

# ALBERTA SECURITIES COMMISSION

Citation: Re Avila Energy Corporation, 2024 ABASC 164

Docket: ENF-013326

Date: 20241021

## SETTLEMENT AGREEMENT AND UNDERTAKING

Avila Energy Corporation and Leonard Van Betuw

### Regulatory Message

Full and accurate disclosure is one of the key underpinnings of the securities regulatory system. Disclosure regarding the intended use of funds when raising capital is fundamental to providing a reliable information base from which investment decisions can be made.

In order to rely upon the Listed Issuer Financing Exemption contained in National Instrument 45-106, section 5A.2, a listed issuer must comply with all of the requirements of that exemption. Importantly, this includes issuing a news release and filing with the Commission a Listed Issuer Financing Document (**LIFD**) that includes, among other things, information about the use of proceeds. In so doing, the issuer and its officers must ensure that neither the news release nor the LIFD contains a misrepresentation.

Making misrepresentations in news releases to the public and in filings to the Commission are serious breaches of the *Securities Act*. Where this occurs, the Commission will act decisively to protect investors and deter such misconduct, including by ensuring persons responsible are prohibited from acting as a director, officer, or otherwise.

### Agreed Facts

#### *Introduction*

1. Staff of the Enforcement division of the Alberta Securities Commission (**Staff** and the **Commission**, respectively) conducted an investigation into Avila Energy Corporation (**Avila**) and Leonard Van Betuw (**Van Betuw**) (collectively, the **Respondents**) in respect of a December 2022 exempt market offering, as particularized in paragraphs 12 to 30 of this Settlement Agreement and Undertaking (**Agreement**), to determine if Alberta securities laws had been breached (the **Investigation**).

2. The Investigation confirmed and the Respondents admit that they breached the Alberta securities laws referred to in paragraphs 34 and 35 of this Agreement.
3. Solely for securities regulatory purposes in Alberta and elsewhere, and as the basis for the settlement and undertakings referred to in paragraphs 41 and 42 and for no other use or purpose, the Respondents agree to the facts and consequences set out in this Agreement.
4. Terms used in this Agreement have the same meaning as provided in Alberta securities laws.

*Parties*

5. Avila was incorporated in Alberta under a predecessor name in January 2010. From March 2022 to January 2023 (the **Relevant Period**), and as of the date of this Agreement, Avila was a reporting issuer, with the Commission as its principal regulator. Its shares traded on the Canadian Securities Exchange under the ticker symbol VIK.
6. Van Betuw is an individual who resided in Calgary and during the Relevant Period was a director and the Chief Executive Officer of Avila.

*Other Parties*

7. Certain other parties were involved in the matters set out in this Agreement. Descriptions of them and their status during the Relevant Period are set out in paragraphs 8–11 below.
8. Terra Land Development Ltd. (**Terra Land**) was incorporated in Alberta under a predecessor name in March 2016.
9. Andres Hernandez (**Hernandez**) is Van Betuw's brother-in-law. He resided in Calgary and was the sole director and 100 per cent voting shareholder of Terra Land.
10. Avex Energy Inc. (**Avex**) was amalgamated in Alberta in September 2022 from two predecessor corporations: 611890 Alberta Inc. (**611**) and Avila Exploration & Development Canada Ltd. (**Avila Exploration**). Van Betuw was:
  - the sole director and 100 per cent voting shareholder of 611 from March 2022 to August 2022;
  - the sole director and 43 per cent voting shareholder of Avila Exploration from March 2022 to August 2022; and
  - the sole director and 100 per cent voting shareholder of Avex from September 2022 to January 2024.
11. Micro Turbine Technology B.V. (**MTT**) was incorporated in the Netherlands and had a registered office in Eindhoven, Netherlands.

