

ALBERTA SECURITIES COMMISSION

DECISION

Citation: Re Mottahed, 2026 ABASC 129

Date: 20261002

Shahin Mottahed

Panel:	Kari Horn, K.C. Tom Cotter Karen Kim
Representation:	Amanda Goodwin Peter Verschoote for Commission Staff Shahin Mottahed for himself
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I. INTRODUCTION

[1] Staff (**Staff**) of the Alberta Securities Commission (the **ASC**) alleged in a January 22, 2025 notice of hearing (the **NOH**) that Shahin Mottahed (**Mottahed**) and Colin Garfield Wagner (**Wagner**) had breached ss. 93(1)(b), 92(4.1), and 221.1(2) of the *Securities Act* (Alberta) (the **Act**) in connection with direct or indirect payments (the **Transfers**) of almost \$2.3 million from Target Capital Inc. (**Target**) to Performance CBD Brands Corp. (**Performance**). Staff alleged that the Transfers were made between October 7, 2019 and February 9, 2021 (the **Relevant Period**).

[2] A hearing into the allegations (the **Hearing**) began on September 22, 2025. Wagner entered into a Settlement Agreement and Undertaking (the **Settlement**) later that day, and was thereafter not a respondent in the proceeding. Wagner was called by Staff as a witness, and the Settlement was entered into evidence. Staff called three other witnesses: a Staff forensic accountant and investigator; and two former directors of Target (Theodore Zurich (**Zunich**) and Gregory Turnbull (**Turnbull**)). Mottahed represented himself, but did not attend the majority of the Hearing, did not testify, called no witnesses, and did not cross-examine any of Staff's witnesses. Staff tendered documents into evidence throughout the Hearing. Staff and Mottahed also agreed on the admission of certain other documents into evidence. Staff and Mottahed made written and oral submissions.

[3] Staff alleged that Mottahed engaged in fraud by carrying out the Transfers and concealing them from investors, the market, and Target's board of directors (the **Target Board**). The alleged concealment from investors and the market was conducted through alleged misrepresentations or misstatements – to the market, to Staff, or to both – in the **December 2019 Interim Financials**, the **December 2019 Interim MD&A**, the **December 2019 Certificate**, and the **2020 News Releases** (all as defined below). Staff asserted that Mottahed was responsible – directly, indirectly, or both – for such misrepresentations or misstatements and for the fraud.

[4] As set out in detail below, we find that Mottahed breached ss. 93(1)(b), 92(4.1), and 221.1(2) of the Act, although we do not make findings on every element of every allegation. Because of our findings of direct misconduct by Mottahed, it is unnecessary for us to consider whether he indirectly breached the Act by authorizing, permitting, or acquiescing in actions of Target. This proceeding will continue in a second phase to determine what, if any, sanction and cost-recovery orders are appropriate against Mottahed.

II. BACKGROUND

A. Summary

[5] The allegations all stemmed from the Transfers. At the start of October 2019, Target had approximately \$2.2 million in cash and guaranteed investment certificates (**GICs**) (along with approximately \$1 million of other assets). Target also received net proceeds of \$90,750 from selling its shares in YSS Corp. (**YSS**) in November 2020. Almost all of these funds were transferred by Target, on Mottahed's instructions, either to Performance or for Performance's benefit, as set out below. Those Transfers, their impact on Target's cash position, and Target's connection to Performance were not mentioned in various disclosure made by Target during the Relevant Period, also as set out below.

B. Entities and Individuals

1. Target

[6] Target is an Alberta reporting issuer incorporated in 1993. It traded on the TSX Venture Exchange and Canadian Securities Exchange and primarily invested in early-stage cannabis-related businesses during the Relevant Period. In 2024, Target changed its name to Westgate Energy Inc. (**Westgate**). We refer to it only as Target in this decision.

[7] Mottahed was Target's chair, president, and chief executive officer (**CEO**) from November 2017 until the Target Board required him to resign effective April 16, 2021. Wagner was its chief financial officer (**CFO**) from August 2019 until the Target Board required him to resign effective April 16, 2021.

[8] During the Relevant Period, Mottahed and Wagner were Target's only employees and the only signatories on its bank account (the **Target Bank Account**). Members of the Target Board included:

- Chad Oakes (**Oakes**; from November 21, 2017 to September 16, 2020);
- Turnbull (from November 21, 2017 to September 16, 2020);
- Matteo Volpi (**Volpi**; from November 21, 2017 to April 16, 2021);
- Ron Hozjan (**Hozjan**; from September 16, 2020 to at least March 31, 2022); and
- Zurich (from September 16, 2020 to approximately June 2024, when Target completed a reverse take-over (**RTO**) transaction).

