ALBERTA SECURITIES COMMISSION

DECISION

Citation: Re Kilimanjaro Capital Ltd., 2021 ABASC 131 **Date: 20210816**

Kilimanjaro Capital Ltd. now known as N1 Technologies Inc.,
Ashmit S. Patel and Zulfikar Hussein Rashid

Panel:	Tom Cotter Kari Horn James Oosterbaan
Representation:	Carson Pillar Colin Schulhauser for Commission Staff Zulfikar Hussein Rashid for himself
Submissions Completed:	May 14, 2021
Decision:	August 16, 2021

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I. INTRODUCTION

[1] We determined that Kilimanjaro Capital Ltd. (now N1 Technologies Inc.) (**Kilimanjaro**), Ashmit Patel (**Patel**) and Zulfikar Hussein Rashid (**Rashid**, and, together with Kilimanjaro and Patel, the **Respondents**) contravened Alberta securities laws. After these findings, this proceeding continued into a second phase for the purpose of assessing what, if any, orders should be made against the Respondents pursuant to ss. 198, 199 and 202 of the *Securities Act* (Alberta) (the **Act**). We provided staff (**Staff**) of the Alberta Securities Commission (the **ASC**) and the Respondents an opportunity to present evidence and make submissions on this question.

[2] Having considered submissions received from Staff and Rashid, we are ordering sanction and cost-recovery orders against the Respondents. Particulars of these orders, and our reasons, are set out below.

II. BACKGROUND

[3] This proceeding centred on a market manipulation scheme in which Kilimanjaro shares were promoted through a combination of misleading news releases and an online tout campaign, which was designed to inflate the share price and provide an opportunity to sell shares into an unsuspecting market.

[4] In *Re Kilimanjaro*, 2021 ABASC 14 (the **Merits Decision**), we found that each of the Respondents contravened s. 93(a)(ii) of the Act by engaging in various acts relating to Kilimanjaro shares that contributed to an artificial price for those shares. Our reasons for these findings are set out in the Merits Decision, which should be read together with this decision.

[5] In summary, Patel implemented a market manipulation scheme to generate artificial demand for Kilimanjaro shares by coordinating the release of misleading news releases concurrent with an aggressive tout campaign, while he covertly sold Kilimanjaro shares through brokerage accounts he controlled. As observed in the Merits Decision (at para. 213):

> . . . 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.

[6] As Kilimanjaro's guiding mind, Patel directed the company's business and operations. He obtained favourable expert reports about the company's assets, issued misleading news releases and instructed Kilimanjaro's transfer agents on share issuances and transfers. We attributed Patel's conduct and knowledge to Kilimanjaro.

[7] Rashid's role in the manipulative scheme was less overt. He was the apparent head of Kilimanjaro as the company's chief executive officer and director, but in fact acted as a nominee for Patel who had authority and control over Kilimanjaro's activities. Rashid authorized Patel to use his electronic signature on company documents, which enabled Patel to implement his scheme without publicly disclosing his *de facto* control. Rashid also funded certain of Kilimanjaro's activities by using his personal credit and by raising approximately $35,000 from his family, friends and business associates. He allowed his name to be associated with misleading statements

in Kilimanjaro's news releases. We determined that Rashid took these actions when he ought to have known of Patel's plan to manipulate Kilimanjaro's share price.

[8] Patel also contravened s. 93(a)(i) of the Act when he contributed to a misleading appearance of trading in Kilimanjaro shares by purchasing 100,000 Kilimanjaro shares in an attempt to uptick the share price. As he did not do this in his capacity as guiding mind of Kilimanjaro, we dismissed this allegation as it pertained to the company.

[9] Patel (and Kilimanjaro) also violated a cease-trade order (the **CTO**) issued by the ASC in relation to Kilimanjaro shares. Once he learned of the CTO, Patel directed the transfer of large blocks of Kilimanjaro shares to brokerage accounts in the United States, where he was able to sell the shares into the artificially-inflated market.

[10] Finally, we determined that Rashid made untrue statements to ASC investigators while under oath in a compelled investigative interview, contrary to s. 221.1(2) of the Act.

[11] We dismissed allegations against two other respondents.

[12] After the Merits Decision was released, we convened a hearing management session to establish a timeline for the parties to adduce additional evidence and to provide submissions addressing the orders (if any) that should be made pursuant to ss. 198, 199 and 202 of the Act. Both Staff and Rashid declined the opportunity to present further evidence, and agreed on a schedule to provide their submissions to the panel. Neither Patel nor Kilimanjaro appeared or provided submissions. We received written submissions from Staff and Rashid, and both indicated that they did not wish to make oral submissions. We therefore proceeded on the basis of their written material.

III. ORDERS SOUGHT BY STAFF

[13] Staff argued that the public interest required significant sanction and cost-recovery orders against the Respondents, taking into account that Patel's primary role was "objectively worse (and far more culpable) than Rashid's". Staff sought permanent market-access restrictions against Patel and Kilimanjaro, with similar 12-year restrictions against Rashid. Staff also proposed administrative penalties of $450,000 and $125,000 against Patel and Rashid, respectively, an order requiring that Patel pay certain amounts obtained from his non-compliance with Alberta securities laws, and cost-recovery orders against Patel ($120,000) and Rashid ($30,000).

