staff is proceeding on the basis that there was an agreement or a conspiracy amongst some or all the Respondents, then it is important that each Respondent know what evidence is relevant to all of the allegations against other Respondents.

D. Staff's Submissions

[21] Staff submits that it has fully complied with its disclosure obligation to the Respondents by disclosing, through the Database, all relevant documents, whether inculpatory or exculpatory, whether or not Staff intends to rely on them at the hearing on the merits.

[22] Staff submits that the disclosure provided to the Respondents has been very meaningful. The Respondents were provided with an electronic Database of disclosure that is fully accessible, highly organized and fully searchable.

[23] Staff submits that this proceeding involves strikingly similar allegations of repeated insider trading and tipping as well as other related misconduct. The allegations and evidence that Staff intends to rely on is highly interlinked amongst the Respondents, including Wing, rendering the relief that has been requested by Wing entirely inappropriate.

[24] Staff submits (consistent with Fiorillo's submissions) that the request for separate disclosure briefs for each Respondent could prejudice other Respondents to this proceeding and could impair the ability of Staff and the Commission to conduct a fair and efficient hearing.

[25] Staff also submits that the requested order for confidentiality is without evidentiary foundation because no personal information is contained in the motion materials filed by the parties.

[26] Accordingly, Staff requests that I dismiss both the Disclosure Motion and the Confidentiality Motion.

III. ANALYSIS

A. Introduction

[27] The Disclosure Motion requires a consideration of the nature of Staff's obligation to make disclosure of relevant documents to the Respondents.

[28] I should say at the outset that it is challenging for me to make judgements about the disclosure of documents when, necessarily, I have limited knowledge of the nature of those documents. Further, I have not been provided with or searched the Database (see paragraph 56 of these reasons).

B. Staff's Obligation to Disclose

[29] As a matter of law, Staff has an obligation to disclose to the Respondents all documents that are relevant to this proceeding, whether inculpatory or exculpatory, in accordance with principles akin to those articulated in *Stinchcombe*. There is no dispute between Staff and the Respondents with respect to the articulation of that principle; the dispute relates to the application of the principle in the circumstances. Staff's obligation to disclose is a matter of fundamental justice based on fairness to respondents to permit them to make full answer and defence to the allegations against them. In furtherance of that obligation, Staff has provided the Database to the Respondents. As noted above, the Database contains a massive number of records.

[30] As a threshold matter, I find that the documents contained in the Database are reasonably accessible to the Respondents by means of electronic searches. I note that the Respondents are not objecting in principle to electronic disclosure effected by means of the delivery of a database.

C. Delivery of the Database

[31] In my view, by delivering the Database, Staff has taken reasonable steps to satisfy its obligation to disclose relevant documents to the Respondents. The question is whether that disclosure meets Staff's obligations.

[32] Staff appears to have conducted a very wide ranging investigation, has assembled and reviewed a massive amount of material and documents and has made relatively specific allegations against each of the Respondents as reflected in the Statement of Allegations. Staff has an obligation to disclose to the Respondents the documents that Staff considers relevant as

a result of those efforts. Staff has an obligation, in the first instance, to separate the "wheat from the chaff."

[33] I agree that Staff should apply a low threshold of relevance in deciding what to disclose to the Respondents. Staff does not know what positions the Respondents and their counsel may take in response to the allegations. However, Staff must apply some judgment in determining which documents or categories of documents in the Database are relevant to the allegations against each of the Respondents. Staff does not, however, have to review all of the individual documents and may address documents by category.

D. The Meaning of "Relevance"

[34] With respect to determining relevance, I adopt the following statement from the Court of Appeal decision in *Deloitte & Touche LLP v. Ontario Securities Commission),* [2002] OJ No. 2350 (Ont. CA) ("***Deloitte CA***"):

> Relevant material in the *Stinchcombe, supra*, sense includes material in the possession or control of Staff and intended for use by Staff in making its case against the [Philip] respondents. Relevant material also includes material in Staff's possession which has a reasonable possibility of being relevant to the ability of the [Philip] respondents to make full answer and defence to the Staff allegations. This latter category includes material that the [Philip] respondents could use to rebut the case presented by Staff; material they could use to advance a defence; and material that may assist them in making tactical decisions.
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> *Deloitte CA*, *supra*, at para. 44.

