Ontario Securities Commission | Commission des valeurs mobilières de l'Ontario | 22nd Floor, 20 Queen Street West, Toronto ON M5H 3S8 | 22e 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 VINCENT CICCONE and CABO CATOCHE CORP. (a.k.a. MEDRA CORP. and MEDRA CORPORATION)

REASONS AND DECISION ON SANCTIONS AND COSTS WITH RESPECT TO MEDRA

Hearing:	August 12, 2013	
Decision:	December 17, 2013	
Panel:	Vern Krishna, C.M., Q.C.	- Commissioner and Chair of the Panel
Counsel:	Catherine Weiler Michelle Vaillancourt	- For Staff of the Commission
		- No one appeared on behalf of Cabo Catoche Corp. (a.k.a. Medra Corp. and Medra Corporation)

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I. BACKGROUND

A. Introduction

[1] This was a hearing before the Ontario Securities Commission (the "**Commission**") pursuant to sections 127 and 127.1 of the *Securities Act*, R.S.O. 1990, c. S.5, as amended (the "**Act**") to consider whether it is in the public interest to make an order with respect to sanctions and costs against Cabo Catoche Corp. (a.k.a. Medra Corp. and Medra Corporation) ("**Medra**" or the "**Respondent**").

[2] Prior to the hearing on the merits (the "**Merits Hearing**"), Vincent Ciccone ("**Ciccone**"), who was also named as a respondent in this matter, settled with Enforcement Staff of the Commission ("**Staff**"). On September 7, 2012, the Commission approved a settlement agreement between Staff and Ciccone (*Re Ciccone* (2012), 35 O.S.C.B. 8417 (the "**Ciccone Settlement**"); *Re Ciccone* (2012) 35 O.S.C.B. 8413 (the "**Ciccone Settlement Order**")).

[3] The Merits Hearing commenced as an oral hearing on September 5, 2012, was adjourned from time to time to address disclosure issues and Staff's request to convert the hearing to a written hearing, continued as a written hearing on December 3, 2012 and concluded as an oral hearing on April 2, 2013. The decision on the merits was issued on June 18, 2013 (*Re Ciccone* (2013), 36 O.S.C.B. 6487 (the "**Merits Decision**")).

[4] On June 18, 2013, an order was issued ordering that a hearing to determine sanctions and costs would be held on July 18, 2013. By order of the Commission dated July 2, 2013, the date for the hearing to determine sanctions and costs was changed to August 12, 2013.

[5] On August 12, 2013, a hearing was held to consider submissions regarding sanctions and costs against the Respondent (the "**Hearing**"). Staff appeared at the Hearing and made oral submissions, which were supported by:

- written submissions, dated July 12, 2013 ("**Staff's Written Submissions**"), accompanied with a Brief of Authorities;
- the Affidavit of Michelle Spain sworn July 11, 2013 (the "**Affidavit of Michelle Spain**"), regarding the costs Staff seeks and is appended with a Bill of Costs (the "**Bill of Costs**");
- the Affidavit of Sharon Nicolaides sworn July 12, 2013 (the "**Affidavit of Sharon Nicolaides**") regarding service on the Respondent of Staff's Written Submissions;
- an e-mail sent from Staff to the Registrar on August 9, 2013, regarding the disgorgement amount Staff seeks;

- a copy of the Commission's sanctions and costs decision in *Re Shallow Oil & Gas Inc.* (2013), 36 O.S.C.B. 191 ("***Shallow Oil***"); and

- a copy of the schedules of disbursements from Staff's closing submissions from the Merits Hearing (the "**Disbursement Schedules**").

[6] No one appeared on behalf of the Respondent for either the Merits Hearing or the Hearing. The Respondent also did not file or serve any submissions on sanctions and costs. Based on the Affidavit of Sharon Nicolaides, I am satisfied that the Respondent received notice of the Hearing and that I may proceed in the absence of the Respondent, in accordance with subsection 7(1) of the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22, as amended, and Rule 7.1 of the Commission's *Rules of Procedure* (2012), 35 O.S.C.B. 10071 (the "***Rules of Procedure***").

B. The Merits Decision

[7] In the Merits Decision, I concluded that between April 2008 and December 2009 (the "**Material Time**"):

(a) Medra traded, and engaged in the business of trading, securities without registration, contrary to subsection 25(1)(a) of the Act, as that subsection existed prior to September 28, 2009, and subsection 25(1), on and after September 28, 2009, and contrary to the public interest;

(b) Medra engaged in a distribution of securities without filing a prospectus, contrary to subsection 53(1) of the Act and contrary to the public interest;

(c) Medra engaged in fraud, contrary to section 126.1(b) of the Act and contrary to the public interest; and

(d) Medra engaged in a course of conduct related to its securities with a view of creating a misleading appearance of trading activity or an artificial price of those securities, contrary to the public interest.