[14] Rashid's written submissions did not specifically address Staff's requested orders or suggest alternative orders. He offered no excuse for his role in Kilimanjaro and claimed a lack of knowledge of the "many improper activities prior to" his involvement. He said that he was impressed by, and convinced of, the validity of the Kilimanjaro project, such that he invested his savings and involved his friends and family. He also indicated that he was director from 2012 to August 2014 but that he could not be responsible for any unknown and unauthorized use of his electronic signature after that time, and he claimed not to have received any money or return on his Kilimanjaro investment. Instead, he worked for his own company 18 hours a day to meet his obligations.

[15] Rashid appended certain documents to his submissions, some of which were not in evidence. We gave these no weight, largely because he had earlier declined the opportunity to present evidence but also because the documents had not been properly adduced into evidence. Regardless, they would not have affected our decision on the appropriate sanction orders.

[16] Rashid's submissions also included various factual assertions that were vague and somewhat inconsistent with our findings in the Merits Decision. To be clear, our assessment of whether we should issue orders pursuant to ss. 198, 199 and 202 of the Act is based on the record and the findings described in the Merits Decision.

IV. SANCTION

A. General Principles

[17] Sections 198 and 199 of the Act allow an ASC panel to order sanctions against a respondent when it is in the public interest. Such orders are preventative in nature and prospective in orientation (not punitive or remedial in nature), and predicated on the protection of investors from unfair, improper or fraudulent practices and the maintenance of a fair and efficient capital market. Specific deterrence (deterring future misconduct by a particular respondent) and general deterrence (deterring misconduct by others) are legitimate considerations, although a sanction order should also be proportionate and account for the nature of the misconduct and the particular respondent's circumstances (*Re Cartaway Resources Corp.*, 2004 SCC 26 at paras. 52-62, *Walton v. Alberta (Securities Commission)*, 2014 ABCA 273 at para. 154).

[18] An effective and proportionate sanction order requires a careful assessment and balance of pertinent sanctioning factors, as outlined in prior ASC decisions. The ASC most recently refined and enumerated those factors in *Re Homerun International Inc.*, 2016 ABASC 95 (at para. 20) as:

- the seriousness of the respondent's misconduct;
- the respondent's pertinent characteristics and history;
- any benefit sought or obtained by the respondent; and
- any mitigating or aggravating considerations.

[19] Consideration of these factors allows a panel to focus on the risk of future misconduct and the need for specific and general deterrence (*R. v. Samji*, 2017 BCCA 415 at para. 97). The factors also take into account proportionality by focussing the sanctioning analysis on the respondent's misconduct and personal circumstances.

[20] Proportionality also requires considering sanctions ordered in other proceedings involving similar misconduct and circumstances (*Homerun* at para. 16). This may be particularly applicable among co-respondents (see *Re Sino-Forest Corporation*, 2018 ONSEC 37 at paras. 106-07).

B. Analysis

[21] Our analysis considers the *Homerun* sanctioning factors as they apply to the Respondents.

1. Application of Sanctioning Principles and Factors

(a) Seriousness of the Misconduct

[22] Market manipulation is a serious contravention of Alberta securities law, adversely affecting those who lost money as a result while also undermining the credibility and integrity of the capital market (see *Re Bluforest Inc.*, 2021 ABASC 25 at para. 46). As recently mentioned in *Re Poonian*, 2021 BCSC 555 at para. 103, market manipulation ". . . is at its core a fraudulent misrepresentation and false pretense . . .".

[23] Patel was the architect of the manipulation of Kilimanjaro shares – a pump and dump scheme lasting several months – in which he covertly exerted control over virtually all aspects of the scheme while using Rashid as his nominee. With this control, Patel:

- obtained an audit of Kilimanjaro's financial statements that falsely reported private placement proceeds of more than US$8 million;
- directed Kilimanjaro's transfer agent to effect a change in Kilimanjaro's share capital – the increase of Kilimanjaro's outstanding shares through a 100-1 forward-share split;
- retained experts to prepare valuation reports for Kilimanjaro assets;
- arranged for Kilimanjaro shares to be traded on a European exchange and on the OTC Markets in the US; and
- issued misleading corporate news releases that overstated or misrepresented the estimated value of Kilimanjaro assets or contained statements falsely attributed to Rashid.

[24] At the same time, Patel coordinated a promotional tout campaign with online promoters, while he sold more than 113.5 million Kilimanjaro shares from March to September 2014 from brokerage accounts he controlled (most of which were not in his name).

[25] In the course of this pump and dump scheme, Patel contravened other provisions of the Act. As mentioned, he breached the CTO by directing the transfer of millions of Kilimanjaro shares to US brokerage accounts soon after he learned of the CTO. In doing so, he avoided the CTO trade restrictions by using falsified documents so that the shares could be traded from the US accounts. By this misconduct, Patel deliberately flouted securities laws for his personal benefit.

