BRITISH COLUMBIA SECURITIES COMMISSION
Securities Act, RSBC 1996, c. 418

Citation: Re Stock Social, 2023 BCSECCOM 372 Date: 20230725

Stock Social Inc., ImagineAR Inc. (formerly Imagination Park Entertainment Inc.) and Kyle Alexander Johnston

Panel	Audrey T. Ho	Commissioner
	Deborah Armour, KC	Commissioner
	Judith Downes	Commissioner
Hearing date	June 16, 2023	
Submissions completed	June 16, 2023	
Decision date	July 25, 2023	

Appearing

Audrey Tait	For the Executive Director
Patrick J. Sullivan	For Stock Social Inc. and Kyle Alexander Johnston
H. Roderick Anderson	For ImagineAR Inc. (formerly Imagination Park Entertainment Inc.)

Decision

I. Introduction

[1] This is the sanctions portion of a hearing under sections 161(1) and 162 of the *Securities Act*, RSBC 1996, c. 418 (Act). The findings of this panel on liability (Findings) made on January 30, 2023, reported at 2023 BCSECCOM 52, are part of this decision.

[2] We found that:

a) Stock Social contravened section 52(2) of the Act while engaging in investor relations activities on behalf of the Issuers by failing to ensure that the Records disseminated on their behalf clearly and conspicuously disclosed that they were issued on their behalf;

b) ImagineAR contravened section 52(2) of the Act by failing to ensure that the Records disseminated by Stock Social on its behalf clearly and conspicuously disclosed that they were issued on behalf of ImagineAR; and

c) Johnston authorized, permitted or acquiesced in Stock Social's contraventions of sections 52(2) and therefore also contravened that section by operation of section 168.2 of the Act.

[3] "Issuers" and "Records" in this decision have the definitions given to them in the Findings.

[4] Each of the executive director and the respondents made written submissions and oral submissions on the appropriate sanctions in this case.

[5] This is our decision with respect to sanctions.

II. Position of the Parties

A. Position of the Executive Director

[6] The executive director submits that it is in the public interest that we impose the following sanctions:

a) With respect to Stock Social:

i. a prohibition from engaging in promotional activities by or on behalf of an issuer for a period of two years, under section 161(1)(d)(v) of the Act;

ii. disgorgement of $63,500 USD (equivalent to $86,353.65 CDN) and $454,050.90 CDN (collectively, Payments), under section 161(1)(g) of the Act; and

iii. an administrative penalty of $60,000, under section 162 of the Act;

b) With respect to Johnston:

i. a prohibition from engaging in promotional activities by or on behalf of an issuer for a period of two years, under section 161(1)(d)(v) of the Act; and

ii. an administrative penalty of $25,000, under section 162 of the Act; and

c) With respect to ImagineAR, an administrative penalty of $30,000 under section 162 of the Act.

[7] The executive director acknowledges that the respondents have demonstrated an understanding of their misconduct and it is unlikely that they will be involved in similar misconduct in the future. Even so, he says the proposed sanctions are necessary and proportionate. There is a significant public interest in imposing sanctions for the purpose of demonstrating this type of misconduct will result in consequences, and failing to impose sanctions will undermine the regulatory regime.

B. Position of the Respondents

[8] The respondents submit that it is not in the public interest to order any sanction against them. They say that general deterrence is the primary consideration in this case, and general deterrence does not necessitate imposing sanctions when they are not warranted by specific deterrence. They also say general deterrence can be achieved in this very first section 52(2) enforcement proceeding by advising the marketplace that Commission staff will be approaching section 52(2) with increased vigilance and that market participants should be aware of the importance of

appropriate disclosures. They say general deterrence is also achieved by the issuance of the Findings, as it provides clear guidance to market participants on the requirements of section 52(2).

[9] The respondents also point to the fact that this is the first enforcement hearing concerning section 52(2) since it was introduced in 1995. They say that this proceeding was in part initiated by the executive director to obtain direction on how "clear and conspicuous" in section 52(2) should be addressed, and to send a message to other market participants concerning his intention to enforce section 52(2). The respondents say the fact that the executive director chose an enforcement process (rather than a policy process) to achieve this goal should be considered in determining appropriate sanctions.