(Merits Decision, *supra* at para. 86)

[8] At the Merits Hearing, Ciccone described Medra as being in the business of raising funds for investments in resort properties in Mexico, Cancun. Medra had two projects in Cancun, Mexico (together, the "**Projects**"). During the Material Time, Ciccone was the Chief Executive Officer and President of Medra, and, subsequently, Jeffery Jensen (a.k.a. Jeffery Jensen Anuth, "**Jensen**") assumed control of the company. Ciccone was also the sole director and officer of Ciccone Group Inc. ("**Ciccone Group**").

[9] I found that Medra "sold shares to more than 100 or 200 investors and raised a total of approximately $7,770,478" in consideration for the shares that were sold to investors ("**Medra Shares**") (Merits Decision, *supra* at para. 58).

II. SANCTIONS AND COSTS REQUESTED BY STAFF

[10] Staff has requested that the following sanctions orders and costs orders be made against Medra:

(a) pursuant to paragraph 2 of subsection 127(1) of the Act, that Medra permanently cease trading securities;

(b) pursuant to paragraph 2.1 of subsection 127(1) of the Act, that the acquisition of any securities by Medra is prohibited permanently;

(c) pursuant to paragraph 3 of subsection 127(1) of the Act, that any exemptions contained in Ontario securities law do not apply to Medra permanently;

(d) pursuant to paragraph 6 of subsection 127(1) of the Act, that Medra be reprimanded;

(e) pursuant to paragraph 8.5 of subsection 127(1) of the Act, that Medra be prohibited from becoming or acting as a registrant, as an investment fund manager or as a promoter;

(f) pursuant to paragraph 9 of subsection 127(1) of the Act, that Medra be required to pay an administrative penalty of $400,000 for its failure to comply with Ontario securities law;

(g) pursuant to paragraph 10 of subsection 127(1) of the Act, that Medra disgorge to the Commission $7,431,305[1] as a result of its non-compliance with Ontario securities law; and

(h) pursuant to subsections 127.1(1) and (2) of the Act, that Medra be ordered to pay the costs of the Merits Hearing.

(Staff's Written Submissions, *supra* at para. 12)

[11] Staff submits that its requested sanctions and costs orders are appropriate in view of Medra's very serious misconduct (Staff's Written Submissions, *supra* at para. 12). Staff submits that the sanctions it proposes are proportionate to Medra's conduct and will deter Medra and similar like-minded respondents from engaging in such conduct in the future, provided that meaningful consequences are attached to Medra's conduct.

[12] As previously discussed, no submissions on sanctions and costs were provided by the Respondent.

[1] On August 9, 2013, Staff sent an e-mail to the Registrar of the Commission and to Jensen, who, according to Staff, is the current president of Medra. In the e-mail, Staff corrected the disgorgement amount it seeks from an amount of $7,542,434 to $7,431,305. The correction made to the disgorgement order amount was also discussed by Staff in its oral submissions at the Hearing. Please refer to paragraph 41, below, for more discussion on the disgorgement amount requested by Staff.

III. SANCTIONS ANALYSIS

A. The Law on Sanctions

[13] The Commission's mandate, set out in section 1.1 of the Act, is: (a) to provide protection to investors from unfair, improper or fraudulent practices; and (b) to foster fair and efficient capital markets and confidence in capital markets. In pursuing the purposes of the Act, the Commission must have regard to the principles described in subsection 2.1 of the Act, namely:

(a) requirements for timely, accurate and efficient disclosure of information;

(b) restrictions on fraudulent and unfair market practices and procedures; and

(c) requirements for the maintenance of high standards of fitness and business conduct to ensure honest and responsible conduct by market participants.

