

**ALBERTA SECURITIES COMMISSION**

**DECISION**

**Citation: Re Kilimanjaro Capital Ltd., 2021 ABASC 14**

**Date: 20210202**

**Kilimanjaro Capital Ltd. now known as N1 Technologies Inc., Ashmit S. Patel,  
Jonathan Harris Levy, Zulfikar Hussein Rashid and Gregory Scott Buczynski**

**Panel:** Tom Cotter  
Kari Horn  
James Oosterbaan

**Representation:** Carson Pillar  
Colin Schulhauser  
for Commission Staff

**Submissions Completed:** March 23, 2020

**Decision:** February 2, 2021

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## I. INTRODUCTION

[1] Staff (**Staff**) of the Alberta Securities Commission (the **ASC** or the **Commission**) issued a Notice of Hearing against Kilimanjaro Capital Ltd., now known as N1 Technologies Inc. (**Kilimanjaro**), Ashmit Patel (**Patel**), Jonathan Levy (**Levy**), Zulfikar Rashid (**Rashid**) and Gregory Scott Buczynski (**Buczynski**, together with Kilimanjaro, Patel, Levy and Rashid, the **Respondents**) alleging that the Respondents engaged in a market manipulation scheme. The Notice of Hearing also alleged that Kilimanjaro and Patel violated an ASC cease trade order, that Rashid obstructed justice and provided misleading information to the ASC in the course of Staff's investigation, and that the Respondents' conduct was contrary to the public interest.

[2] Allegations against two other respondents named in the Notice of Hearing – Richard Kenneth Moore (**Moore**) and John Charles Zang (**Zang**) – were resolved by settlement agreements with Staff. Moore's settlement (the **Moore Settlement**, cited as *Re Moore*, 2018 ABASC 154) occurred before the hearing, whereas Zang's settlement (the **Zang Settlement**, cited as *Re Zang*, 2019 ABASC 171) occurred after the hearing began.

[3] Other than an adjournment application brought by Patel, none of the Respondents participated in the hearing. We were satisfied that each Respondent was properly served with the Notice of Hearing and was given an opportunity to be heard, including the ability to make written and oral argument.

## II. PROCEDURAL HISTORY

[4] The hearing began on October 1, 2018. At that time, Zang applied for certain relief under the *Canadian Charter of Rights and Freedoms*. We ruled that the Alberta Court of Queen's Bench was the more appropriate forum to bring that application, and in accordance with the *Administrative Procedures and Jurisdiction Act* (Alberta), the hearing was suspended pending Zang's court application.

[5] The Alberta Court of Queen's Bench dismissed Zang's application, and the hearing resumed on November 12, 2019. At the outset of the reconvened hearing, Staff and Zang resolved the allegations against him on the terms of the Zang Settlement. The hearing proceeded in respect of the remaining Respondents for 11 days.

[6] Staff amended the Notice of Hearing on December 10, 2019, in part due to the Zang Settlement. We dismissed an application by Patel to adjourn the hearing – he stated in his written submissions that he "cannot and will not" defend until a pending interlocutory appeal was resolved by the Alberta Court of Appeal. We did however give him and the other Respondents an additional week to respond to Staff's allegations. As none of the Respondents appeared at that time, and having received no further communication from any of them, we set a timetable for the parties to provide written and oral submissions. Staff provided us with their submissions. We received no submissions from any of the Respondents.

[7] After considering the evidence and Staff's submissions, we determined that Patel contributed to a false or misleading appearance of trading in Kilimanjaro shares; Patel, Rashid and Kilimanjaro contributed to an artificial price for Kilimanjaro shares; Patel and Kilimanjaro

breached an ASC order; and Rashid provided misleading statements to the ASC. Reasons for our conclusions are set out below.

### **III. PRELIMINARY MATTERS**

#### **A. Allegations**

[8] In their submissions, Staff withdrew certain allegations – specifically that Levy or Rashid breached s. 93(a)(i) of the *Securities Act* (Alberta) (the **Act**). Staff maintained allegations that Levy and Rashid each breached s. 93(a)(ii) of the Act.

[9] Staff also conceded that they were not relying on certain particulars in respect of allegations that Rashid provided misleading statements to Staff and obstructed justice (contrary to ss. 221.1(2) and 93.4, respectively, of the Act). In the course of Staff's oral submissions, we asked whether considerations analogous to the *Kienapple* principle in criminal law (*Kienapple v The Queen*, [1975] 1 SCR 729) could apply to these allegations. In subsequent written submissions, Staff conceded that similar conduct grounded these allegations but contended that *Kienapple* did not apply because different legal elements were required to prove these allegations. Staff also advised that they were withdrawing the allegation that Rashid obstructed justice contrary to s. 93.4. In light of this, we considered the *Kienapple* issue to be moot and we have not addressed it in our reasons.

#### **B. Standard of Proof**

[10] The applicable standard of proof for ASC enforcement proceedings is a balance of probabilities, which requires a determination of whether "it is more likely than not that an alleged event occurred", based on "sufficiently clear, convincing and cogent" evidence (*F.H. v McDougall*, 2008 SCC 53 at paras. 46, 49).

#### **C. Evidence**

##### **1. Witness Testimony**

[11] Staff called five fact witnesses: two ASC investigators, Blaine Parks (**Parks**), Denis Brière (**Brière**) and Avrom Howard (**Howard**). William Park (**Park**) was called as an expert witness. Each of the witnesses provided credible evidence and we generally accepted their testimony.

##### **(a) Expert Witness**

[12] Park, a senior director of the U.S. Financial Industry Regulatory Authority enforcement department, was called by Staff to provide expert opinion evidence about microcap trading schemes, and whether the facts of this case fit the profile of such schemes. Park also opined on the effect these schemes have on the integrity of capital markets and harm to investors.

[13] We were satisfied that Park was qualified to provide opinion evidence on microcap trading schemes involving "trading patterns that could be indicative of potential market manipulation, illegal unregistered distributions, or some other fraudulent or suspicious scheme". We considered the scope of Park's expertise to include activity causing a misleading appearance of trading activity or an artificial price for securities.

[14] We discuss the substance of Park's evidence below in our analysis of Staff's market manipulation allegations.

## 2. Documentary Evidence

### (a) Settlements

[15] In the Moore Settlement, Moore admitted that he breached s. 93.1 of the Act by failing to take the steps necessary to make himself aware of, and comply with, an ASC cease-trade order (CTO) issued on April 3, 2014, and that he failed to make inquiries into suspicious and unusual circumstances surrounding the trading of Kilimanjaro shares.

[16] In the Zang Settlement, Zang admitted that he breached s. 93.1 of the Act by directly or indirectly engaging in an act or course of conduct in furtherance of the sale of Kilimanjaro shares after the issuance of the CTO, and that he breached s. 93(a)(i) by indirectly engaging in a course of conduct that he ought to have known may contribute to an artificial price for Kilimanjaro shares. He also admitted that he failed to identify and adequately respond to suspicious circumstances surrounding Kilimanjaro's management, business operations and promotional activities.

[17] Staff relied on the Moore Settlement and the Zang Settlement as relevant evidence regarding the allegations against the Respondents. Neither Moore nor Zang testified in the hearing, although we received transcript evidence from two investigative interviews of Zang.

[18] ASC panels have previously admitted settlement agreements, subject to the weight to be given the admissions of fact in those agreements. When those facts provide background information or context to the proceedings or are consistent with other evidence, they have generally been accepted as reliable. Contentious and uncorroborated admissions of fact in settlement agreements are typically given limited or no weight, for the reasons in *Re Stewart*, 2005 ABASC 91 at paras. 20-28.

[19] We have attached little, if any, weight to the admissions of fact in the Moore Settlement and the Zang Settlement, other than uncontroversial statements or background facts, unless otherwise corroborated by other independent and reliable evidence.

### (b) Transcripts

[20] We received into evidence transcripts from Staff investigative interviews of Rashid, Buczynski and Zang. None of these individuals testified in the hearing. Consistent with ASC practice, the entire interview transcripts were admitted.

[21] Rashid was interviewed by Staff while under oath and represented by counsel on September 24 and 29, 2014. Rashid later attended voluntarily at the ASC office without counsel on October 9, 2014 to "clarify" certain of his earlier statements.

[22] Buczynski attended a compelled interview conducted by the United States Securities and Exchange Commission (SEC) on July 28, 2016, in which he was under oath and not represented by counsel. Two ASC Staff investigators participated remotely in that interview. Although Buczynski said in his interview that he spoke to Levy and Patel about how to respond to the SEC's subpoena, he did not retain them as counsel nor did he pay them any money.

[23] Zang was interviewed at least three times by Staff. Transcripts from his first two interviews, held on October 21, 2014 and on June 17, 2015, were admitted into evidence. On both

occasions, Zang was under oath and he appeared without counsel. The transcript from a third interview in 2018 was not tendered into evidence.

[24] We were hesitant to place much, if any, weight on portions of the transcript evidence that were inconsistent with or unsupported by other evidence. Specific concerns as to the weight given to the transcript evidence are set out in our reasons.

(c) **Kilimanjaro's Corporate Records**

[25] Kilimanjaro's corporate records were generally unreliable, as both internally inconsistent and at odds with other reliable evidence. Examples included documents for the appointment and resignation of Kilimanjaro directors. In evidence were resolutions documenting Rashid's purported resignation as an officer and director on August 25, 2014 and again on August 29, 2014 (effective September 8, 2014), yet he continued to be shown in other corporate records as a Kilimanjaro director after those dates, including documents purportedly signed by him on behalf of the company. In his interview with Staff, Rashid said that he did not sign any resolutions or attend any board meetings for Kilimanjaro or Kilimanjaro Canada, and that Patel (and perhaps Levy) used his signature on corporate documents as they saw fit. Most of Kilimanjaro's resolutions in evidence were titled shareholders' resolutions, even though the substance was more akin to directors' resolutions and signed by the company's apparent directors.

[26] We were hesitant to place much, if any, weight on Kilimanjaro's corporate records unless corroborated by other evidence.

#### IV. RESPONDENTS

##### A. Kilimanjaro

[27] Kilimanjaro was incorporated as an international business company in Belize on May 25, 2011. At that time, the company was named Avatar Solutions Inc. (**Avatar**), and Rashid was appointed director and issued 50,000 shares.

[28] The company changed its name to Kilimanjaro Capital Ltd. on March 28, 2013. Kilimanjaro then acquired an Alberta company, also named Kilimanjaro Capital Ltd., which Rashid (with Parks and his spouse) had incorporated on July 15, 2010 (which we will refer to as **Kilimanjaro Canada**). At that point, Kilimanjaro apparently operated entirely through Kilimanjaro Canada and assumed joint responsibility for all of Kilimanjaro Canada's contracts. Rashid, as sole director and shareholder, dissolved Kilimanjaro Canada on November 19, 2013.

[29] Kilimanjaro's shares were listed on GXG Markets (**GXG**), a Danish-regulated microcap stock exchange, from August 29, 2013 until June 11, 2014, and they traded on the OTC Markets (the **OTC**) from about October 30, 2013. In light of the company's significant connections to Alberta – its Calgary address and that Rashid, the indicated mind and management of the company, was an Alberta resident – Kilimanjaro was deemed a reporting issuer in Alberta pursuant to Multilateral Instrument 51-105 *Issuers Quoted in the U.S. Over-The-Counter Markets*.

[30] Kilimanjaro used two transfer agents: Integral Transfer Agency Inc. (**Integral**), located in Toronto, and Issuer Direct Corporation (**Issuer Direct**) as the company's US transfer agent.



**B. Patel**

[31] Patel is currently a resident of Ontario. Throughout the time relevant to Staff's allegations – from approximately November 2012 through October 2014 (the **Relevant Time**) – he resided in the US and was licensed to practice law in Illinois. He held himself out as legal counsel or as chief operating officer (**COO**) for Kilimanjaro during the Relevant Time.

**C. Levy**

[32] Levy, a resident of Hilton Head, South Carolina, was an attorney licensed to practice law in California and the District of Columbia. Levy and Patel have known one another since at least 2012 and shared a law office (Brimstone & Co.) in Washington D.C. At times, Levy held himself out as Kilimanjaro's general counsel and he also acted as the legal representative for various entities that entered into agreements with Kilimanjaro Canada. Many of these entities were said to be governments in exile – the Government of Southern Cameroons, the Biafra Government in Exile (**BGE**), the Republic of Cabinda (**Kabinda**) and the Front for the Liberation of the State of Cabinda (**Kabinda**) (**FLEC**). Levy also represented Maiombe Ouro e Minerais Ltd. (**Maiombe**) – a Belizean company. BGE and Maiombe were also shareholders of Kilimanjaro, and Maiombe was a shareholder of Kilimanjaro Canada.

**D. Rashid**

[33] Rashid, a Calgary, Alberta resident, was a director, chief executive officer (**CEO**) and control person of Kilimanjaro. Although some evidence suggested that he resigned as director, president and CEO of Kilimanjaro on either August 25 or September 8, 2014, his signature appeared on some corporate documents dated after his apparent resignation.

[34] Rashid incorporated Kilimanjaro Canada, and was its director, CEO and shareholder.

**E. Buczynski**

[35] Buczynski, using an alias "Gregory Scott" or "Greg Scott", operated an audit firm identified as Gregory Scott, LLP, LLC. He also operated Gregory Scott International Inc., which audited Kilimanjaro's financial statements.

**F. Former Respondents****1. Zang**

[36] Zang, a resident of Calgary, was a lawyer licensed to practice in Alberta (although he did not appear to provide any legal services in relation to this matter). He was the sole director and shareholder of 1649568 Alberta Ltd. (**164 Alberta**), in which he held Kilimanjaro shares.

[37] On April 17, 2014, Zang incorporated, and became the sole director and officer of, a Delaware corporation named 1649568 Alberta Ltd. (**164 Delaware**). 164 Delaware was incorporated for the purpose of opening a US brokerage account to trade Kilimanjaro shares.

[38] Zang was also a director, president and CEO of Verity Energy (**Verity**), a private oil and gas company that negotiated a letter of intent with Kilimanjaro in the Relevant Time.

## **2. Moore**

[39] Moore, a Calgary resident, was a registered representative since 1982. He was with a private securities brokerage which was acquired by Richardson GMP Limited (**RGMP**) in September 2013.

[40] Zang, one of Moore's longstanding clients, maintained a significant portfolio of securities at RGMP.

[41] Moore retired from RGMP effective November 30, 2015 and is no longer a registrant.

## **V. SUMMARY OF EVENTS**

[42] The following narrative of significant events provides context for our analysis of Staff's allegations.

### **A. Shell Company for Contingent Assets**

[43] In the fall of 2012, Levy and Patel sought a shell company for a project involving certain future contingent oil, gas and mineral rights in Africa (**FCAs**). These rights were said to be contingent on the self-determination of the countries where the FCAs were located.

[44] Patel discussed a "Cabinda" deal with a prospective investor group that included Zang. He told Zang that he would "gladly work with a cooperative accountant to capitalize the shell, roll the asset into the shell, secure the private placement, then obtain an AIM listing". The investor group objected to Patel's terms, and Patel told Levy that further negotiation was pointless.

[45] About this time, Patel contacted Rashid to explore whether the FCAs could be sold to a capital pool company of which Rashid was an officer or director. Although that company rejected the proposal, Rashid discussed it with his friend, Parks, and inquired whether another company might be interested. Parks referred the project to another capital pool company that also turned it down.

[46] Rashid was still interested in the project and pursued it through Kilimanjaro Canada – an Alberta company he had incorporated in July 2010 for a potential transaction that did not materialize. Although the terms of the arrangement between Patel and Kilimanjaro Canada were unclear and undocumented, Parks recalled that the initial understanding was that Rashid would provide the shell company and raise approximately \$30,000, and that Patel would arrange for the company to be taken public.