[9] Due to the effects of the COVID-19 pandemic (the **Pandemic**), regulators in Canada allowed late filing of certain financial statements. In Alberta, this was effected under ASC Blanket Order 51-519 *Temporary Exemption from Certain Corporate Finance Requirements with Deadlines during the Period from June 2 to August 31, 2020* (**BO 51-519**, cited as 2020 ABASC 67). Target relied on that when issuing the impugned 2020 News Releases on August 6, August 28, September 15, September 28, and October 13, 2020. The primary purpose of these releases was to inform investors and the capital market in general about Target's late annual financial statements for the year ended March 31, 2020 (the **2020 Annual Financials**). Before, during, and after the time of the 2020 News Releases, Wagner was working with Target's auditors (the **Auditors**) on the draft of the 2020 Annual Financials, and the Auditors were raising concerns about Target's disclosure of its relationship to Performance and of the Transfers. We are satisfied that Mottahed was aware during that period of the process and the Auditors' concerns.

[10] Because its periodic financial disclosure was late, Target eventually applied to the ASC for a management cease-trade order (the **MCTO**), which was granted on September 15, 2020 and stopped Mottahed and Wagner from trading in and purchasing securities of Target. On November 5, 2020, the MCTO was revoked and replaced by a failure-to-file cease-trade order (the **FFCTO**), which stopped all trading in and purchasing of securities of Target.

[11] Zunich became the interim CEO of Target on April 16, 2021 when Mottahed resigned. At the same time, Robert Dion (**Dion**) became the interim CFO, replacing Wagner. We refer to Zunich and Dion, starting on April 16, 2021, as Target's **New Management**. Wagner testified that he stayed available to New Management to answer questions and provide background information. New Management eventually filed amended disclosure documents for the period ended December 2019 – the **Amended and Restated December 2019 Interim Financials** and the **Amended and Restated December 2019 Interim MD&A** – and filed the 2020 Annual Financials and all other required disclosure which had been outstanding, as discussed below. The FFCTO was revoked on May 8, 2023.

[12] Target also had a legacy business during the Relevant Period. For a time, it received a small annual fee from a number of companies associated with that business.

2. Performance

[13] Performance was a company registered in Alberta on February 8, 2017 and with a registered office in Calgary. Its business was selling cannabidiol sports supplements through Champions + Legends Corp. (**Champions**), a subsidiary in the United States (US). Some of the evidence used the names Performance and Champions somewhat interchangeably – regardless, neither was part of Target. Wagner described Performance as "a brand-new start-up". We had limited evidence about Performance's operations, but it was clear Performance had little, if any, success during the Relevant Period and was unable to fund itself or pay back Target for the Transfers. On September 2, 2021, Performance was struck for failing to file annual returns.

[14] Mottahed was Performance's sole director during the Relevant Period and was its founder and majority shareholder. Wagner testified that he became CFO of Performance sometime in early 2020, reporting to Mottahed, who had brought Wagner the opportunity. Wagner said that he also purchased a small number of shares in Performance in 2020 and that there were other minor shareholders around that time.

[15] Mottahed and Wagner were the only signatories on Performance's two bank accounts during the Relevant Period. These were opened in November and December 2019, respectively, and Mottahed was noted on the documentation as the sole owner of Performance. Wagner stated that he and Mottahed also managed Champions' bank accounts.

[16] An October 2020 Champions promotional document in evidence listed Zunich and Hozjan as directors and advisors of Champions. Zunich testified that he had not seen that reference but would have had a problem with it because he never had any role with Champions. There was no evidence Hozjan did either. We conclude that Zunich and Hozjan had no such role and were unaware of Mottahed's and Wagner's roles with Performance and Champions and the existence and significance of the Transfers until it was too late.

3. Mottahed

[17] Mottahed is a Calgary resident. We described above his relevant roles with Target, Performance, and Champions.

4. Wagner

[18] Wagner is a Calgary resident. We described above his relevant roles with Target, Performance, and Champions. As noted, allegations against Wagner were settled, his Settlement was in evidence, and he testified at the Merits Hearing.

