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

Citation: Re Affinor Growers Inc., 2024 BCSECCOM 278 Date: 20240624

Affinor Growers Inc., Nicholas Gordon Brusatore, Brian Kent Whitlock, and Usama Zafar Chaudhry

Panel	Gordon Johnson	Vice Chair
	Deborah Armour, KC	Commissioner
	James Kershaw	Commissioner
Hearing dates	March 6, 7 and 8, 2023	
Submissions completed	October 11, 2023	
Date of findings	June 24, 2024	

Appearing

Audrey Tait Derek Chapman	For the Executive Director
Joan M. Young Melanie Harmer	For Affinor Growers Inc. and Brian Kent Whitlock
Sean Boyle Jenna Green	For Nicholas Gordon Brusatore
Eric S. Bojm David Gibbons	For Usama Zafar Chaudhry

Findings

I. Introduction

[1] This is the liability portion of a hearing under sections 161, 162 and 174 of the *Securities Act*, 1996, c. 418 (Act).

[2] In a notice of hearing issued January 25, 2022, (2022 BCSECCOM 8), the executive director alleged, among other things, that:

March 5, 2018 news release

a) On March 5, 2018, Affinor announced a $4 million private placement and that the proceeds would be used to fund Affinor's operations and corporate development and for general working capital but did not disclose it would retain only about $325,000, or approximately 8%, of the private placement as it intended to immediately spend $3,675,000 on consulting fees;

b) By announcing a private placement but failing to disclose it intended to spend almost all of the funds on consulting fees, Affinor made a statement to investors it knew, or ought reasonably to have known, was a misrepresentation contrary to section 50(1)(d) of the Act;

c) While they were officers and/or directors of Affinor, Brusatore and Whitlock authorized, permitted or acquiesced in Affinor's contravention of section 50(1)(d) and, therefore, by operation of section 168.2 of the Act, they also contravened that same provision;

March 8, 2018 news release

d) On March 8, 2018, Affinor announced it had closed the private placement's first tranche of $3,999,666 and that the proceeds would be used to fund Affinor's operations and corporate development and for general working capital, but did not disclose it would retain only about $325,000, or approximately 8%, of the first tranche as it intended to immediately spend $3,675,000 on consulting fees;

e) By announcing the proceeds from the first tranche but failing to disclose it intended to spend almost all of the funds on consulting fees, Affinor made a statement to investors it knew, or ought reasonably to have known, was a misrepresentation contrary to section 50(1)(d) of the Act; and

f) While they were officers and/or directors of Affinor, Brusatore, Whitlock and Chaudry authorized, permitted or acquiesced in Affinor's contravention of section 50(1)(d) and, therefore, by operation of section 168.2 of the Act, they also contravened that same provision.

[3] Two witnesses testified at the liability hearing. A commission investigator testified and was cross-examined by counsel for each respondent. An expert also testified. His evidence was led by counsel for Chaudhry and he was cross examined by counsel for the executive director.

[4] The liability hearing was followed by written submissions and also, on October 10 and 11, 2023, by oral submissions.

II. Factual Background

A. General background about Affinor

[5] Affinor was originally federally registered and was continued into British Columbia on February 1, 2016. Its corporate office and principal place of business are in Vancouver.

[6] During the relevant period, Affinor was a reporting issuer under the Act and its shares traded on the Canadian Securities Exchange (CSE) with the ticker symbol "AFI".

[7] During the relevant period, Affinor's business was, according to its management discussion and analysis (MD&A) for the six months ending November 30, 2017, "developing vertically integrated farming technology and growing problematic demand crops on mass produce, high quality, and product for local distribution". It was also working towards becoming a "supplier of vertical farming technologies and proprietary processes for strawberries and other crops such as romaine lettuce and herbs in North America".

[8] Affinor had minimal revenues and significant expenses. For example, for the year ended May 31 of 2016, Affinor reported the following financial results:

Total revenue	$83,431
Net losses	($2,618,710)
Professional fees and consulting fees	$498,604
Cash at beginning of year	$2,662
Cash at end of year	$3,206
Proceeds from issuance of common shares	$1,255,000

[9] For the year ended May 31, 2017, Affinor reported the following financial results:

Total revenue	$0.00
Net losses	($1,717,118)
Professional fees and consulting fees	$406,724
Cash at beginning of year	$3,206
Cash at end of year	$521,618
Proceeds from issuance of common shares	$870,000

[10] On January 3, 2018, Affinor released its consolidated interim financial statements for the six months ended November 30, 2017. The company reported no revenues and a net loss of $294,289 during this period. Funds spent on professional and consulting fees combined were $131,768.

[11] The financial statements for the six months ending November 30, 2017 were comparative statements with reference to the previous year's six month period. They were also the last statements released prior to the events which are most relevant to the notice of hearing. An investor or potential investor who paid attention to those financial statements would learn:

a) Revenues were negligible in both periods;

b) Affinor's activity level and expenses had been much higher in the relevant six month period in 2016 compared to that period in 2017;

c) As a proportion of expenses, the amount spent by Affinor which was classified as professional fees and consulting fees was approximately 18.6% in the 2016 period and approximately 59.6% in the 2017 period;

d) At the end of November 2017, Affinor had cash of $303,000 on hand and in the six months prior to that it had incurred operating costs of $296,813; and

e) Note 1 to the financial statements included the following:

> Effective May 2014, the Company changed its name to Affinor Growers Inc. to better reflect the mission of the Company of being the world-wide technology and market leader in creating and commercializing the most economical vertical farming technologies that use the least possible resources (eg. land, water, and energy resources) to produce the highest quality pesticide-free produce year-round, regardless of environmental conditions. Revenue models for the Company's patented technologies include license fees, royalties on production, margin on equipment sales and owning strategic production facilities and becoming the farmer. To date, the Company has entered into a purchase agreement, license agreements and test license agreements. Pursuant to a

> license agreement, the Company is entitled to receive a 10% ownership interest in a subsiding [sic, incomplete sentence appears in the quoted note]
>
> The Company is subject to a number of risks and uncertainties associated with the successful development of its major crop products, such as strawberries and romaine lettuce, and with the financing requirements of its operations. The attainment of profitable operations is dependent upon future events, commercialization of its products and technology and obtaining adequate financing to complete its commercialization plans.
>
> To date, the Company has generated limited revenue and significant losses, has not generated positive cash flows from operations and as at November 30, 2017 has an accumulated deficit of $24,558,869 and a working capital of $310,639. It has relied upon financing primarily from private equity placements and exercise of options and warrants to fund its operations and construction of its facility. The Company expects to obtain funding through additional equity offerings and licensing of its technology until it achieves positive cash flows from operations.
>
> The Company's business plan is dependent on raising additional funds to finance its operations within and beyond the next 12 months. While the Company has managed to fund its operations in the past through equity financing, raising additional funds is dependent on a number of factors outside the Company's control, and as such there is no guarantee that it will be able to obtain additional financing in the future. If the Company is unable to obtain sufficient additional financing, it may have to delay, scale back or eliminate construction plans for its present or future facilities and curtail operations, which could harm the business, financial condition and results of operations. This could occur in the near term. Until such financing is secured and profitable operations are reached, there is a material uncertainty that may cast significant doubt about the Company's ability to continue as a going concern.

[12] In its MD&A for the six month period to November 30, 2017, Affinor affirmed the nature of its business and stated it continued to focus on strawberry development but that testing would begin on kale, leafy greens and cannabis. Affinor also described a number of its active business initiatives, some of which would generate licensing revenues and some of which were collaborations with other entities. Affinor did not indicate which of those initiatives would involve significant expenses or capital contributions from Affinor and which would be funded, at least in part, by parties who were collaborating with Affinor.

[13] Affinor also stated:

> [the company's] goal over the next year is to shift from a development to an operational company by generating revenue from vertical tower sales, license agreements and introducing new agriculture technologies. Affinor has numerous license agreements under negotiations with international and local companies as well as several current license holders under construction with equipment orders pending.

[14] Affinor also stated in its MD&A that it expected to commission 32 vertical growing towers with a license holder in Abbotsford, BC and reported that construction on a greenhouse to hold the towers was underway.