[10] ImagineAR also submits that no administrative penalty should be ordered against it as it did not act independently of its consultant, Chad David McMillan, and it relied on McMillan, Stock Social and Johnston to prepare and disseminate the Records in compliance with securities law. ImagineAR also submits there is no need for an administrative penalty since the directors and officers of the company at the time of the contraventions have all ceased to be directors and officers.

III. Relevant Law

A. Introduction

[11] Orders under sections 161(1) and 162 of the Act are protective and preventative, intended to be exercised to prevent future harm. See *Committee for Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, 2001 SCC 37.

[12] When it crafts its orders, the Commission aims to protect investors, promote the fairness and efficiency of the capital markets, and preserve public confidence in those markets. The sanctions must be sufficiently severe to establish that both the respondents and others will be deterred from similar misconduct. They must also be proportionate to the misconduct (and the circumstances surrounding it) of the respondents. See: *Re Braun*, 2019 BCSECCOM 65; *Davis v. British Columbia (Securities Commission)*, 2018 BCCA 149.

[13] As for the role of general deterrence in sanctioning, the Supreme Court of Canada said the following in *Re Cartaway Resources Corp.*, 2004 SCC 26 (CanLII), with respect to the Ontario Securities Commission, at paragraphs 60 and 64:

> In my view, nothing inherent in the Commission's public interest jurisdiction, as it was considered by this Court in *Asbestos, supra*, prevents the Commission from considering general deterrence in making an order. To the contrary, it is reasonable to view general deterrence as an appropriate, and perhaps necessary, consideration in making orders that are both protective and preventative...
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> The weight given to general deterrence will vary from case to case and is a matter within the discretion of the Commission. Protecting the public interest will require a different remedial emphasis according to the circumstances. Courts should review the order globally to determine whether it is reasonable. No one factor should be considered in isolation because to do so would skew the textured and nuanced evaluation conducted by

> the Commission in crafting an order in the public interest. Nevertheless, unreasonable weight given to a particular factor, including general deterrence, will render the order itself unreasonable…

[14] The pursuit of general deterrence does not warrant imposing a crushing or unfit sanction on any individual respondent. See: *Re QcX Gold Corp.*, 2022 BCSECCOM 422 at paragraph 43, quoting the Alberta Court of Appeal in *Walton v. Alberta (Securities Commission)*, 2014 ABCA 273.

[15] In *Re Eron Mortgage Corporation*, [2000] 7 BCSC Weekly Summary 22 at page 24, the Commission provided a non-exhaustive list of factors relevant to making orders under sections 161 and 162 of the Act:

> In making orders under sections 161 and 162 of the Act, the Commission must consider what is in the public interest in the context of its mandate to regulate trading in securities. The circumstances of each case are different, so it is not possible to produce an exhaustive list of all of the factors that the Commission considers in making orders under sections 161 and 162, but the following are usually relevant:
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> - the seriousness of the respondent’s conduct,
> - the harm suffered by investors as a result of the respondent’s conduct,
> - the damage done to the integrity of the capital markets in British Columbia by the respondent’s conduct,
> - the extent to which the respondent was enriched,
> - factors that mitigate the respondent’s conduct,
> - the respondent’s past conduct,
> - the risk to investors and the capital markets posed by the respondent’s continued participation in the capital markets of British Columbia,
> - the respondent’s fitness to be a registrant or to bear the responsibilities associated with being a director, officer or adviser to issuers,
> - the need to demonstrate the consequences of inappropriate conduct to those who enjoy the benefits of access to the capital markets,
> - the need to deter those who participate in the capital markets from engaging in inappropriate conduct, and
> - orders made by the Commission in similar circumstances in the past.

B. Sections 161(1) and 162 orders

[16] Section 161(1)(d)(v) of the Act authorizes the Commission, after a hearing, to make an order to prohibit a person from “engaging in promotional activities by or on behalf of an issuer”.

[17] Section 161(1)(g) states that the Commission, after a hearing, may order:

> […] if a person has not complied with this Act, the regulations or a decision of the commission or the executive director, that the person pay to the commission any amount obtained, or payment or loss avoided, directly or indirectly, as a result of the failure to comply or the contravention.