[19] Wagner testified that he was in regular contact with Mottahed, but rarely had any contact with Target Board members and did not attend Target Board meetings. He acknowledged in the Statement that he relied on Mottahed's representations that the Target Board was aware of the Transfers and had approved them. Wagner also acknowledged that he did not seek any confirmation of that from Target Board members or otherwise. Wagner drafted Target's financial statements. He testified that he sent those to Mottahed, who then presented them to the Target Board.

[20] Overall, we accept Wagner's admissions in the Statement that he knew or ought to have known that the documents at issue here were false or misleading and that they should have disclosed the context and information about the Transfers. We also accept that he had very little communication with Target Board members. That lack of communication did not excuse Wagner's actions – as an experienced accounting and financial professional, he should have known that level of interaction with the Target Board was insufficient.

5. Turnbull

[21] Turnbull is a retired lawyer who served on the boards of many companies. Turnbull started on the Target Board in November 2017 after learning of the opportunity from Sony Gill (**Gill**), who was Target's counsel and a friend of Mottahed. Turnbull was an outside director of Target and described his duties as normal for that position, including monitoring the business and operations, reviewing financial statements, and, later, looking for a major transaction for Target. He resigned in September 2020. Turnbull was not compensated for being on the Target Board (he did have some ultimately worthless securities).

6. Zurich

[22] Zurich had an investment banking, CEO, and consulting background with various entities, including YSS, before joining the Target Board in September 2020. Mottahed and Gill brought him the Target opportunity (Hozjan, who did not testify, was apparently approached at the same time). Zurich was interim CEO of Target from April 16, 2021, when Mottahed and Wagner resigned, until the transaction with Westgate in 2024.

C. Details of Transfers to and for Performance

1. Amount of Transfers

[23] Wagner stated that Performance had no revenue of its own until about the middle of 2020, and needed money from Target to pay directly and indirectly for things such as product, consultants, and celebrity endorsers. The money was also used for Performance salaries, but not for Mottahed or Wagner.

[24] Staff prepared a spreadsheet summarizing the evidence of the Transfers. That was consistent with the other documents in evidence, such as bank statements from Target and Performance (respectively, the **Target Bank Statements** and the **Performance Bank**

Statements) and spreadsheets prepared by New Management. This evidence showed that, during the Relevant Period, Target transferred or paid amounts totaling \$2,351,939.91 to, or for the benefit of, Performance. Regardless of the nature of those payments, we use Staff's terminology of "Transfers", rather than Mottahed's terminology of "advances".

[25] The three categories of Transfers were: (1) direct payments totaling \$1,647,500 to Performance; (2) a payment of \$267,187.50 to Jayvee & Co. (**Jayvee**) on December 13, 2019 relating to an investment – the investment did not proceed and the money was returned, but to Performance not to Target; and (3) payments totaling \$437,252.41 to Performance's vendors. The last category included, for example, two October 7, 2019 bank drafts, each to Excel Sports Management (**Excel**) for US\$115,500 (also shown in the documentation as converted to CDN\$154,227.15 each, which is the amount used in this decision).

[26] During the Relevant Period, Performance paid \$65,500 to Target, resulting in net Transfers during that time of \$2,286,439.91. Performance made additional payments to Target between February 23, 2021 and October 8, 2021, totaling \$113,000.

2. Sources of Funds for Transfers

[27] The evidence showed that Target had some cash at the start of the Relevant Period, along with \$2 million in GICs. Target purchased four GICs of \$500,000 each on September 5, 2019, and redeemed them individually on October 7, 2019, December 12, 2019, May 29, 2020, and July 13, 2020. Wagner testified that the GICs were redeemed because Target needed the money to cover the Transfers. When asked if the purchase and redemption of the GICs had been discussed with the Target Board, Wagner replied that he did not know (presumably Staff's question was also intended to learn if Mottahed had discussed those matters with the Target Board; we are satisfied from the other evidence that that specific question would have returned the same answer). Turnbull testified that he was unaware the GICs had been purchased, but stated it would not be unusual to have GICs for a protected investment with a higher rate of interest. Turnbull was also not aware of the October 7, 2019 sale of one GIC; he was not asked about the others.

[28] After the GICs had all been cashed (by July 2020), Target continued to receive some other dividend and investment funds. Most of that was transferred to Performance, and smaller, unidentified amounts were also paid out.