[35] The Court's reasoning in *Deloitte CA* suggests a low threshold for relevance, a view confirmed by the Supreme Court's statement that the "right to disclosure of all relevant material has a broad scope and includes materials which may have only a marginal value to the ultimate issues at trial" (*R* v. *Dixon,* [1998] S.C.J. No. 17 (SCC) at para. 23). I take this to mean that while Staff should not produce information or documents that are "clearly irrelevant", it nevertheless must "err on the side of inclusion" (*Stinchcombe, supra,* at para. 20).

[36] A summary of the *Stinchcombe* principles was set out by the Supreme Court of Canada in *R. v. Taillefer* [2003], S.C.J. No. 75 (SCC) and was repeated by the Commission in *Berry (Re)* (2008), 31 OSCB 5441 ("***Berry***"):

> After a period during which the rules governing the Crown's duty to disclose evidence were gradually developed by the provincial appeal courts in recent decades, those rules were clarified and consolidated by this Court in *Stinchcombe*. The rules may be summarized in a few statements. The Crown must disclose all relevant information to the accused, whether inculpatory or exculpatory, subject to the exercise of the Crown's discretion to refuse to disclose information that is privileged or plainly irrelevant. Relevance must be

assessed in relation both to the charge itself and to the reasonably possible defences. The relevant information must be disclosed whether or not the Crown intends to introduce it in evidence, before election or plea (p. 343). Moreover, all statements obtained from persons who have provided relevant information to the authorities should be produced notwithstanding that they are not proposed as Crown witnesses (p. 345). This Court has also defined the concept of "relevance" broadly, in *R. v. Egger*, [1993] 2 S.C.R. 451, at p. 467:

> One measure of the relevance of information in the Crown's hands is its usefulness to the defence: if it is of some use, it is relevant and should be disclosed -- *Stinchcombe, supra*, at p. 345. This requires a determination by the reviewing judge that production of the information can reasonably be used by the accused either in meeting the case for the Crown, advancing a defence or otherwise in making a decision which may affect the conduct of the defence such as, for example, whether to call evidence.

As the courts have defined it, the concept of relevance favours the disclosure of evidence. Little information will be exempt from the duty that is imposed on the prosecution to disclose evidence. [page335] As this Court said in *Dixon, supra*, "the threshold requirement for disclosure is set quite low... . The Crown's duty to disclose is therefore triggered whenever there is a reasonable possibility of the information being useful to the accused in making full answer and defence" (para. 21; see also *R. v. Chaplin*, [1995] 1 S.C.R. 727, at paras. 26-27). "While the Crown must err on the side of inclusion, it need not produce what is clearly irrelevant" (*Stinchcombe, supra*, at p. 339).

Berry, *supra*, at para. 69.

[37] The Supreme Court held that the *Stinchcombe* standard was appropriately applied by the Commission in *Deloitte SCC, supra*, where the Court stated:

> The OSC reasonably rejected Deloitte's argument that the Staff could not establish relevance with respect to any documents it had not examined on the basis that, given the nature of the allegations made in the s. 127 proceedings and defences, the relevancy of the compelled material was to be determined as a whole. In other words, as the OSC observed, documents which might appear irrelevant to the OSC Staff might have considerable relevance to the defence of Philip and the officers, and documents in isolation may not have relevance but might well have considerable relevance when studied in light of other information possessed by Philip or the officers. This approach also answers the argument of Deloitte for "disclosure by installment"; surely it is reasonable to disclose all the material at once so Philip and the officers can effectively plan and construct their response.

> In short, like the Court of Appeal, I find that the decision of the OSC was reasonable and soundly based with respect to the disclosure of all the compelled material to Philip and the officers to allow them in the circumstances to mount a full answer and defence. Also like the Court of Appeal, I agree that the relationship between Deloitte and Philip with respect to financial disclosure in the 1995, 1996 and 1997 audits will be central to the s. 127 proceedings. There is a reasonable possibility that all of the compelled material relating to Deloitte's audit of Philip will be relevant to the allegations against Philip and the officers. Consequently, the application by the OSC of the relevance standard from *Stichcombe* was reasonable in all the circumstances.
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> *Deloitte SCC*, *supra*, at para. 26-27.