### *Chronology of Events*

12. On or about March 22, 2022, 611 (now Avex) entered into a subordinated loan agreement with MTT, whereby 611 agreed to provide a €5 million EUR loan to MTT. Pursuant to this loan agreement, 611 incurred payment obligations to MTT and, eventually, its successor by amalgamation, Avex (the **Avex Payment Obligations to MTT**).
13. On or about November 14, 2022, Avila announced the formation of its “*Vertically Integrated Energy Business*.” In a press release, it announced that the business:
  - 13.1 would be supported by “a 5 (five) million Euro cash investment” in MTT; and
  - 13.2 Avila had secured the preferred licencing rights to manufacture, sell, lease, and service MTT’s “EnerTwin” micro-turbines in Canada and the United States.
14. On or about November 14, 2022, Avila and Terra Land entered into a “Market Research Proposal,” which provided that Terra Land would perform data analysis for Avila, at a cost of \$1,621,943 CAD (the **Terra Land Market Research Proposal**).
15. Van Betuw signed the Terra Land Market Research Proposal on behalf of Avila, and Hernandez signed it on behalf of Terra Land.
16. On December 5, 2022, Terra Land issued an invoice for \$774,109 CAD to Avila, which was an advance for the data analysis that Terra Land was to perform for Avila. Van Betuw specified to Terra Land the amount to be invoiced to Avila.
17. On December 6, 2022, Avila filed a Form 45-106F19 offering document (the **Initial Offering Document**) with the Commission and issued a corresponding news release (the **Initial Offering News Release**) in respect of an \$8 million CAD brokered private placement offering of common shares and warrants of Avila through the use of the Listed Issuer Financing Exemption pursuant to Part 5A of National Instrument 45-106, *Prospectus Exemptions*. The private placement included an offering of \$4 million CAD of charitable flow-through units (the **Offering**).
18. Collectively, the Initial Offering Document and Initial Offering News Release stated that Avila would use the net proceeds of the Offering to advance Avila’s “*Vertically Integrated Energy Business*,” and the securities issued would be issued on a “flow-through basis” in respect of Canadian renewable and conservation expenses within the meaning of the *Income Tax Act* (Canada), RSC 1985, c 1 (5<sup>th</sup> Supp).
19. Over that same time period, between December 6 and 22, 2022, the Corporate Finance department of the Commission (**Corporate Finance**) and Avila exchanged communications about the Initial Offering Document and Initial Offering News Release. As part of those communications, Corporate Finance advised that key disclosure was missing from the Initial Offering Document and Initial Offering News Release, including details about how Avila intended to use the available funds from the Offering.

20. After receiving Corporate Finance's concerns about the Initial Offering Document and Initial Offering News Release, on December 22, 2022, Avila filed an amended Form 45-106F19 offering document under the Listed Issuer Financing Exemption (the **Amended Offering Document**), and on December 23, 2022, issued a corresponding news release.
21. The Amended Offering Document represented that Avila would use the net proceeds of the Offering to advance Avila's "*Vertically Integrated Energy Business*," including by using \$1.5 million CAD of the net proceeds of the Offering on data analysis, which included the collection of information on more than 1,000 potential customers' current power, heating and cooling needs (the **Data Analysis Representations**).
22. The Initial Offering Document and Amended Offering Document contained a certificate that was required to be signed by Van Betuw as Chief Executive Officer, which stated, among other things, that the Form 45-106F19 contained disclosure of all material facts about the securities being distributed and did not contain a misrepresentation.
23. On December 23, 2022, the Offering closed. Avila raised approximately \$4 million CAD from 12 investors pursuant to the Offering in exchange for shares and warrants of Avila.

*Actual Use of December Offering Proceeds*

24. Following the closing of the Offering, Van Betuw directed Avila to send \$1.5 million CAD of the net proceeds of the Offering (the **Relevant Proceeds**) to Terra Land, and then directed Terra Land to send the vast majority of the Relevant Proceeds to MTT.
25. On December 28, 2022, shortly after the Offering closed, Avila sent \$774,109 CAD of the Relevant Proceeds to Terra Land. Later that day, Terra Land transferred \$724,050 CAD to MTT.
26. On January 12, 2023, Terra Land issued a second invoice for \$744,109 CAD to Avila, which Avila transferred to Terra Land that same day. Van Betuw specified to Terra Land the amount to be invoiced to Avila.
27. On January 13, 2023, Terra Land transferred \$728,000 CAD to MTT.
28. In total, and contrary to the Data Analysis Representations, Van Betuw directed Hernandez to send approximately \$1,452,050 CAD (€1,000,000 EUR) of the Relevant Proceeds from Terra Land to MTT.
29. The Respondents state that, since January 2023, Terra Land has provided services for Avila, including its "*Vertical Integrated Energy Business*," in ways that are separate from the Data Analysis Representations. This includes:
  - 29.1 the creation of a website for Avila's *Vertically Integrated Energy Business*: <https://terra-land.com/>;