[15] Affinor issued very few news releases in the six months before the March news releases which are the subject of this proceeding. Most of the news releases during that six month period

related to modest financings by Affinor or changes in officers. The two news releases which included information about Affinor's operations and plans were the following:

a) In a news release dated February 14, 2018, Affinor announced that it had signed a letter of intent with a later stage Licensed Producer Applicant in British Columbia. According to Affinor, the letter of intent represented a potential joint venture under which there would be an investment in the Applicant once its marijuana related license was obtained and Affinor's technology would be used in the new business. The same news release also stated that Affinor is in the process of setting up a single vertical growing tower in Abbotsford for the purpose of completing a second phase test and improving efficiencies. Brusatore was quoted as saying he was looking forward to executing what was in his opinion "the most comprehensive competitive business plan the Canadian Marijuana Markets has seen".

b) In a news release dated February 21, 2018, Affinor announced it had signed an exclusive license agreement with a firm in Aruba to produce marijuana and food using Affinor's vertical towers. The news release reads in part "In return for granting the license, Affinor Growers will receive 10% ownership in VDA and VDA will order all towers from Affinor for its farm to be based in Aruba. The license granted to VDA will cover the region of the Caribbean…".

B. Affinor's management

[16] On February 7, 2018, Affinor announced that Brusatore was appointed president and CEO of Affinor and that:

> …Mr. Brusatore is a known design expert in the commercial production of plants using vertical growing technology to automate and accommodate low cost food production. He was also nominated for the award of excellence in Canada for agriculture in 2012 for technology and was an early pioneer in the vertical farming space starting his designing back in 2000. Nick was the initial funder and founder of Affinor Growers which is the current holder of two vertical farming patents. Mr. Brusatore is also currently funding and constructing Affinor's technology in a state of the art facility to grow strawberries and other crops on his 10.6 acre farming property in Abbotsford, BC.
>
> The Board of Directors is pleased to have Mr. Brusatore back with Affinor while it transitions from a technology development company, to selling and implementing the vertical tower technology in multiple locations and with a variety of important plants.

[17] Brusatore continued as Affinor's president and CEO during the relevant period.

[18] Other individuals assisted Affinor's management, including external accountants and administrators. Three of the most prominent in assisting Affinor's management were accountants MB and WW, and administrator SL.

[19] Whitlock was a director of Affinor from at least 2016 and throughout the relevant period.

[20] During an investigative interview, Brusatore testified that Whitlock was the most involved in Affinor of its four directors and was "really pushing hard to try to help get the tech going as well".

[21] Brusatore advised Chaudhry in a March 7, 2018 email that Whitlock was "an AFI board member quite active and perhaps will become COO as he is an amazing logistics guy hands on".

[22] In that March 7, 2018 email, Brusatore stated that Chaudhry was appointed as Affinor's CFO "effective immediately", although documentation to give effect to that appointment was not prepared until the next day.

[23] On March 8, 2018, in a separate news release from the one containing the alleged misrepresentation, Affinor announced that Chaudhry, CPA, CGA, was appointed CFO of Affinor and that:

> Mr. Chaudhry provides executive management services in varying capacities, along with currently sitting on several public company Boards. Mr. Chaudhry has provided services, such as financial reporting, company filings, quarterly and annual budgets, and overseeing corporate governance, while achieving company objectives and maintaining internal cost controls.

[24] Less than two months later, Affinor announced that Chaudhry had resigned and that a new CFO had been appointed.

C. Events related to the March 5 and 8, 2018 news releases

[25] At his investigative interview, Brusatore testified that a long-time friend recommended a group of individuals to him who could provide potential financing assistance for Affinor. Brusatore referred to them as the "BridgeMark Group".

[26] Brusatore testified that, in late February 2018, he met with BridgeMark Group members at a Vancouver hotel. The group then moved to BridgeMark's office, where the meeting continued with the addition of other individuals who represented companies which eventually signed consulting agreements with Affinor.

[27] Brusatore testified that the BridgeMark Group offered Affinor a financing of $4 million with an overallotment of an additional $4 million on the condition that Affinor participate in a cheque swap of approximately $3.4 million whereby Affinor would hire a number of consultants. Brusatore testified that he was "pretty excited" about the offer and that he "could have floated off the 19th floor and landed gently…".

[28] On February 27, 2018, Whitlock emailed his fellow Affinor board members and the CEO of Affinor's contracted accounting firm who initially acted as Affinor's CFO (Affinor's Service Provider) to arrange an "important meeting" for the next day, advising that, "Nick has something we need to talk about…".

[29] In a response email to all, Brusatore advised, "Yes please as I have been offered a lot of money from a very powerful market group I've known for a while. They want to do a placement. They are responsible for the 28 mill raised by Abattis and traded over 300 million shares". Brusatore further advised that the meeting would only take ten minutes.

[30] Commission investigators asked Brusatore about his meeting with Affinor's board of directors and Affinor's Service Provider:

> Q: So during the conference call, what was discussed?
>
> A: The opportunity for the financing. And I told them basically on the conference call after I had met with the BridgeMark Group that I felt strongly that these guys were

> going to give us the money and that this was going to be a good deal based on everything that I have seen and in talking to them. They said they have the money. They will do the first 4 million right away. And the Board was, well, that's a large cheque swap. I said, well, to my understanding the cheque swap itself is not illegal, but we get the other 4 million as well, so we're going to end up netting 8 million – not netting 8 million, but we're going to get 8 million in. I also told them that the type of M&A and the consulting and the agreements and the stuff that is going to come to help sell the technology and get it moving, it's going to be very strong. We have got ourselves a very good team, very strong. And I have got to be honest. I sold the board. I did. I sold that board. I really felt strongly these guys had me sold.

[31] As a result of the meeting, Affinor moved forward with the private placement and the staff of Affinor's professional service provider began to assemble the required documentation to administer and close the financing.

[32] On February 28, 2018, the consulting agreements were emailed to Affinor's Service Provider for his review. That service provider testified during his investigative interview that he was surprised by the agreements because they amounted to "a huge part of the financing".

[33] As a condition of the financing, Affinor entered into fourteen consulting agreements, listed in the chart below. All of the agreements were dated effective as of March 1, 2018, except for the International Canyon Holding agreement which was dated February 16, 2018. Affinor paid each consultant with a cheque dated March 9, 2018.

Consultant's name	**Amount paid (including taxes)**
International Canyon Holding	$315,000.00
Chaudhry U Consulting Inc.	$105,000.00
JCN Capital Corp.*	$367,500.00
BridgeMark Financial Corp.	$367,500.00
Detona Capital Corp.*	$105,000.00
Essos Corporate Services Inc.	$52,500.00
KH	$105,000.00
SG	$105,000.00
Northwest Marketing and Management Inc.*	$420,000.00
Prentice Ventures Inc.	$420,000.00
Justin Liu	$420,000.00
Lukor Capital Corp.	$367,500.00
Cam Paddock Enterprises*	$420,000.00
KM	$105,000.00
TOTAL	**$3,675,000.00**

[34] Four of the fourteen consultants participated in the private placement (marked with asterisks above).

[35] Chaudhry is the sole director of Chaudhry U Consulting Inc., one of the fourteen consultants.

[36] On March 1, 2018, Whitlock and Brusatore both emailed Affinor's Service Provider to inquire about the status of the financing. Affinor's Service Provider's reply email attached a draft news release about the private placement for their review.

[37] On March 2, 2018, at 4:44pm, Affinor's Service Provider sent the following email to Whitlock and Brusatore:

> Nick & Brian,
>
> (Brian – I just chatted with Nick about all this.)
>
> I'm going to send this in a few emails – the first will be the financing documents including the NR, then the edits that should be made to those agreements (which you can forward to them directly). As you and I have discussed, I have a conflict with another MJ company that we are going to provide a shell for and that I will be going on the Board of. While I don't want to leave Affinor, I have to resign at this time, and have attached my resignation.
>
> In the meantime, to be professional, POC can continue to handle the accounting and payments as long as you need us to and we can also handle the collecting the documents on this financing to get it done. [Redacted] can send out the NRs on your approval also. If you would like to change accountants, we will facilitate that also, but we can continue to do the accounting work and make sure Affinor is kept in good standing as long as you see fit. If you appoint a new CFO, we can assist and support him or her as needed.

[38] Affinor's Service Provider's March 2, 2018, resignation letter stated:

> …I, [redacted] CPA, CA, hereby resign as CFO and Corporate Secretary of the Company, effective immediately…

[39] On March 2, 2018, at 4:53pm, Affinor's Service Provider emailed an updated draft news release, subscription agreement, and board resolution about the private placement to Brusatore and Whitlock. The email asked them to "…review the news release carefully to make sure it reflects the terms you want…".