[47] In his discussions with Rashid about the deal, Parks thought that there were indications that made it "look like some kind of scam", specifically that Levy and Patel were seeking free-trading shares, demanding payment in advance and were in a rush to sign the deal. Parks testified that at the time he thought that Levy and Patel "simply had never done this before, and they didn't know how bad this looked . . . but it did look pretty bad".

### **B. Kilimanjaro Canada Transactions**

[48] Once an understanding was reached with Rashid, Kilimanjaro Canada began announcing several transactions in news releases.

## 1. Southern Cameroons

[49] On October 29, 2012, Levy emailed Rashid an assignment agreement between Kilimanjaro Canada and the Government of Southern Cameroons (defined in the agreement as "the unified government for Southern Cameroons including the Bakassi Peninsula") (the **Southern Cameroons Assignment**). The agreement provided that a conveyance of certain oil, gas and mineral rights would vest "upon self determination (decolonization) of Southern Cameroons", and that Kilimanjaro would pay a "signing bonus fee" of \$22,500.

[50] On October 30, 2012, Levy emailed Rashid with the text for a news release announcing the Southern Cameroons Assignment that only needed some contact information to be completed. A news release was issued on November 14, 2012 containing essentially the same content as Levy's draft.

[51] On January 30, 2013, Kilimanjaro Canada announced that it had granted Forest Gate Energy Inc. (**Forest Gate**) a 20% stake in the Southern Cameroons Assignment in exchange for 3 million Forest Gate shares, conditional on the removal of a cease-trade order against Forest Gate. It was also announced that Forest Gate's CEO, Michael Judson (**Judson**), would join Kilimanjaro Canada's board of directors. According to Kilimanjaro's corporate records, Judson became a Kilimanjaro director effective April 15, 2013.

[52] Judson told Staff that he consulted with Kilimanjaro in relation to its GXG listing, that Forest Gate never provided its shares to Kilimanjaro and that he personally received Kilimanjaro shares as a bonus for helping the company.

## 2. Cabinda Transactions

[53] In a November 19, 2012 news release, Kilimanjaro Canada announced that it had entered into an oil and mineral rights assignment agreement with the Republic of Cabinda and FLEC for a 49% interest in Cabinda's disputed offshore claims (the **Cabinda Offshore Claims**). The agreement, signed by Rashid for Kilimanjaro Canada, provided that Kilimanjaro Canada's rights would "fully vest upon decolonialization [sic] of Cabinda" and that it would pay the counterparty \$5,000. Levy was shown in the agreement as Cabinda's legal representative.

[54] In a February 5, 2013 news release, Kilimanjaro Canada announced that it had signed an oil assignment agreement with the Republic of Cabinda and FLEC granting a 49% interest in future rights to Cabinda's disputed Northeast Block (the **Northeast Block Property**).

[55] A March 18, 2013 news release announced an agreement granting an option to Forest Gate for a 49% stake in the Cabinda Offshore Claims and the Northeast Block Property. Kilimanjaro Canada also announced that it had entered into an assignment agreement with the Republic of Cabinda for "future oil and mineral rights to Cabinda's South, Central and Northern Blocks fully vesting upon international recognition of Cabinda's government" (the **Cabinda Blocks Properties**). (As discussed below, it was about this time that Kilimanjaro acquired Kilimanjaro Canada.)

### 3. **Biafran Deal**

[56] In a December 17, 2012 news release, Kilimanjaro Canada announced that it signed an assignment agreement with the BGE for certain oil and mineral rights in Biafra (the **Biafran Property**).

### 4. **Maiombe**

[57] On February 1, 2013, Kilimanjaro Canada acquired a 49% interest in Maiombe, a private Belizean company, in exchange for 9,750,000 Kilimanjaro Canada shares. Maiombe reportedly held a 20-year concession to certain property rights obtained from the Republic of Cabinda.

[58] Parks testified that Rashid did not write the news releases, and that anything written by the company was written by either Levy or Patel and Rashid put his name to it.

### C. **Kilimanjaro Canada Fundraising**

[59] As Kilimanjaro Canada was announcing these transactions, Levy, Patel and Rashid sought to raise capital for Kilimanjaro Canada.

[60] Parks said that both Patel and Rashid were under the misapprehension that he would raise capital for the company but he refused, and said that they "mostly bounced ideas off me". Parks recalled that Levy and Patel were annoyed with him because of his refusal. Levy complained in a January 7, 2013 email that "we cannot do any actual business without funds", and said that he was beginning to lose confidence in the operation and that Rashid and Parks were about to default on the deal.

[61] Rashid raised some money for Kilimanjaro Canada, primarily from his family and friends. In addition to \$15,000 of his own funds, Rashid persuaded Parks to invest \$10,000 in Kilimanjaro Canada (paid by cheque to Rashid personally dated December 15, 2012), along with \$5,000 from Parks' son. Although Parks said that his investment was in Kilimanjaro Canada, the share certificates issued to him (for 100,000 shares) and his son (for 50,000 shares) were from Kilimanjaro.

[62] Rashid also raised at least \$35,000 from his family (including his sister) and business associates in the first few months of 2013. These amounts were deposited into Kilimanjaro Canada's bank account, which Rashid had opened. Rashid also admitted in his investigative interview that he raised money from family, friends and business associates, some as investments and some in the form of personal loans, which he said were paid by bank drafts payable to Patel and forwarded directly to him.

[63] In a January 19, 2013 email, Levy reported to Patel, Rashid and Parks that he had negotiated a letter of intent with RGB Partners Trust (a trust formed under the laws of the Commonwealth of the Bahamas, **RGB Partners**), whereby RGB Partners would provide capital – up to US\$5 million – in exchange for up to 20 million shares and that RGB Partners' trustee, Clement Chigbo (**Chigbo**), might join Kilimanjaro's board of directors. At the time, Levy and Patel were seeking a listing on the London Stock Exchange's Alternative Investment Market (**AIM**) or on a junior exchange in Germany. Parks questioned whether Kilimanjaro Canada (or Kilimanjaro) ever received access to these funds, as Levy and Patel were constantly seeking money.

#### **D. Valuation Report**

[64] In early February 2013, Patel (holding himself out as Kilimanjaro Canada's COO) engaged Howard, a geologist, to provide an expert valuation of Kilimanjaro Canada's FCAs. Howard's final report, dated March 14, 2013, (the **Valuation Report**) analyzed the Cabinda Offshore Claims, the Northeast Block Property, the Cabinda Blocks Properties, the Biafran Property, as well as the rights acquired under Kilimanjaro Canada's agreement with Maiombe.

[65] Initially, it appeared that Howard struggled somewhat with the concept of contingent rights, and he communicated with Patel and Levy about valuation methodologies for Kilimanjaro's FCAs. The frequency of those communications increased after Howard provided a draft report in which he suggested a valuation in excess of several million dollars. Patel and Levy commented on the draft report, asking Howard to consider "a bottom line figure". Levy suggested Howard write in his report the following statement: "Although no known methodology exists to estimate the value of these various rights described herein, the company plausibly values the assets current worth at no less [than] 150 million dollars (US)." Howard ultimately adopted the same language in both the executive summary and the body of the Valuation Report, after satisfying himself that it "was the best way to describe what needed to be described for this particular section of the report". The Valuation Report also incorporated other text drafted by Levy about the legal status of Kilimanjaro Canada's FCAs.

[66] Howard understood that Levy was a lawyer associated with Kilimanjaro, and testified that it is not unusual to rely on outside experts when preparing a report pursuant to National Instrument 43-101 *Standards of Disclosure for Mineral Projects*.

#### **E. Pursuit of a Listing and Kilimanjaro's Acquisition of Kilimanjaro Canada**

[67] As Levy and Patel were finalizing the Valuation Report with Howard, Patel sought a listing for Kilimanjaro Canada's shares on a European exchange. It was unclear whether his focus was a listing on the GXG, AIM or the Deutsche Börse. When Patel initially discussed a listing on either on the AIM or GXG in early March 2013 with Integral, he was told that the company must have (among other things) at least 12 months' working capital and two years of audited financial statements.

[68] Patel negotiated a letter of engagement between Kilimanjaro Canada and CdC Capital GmbH (**CDC Capital**), which contemplated a listing on the Deutsche Börse by the third quarter of 2013.

[69] Later the strategy to list Kilimanjaro Canada changed to instead use a Belizean company, with Kilimanjaro Canada becoming its wholly-owned subsidiary. According to Rashid's interview transcripts, "the GXG wanted an international incorporated company" and "there was no use for Kilimanjaro Canada anymore, so they went and formed the company in Belize". Parks testified that Levy and Patel were the driving force behind the decision to list Kilimanjaro and they simply told Rashid that this was what they were going to do.

[70] On March 28, 2013, Avatar changed its name to "Kilimanjaro Capital Ltd.", and acquired all of Kilimanjaro Canada's shares in exchange for 3.5 million Kilimanjaro shares.

[71] Internal corporate records documented Kilimanjaro's acquisition of Kilimanjaro Canada, including:

- a Kilimanjaro Canada shareholder resolution approving Kilimanjaro's acquisition of Kilimanjaro Canada;
- Kilimanjaro's ratification of its acquisition of Kilimanjaro Canada as a wholly-owned subsidiary (in anticipation of Kilimanjaro becoming listed on the "Frankfurt Stock Exchange");
- appointment of Judson, Chigbo and Thomas Easton (**Easton**) as Kilimanjaro directors, with Rashid to remain Chairman of the Board and CEO of both Kilimanjaro and Kilimanjaro Canada; and
- a directors' resolution dated April 3, 2013 that Kilimanjaro assume responsibility for Kilimanjaro Canada's contracts upon the latter's dissolution.

#### **F. Audited Financial Statements**

[72] On April 29, 2013, Kilimanjaro's board of directors approved and authorized the issuance of its audited financial statements for the years ended December 31, 2011 and 2012 (the **Audited Financial Statements**). These statements were audited by Gregory Scott International.

[73] According to the Audited Financial Statements, Kilimanjaro conducted all of its business through Kilimanjaro Canada, which did not commence significant business operations until November 2012. Kilimanjaro's balance sheet included US\$92,500 for unvested mineral rights as at December 31, 2012, derived from the Southern Cameroons Assignment (US\$42,500), the Cabinda Offshore Claims (US\$5,000) and the Biafran Property transaction (US\$45,000). The balance sheet also included cash and cash equivalents of nearly US\$8 million as at December 31, 2012, most of which consisted of proceeds from a private placement in which Kilimanjaro Canada claimed to have received US\$8,116,000 in exchange for the issuance of 89,775,000 Kilimanjaro Canada shares (the **Kilimanjaro Canada Private Placement**).

[74] The Audited Financial statements, along with the Valuation Report and a letter authored by Levy, were appended to a Kilimanjaro prospectus, in connection with the company's application for a GXG listing. The documentation included a representation on behalf of Kilimanjaro that it had sufficient working capital for its present requirements and for the next 12 months.

#### **G. Zang's Private Placement**

[75] Once Kilimanjaro Canada became Kilimanjaro's wholly-owned subsidiary, and after obtaining the Valuation Report and the Audited Financial Statements, Patel continued to pursue a listing for Kilimanjaro shares, using CDC Capital as the company's agent.

[76] Despite the Audited Financial Statements showing that Kilimanjaro had working capital of approximately \$8 million, Patel emailed Zang on May 30, 2013 email, stating that "we need \$30,000 to wrap this thing up and complete the listing", for which he offered Zang 200,000 Kilimanjaro shares. About this time, Levy also emailed Zang, writing that he was "overjoyed you are getting re-involved" and that Zang would be acquiring "unrestricted pre listing shares" from one of the company officers that could be traded immediately upon listing. Zang recalled in his

interview with Staff that he and Patel discussed Verity selling a property to Kilimanjaro, and that Zang agreed to invest \$30,000 in Kilimanjaro to help facilitate the transaction for Verity.

[77] On June 4, 2013, Patel emailed Zang (with a copy to Levy) certain documents apparently signed by Rashid (an agreement and a guarantee, according to Staff) and provided instructions for a wire transfer. In the email, Patel assured Zang that he would hold the funds in his account "until the prospectus is paid for and vetted by the Danish FSA".

[78] Zang wired US\$30,000 to Patel on June 4, 2013, and Zang received 300,000 Kilimanjaro shares, which were deposited into his trading account at RGMP. In evidence was a subscription agreement dated June 8, 2013 (with Rashid's signature) reflecting Zang's US\$30,000 private placement for 300,000 Kilimanjaro shares at a price of US\$0.10 per share.

#### **H. Patel Directs Movement of Kilimanjaro Shares**

[79] On August 8, 2013, an email (purportedly from Rashid) was sent to Kilimanjaro's transfer agent, Integral, attaching a resolution authorizing Rashid to give instructions to Integral for all Kilimanjaro share distributions. In his interview with Staff, Rashid denied using the email account or even knowing of its existence.

[80] The email included a Kilimanjaro share ledger, which showed 5 million Kilimanjaro shares belonging to various individuals and entities, including:

- Rashid (215,322 restricted shares);
- Patel and Levy (215,322 restricted shares each);
- Patel, as attorney for RGB Partners (829,934 shares);
- BGE, but "payable" to Patel (250,000 restricted shares);
- Judson (25,000 shares);
- Chigbo and Easton (25,000 restricted shares each);
- Maiombe (487,500 shares);
- "EAHRHI" (which we inferred was an acronym for Ebenezer Akwanga Human Rights & Humanitarian Institute (**EAHRHI**)), but payable to Patel (250,000 restricted shares);
- C.A.A.R.C. Association (**CAARC**), but payable to Patel (250,000 restricted shares);
- Zang (300,000 shares); and
- CDC Capital (750,000 restricted shares).

[81] It was unclear how most of these parties obtained Kilimanjaro shares, though in evidence was a Kilimanjaro resolution dated November 16, 2012 signed by Rashid, Easton and Chigbo, that authorized the issuance of 215,322 shares to Patel "for cross border transactional consulting services rendered on the acquisition of shares".

[82] On August 13, 2013, Patel sent Integral a Kilimanjaro directors' resolution (dated August 12, 2013) that authorized Patel (as the company's attorney) to give email instructions on behalf of Kilimanjaro for the distribution of company shares.

[83] With this authority, Patel directed the issuance and transfer of Kilimanjaro shares in the following months by sending Integral several Kilimanjaro directors' resolutions apparently signed by Rashid, Easton and Chigbo, all of which recited that they had been approved in Kilimanjaro board meetings held on dates corresponding to the resolutions.

#### **I. Listing on the GXG**

[84] On August 29, 2013, Kilimanjaro announced that its shares were trading on the GXG.

#### **J. Somalia Asset**

[85] On September 30, 2013, Kilimanjaro announced that it had had entered into a farmout agreement to acquire a non-working interest in certain hydrocarbon assets located in Somalia (the **Somalia Asset**).

#### **K. OTC Markets**

[86] Kilimanjaro shares traded on the OTC, but the evidence was unclear on when Kilimanjaro shares began trading on that market. In evidence was a Kilimanjaro disclosure statement submitted to the OTC, dated October 30, 2013, with Rashid's signature as president and CEO of Kilimanjaro. The disclosure included:

- Rashid, Easton and Chigbo as Kilimanjaro's directors;
- RGB Partners, CDC Capital, Maiombe, Zang, EAHRHI, CAARC and BGE as control persons;
- Patel as Legal Counsel, and Greg Scott (of the firm Gregory Scott International) as the accountant or auditor; and
- Issuer Direct as Kilimanjaro's transfer agent.

[87] Subsequent Kilimanjaro news releases referred to Kilimanjaro's OTC trading symbol, KIMJF.

#### **L. Dissolution of Kilimanjaro Canada**

[88] Kilimanjaro Canada was dissolved on November 19, 2013, with Rashid identified as the holder of the corporate records upon dissolution. When confronted in his investigative interview with the fact that this occurred one day after he was contacted by ASC Staff inquiring about Kilimanjaro's status as an Alberta reporting issuer, Rashid said that the timing of the dissolution was "just coincidence".