[38] Accordingly, the standard of relevance is quite low and the relevance of information or documents is not to be determined in isolation but in the overall context of the particular allegations in a proceeding. Disclosure of documents which may have only a marginal value to the ultimate issues is nonetheless appropriate.

E. Perfect Disclosure is Not Required

[39] The use of electronic disclosure to discharge disclosure obligations has been repeatedly endorsed by the courts and particularly preferred for large and complex matters (*R. v. Therrien*, [2005] B.C.J. No. 3145 (BCSC) at paras. 25 and 33 ("***Therrien***")).

[40] The general principle relating to electronic disclosure is that the defence must be able to "reasonably access" the material in order to make full answer and defence (*R. v. Greer*, [2006] B.C.J. No. 3265 at para. 10 ("***Greer***"), *Therrien*, *supra*, at paras. 27 and 33). If disclosure is reasonably accessible, the court should not interfere with a prosecutor's discretion as to how the material is organized or presented "just because there may be a different way of doing so" (*Greer*, *supra*, at para. 12).

[41] Accordingly, when providing disclosure, Staff should not be held to a standard of perfection. This proposition applies to any format of disclosure, whether hardcopy or electronic, and holds particularly true in large and complex cases involving a large volume of material. This is such a case. As stated by the Alberta Securities Commission in *Proprietary Industries Inc. (Re)*:

> Disclosure must enable respondents to know and be in a position to answer the case against them... However, disclosure need not be perfect. Nor is perfect disclosure a realistic expectation in complex cases involving large volumes of material. The disclosure requirement will always be subject to the practical limit of what can be found and produced. Therefore, in a complex case, the disclosure standard is unlikely to require production of every paragraph of every document that might conceivably be obtained.

> ... After reviewing *Scientology,* Binder J. in *R. v. Trang,* 2002 ABQB 744 noted (at para. 510) that:
>
> ... 'perfect disclosure' is too high a standard, particularly in the case of a massive investigation. ... Such a standard is likely impossible to achieve, notwithstanding the best efforts on the part of the police and Crown. It follows that an accused is not entitled to a perfect trial, but rather a fair trial...
>
> *Proprietary Industries Inc. (Re)* 2005 LNAB ASC 810 (Alta. Sec. Comm.) at para. 44-46.

[42] A similar view was expressed by Justice McLachlin (as she then was) in *R. v. O'Connor.* In that case, a criminal matter in which rights to natural justice are at their highest, Her Honour stated that the criminal discovery process is always a compromise and that an accused is not entitled to "perfect justice, but fundamentally fair justice":

> ... The key to achieving [an appropriate balance] lies in recognition that the *Canadian Charter of Rights and Freedoms* guarantees not the fairest of all possible trials, but rather a trial which is fundamentally fair: *R. v. Harrer,* [1995] 3 S.C.R. 562. What constitutes a fair trial takes into account not only the perspective of the accused, but the practical limits of the system of justice and the lawful interests of others involved in the process, like complainants and the agencies which assist them in dealing with the trauma they may have suffered. Perfection in justice is as chimeric as perfection in any other social agency. What the law demands is not perfect justice, but fundamentally fair justice.
>
> Perfect justice in the eyes of the accused might suggest that an accused person should be shown every scintilla of information which might possibly be useful to his defence. From the accused's perspective, the catalogue would include not only information touching on the events at issue, but anything that might conceivably be used in cross-examination to discredit or shake a Crown witness. When other perspectives are considered, however, the picture changes. The need for a system of justice which is workable, affordable and expeditious; the danger of diverting the jury from the true issues; and the privacy interests of those who find themselves caught up in the justice system - all these point to a more realistic standard of disclosure consistent with fundamental fairness. That, and nothing more, is what the law requires.
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> *R. v. O' Connor*, [1995] S.C.J. No. 98 (SCC) at paras. 192-194.