[40] On March 2, 2018, Affinor's board of directors, including Whitlock, resolved to issue, pursuant to a private placement, an aggregate of 25,000,000 units at a price of $0.16 per unit for gross proceeds of $4,000,000.

[41] On March 5, 2018, Brusatore emailed SL, copying Affinor's Service Provider and Whitlock, with the finalized news release and asked SL to immediately release it or to send him the contact at a news group and he could do it.

[42] On March 5, 2018, Affinor issued the news release announcing the private placement as follows:

> **Affinor Growers to Raise $4 Million**
>
> **Vancouver (Canada), March 5, 2018 – Affinor Growers Ltd. ("Affinor Growers")** (CSE:AFI, OTC:RSSFF, Frankfurt:1AF) is pleased to announce it has arranged by way of a private placement of 25 million Units at $0.16 per Unit, a financing of $4

million. The company reserves an overallotment option to increase the offering by up to 100 per cent.

Each Unit consists of one common share and one common share purchase warrant giving the warrant holder the right to buy another common share for two years at $0.25 per common share. In the event that the Company's common shares trade at a price on the Canadian Securities Exchange (or such other exchange on which the common shares may be traded at such time) of greater than $0.40 per share for a period of 20 consecutive trading days, the issuer may accelerate the expiry date of the warrants by giving notice to the holders thereof by way of a news release, and in such case, the warrants will expire on the 30th day after the date of such notice.

The proceeds of the offering will be used to fund Affinor's operations, corporate development and for general working capital purposes.

Nick Brusatore, CEO, commented that "the opportunity to raise a significant amount of funds for Affinor came up and we are pleased to have a new strategic shareholder group involved who will also assist with bringing in additional investors to Affinor."

Affinor plans to close the financing shortly and may pay commission to certain finders.

About Affinor Growers

Affinor Growers is a publicly traded company on the Canadian Securities Exchange under the symbol ("AFI"). Affinor is focused on growing high quality crops such as romaine lettuce, spinach, strawberries using its vertical farming techniques. Affinor is committed to becoming a pre-eminent supplier and grower, using exclusive vertical farming techniques.

Neither Canadian Securities Exchange nor its Regulation Services Provider (as that term is defined in the policies of the Canadian Securities Exchange) accepts responsibility for the adequacy or accuracy of this release.

This news release may contain assumptions, estimates, and other forward-looking statements regarding future events. Such forward-looking statements involve inherent risks and uncertainties and are subject to factors, many of which are beyond the Company's control that may cause actual results or performance to differ materially from those currently anticipated in such statements.

AFFINOR GROWERS INC.

"Nicholas Brusatore"
CEO

For More Information, please contact:
Nicholas Brusatore, CEO
contact@affinorgrowers.com

[43] Brusatore testified at his investigative interview that he approved the March 5 and March 8, 2018 news releases.

[44] On March 5, 2018, Anthony Jackson of the BridgeMark Group emailed Brusatore with revised consulting agreements that reflected changes requested by Affinor. On March 6, 2018, Brusatore emailed those consulting agreements to Affinor's Service Provider, copying WW and

Whitlock, asking the service provider if the agreements had been changed in accordance with prior instructions.

[45] After Affinor's Service Provider resigned as CFO of Affinor on March 2, 2018, Affinor needed a new CFO. The evidence shows that Whitlock was the intended interim replacement. However, in an email from Brusatore to Jackson dated March 7, 2018, copying Chaudhry and Whitlock, Brusatore appointed Chaudhry as Affinor's CFO "effective immediately".

[46] At his investigative interview, Brusatore testified:

> …And then Anthony Jackson said that he has a guy, Sam Chaudhry, that would – could fill it in for me temporary because Mark was leaving. And I said, is he qualified? Is he an accountant and he's got the capabilities? Because the guy has to have public – and he said, oh yea, no, no, it's no problem. We have – they have a big office there it looks like and there's a whole accounting firm. He says, I'll just put one of our accountants in. And I said, okay. I need one. Until I find a permanent one, he said, I can let you use a guy temporarily. I said, okay, because I just, again, wanted the money.
>
> So he put Sam Chaudhry in there. And I think from what I understand and what I understand now is I think – I don't know, but I think Sam is one of these people. I don't know if he's one of these companies that is, you know – I don't know when we write a cheque to BridgeMark if he works for BridgeMark. Like, I didn't think about any complications that way. I just figured, oh, CFO, good enough. As you can see I'm a fairly fast paced kind of guy. The way I speak is kind of the way I roll. So that Sam Chaudhry was the CFO and just got everything finished off for us.

[47] On March 7, 2018, at 10:11pm, Brusatore emailed Affinor's bank account manager, copying one of Affinor's service providers, Whitlock and Chaudhry, and asked her to add Chaudhry to the company's list of authorized signatories.

[48] On March 8, 2018, in a separate news release from the one containing the alleged misrepresentation, Affinor announced Chaudhry's appointment to CFO. Prior to that announcement, one of Affinor's Service Providers had emailed a draft of it to Brusatore, Whitlock and Chaudhry and asked them to provide their comments before the news release was published.

[49] On March 8, 2018, Jackson emailed the subscription agreements and a copy of the placees' cheques to WW and Brusatore, copying Whitlock.

[50] According to a Form 9 Notice of Proposed Issuance of Listed Securities dated March 8, 2018, and filed with the CSE, Affinor closed the first tranche of the private placement on March 8, 2018, by issuing 24,997,916 units at a price of $0.16 per unit for aggregate proceeds of $3,999,666.56 from four placees as follows:

Placee's name	Amount invested
JCN Capital Corp.	$650,000.00
Detona Capital Corp.	$683,000.00
Northwest Marketing and Management Inc.	$1,333,333.28
Cam Paddock Enterprises	$1,333,333.28
TOTAL	**$3,999,666.56**

[51] All of those placees were part of the BridgeMark Group and all were part of the group of fourteen consultants.

[52] Chaudhry executed the certificate of compliance in the Form 9 on behalf of Affinor in his capacity as CFO.

[53] On March 8, 2018, Chaudhry and Brusatore authorized Computershare Trust Company of Canada (Computershare) to accept and act upon any directions and orders given by both or either of them on behalf of Affinor. Chaudhry and Brusatore then directed Computershare to issue 24,997,916 Affinor common shares to the placees. The shares had no legend restricting them from trading.

[54] On March 8, 2018, at 2:36pm, Brusatore emailed Chaudhry with the draft March 8, 2018 news release and asked him to forward it for immediate release to WW, adding that the Affinor administrator "can release once approved". Chaudhry emailed the March 8, 2018 news release to WW at 3:01pm, copying Brusatore, advising "that I have reviewed" the news release.

[55] On March 8, 2018, Affinor issued a news release announcing the closing of the first tranche of the private placement as follows:

> **Affinor Growers Closes First Tranche of Financing for $3,999,666**
>
> **Vancouver (Canada), March 8th, 2018 – Affinor Growers Ltd. ("Affinor Growers")** (CSE:AFI, OTC:RSSFF, Frankfurt:1AF) further to the news release dated March 5th, 2018, the company would like to announce that it has closed the first tranche for total proceeds of $3,999,666. The company plans to use its overallotment option to close the final tranche for up to an additional $4 million.
>
> The private placement consisted of 24,997,916 units at 16 cents per unit. Each unit consists of one common share and one common share purchase warrant giving the warrant holder the right to buy another common share for two years at 25 cents per common share.
>
> In the event that the company's common shares trade at a price on the Canadian Securities Exchange (or such other exchange on which the common shares may be traded at such time) of greater than 40 cents per share for a period of 20 consecutive trading days, the issuer may accelerate the expiry date of the warrants by giving notice to the holders thereof by way of a news release, and in such case, the warrants will expire on the 30th day after the date of such notice.
>
> The proceeds of the offering will be used to fund Affinor's operations, corporate development and for general working capital purposes.
>
> **About Affinor Growers**
>
> Affinor Growers is a publicly traded company on the Canadian Securities Exchange under the symbol ("AFI"). Affinor is focused on growing high quality crops such as romaine lettuce, spinach, strawberries using its vertical farming techniques. Affinor is committed to becoming a pre-eminent supplier and grower, using exclusive vertical farming techniques.