[26] Patel also created a false or misleading appearance of trading activity when he purchased 100,000 Kilimanjaro shares, as an apparent attempt to uptick the share price and stabilize the market for Kilimanjaro shares, also for his benefit.

[27] In the Merits Decision, we found that Patel undertook his scheme with full knowledge of the consequences of his conduct and that he carried out his plan to profit at the expense of an unwitting market. In short, Patel knowingly planned and implemented a scheme to artificially stimulate demand for Kilimanjaro shares for the purpose of liquidating millions of shares to unsuspecting market participants. After the promotion ended, Kilimanjaro's share price collapsed.

[28] Patel's misconduct was an egregious breach of Alberta securities laws, done with planning and deliberation, and caused significant harm to investors and undermined confidence in the capital market.

[29] Rashid had a distinctly lesser role in the market manipulation of Kilimanjaro shares. While he may not have fully appreciated that Patel planned to engage in a market manipulation scheme, we found that Rashid ought to have known that his own conduct would contribute to an artificial price for Kilimanjaro shares. Evidence that he contributed – and perhaps lost – as much as $200,000 to pay for Kilimanjaro's expenses supported his position that he did not mean to cause harm to individual investors (many of whom were Rashid's family and business associates who invested in Kilimanjaro at Rashid's suggestion). In the circumstances, Rashid's role in the market manipulation misconduct was serious, albeit less so than that of Patel.

[30] Rashid's other misconduct – making untrue statements to Staff – is of concern. As observed in *Wilder v. Ontario Securities Commission* (2001), 53 OR (3d) 519 (CA) at para. 22, "[i]t is difficult to imagine anything that could be more important to protecting the integrity of capital markets than ensuring that those involved in those markets, whether as direct participants or as advisers, provide full and accurate information to the [Commission]". Any attempt to hinder or frustrate an investigation into capital market misconduct potentially impairs the ASC's ability to protect the public interest.

[31] Rashid evidently did not plan on making the untrue statements to Staff in his interview. The transcript evidence suggested that he was confused when presented with a list of Kilimanjaro shareholders. However, he clearly knew that his statements were false, having disclosed this to his lawyer immediately upon the conclusion of the interview. Making untrue statements to Staff while under oath is self-evidently wrong, but the fact that Rashid was compelled to attend the interview should dispel any doubt that he understood the need for honesty and candour.

(b) Characteristics and History

[32] Assessment of a respondent's background – including education, work experience, registration or other participation in the capital market, disciplinary history and impecuniosity – provides insight into the respondent's future risk to the capital market and to the proportionality of Staff's proposed sanctions (*Homerun* at paras. 27-28).

[33] Staff acknowledged that there was no evidence that either Patel or Rashid had previously engaged in, or been sanctioned for, securities misconduct. Here we did not consider the absence of a disciplinary history to be mitigating, but only a neutral factor. We later address Staff's assertion that Patel's position as a lawyer was an aggravating factor.

[34] Staff suggested that Kilimanjaro's name change and radically different business objective involving nanotechnology, following Patel's market manipulation scheme, may pose a risk of ongoing misconduct. We accept that Kilimanjaro's activities following the market manipulation scheme presents a danger of the company again being used in a manner contrary to the public interest.

(c) Benefits Sought or Obtained

[35] As discussed, Patel engaged in misconduct so that he could profit at the expense of other market participants. As recounted in the Merits Decision, he sold more than 113.5 million Kilimanjaro shares during the market manipulation. Staff asserted that Kilimanjaro investors were directly and negatively affected by the significant decline in Kilimanjaro's share price and that the scheme eroded public trust in the capital market.

[36] As discussed in further detail later in this decision, we were satisfied that Patel obtained at least $117,400 from his misconduct. Patel's willingness to engage in serious market misconduct for personal gain indicates that he poses a significant risk to the capital market.

[37] Staff acknowledged that Rashid did not receive any benefits from his misconduct. While the evidence persuades us that Rashid was motivated by his interest in the success of the Kilimanjaro project and that he sought to profit from this enterprise, we noted that he evidently lost money from his involvement with Kilimanjaro.

(d) Mitigating or Aggravating Considerations

[38] Consideration of mitigating and aggravating factors ensures that a sanction order takes into account all relevant circumstances, and is not limited to the specific sanctioning factors identified earlier (*Homerun* at para. 39).

[39] Staff submitted that there were no mitigating factors in the circumstances – other than Rashid's voluntary correction of his misleading statement (which Staff characterized as moderately mitigating) – and several aggravating ones.

[40] One aggravating factor cited by Staff was that Patel used his professional designation as a lawyer to further his market manipulation scheme. Staff submitted that lawyers are more likely to be trusted and relied on by others because they are bound by professional codes of conduct and subject to the oversight of self-governing bodies. As presented, this argument was somewhat abstract, as Staff did not identify a specific finding in the Merits Decision or point to evidence demonstrating that Patel's legal background enabled him to carry out his misconduct.