- 29.2 providing additional business development, consultancy and construction management services for commercial opportunities that have arisen for Avila; and
  - 29.3 advancing a land development project in the Cochrane, Alberta area.
30. In essence, the majority of the Relevant Funds raised by Avila that were provided to Terra Land were used to pay the Avex Payment Obligations to MTT, instead of being used for data analysis as represented in the Amended Offering Document.

*Misleading Statements to Investors*

31. The Amended Offering Document misrepresented how Avila intended to use the Relevant Proceeds. Had Avila disclosed how it intended to use the Relevant Proceeds, as set out in paragraphs 24 to 30, that information would reasonably have been expected to have a significant effect on the market price or value of the common shares and warrants offered by Avila in the Offering.
32. The effect of the misrepresentations were that investors were deprived of the knowledge of how the Relevant Proceeds were to be used, and the risks to their investment associated with the actual use of the Relevant Proceeds.

*Misleading the Commission*

33. As the Amended Offering Document contained a misrepresentation regarding the intended use of the Relevant Proceeds, by filing the Amended Offering Document with the Commission on SEDAR, and, in particular, by falsely certifying that the Amended Offering Document contained disclosure of all material facts about the securities being distributed and did not contain a misrepresentation, Avila and Van Betuw misled the Commission in a material respect.

**Admitted Breaches of Alberta Securities Laws (Admitted Breaches)**

34. Based on the Agreed Facts, Avila admits that it:
- 34.1 contravened subsection 92(4.1) of the *Securities Act*, RSA 2000, c S-4, as amended (*Act*), by making a statement that it knew, or reasonably ought to have known, was misleading or untrue in a material respect, or which failed to state a fact necessary to make the statement not misleading, and which would reasonably be expected to have a significant effect on the market price or value of Avila's securities; and
  - 34.2 contravened section 221.1 of the *Act* by filing a misleading or untrue certificate with the Commission as part of the Amended Offering Document.
35. Based on the Agreed Facts, Van Betuw admits that he:
- 35.1 contravened subsection 92(4.1) of the *Act* by directing Avila to make a statement that he knew, or reasonably ought to have known, was misleading or untrue in a material respect, or which failed to state a fact necessary to make the statement not

misleading, and which would reasonably be expected to have a significant effect on the market price or value of Avila's securities; and

- 35.2 contravened section 221.1 of the *Act* by filing a misleading or untrue certificate with the Commission as part of the Amended Offering Document.

### **Circumstances Relevant to Settlement**

36. As a condition of settlement, Van Betuw has agreed to resign as CEO and a director of Avila.
37. As a condition of settlement, Van Betuw has agreed to receive appropriate education and training regarding the obligations of directors and officers of a reporting issuer prior to resuming his role as an officer or director of a reporting issuer.
38. The Respondents have not been previously sanctioned by the Commission.
39. The Respondents cooperated with Staff during the Investigation.
40. This Agreement has saved the Commission the time and expense associated with a contested hearing under the *Act*.