#### **M. Chapman Resource Report**

[89] In November 2013, Kilimanjaro engaged Chapman Petroleum Engineering (**Chapman**), a reserves evaluation company, to prepare an assessment and economic evaluation of the Somalia Asset. The engagement agreement was signed on November 22, 2013 by Rashid for Kilimanjaro.

[90] Brière, an engineer with Chapman, testified that Kilimanjaro paid only \$5,000 of the \$15,000 retainer and that Chapman did not receive any further payment of the final invoice of more than \$30,000. Brière also testified that Patel provided Chapman with all of the information required for the evaluation, aside from a single email from Levy.



[91] Chapman completed a resource evaluation report for Kilimanjaro in February 2014. Brière said Patel had been "getting almost panicky about receiving" the report and sent several emails asking when the report would be finished. Before finalizing the evaluation, Chapman sent Patel a draft report, in part to help Patel prepare a news release on the report's findings.

[92] Kilimanjaro issued a news release on January 14, 2014 announcing that it had obtained an independent "NI 51-101" evaluation for the Somalia Asset, which conservatively estimated Kilimanjaro's share of the Somalia Asset to be approximately US\$187.5 million. Brière testified that he had not seen this release before its issuance and to his knowledge nobody at Chapman commented on the draft, stating that the "wording is not something that we would be writing for this kind of resource report". He explained that there was no range provided for the estimated reserves volumes, nor a risk-adjusted estimated value:

. . . there are two things about a resource report that are very important. The first thing is that there's a high, low, and a most likely case that we calculate for the volumes of oil or gas. And the second thing about a resource report is that there's a before-risk and an after-risk, a net present value at a discounted rate. So our numbers should reflect the most likely case is and then the number.

Here, he doesn't specify what case it is that he's presenting; and, secondly, he's not presenting his net present value after risk, which is considerably a lower number than he's presented here.

[93] Kilimanjaro's disclosure of the Chapman resource report did not comply with National Instrument 51-101 *Standards of Disclosure for Oil and Gas Activities (NI 51-101)*.

#### **N. Kilimanjaro's Forward Share Split**

[94] On February 6, 2014, Patel instructed Kilimanjaro's transfer agent to, in effect, combine his 215,322 Kilimanjaro shares with Levy's 115,322 Kilimanjaro shares, resulting in the issuance of a new share certificate in Patel's name for 330,644 Kilimanjaro shares. That number of Kilimanjaro shares was deposited into Patel's account with COR Clearing (**COR**), a brokerage in Omaha, Nebraska.

[95] In a February 20, 2014 news release, Kilimanjaro announced a 100-for-1 forward share split effective March 3, 2014, which increased its issued and outstanding shares to 500 million. As a result, Patel held 33,064,400 shares and Zang held 30,000,000 shares.

#### **O. Consolidation of Kilimanjaro Shares Into RGMP Accounts**

[96] Before the share split, Zang and Moore discussed problems that Moore was having trying to trade Zang's Kilimanjaro shares. Moore told Zang on February 5, 2014 that he was working on a solution, and Zang responded on February 6, 2014 that "Kilimanjaro[]"s promotion is apparently going to start soon". Zang, Moore and Patel communicated with one another to find a way to sell Kilimanjaro shares.

[97] Moore advised Zang on March 18, 2014 that Kilimanjaro had appointed a market maker and that Zang now held 30 million Kilimanjaro shares as a result of the share split. Zang asked whether Kilimanjaro shares were trading and instructed Moore to do a test trade at \$0.02. A week later, Moore confirmed that he was able to sell 300,000 of Zang's Kilimanjaro shares at \$0.02 per share.

[98] Zang reported this news to Patel in a March 25, 2014 email, stating: "[A]s we can now move the paper we should talk how we now proceed". In his first investigative interview with Staff, Zang said that Patel wanted to sell shares he held in trust for, or on behalf of, certain African clients and Zang agreed to transfer Patel's shares to 164 Alberta's trading account, thinking that the easiest way to sell Patel's shares was from an existing trading account. Zang also agreed to provide Patel with trading authority over those shares.

[99] Accordingly, Patel instructed Kilimanjaro's transfer agent to transfer 202,183,700 Kilimanjaro shares to 164 Alberta, comprised of shares belonging to RGB Partners (55,993,400 shares), Maiombe (48,750,000 shares), Velikan Inc. (22,440,300 shares), BGE (25 million shares), CAARC (25 million shares) and EAHRHI (25 million shares). Those shares were deposited into 164 Alberta's RGMP account by March 27, 2014, with an aggregate book value of more than \$3.2 million.

[100] Zang gave Patel trading authority for 164 Alberta's RGMP account. RGMP eventually rejected Patel's authority to trade 164 Alberta's account (for lack of an original signature on the form), but he was able to direct trades in 164 Alberta's account in the interim.

[101] We discuss below the trading of Kilimanjaro shares in Zang's and 164 Alberta's RGMP accounts.

#### **P. Zang's March Loan**

[102] About this time, Zang agreed to lend US\$20,000 to Kilimanjaro (the **March Loan**) to help fund the promotion of Kilimanjaro shares. He provided Patel with a document entitled "Promissory Note and Security Agreement" on March 26, 2014, which stipulated that the loan proceeds were to be used "solely for the purpose of the retention of an Investor relations firm and for no other purpose". Zang advanced US\$22,136 to Patel on March 27, 2014.

[103] Patel and Zang continued to discuss funding the Kilimanjaro share promotion. In an exchange of emails culminating on March 27, 2014, Patel told Zang that "[w]e have to pay them 40k . . . any chance you would be willing to make up the difference? Obviously it will be coming back to you." Zang replied that he could "cover it." Patel reiterated in an April 2, 2014 email to Zang that "we will need to fund our promoters the 40k for next by Friday at the latest. I wanted to give you the heads up so you could work it out with Rick or however to get the funds on the way". Patel added that "[w]e definitely want to keep this going because they have a game plan to break this through 3 cents next week and maybe up to five." Zang replied: "So I thought we were paying back my \$23k and taking the \$40k from the sales that have been made. No?" Patel confirmed the next day: "[t]hat's the exact plan. We are going to have make sure we get the 40k out from the account. Also your 23k will be in there too by the end of the week once I push through some orders tomorrow".

#### **Q. Tout Campaign**

[104] According to stockpromoters.com (a website that aggregates promotional touts for public companies), 97 promotional touts for Kilimanjaro were disseminated by various stock promoters from March 27, 2014 through to August 20, 2014 (the **Tout Campaign**). Park testified that this

website is a reliable source, and one that he often used when investigating suspicious trading schemes.

[105] The summary information compiled by Staff from these touts – including the date of the tout, the promoter identity, the amount (if any) paid for the promotion and the identity of the party who paid for the promotion, together with the volume of Kilimanjaro shares traded on the date of the promotion – indicated that the promoters involved in the Tout Campaign collectively received \$319,500 for promoting Kilimanjaro shares. We did not receive evidence of payments actually made to promoters, or who made any such payments.

[106] Staff investigators searched the domain names used to send the touts and found that a registered domain often owned several websites that disseminated the touts.

[107] We received into evidence the following touts:

- an email dated April 2, 2014 from "High Rising Stocks", using blatantly promotional language, including reference to established rights valued at \$187 million;
- an email dated April 3, 2014 from High Rising Stocks, referencing a news release issued by Kilimanjaro, again describing the company's business with hyperbolic content; and
- an email dated August 7, 2014 from Jet Life – a penny stock promotional company – claiming that Kilimanjaro "has acquired an extensive portfolio of oil, gas and mineral assets in Africa".

[108] Staff said that they obtained similar materials from other stock promoters that touted Kilimanjaro's business.

## **R. Kilimanjaro's News Releases**

[109] In the months March through August 2014, corresponding to the Tout Campaign, Kilimanjaro issued a series of news releases, including:

- March 27 announcing that a favourable decision relating to the status of its Cabinda interest was expected to be ratified by the African Union within 90 days;
- April 2 announcing progress on the Somalia Asset;
- April 3 first-person narrative from Rashid providing updates on various Kilimanjaro projects;
- April 15 updating on Kilimanjaro's "evolving interests in Somalia";
- April 28 giving a "non material update on the Company's economic plan for Matebeleland", although there was no statement in the release (or otherwise in evidence) that Kilimanjaro had any property interests in the area;
- May 13, 21 and 27, in relation to Kilimanjaro's stated exploration program for the Somalia Asset (the latter release also announced Kilimanjaro's intention to withdraw its listing from the GXG effective June 11, 2014 and that Kilimanjaro would continue trading on the OTC);

- June 17, 2014 announcing that Kilimanjaro had suspended all operations in the Somalia region due to deteriorating security conditions (along with a reference to restrictions from the GXG regarding discussion of FCAs, which were said to no longer apply);
- June 24 announcing that Kilimanjaro had entered into a letter of intent to acquire certain oil and gas assets located in southern Alberta from Verity, followed by another news release on June 30 announcing receipt of a technical report for those assets;
- July 17 announcing that Kilimanjaro had expanded its letter of intent with Verity to include additional Alberta assets;
- August 8 announcing that Kilimanjaro had entered into an agreement in principle with Sika Resources (**Sika**) to acquire an interest in resource assets in Tanzania, followed by an August 11 announcement that the agreement with Sika was signed; and
- August 11 in the form of questions and answers with Rashid in which he discussed developments in Somalia, Kilimanjaro's FCAs in Cabinda, Biafra, and Southern Cameroons, and the transaction with Sika.

[110] We were satisfied that Patel prepared most, if not all, of these news releases. He drafted one of the releases announcing Kilimanjaro's pending transaction with Verity, which he sent to Zang for comments. He also was involved in preparing the earlier news release regarding Chapman's report. Other evidence similarly indicated that Patel had drafted, or at least coordinated the issuance of, various Kilimanjaro news releases with the promoters.

#### **S. Cease Trade Order**

[111] Just as the Tout Campaign began, the ASC issued the CTO on April 3, 2014 pursuant to s. 33.1 of the Act, directing that trading or purchasing of Kilimanjaro securities cease. The CTO recited that Kilimanjaro, a reporting issuer under the Act, had failed to file its annual information form for the year ended December 31, 2013, as required by s. 146 of the Act. Leading up to the CTO, Staff had identified significant trading of Kilimanjaro shares in an RGMP account.

[112] Kilimanjaro's transfer agent emailed Patel with a copy of the CTO on April 4, 2014, telling Patel that he would need to contact the ASC to advise that the company is not in Canada anymore. Patel informed Zang of the CTO on April 5, 2014.

#### **T. Kilimanjaro Shares Transferred to US Brokerage Accounts**

[113] After Moore asked Zang in an email whether "they are going to get it going again soon", Zang replied on April 17 that "we are changing strategies for Kilimanjaro". At the time, Zang had 29,500,000 Kilimanjaro shares in his personal RGMP account and 200,678,020 Kilimanjaro shares in 164 Alberta's RGMP account.

[114] The new strategy evidently involved the transfer of Kilimanjaro shares from the RGMP accounts to US brokerages, from which Kilimanjaro shares were traded despite the CTO. Zang described the process in his first investigative interview, stating that Patel facilitated the transfer of Kilimanjaro shares to COR in the US by obtaining a legal opinion and opening brokerage accounts for Zang and 164 Alberta.

### 1. Incorporation of 164 Delaware

[115] The first step in the new strategy was incorporating a new company in the US. On April 17, 2014, 164 Delaware was incorporated under the laws of Delaware, with Zang as the sole director.

### 2. Opening of COR Brokerage Accounts

[116] On April 22, 2014, Patel sent documentation, signed by Zang, to COR to open accounts for Zang and 164 Delaware. As mentioned, Patel already had a COR account which he was using to trade Kilimanjaro shares.

### 3. Transfer of Kilimanjaro Shares from RGMP Accounts

[117] Near the end of April 2014, Zang made arrangements with RGMP to transfer the remaining Kilimanjaro shares in Zang's and 164 Alberta's RGMP accounts to US brokerages. He initially instructed RGMP to send the shares to Patel in the US, but after he was told by Patel that "[i]t would be best if they send you the cert though", Zang emailed Moore's assistant on April 22 and asked "instead can you hold the shares for me to pick them up?"

[118] On April 25, 2014, Patel sent a Kilimanjaro resolution (signed by Rashid, Easton and Chigbo) to Kilimanjaro's transfer agents, instructing them to immediately re-issue six share certificates – five to Zang's numbered company (it did not specify whether it was 164 Alberta or 164 Delaware) representing an aggregate of 200,678,020 shares and one to Zang for 29,500,000 shares.

[119] On April 29, 2014, 200,678,020 Kilimanjaro shares were transferred out of 164 Alberta's RGMP account.

### 4. Deposit of Kilimanjaro Shares Into COR Brokerage Accounts

[120] On May 7, 2014, Patel emailed share deposit forms to COR for 49.5 million Kilimanjaro shares held by 164 Delaware. Among these documents was a "Heightened Risk Security Policy Questionnaire" signed by Zang as 164 Delaware's director on May 3, 2014 (the **Security Questionnaire**), an opinion letter dated April 30, 2014 from a Florida attorney, Thomas Craft, referring to a contemplated sale by 164 Delaware of 49,500,000 Kilimanjaro shares (the **Craft Opinion**), and a Share Compensation Agreement between Kilimanjaro (with Rashid's signature) and 164 Delaware dated March 27, 2013 (the **Share Compensation Agreement**).

[121] Patel also emailed COR share deposit forms for 29.5 million Kilimanjaro shares held by Zang, including an opinion from Craft dated April 30, 2013, similar to the Craft Opinion, again referring to a contemplated sale of Kilimanjaro shares.

[122] COR approved both share deposits in an email to Patel on May 27, 2014 and requested that the certificates be sent to COR, and the next day Zang sent COR the certificates for 49,500,000 shares and 29,500,000 shares.

**(a) Security Questionnaire**

[123] The Security Questionnaire pertained to the deposit of 49.5 million Kilimanjaro shares into 164 Delaware's account. Zang first completed a security questionnaire indicating that (a) 164 Delaware held 200,678,020 Kilimanjaro shares, and (b) the aggregate number of shares beneficially held in the last 12 months was 230,678,020. The plan then changed and Patel had Zang sign a new Security Questionnaire so that only 49.5 million shares would be deposited in 164 Delaware's account. This version of the questionnaire indicated that 164 Delaware beneficially owned or controlled 49.5 million shares and that the aggregate number of shares it beneficially owned in the last twelve months was 79 million. Another statement in the account opening forms – that 164 Delaware acquired the shares on March 27, 2014 – was clearly false, as 164 Delaware did not then exist.

**(b) Craft Opinion**

[124] The documents sent by Patel to COR included the Craft Opinion which concluded that 164 Delaware could sell the 49.5 million Kilimanjaro shares. The opinion was premised on five representations made by Kilimanjaro and 164 Delaware, including that the shares were "beneficially owned per compensation agreement dated March 27, 2013", 164 Delaware was not an officer, director or manager of Kilimanjaro nor "an affiliate", and that Kilimanjaro was not a shell company and had not been such in the past 12 months.

[125] Patel had previously told Zang that a legal opinion was required to deposit the Kilimanjaro certificates into the COR brokerage accounts and that he had "a guy who does it . . . [for] \$700 a cert". Patel also told Zang on April 22 that he should use the balance of funds from the RGMP accounts to pay for the legal opinion. Patel gave Zang wire instructions on April 30, 2014 to pay for two legal opinions – one for 164 Alberta's shares and another for Zang's shares – and Zang wired US\$1,400 to J. Craft Jr. LLC the next day.

**(c) Share Compensation Agreement**

[126] The Share Compensation Agreement recitals included statements that 164 Delaware had agreed to provide Kilimanjaro with technical services in exchange for share compensation of 495,000 Kilimanjaro shares.