[41] Staff argued that Patel's in-depth knowledge of securities laws was also aggravating, as it demonstrated that he engaged in misconduct knowing it to be illegal. Patel was clearly aware of applicable securities laws and he deliberately engaged in serious misconduct, in part by secretly controlling Kilimanjaro as its guiding mind while covertly trading Kilimanjaro shares in brokerage accounts that were mostly held by nominees. However, Patel did not require specialized legal training or securities-related experience to know that engaging in market manipulation and contravening cease-trade orders is self-evidently wrong.

[42] Staff also asserted that Patel's attempts to avoid regulatory scrutiny constituted an additional aggravating factor. As discussed in the Merits Decision, expert evidence suggested that suspicious trading schemes often occur where undisclosed control persons secretly exercise authority over an issuer and its share transactions – typically through the appointment of nominee directors and officers and by exercising trading authority over third-party brokerage accounts. Perpetrators of market manipulation schemes take these steps to conceal their misconduct from the

oversight of regulatory authorities and brokerage firms (who exercise a gatekeeping responsibility). In the Merits Decision we found that Patel persuaded Rashid to act as his nominee for Kilimanjaro, which allowed Patel to secretly control the company and orchestrate a coordinated promotional campaign and concomitant liquidation of its shares. A critical component to Patel's scheme was avoiding the CTO by transferring Kilimanjaro shares to various US brokerage accounts that he controlled. Using falsified account-opening documentation, Patel continued his scheme, while circumventing securities laws governing control distributions and resale restrictions. These efforts to avoid regulatory oversight were aggravating, and reflected Patel's contempt for the integrity of the capital market.

[43] Although Staff contended that the scope of Patel's scheme was an additional aggravating factor, this element of Patel's misconduct was largely subsumed within our analysis of other sanctioning factors, and we did not consider it as a separate aggravating factor.

[44] Staff argued that Rashid abused his position of trust when he solicited investment funds from friends and family and that he potentially prevented Staff from halting Patel's pump and dump scheme by evading Staff's summonses and document requests while Patel engaged in his market misconduct. Staff's assertions were somewhat hypothetical and we did not have clear and convincing evidence that Rashid abused a position of trust. Moreover, in light of commentary in *Homerun* at para. 44 suggesting that assistance to Staff in identifying and curtailing ongoing misconduct by others is a potential mitigating factor, we considered Rashid's lack of cooperation as the absence of a mitigating factor rather than as an aggravating factor.

[45] We also identified some mitigation from Rashid's self-reporting to Staff of the false information he gave in his interview and his willingness to clarify his statement by giving evidence under oath and without a lawyer. Staff submitted that this was moderately mitigating, given that the misinformation would have been uncovered in the course of Staff's investigation. Although we were concerned that Rashid offered no explanation of why he waited nearly two weeks to self-report to Staff, and that he minimized his deception when he did so, we nevertheless consider a reduced need for specific deterrence in his case.

(e) Conclusion on Sanctioning Factors

[46] Taking into account the relevant sanctioning factors, we are convinced that the public interest warrants meaningful sanction orders to provide both specific and general deterrence.

[47] Patel presents a real risk to the capital market and thus requires both specific and general deterrence to convey the message that securities manipulation will not be tolerated. Patel's deliberate flouting of the CTO also signifies that he is willing and able to contravene securities laws and ignore his professional obligations. In short, Patel cannot be trusted to again participate in the capital market.

[48] While Rashid's misconduct also reflected a risk to the public interest, we discerned some mitigation that modifies the need for specific deterrence, although general deterrence remains a pertinent consideration.

[49] Significant deterrence is also appropriate for Kilimanjaro, particularly in light of the risk that the company might again be used as a tool for securities misconduct.

2. Outcomes in Other Proceedings

[50] Staff cited several previous decisions that provide some assistance in determining appropriate sanction orders: *Bluforest*; *Re Deyrmenjian*, 2019 BCSECCOM 93; *Re Lim*, 2017 BCSECCOM 319; *Re Sulja Bros Building Supplies, Ltd.*, 2011 ONSEC 19 and *Re Hagerty*, 2014 ABASC 348.

[51] In *Bluforest*, an ASC panel ordered sanctions for an elaborate, multi-jurisdictional pump and dump scheme that manipulated the market through the use of a promotional tout sheet campaign and trading in offshore brokerage nominee accounts. The principal of the scheme received permanent market-access bans and was ordered to pay an administrative penalty of $750,000 along with a significant disgorgement order. His attempts to conceal his involvement in the scheme – through the use of nominees and offshore accounts that he controlled – was an aggravating factor.

[52] Similar sanctions – consisting of permanent market prohibitions, substantial disgorgement orders (where applicable) and administrative penalties of $850,000 and $700,000 – were ordered in *Deyrmenjian* against various respondents. The panel there described the market manipulation scheme as "a complex, opaque scheme employing multiple offshore accounts and trusts and a tout sheet promotional campaign" (at para. 148).