3. Cash Position During and After the Relevant Period

[29] The Target Bank Statements showed Target's actual cash position (treating GICs as cash-equivalent) at various points:

DATE	CASH	GICs	TOTAL FUNDS
October 4, 2019	\$209,708.04	\$2,000,000.00	\$2,209,708.04
October 7, 2019	\$401,238.74	\$1,500,000.00	\$1,901,238.74
November 30, 2019	\$186,328.23	\$1,500,000.00	\$1,686,328.23
December 31, 2019	\$407,176.47	\$1,000,000.00	\$1,407,176.47
February 12, 2020	\$381,717.76	\$1,000,000.00	\$1,381,717.76
February 25, 2020	\$387,183.36	\$1,000,000.00	\$1,387,734.25
March 31, 2020	\$241,576.76	\$1,000,000.00	\$1,241,576.76

May 31, 2020	\$111,329.82	\$500,000.00	\$611,329.82
June 30, 2020	\$21,556.12	\$500,000.00	\$521,556.12
July 31, 2020	\$45,452.19	\$0.00	\$45,452.19
*August 6, 2020	\$42,851.56	\$0.00	\$42,851.56
*August 28, 2020	\$22,526.85	\$0.00	\$22,526.85
August 31, 2020	\$22,436.85	\$0.00	\$22,436.85
*September 15, 2020	\$14,768.56	\$0.00	\$14,768.56
*September 28, 2020	\$3,712.77	\$0.00	\$3,712.77
September 30, 2020	\$3,652.77	\$0.00	\$3,652.77
*October 13, 2020	\$3,282.65	\$0.00	\$3,282.65
November 30, 2020	\$957.58	\$0.00	\$957.58
February 9, 2021	\$8,940.73	\$0.00	\$8,940.73
April 23, 2021	\$8,357.60	\$0.00	\$8,357.60

* indicates the date of a 2020 News Release

[30] Following is a brief summary of the stated and actual cash positions at the more pertinent points, along with some of the surrounding circumstances:

- December 31, 2019
 - The Target Bank Statements showed a balance of \$1,407,176.47 in cash and GICs. The evidence indicated that Mottahed deliberately kept this number from the Target Board.
 - The December 2019 Interim Financials reported Target's cash and GIC position as \$2,032,870.
 - The Amended and Restated December 2019 Interim Financials showed Target's cash and GIC position as \$1,407,176.
- February 12, 2020
 - Mottahed told Turnbull, Oakes, and Volpi (copied to Wagner and Gill) in an email that "our current cash balance is approximately \$2,075,000 at the end of the quarter".
 - The end of the quarter would have been December 31, 2019. As noted, the Target Bank Statements showed a balance of \$1,407,176.47 on that date (including GICs), far lower than Mottahed claimed it was. By February 12, 2020 when Mottahed sent that email, the balance had further decreased to \$1,381,717.76.
 - Wagner testified that he would have provided the \$2,075,000 number to Mottahed and that it was inaccurate, although he claimed to have been unaware of that at the time of Mottahed's email. We reject that testimony.

Wagner knew there had been significant Transfers by the end of 2019 and would have known (or should have known) the December 31, 2019 balance as set out in the Target Bank Statements.

- February 25, 2020 Target Board meeting
 - Mottahed led the Target Board members through draft December 2019 Interim Financials, which were approved with a cash balance of \$2,032,870 as at December 31. Wagner's explanation for this number being different than in the Target Bank Statements was not credible (claiming it was a mistake or "included the monies that were sent to support that investment").
 - At the date of that meeting, the cash balance was \$1,387,734.25.
 - There was no indication in the evidence that Mottahed told the Target Board members that \$1 million of GICs had been cashed before the end of 2019.
- Summer 2020
 - Turnbull testified that he and Oakes were looking for potential transactions for Target and considered Target's value at the time to be \$4 million, including the \$2 million in cash they thought Target still had. However, during the summer of 2020 – specifically at the end of July 2020 and August 2020, respectively – Target's cash balance was down to \$45,452.19 and \$22,436.85.
 - Turnbull confirmed that Mottahed never raised Target's actual cash position as an impediment to the potential transactions Turnbull and Oakes were exploring.
- September 2020
 - Turnbull resigned in September 2020 because Mottahed "always had a reason to reject [every potential transaction] brought forward". We are satisfied that reason was Mottahed's knowledge of Target's true cash position.
 - Zurich stated that when he joined the Target Board in September 2020, Mottahed and Gill said the goal for Target was to use its cash to find an RTO.
 - According to Zurich, Mottahed said in September 2020 that Target had \$1.1 to \$1.3 million in cash, which Zurich said was consistent with what he found in Target's public information.