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>
> This news release may contain assumptions, estimates, and other forward-looking statements regarding future events. Such forward-looking statements involve inherent risks and uncertainties and are subject to factors, many of which are beyond the Company's control that may cause actual results or performance to differ materially from those currently anticipated in such statements.
>
> **AFFINOR GROWERS INC.**
>
> "Nicholas Brusatore"
> CEO
>
> **For More Information, please contact:**
> Nicholas Brusatore, CEO
> contact@affinorgrowers.com

[56] Brusatore also testified that he knew before the news releases were issued that only about $325,000 of the approximate $4 million private placement would be retained by Affinor because of the requirement to hire the consultants.

[57] Furthermore, Brusatore testified that additional information or clarity on how the private placement funds would be used was not provided in the news releases because, "…I didn't think I needed to put more disclosure out because I was under the understanding that, you know, we were going to get this done and I was going to have a whole bunch of money….".

[58] There was no second tranche of the financing.

III. Legal Background

A. Standard of proof, elements to be proven

[59] The standard of proof is proof on a balance of probabilities. In *F.H. v. McDougall*, 2008 SCC 53 (CanLII), the Supreme Court of Canada held, at paragraph 49:

> In the result, I would reaffirm that in civil cases there is only one standard of proof and that is proof on a balance of probabilities. In all civil cases, the trial judge must scrutinize the relevant evidence with care to determine whether it is more likely than not that an alleged event occurred.

[60] The Court also held at paragraph 46 that the "evidence must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test".

[61] In *Re Donald Bergman and others*, 2021 BCSECCOM 302, the panel adopted verbatim a submission of the executive director which included the statement that "the executive director does not have to prove each evidentiary element on a balance of probabilities. The totality of the evidence must establish that the events at issue are more likely than not to have occurred in order to satisfy the balance of probabilities test".

[62] The language quoted above from *Bergman* references "evidentiary elements". From the context in which those words are used, the reference was likely to the discussion in *McDougall* at paragraphs 47, 48, 58 and 86 regarding how a trier of fact should reach conclusions on an issue when some factual elements favour one party and some factual elements favour another party.

None of that discussion in *McDougall* was inconsistent with the proposition that each and every legal element of an alleged breach of statute must be proven. The language which the panel adopted in *Bergman* oversimplified *McDougall* to such an extent that it would naturally lead parties to wonder if the Commission might conclude that the Act has been breached in the absence of proof of each legal element. The Commission would not.

B. Relevant provisions of the Act

[63] Section 1(1) of the Act defines “security” to include:

> (a) a document, instrument or writing commonly known as a security,
>
> (b) a document evidencing title to, or an interest in, the capital, assets, property, profits, earnings or royalties of a person,
>
> (c) a document evidencing an option, subscription or other interest in or to a security, and
>
> (d) a bond, debenture, note or other evidence of indebtedness, share, stock...

[64] Section 1 of the Act defines “misrepresentation” as:

> (a) an untrue statement of a material fact, or
>
> (b) an omission to state a material fact that is
>
> (i) required to be stated, or
> (ii) necessary to prevent a statement that is made from being false or misleading in the circumstances in which it was made.

[65] Section 1 of the Act at the relevant time, defined “investor relations activities” to mean:

> any activities or oral or written communications, by or on behalf of an issuer or security holder of the issuer, that promote or reasonably could be expected to promote the purchase or sale of securities of the issuer, but does not include
>
> …
>
> (b) activities or communications necessary to comply with the requirements of
>
> (i) this Act or the regulations, or
> (ii) the bylaws, rules or other regulatory instruments of a self regulatory body, exchange or quotation and trade reporting system,
>
> …

[66] “Material fact” is defined in section 1 of the Act as follows:

> When used in relation to securities issued or proposed to be issued, a fact that would reasonably be expected to have a significant effect on the market price or value of the securities.

[67] Section 168.2(1) of the Act states that:

> (1) If a person, other than an individual, contravenes a provision of this Act or of the regulations, or fails to comply with a decision, an employee, officer, director or agent of the person who authorizes, permits or acquiesces in the contravention or non-compliance also contravenes the provision or fails to comply with the decision, as the case may be.

C. Key precedents

[68] Counsel for both the executive director and the respondents agreed that the leading precedent in this context is the *New Point* decision, 2023 BCSECCOM 170. We agree with that position, although we note that *New Point* relied upon other established precedents. We also note that, since the parties made their submissions, *New Point* has been followed in *BLOK Technologies Inc.*, 2024 BCSECCOM 55.

[69] The Respondents submitted that *New Point* addressed a novel point of law regarding the level of spending on consultants by an issuer which triggers an obligation to disclose that spending when announcing the closing of a private placement. To some extent, that characterization is accurate, but to some extent, that characterization is a distraction. The core issue in *New Point* and here is that the Act has provisions which in certain circumstances prohibit parties from making statements which are literally true but misleading due to the absence of other information. When viewed in that manner, the *New Point* decision is not novel, it instead represents the application of established legal principles in a new context. The application of established principles in a new context does not reflect a revolution in our disclosure laws. There are many contexts in which issuers and other parties have to make disclosure. The potential to mislead by omission arises in most if not all of them. The Act does not identify each situation in which misleading statements of this type are prohibited. The prohibitions are instead more general and principled, which reflects the range of potential scenarios in which a party might tell misleading half-truths.

[70] The leading precedent in British Columbia on misrepresentation by omission is *Tietz v. Cryptobloc Technologies Corp.*, 2021 BCSC 2275. In *Tietz* Justice Wilkinson stated:

> [24] It is clear that the definition of misrepresentation encompasses "half-truths." An issuer cannot escape liability by only stating facts that are, strictly speaking, true, but which become misleading when considered alongside the omitted information (*Kerr v. Danier Leather Inc.* (2005), 2005 CanLII 46630 (ON CA), 261 D.L.R. (4th) 400 at paras. 112-113 (Ont. C.A.):
>
>> [112] … By defining "an omission to state a material fact necessary to make a statement not misleading in the light of the circumstances in which it was made" as a misrepresentation, the Legislature intended to capture under the rubric of misrepresentation so-called "half-truths."
>>
>> [113] For example, if an issuer said in a prospectus, truthfully, that it had acquired a patent, but it omitted to say that it was engaged in litigation challenging the validity of the patent, it may well be liable for prospectus misrepresentation. Or, if an issuer had said that over the past ten years its profits had averaged $4 million annually, without also disclosing that its profits were $40 million in the first year and zero in the next nine years, this

> half-truth would also likely amount to a misrepresentation. In each example, the second statement was necessary to make the first statement - "in the circumstances" - not misleading.

[71] Another important precedent in British Columbia is *Re Canaco Resources Inc.*, 2013 BCSECCOM 310. In that case the issuer was a mining company which was conducting an active drilling program on a property. The issuer's earlier drilling results had been disclosed to the public, but many drilling results were not disclosed. The executive director issued a notice of hearing regarding Canaco's failure to make that disclosure. Canaco argued that because the new drilling results were part of an ongoing program of infill drilling and were generally consistent with what the company had announced previously there was no duty to disclose. The hearing panel ruled as follows at paragraphs 84 and 92:

> [84] The reasonableness of market impact is assessed from the point of view of the reasonable investor, that is, would a reasonable investor expect that the market price or value of the securities would be affected by the fact or event?
>
> [92] The definitions of material fact and material change measure the impact on the "market price or value" of the issuer's securities. The implication is that "market price" and "value" can be affected differently by a given fact or event.