[14] Subsection 127(1) of the Act provides that the Commission may make certain orders in the public interest. Where market conduct engages the animating principles of the Act, the Commission may exercise its public interest jurisdiction even if the Commission does not conclude that an abuse has occurred (*Re Biovail Corp.* (2010), 33 O.S.C.B. 8914 ("***Re Biovail Corp.***") at para. 382). In exercising its public interest jurisdiction, the Commission must act in a protective and preventative manner, as stated by the Commission in *Re Mithras Management Ltd.* (1990), 13 O.S.C.B. 1600 ("***Mithras***"):

> …We are not here to punish past conduct; that is the role of the courts…We are here to restrain, as best we can, future conduct that is likely to be prejudicial to the public interest in having capital markets that are both fair and efficient.
>
> (*Mithras, supra* at pp. 1610-1611)

[15] The Supreme Court of Canada has described the Commission's public interest jurisdiction as follows:

> …the purpose of an order under s. 127 is to restrain future conduct that is likely to be prejudicial to the public interest in fair and efficient capital markets. The role of the OSC under s. 127 is to protect the public interest by removing from the capital markets those whose past conduct is so abusive as to warrant apprehension of future conduct detrimental to the integrity of the capital markets.
>
> (*Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, 2001 SCC 37 ("***Asbestos***") at para. 43)

[16] In determining appropriate sanctions, the Commission has identified a number of factors to be considered when determining the appropriate sanctions to be imposed. They include:

(a) the seriousness of the allegations proved;

(b) the respondent's experience in the marketplace;

(c) the level of a respondents' activity in the marketplace;

(d) the size of any profit (or loss avoided) from the illegal conduct;

(e) the restraint any sanctions may have on the ability of a respondent to participate without check in the capital markets;

(f) the size of any financial sanction or voluntary payment;

(g) the restraint any sanction may have on the ability of the respondent to participate without check in the capital markets; and

(h) any mitigating factors.

(*Re Belteco Holdings Inc.* (1998), 21 O.S.C.B. 7743 at 7746; *Re M.C.J.C. Holdings Inc.* (2002), 25 O.S.C.B. 1133 ("***M.C.J.C. Holdings Inc.***") at 1134-1136)

[17] General deterrence is an important factor in imposing sanctions and the Supreme Court of Canada has stated that "…it is reasonable to view general deterrence as an appropriate, and perhaps necessary, consideration in making orders that are both protective and preventative" (*Re Cartaway Resources Corp.*, [2004] 1 S.C.R. 672 at para. 60). The Commission will also consider the specific circumstances of each case and ensure that sanctions are proportionate to those circumstances (*M.C.J.C. Holdings Inc.*, *supra* at 1134).

B. Application of the Factors

[18] The sanctions imposed against the Respondent in this matter must protect both investors and the capital markets in Ontario. These sanctions must also be fair and proportional to the Respondent's misconduct. Having regard to the factors that are summarized in paragraphs 16 and 17 above, I consider the following factors to be of particular relevance:

1. The Seriousness of the Allegations

[19] I agree with Staff's submission that Medra's conduct harmed the integrity of, and investor confidence in, the capital markets. The conduct of the Respondent was very serious. The Respondent's misconduct not only was found to be contrary to the public interest, but also led to multiple contraventions of the Act over a period of 21 months. During the Material Time, Medra was not registered to trade securities under the Act, the securities in question were not previously issued, no prospectuses were filed and no exemptions from registration or prospectus requirements were available to Medra (Merits Decision, *supra* at paras. 59, 64, 66 and 70).

[20] In the Merits Decision, I found that Medra engaged in fraud, contrary to subsection 126.1(b) of the Act, by making false and misleading statements to investors and by engaging in acts of deceit or falsehood (Merits Decision, *supra* at paras. 79 and 82). Funds received from the sale of Medra Shares from treasury were deposited into two accounts for Medra at TD Financial Group (together, the "**Medra Accounts**"). Some investor funds were transferred to accounts held in the name of Ciccone Group (the "**Ciccone Group Accounts**"), which were then dispersed for various uses, including: investment with Axcess Automation LLC; and, transfers to Ciccone's personal accounts at TD Financial Group (the "**Ciccone Personal Accounts**"), which were then

transferred to Ciccone's trading accounts at TD Waterhouse (the "**Ciccone Trading Accounts**"). I found that Medra, through its directing mind Ciccone, knew that the representations to investors regarding the use of funds was false, misleading and would cause deprivation to investors by exposing them to risks of loss that were not contemplated by them (Merits Decision, *supra* at para. 81).

[21] Moreover, the evidence established that Medra engaged in conduct related to its securities with a view to create a misleading appearance of trading activity or an artificial price for those securities. Ciccone, who was Medra's directing mind during the Material Time, purchased Medra Shares on the Pink Sheets LLC in the over-the-counter securities market in the U.S. (the "**Pink Sheets**") using funds raised from the distribution of Medra Shares, and accumulated a fairly sizable holding of such shares as a result. I found that the purchase of Medra Shares by Ciccone using funds that were raised from the distribution of Medra Shares "was done with a view to increase the price of Medra Shares and not for any legitimate purpose" (Merits Decision, *supra* at para. 85).