[53] In *Lim*, two respondents engaged in a fraudulent pump and dump scheme involving an extensive marketing campaign and used offshore accounts and third party intermediaries to conceal their misconduct. It was aggravating that Lim, who orchestrated the market manipulation, abused his role as a registrant. The panel ordered broad, permanent market prohibitions (with limited carve-outs) and administrative penalties that recognized the relative contributions of each respondent to the overall misconduct – Lim received an administrative penalty of $800,000, while the other respondent was ordered to pay $375,000. There was no disgorgement order in *Lim*, although the evidence did not clearly indicate whether the respondents were enriched from certain trading accounts connected to the market manipulation.

[54] *Sulja Bros.* was another pump and dump scheme in which the respondents were found to have engaged in fraud, market manipulation and making misrepresentations. They profited from their misconduct and were able to conceal their involvement for almost a year by trading through nominee accounts. Sanction orders against some respondents included permanent market-access bans, administrative penalties of $750,000 and a significant disgorgement order, with administrative penalties of $125,000 and 15-year market restrictions for some of the less culpable respondents.

[55] These cases provided helpful guidance on the nature and extent of sanctions for similar misconduct. In sum, they demonstrate that respondents principally responsible for pump and dump schemes typically receive permanent market-access bans, along with administrative penalties – in the range of $700,000 to $850,000 – and disgorgement orders where appropriate. Lesser sanction orders – consisting of limited market restrictions and smaller administrative penalties – are

generally ordered for other respondents to reflect their relative culpability and involvement in such schemes.

[56] Staff also cited *Hagerty*, in which an administrative penalty of $20,000 was ordered against a respondent who made a materially untrue statement in an investigative interview. The panel in *Hagerty* considered another case where a respondent corrected her untrue statements, which suggested to the panel that "even a corrected untruth to Staff investigators can, depending on the circumstances, constitute serious misconduct warranting a not-insignificant monetary sanction" (para. 23).

[57] We also took into account the two settlement agreements involving co-respondents in this proceeding. One respondent, Richard Moore – a registrant at the time of the misconduct – admitted that he contravened s. 93.1 of the Act by failing to take the necessary steps to make himself aware of, and to comply with, the CTO and that he acted contrary to the public interest by failing to make inquiries into suspicious and unusual circumstances surrounding the trading of Kilimanjaro shares. For these contraventions, he agreed to pay $15,000 (inclusive of costs) and to a five-year ban on becoming or acting as a registrant. The other co-respondent – a lawyer licensed to practice in Alberta, John Zang (**Zang**) – also admitted that he contravened ss. 93.1 and 93(a)(i) of the Act and that he engaged in conduct contrary to the public interest. In his settlement, Zang acknowledged that he engaged in an act or course of conduct in furtherance of the sale of Kilimanjaro shares after the CTO had been issued, he indirectly engaged in a course of conduct that he ought to have known may have contributed to an artificial price for Kilimanjaro shares and he failed to identify and adequately respond to suspicious circumstances surrounding Kilimanjaro's management, business operations and promotional activities. For these contraventions, Zang agreed to pay $70,000 (inclusive of costs) and to certain six-year market restrictions.

3. Analysis of Sanctions

[58] We conclude that significant sanctions are necessary to deliver necessary specific and general deterrence, with Patel's misconduct and circumstances clearly warranting a heightened need for sanction. Consistent with prior similar decisions, the appropriate sanctions should include an array of comprehensive market-restrictions against the Respondents, along with significant monetary penalties for Patel and Rashid.

(a) Market-Access Bans

[59] An ASC panel in *Re Fauth*, 2019 ABASC 102 at para. 68 summarized the ASC's authority to impose market restrictions under s. 198(1) of the Act:

> Different bans addressing different types of activity in the Alberta capital market are available under s. 198(1). They may be temporary or permanent, and subject to exceptions (the aforementioned "carve-outs") or not. Such orders prohibit those who contravene Alberta securities laws from future participation in the market, and make it apparent to others that they risk losing the privilege of participation if they undertake similar misconduct (see *Planned Legacies* at para. 63 and *Mandyland* at para. 51).

[60] Staff proposed comprehensive, permanent market bans for Patel, consisting of trading bans, director and officer bans and other bans precluding his involvement in the capital market. In the circumstances, we agree that the orders proposed by Staff for Patel – both the type of bans and

their duration – are appropriate and in the public interest. In short, the grave and substantial risk he presents to the capital market warrants a comprehensive and permanent ban precluding future involvement in the capital market.

[61] Staff also sought 12-year market bans against Rashid, consisting of a trade ban (without carve-outs or access to exemptions), a director and officer ban and a prohibition from acting in a management or consultative role. In the circumstances, and taking into account Rashid's personal circumstances and the lessened need for specific deterrence, we are of the view that the public interest will be adequately served by eight year market restrictions, with the exception of the director and officer restrictions. In our view, Rashid's willingness to act as nominee director and officer of Kilimanjaro warrants a longer ban, and we therefore order a director and officer ban against Rashid for a period of 10 years. However, it would be appropriate for Rashid to receive a limited carve-out from the director and officer ban so that he can maintain his personal business.