[43] This principle has also been applied in several cases expressly dealing with the adequacy of electronic disclosure. In *R.* v. *Foy,* [2001] OJ No. 617 (SCJ) *("**Foy**"),* for example, the accused asserted that the electronic database could not be "perfectly searched" and was "less than perfectly classified." The Court dismissed the application noting that, while not perfect, the organization and classification of the material was adequate. The Court observed that the obligation on the Crown is not one of providing perfect disclosure:

> It might be argued that provision of all the documents in hard copy would be perfect disclosure. This, the applicants manifestly do not wish. It is not possible for the Crown to classify every document as to relevance. The Crown does not know what defences are to be raised; thus it cannot do so. Crown's duty of disclosure does not extend to preparation of defence case [*sic*]. Crown seems to have done at least an adequate job of organization and classification insofar as it was possible or practicable. At least, applicants have failed to demonstrate that the job was inadequate to meet the Crown's disclosure obligations. It is true that there is a less than perfect glossary of terms that were used as identifiers for the various field codes. Some field codes have not been completely filled out and, undoubtedly some mistakes in identification will have been made. Despite these reservations, I remain unconvinced that the classification was inadequate...
>
> I am not persuaded that the alleged deficiencies of disclosure could have any meaningful impact on the ability of the defence to elect the forum of their choice for trial. The allegations are fully known as is the evidence in support of them.
>
> *Foy*, *supra*, at paras. 7, 9 and 12.

[44] Accordingly, the Respondents are entitled to disclosure that ensures them a fair hearing. At the same time, Staff's disclosure must be adequate, not perfect. Staff is entitled to disclose all information or documents that it views as potentially relevant to the Respondents' defence. Staff should clearly prefer inclusion. At the same time, our approach to disclosure must be workable particularly in cases such as this where large volumes of documents are potentially relevant.

[45] In my view, this case is distinguishable from the circumstances in *Biovail Corp. (Re)* (2008), 31 OSCB 7161 ("***Biovail***") on two grounds. First, in this case, Staff has taken what I consider to be reasonable steps to provide a searchable Database containing potentially relevant documents and has excluded a number of documents from the Database that are clearly irrelevant. Second, in *Biovail*, Staff was proceeding with a very limited number of the allegations made in the original statement of allegations. That meant that the database in *Biovail* contained an extremely large number of documents that were irrelevant to the allegations that were to proceed.

[46] I would add that it is appropriate for Staff to have made the entire Database available to each of the Respondents. That gives the Respondents the opportunity to conduct their own Database searches and to apply their own standard of relevance to the documents in the Database. They are free, however, to search for and review only those documents that appear to be directly related to the specific allegations against them. By saying that, I am not suggesting that Staff has inappropriately shifted its disclosure obligation to the Respondents.

IV. CONCLUSION

[47] To summarise, Staff has an obligation to make broad disclosure of all relevant documents to the Respondents. The standard of relevance is relatively low, meaning that Staff should err on the side of disclosure. In providing disclosure, Staff should separate the "wheat from the chaff", meaning clearly irrelevant documents should not be included. The objective of these principles is to ensure that the Respondents have adequate notice of relevant documentary evidence and, based on that disclosure, can make full answer and defence to Staff's allegations. Staff's disclosure obligation is intended to ensure that the Respondents receive a fair hearing and are not surprised by the evidence that Staff submits at the hearing on the merits. Staff has an obligation to take reasonable steps to ensure it has provided disclosure of relevant documents to the Respondents; it is not, however, required to provide perfect disclosure.

[48] I note that, while Staff included 379,099 records in the Database, they have coded 5,117 documents as "relevant" and 1,597 documents as "key documents". Staff submits that the Database is searchable by "name, by document type, by issuer, by date, by account number, by telephone number, by key document and by many other parameters that are coded into the database." Staff has also offered to assist the Respondents in demonstrating how the Database can be searched.

[49] Staff has advised Wing that the "majority of the documents that are relevant to your client were identified to Wing and entered at his various examinations". Staff has stated that it also intends to prepare and provide to the Respondents in advance of the hearing on the merits a key document brief separated into the nine different categories of allegations. Those document briefs are proposed to be submitted in evidence at the hearing.

[50] There are aspects of Staff's disclosure in this matter that raise questions in my mind. For instance, it seems unlikely that many of the e-mails between Agueci and Mr. McBirney in the Database are relevant to the allegations. I am not prepared, however, to second-guess Staff's decision that such e-mails could be relevant.