[127] The agreement was an obvious fabrication, since 164 Delaware did not exist on the date of the agreement – March 27, 2013. It, along with the directors' resolution authorizing the Share Compensation Agreement, appeared to be created solely for the purpose of supporting the representations upon which the Craft Opinion was based. This conclusion is consistent with other evidence, notably an email Zang had sent himself on May 1, 2014, in which he wrote that "[o]ne minor thing was he wanted [to] change the personal sub to get rid of the guarantee etc. And wanted to do a sub for the company which showed it was providing a service for the shares." This note was sent the same day Zang apparently created the Share Compensation Agreement, which he sent to Patel in a separate email the same day.

[128] On June 7, 2014, Zang gave Patel trading authority for his COR account, and the next day he gave Patel trading authority over 164 Delaware's COR account.

## **U. Verity Deal**

[129] Kilimanjaro announced in a news release dated September 17, 2013 that it had entered into negotiations to acquire a conventional oil and gas asset in North America. On September 19, 2013, Zang emailed Verity management and directors, advising that he was working closely with the founders of Kilimanjaro, who were looking for production and reserves and had proposed acquiring a small interest in a Verity-controlled asset in exchange for Kilimanjaro shares.

[130] In a letter dated June 13, 2014, Verity offered to sell certain Alberta properties to Kilimanjaro for \$1 million, to be paid by 40 million Kilimanjaro shares "tradeable on the Over the Counter Pink Sheets Market". That offer was amended by a letter from Verity to Kilimanjaro dated July 16, which included an additional property and increased the cost to \$4 million. According to Zang, the transaction did not progress beyond the July 16 letter of intent.

## **V. Trading of Kilimanjaro Shares**

[131] From March 7, 2014 through to September 8, 2014, Kilimanjaro shares were sold from Zang's and 164 Alberta's RGMP accounts, and from the COR accounts in the name of Patel, Zang and 164 Delaware.

### **1. RGMP Accounts**

[132] From March 25 to 27, 2014, 500,000 Kilimanjaro shares were sold from Zang's RGMP account at prices ranging from \$0.02 to \$0.025 per share, with net proceeds of more than \$11,000.

[133] From March 27 to April 4, 2014, 1,505,680 Kilimanjaro shares were sold from 164 Alberta's RGMP account at prices ranging from \$0.0154 to \$0.028 per share, with net proceeds of more than \$36,000. These sales were all directed by Patel, who had trading authorization for this account. As the CTO did not immediately come to Moore's attention, some Kilimanjaro shares – 105,000 in total – were sold from 164 Alberta's RGMP account after the CTO had been issued. After trading stopped, 164 Alberta held 200,678,020 Kilimanjaro shares in its RGMP account.

[134] On April 17, 2014, Patel told Zang in an email that he could repay his loan and deduct the tax, and that "we will need to appease the shareholders with the remainder until we set you up with Cor Clearing" (which he indicated "[h]opefully we will get that rolling today"). After deducting Zang's loan and capital gains tax withholding, the account balance was \$479.

### **2. Patel's COR Brokerage Account**

[135] As mentioned, Patel combined his Kilimanjaro shares with Levy's in February 2014, which were then deposited into Patel's COR account on March 4, 2014. Following Kilimanjaro's forward share-split, Patel held 33,064,400 Kilimanjaro shares in that account.

[136] From March 7 through to September 4, 2014, Patel sold all of the Kilimanjaro shares in his COR account, with gross proceeds of approximately US\$100,000. Aside from nominal transactions described in the account statements as "money market activity", all trading in Patel's COR account were sales of Kilimanjaro shares, with the sole exception of the purchase of 100,000 shares on May 12, 2014 at prices ranging from \$0.007 to \$0.0095 per share, at a total cost of US\$868.50.

[137] A total of US\$98,600 was withdrawn from Patel's COR account during the Relevant Time period. On at least five occasions, Patel emailed instructions to wire funds from his COR account to his personal bank account. His COR account statements showed withdrawals of US\$16,600 on April 24, 2014, US\$20,000 on June 3, US\$5,500 on June 27, US\$6,000 on August 4, and US\$6,100 on September 8.

### **3. 164 Delaware's COR Brokerage Account**

[138] On June 3, 2014, 49,500,000 Kilimanjaro shares were deposited into 164 Delaware's COR account. From July 17 through to September 5, 2014, all of these Kilimanjaro shares were sold from that account at prices ranging from \$0.0034 to \$.0002 per share, with gross proceeds of more than US\$47,000. These trades were all directed by Patel, who had been given trading authorization over the account on June 10, 2014.

[139] On September 8, 2014, Patel instructed COR to wire the remaining funds from 164 Delaware's account to his personal US account, which corresponded to US\$47,300 wired from 164 Delaware's account on September 12, 2014. However, there was also a deposit of US\$47,260 on September 12 into 164 Delaware's account, followed by another wire of US\$47,300 sent from that account on September 15. Zang received this second wire on September 15, which was consistent with his email instructions to COR late on September 12 to wire US\$47,300 from 164 Delaware's account to his personal bank account. In a separate email that day, Zang instructed that US\$6,000 be wired from his COR account to his personal bank account.

[140] It appeared that some of the share sales proceeds in 164 Delaware's and Zang's account were shared with Patel. On September 15, 2014, Patel emailed Zang with wire instructions for Patel's bank account, stating: "[y]ou will want to request the wire(s) from Cor and when they finally hit your account send only \$16,500USD to my account below".

[141] Zang sent Patel an email on September 30, 2014 indicating that trading in his personal account and the corporate account did not occur "evenly" as was intended, and he provided what appeared to be a reconciliation of trading from the two accounts. He also stated that "we discussed that 1/3 of the proceeds from the Corporate Account would go to me", and that he was willing to send a cheque to Patel for US\$5,744.03 upon Patel's confirmation. Later that day, Patel responded "[w]e are ok on the \$6200ish figure" and provided Zang with an address for the payment.

### **4. Zang's COR Brokerage Account**

[142] On June 3, 2014, Zang's 29,500,000 Kilimanjaro shares were deposited into his COR account. From September 3 through to September 8, Patel directed the sale of all of those shares at prices ranging from \$.001 to \$.002 per share, with gross proceeds of \$6,154.

[143] On September 12, 2014, US\$6,100 was wired from Zang's COR account to his personal US bank account.

## **W. Subsequent Developments**

[144] A news release dated October 30, 2014, using Kilimanjaro's OTC trading symbol and its Belize address, stated that the directors of Tremissis Inc. had resigned and were replaced, and that



the company would focus on providing business services in Asia and had signed a resource advisory agreement with the West Papua Liberation Organization.

[145] On January 29, 2015, Tremissis Inc. changed its name to N1 Technologies Inc. The stated business for N1 Technologies related to nanotechnology, although it used the same Belize address as Kilimanjaro and continued to list Patel as the company's legal counsel and Greg Scott as its auditor/accountant. N1 Technologies' audited financial statements for 2013 and 2014 contained no reference to Kilimanjaro or its FCAs.

## **VI. STAFF INVESTIGATION**

[146] Kilimanjaro came to Staff's attention in late 2013 from promotional activity and disclosure of the Kilimanjaro Canada Private Placement. Inquiries from the ASC's Corporate Finance department did not prompt satisfactory answers from the company. At the time, Kilimanjaro's head office was in Calgary, and the president of the company, Rashid, was a Calgary resident who was not registered to sell securities under the Act.

[147] After obtaining a court order requiring Rashid to attend an investigative interview, Staff interviewed Rashid under oath on September 24 and 29, 2014. Staff described Rashid's evidence from these interviews as inconsistent, contradictory at times and nonsensical.

[148] In his September 24, 2014 interview, Rashid told Staff that he did not control Kilimanjaro and was only the company's figurehead because he spoke "African language". He told Staff that Patel was the best person to answer their questions, as Patel took care of all the accounts and company documents, and Rashid had authorized Patel to use his electronic signature. Rashid denied communicating with Kilimanjaro's auditors and said that Patel "was looking after all of this stuff", although he also said that the company did not receive the reported \$8 million from the Kilimanjaro Canada Private Placement and Patel told him that this was actually a Kilimanjaro line of credit. Rashid denied raising money from investors for Kilimanjaro or Kilimanjaro Canada, or having any involvement with seed shareholders, and said that he and Parks personally invested \$30,000 in Kilimanjaro.

[149] Rashid made statements in his September 29, 2014 interview. He also told Staff that he did not write or review any of Kilimanjaro's news releases before they were publicly disseminated, nor did he ask to see the news releases before they were issued and he did not care what they said (even though they contained quotes attributed to him) because he "wanted to see a deal go through; that's all". Rashid said that the news releases were most probably drafted by Patel, although Rashid received and paid invoices for the news releases with his own money. Rashid also denied attending any of Kilimanjaro's board of directors meetings, or knowing any Kilimanjaro shareholders (aside from his son), and said that he had never spoken with Chigbo, a Kilimanjaro director and shareholder.

[150] On October 9, 2014, Rashid voluntarily attended another interview, without counsel, "to clarify some items . . . that weren't correct from the first and second interview". At that time, he told Staff that he was confused in his previous interview, which he attributed to a common over-the-counter pain medication he was taking in relation to an unspecified ailment. He said that he knew the seed shareholders and had pitched his friends, family and business associates to invest

in Kilimanjaro. He did not address his other statements from the earlier interviews, and reiterated that "technically, I was more or less, you know, like a figurehead and helped them to, you know, get them the money to pay for whatever they had to pay".

[151] Staff testified that Rashid did not appear to be under the influence of drugs during his interviews.

## VII. ANALYSIS OF MARKET MANIPULATION ALLEGATIONS

### A. The Law

[152] The integrity of the capital market is premised on market participants engaging in ordinary course arm's length transactions, thereby allowing the price of publicly-traded securities to be established by genuine market supply and demand (*Re Podorieszach*, [2004] A.S.C.D. No. 360 at paras. 69-70, 84-86). Market activity that provides a false impression of the price or value of, or level of interest in, a security is inconsistent with a fair and efficient capital market (*Re Workum and Hennig*, 2008 ABASC 363 at para. 1141 (affirmed *sub nom. Alberta (Securities Commission) v. Workum*, 2010 ABCA 405)).

[153] Section 93(a) of the Act is intended to protect against the manipulation of the appearance of a security's trading activity or the apparent price for a security. In the Relevant Time, s. 93 provided:

- 93 No person or company shall, directly or indirectly, engage or participate in any act, practice or course of conduct relating to a security . . . that the person or company knows or reasonably ought to know will
- (a) result in or contribute to
    - (i) a false or misleading appearance of trading activity in a security . . . , or
    - (ii) an artificial price for a security . . . ,

[154] To establish a contravention of s. 93(a), Staff must prove that the respondent's activity constituted or involved an act, practice or course of conduct relating to a security that would have resulted in or contributed to a false or misleading appearance of trading activity or an artificial price for the security, which the respondent knew or reasonably ought to have known of (*Re De Gouveia*, 2013 ABASC 106 at para. 99, *Re Cohodes*, 2018 ABASC 161 at para. 42). Also necessary is the establishment of a causal connection between the impugned activity and the potential for the activity to result in a misleading appearance of trading activity or artificial price for the security (*Re Lim*, 2017 BCSECCOM 196 at paras 126-130).

[155] There was no dispute – and we consider it self-evident – that Kilimanjaro shares are securities within the meaning of s. 1(ggg) of the Act.

#### 1. False or Misleading Appearance of Trading Activity

[156] A false or misleading appearance of trading activity may result where it is motivated by something other than *bona fide* investment intent and thereby creates a distorted projection of supply or demand (or both) for a security (*De Gouveia* at para. 97).

[157] As noted by the British Columbia Securities Commission panel in *Re Siddiqi*, 2005 BCSECCOM 416 at para. 118, the analysis of whether certain trades give rise to a misleading appearance of trading activity requires scrutiny of the respondent's conduct as a whole to determine whether otherwise legitimate trading practices are used with an intent to manipulate the market:

... a person manipulating the market might use a variety of tools to do the job. Some of these tools are not inherently illegitimate trading practices – they only become so when employed with the intention of manipulating the market. It is also necessary to consider the conduct of the alleged manipulator as a whole. Some trading and order activity may not seem manipulative when viewed in isolation, but is clearly so when considered along with all of the manipulator's other conduct.

[158] In some cases, a seemingly manipulative scheme involving share sales may not necessarily give rise to a false or misleading appearance of trading activity where the impression of supply and demand is not distorted and real trades are transacted (*Re Coastal Pacific Mining Corp.*, 2016 ABASC 301 at paras. 41-45).

[159] In very general terms, the distinction between manipulative trading schemes that result in a misleading appearance of trading activity (under s. 93(a)(i)) and an artificial price (under s. 93(a)(ii)), is that the former often involves a distortion of the quantitative nature of trading, whereas the latter more commonly relates to the qualitative nature of the security being traded. For example, wash trades and matched trades – where there are no genuine counterparties to the trades – are archetypal means of creating a misleading appearance of trading activity by giving the impression of considerable interest in the subject security from the number of orders and trading volumes.

[160] On the other hand, as discussed *infra*, an artificial price more typically results from a distorted impression of the quality of the issuer's business prospects, financial results and similar attributes pertaining to the value underlying the issuer's securities. The question of motive can be more relevant in discerning the intent of the impugned trading activity in the case of allegations involving a misleading appearance of trading activity, than in other cases involving artificial price where the intent of the alleged conduct is objectively more obvious.

[161] These generalizations will admit of several exceptions as well instances where the impugned trading activity results in both a misleading appearance of trading activity and an artificial price. As will be discussed in these reasons, there can be instances of small uneconomic trades that involve genuine counterparties, where the reason for the trade is not immediately apparent on its face, but other evidence indicates an intention to create a misleading appearance of trading activity or an artificial price (or both).

## 2. Artificial Price for a Security

[162] Artificial price has been described as "a price that differs from the price that would result from the market operating freely and fairly on the basis of information concerning true market supply and demand" (*Podoriesz* at para. 85). Activity meant to either raise or lower the price of a security to a level different from the price that would otherwise result from normal market conditions will produce a distorted and artificial price, as does activity intended to maintain the price when it would otherwise have risen or fallen (*Podoriesz* at para. 88).

[163] A relevant consideration to determine whether a price is artificial is "whether one party or another to a transaction is or is not acting in response to real demand for or supply of a security", and taking into account the circumstances surrounding a transaction to determine whether the transaction reflects genuine supply and demand (*Podoriesz* at para. 89).

### 3. Causal Connection

[164] Section 93(a) of the Act casts a potentially wide net. It applies to conduct relating to a "security", a term that is necessarily broad (*R. v Stevenson*, 2017 ABCA 420, leave to appeal to SCC refused 2018 CanLII 80683), as well as to both direct and indirect conduct. The provision's broad scope is narrowed by the requirement that the misconduct must result in or contribute to market manipulation.

[165] Market manipulation cases often involve the purchase and sale of securities using certain trading practices – market domination, wash trades, high closes, uptick trades and uneconomic trading – considered "hallmarks of market manipulation" (see *Siddiqi* at para. 114, *Workum* at para. 1146). Even so, other security-related conduct may also contravene market manipulation provisions, including conduct that involves "the dissemination of information (or misinformation) which is alleged to have distorted genuine supply or demand by making a security appear more or less desirable than it might otherwise" (*Cohodes* at para. 44). Determining whether a respondent directly or indirectly contributed to market manipulation requires a fact-specific analysis that considers the context of the impugned conduct and its causal proximity to the manipulative activity:

There is a spectrum of conduct that is tangential to the core trading and promotional efforts associated with a market manipulation. Where various conduct fits within this spectrum will be highly factual and context specific. Generally, where the conduct is further removed from the actual improper trading or specific improper promotional activities, it will be more difficult to establish that that conduct "results in" or "contributes to" a misleading appearance of trading activity or an artificial price for a security. Examples of conduct on this end of the spectrum would include efforts to establish a general business website for an issuer, maintenance of an issuer's securities regulatory filings, instructing escrow agents or transfer agents and the mere assisting in the opening of brokerage accounts on behalf of others. (*Re Cerisse*, 2017 BCSECCOM 27 at para. 142)

### B. Park's Opinion Evidence

[166] Park gave expert opinion testimony on suspicious microcap liquidation schemes including pump and dump schemes. We also received a written report from Park in which he set out his analysis.