[18] Section 162 in force at the relevant time stated:

> (1) If the commission, after a hearing,
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> > (a) determines that a person has contravened
> > (i) …a provision of this Act… and
> > (b) considers it to be in the public interest to make the order,
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> the commission may order the person to pay the commission an administrative penalty of not more than $1 million for each contravention.

IV. Analysis

Application of the *Eron Mortgage* Factors

Seriousness of conduct

[19] As described in the Findings, section 52(2) exists to assist investors in assessing the objectivity of information received from a person engaged in investor relations activities. Section 52(2) is an important safeguard to help investors make fully informed investment decisions about issuers.

[20] The integrity of the capital markets relies on those who disseminate promotional information to be candid. Therefore, disseminating paid promotional advertisements in the form of advertorials about issuers without clearly and conspicuously disclosing that they were done on behalf of those issuers not only deprives investors of an important safeguard but also jeopardizes public confidence in the integrity of the capital markets. For those reasons, a breach of section 52(2) is inherently serious.

[21] We have found that the advertorials disseminated by Stock Social were singularly positive and touted certain aspects of the Issuers' businesses but failed to disclose risks or other negative factors that one would expect to find in a true editorial or report. Given that, clear and conspicuous disclosure that those advertorials were disseminated on behalf of the Issuers is even more important in helping investors assess the objectivity of the provided information.

[22] Stock Social and Johnston were responsible for promoting five Issuers through 18 advertorials and many more social influencer posts, resulting in repeated contraventions of section 52(2). ImagineAR had one advertorial and six social media posts disseminated on its behalf. The number of ImagineAR advertorials and social media posts was the least among the Issuers. The conduct of ImagineAR is less extensive and less serious than that of Stock Social and Johnston.

Harm to investors and damage to the capital markets

[23] There is no evidence that any investor was harmed by the respondents' conduct. There is no evidence that the dissemination of the Records had any material impact on the market price of the Issuers.

[24] However, as noted above, the respondents' conduct jeopardizes public confidence in the integrity of the capital markets.

Enrichment

[25] There is no evidence that Johnston or ImagineAR was enriched by the misconduct.

[26] Stock Social received the Payments for providing services to the Issuers.

[27] Stock Social submits (and filed affidavit evidence to the effect) that it provided various services to the Issuers including services that were compliant with securities law, and that the Payments also covered those services and were not just for the services that contravened section 52(2). Johnston stated in an affidavit that most of the $400,000+ received from the Issuer MGX was simply forwarded onto other service providers on a flow-through basis, and was only paid to Stock Social to take advantage of the preferred pricing that Stock Social had with those providers. Johnston also deposed that on average, Stock Social only kept about "20-30% of the executed campaigns" from its clients. Stock Social did not indicate exactly how much of the Payments were for the services that contravened section 52(2).

[28] The Commission investigator confirmed during cross-examination that there was work or evidence of work being done by Stock Social for the Issuers other than the dissemination of the Records. The executive director did not allege any contraventions in respect of that other work in this proceeding.

[29] The executive director submits that the Payments represent a reasonable approximation of the amount obtained by Stock Social as a result of its contravention of section 52(2), and the entire amount could be (and should be) disgorged under section 161(1)(g) of the Act. He submits that the evidence from Stock Social regarding the purpose of the Payments is vague and inadequate, and Stock Social has failed to meet the onus on it to show that the Payments also covered services unrelated to its misconduct.

Mitigating or aggravating factors

[30] There are no aggravating factors.

[31] The executive director submits that it is mitigating that the respondents made admissions in an agreed statement of facts, which shortened the enforcement proceedings. We agree.

Past misconduct

[32] None of the respondents has any history of securities-related misconduct.

Risks posed by the respondents' continuing participation in the capital markets

[33] In part as a result of these proceedings, Stock Social has ceased operations and is in the process of being dissolved. Johnston deposed that he now recognizes and understands what is expected of him when engaged in investor relations activities.

[34] ImagineAR filed affidavit evidence that all of its directors and officers during the time of the misconduct have ceased to be directors and officers.

[35] The respondents were cooperative in the enforcement process and indicated early on they were prepared to make admissions. The executive director acknowledges that by entering into the agreed statement of facts, the respondents have demonstrated an understanding of their misconduct and it is unlikely that they will be involved in similar misconduct in the future.