[62] We also agree with Staff's request for a permanent trading ban for Kilimanjaro securities, and that the company be precluded from trading or purchasing other securities or relying on Alberta securities laws exemptions.

(b) Monetary Sanctions

[63] We are satisfied that market-access bans, without more, provide an insufficient deterrent to the individual respondents. We are therefore ordering monetary sanctions against Patel and Rashid.

(i) Administrative Penalty

[64] In addition to any other sanction that may be imposed, an ASC panel may order a person or company to pay an administrative penalty of not more than $1 million for each contravention or failure to comply with Alberta securities laws (s. 199(1) of the Act). An administrative penalty is an important sanctioning measure for specific and general deterrence (*Re Workum and Hennig*, 2008 ABASC 719 at para. 135). The Alberta Court of Appeal has observed that an administrative penalty should not be so low that it amounts to nothing more than another cost of doing business (*Alberta Securities Commission v. Brost*, 2008 ABCA 326 at para. 54), that sanctions must not be "so low as to communicate too mild a rebuke to the misconduct, or perhaps a licensing fee for its occurrence", or else "the opposite to deterrence may result" (*Maitland Capital Ltd. v. Alberta (Securities Commission)*, 2009 ABCA 186 at para. 21), and that the amount of an administrative penalty must also be "proportionate to the offence, and fit and proper for the individual offender" (*Walton* at para. 156).

[65] Staff submitted that prior decisions involving pump and dump market-manipulation schemes typically resulted in administrative penalties ranging from $700,000 to $800,000 for the architects or instigators of such schemes. Staff nevertheless sought an administrative penalty of $450,000 against Patel because his misconduct was considerably less profitable relative to other decisions. We agree that an administrative penalty of $450,000 would provide sufficient general and specific deterrence in the circumstances, is not so low as to be considered a licensing fee and is proportionate to Patel's misconduct and his personal circumstances, while also being consistent with prior sanction decisions. Accordingly, we order Patel to pay an administrative penalty of $450,000.

[66] Staff also requested an order requiring that Rashid pay an administrative penalty of $125,000. Staff submitted that identical administrative penalties were ordered against certain respondents in *Sulja Bros.*, whose misconduct was analogous to that of Rashid. Staff pointed out that their proposal would also address Rashid's contravention of s. 221.1(2), which typically attracts an administrative penalty of approximately $20,000 to $25,000.

[67] We observe that the administrative penalties in *Sulja Bros.* were meant to reflect the varying levels of involvement in, and culpability for, the pump and dump scheme, particularly in relation to the co-respondents. In the circumstances, Rashid's misconduct in enabling the pump and dump scheme was no more culpable, and probably less, than that of Zang, who admitted to facilitating Patel's misconduct and engaging in conduct contrary to the public interest, for which he agreed to make a payment of $70,000 (inclusive of costs) for his contraventions of the Act. In the circumstances, an administrative penalty against Rashid should more closely approximate the amounts paid by Zang. We consider that an administrative penalty of $75,000 would meet the needs of proportionality while providing sufficient deterrence for Rashid (and others). We therefore order Rashid to pay an administrative penalty of $75,000.

[68] Staff did not seek an administrative penalty from Kilimanjaro, and we agree that the public interest would not be served by imposing a monetary sanction on the company.

(ii) Disgorgement

[69] If a person or company has not complied with Alberta securities laws, s. 198(1)(i) of the Act authorizes an ASC panel to order the person or company to pay any amounts obtained or payments or losses avoided as a result of their non-compliance. Such an order, often referred to as a disgorgement order, is an important enforcement tool that reinforces specific and general deterrence so that a wrongdoer does not retain a financial benefit from the misconduct (*Fauth* at para. 77).

[70] A disgorgement order requires a finding that the respondent obtained amounts from the misconduct found and that the order is in the public interest (*Poonian v. British Columbia Securities Commission*, 2017 BCCA 207 at paras. 144-45). Staff bear the onus of demonstrating on a balance of probabilities that the respondent obtained amounts as a result of the misconduct. An assessment of that issue is not limited to the respondent's profits and should consider all amounts received by the wrongdoer without deduction for losses or expenses (*Poonian* at paras. 84-88). Once Staff have shown a reasonable approximation of the amount illegally obtained, the respondent has the burden of disproving the reasonableness of that amount. This approach ensures that the disgorgement order "is not frustrated by the complexity of the wrongdoing or the wrongdoer's intentional masking of their activities" and places the risk of ambiguity or uncertainty in calculating disgorgement onto the respondent whose non-compliance gave rise to the uncertainty (*Fauth* at para. 81, *Poonian* at para. 140).

[71] Staff requested a disgorgement order against Patel based on amounts he obtained from selling Kilimanjaro shares through US brokerage accounts. One account belonged to Patel, from which he realized gross proceeds of US$100,648.84. Two other accounts were beneficially owned by Zang, who provided Patel with a cheque in the amount of US$6,429.75 for his share of the sale

proceeds. We determined in the Merits Decision that Patel exercised trading authority in these accounts and directed trading of Kilimanjaro shares while engaged in a course of conduct that contributed to an artificial price for those shares.