[167] According to Park, suspicious microcap liquidation schemes generally involve the coordinated effort of a small group of individuals who secretly exercise control over an issuer and its share transactions. Suspicions arise when these two elements are coordinated by the same individual or group of individuals, as it creates a "perfect storm" that can be exploited by enabling undisclosed control persons to engage in promotion to stimulate demand for the issuer's shares while simultaneously liquidating the issuer's shares into the market. The combination of control and influence over the issuer and its securities transactions provides an "appearance of independent decisions and legitimate transactions" and gives "an extra layer of protection to the perpetrators to help avoid regulatory scrutiny".

[168] The first element – control or influence over an issuer – arises where officers or directors publicly appear as an issuer's control persons but act as nominees who take direction from an undisclosed third party or otherwise allow the third party to act as the true control person of the issuer. With the ability to control the issuer's decisions, demand for the issuer's shares can be generated by the aggressive dissemination of news releases touting the issuer's business prospects.

[169] At the same time, a promotional campaign may be orchestrated through email, website newsletters or mailings with optimistic share price projections based on the issuer's apparent success (often using misleading or false information). This promotional activity creates what Park described as compromised or illegitimate demand by placing upward pressure on the share price unsupported by material information. This distorted demand may increase the issuer's share price, or "help offset . . . the downward pressure from selling, keep it from going to zero".

[170] The second element – control and influence over an issuer's securities transactions – occurs when the issuer's shares are transferred to brokerage accounts controlled by the undisclosed control persons, where the shares are traded and ultimately liquidated. Park observed that the deposit of shares is usually accompanied by documentation, such as a legal opinion on the tradability of the shares, that allow the shares to be sold in the market. An additional element sometimes present is where the undisclosed control persons direct trading activity in other accounts after obtaining trading authority from the beneficial account holders.

[171] Park identified additional indicia of microcap manipulation schemes, including:

- a microcap issuer whose securities are traded over the counter – these securities tend to be ripe for possible manipulation as they are generally not household name stocks and may be sensitive to promotional campaigns;
- public disclosure containing material misrepresentations, omissions or falsehoods, including misrepresentations in publicly-filed, audited financial statements that may be "distorted in such a way to make the . . . financials of the issuer look better than they really are";
- the failure to comply with certain SEC regulatory requirements – including registration requirements (and exemptions therefrom) meant to ensure investors have adequate, material information to make investment decisions, and the restriction on control-person sales of more than 1% of an issuer's outstanding shares in any 90-day period (if the issuer's shares are not listed on an exchange);
- trading in a brokerage account involving only one microcap equity; and
- evidence of certain deceptive trading practices, such as "rigged or prearranged trading", that give an appearance of legitimate market volume and demand to stabilize or increase share price, as well as trading specifically meant to influence the closing price – a practice he referred to as "marking the close".

[172] Park observed that Kilimanjaro exhibited several characteristics of a microcap liquidation scheme in which a significant number of shares were sold from accounts controlled by a small number of people having close ties to the issuer. He stated in his report:

Based on my review and in my opinion, the circumstances in this case appear consistent with the indicators of a potential Microcap Liquidation scheme. A common trait with such schemes is that the significant selling comes from a concentration of individuals usually closely linked, often secretly, to the issuer or a promoter of the issuer. Another common trait is that when the individuals have significant amounts of shares to sell, such schemes may involve the use of strategically timed trading, press releases, and promotion campaigns to help generate some type of demand. Although Rashid held the title as President and CEO of Kilimanjaro, based on testimony and documents, there are certainly red flags of significant undisclosed control by Patel of the issuer, issuer communications, and issuer shares. Furthermore, based on testimony and documents, there are red flags of control and direction by Patel over shares deposited into accounts and liquidated into the market place. The share amounts sold into the market place by the accounts during a time of issuer press releases, issuer public filings, and stock promotion represented substantial percentages of total market volume and unregistered shares that far exceeds limitations Rule 144 places on control person sales. Without adequate disclosures of the control arrangements or registration of the shares sold, it raises the question how the investing public and market participants that happened to have bought Kilimanjaro shares in the market place (possibly after seeing trading volume, press releases, or stock promotion) would ever know that their buying was contributing to the demand necessary to offset a significant microcap liquidation effort.

[173] From his review and analysis of materials provided to him, and based on his experience, Park opined that Kilimanjaro was a microcap liquidation scheme.

### **C. Allegations of False or Misleading Appearance of Trading Activity**

[174] As mentioned, Staff withdrew allegations that Levy and Rashid breached s. 93(a)(i) by contributing to a false or misleading appearance of trading.

[175] Staff maintained that Patel's purchase of 100,000 Kilimanjaro shares in his COR account on May 12, 2014 (at a total cost of US\$868.50) contributed to a misleading appearance of trading activity in Kilimanjaro's shares. This was Patel's only known purchase of Kilimanjaro shares in the Relevant Time, and the order was executed as follows:

- 30,000 Kilimanjaro shares for US\$292.50, at a price of US\$0.0095/share;
- 20,000 Kilimanjaro shares for US\$148.50, at a price of US\$0.007/share;
- 20,000 Kilimanjaro shares for US\$195.00, at a price of US\$0.0095/share;
- 10,000 Kilimanjaro shares for US\$77.50, at a price of US\$0.0075/share;
- 10,000 Kilimanjaro shares for US\$82.50, at a price of US\$0.008/share; and
- 10,000 Kilimanjaro shares for US\$72.50, at a price of US\$0.007/share.

[176] Patel's purchase of 100,000 shares occurred when he was selling more than 33 million Kilimanjaro shares from his COR account. Kilimanjaro trading data from that week showed the following:

<b>Date</b>	<b>Patel's Transactions</b>	<b>Value</b>	<b>Total Sales</b>	<b>Patel's % of Market Activity</b>	<b>Closing Price</b>
May 12	100,000 (purchase)	US\$868.50	110,000	91%	US\$0.007
May 13	26,000 (sale)	US\$197.03	76,000	34%	US\$0.0089
May 14	0	0	35,874	0%	US\$0.01
May 15	840,000 (sale)	US\$5,908.01	935,256	90%	US\$0.007
May 16	100,000 (sale)	US\$572.46	166,000	60%	US\$0.009

[177] Other trading data showed that the closing prices for Kilimanjaro shares had been trending down in the weeks and months prior to the week of May 12, 2014. Kilimanjaro shares closed at US\$0.0055 in the week before the impugned purchase, which was down considerably from the first week of April 2014 when closing prices ranged from US\$0.016 to US\$0.022. In March 2014, closing prices for Kilimanjaro shares ranged from US\$0.01 to US\$0.061.

[178] On May 12, 2014, seven promoters disseminated touts, with six of those promoters circulating another six touts the following day. Kilimanjaro issued a news release on May 13 announcing a preliminary agreement that could facilitate a successful exploration program in Somalia.

[179] Addressing Patel's purchase of 100,000 Kilimanjaro shares, Park testified that it was a "head-scratcher" that did not make sense, except that it seemed designed to provide an appearance of demand and reflect a "positive reaction to stock promotion, to help support the bid while there's all this selling going on". He also testified that suspicious trading schemes may involve share purchases, either in the same account or from a coordinated account, at the same time as selling shares, which raises a concern and requires a closer examination to determine whether the trading made economic sense. Park observed from the Kilimanjaro trading data that Patel bought Kilimanjaro shares at a higher price than had previously been sold while concurrently trying to sell more Kilimanjaro shares, and that the "buy dominated the trading market" on that day.

[180] Staff submitted that Patel's purchase of Kilimanjaro shares gave a false impression of widespread interest in Kilimanjaro shares on a day that featured promotional material that he had organized. Staff asserted that there was no *bona fide* investment purpose for the purchase, made at inflated prices, when Patel planned to sell millions of Kilimanjaro shares that he controlled. Staff also argued that Patel reasonably knew or ought to have known that his purchase of Kilimanjaro shares would create a misleading appearance of trading activity.

[181] We find that Patel's purchase of 100,000 Kilimanjaro shares contributed to a misleading appearance of trading activity in Kilimanjaro shares. In making this finding, we took into account the following:

- the purchase occurred at prices higher than the closing price for Kilimanjaro shares only a few days earlier and at a time when the share price was trending down;
- Patel's purchase was largely uneconomic, given that he sold more shares (840,000) a few days later, at prices equal to or less than those purchased on May 12, albeit at prices higher than in the prior week;
- Patel held millions of Kilimanjaro shares at the time – the acquisition of 100,000 shares did not meaningfully increase his shareholdings;
- Patel did not purchase Kilimanjaro shares at any other time during the promotional campaign, and he continued to sell Kilimanjaro shares in the ensuing weeks and months, not only from his COR account but also from brokerage accounts he controlled, all while Kilimanjaro's share price continued to drop well below US\$0.007 per share;

- Patel's purchase occurred during a promotional campaign for Kilimanjaro, including 13 touts issued on that same day and the next, while Kilimanjaro was issuing numerous news releases (including the issuance of a news release on the day after the purchase); and
- the purchase constituted virtually all of the market trading that day.

[182] We do not have evidence on Patel's motive for the purchase of Kilimanjaro shares in question. Nonetheless, in the circumstances outlined above, we inferred no genuine intention to purchase shares at an economically beneficial price as part of a strategy to accumulate Kilimanjaro shares.

[183] Instead, the only plausible explanation for Patel's purchase was an attempt to uptick the price for Kilimanjaro shares, as most of the fills were at prices equal to or higher than the closing price of US\$0.0055 from the previous trading day. The apparent effect of his purchase was the stabilization of the closing price in the following week, after which the share price declined and did not exceed US\$0.006 for the remainder of the Relevant Time. Thus, while his sale of 100,000 Kilimanjaro shares on May 16 was at a loss relative to the shares he purchased on May 12, he still benefitted from the short-term demand for Kilimanjaro's shares.

[184] We are satisfied on a balance of probabilities that Patel knew, or that he ought to have known, that his purchase would contribute to a misleading appearance of trading activity. He was the only individual known to have trading authority over his COR account, he was well aware of the trading prices for Kilimanjaro shares, and the decision to purchase was clearly made with a deliberate strategy inconsistent with *bona fide* ordinary course market trades.

[185] We therefore find that Patel breached s.93(a)(i) of the Act.

[186] Staff contended that Patel's actions and knowledge were attributable to Kilimanjaro, since he was the company's guiding mind. Although we accepted that Patel was Kilimanjaro's guiding mind throughout the Relevant Time, in our view he was not acting in that capacity when he made the subject share purchase. He bought those shares in his personal account and the circumstances surrounding his purchase reflected an intention by Patel to personally benefit from the trading of Kilimanjaro shares, not to provide any benefit to Kilimanjaro. The trading proceeds from his brokerage account were wired to Patel's bank account.

[187] Kilimanjaro cannot be liable for market manipulation based solely on it being "the issuer of securities subject to false or misleading trading activity", as alleged in the Notice of Hearing. That a company's securities are used for market misconduct does not necessarily implicate the company itself. For example, a panel of the British Columbia Securities Commission in *Re Hamilton*, 2018 BCSECCOM 290 determined (at para. 157) that public interest concerns were not raised by the mere creation of a publicly-traded shell company which could be used in a manipulative trading scheme.

[188] We dismiss the allegation that Kilimanjaro breached s. 93(a)(i) of the Act.



**D. Allegations of Artificial Price**

[189] The Notice of Hearing alleged that the Respondents participated in a market manipulation scheme in relation to Kilimanjaro shares. According to Staff, Patel and Levy, as the architects and masterminds of the scheme, created and promoted a public façade to portray Kilimanjaro as a philanthropic oil and gas company, which they used to manipulate trading activity and profit from artificial prices for its shares. Patel and Levy accomplished this by orchestrating a promotional campaign from approximately March to October 2014, when Kilimanjaro shares traded on the OTC and the GXG (at least until June 2014). The promotional campaign, intended to create interest in and an artificial value for Kilimanjaro shares, consisted of numerous promotional news releases and the Tout Campaign in which promoters were paid to disseminate approximately 97 touts. During the promotion, Patel and Zang dumped Kilimanjaro shares into the markets.

[190] We address these allegations in relation to each of the Respondents below.

**1. Patel**

[191] Staff contended that Patel engaged in a course of conduct that artificially inflated Kilimanjaro's share price. His scheme largely centered on the alleged promotional campaign – strategically-timed Kilimanjaro news releases that were coordinated with the Tout Campaign – from which Patel profited by selling Kilimanjaro shares through brokerage accounts that he controlled into an unsuspecting market.

[192] Park identified several "red flags" surrounding Patel's conduct consistent with a microcap trading scheme, including his secret control over Kilimanjaro and its operations, and the direction of strategically-timed news releases coinciding with the Tout Campaign. As this was taking place, he covertly sold Kilimanjaro shares in amounts that exceeded SEC limits for control persons.

[193] We had little difficulty in concluding that Patel knowingly engaged in an act, practice or course of conduct that contributed to or resulted in an artificial price for Kilimanjaro shares. He was responsible for several news releases timed to coincide with touts intended to artificially stimulate Kilimanjaro share prices, while he sold Kilimanjaro shares into the market. We address each in turn.

**(a) Directing Kilimanjaro News Releases**

[194] Kilimanjaro, similar to other publicly-traded companies, issued news releases to disclose important developments in its business and operations. Our focus is on the Kilimanjaro news releases alleged to have been issued as part of a promotional campaign from March 2014 to October 2014.

[195] In evidence were more than a dozen Kilimanjaro news releases issued in this timeframe, many of which announced prospective transactions that were not ultimately consummated or operations that did not proceed. Other news releases overstated or misrepresented the estimated value Kilimanjaro's assets, or attributed fabricated statements to Rashid regarding Kilimanjaro's strategy and purported operations.

[196] After it disclosed in September 2013 that the company had entered into a farmout agreement in relation to the Somali Asset, Kilimanjaro made several announcements about its

operations in Somalia in April and May 2014 before disclosing on June 17 that it was suspending its operations in the region. These included news releases on May 13, 21 and 27 that reported on Kilimanjaro's exploration plans for the Somalia Asset, and an earlier news release on April 15, 2014 announcing the company's "evolving interests" in Somalian uranium deposits.

[197] Kilimanjaro also published news releases in June and July 2014 in relation to a potential asset acquisition from Verity and in August in relation to another potential acquisition from Sika, neither of which resulted in a definitive agreement.

[198] Kilimanjaro news releases dated March 27, April 2 and April 3 made representations about the value of Kilimanjaro's assets, including a statement in one that its interests in Cabinda could be worth billions of dollars. Other representations, seemingly based on the Chapman report, were that a conservative estimate of Kilimanjaro's Somalia Asset was approximately US\$187.5 million, and that the company estimated its net profit to be "about \$200 million and climbing". As was the case with Kilimanjaro's earlier news release in relation to the Chapman report, these news releases did not conform to the manner in which resource estimates are to be publicly disclosed under NI 51-101.

[199] Other Kilimanjaro news releases referred to the Valuation Report, and represented that the report stated "that the combined value of the company's [FCAs] is no less than \$150 million". This representation omitted important context from the Valuation Report, specifically the uncertainty and qualifications relating to the valuation methodology used, and that the \$150 million figure was management's assessment of the value of its assets.

[200] We were also satisfied that the news releases representing that statements ostensibly made by Rashid (as Kilimanjaro's CEO), either in the form of a first-person narrative providing project updates or in the form of questions and answers with Rashid, were contrived and that Rashid did not make these statements. The news releases gave a fictitious account of management's discussion and analysis of the company's operations and prospects.