[72] The hearing panel in *New Point* relied upon *Tietz* and *Canaco* and also reached the following conclusions:

Liability relating to news releases

a) "Investor relations activities" are defined in section 1 of the Act. The panel in *Re Brookmount Explorations Inc.*, 2012 BCSECCOM 250, stated that it includes "any… written communications, by or on behalf of an issuer…that promote or reasonably could be expected to promote the purchase or sale of securities of the issuer", including press releases;

b) "Investor relations activities" do not include "activities or communications necessary to comply with the requirements of… this Act or its regulations, or… (an) exchange". This can be interpreted broadly or narrowly;

c) A broad interpretation would mean that, if an issuer was required to announce something, then that issuer could include false statements or improper omissions and escape liability;

d) A narrow interpretation would mean that only the parts of a communication that are mandatory are excluded from the definition of investor relations activities. No other parts are excluded. Any facts included or omitted in a news release that are not legally compulsory may be investor relations activities;

e) A narrow interpretation was preferred in order to align the definition with the textual, contextual and purposive analysis of the Act as a whole and to prevent "an absurdity that contradicts the purpose of the Act";

f) New Point was engaging in investor relations activities when it issued the two news releases at issue and could not rely on any exclusions to escape liability;

g) An issuer's continuous disclosure obligations require transparency that is sufficient for investors to make informed decisions based on that disclosure;

h) New Point's news releases were misleading because when they announced that they had raised a significant amount of capital, they failed to disclose that most of the funds raised were not being spent on the company's resource exploration and exploitation commitments that had been previously disclosed. Instead, the majority of the funds raised were being spent on commitments that had not been disclosed to investors;

i) New Point ought to have known that the news releases were misleading because the company had set market expectations through prior disclosures and financial statements and made a conscious choice to not disclose the information that would have prevented the news releases from being misleading;

j) The non-disclosed information was material because, objectively, if it was disclosed, it would reasonably be expected to have a significant effect on the market price or value of New Point's securities (the market impact test). A reasonable investor would not have expected such a divergence between the expected use of funds and the actual use of those funds;

Liability relating to material change reports

k) The news releases were included in material change reports;

l) A person who files any record under the Act is prohibited from providing false or misleading statements or information or omitting to provide facts that are necessary to make records not false or misleading;

m) Because New Point's material change reports failed to include the consultant payments which were already found to be material, those reports were misleading and contravened section 168.1(1)(b) of the Act; and

Gardener-Evans' personal liability

n) Gardener-Evans was, at all material times, New Point's decision maker as CEO, president, and director. He reviewed the news releases and gave them final approval. He also participated in the cheque swaps. He was aware that the subject consulting fees were not disclosed in the news releases. As such, he authorized, permitted or acquiesced in New Point's contraventions of the Act and therefore also contravened those sections under section 168.2 of the Act.

[73] The *New Point* decision was followed in *BLOK*.

[74] BLOK was a venture company which was focused on blockchain technologies, with a particular focus on using the blockchain in cannabis supply chain management applications. In the ten months leading up to a news release of June 8, 2018, BLOK issued over a dozen news releases about its business. Many of those news releases included descriptions of business opportunities BLOK was pursuing and many of those business opportunities would be expected to require the allocation of funds by BLOK.

[75] The financial statements and MD&A which BLOK issued in the months leading up to the June 8, 2018 news release were consistent with BLOK being a company which was spending significant

funds to develop its technology and which would continue to do so well into the future. BLOK had never generated profits and it clearly disclosed that its ability to continue operating would need further financings.

[76] BLOK issued its June 8, 2018 news release announcing that it had closed the second tranche of a financing and raised proceeds of $4,875,500. BLOK did not disclose that, of the funds raised, $4,450,000 was already committed by BLOK to pay consultants. The panel in *BLOK* found that BLOK had not created expectations in the market that a significant amount would be spent on consulting fees. The panel said "In fact, previous communications relating to amounts spent on consultants and marketing created expectations that BLOK might spend in the few hundreds of thousands, not millions."

[77] The panel in *BLOK* found that BLOK had "created an expectation among investors that if it raised significant funds, a large part would go to the development of emerging blockchain technology and investments in strategic opportunities…". Given the "significant undisclosed divergence in the actual use of proceeds from that which was previously disclosed", the panel in *BLOK* found it was misleading for BLOK to disclose the amount of funds raised without also disclosing the amount which was spent on consultants.

[78] The panel in *BLOK* also said:

> [134] We find that the undisclosed consulting fees were material. We conclude that reasonable investors who had been following communications from BLOK, would have seen BLOK as a company very much engaged in developing blockchain technology and investing in companies with that technology in various sectors in order to become a profitable enterprise. Reasonable investors would have expected that BLOK might use some of the monies raised to improve its financial position and pay expenses. But those reasonable investors would not have expected that BLOK would retain only about 18% of the monies raised to execute its business model and pay expenses.

[79] A more recent decision is PreveCeutical Medical Inc. and Stephen Van Deventer, 2024 BCSECCOM 199. In that case, PreveCeutical had issued a news release announcing it had raised gross proceeds totaling $6,539,987.50 in a private placement without disclosing that it would retain only $3,342,090. At the time of the news release, PreveCeutical had already spent or committed to spend approximately $2,924,000 on consultants. The omission by PreveCeutical of the extent to which the funds raised had already been committed to uses other than what PreveCeutical had indicated it would focus upon, was alleged to be both misleading and material.

[80] The panel in PreveCeutical made a number of important findings. The panel found that the amount which PreveCeutical had paid to consultants on account of GST would remain available to PreveCeutical to fund its expected business plans because PreveCeutical would recover those funds in normal course rebates and this result would be expected by investors who read PreveCeutical's news releases.

[81] The panel in PreveCeutical also found that although there was significant merit in the characterization which the executive director had advocated for in describing the pre-existing expectations of investors regarding how PreveCeutical would likely spend funds raised in a substantial private placement, the situation was more nuanced. The panel stated the following at paragraphs118 and 119:

> [118] In our view, the totality of the evidence mostly supports the submissions of the executive director. However, the picture is not one-sided, and some elements of the respondents' position are, on balance, reasonable. We conclude that reasonable investors looking at the information available to PreveCeutical before June 29, 2018 would have been aware that PreveCeutical had a multi-year road ahead of it to move forward with its various research and development projects, and would have needed to raise further funds to continue its activities over that time. In addition, reasonable investors would expect that, if PreveCeutical raised material amounts of new funds, PreveCeutical might allocate some proportion of those funds towards finding contacts and positioning itself for future funding rounds, and PreveCeutical might use consultants to support some of those efforts.
>
> [119] Those expectations are not inconsistent with the conclusion we have reached that reasonable investors would have expected that if PreveCeutical raised a material amount of new funds, it would have devoted a significant proportion of those funds to its research and development efforts and to cover its overhead for many months to come. Our conclusion differs from the position advocated for by the executive director only in one important detail: the executive director argues that in the above sentence we should use the words "a large majority" instead of "a significant proportion of" new funds raised.

[82] The panel in PreveCeutical then noted that although PreveCeutical did pay a significant proportion of funds to consultants without disclosing that fact, PreveCeutical did keep a majority of funds raised in its private placement available for expected corporate purposes. In addition, PreveCeutical had some history of spending funds on consultants and there would be some basis for reasonable investors to expect that type of expenditure might increase to some degree if PreveCeutical suddenly raised a significant amount of capital. The panel found that the extent to which PreveCeutical's actual expenditure on consultants diverged from what would have been expected was sufficient to establish that the information PreveCeutical omitted was necessary to avoid its statements from being misleading. However, the onus was on the executive director to show, based on the market impact test, that the omission was material and that onus had not been met. The panel clarified its conclusion at paragraph 137:

> [137] For the sake of clarity, we will restate our conclusions in deliberately over-simplified language. The executive director has proven that reasonable investors who learned what PreveCeutical had omitted from the June 29, 2018 news release would have thought "that is not what I thought based on the news release, I got the wrong impression because PreveCeutical withheld related information". However, it has not been established according to the required standard of proof that reasonable investors would have changed their behaviour, or expected other investors to change their behaviour, in a manner which would have had a significant effect on the market price of PreveCeutical's shares.

IV. Positions of the Parties

Executive Director

[83] The executive submits that the principles identified in *New Point* should be applied here. The executive director submits that all of the elements of liability have been established against Affinor and against the individual respondents.

[84] The executive director further submits that Affinor was engaging in investor relations activities when it issued the March 5 and March 8, 2018 new releases because those news releases

described Affinor's business in terms which could reasonably be expected to promote the purchase or sale of securities of Affinor.

[85] The specific elements of the March 5 news release, which the executive director characterizes as promotional, include Affinor's statement that it was "pleased to announce the $4,000,000 private placement". The executive director also characterizes Affinor's reservation of an overallotment option to increase the offering by up to 100% as promotional as such reservation could suggest that strong demand existed for Affinor's securities.

[86] The executive director also identifies, as promotional, Affinor's specified use of the proceeds raised (for "operations, corporate development and for general working capital purposes"), as well as Brusatore's comments in the fourth paragraph of the March 5 news release that "the opportunity to raise a significant amount of funds for Affinor came up and we are pleased to have a new strategic shareholder group involved who will also assist with bringing in additional investors to Affinor".

[87] The executive director also characterizes as highly promotional the fifth paragraph of the March 8, 2018 news release under the heading 'About Affinor Growers', which is the same as the sixth paragraph in the March 5, 2018 news release and includes the same promotional language. The language common to those paragraphs which is alleged to be promotional are words regarding Affinor's business such as "high quality", "committed", "pre-eminent", and "exclusive vertical farming techniques".