[72] Staff submitted that the combined amount of $117,421.38 (converted into Canadian dollars) was a reasonable approximation of amounts obtained by Patel from his misconduct. Staff argued that this was probably a conservative amount because it likely underestimated amounts received by Patel from share sales in Zang's US brokerage accounts and did not account for trading in Zang's Canadian accounts prior to the CTO. Staff's calculation was based on the gross proceeds realized in Patel's brokerage account, rather than the amounts he withdrew from the account and included all amounts he obtained without deduction for trading expenses or amounts used to acquire Kilimanjaro shares (which resulted in the finding that Patel contributed to a misleading appearance of trading activity).

[73] Patel elected not to adduce evidence or make submissions, so he has not disproved the reasonableness of the amount proposed by Staff.

[74] We are satisfied on a balance of probabilities that Patel obtained at least $117,400 from his non-compliance with Alberta securities laws. We agree that the gross proceeds realized in Patel's account is an appropriate measure of the amount obtained for purposes of assessing the disgorgement order in this case. That approach is consistent with the objective of a disgorgement order to reinforce deterrence, thereby protecting the public interest. Moreover, a respondent should not benefit by deducting expenses incurred in furtherance of the misconduct (see *Poonian* at para. 87).

[75] Staff submitted that a disgorgement order is in the public interest as it would deter Patel and others by removing amounts obtained from the misconduct.

[76] In our view it is in the public interest to make a disgorgement order against Patel. We agree that such an order appropriately augments specific and general deterrence by providing a clear message that wrongdoers will not benefit by engaging in market manipulation and evading ASC cease-trade orders. The disgorgement order is also consistent with the Act's protective purposes in fostering confidence in the capital market and protecting investors from unfair and fraudulent acts. We consider the amount of the order to be proportionate together with the administrative penalty.

V. COSTS

[77] Staff sought orders under s. 202(1) of the Act requiring Patel and Rashid to pay certain costs of the hearing and the investigation that led to the hearing. Staff did not seek a cost-recovery order against Kilimanjaro, as Patel directed the company as its guiding mind and thus should bear Kilimanjaro's costs.

[78] Section 202(1) of the Act provides that a person or company who has contravened Alberta securities laws or acted contrary to the public interest may be ordered to pay "costs of or related to the hearing or the investigation that led to the hearing, or both". A costs order differs from a sanction and is a means of recovering from a respondent certain investigation and hearing costs that would otherwise be borne by market participants who fund the ASC's operations.

[79] The process of assessing costs under s. 202 has been described in the following terms:

> . . . the relevant costs will be those related to the investigation into the misconduct found, and the hearing in which that misconduct was proved. It would be inappropriate to assess costs attributable to allegations ultimately withdrawn or dismissed. A panel will therefore be mindful of which allegations were proved and which were withdrawn by Staff or dismissed by the panel. Where a cost item can be readily ascribed to a particular respondent and particular allegation, the task is straightforward. More often, however, it would be impractical for Staff's supporting documentation and submissions to make such plain distinctions, given the complexity and evolving nature of the investigation process or the scope of a particular hearing. In those cases the panel faces the task of estimating the proportion of claimed costs fairly attributable to specific respondents and specific allegations.
>
> In assessing the reasonableness of claimed costs, the panel also considers aspects such as time spent by Staff on a matter; indications of duplicated effort for which some reduction might be warranted; the nature and scale of claimed disbursements; and any prior recovery of costs arising from the same matter (for example, through settlement with another respondent). Through that process the panel determines the amount of costs prima facie recoverable.
>
> The panel must also make an allocation of recoverable costs based on its assessment of which respondents should bear responsibility, and in what respective proportions. In this task the panel will focus on the extent to which investigation and hearing resources (as reflected in the recoverable costs) were applied to proving the respective respondents' misconduct. Other considerations may lead the panel to conclude that cost responsibility is properly allocated wholly among one of multiple classes of respondents (for example, wholly among individual respondents for whom corporate respondents were mere vehicles for the misconduct found).
>
> Having made that allocation, the panel then considers the efficiency (or inefficiency) that each party brought to the proceeding as a whole, and the associated contribution to the broader public interest objectives of our regulatory system. This factor may argue for moderation – sometimes substantial – in the extent of cost recovery to be ordered against a particular respondent (and therefore may result in less than full recovery of the prima facie aggregate amount).
>
> Finally, there may be concern that a cost-recovery order could diminish prospects of recovery for investor victims. This, too, may warrant moderating the amounts of cost recovery ordered against certain respondents, or wholly foregoing cost recovery in a particular case. (*Homerun* at paras. 49-53)

[80] We adopt this approach in our analysis of Staff's request for cost-recovery orders here.