[22] At the Merits Hearing, the evidence of Michael Ho ("**Ho**"), a forensic account with the Enforcement Branch of the Commission, could not match all of the raised funds to Medra's list of shareholders. Staff also noted that it was not possible to directly identify the ultimate use of the majority of investor funds, due to the commingling of funds. However, in the Merits Decision, I accepted Ho's explanation that the name of a depositor is not always provided in the supporting documents of the bank and that the use of some investor funds were not applied to the purchase of properties for the Projects. As such, I found that Medra received a total of approximately $7,770,478 through its non-compliance of the Act (Merits Decision, *supra* at para. 58).

2. Medra's Experience and Level of Activity in the Capital Markets

[23] The level of the Respondent's activities in the marketplace and the amounts raised by the Respondent were significant. As referred to above, Medra's misconduct took place over a period of 21 months and resulted in approximately $7.7 million raised through the sale of Medra shares. Despite its high level of activity in the capital markets, there was no record presented to me at the Merits Hearing that Medra had been a reporting issuer in Ontario, filed a prospectus with the Commission or was registered under the Act during the Material Time.

3. The Size of Any Profit or Loss Avoided from Illegal Conduct

[24] Medra must be accountable for its misuse of investor funds during the Material Time. In relation to the flow of investor funds, the evidence established that some of the funds raised from investors were not used to purchase properties for the Projects, as represented to investors, namely:

(a) on April 24, 2008, $800,000 was transferred from the Medra Accounts to the Ciccone Group Accounts and US$800,000 was transferred to an account in the name of Axcess Automation LLC;

(b) from November 2008 to May 2009, amounts totaling $595,000 and US$650,000 were transferred from the Ciccone Group Accounts to the Ciccone Personal Accounts;

(c) from November 2008 to June 2009, amounts totaling $521,000 and US$757,000 were transferred from the Ciccone Personal Accounts to the Ciccone Trading Accounts;

(d) on a net basis, amounts totaling $913,612.18 and US$142,621.41 were transferred from the Medra Accounts to the Ciccone Group Accounts; and

(e) from January 2, 2009 to October 21, 2009, Ciccone spent over $1.5 million to purchase Medra Shares on the Pink Sheets through the Ciccone Trading Accounts.

(Merits Decision, *supra* at paras. 38, 43, 77 and 78)

[25] The Respondent raised approximately $7.7 million from investors in breach of the Act and contrary to the public interest. Additionally, the misuse of investor funds was not disclosed to investors and Medra knew that its fraudulent actions would cause deprivation to its investors.

4. Specific and General Deterrence

[26] Given the seriousness of its conduct, orders removing Medra permanently from the capital markets and imposing a significant administrative penalty are proportionate to its misconduct. These sanctions will not only reflect the harm done to investors, they will also send a message to Medra and to like-minded individuals that involvement in these types of illegal and fraudulent schemes will result in severe sanctions. I agree with Staff's submission that the sanctions imposed must also deter foreign companies that are similarly situated to Medra to show that similar conduct will not be tolerated in Ontario's capital markets (Staff's Written Submissions, *supra* at para. 25).

5. Sanctions of the Ciccone Settlement

[27] The Commission has held that the overall financial sanctions imposed on each respondent is a relevant consideration in imposing administrative penalties and disgorgement (*Re Sabourin* (2010), 33 O.S.C.B. 5299 ("***Sabourin***") at para. 59). In the Ciccone Settlement, Ciccone agreed to permanent market and trading bans and was reprimanded for his misconduct. In terms of financial sanctions and orders, Ciccone agreed to pay an administrative penalty of $750,000, a disgorgement order of $15,497,586 and costs of $100,000. The disgorgement order related to four distributions of securities, one of which involved the distribution of Medra Shares and units of Medra's Founding Partners Program (collectively, "**Medra Securities**"). In calculating the total disgorgement order, $8,395,778 was attributed to the distribution of Medra Securities (the Ciccone Settlement, *supra* at para. 45).

[28] I note that the monetary sanctions of the Ciccone Settlement reflect Ciccone's acknowledgement of wrongdoing and his cooperation with Staff; those mitigating factors are not present for Medra. However, the Ciccone Settlement involved multiple illegal distributions of securities, which spanned over a longer time period than the Material Time involved in this case.

[29] Additionally, the Ciccone Settlement involved the sale of Medra Securities and not just the sale of Medra Shares. In its written submissions for the Merits Hearing, Staff withdrew its allegation that Medra sold units of Medra's Founding Partners Program to at least 15 investors. The deposits relating to the purchase of units of Medra's Founding Partners Program totaled US$1,279,000 (Merits Decision, *supra* at para. 45 and footnote 2).