### **Settlement and Undertakings**

41. Based on the Agreed Facts and Admitted Breaches, Avila agrees and undertakes to the Executive Director of the Commission to:
- 41.1 pay to the Commission a monetary settlement of \$60,000 CAD, inclusive of \$10,000 CAD in costs, jointly and severally with Van Betuw;
- 41.2 provide training for all current officers and directors of Avila in public company obligations, governance and disclosure, as approved by the Executive Director in writing upon proof of satisfactory completion, to be completed by no later than 12 months from the date this Agreement was signed by the Executive Director (the **Effective Date**); and
- 41.3 ensure that all members of its audit committee, including those encompassed by subparagraph 41.2, successfully complete training in oversight responsibilities for audit committees as approved by the Executive Director in writing upon proof of satisfactory completion, to be completed by no later than 12 months from the Effective Date.
42. Based on the Agreed Facts and Admitted Breaches, Van Betuw agrees and undertakes to the Executive Director of the Commission to:
- 42.1 pay to the Commission a monetary settlement of \$60,000 CAD, inclusive of \$10,000 CAD in costs, jointly and severally with Avila;

- 42.2 resign all positions he may have as a director or officer, or both, of any reporting issuer as of the Effective Date;
- 42.3 be prohibited for a period of 24 months from:
  - 42.3.1 acting as a director or officer, or both, of any reporting issuer;
  - 42.3.2 engaging in investor relations activities in respect of any reporting issuer; and
  - 42.3.3 acting in a management capacity in connection with activities in the securities market in respect of any reporting issuer;

unless the undertaking set out in subparagraph 42.4 has not yet been fulfilled, in which case the prohibition continues until that undertaking has been fulfilled; and
- 42.4 pursue and complete training in best practices for public company obligations, including governance and disclosure, as approved by the Executive Director of the Commission in writing upon satisfactory completion.

#### **Administration**

- 43. The Respondents acknowledge that they received independent legal advice and have voluntarily made the admissions and undertakings in this Agreement.
- 44. The Respondents waive any right existing under the *Act*, or otherwise, to a hearing, review, judicial review or appeal of this matter.
- 45. The Respondents acknowledge and agree that the Commission may enforce this Agreement in the Court of King's Bench or in any other court of competent jurisdiction.
- 46. The Respondents understand and acknowledge that this Agreement may form the basis for securities-related orders in other jurisdictions in Canada. The securities laws of some other Canadian jurisdictions may allow for provisions of a settlement agreement made in this matter to be given parallel effect in those other jurisdictions automatically, without further notice to them. The Respondents understand and acknowledge that they should contact the securities regulator of any other jurisdiction in which they may intend to engage in any securities-related activities.
- 47. Execution and fulfillment of the terms of this Agreement by the Respondents resolves all issues relating to the conduct described above, and Staff will take no further steps against them arising from these facts. However, execution and fulfillment of the terms of the Agreement by the Respondents does not in any way prevent the Executive Director, Staff, or Staff from another division of the Commission from taking action against Avila or Van Betuw, or both, in respect of other conduct not described in this Agreement.
- 48. Notwithstanding paragraph 47, the Respondents understand and acknowledge that the Commission has entered into this Agreement in reliance on the statements made by the

Respondents in paragraph 29 above. The Commission reserves its right to take action against the Respondents if Staff later learn that any of those statements are false or materially misleading and constitute a further breach of the Alberta securities laws.

49. This Agreement may be executed in counterpart.

Signed by the duly authorized signatory of	)	
Avila Energy Corporation at Calgary,	)	Avila Energy Corporation
Alberta this 17 day of October 2024, in the	)	
presence of:	)	
	)	
<u>WITNESS NAME</u>	)	
<u>WITNESS NAME</u>	)	
	)	Per: <u>"Original signed by"</u>
<u>"Original signed by"</u>	)	Donald Benson
<u>SIGNATURE</u>	)	Chief Executive Officer

Signed by Leonard Van Betuw at Calgary,	)	
Alberta this 18 day of October 2024, in the	)	
presence of:	)	
	)	
<u>WITNESS NAME</u>	)	
<u>WITNESS NAME</u>	)	
	)	
<u>"Original signed by"</u>	)	<u>"Original signed by"</u>
<u>SIGNATURE</u>	)	Leonard Van Betuw
	)	

	)	ALBERTA SECURITIES COMMISSION
	)	
Calgary, Alberta, 21 October 2024	)	
	)	<u>"Original signed by"</u>
	)	Samir Sabharwal
	)	Executive Director