A. Staff's Position

[81] Staff provided a bill of costs, estimating their investigation and hearing costs at nearly $400,000. Staff deducted from this certain litigation costs and disbursements to reflect work that was either duplicative or unnecessary and work or disbursements attributable to other respondents or to matters in which Staff was awarded costs in court proceedings. Staff conceded that the resulting amount – about $240,000 for investigation, litigation and disbursements – should be further adjusted to account for allegations that were withdrawn by Staff or dismissed in the Merits Decision, and submitted that $150,000 represented a reasonable amount for costs against Patel and Rashid.

[82] From this amount, Staff submitted that Patel should pay the majority because of his extensive role in the misconduct and to account for his unsuccessful interlocutory applications that seemed to be attempts to "derail the proceedings". Accordingly, Staff requested cost-recovery orders of $120,000 against Patel and $30,000 against Rashid.

B. Analysis of Costs

[83] We accepted the costs itemized in Staff's bill of costs and agree with Staff's proposed discounts as reasonable and practical. Accordingly, we find that $150,000 reasonably reflects the costs recoverable against the Respondents.

[84] Patel was the architect of the market manipulation scheme and, as Kilimanjaro's guiding mind, he should bear the company's portion of costs. Neither Patel nor Rashid contributed to an efficient hearing. Significant hearing time was dedicated to the allegations against Patel, including expert evidence to assist the panel. Patel made several unsuccessful applications – including one for a mid-hearing adjournment – which increased costs. While Patel was entitled to defend himself, he is responsible for the cost consequences of his actions.

[85] In summary, we order Patel to pay costs of $120,000 and Rashid to pay costs of $30,000 pursuant to s. 202 of the Act.

VI. CONCLUSION

[86] For the reasons given, we make the orders set out below.

Patel

[87] Against Patel, we order that:

- under s. 198(1)(d) of the Act, he must resign all positions he holds as a director or officer of any issuer, registrant, investment fund manager, recognized exchange, recognized self-regulatory organization, recognized clearing agency, recognized trade repository or recognized quotation and trade reporting system;

- with permanent effect:

    - under ss. 198(1)(b) and (c) of the Act, he must cease trading in or purchasing securities or derivatives, and all of the exemptions contained in Alberta securities laws do not apply to him;

    - under s. 198(1)(c.1), he is prohibited from engaging in investor relations activities;

    - under s. 198(1)(e), he is prohibited from becoming or acting as a director or officer (or both) of any issuer (or other person or company that is authorized to issue securities), registrant, investment fund manager, recognized exchange, recognized self-regulatory organization, recognized clearing agency, recognized trade repository or recognized quotation and trade reporting system;

- under s. 198(1)(e.1), he is prohibited from advising in securities or derivatives;

- under s. 198(1)(e.2), he is prohibited from becoming or acting as a registrant, investment fund manager or promoter; and

- under s. 198(1)(e.3), he is prohibited from acting in a management or consultative capacity in connection with activities in the securities market;

- under s. 198(1)(i) of the Act, he must pay to the ASC $117,400 obtained as a result of his non-compliance with Alberta securities laws;

- under s. 199, he must pay an administrative penalty of $450,000; and

- under s. 202, he must pay $120,000 of the costs of the investigation and hearing.

Rashid

[88] Against Rashid, we order that:

- under ss. 198(1)(d) and (e) of the Act, he must resign all positions he holds as a director or officer of any issuer, registrant, investment fund manager, recognized exchange, recognized self-regulatory organization, recognized clearing agency, recognized trade repository or recognized quotation and trade reporting system, and he is prohibited from becoming or acting as a director or officer (or both) of any issuer (or other person or company that is authorized to issue securities), registrant, investment fund manager, recognized exchange, recognized self-regulatory organization, recognized clearing agency, recognized trade repository or recognized quotation and trade reporting system, until and including August 16, 2031, except that these orders to not preclude him from continuing to act as a director or officer (or both) of Rodeo Express Delivery Limited, provided that it is wholly owned by one or more of him and his immediate family members, does not issue or propose to issue securities to the public, and does not engage in any act, advertisement, solicitation, conduct or negotiation directly or indirectly in furtherance of a sale or disposition of a security to the public;

- until and including August 16, 2029:

    - under s. 198(1)(b) and (c) of the Act, he must cease trading in or purchasing securities or derivatives, and all of the exemptions contained in Alberta securities laws do not apply to him; and

    - under s. 198(1)(e.3), he is prohibited from acting in a management or consultative capacity in connection with activities in the securities market;

- under s. 199, he must pay an administrative penalty of $75,000; and

- under s. 202, he must pay $30,000 of the costs of the investigation and hearing.

Kilimanjaro
[89] Against Kilimanjaro, we order that, with permanent effect, under ss. 198(1)(a), (b) and (c) of the Act, all trading in or purchasing of securities or derivatives of Kilimanjaro must cease, Kilimanjaro must cease trading in or purchasing securities or derivatives, and all of the exemptions contained in Alberta securities laws do not apply to Kilimanjaro.

[90] This proceeding is concluded.

August 16, 2021

For the Commission:

"original signed by"
Tom Cotter

"original signed by"
Kari Horn

"original signed by"
James Oosterbaan