6. Mitigating Factors

[30] I agree with Staff's submission that there are no mitigating factors for the Respondent in this case.

C. Market and Trading Bans

[31] The Supreme Court of Canada has held that in exercising its public interest powers under subsection 127(1) of the Act, the Commission must be mindful that, "s. 127(1) is a regulatory provision. The sanctions under the section are preventive in nature and prospective in orientation" (*Asbestos*, *supra* at para. 45). The Respondent's misconduct led to multiple breaches of the Act, including fraud, and approximately $7.7 million was raised through the illegal distribution of Medra Shares over a sustained period of 21 months. Medra's past actions demonstrate that it will pose a considerable future risk if it is permitted to continue to operate in the capital markets of Ontario.

[32] Taking into account the sanctioning factors listed in paragraphs 16 and 17, above, and the circumstances of this case, I find that it is in the public interest to permanently restrain the Respondent from any future market participation. I conclude that it is in the public interest to impose permanent trading, acquisition and exemption bans on Medra and permanently prohibit Medra from becoming or acting as a registrant, as an investment fund manager or as a promoter. I further find it appropriate to reprimand Medra, in order to affirm that the Commission will not tolerate the illegal and fraudulent conduct engaged by Medra in the past or in the future. These orders will serve to remove the Respondent from the capital markets and to protect the investing public.

D. Administrative Penalty

[33] The Commission's public interest jurisdiction allows it to impose sanctions under section 127 of the Act, even if there is no breach of Ontario securities law or any conduct inconsistent with a policy statement; however, this public interest jurisdiction must be exercised with some caution and restraint (*Re Biovail Corp.*, *supra* at para. 374). Under paragraph 9 of subsection 127(1) of the Act, I am entitled to impose an administrative penalty of not more than $1 million in connection with each failure of the Respondent to comply with the Act. For Medra's three breaches of the Act, the maximum penalty is $3 million.

[34] Staff requests an administrative penalty of $400,000, considering the significant disgorgement order it requests at $7,431,305 (Transcript, Hearing, p. 43, line 22 to p. 44, line 6). Staff relies on the Commission's decisions in *Re Borealis International Inc.* (2011), 34 O.S.C.B. 5261 ("***Borealis***") and *Sabourin* to demonstrate that the Commission has ordered administrative penalties against both the directing minds of corporations and corporate respondents in cases involving unregistered trading, illegal distribution and fraud or conduct contrary to the public interest. I have reviewed these cases in considering the range of administrative penalties that have been ordered by the Commission against respondents involved in similar misconduct.

[35] I agree with Staff's submission that the circumstances of this case warrant a significant administrative penalty and that such a penalty will achieve specific and general deterrence. I accept that the administrative penalty requested by Staff is appropriate and proportional to the circumstances in this case and is within the range of penalties ordered by the Commission

against respondents involved in similar misconduct. I therefore order that Medra pay an administrative penalty in the amount of $400,000, and that the amounts paid to the Commission in satisfaction of the administrative penalty order is to be designated for allocation or for use by the Commission, pursuant to subsection 3.4(2)(b) of the Act.

E. Disgorgement

1. The Law on Disgorgement

[36] Pursuant to paragraph 10 of subsection 127(1) of the Act, the Commission may order a person or company who has not complied with Ontario securities law to disgorge to the Commission "any amounts obtained as a result of the non-compliance" with Ontario securities law. This Commission has described the purpose of the disgorgement remedy as follows:

> …[T]he objective of the disgorgement remedy is to deprive a wrongdoer of ill-gotten gains, reflecting the view that it would be inappropriate for those who contravene Ontario securities law to be able to retain any illegally obtained profits…
>
> …
>
> …[T] the legal question is not whether a respondent "profited" from the illegal activity but whether the respondent "obtained amounts" as a result of that activity. In our view, this distinction is made in the Act to make clear that all money illegally obtained from investors can be ordered to be disgorged, not just the "profit" made as a result of the activity…
>
> (*Re Limelight Entertainment Inc.* (2008), 31 O.S.C.B. 12030 ("***Limelight***") at paras. 47 and 49)

[37] In *Limelight*, the Commission held that it should consider the following non-exhaustive list of factors when contemplating a disgorgement order, in addition to the general factors for sanctioning:

(a) whether an amount was obtained by a respondent as a result of non-compliance with the Act;

(b) the seriousness of the misconduct and the breaches of the Act and whether investors were seriously harmed;

(c) whether the amount that a respondent obtained as a result of non-compliance with the Act is reasonably ascertainable;

(d) whether the individuals who suffered losses are likely to be able to obtain redress; and

(e) the deterrent effect of a disgorgement order on the respondents and other market participants.