[88] With respect to the March 8, 2018 news release, the executive director submits the fifth paragraph under the heading 'About Affinor Growers' is the same as the sixth paragraph in the March 5, 2018 news release and includes the same promotional language regarding the details of the securities being purchased by investors. The executive director submits that, if Affinor was required to disclose that information, then those paragraphs may be excluded from investor relations activities to comply with its continuous disclosure obligations, following the panel's reasons in *Re New Point Exploration*.

[89] With respect to whether the news releases were false or misleading, the executive director submits that Affinor's disclosure of the intended use of funds raised by Affinor was misleading because it was not accompanied by a qualification that almost all of the funds raised would immediately be spent on consulting fees and that, as a result, those funds would not be available to Affinor to execute its business plan or to rescue the company from its poor financial conditions as illustrated by prior disclosures. To support that submission, especially regarding the market expectation, the executive director made detailed submissions which we quote in full detail.

> This market expectation was supported by Affinor's reports that it:
>
> - intended to commence testing on kale, leafy greens and cannabis;
> - intended to shift from a development to an operational company by generating revenue from vertical tower sales, license agreements and introducing new agriculture technologies;
> - expected to commission 32 vertical growing towers with a license holder in Abbotsford and had commenced construction on a greenhouse to hold the towers;
> - had signed a letter of intent with a later stage licensed marijuana producer applicant representing a potential joint venture agreement to purchase equity

in the applicant in the event Health Canada granted it a license to grow, process, import and export marijuana;
- was in the process of setting up a single vertical growing tower for the purpose of testing and improving efficiencies in marijuana growing; and
- had granted a license to a company based in Aruba to use its growing towers in exchange for a 10% ownership stake.

The market expectation was further supported by the fact that:

- Affinor had a poor financial track record, as evidenced by its financial statements and MD&A issued before the March 5 and 8, 2018 news releases;
- there was significant doubt about the company's ability to continue as a going concern if additional financings were not obtained;
- there was nothing in the company's prior disclosure to suggest that investors could reasonably anticipate or expect that Affinor would spend $3.675 million dollars on consulting fees when it had never spent even close to that amount before;
- CSE Policy 5 required Affinor to immediately disclose entering into significant contracts; and
- CSE Policy 7 required Affinor to immediately disclose entering into significant transactions constituting material information.

[90] The executive director submits that Affinor's failure to disclose its intention to immediately spend almost all of the funds raised on consulting fees was misleading because it was a significant undisclosed divergence in the use of funds by Affinor from that which was previously disclosed to investors.

[91] The executive director submits that the element of knowledge is established because the pre-existing market expectations were created in the minds of investors by communications distributed by Affinor. It follows that, in the face of such pre-existing expectations so created, Affinor was uniquely positioned to comprehend the nature and degree of divergence between such expectations and what was subsequently disclosed to investors.

[92] The executive director submits that materiality is established. The core of the executive director's submissions are that it would be material to a reasonable investor to know of the divergence between actual and expected use of the raised funds and that the news releases:

- led investors to believe that the company was on its way to being profitable;
- led investors to believe that the company no longer faced going concern issues;
- changed investor perception of Affinor enough to significantly affect the market price of its securities;
- were misrepresentations and half-truths because they did not disclose that Affinor intended to immediately spend almost half the funds on consulting fees and only retain approximately 8% of the amount raised; and
- misled investors about how successful the financing was for Affinor.

[93] The executive director submits that the expert's opinion evidence was unhelpful for a number of reasons, including that it relied on hindsight, that it relied upon evidence about the rarity of issuers disclosing contracts with consultants which did not stand up to scrutiny and that the expert's evidence focused not on what reasonable investors would conclude but on what an unusual subgroup of investors would conclude.

[94] The executive director submits that each of the individuals played significant roles in the issuance of the news releases, or at least acquiesced in the issuance of those news releases. Each of them are therefore liable under section 50(1)(d) of the Act by operation of section 168.2.

Affinor and Whitlock

[95] Counsel for Affinor and Whitlock submits that there was no basis to conclude that disclosure of the consulting services would have been material to the market price of Affinor's shares and, in order to prove its case against Affinor, the executive director must overcome the following:

- The alleged misrepresentations in the news releases do not apply because disclosure of the private placement proceeds is not subject to misrepresentation under section 50(1)(d);
- Affinor disclosed what it intended to spend the private placement proceeds on;
- Affinor relied on professional advisors and did not know (and should not have known) that further disclosure may be required; and
- If further details regarding the use of proceeds for consulting services had been disclosed, this information would likely have been viewed neutrally by the market.

[96] Counsel for Affinor notes the absence of evidence which it submits might have been significant. Counsel points out, as examples, that no directors of Affinor were interviewed during the investigation, no interview of Affinor's chief financial officer was conducted, no investors testified, no evidence was led from investors who claimed to have been misled by Affinor's news releases and no expert evidence was tendered by the executive director. Counsel for Affinor submits that the evidence in support of the notice of hearing is thin.

[97] Counsel for Affinor submits that the executive director should have taken into account that 8% of the proceeds raised by Affinor and paid to consultants would have been remitted as GST payable and recoverable by Affinor later. As a result, those funds, which total $325,000, would have been available for Affinor's other business objectives.

[98] Counsel for Affinor submits that Affinor and the other respondents relied upon external consultants for advice about how to deal with the financing and the payments to consultants, and that they were entitled to rely upon that advice.

[99] Counsel for Affinor submits that the expert's opinion evidence should be accepted. They summarized the key elements of that evidence as follows:

a) the market price of Affinor shares was largely unaffected by any of the public disclosures or the alleged omissions in the period from January 1, 2018, through August 2, 2019, other than business development news, and in that only occasionally;

b) the market price of Affinor was unaffected by the Commission's announcement of the investigation into the consultants and by the announcement of a class action in July, 2019; and

c) therefore, the market did not reflect a view among investors that these matters were significant.

[100] Counsel for Affinor submits that issuers such as Affinor are not amenable to standard securities valuation techniques applied to non-speculative investments and that the sole basis for an investment in a company like Affinor is speculation that their products will find markets and eventually generate profits. Their prices are driven by speculative interests affected by sectoral considerations such as the past interest in cannabis-related stocks, rumors, chat-room comments and the efforts of investor relations companies.

[101] Counsel for Affinor submits that the news releases in question do not represent investor relations activities by Affinor as alleged in the notice of hearing. Counsel for Affinor submits that the content of the March 5 and March 8, 2018 news releases in general, or at least the portions of them which are integral to the alleged misrepresentations, were necessary to comply with a regulatory requirement of the Canadian Securities Exchange and therefore are excluded from the definition of investor relations activities. Counsel for Affinor submits that the *Brookmount Explorations Inc.* decision should be distinguished because, in that case, the entire news release issued by Brookmount was riddled with outright falsehoods. It is submitted that, in contrast, in this case, the key elements of the news releases which are alleged to lead to a misrepresentation by omission are facts which were disclosed on a compulsory basis and are thus excluded from the definition of investor relations activities.

[102] In addition, counsel for Affinor seeks to distinguish *New Point*'s narrow view of the exclusion in the definition of investor relations activities in the Act on the following basis:

> Affinor submits that this reasoning is circular as, by definition, any communication that contains a misrepresentation (including a misrepresentation by omission) cannot fall within the clearly intended exception. According to this reasoning, in order to decide whether a communication is captured by the definition of investor relations activities, the Commission must decide if it contains a misrepresentation. But to constitute a misrepresentation contrary to s. 50(1)(d), it cannot fall within the exclusion. Affinor submits that this reasoning should not be followed by this panel.

[103] Counsel for Affinor also submits that the reason for the amendments to the Act which deleted reference to the words "while engaging in investor relations activities or with the intention of effecting a trade in security" in section 50 of the Act was, according to *Hansard*, identified by the then Finance Minister as to create a broad scope rather than the pre-existing narrow scope. Counsel for Affinor's argument amounts to a submission that if the intent of the amendment was to create a broad scope for section 50 of the Act then the pre-existing language must have had a narrow scope.

[104] Counsel for Affinor also submits that because Affinor disclosed in its news releases that it intended to spend the proceeds of its financing "to finance Affinor's operations, corporate development and for general working capital purposes", Affinor did accurately disclose the intended use of the funds and there was no misrepresentation. Counsel for Affinor submits that Affinor's spending on consultants was consistent with those purposes. Referencing various precedents from a number of different contexts, counsel for Affinor submits that the concept of

working capital as used in the news releases is capital used to fund the expenses incurred by a company in carrying out or furthering its typical business operations in the short term.