[36] There is no evidence that the respondents intentionally breached section 52(2). This is also not a case of the respondents ignoring Commission decisions or pronouncements on the requirements of section 52(2). This case is the first enforcement proceeding involving section 52(2) since it was introduced in 1995. At the time of the misconduct, there had been no policy or guidance from the Commission on how to comply with section 52(2) when using social media in promotional activities.

[37] We agree with the executive director that there is a low risk that the respondents will be involved in similar misconduct in the future.

The need for specific and general deterrence

[38] Specific deterrence is not a significant consideration here and we give this factor a low weighting.

[39] Stock Social and Johnston submit that general deterrence does not necessitate imposing sanctions when they are not warranted by specific deterrence. That does not flow from our reading of the cited cases, nor from a plain reading of sections 161(1) and 162. On the contrary, we conclude from the cases and the statutory provisions that, if warranted, it is permissible and in keeping with the purpose of sections 161(1) and 162 to impose sanctions on respondents for the purpose of general deterrence, even in circumstances where specific deterrence is not a significant consideration. However, we must not give unreasonable weight to general deterrence, and we must craft sanctions that, taken globally, are reasonable and proportionate to the misconduct of the respondents and the circumstances. The pursuit of general deterrence does not warrant imposing a crushing or unfit sanction on any given respondent.

[40] Accordingly, we conclude that we can order the types of sanctions requested by the executive director, if we find they are warranted in this case. The more pertinent question is whether there is a need for general deterrence and if so, can it be achieved without the imposition of market bans or monetary sanctions, as suggested by the respondents.

[41] In answering that question, the reason the executive director chose an enforcement process over a policy process is not relevant to sanctions. The executive director has the discretion to choose how to use the tools given to him in discharging his duties. But the fact that this is a first enforcement of a violation of section 52(2) is relevant and supports a lighter touch on sanctions, for the reasons stated in *Wells Fargo* (see below). However, it does not justify imposing no sanctions at all. Section 52(2) has been in existence for many years. The requirement to clearly and conspicuously disclose the relationship between a promoter and an issuer is plainly stated and certain. Johnston deposed that all "market awareness" participants displayed disclaimers in a similar fashion to Stock Social (smaller font, legal language, at the end of a document). Those disclosures do not meet any common sense interpretation of what is "clear and conspicuous". A strong signal to the market that those disclosures are inadequate is needed.

[42] Any penalty which will effectively speak to all participants in the capital markets must be relatively severe to be meaningful. See: *Re Alexander*, 2007 BCSECCOM 773 at paragraph 46. In our view, publication of the Findings alone is not sufficiently severe. A modest monetary

sanction is necessary to give a meaningful signal to market participants on the importance of clear and conspicuous disclosure.

[43] With respect to ImagineAR's submission that all of the directors and officers have changed since the misconduct, that is a relevant factor primarily with respect to consideration of specific deterrence, and is far less relevant on consideration of general deterrence.

Prior decisions

[44] Section 52(2) has not been previously considered by a commission panel. The executive director referred the panel to several settlement cases.

[45] The Supreme Court noted in *Re Cartaway*, at paragraph 5, that settlement agreements between the executive director and co-respondents are not dispositive or binding on the Ontario Securities Commission, but they are a relevant factor. The executive director referred to the recent settlements he made with three of the Issuers, who paid an administrative penalty of $25,000 each. He submits that ImagineAR should receive a higher penalty to reflect the fact that making admissions in an agreed statement of facts is not the same as entering into a settlement agreement before a hearing. We have considered these settlements in our deliberations, but we are mindful that the number of ImagineAR Records involved was the least among the Issuers, and there may be known and unknown considerations at play in a settlement process to arrive at a settlement amount.

[46] The executive director also brought to our attention two 1997 settlement agreements with parties who admitted to contravening the predecessor to section 52(2), and to two other contraventions. They resulted in an administrative penalty of $1,500 and $4,500. Those settlements dealt with disseminations to 3,300 and 3,500 addressees, while Stock Social's marketing materials or contracts suggested a far greater reach through the Internet and social media. In addition, $4,500 in 2023 dollars is not very impactful for sending a meaningful signal.