(*Limelight, supra* at para. 52)

[38] Staff has the onus of proving, on a balance of probabilities, the amounts obtained by a respondent as a result of its non-compliance with the Act.

2. Staff's Submissions on Disgorgement

[39] Staff submits that the total amount obtained by Medra from investors, less the amounts repaid to investors, should be disgorged based on consideration of the following factors:

(a) Medra obtained approximately $7.7 million as a result of its non-compliance with Ontario securities law;

(b) Medra's conduct was very serious and resulted in significant harm to investors;

(c) the amounts Medra obtained as a result of its non-compliance are reasonably ascertainable;

(d) the majority of the 100 to 200 investors have not been repaid and are unlikely ever to recover their funds; and

(e) a disgorgement order in this case would be an effective specific and general deterrent.

(Staff's Written Submissions, *supra* at para. 30)

[40] Staff submits that there is no clear evidence that Medra made any payouts to investors. However, Staff informed me about two disbursements: one disbursement was made from the Medra Accounts that may have been an investor payout, as the recipient appeared on the Medra shareholder list; the second disbursement may have been made in relation to the Projects in Mexico, as the receiving individual was located in Puerto Aventura, Mexico. The amounts of these two disbursements were CDN $3,643.50 and USD $200,000, respectively.

[41] On August 9, 2013, the Registrar of the Commission received an e-mail from Staff (the "**August 9 E-mail**") stating that the latter amount of USD $200,000 was included in error. The correct reference should have been to a larger amount of USD $317,000. This amount related to payments made out of Medra's U.S. bank account to persons whose names appeared on the Founders Package list and whose names may also have appeared on Medra's shareholder list. To demonstrate how this number was reached, Staff presented me with a copy of the Disbursement Schedules at the Hearing. Staff indicated in the August 9 E-mail that it is possible that some or all of these payments may have been made for the redemptions of Medra Shares, and, as such, the amount of USD $317,000 (i.e., CDN $335,529.50) should be deducted from the amount of CDN $7,770,478, being the total amount raised from the purchase of Medra Shares. As a result, the total disgorgement amount Staff requests is CDN $7,431,305.

[42] Staff submits that the Ciccone Settlement related to largely the same conduct that was at issue in the Merits Hearing with respect to Medra, but that the time periods were slightly different and the amounts included in the disgorgement order included the amounts raised from both the distribution of Medra Shares and from the Founding Partners Program (Transcript, Hearing, p. 18, ll. 1-12). In the Ciccone Settlement, the net amount attributed to the distribution of Medra Securities was $8,395,778 (the Ciccone Settlement, *supra* at para. 45). Staff now seeks

an order for disgorgement of $7,431,305 from Medra itself, not on a joint and several basis with Ciccone. If this request is granted, the amount of the combined disgorgement orders would exceed the amount obtained by Ciccone and Medra as a result of their non-compliance with Ontario securities law.

[43] Staff's request raises the question whether the Commission has authority to make disgorgement orders that exceed the amount actually obtained as a result of the non-compliance with Ontario securities that gave rise to the proceeding. Staff relies on *Shallow Oil* to demonstrate that the Commission has imposed such disgorgement orders in the past. Staff took me to paragraph 54 of *Shallow Oil*, *supra* which states:

> Staff suggested that I should deduct from any disgorgement order the amount of $49,600 representing the aggregate amount of the other disgorgement orders made by the Commission against other participants involved in the Shallow Oil stock fraud. I am not prepared to do that. The Respondents obtained $205,000 from investors in contravention of the Act and should, in the circumstances, be ordered to disgorge the full amount so obtained. In my view, in imposing a disgorgement order, I am not required to take account of what the Respondents may have done with the moneys they obtained from investors, including whether the use of such moneys forms the basis for disgorgement orders against other persons involved in the same investment scheme. In my view, that conclusion is consistent with the Commission's decisions in *Re Limelight Entertainment Inc.* (2008), 31 OSCB 12030 and *Re Sabourin* (2010), 33 OSCB 5299. I am not suggesting that in other circumstances it may not be appropriate to reduce the amount of a disgorgement order in light of other relevant orders made by the Commission or other regulatory authorities. That is an issue for determination by the Commission panel imposing the particular sanctions. I am simply deciding in this case that doing so is not legally required and is not appropriate in these circumstances.