[105] Counsel for Affinor states that "it is equally likely that the expenditures on consultants would have been viewed as a neutral or positive development by investors" rather than a negative one, and that "there is no basis to conclude that further disclosure would have had a "significant" effect on the value of Affinor's shares."

[106] Counsel for Affinor also submits that the element of materiality has not been proven regarding the alleged misrepresentations. Counsel for Affinor points out that the test is whether the information in question will change an investor's perception to the extent sufficient to significantly affect the market price for the securities of Affinor. Counsel for Affinor asserts that the evidence needed to establish materiality is absent, and that it is inappropriate to draw inferences about investor expectations solely from evidence about how much Affinor historically spent on expenses labeled "consultants and professional fees" to the exclusion of other expenses which were operational (as opposed to developmental). Counsel for Affinor submits that, although it is appropriate at times for a panel to draw inferences about what investors would have known, it is not appropriate to draw adverse inferences when other explanations are also supported by common sense.

[107] With respect to Whitlock personally, it was submitted that he played no role other than having been copied on email correspondence related to the March 5 news release. As for the March 8 news release, counsel points out there is no evidence that Whitlock was even copied on it before it was posted. It was submitted that he did not authorize, permit or acquiesce in any breach of the Act which might be established against Affinor.

Brusatore

[108] Counsel for Brusatore placed significant emphasis on evidence from Brusatore that he had relied on advice from advisors that there was nothing illegal about the cheque swap arrangement and no reason to go further than what was said in the news releases in terms of disclosure. Counsel for Brusatore submitted that the disclosure in the news releases was sufficient to avoid any misrepresentation.

Chaudhry

[109] Counsel for Chaudhry made many of the same submissions as did counsel for Affinor, although often with a different emphasis. In some important respects, the submissions made by counsel for Chaudhry were quite distinct. Some distinct points made on behalf of Chaudhry related to the proper interpretation of section 50(1)(d) of the Act are as follows:

- The executive director's interpretation of the Act is an "impermissible result of backwards reasoning." The executive director found an absurdity, an issuer avoiding liability for misrepresentation, and then found an ambiguity to correct it by narrowly interpreting the definition of investor relations activities. This forces an impermissible interpretation upon section 50(1)(d) "to achieve an expedient result" instead of analyzing "the clear and unambiguous words of the Act";

- A narrow interpretation of section 50(1)(d) fails to read the section within the context of the Act as a whole and neglects "the presence and purpose of section 168.1 of Act" which forbids misrepresentations in communications required by the Act;

- Section 168.1 answers “the absurd result that the Executive Director wishes to avoid” by expressly capturing communications that “the Executive Director submits could be missed under section 50(1)(d) if the narrow interpretation of the exclusion is not adopted”;

- The express exclusion of activities or communications necessary to comply with the Act from the definition of “investor relations activities” “does not lead ordinary readers to think that various sentences and paragraphs all contained in the same news release should be analysed individually, rather than read as the wholes [sic] that they are”;

- “The Act clearly provides that misrepresentations contained in communications required by the Act are prohibited by section 168.1(b) and misrepresentation in communications made outside of the regulatory context are prohibited by section 50(1)(d)”; and

- Section 50(1)(d) “read in its ordinary and grammatical sense, and harmoniously with the scheme of the Act” does not apply in the “context in which the second news release was issued”.

[110] With respect to the issue of materiality, counsel for Chaudhry had some distinct submissions, including the following:

> The receipt of a large amount of funds by a speculative issuer is too remote from that issuer’s potential for profitability to be good news to the reasonable investor. While it may be good news to the issuer, and the evidence given by [Affinor’s Service Provider] and Mr. Brusatore is that it certainly was, it is clear that investors do not really care about funds raised or spent on consulting contracts.
>
> Instead, investors care about profits, and from the point of view of a reasonable investor, the future profitability of an entirely untested issuer with a poor financial track record, cannot be inferred from an injection of liquidity. Essentially, [the expert’s] evidence is that, when it comes to junior issuers who have never had revenue, reasonable investors do not count their chickens before they hatch, and, when it comes to their effect on the expected value of their securities, remain ambivalent about both consulting agreements, which are common, and funds raised. Instead, reasonable investors’ expectations are formed and impacted by what the company is actually doing, and by signs of success or sales in what it actually produces, develops, or grows.

[111] Counsel for Chaudhry emphasizes that Chaudhry joined Affinor as the chief financial officer only on March 8, 2018, after the March 5, 2018 news release had already been sent. Counsel for Chaudhry reviewed the evidence related to Chaudhry’s involvement in the March 8 news release and submits that the information available to Chaudhry or anyone else in his position was not sufficient to come to a conclusion that the issuance of the March 8, 2018 news release would have constituted a contravention of the Act. Chaudhry’s counsel submitted that the primary evidence which exists about Chaudhry’s involvement is the fact that the March 8, 2018 news release was copied to Chaudhry. No evidence was led to show that Chaudhry had sufficient knowledge to believe that the March 8, 2018 news release was misleading or that Chaudhry had an ability to prevent the alleged misrepresentation.

V. Analysis and Findings

[112] We were invited by each of the respondents' counsel to review certain elements of the legal analysis in *New Point* in light of new arguments presented by counsel for the respondents. We would have considered the respondent's new legal arguments, except we find it unnecessary to do so because of the factual conclusions we have reached.

[113] Our analysis begins with a restatement of what must be proven in order to establish liability against Affinor. The executive director must prove:

a) In issuing the March 5 and March 8 2018, news releases, Affinor was engaging in investor relations activities;

b) Affinor's failure to include in the March 5 and March 8, 2018 news releases the fact that it would only retain approximately 8% of the amount raised in the private placement, because it had already spent or then owed most of the amount raised on consulting fees, made the statements in those news releases false or misleading;

c) Affinor ought to have known that the above-noted omissions made the statements in the News Releases false or misleading; and

d) The omitted facts were material.

[114] The above list of what must be proven can be further broken down into a number of sub-issues, including the proper interpretation of section 50(1)(d) of the Act and the definition of "investor relations activities". We note that in the *PreveCeutical* decision the panel addressed the issue of whether the news release at issue was misleading, then turned to the question of whether the misleading omission was material. We focus, initially, on the factual issue of whether the omissions alleged were misleading and material. Although those issues are distinct and engage some different factors, both must be determined by analyzing some factors which, in this case at least, overlap to some degree. For example whether the omissions were misleading will depend to some extent on the degree of divergence between what investors would expect upon seeing the March 5, 2018 and March 8, 2018 news releases from Affinor and what Affinor's true intention was regarding how funds would be spent. The extent of such divergence assists in an evaluation of whether it would reasonably be expected to have a significant effect on the market price of Affinor's shares. The market impact test is focused on the reasonable expectations of investors, but those expectations would be influenced by the degree of divergence mentioned above together with the importance to investors of the subject matter of the divergence.

[115] As we have noted, both the existence of a misleading statement and materiality were proven in *New Point* and in *BLOK*. In *PreveCeutical* it was proven that a misleading statement had been made but the materiality of that omission was not proven on a balance of probabilities.

[116] The panels' decisions in *New Point* and in *BLOK* related to contexts which included three key elements. First, the issuers had created a clear and strong expectation in the market regarding the plans of the issuer and its business focus in the immediate future. In each case, the expectations which had been created included an expectation regarding how the issuer intended to allocate funds if significant funds were raised. Second, the issuers' news releases announcing the raising of the funds reinforced the pre-existing market expectation. Third, the proportion of the funds raised which was immediately allocated to paying consultants was very high, was inconsistent with the expectations which existed in the market and was inconsistent with the way the issuer had allocated funds historically.

[117] Our conclusion on the first of these elements, regarding whether Affinor's prior disclosures had created an expectation that a substantial proportion of any material funds raised would be used to fund Affinor's development and operations, is that the reasonable investors would have considered the context holistically, considering all available information, and we should do the same.