[51] There is no doubt that there is some inconsistency in Staff's use, in the correspondence and the Database, of the term "relevant". That as it may be, on balance, Staff has, through the Database, provided the Respondent with what I consider to be adequate disclosure of relevant documents. In doing so, Staff has applied its mind to the various categories of relevant documents and appears to have made a reasonable attempt to determine which documents are relevant. Staff has provided the Respondents with a Database that appears to be reasonably searchable and accessible.

[52] In addition to providing the Database, Staff identified in its examinations of Wing 53 documents that it considered relevant to those examinations. Wing has those documents. Further, the disclosure being made by Staff to the Respondents is on-going. Staff has an obligation under section 4.4 of the *Rules of Procedure* to deliver to Wing particulars of its allegations and "all documents and things in Staff's possession or control relevant to the allegations …" Staff has stated that it will prepare hearing briefs containing relevant

documents related to each of the categories of allegations made in the Statement of Allegations. Staff will submit those briefs in evidence at the hearing on the merits. It is desirable that Staff prepare those briefs expeditiously in order to give the Respondents adequate notice of the relevant documents and material. This is an issue that can be addressed as part of the pre-hearing conference process. I note that disclosure by Staff of relevant documents under Rule 4.3(2) of the *Rules of Procedure*, and of particulars under Rule 4.4, are to be provided "as soon as is reasonably practicable after the Notice of Hearing is served, and, in any case, at least 20 days before the commencement of the hearing."

[53] Staff's disclosure is not inappropriate simply because it has provided in the Database documents that might not be relevant. The documents in the Database appear to be appropriately characterized and different categories of documents can be included or excluded by any electronic searches. It is open to the Respondents to search only "relevant" or "key" documents.

[54] Wing submitted that Staff tendered no evidence on the Disclosure Motion with respect to whether the nine categories of allegations in this matter are related. The Respondent submitted that the only evidence before me is the statement in the affidavit of Donald A. Sheldon that "[t]he separate allegations are unrelated to each other." I do not accept that submission. It is clear based on the Statement of Allegations that the nine categories of allegations are linked in some respects. Those categories of allegations involve: (i) parties alleged to have some relationship with each other and to the trading involved; (ii) trading in securities of issuers involved in specified corporate transactions; (iii) alleged similar fact evidence or conduct; or (iv) alleged actions to disguise the relevant trading or to mislead Staff in its investigation.

[55] Because of the elements referred to in paragraph 54 of these reasons, it is important that all Respondents receive disclosure related to all nine categories of allegations. Whether a Respondent wishes to search or examine documents unrelated to allegations made against that Respondent is their decision. In coming to that conclusion, I recognise that Wing is not named in four of the nine categories of allegations in the Statement of Allegations.

[56] I note that, in connection with this motion, I was not provided with the Database and I have not reviewed documents or categories of documents in the Database or attempted to search that Database using the key terms Staff submits can be used to do so. If there are further issues not identified or raised on this motion that affect the Respondents' ability to identify documents relevant to the allegations made against them, those issues can be raised as part of the pre-hearing conference process or with the Panel hearing this matter on the merits.

[57] It is up to the Panel hearing this matter on the merits to determine how that hearing will be conducted and what documents it will accept in evidence.

Motion for Confidentiality

[58] Wing has also requested an order that the transcripts of this motion and the parties' motion records and factums be kept confidential or be redacted with respect to personal

information of investors, witnesses and other third parties. The Commission's Practice Guideline dated April 24, 2012, entitled "Use and Disclosure of Personal Information in Ontario Securities Commission's Adjudicative Proceedings" requires parties filing documents intended to be part of a hearing record "to use all reasonable efforts to limit the disclosure of personal information of investors, witnesses and other third parties …" It does not appear to me that personal information was disclosed in connection with the motions before me. I expect the parties to comply with the Practice Guideline in tendering documents as evidence in this proceeding. If it becomes necessary to address confidentiality of personal information at a later stage, the parties are free to make submissions. In my view, the Confidentiality Motion is premature and unsupported by the evidence.

Conclusion

[59] Accordingly, the Disclosure Motion and the Confidentiality Motion are dismissed.

DATED at Toronto this 14th day of December, 2012.

"James E. A. Turner"

James E. A. Turner