[44] Staff submits, based on *Shallow Oil*, that when there is a settling respondent and a non-settling respondent, and both parties are equally culpable for the misconduct at issue, the non-settling respondents' disgorgement order should not, or need not, take into account the settling respondents' disgorgement order (Transcript, Hearing, p. 41, ll. 18-23).

[45] Staff also relied on *Sabourin* as a precedent for making disgorgement orders against a number of respondents that, in total, exceeded the amount obtained from investors, although the Commission sought to avoid double-counting in that case (*Sabourin*, *supra* at paras. 70-72; Transcript, Hearing, p. 36, line 4 to p. 38 , line 18).

3. Analysis on Disgorgement

[46] Medra did not generate revenue from its business. Rather, the evidence demonstrated that the majority of the funds in the Medra Accounts came from the illegal distribution of Medra Shares from treasury (Merits Decision, *supra* at para. 35). Therefore, I am satisfied that, on a balance of probabilities, the $7,770,478 raised from the sale of Medra Shares was obtained by Medra as a result of its non-compliance with the Act. I find that it is in the public interest that

Medra be ordered to disgorge the entire amount it obtained as a result of its non-compliance with the Act.

[47] However, as Ciccone was ordered, in the Ciccone Settlement, to disgorge the amount obtained by Medra, I prefer not to make another disgorgement order, this time against Medra, with respect to the same amount obtained as a result of the same non-compliance by the parties.

[48] The circumstances in this case are distinguishable from both *Sabourin* and *Shallow Oil*. In particular, this matter involves a settlement that dealt with multiple distributions of securities, only one of which (the distribution of Medra Shares) is at issue before me. The Ciccone Settlement did not stipulate how the total disgorgement order of $15,497,586 would be allocated to each of the four distributions. I also note that the amount of the disgorgement order against Ciccone ($8,395,778) is greater than the amount Staff requests against Medra ($7,431,405).

[49] Ciccone was the President, Chief Executive Officer and, most importantly, the directing mind of Medra during the Material Time. It was through the actions of Ciccone that Medra was found to be liable for breaching the Act and for acting contrary to the public interest. In these circumstances, and consistent with my findings in the Merits Decision, I find no reason to treat Ciccone and Medra as separate entities that warrant separate disgorgement orders to be made against them. Staff did not provide sufficient evidence for me to do so, nor has it provided any evidence to show that Medra illegally obtained funds that are not covered by the disgorgement amount in the Ciccone Settlement Order.

[50] The authority granted by paragraph 10 of subsection 127(1) is limited. "If a person or company has not complied with Ontario securities law," the Commission has authority to order "the person or company to disgorge to the Commission any amounts obtained as a result of the non-compliance." Where funds flow through multiple persons and companies, Staff bears the onus of proving the amount obtained by each person or company against whom the disgorgement order is requested. In this case, I find that the amounts obtained by Medra through its non-compliance have been accounted for in the disgorgement amount ordered against Ciccone in the Ciccone Settlement Order.

[51] I note that the circumstances in this case are unique. If Staff and Ciccone had not entered into the Ciccone Settlement, this would likely have been an appropriate case for an order that Ciccone and Medra disgorge the amount they obtained as a result of their distribution of the Medra Shares on a joint and several basis. Alternatively, if the disgorgement order in the Ciccone Settlement was reduced by the amount that Medra allegedly obtained as a result of the illegal distribution of Medra Shares, in light of the ongoing proceeding against Medra, which did not settle, I may have been prepared to make the disgorgement order requested against Medra. However, in the circumstances before me now, I am not persuaded to make the disgorgement order sought by Staff, or that it is in the public interest for me to do so.

[52] Consequently, I dismiss Staff's request for a disgorgement order of $7,431,305 against Medra.

III. COSTS ANALYSIS

[53] Pursuant to section 127.1 of the Act, the Commission has the discretion to order a person or company to pay the costs of an investigation or hearing if the Commission is satisfied that the person or company has not complied with Ontario securities law or has not acted in the public interest.

[54] Staff seeks an order for the payment of $69,528.75 for the costs of the Merits Hearing. Staff prepared and filed the Bill of Costs for the period of September 8, 2012 to June 24, 2013. Staff began calculating its Bill of Costs after September 7, 2012, which was the date of the Ciccone Settlement Order. Staff's Bill of Costs reflects the time spent by two litigation employees, an investigation employee and a law clerk. The Bill of Costs did not include any disbursements, time spent by assistants or law students, time spent in respect of this Hearing or any investigation time up to and including September 7, 2012. More specifically, Staff did not include any time before September 7, 2012 with respect to Allister Field, an investigator, or Amy Tse, a forensic accountant with the Enforcement Branch of the Commission. The claim for costs have been calculated by reference to the hourly rates approved by the Commission in other cases (for example, *Re XI Biofuels Inc.* (2010), 33 O.S.C.B. 10963 at paras. 82 and 103) and by reference to the *Rules of Civil Procedure*[2] in relation to the time requested for the law clerk in this matter.