[118] Here is the most compelling evidence suggesting that the market expectation alleged by the executive director was present in the minds of reasonable investors:

a) Affinor had historically suffered significant losses, including the new loss of $2,618,710 shown in its financial statements for the year ended May 31, 2016, and $1,717,118 for the year ended May 31, 2017. This would support an impression that Affinor needed significant funds to remain a going concern and continue in operation, and would allocate funds to that purpose if it raised new funds;

b) Affinor's then most recently released financial statements for the 6 month period ended November 30, 2017, showed no revenues and a net loss of $294,289. This would support an impression that Affinor continued to suffer losses and continued to need funds for operational and developmental purposes;

c) During the full years ended May 31 of 2016 and 2017, the total spent by Affinor on professional fees and consultants was $498,604 and $406,724 respectively and the equivalent total for the 6 month period ended November 30, 2017, was $131,768. This would tend to suggest that Affinor would not suddenly allocate millions raised in a new financing on consultants;

d) The notes to its November 30, 2017, financial statements included the statement that "the attainment of profitable operations is dependent on future events, commercialization of its products and technology and obtaining adequate financing to complete its commercialization plans". This would tend to suggest that Affinor's need for funds in order to complete its plans was a need which would continue into the coming period;

e) Affinor's MD&A for the 6 month period ended November 30, 2017, indicated that Affinor expected to commission 32 growing towers with a license holder and had commenced construction of a greenhouse to hold the towers. This would tend to suggest that Affinor was spending funds on development; and

f) Affinor's MD&A for the same period indicated it intended to commence testing on kale, leafy greens and cannabis. This would also suggest that Affinor was spending funds on development.

[119] In contrast, the following is the most compelling evidence suggesting that the market expectation alleged by the executive director was not present in the minds of reasonable investors:

a) Affinor's net loss had decreased from over $2.6 million in the year ending May 2016 to just over $1.7 million in the year ending in May 2017 and decreased further to just under $300,000 in the 6 month period ended in November 2017. To some investors, this could suggest that Affinor's need for funds to support operations and development was declining and was far lower than it had historically been;

b) As of November 30, 2017, Affinor had cash of just over $300,000 in hand, almost $300,000 more than it had on hand as of the year ends of the prior two financial periods. This fact can be interpreted in many ways, but to some readers it could suggest that Affinor's need for cash was not as significant as it had been, particularly in light of Affinor's reduced net losses;

c) In a note to its November 31, 2017, financial statements, Affinor stated that it expected to obtain future funds both from financings and from the licensing of its technology. This would tend to suggest that Affinor expected to increase its earned revenue and no longer have an exclusive dependence on financings;

d) In its November 2017 MD&A, Affinor stated that its "goal over the next year is to shift from a development to an operational company by generating revenue from vertical tower sales, license agreement and introducing new agricultural technologies". This would tend to suggest that Affinor was expecting to begin earning more revenue from operations in the coming months;

e) Many of the initiatives announced by Affinor, for example the potential joint venture it had announced in the Caribbean and the installation of the greenhouse and a number of growing towers in Abbotsford, were being done in collaboration with other parties. The announcements were unclear as to whether the ventures would be funded by Affinor or by the other parties, and to what extent. This would tend to suggest that some reasonable investors might not view these developments as requiring Affinor to spend significant capital in the then upcoming periods; and

f) Although the dollar value which Affinor spent on professional and consulting fees in the 6 month period ending November 30, 2017 was relatively small ($131,768), the proportion which that amount made up of total expenses paid by Affinor in the period was much more significant than Affinor's historical proportionate spend in that category (59.6%).This would tend to suggest that investors had at least some indication that the proportion of funds which Affinor might spend on consultants in any given period could be variable.

[120] In this case, the appropriate approach is not to weigh which set of factors is more persuasive than the other. There are factors which point in several directions, but the picture which emerges, which is most likely to be accurate, is that the factors most relied on by the executive director reflect where the company had been based on its prior financial statements but the expectations which management was communicating regarding Affinor's situation as of 2018 and, looking forward from there was a different one. Affinor had been a cash starved business which still needed to complete further research and development in order to survive and then commercialize its technology. According to its communications to investors, around the time of the relevant news releases Affinor had funds in the bank sufficient to fund several months of operations, it had signed agreements with third parties which would soon be generating licensing revenues and Affinor was seeking other ventures in various countries which might create further revenue streams. In that context, a decision made by management to begin to spend funds in a different manner, and to employ consultants for the purposes apparent from the consulting agreements in issue might not have been seen by investors as a decision which was out of character with Affinor's expected business plans.

[121] When we balance all of the evidence in this proceeding, and particularly the evidence we have emphasized above, we have significant doubt that the expectations of investors have been established with sufficient clarity to prove all of the elements that the executive director must prove. Based on Affinor's communications to the market, it is not clear that reasonable investors would have assumed, upon reading the March 5, 2018 news release, that Affinor intended to spend a significant majority of the funds raised to advance its development or improve its difficult financial situation. We find it is, at best, plausible, in this circumstance, that reasonable investors would not have been surprised by the undisclosed decision to dedicate a significant majority of the funds to retain consultants to advance new priorities for Affinor through services to be provided by consultants. The key elements which are present which make that alternative plausible are:

a) the sharply reduced losses by Affinor in recent periods;

b) Affinor's announcements that it was moving from a development phase (which would be expected to include a significant incentive to keep funds raised to fund pending operational and research and development obligations) to become an operational company with real revenue; and

c) Affinor's announcement of various licensing agreements which might also start to generate revenue.

[122] We have noted that in both *New Point* and *BLOK* there was a confluence of elements which created a factual basis for liability, including a clear expectation in the market created by the issuers' prior disclosure, a consistent message in the news releases which reinforced the pre-existing expectations and a significant, but undisclosed, divergence between those market expectations and the actual intention of management regarding plans for how to spend the funds raised in the private placements. In some instances it might be possible that the other elements will establish a breach of the Act even if the first element does not. In this case, the pre-existing expectation in the market, viewed fairly and objectively, included the possibility that a substantial proportion of the funds raised in this private placement would be paid to consultants who might be contracted to assist Affinor as it moved from a development stage to an operational stage. Our review of the consulting contracts suggests that many of the services to be provided under those contracts could reasonably be seen to have been useful for a business making the type of transition which Affinor suggested it was commencing. As has been made clear throughout this proceeding, it is not alleged that the consulting contracts themselves were improper.

[123] Given our analysis above, we conclude that the executive director has not established on a balance of probabilities that the omissions in the March 5, 2018 news release and the March 8, 2018 news release were misleading.

[124] In addition, we conclude that, even if there was a misleading omission, such omission was not material. The applicable test is the market impact test, which focuses on whether a reasonable investor would expect the omission in question to have a significant effect on the price of Affinor's shares. The degree of divergence between what was disclosed and what was expected would be relevant in the sense that small divergences will often be seen as less important to investors than large divergences. However, when applying the market impact test the significance of the omission, misleading statement or event is the key issue.

[125] In any event, given the expectations which Affinor had communicated to the market we do not see a basis to conclude that reasonable investors would have expected a significant impact on market price had Affinor disclosed what it chose to omit. An individual looking only at the raw percentages of how much Affinor had spent of what it had announced had been raised, might have been shocked. However, the respondents asked us to look deeper into the evidence regarding the market expectation which Affinor had created and it is proper for us to do so. We do not dismiss this proceeding because we agree with the respondents about the correctness of the legal analysis in New Point. It is the body of pre-existing disclosure which Affinor made to investors and potential investors which leads us to the conclusions we have expressed.
We should add two important clarifications to this decision. First, although it is true that in this case the pre-existing expectations created by Affinor regarding its intentions about how it would allocate future spending were not as clear as those which were proven in *New Point* and in *BLOK*, we are not saying that it is a lack of clarity by Affinor in its messages to investors which leads to the dismissal of the Notice of Hearing. What we are saying is that the pre-existing expectations here included a large element of expectation that Affinor's business focus was in the process of changing because Affinor was moving from a developmental business to an operational business and because Affinor's disclosure might suggest to some investors that its cash needs had been sharply reduced.

[126] Our second important qualification is that although the outcome in this proceeding is consistent with the outcome we might have reached had we relied on the expert opinion which was tendered regarding materiality, we did not place significant weight on the opinion presented. The issue of materiality turned on our own assessment of the reasonable investor and whether a significant effect on the price of Affinor's shares was expected. The opinion we received had attached to it some factual evidence which we found interesting and useful. However, the opinion presented was based on hindsight and did not provide much assistance regarding what to expect from a reasonable investor.

[127] As a result of our factual analysis we need not go further. The allegations in the notice of hearing are dismissed.

June 24, 2024

For the Commission

Gordon Johnson
Vice Chair

Deborah Armour, KC
Commissioner

James Kershaw
Commissioner