[201] In short, we find that Kilimanjaro's news releases provided misleading information to the market about its projects, the value of its assets, and management's perspective on the company's business.

[202] We also find that Patel, as Kilimanjaro's guiding mind, was responsible for the issuance of Kilimanjaro's news releases during this time. We had compelling evidence that he drafted at least one of the Verity news releases and the Chapman news release. Given his role with Kilimanjaro, we are satisfied on a balance of probabilities that he was responsible for all of the company's news releases in the Relevant Time.

**(b) Coordination with Promotional Activity**

[203] We were also satisfied that Patel worked with different promoters to coordinate the publication of Kilimanjaro news releases with the dissemination of touts to stimulate demand for Kilimanjaro's shares. This is borne out by his email to Zang on April 2, 2014, mentioned earlier, in which he stated that their promoters would need \$40,000 shortly because they had a plan to potentially double the share price in connection with announcements about Somalian uranium and

Verity's asset sale. Patel also asked if Zang knew of any companies that might enter into a letter of intent in relation to the Somalia Asset, as this "would help bump the stock as well".

[204] This email was consistent with other evidence reflecting Patel's plan to undertake a coordinated promotional campaign to increase Kilimanjaro's share price, including:

- Patel's email to Zang in June 2013, where he said that Kilimanjaro's story should generate plenty of interest which can be furthered by continual news flow, and that he had been told "to consider Vancouver and Florida (the place for the old VanCity exchange guys and the old Boca Raton Stock Mafia) as key targets to find market makers/book runners/boiler room guys";
- a Zang email in September 2013, in which he stated that Kilimanjaro's founders believe that they will be able to promote the contingent rights to create some good value in the stock in the short term;
- Zang's email to Moore in February 2014, advising that Kilimanjaro's promotion was apparently going to start soon;
- the March Loan made by Zang to help fund Kilimanjaro's promotions; and
- Patel's email to Zang on April 2, 2014, on the need to fund their promoters, and his statement that "[w]e will make more money tomorrow as the company will issue another press release" after managing good trading volume earlier that day.

[205] As Patel was Zang's principal point of contact for his involvement with Kilimanjaro, we inferred that the information Zang conveyed to others about Kilimanjaro's promotional plans came from discussions he had with Patel.

**(c) Tout Campaign**

[206] We earlier discussed details of the Tout Campaign. To be clear, the evidence did not establish a direct link between the promoters involved in the Tout Campaign and Patel. Nevertheless, we inferred that the unidentified promoters that Patel was communicating with included the promoters involved in the Tout Campaign. Our conclusion on this point derives largely from the timing of the touts published throughout the Tout Campaign, as their dissemination coincided with the release of Kilimanjaro's public statements and with Patel's liquidation of Kilimanjaro shares.

[207] The pertinent evidence included:

- From March 27 through April 3, 2014, nine Kilimanjaro touts were published by several different promoters; Kilimanjaro issued three news releases in this short time period, during which Patel sold more than 1.4 million Kilimanjaro shares from 164 Alberta's RGMP account. Around this time, Patel communicated to Zang the need to raise \$40,000 from the sale of Kilimanjaro shares "to fund our promoters".
- Once the CTO was issued on April 3, no touts were sent until April 14, when 13 touts were disseminated on April 14 and 15; Kilimanjaro issued a news release on April 15, while Patel sold nearly 500,000 shares (from his COR account) from April 15 to 17.

- Ten Kilimanjaro touts were sent on April 21 and 22, in advance of Kilimanjaro publishing a "non material update" on April 28. On April 21, Patel began selling a significant number of Kilimanjaro shares – nearly 2.6 million shares from April 21 through 28 (for about US\$25,000).
- As earlier noted, 13 touts were circulated on May 12 and 13, and two more on May 21; Kilimanjaro issued news releases on May 13, 21 and 27. While Patel purchased 100,000 Kilimanjaro shares on May 12, he sold more than 6 million shares from May 13 to 22.
- On July 16 and 17, another 17 touts were disseminated, while Kilimanjaro issued news releases in relation to its communications with Verity about this time. From July 17 to 23, Patel sold more than 8 million Kilimanjaro shares in 164 Delaware's COR account.
- On August 7 and 8, 26 touts were sent, and two more touts on August 11 and 12. Throughout this time, Kilimanjaro made various public announcements, primarily in relation to its negotiations with Sika. From August 11 to 12, Patel sold nearly 1.5 million shares from 164 Delaware's COR account.

[208] The remaining touts were released on August 18 and 20. Although Kilimanjaro did not issue news releases around this time, Patel sold more than 3.5 million Kilimanjaro shares from 164 Delaware's account from Aug 15 to 21.

[209] Of the touts in evidence, they generally repeated and embellished the information in the news releases. One of the touts in evidence, dated April 2, 2014, included significantly higher share price projections, to the effect that Kilimanjaro share prices "could climb to .06 -.07" resulting in a "High ROI target of up to 200%+", and that Kilimanjaro "**already has established rights** to resources valued at 187M and at the price of just **\$0.02** per share grabbing **KIMJF** is the best risk to reward you'll find for short and long term profits This Entire Quarter" [emphasis in original tout]. We expect that the other touts sent during the Tout Campaign used similar promotional language.

#### (d) Liquidation of Kilimanjaro Shares

[210] The foregoing review of Patel's trading in relation to Kilimanjaro news releases and the Tout Campaign, leads to an inescapable conclusion that he orchestrated a coordinated promotional campaign and liquidation of Kilimanjaro shares. Ultimately, Patel sold more than 113.5 million Kilimanjaro shares from March 7 through to September 8, 2014, through brokerage accounts he controlled. Pertinent details from that trading included:

- nearly 290 million Kilimanjaro shares traded in this time period, of which Patel's trading accounted for approximately 39% of the total market volume;
- on certain days, Patel's trading represented the entire reported market volume;
- much of Patel's trading occurred as Kilimanjaro news releases and promotional touts were disseminated; and
- Patel's trading exceeded prescribed limits on control person sales – i.e., not exceeding 5 million shares (1% of Kilimanjaro's outstanding shares) in any 90-day consecutive period without a registration statement or an exemption (under Rule 144 of the *Securities Act of 1933* (US)). Park's evidence was that this limit likely

applied to Patel as a Kilimanjaro "affiliate" – defined to include any person who directly or indirectly controls an issuer – based on evidence from Rashid's statements (as corroborated by Zang) that Patel exercised de facto control over Kilimanjaro's decision-making, handled the company's press releases and used Rashid as a nominee. Park's observations are consistent with our findings (below) that Patel exercised control over Kilimanjaro, such that he was Kilimanjaro's guiding mind.

[211] Patel's trading activity exploited the misguided interest in Kilimanjaro generated by his coordinated dissemination of news releases and touts, and that manipulation was exacerbated by providing most, and on some days all, of the Kilimanjaro share supply. Moreover, Patel concealed his trading by using accounts held by 164 Alberta, Zang and 164 Delaware, so that the market would be unaware that the supply was coming from someone who was secretly controlling the issuer's business.

**(e) Conclusion on Patel's Liability**

[212] We have no doubt that the objective of the Kilimanjaro promotion campaign – the company's news releases and the Tout Campaign – was to falsely portray Kilimanjaro as a well-capitalized company that was actively engaged in acquiring and developing valuable hydrocarbon and mineral interests. The information conveyed by the promotional campaign likely misled capital market participants and resulted in an artificially inflated share price and trading volumes. While less than 3,000 Kilimanjaro shares were sold in the first two months of 2014 (prior to the share split), daily trading volumes increased dramatically once the promotional campaign was underway, frequently more than one million shares trading daily starting in March 2014.

[213] Patel's trading activity capitalized on the artificial price for Kilimanjaro shares that he was instrumental in creating. He quickly moved to liquidate all Kilimanjaro shares over which he had control once the promotion started. In other words, Patel's pattern of conduct had all of the ingredients of a standard pump and dump scheme – secret control over the issuer and a substantial block of its shares, direction of a promotion replete with falsehoods and exaggerations (the pump) and the concurrent liquidation of shares (the dump) with the use of phony legal opinions and third party brokerage accounts to circumvent securities laws governing control distributions and resale.

[214] We are satisfied that Patel knew that his actions would contribute to an artificial price for Kilimanjaro shares. The many incriminating emails that Patel sent leave us with no doubt that he undertook the scheme with full knowledge of the consequences of his conduct. He was the architect of the scheme to manipulate Kilimanjaro shares, and each step along the way – which we have already described in some detail – was deliberate in accomplishing his objective to profit at the expense of an unwitting market.

[215] We find that Patel breached s. 93(a)(ii) of the Act.

**2. Levy**

[216] The Notice of Hearing alleged that Levy was also an architect and mastermind of the Kilimanjaro market manipulation scheme. Staff asserted that his involvement included:

- preparing Kilimanjaro news releases;
- brokering transactions with Kilimanjaro for FCAs;
- assisting with Kilimanjaro's public listing, in part by preparing a legal opinion and retaining Buczynski to conduct a false audit; and
- controlling the language used by Howard in the Valuation Report, to ensure that Kilimanjaro's assets would be represented as being worth at least US\$150 million.

[217] Staff also said that Levy obfuscated his role and relationship with Kilimanjaro, at times representing himself as either Kilimanjaro's counsel, independent counsel or consultant when it suited his purpose, while at the same time acting for several counterparties to the Kilimanjaro agreements for FCAs. Staff submitted that Levy's obfuscation of what party he was representing directly related to Kilimanjaro's securities and facilitated the scheme.

**(a) Did Levy's Conduct Contribute to an Artificial Price?**

[218] Levy's involvement in the alleged market manipulation was, relative to that of Patel, far removed from the misconduct that gave rise to an artificial price for Kilimanjaro shares. He was not directly implicated in the Tout Campaign or in the liquidation of Kilimanjaro shares. Staff alleged that his primary involvement with the coordinated promotional campaign was drafting news releases.

**(i) Preparing News Releases**

[219] Contrary to Staff's submissions, we did not see sufficient evidence that Levy was centrally involved in preparing news releases. He authored one draft news release in November 2012, which announced the Southern Cameroons Assignment. This occurred more than a year before the promotional campaign, when Kilimanjaro's shares were not publicly traded. The news release itself did not contain any obviously misleading information, with the possible exception that it attributed a statement to Rashid. (Rashid received an email with the draft news release approximately two weeks before it was issued, and thus had ample opportunity to comment before its dissemination.) We do not view Levy's drafting of this news release as giving rise to a reasonable expectation of contributing to an artificial price for Kilimanjaro securities.

[220] There was no other credible evidence that Levy was involved with the preparation or dissemination of the news releases that formed part of Kilimanjaro's promotional campaign.

**(ii) Assigning FCAs to Kilimanjaro Canada**

[221] Staff argued that Levy was instrumental in transactions whereby Kilimanjaro Canada acquired FCAs.

[222] Once the company was made available by Rashid, Levy certainly played a central role in having FCAs assigned to Kilimanjaro Canada. These transactions occurred from November 2012 through March 2013, with corresponding news releases announcing these transactions. These actions occurred in relation to Kilimanjaro Canada approximately a year or more before the promotional campaign and liquidation of Kilimanjaro shares. There was no suggestion that the transactions were a sham or otherwise fraudulent.

[223] In the circumstances, we did not consider Levy's involvement in assigning FCAs into Kilimanjaro Canada to have contributed to an artificial price for Kilimanjaro securities.

**(iii) Kilimanjaro's Listing**

[224] Staff also impugned Levy's involvement with Kilimanjaro's listing application, particularly the letters he authored in support of Kilimanjaro's listing with the GXG.

[225] One of his letters, dated March 6, 2013, was titled "Legal Consultant's Report on Assets". According to the letter, it was meant to be included in an Admission Document pursuant to a public listing of Kilimanjaro Canada's shares. Staff did not contend that the document contained any misinformation; the objective of the letter was to provide an overview of the applicable laws, a legal description of Kilimanjaro Canada's principal agreements, and a summary of the political and legal factors pertinent to the company's operations. Patel attached this letter to a March 6 email (along with other materials) to a Kilimanjaro consultant, describing it as "the legal due diligence carried out by an independent law firm". We do not know whether this letter was in fact relied on in support of a listing, bearing in mind that the letter related to Kilimanjaro Canada.

[226] A similar Levy letter, described as a "Comfort Letter" and dated June 13, 2013, was appended to a draft Kilimanjaro prospectus used for Kilimanjaro's GXG listing application. This letter expressly stated that it was meant to "provide information pertinent to the securitization process of [Kilimanjaro's] Shares" to support the company's listing on the GXG. Again, Staff did not contend that this letter contained any misleading information, nor do we know the extent to which it assisted with Kilimanjaro's listing application.

[227] We were not persuaded that these letters contributed to an artificial price for Kilimanjaro's securities.

**(iv) Opinion Letters**

[228] Staff also referred to opinion letters prepared by Levy in relation to Kilimanjaro's public disclosure provided to the OTC. These letters, dated October 30, 2013, April 2 and May 15, 2014, addressed to OTC Markets Group in relation to Kilimanjaro's financial disclosure and provided that Levy had been retained by Kilimanjaro as "General Counsel". Each opined that the subject disclosure complied with certain requirements of the *Securities Act of 1933* (US) and the *Exchange Act of 1934* (US).

[229] Staff claimed that Levy's legal opinions confirmed the veracity of Kilimanjaro's public disclosure, including the Audited Financial Statements. However, these opinion letters were qualified by declining to opine on the "validity of any assumptions, form or content of any financial or statistical data contained therein". This limitation on the scope of the opinion letters satisfies us that they would not reasonably have been relied upon as confirmation of the validity of Kilimanjaro's financial disclosure, including the Audited Financial Statements.

[230] Even though there was an apparent connection between Patel's conduct and Levy's April 2, 2014 opinion letter, we did not have sufficient evidence to infer that Levy was knowingly assisting Patel's market manipulation by providing the April opinion letter. The connection

between the opinion letter and the market manipulation scheme was alluded to in an April 2, 2014 email from Patel to Zang:

So we had a pretty good day today despite the company leadership dropping the ball. The company went from "Pink Sheet Current Information" (the highest tier of Pink Sheets) to "Pink Sheet No Information" (one of the lowest tiers) and had a stop sign next to the company ticker all day which you can see here: <http://www.otcmarkets.com/stock/KIMJF/quote>

This happened because the company was "late" on its annual filings (the audit) in the eyes of the OTC Markets. Fact is GXG doesn't require it to be done till May 1st, but the OTC didn't know this, and despite our urging to Zul to have it done by March 31st he chose to not do it. Regardless, the good news is the stop sign will disappear and we will be back as Pink Sheet Current Information tomorrow morning as our firm did damage control and worked it out with OTC by filing some attorney letter, an unaudited fiscal year end and a company disclosure statement. So that was settled. It's too bad it happened today, because when it does fall down to that tier some major brokerage houses like Schwab won't accept orders for those kind of companies. In short we lost out on about 30% of the market today. Still we managed to do good volume and get things moving in the right direction. We will make more money tomorrow as the company will issue another press release and be back to current.

[231] We were satisfied that the email reference to the "attorney letter" was Levy's opinion letter of the same date, however that alone is insufficient to conclude that Levy was complicit in restoring Kilimanjaro's standing with OTC Markets with knowledge, actual or constructive, that he was benefiting Patel's coordinated promotion campaign and share liquidation program. Levy's April 2, 2014 letter appeared to be a quotidian opinion in the same form as the other opinion letters that accompanied Kilimanjaro's filings with OTC Markets. We believe it more likely that the critical document instrumental in bringing the company back into good standing with OTC Markets was the financial statements, concerning which Levy evidently had no role.

[232] In the circumstances, we cannot find that the impugned opinion letter contributed to an artificial price for Kilimanjaro's securities.