[55] Although it was served with the Affidavit of Michelle Spain, which appended the Bill of Costs, the Respondent did not serve a response setting out any objections to Staff's request for costs, pursuant to Rule 18.1(4) of the *Rules of Procedure*.

[56] In *Re Ochnik* (2006), 29 O.S.C.B. 5917 ("***Ochnik***"), the panel identified criteria that was considered by the Commission in past decisions when awarding costs:

(a) failure by Staff to provide early notice of an intention to seek costs may result in a reduced costs award;

(b) the seriousness of the charges and the conduct of the parties;

(c) abuse of process by a respondent may be a factor in increasing the amount of costs;

(d) the greater investigative/hearing costs that the specific conduct of a respondent tends to require in the case; and

(e) the reasonableness of the costs requested by Staff.

(*Ochnik*, *supra* at para. 29)

[57] Applying the factors from *Ochnik* and the factors listed in Rule 18.2 of the *Rules of Procedure*, I find the following factors to be relevant in imposing a costs order against Medra:

[2] Costs Subcommittee of the Civil Rules of Procedure Committee, "Information for the Profession" (2005), online: Court of Appeal for Ontario <http://www.ontariocourts.ca/coa/en/notices/adminadv/rates.htm>.

(a) an Amended Notice of Hearing was issued by the Commission on May 3, 2012 to notify the respondents in this matter that Staff would be seeking investigation and hearing costs against them;

(b) serious allegations were made by Staff against Medra in its Amended Statement of Allegations, dated May 2, 2012, and dealt with conduct that involved a substantial amount of investor funds and led to multiple contraventions of the Act, including fraud, and conduct contrary to the public interest;

(c) Staff has taken a conservative approach in assessing the amount of costs, particularly since investigative costs prior to September 8, 2012 are not included; and

(d) this matter involved preliminary issues at the Merits Hearing related to Staff's disclosure of materials to Medra and Staff's request to proceed by way of a written hearing.

[58] Having reviewed Staff's Bill of Costs, heard Staff's oral submissions at the Hearing and considered the relevant factors in *Ochnik* and Rule 18.2 of *Rules of Procedure*, I agree with Staff that the amount of $69,528.75 is appropriate, conservative and reasonable, given Medra's serious misconduct. As such, I will order that Medra pay the cost of the Merits Hearing in the amount of $69,528.75.

IV. CONCLUSION

[59] For the reasons set out above, I find that it is necessary to protect investors in Ontario and the integrity of Ontario's capital markets, and that it is in the public interest, to make the orders set out below. In my view, the sanctions imposed are proportionate to the circumstances and the conduct of Medra and will deter the Respondent and other like-minded individuals from engaging in similar misconduct in the capital markets in the future.

[60] I will issue a separate order giving effect to my decision on sanctions and costs as follows:

(a) pursuant to paragraph 2 of subsection 127(1) of the Act, that Medra shall permanently cease trading securities;

(b) pursuant to paragraph 2.1 of subsection 127(1) of the Act, that the acquisition of any securities by Medra shall be prohibited permanently;

(c) pursuant to paragraph 3 of subsection 127(1) of the Act, that any exemptions contained in Ontario securities law shall not apply to Medra permanently;

(d) pursuant to paragraph 6 of subsection 127(1) of the Act, that Medra is reprimanded;

(e) pursuant to paragraph 8.5 of subsection 127(1) of the Act, that Medra shall be prohibited from becoming or acting as a registrant, as an investment fund manager or as a promoter;

(f) pursuant to paragraph 9 of subsection 127(1) of the Act, that Medra shall be required to pay an administrative penalty of $400,000 for its failure to comply with Ontario

securities law, to be designated for allocation or use by the Commission, pursuant to subsection 3.4(2)(b) of the Act; and

(g) pursuant to subsections 127.1(1) and (2) of the Act, that Medra shall be ordered to pay $69,528.75 for the costs of the Merits Hearing.

[61] I dismiss Staff's request for a disgorgement order against Medra for $7,431,305.

DATED at Toronto this 17th day of December, 2013.

"Vern Krishna"

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Vern Krishna, C.M., Q.C.