[47] The executive director also referred to several settlements made by the US Securities and Exchange Commission with issuers for violations of what he says is an analogous provision to section 52(2). One settlement also involved a serious element of deceit. The executive director relies on these cases to show that the types of sanctions he seeks (bans from promotional activities, disgorgement and administrative penalties) are suitable in cases involving the type of misconduct committed by the respondents. We appreciate the efforts taken by the executive director to locate precedents that may assist the panel, but we find the US cases of no value as they involved settlements by a foreign regulator in a different jurisdiction applying different (albeit analogous) legislation and involved deceit in one instance. We have to weigh what is in the public interest in British Columbia.

[48] In support of their arguments described in paragraphs 8-9 above, the respondents cited an Ontario Securities Commission decision, *Wells Fargo Financial Canada Corp.*, [2005] 28 OSCB 1791. Following the introduction of administrative penalty as a sanctioning tool in Ontario, the OSC panel was asked to order an administrative penalty against Wells Fargo for repeated late filings. The panel said:

> [27] The case before us is novel. It's the first one for an administrative penalty. It also represents a departure, in the sense that staff have indicated to us, and by their action today have shown, that they intend in the future to vigorously enforce late filings to the extent they haven't in the past.
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> [28] Therefore, this case is a signal to the marketplace of the increased vigilance on the part of staff and the danger to market participants in failing to comply with these technical, but necessary, requirements of our law.
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> [29] We note that the offences today are a first offence on the part of Wells Fargo. We also note that there is a certain shame factor. We are aware that the first time that a violation of a particular nature is enforced, perhaps it would be unjust to come forth with a huge administrative penalty, and, therefore, although $20,000 as the agreed amount appears on the light side, we think it is appropriate in this particular case.
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> [30] The street should not take this as a precedent and the indication of a scale that might be applied in the future. The warning signal has been given. Let the street take note.
>
> [31] So, in conclusion, we are approving the settlement agreement and the proposed sanctions because the proposed sanctions in this particular case provide a specific deterrent to Wells Fargo regarding the future filing of financial information. The proposed sanctions also signal to market participants the importance of timely filing of financial information, as required by Ontario law.

[49] In support of its submission described in paragraph 10 above, ImagineAR cited past Commission cases which held that where a corporate respondent did not act independently from its director/officer (and a penalty was ordered against the individual), it was not necessary to order an administrative penalty against the corporate respondent as well. See: *Re Pegasus Pharmaceuticals*, 2022 BCSECCOM 145, *Re SBC Financial Group Inc.*, 2018 BCSECCOM 267, *Re Williams*, 2016 BCSECCOM 283, *Re EagleMark*, 2017 BCSECCOM 42, and *Re Wong*, 2017 BCSECCOM 57.

[50] We agree with the executive director that these cases are distinguishable because the individual respondent in each held the highest levels of control at their respective corporate entities or was the alter ego of those entities. In contrast, none of Stock Social, Johnston or McMillan held any corporate responsibility at ImagineAR. McMillan was ImagineAR's agent through his contract for services with the company. He brought Stock Social to ImagineAR and acted as its representative but he did not authorize the contract between Stock Social and ImagineAR. That was done by Imagine AR's then chief financial officer.

V. Conclusions Regarding Appropriate Sanctions

A. General

[51] The sanctions must be proportionate to the misconduct, the respondents and all the circumstances. The misconduct here, although serious, is far less serious than others under the Act such as fraud and misrepresentation. The misconduct was not intentional, and the respondents do not have any history of securities-related misconduct. This was the first enforcement proceeding under section 52(2). There was no evidence of harm to investors. The

respondents were cooperative, made admissions and signaled early on in the enforcement process that they would be open to doing so. Specific deterrence is not a significant concern. In all these circumstances, we conclude that a modest monetary sanction will be sufficient to promote general deterrence without it being a crushing or unfit sanction on the respondents.

B. Market prohibitions

[52] The executive director submits that a two-year market ban from promotional activities will act as a specific deterrent for Stock Social and Johnston, as well as a general deterrent to others.

[53] Stock Social is being dissolved. Although we have no evidence on Johnston's intentions to carry on investor relations activities in the next two years, that was his business for several years. We do not think a market ban that would limit either Stock Social or Johnston's participation in the capital markets is necessary when specific deterrence is not a significant factor and a modest monetary sanction should be adequate to promote general deterrence in the circumstances of this case.