**(v) Buczynski Retainer**

[233] Staff argued that Levy (and Patel) retained Buczynski to conduct a false audit of Kilimanjaro so that it would appear to be a financially viable business. Staff submitted that Kilimanjaro (or Kilimanjaro Canada) never received funds from the Kilimanjaro Canada Private Placement – approximately US\$8.1 million – as reported in the Audited Financial Statements.

[234] We discuss the allegations in more detail below, particularly as they relate to Buczynski. In short, we did not discern a sufficient link between Kilimanjaro's Audited Financial Statements and the misconduct that gave rise to an artificial price for Kilimanjaro securities. Further, there was insufficient evidence to prove that Buczynski conducted a false audit as alleged. Therefore, we were not persuaded that Levy's role in retaining and instructing Buczynski in relation to the audit of Kilimanjaro's financial statements would reasonably be considered to have given rise to an artificial price for Kilimanjaro securities.

**(vi) Manipulating the Valuation Report**

[235] Staff also asserted that Levy knew he was contributing to an artificial price for Kilimanjaro's shares by providing Howard with language to be used in the Valuation Report.



[236] We earlier discussed how the preparation of the Valuation Report unfolded, with Levy suggesting language indicating a "bottom line figure" while acknowledging that there was no known methodology to estimate the value of Kilimanjaro's FCAs.

[237] In our view, any impropriety arising from the Valuation Report was the manner in which it was misrepresented in Kilimanjaro's news releases. Levy's proposed drafting, accepted by Howard, expressly qualified Kilimanjaro's estimated value of at least US\$150 million by stating that there was no known methodology to estimate Kilimanjaro's FCAs. While the Valuation Report suggested that Kilimanjaro's estimate was plausible, we view that as merely an indication that Kilimanjaro's assessment was a conceivable outcome. That nuance was completely absent from Kilimanjaro's news release, which baldly asserted that the Valuation Report concluded the value of Kilimanjaro's FCAs was no less than US\$150 million.

[238] We do not accept that Levy's drafting suggestions used in the Valuation Report would reasonably have contributed to an artificial price for Kilimanjaro's shares. Howard considered various approaches and it was evident that his principal concern was assessing the likelihood of the self-described African governments in exile being in position to convey the rights they were purporting to assign under the FCA agreements. There was insufficient evidence to persuade us that Howard did not use his own professional judgment in expressing his conclusions.

[239] Further, the impugned Levy communications occurred more than a year before the promotional campaign, and several months before the company's shares were publicly trading. As previously discussed, we also were not persuaded that Levy was involved in distorting the Valuation Report's findings in Kilimanjaro's news releases.

[240] In short, we do not view Levy's conduct as sufficiently proximate to the critical elements of the market manipulation scheme that it would reasonably be considered to have contributed to an artificial price for Kilimanjaro securities. Accordingly, we dismiss the allegation that Levy breached s. 93(a)(ii) of the Act.

### **3. Kilimanjaro**

[241] Staff contended that Patel and Levy were, either alone or with one another, the guiding minds of Kilimanjaro, such that their knowledge and misconduct was attributable to Kilimanjaro.

#### **(a) Patel and Levy as Kilimanjaro's Guiding Mind**

[242] The Notice of Hearing alleged that Patel and Levy directed the incorporation of Kilimanjaro and they maintained *de facto* control of Kilimanjaro at all material times.

[243] Staff submitted that Rashid acted as a mere figurehead of the company despite being Kilimanjaro's director, president and CEO, and that Patel exercised actual control over Kilimanjaro throughout the Relevant Time. We agree with Staff – the evidence was overwhelming that from the time that Kilimanjaro acquired Kilimanjaro Canada, Patel made virtually all of the key decisions for Kilimanjaro and was involved in all of the company's operations. He directed Kilimanjaro's transactions, prepared news releases, engaged experts, held himself out as Kilimanjaro's COO, directed changes to the company's share capital and instructed Kilimanjaro's

transfer agents on share issuances and transfers. It was clear that Patel did all of this on his own initiative and not on instructions from Rashid. Instead, Patel gave instructions to Rashid, to the extent that Rashid was involved in any of Kilimanjaro's activities. From Patel's communications it was evident that he considered Rashid a necessary annoyance, illustrated by one email to Zang where Patel wrote: "[t]he less we deal with [Rashid] the better".

[244] We were satisfied that Kilimanjaro did not do anything of substance without Patel's involvement and approval – Patel was Kilimanjaro's mind and management.

[245] With regard to Levy, Staff asserted that he drafted opinion letters, brokered the FCAs into Kilimanjaro Canada, drafted press releases and fielded emails at the company's email address.

[246] Despite his early involvement with Kilimanjaro Canada, we were not persuaded that Levy was a guiding mind of Kilimanjaro, at least not in the time relevant to the promotional campaign. While Levy seemingly had a role in corporate decision-making in late 2012 and early 2013, we had insufficient evidence of his having any responsibility for Kilimanjaro's affairs after that period. Aside from preparing ordinary course opinion letters, we did not see evidence that he communicated with transfer agents, drafted Kilimanjaro's news releases or was otherwise significantly involved with the company. Accordingly, we do not find Levy to be a guiding mind of Kilimanjaro during the time material to the market manipulation allegations.

**(b) Kilimanjaro's Misconduct**

[247] As mentioned, Kilimanjaro issued several misleading news releases as part of the coordinated promotional campaign. This was done under the direction of Patel, and as the company's guiding mind, his conduct and knowledge are attributable to Kilimanjaro.

[248] We find that Kilimanjaro breached s. 93(a)(ii) of the Act.

**4. Buczynski**

[249] The Notice of Hearing alleged that Buczynski breached s. 93(a)(ii) of the Act "by providing a false audit of Kilimanjaro under the direction of Patel and Levy". In particular, Staff alleged that Buczynski provided an audit report without actually conducting an audit, and that the audit report contained falsehoods and misrepresentations about the nature and value of Kilimanjaro's purported assets. Among them was a fabricated private placement of approximately \$8 million reflected in Kilimanjaro's financial statements.

**(a) Did Buczynski's Conduct Contribute to an Artificial Price?**

[250] Buczynski was not directly involved in trading or purchasing Kilimanjaro securities nor was he implicated in Kilimanjaro's coordinated promotional campaign. Accordingly, his culpability depends in part on whether his actions were sufficiently connected to the market manipulation scheme, so that he indirectly contributed to an artificial price for Kilimanjaro's shares within the meaning of s. 93(a)(ii).

[251] Buczynski's investigative interview confirmed that he knew the purpose of the audit was to assist with Kilimanjaro's GXG listing application, and that he worked with Patel and Levy on the "process of getting them listed" on that exchange. Buczynski prepared Kilimanjaro's audit so

that it was in accordance with international standards on auditing rather than generally accepted auditing standards, as a result of his understanding that GXG-listed companies use international financial reporting standards for their financial statements.

[252] While Buczynski's work was clearly in relation to a security – Kilimanjaro shares – we saw no significant connection between his audit and the misconduct that gave rise to the artificial share price. There was no suggestion that the audit was connected to the share liquidation, and the touts and news releases during the coordinated promotional campaign made no reference to the Audited Financial Statements. The audit occurred nearly a year before the promotional campaign, by which time Kilimanjaro's unaudited financial statements indicated that the private placement funds had been largely spent. In our view, there was insufficient evidence on a balance of probabilities that Buczynski's audit would reasonably be considered to have given rise to an artificial price for Kilimanjaro securities.

**(b) Buczynski's Knowledge**

[253] Even if we had found a sufficient causal connection between Buczynski's audit and the market manipulation scheme, there was not clear and cogent evidence from which we could conclude that Buczynski knowingly engaged in acts that would have contributed to an artificial price for Kilimanjaro securities.

[254] Park testified that material misrepresentations, omissions or false statements in financial statements can distort demand for the issuer's securities, with the result that "investors are buying a product that they think is better than it really is". Staff's position was that Buczynski was a "cooperative accountant" who contributed to such a distortion by providing a false audit of Kilimanjaro's financial statements that portrayed an inflated value of the business. Staff contended that (1) Kilimanjaro did not receive proceeds from the Kilimanjaro Canada Private Placement, and (2) Buczynski, knowing this fact, gave a clean audit opinion on financial statements that reflected receipt of those funds.

**(i) Private Placement**

[255] Kilimanjaro's Audited Financial Statements reported that Kilimanjaro Canada received \$8,116,000 from the Kilimanjaro Canada Private Placement. This was repeated in other company documents, including a Kilimanjaro prospectus and a Kilimanjaro investor presentation document. Patel did not provide any documents in response to demands made in the course of the ASC's investigation, including Kilimanjaro's bank records. Kilimanjaro's Canadian bank records showed nominal funds proximate to the time when the Kilimanjaro Canada Private Placement was said to have occurred. Staff submitted that the only reasonable inference is that Kilimanjaro (or Kilimanjaro Canada) never received the \$8.1 million.

[256] It was clear from the evidence that Patel and Levy, on behalf of Kilimanjaro, were seeking funds for relatively modest expenses. Viewed as a whole, the communications among Patel, Levy, Rashid and Parks in early 2013 concerning Kilimanjaro's cash requirements were at odds with the purported cash position reflected in the Audited Financial Statements – i.e., approximately \$8.5 million working capital as at December 31, 2012. The subsequent event notes in those statements did not begin to explain the apparent discrepancy. Patel and Levy continually pestered Rashid and Parks to raise funds for Kilimanjaro Canada, to the point that Levy complained in

January 2013 that "we cannot do any actual business without funds". Kilimanjaro's financial situation was so dire that Rashid ostensibly contributed as much as \$200,000 to cover the company's business expenses, relying on loans from friends and family and his personal credit.

[257] The evidence satisfies us on a balance of probabilities that the Kilimanjaro Canada Private Placement did not occur as represented and that neither Kilimanjaro nor Kilimanjaro Canada received the private placement funds of US\$8,116,000.

**(ii) False Audit**

[258] Staff submitted that the Audited Financial Statements were never truly audited and that Buczynski made false statements that made Kilimanjaro appear to be a financially viable business.

[259] We are mindful that an audit is no guarantee of the accuracy of financial statements. ASC panels have previously commented on the purpose and scope of audits, for example in *Workum* at para. 693:

Auditors review and comment on an issuer's financial statements, but the financial statements remain the responsibility of the issuer. An "audit" is a process of testing the issuer's work and the audit opinion is a comment based on such testing. It certainly does not lift responsibility for financial statements from the issuer or its management and directors.

[260] When confronted with questions about the legitimacy of his audit, Buczynski told SEC investigators (under oath) that he received and reviewed bank statements (which he said were not from a Canadian or US bank, although he could not recall the name of the bank or where it was located) and stock transfer records to confirm that Kilimanjaro Canada received the approximately \$8.1 million and that the shares were issued from treasury as part of the private placement. He did not recall who provided him with those records but said that the audit would not have been completed without first reviewing those records. He added that he would also have obtained a management representation letter in which "auditors ask the company to sign a letter that says that they provided us with proper balances, numbers" and that they are not falsifying anything.

[261] There were certain irregularities surrounding Buczynski's audit of Kilimanjaro. Foremost among these was the lack of documents retained by Buczynski from the Kilimanjaro audit. In his investigative interview, he explained that he searched for the documents he had received but they were no longer in his possession and he had probably disposed of them. He said that he scanned the materials onto his computer, which he also had disposed of because it was old and no longer functioned. He said that he did not back up those electronic copies, and though he acknowledged that the applicable audit standard stipulated a five-year document-retention period, he maintained that he had not consciously disposed of his working papers and only realized he had done so when he attempted to find them.

[262] Another apparent irregularity was that the Kilimanjaro audit was, according to Buczynski, performed by Gregory Scott, LLC, yet the Audited Financial Statements bore a stamp for "Gregory Scott International". Buczynski characterized Gregory Scott International as a brand name, but admitted that it was not a licensed accounting firm in Illinois and not licensed to conduct audits.

[263] Finally, there was a conflict in the evidence between what Buczynski and Rashid respectively said about their communications with one another. Buczynski insisted that he spoke with Rashid in at least one short conversation (and perhaps more) before the audit was finalized. Rashid stated in his investigative interview that he had not seen the Audited Financial Statements and that he did not speak with (and did not seem to know) Kilimanjaro's auditor. Given Rashid's lack of candour in his investigative interviews (as addressed later), we preferred the evidence of Buczynski's account on this point.

[264] We were not satisfied that these irregularities amounted to cogent and compelling evidence that Buczynski falsified his audit report. An equally plausible explanation was that Buczynski conducted a *bona fide* audit and was unable to detect in his review that neither Kilimanjaro nor Kilimanjaro Canada received the private placement funds, because he was given fabricated documents. As mentioned, we saw instances of falsified documents prepared at Patel's instigation.

[265] To summarize, while we accept that the Kilimanjaro Canada Private Placement was fictitious, we were not satisfied that Buczynski prepared a false or misleading audit report.

[266] Accordingly, we dismiss the allegation that Buczynski breached s. 93(a)(ii) of the Act.

## **5. Rashid**

[267] The Notice of Hearing alleged that Rashid was recruited to be a nominal director and officer of Kilimanjaro while *de facto* control remained with Patel and Levy, which assisted in establishing a public façade for Kilimanjaro. Alleged particulars include that Rashid:

- materially assisted Patel's and Levy's promotion of Kilimanjaro;
- raised \$45,000 from seed shareholders;
- permitted Patel and Levy to use his name, signature, credit card, email accounts, addresses, and Alberta companies or entities that he owned or controlled in order to promote Kilimanjaro;
- caused or acquiesced to Kilimanjaro's filings and public disclosures that misrepresented Kilimanjaro's activities and asset values; and
- contributed to a promotional campaign that included numerous news releases.

[268] Staff submitted that Patel and Levy recruited Rashid for their scheme to provide a shell company in which he agreed to act as a figurehead – both CEO and president – and raise capital. This set the stage for what Park described as a microcap liquidation scheme, namely providing significant undisclosed control over the company, especially its communications and share capital. Staff contended that Rashid's actions contributed to an artificial price by helping create the façade that Kilimanjaro was a legitimate business.

### **(a) Rashid's Role with Kilimanjaro**

[269] In his compelled investigative interviews, Rashid admitted that his role with Kilimanjaro was that of a figurehead and to raise capital. He described how Patel approached him and said that he agreed to provide Patel with a private shelf company that he controlled so that it could be listed on the "German exchange". Rashid understood that once the company was listed "they would raise money and do whatever they had to do with the company".

[270] Rashid told Staff that he became "a figurehead because I speak African language" but that he did "[m]ore or less nothing" and did not make decisions for the company. He denied having any role in negotiating the company's acquisitions, overseeing the company's financial statements or having direct contact with Kilimanjaro's transfer agent. He also said that he did not attend any board meetings, sign directors' resolutions or draft news releases. Rashid was not concerned that news releases falsely attributed statements to him, because he "wanted to see a deal go through".

[271] Rashid said that he authorized Patel to use his electronic signature wherever needed. He explained that he trusted Patel, was content to let him to run the company and to take directions from him. According to Rashid, his involvement was mostly "on the financial side", which we understood to mean that he provided initial financing and paid certain company expenses. Rashid told Staff that he and Parks collectively invested \$30,000, and he eventually admitted that he solicited investments in Kilimanjaro from his family and friends. Rashid paid for some of Kilimanjaro's expenses, including invoices for Kilimanjaro news releases and Chapman's retainer. He said that he personally covered these expense with his credit card and by borrowing money from friends and family.

[272] Rashid also admitted to participating in a video that was posted on Kilimanjaro's website (using a script provided to him by Patel), and to making an introduction to an executive he knew at Sika – a company that held mining rights in Tanzania – which he said was a way to enhance the value of the shares he held in that company.