C. Section 161(1)(g) orders

[54] The British Columbia Court of Appeal in *Poonian v. British Columbia Securities Commission*, 2017 BCCA 207, adopted a two-step approach from *Re SPYru Inc.*, 2015 BCSECCOM 452 at paragraphs 131 and 132, when considering section 161(1)(g) orders:

> [131] The first step is to determine whether a respondent, directly or indirectly, obtained amounts arising from his or her contraventions of the Act. This determination is necessary in order to determine if an order can be made, at all, under section 161(1)(g).
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> [132] The second step of my analysis is to determine if it is in the public interest to make such an order. It is clear from the discretionary language of section 161(1)(g) that we must consider the public interest, including issues of specific and general deterrence.

[55] There is no evidence that Johnston or ImagineAR obtained any amount arising from their respective contraventions, and the executive director did not ask for orders against them under section 161(1)(g).

Applying the two-step approach to Stock Social

[56] With respect to step 1 of the analysis, we have the affidavit of Johnston that establishes that Stock Social provided services to the Issuers beyond the preparation and dissemination of the Records, and not all of the Payments were for that work. The Commission investigator acknowledged during cross-examination that Stock Social provided services to the Issuers beyond the services that resulted in the contravention of section 52(2). The evidence is unclear as to how much of the Payments were paid for the preparation and dissemination of the Records.

[57] In *Poonian*, the Court said, at paragraphs 152-153, that the executive director has the onus of proving the amounts obtained, directly or indirectly, by a respondent arising from his or her contraventions of the Act. He does not have to determine the amount to a certainty. The amount just needs to be "reasonably approximate". The onus then shifts to the respondent "to show why such amount is not reasonable. Any uncertainty in the calculations is resolved in favour of the

executive director, since a wrongdoer should not benefit from any ambiguity arising from his or her misconduct."

[58] We agree with the executive director that "the amount obtained" under section 161(1)(g) does not require the Commission to allow for deductions of expenses and costs to arrive at a profit or net amount retained by a respondent. See: *Re Liu* 2019 BCSECCOM 236, paragraph 59, relying on *Re Poonian*.

[59] However, given the evidence that the Payments were in part for services other than the dissemination of the Records, which is consistent with the Commission investigator's testimony, we question whether the executive director has provided a reasonable approximation of the amount obtained by Stock Social "as a result of" its contravention. The evidence on this point is vague and of limited help.

[60] In this instance, we need not reach a conclusion on whether the executive director has provided a reasonable approximation. Even if we conclude that he had done so and a section 161(1)(g) order can be made under step 1, we would not have made the order sought under step 2 of the analysis. In all the circumstances here, ordering disgorgement of all of the Payments is disproportionate to Stock Social and the misconduct. There is also no need to make such an order for a smaller amount when we are of the view that an administrative penalty under section 162 will suffice.

D. Administrative penalties

[61] As stated, we are of the view that a modest monetary sanction is needed and appropriate. This monetary sanction is best achieved in the form of an administrative penalty.

[62] With respect to ImagineAR, after balancing all the relevant factors, we conclude that an administrative penalty of $20,000 is an appropriate amount that is large enough to be a meaningful signal to market participants but modest enough so it is not unfit for ImagineAR.

[63] As the company that carried on the promotional activities as a business, and as the president, CEO and sole director of that company, the misconduct of Stock Social and Johnston are more serious and extensive than that of ImagineAR and the other Issuers. We conclude that administrative penalties of $50,000 for Stock Social and $25,000 for Johnston are appropriate. They are large enough to be a meaningful signal to market participants but modest enough so they are not unfit for Stock Social and Johnston respectively.

VI. Orders

[64] Considering it to be in the public interest, and pursuant to section 162 of the Act, we order that:

Stock Social

a) Stock Social pay to the Commission an administrative penalty of $50,000;

Johnston

b) Johnston pay to the Commission an administrative penalty of $25,000; and

ImagineAR

c) ImagineAR pay to the Commission an administrative penalty of $20,000.

July 25, 2023

For the Commission

Audrey T. Ho Commissioner	Deborah Armour, KC Commissioner

Judith Downes
Commissioner