[273] Staff argued that we should rely on Rashid's testimony, because it was corroborated by other evidence and was not self-serving. Staff's position on the reliability of Rashid's evidence was inconsistent with allegations that he made statements in his September interviews that were misleading or untrue and that were intended "to conceal, or had the effect of concealing, from Staff the true nature of his involvement with Kilimanjaro and the related matters under investigation". A Staff investigator characterized Rashid's statements as "inconsistent, contradictory at times and nonsensical".

[274] We were hesitant to place much, if any, weight on Rashid's investigative interviews unless corroborated by other reliable evidence. His answers to Staff's questions during the September investigative interviews were largely self-serving and tended to minimize his involvement in any misconduct. That said, Rashid's evidence was generally confirmed by other evidence, including that he was essentially a nominee director and officer for both Kilimanjaro and Kilimanjaro Canada, and that Patel was Kilimanjaro's guiding mind who made virtually all corporate decisions, retained and instructed professionals and directed Kilimanjaro's transfer agent on share issuances and transfers. Parks also corroborated Rashid's statements that he did not draft or prepare Kilimanjaro's news releases, and that his arrangement with Patel was to provide the shell company and to raise some initial capital for Kilimanjaro Canada. Documentary evidence corroborated Rashid's statement that he used his personal credit by borrowing money and providing his personal credit card information to Patel, all for Kilimanjaro's benefit.

[275] We had no direct evidence to corroborate Rashid's evidence that he provided Patel with an electronic signature or that he authorized Patel to use the signature on Kilimanjaro documents.

However, we infer that he did so, given Patel's ability to regularly provide documents bearing Rashid's (and others) signature on short notice. This occurred in providing corporate resolutions to Kilimanjaro's transfer agent, and in relation to agreements with Zang. There were also corporate documents with Rashid's signature, but dated after his resignation from the company.

[276] Some of Patel's emails in late March 2014 indicated that Rashid's involvement was not as limited as he portrayed. In particular, one email suggested that Rashid's role may have included filing Kilimanjaro's year-end financial statements with the OTC, and another suggested that Rashid had some involvement with handling certain funds (approximately \$20,000) received by Patel.

[277] Rashid's conduct was indirectly related to Kilimanjaro securities, including:

- acting as a nominee director and officer, including authorizing Patel to use his electronic signature;
- acquiescing to news releases that contained statements falsely attributed to him;
- raising capital for Kilimanjaro Canada; and
- paying Kilimanjaro expenses, including for issuance of news releases.

**(b) Causal Connection to Patel's Misconduct**

[278] Staff submitted that Rashid helped create the façade that Kilimanjaro was a legitimate business and that he knew or ought to have known that pretending to be the CEO and president of a shell with no real business gave the company legitimacy. This, according to Staff, contributed to an artificial share price.

[279] While it was somewhat less obvious that Rashid's conduct was sufficiently related to the misconduct that gave rise to an artificial share price, in our view, certain of Rashid's conduct contributed to an artificial price for Kilimanjaro shares, particularly his acquiescence to misleading statements in Kilimanjaro news releases and payment for some news releases drafted by Patel.

[280] Rashid engaged in other conduct that allowed Patel to sell significant volumes of Kilimanjaro shares. Most notably, Rashid gave Patel seemingly unfettered authority to control aspects of Kilimanjaro's share capital, which included directing the forward-share split and instructing Kilimanjaro's transfer agent on the issuance and transfer of shares into brokerage accounts Patel controlled. Rashid also allowed Patel to use his electronic signature – on numerous corporate resolutions and the Share Compensation Agreement with Zang – so that these shares were free of resale restrictions.

**(c) Rashid's Knowledge**

[281] We turn to the determination of whether Rashid knew, or ought to have known, that his conduct would contribute to an artificial share price.

[282] It was unclear whether Rashid knew that Patel's objective was to manipulate Kilimanjaro's share price and sell a significant number of shares with the benefit of an artificial price. If Rashid did not have actual knowledge, we are of the view that he ought to have known of Patel's plans. The trail of documents which he received was littered with signs of a market manipulation scheme. That Rashid knew the risks of the stated plans for Kilimanjaro is evident from an email that Parks

sent to Rashid in October 2012, enumerating his concerns with Patel's and Levy's proposal. One concern he had was that they wanted free-trading shares, which he considered to be a red flag for a pump-and-dump. He also warned in the email:

There is a crazy rush to sign the deal NOW! ASAP! Right Now!!!! That is very scary. Combine the rush to sign the deal with the demand for free trading shares and the demand for money up front and this starts to look like some kind of scam. I do not believe that it is a scam but it has all the markings of one.

[283] In allowing himself to be appointed president and CEO of Kilimanjaro, Rashid cannot disavow the responsibilities that come with those offices by delegating unsupervised authority over all of the company's affairs to others. At the very least, Rashid was put on enquiry by several warning signs that Kilimanjaro was being used for a market manipulation scheme. We therefore find that Rashid ought to have known that his actions would contribute to an artificial price for Kilimanjaro securities.

[284] Accordingly, we find that Rashid breached s. 93(a)(ii) of the Act.

### **VIII. VIOLATION OF CTO**

[285] Section 93.1 of the Act requires a person or company to "comply with decisions of the Commission or the Executive Director made under Alberta securities laws".

#### **A. Patel's Knowledge of the CTO**

[286] Staff's position was that Patel knew of the CTO at the time he made arrangements with Zang to transfer Kilimanjaro shares from RGMP to COR accounts, from which he continued to trade Kilimanjaro shares on the OTC in contravention of the CTO.

[287] Evidence established that Kilimanjaro's transfer agent emailed a copy of the CTO to Patel on April 4, 2014, and that he told Zang about the CTO the following day. We find that Patel had knowledge of the CTO on or about April 4, 2014.

[288] As Kilimanjaro's guiding mind, Patel's knowledge is attributable to the company.

#### **B. Acts in Furtherance of a Trade**

[289] A trade is broadly defined in s. 1(jjj)(vi) of the Act to include "any act, advertisement, solicitation, conduct or negotiation made directly or indirectly in furtherance of" a trade. Assessing whether certain conduct is in furtherance of a trade is fact-specific, and generally involves an examination of the overall conduct and an assessment of how proximate it was to any actual trade of a security (*Re Costello* (2003), 26 OSCB 1617 at para. 47).

[290] In our view, Patel's conduct clearly advanced the trading of Kilimanjaro shares held by an Alberta resident through brokerage accounts in the US. Specifically, Patel:

- directed the incorporation of 164 Delaware;
- removed share resale restrictions by arranging for the Craft Opinion (and having Zang pay for it using proceeds from the sale of Kilimanjaro shares) and preparing



a resolution that authorized the Share Compensation Agreement (and affixing Rashid's electronic signature thereto) to support the Craft Opinion;

- assisted Zang in opening brokerage accounts by having Zang sign account opening documents (including the Security Questionnaire) and directing the number of shares that were deposited into 164 Delaware's account;
- provided instructions to Kilimanjaro's transfer agent to transfer shares; and
- arranged for Zang to provide him with trading authority over 164 Delaware's and Zang's COR accounts.

[291] Considered as a whole, we conclude that the foregoing – all with connections to Alberta through either Kilimanjaro or Zang – were acts in furtherance of trades, and therefore trades, within the meaning of the Act.

[292] Accordingly, we find that Patel breached s. 93.1 of the Act.

### **C. Kilimanjaro**

[293] As mentioned, Patel's conduct, as Kilimanjaro's guiding mind, is attributable to Kilimanjaro if that conduct was connected to the company's business. Some of Patel's actions in contravention of the CTO were on behalf of Kilimanjaro, including the directions he gave to the transfer agent and the resolution authorizing the Share Compensation Agreement. These steps, along with the Craft Opinion, were instrumental in removing resale restrictions from Kilimanjaro shares deposited into the COR accounts and allowing for their subsequent sale into the market. Accordingly, we find that Kilimanjaro breached s. 93.1 of the Act.

## **IX. MISLEADING STAFF**

[294] Section 221.1(2) of the Act reads:

No person . . . shall make a statement, whether oral or written, in any document, material, information or evidence provided to the Commission, that, in a material respect and at the time and in light of the circumstances under which it is made, is misleading or untrue or does not state a fact that is required to be stated or that is necessary to make the statement not misleading.

[295] A finding that this provision has been contravened requires Staff to prove that a statement was made to the ASC, that the statement was misleading or untrue at the time and in light of the circumstances under which it was made, and that it was misleading or untrue in a material respect (*Re Hagerty*, 2014 ABASC 237 at para. 130, *Re Aitkens*, 2018 ABASC 27 at para. 143). In the context of a statement made to investigators, the materiality of a misleading or untrue statement is not assessed based on the relevance of the information to the investigation but on the extent to which the impugned statement diverges from the facts known by the person at the time that the statement was made (*Re Nuttall*, 2011 BCSECCOM 521 at paras. 43-46). The more at variance that a statement is from the truth, the more likely it is that investigators will pursue an erroneous line of inquiry, thus undermining the efficiency and efficacy of the investigation to the detriment of the public interest.

[296] Staff alleged that Rashid made misleading or untrue statements to Staff in his compelled interviews on September 24 and 29, 2014, when he stated "that he had not raised any money from other people to invest in Kilimanjaro" and "that he did not know any of the seed shareholders in

Kilimanjaro". Staff's Notice of Hearing also stated that in his later interview on October 9, 2014, Rashid admitted that these statements were untrue or misleading. He then told Staff that he raised money from the seed shareholders, many of whom were his family members, friends and business associates.

[297] Although Staff maintained that Rashid made the impugned statements in both September 2014 interviews, our focus is on the second interview of September 29, 2014. Rashid answered questions from Staff investigators while he was under oath and represented by counsel. His responses were oral statements made to the ASC within the meaning of s. 221.1(2) of the Act.

[298] In the September 29 interview, Staff asked Rashid about raising capital for Kilimanjaro and Kilimanjaro Canada. Rashid consistently answered that he and Parks each contributed \$15,000 to Kilimanjaro Canada, and that Kilimanjaro Canada planned to raise additional capital once the shares were listed on the German exchange. When that did not occur, Rashid said that he personally funded Kilimanjaro operations by taking personal loans from family and friends and by using his personal credit. When Staff showed Rashid a list of Kilimanjaro shareholders, he denied selling Kilimanjaro shares to any of them and denied knowing any of the shareholders (other than his son, who Rashid said received Kilimanjaro shares after paying for part of Rashid's investment in Kilimanjaro Canada). As an example of his responses, the following exchange took place after Rashid reviewed the names on the shareholder list:

Q And just to confirm, you've never raised any money for Kilimanjaro Canada?

A No. The Canadian side.

Q Okay. What - - but on the Belize side, it wasn't investments; it was loans you raised?

A Loans, yes.

Q So that list of mainly Alberta-based individuals we went through line by line –

A Yeah.

...

Q - you never sold any of those people securities?

A No.

[299] On October 9, 2014, Rashid voluntarily attended the third interview without counsel and admitted that he knew the individuals on the shareholder list. According to transcripts from that interview, Rashid stated that he "just didn't know what to say at that time", that he did not know why he told Staff that he did not know the shareholders, and that "[n]ow I'm saying I know who they are". Staff reviewed Kilimanjaro's shareholder list with Rashid, and he identified more than a dozen names of people he previously denied knowing. They included his sister and other relatives, and others he identified as friends or business associates. Rashid also described how he solicited those investors, stating that he did not provide an offering memorandum or other investment documents, but simply referred them to a website and told them that they could invest if they were

interested. He said that each investor paid with a bank draft made payable to Patel and thereafter received their share certificates.

[300] Rashid offered various explanations for his untruthfulness in the October interview. He recounted taking common over-the-counter pain medication on the morning of the September 29 interview in relation to a "medical accident". We note that the impugned statements were made near the end of the September 29 interview, that he was asked and explicitly denied having any medical issues that affected his memory, and that the medication apparently did not cause him to make any other mistakes that required clarification. Rashid also said that he was tired, exhausted and surprised to see the shareholder ledger.

[301] Rashid's impugned statements from his September 29 interview were consistent with his statement in the September 24 interview, when he similarly denied raising money for Kilimanjaro or having any involvement with Kilimanjaro seed shareholders. Thus, any surprise from seeing a shareholder list did not explain his earlier interview answers. In short, we do not believe that Rashid's explanations have an air of reality.

[302] We gave significant weight to Rashid's admissions made in the October interview and accepted them as generally truthful, since they were voluntarily, under oath and contrary to his own interest. His admissions were also consistent with other evidence, notably Kilimanjaro Canada's bank records showing that some of the Kilimanjaro investors identified by Rashid in the October interview paid funds to Kilimanjaro Canada in the first few months of 2013 – at a time when Patel and Levy were seeking to raise initial funding for Kilimanjaro Canada. We are satisfied that Rashid made statements in the September 29 investigative interview that were untrue at the time and in light of the circumstances in which they were made.

[303] We are also of the view that Rashid's untrue statements were material in the circumstances. Rashid could not explain why he did not tell Staff in the September 29 interview that he knew the Kilimanjaro shareholders, and he stated in the October interview that he knew his answers in the earlier interview were wrong when he recognized his sister's name. He also told his lawyer immediately after the September 29 interview that he had made a mistake. In the circumstances, Rashid knew that his statements to Staff investigators were untrue and contrary to the facts known to him at the time.

[304] We find that Rashid contravened s. 221.1(2) of the Act.

## **X. PUBLIC INTEREST**

[305] The Notice of Hearing alleged that the Respondents' breaches of the Act constituted conduct contrary to the public interest. Staff also alleged the Respondents' conduct was – either in addition to such breaches or in the alternative – contrary to the public interest and otherwise deserving of sanction. Specifically, Staff alleged that "the market manipulation scheme, including the presence of an Alberta nominee, the creation of seed shareholders, the forward stock split, the artificially created interest and false impression of value in Kilimanjaro, the circumvention of the CTO, and sales of vast amounts of Kilimanjaro shares to the unsuspecting public" was incompatible with a fair and efficient capital market and contrary to the public interest.

[306] The ASC has the authority to make an order in the public interest in circumstances where no contravention of Alberta securities laws had been found: *Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, 2001 SCC 37 at para. 45. Because this authority should only be exercised with restraint and caution after taking into account all relevant considerations, it is only in rare circumstances that public interest orders will be issued where Staff failed to establish that a respondent's conduct breached a specific provision of the Act (*Re Carnes*, 2015 BCSECCOM 187 at paras. 128-32). The discretion to issue orders in the public interest "is not a substitute for a near miss of an essential element of a breach of a section of the Act" (*Re Azeff*, 2015 ONSEC 11 at para. 66). Otherwise, a public interest order may result in a lower threshold for prescribed statutory misconduct and restrain market participants from relying on provisions of the Act when they structure their business affairs. At a minimum, Staff must demonstrate that the impugned conduct is abusive of capital markets (*Carnes*).

[307] In light of our findings that Patel, Rashid and Kilimanjaro breached Alberta securities laws, we did not consider it necessary to make additional findings in relation to the allegations of conduct contrary to the public interest. We were unable to find, based on clear and convincing evidence, that either Levy or Buczynski contravened s. 93(a)(ii) of the Act, and we were similarly unpersuaded that there was sufficient evidence to determine that either (or both) engaged in conduct that was abusive to the capital market and warranted a finding that their actions were contrary to the public interest. We therefore do not find that either of Levy's or Buczynski's conduct was contrary to the public interest.

## **XI. CONCLUSION**

[308] Having found that Patel, Rashid and Kilimanjaro breached Alberta securities laws, this proceeding will now move into a second phase for the determination of what, if any, orders for sanctions and costs ought to be made against them in light of our findings.

[309] We will hold a hearing management session at 09:00 on Tuesday, February 16, 2021 for the purpose of establishing a timetable for the delivery and hearing of evidence (if any) and submissions on the issue of appropriate orders.

February 2, 2021

### **For the Commission:**

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"original signed by"  
Tom Cotter

\_\_\_\_\_  
"original signed by"  
Kari Horn

\_\_\_\_\_  
"original signed by"  
James Oosterbaan