- During September 2020 – when Mottahed made that statement, when Turnbull resigned, and when Zurich joined the Target Board – Target's actual cash position ranged from \$22,436.85 to \$3,652.77.
- February 2021
 - Zurich testified that he understood in early February 2021, based on discussions with Mottahed, that Target still had cash of \$1.1 to \$1.3 million.
 - Zurich had still not seen the draft 2020 Annual Financials or the Target Bank Statements by that point. He testified that he asked Mottahed many times between October 2020 and February 2021 for those documents, but Mottahed did not provide that information.
 - Zurich stated that he remained focused on getting the 2020 Annual Financials completed so Target would be in good standing and able to engage in an RTO or other transaction. He had still not seen draft 2020 Annual Financials and was unaware of Wagner's communications with the Auditors discussing that draft and the Auditors' concerns with previous disclosure of the Transfers, their effect on Target's cash reporting, and the related party status of Target and Performance.
 - On February 8, 2021, the Target Board was sent draft 2020 Annual Financials (and the accompanying audit report), as well as draft financials for the interim periods ended June 30, 2020 and September 30, 2020. Zurich testified that he and Hozjan learned at that time of the Transfers, although the amount in those materials was \$537,002, not the full amount.
 - Target's cash balance on February 9, 2021 was \$8,940.73.
 - On February 17, 2021, the Target Board met with management to review those draft financials. In a summary document prepared for the Auditors in October 2021 (the **October 2021 Summary**), Zurich and Hozjan said they suggested at the February 17 session that the Target Board should not approve the documents at that time "as more information was required to understand the nature, quantum and other particulars of the related party advances".
 - Also according to the October 2021 Summary, Mottahed and Wagner "confirmed that the advances had been made without [Target Board] approval", and said the amount of Transfers was \$1.7 million (with New Management confirming later that the amount was \$2.3 million).

- March 2021
 - Wagner admitted that a March 17, 2021 report (likely generated by him) showed that Transfers continued to be made after November 2020, despite his earlier claims to the contrary. Zurich thought that he received this list sometime before becoming Target's interim CEO in April 2021.
 - A March 22, 2021 email from Wagner to Hozjan (copied to Mottahed, Zurich, and Gill) attached "loan details for Target and [Champions]". That list of Transfers was incomplete, but did confirm when some additional information was given to Target Board members.
- April 2021
 - Zurich testified that he still thought Target had "a substantial cash position" when he was appointed interim CEO on April 16, 2021.
 - Zurich received an April 23, 2021 bank statement for Target showing a closing balance that day of \$8,357.60. He testified that he thought it might be a mistake or, more specifically, "thought that Target likely had other accounts either with [that bank] or elsewhere that substantiated a larger cash position" because he was expecting a balance of between \$500,000 and \$1 million, even allowing for the \$1.7 million in Transfers he knew about by then. It turned out there were no other accounts and no other money still held by Target.

4. Logistics of Transfers and Lack of Approval

[31] Wagner was asked how the Transfers started. He testified that Mottahed came to him with two invoices for Excel and asked if Target could pay them. Wagner said he told Mottahed: "Okay. If the [Target Board] says this is okay, we can go ahead with that", with Mottahed replying: "Yes, these have been approved, so we can proceed with that." Wagner further stated that, although he was not sure at the time how the invoices related to Performance, he knew they were "in line with what Target had done before", so it seemed reasonable to pay them, and he trusted Mottahed. As noted, those were paid on October 7, 2019.

[32] Wagner then stated that he became aware around that time that the Transfers were related to Performance and that Mottahed's plan was for Target to be involved in "getting Performance up and running": "It just needed the initial push, the initial funding to get it through." Target was to be "a lender, a shareholder, or something of some sort".

[33] When asked by Staff about the Target Board's approval (or lack thereof) of the 2020 News Releases, Wagner said he understood that the Target Board had approved those, but also answered more broadly. He claimed that he thought Mottahed was constantly communicating with the Target Board, potential investors, and lawyers. He further asserted that he had the impression that "everything we were doing was aboveboard and met requirements". This was reasonably

consistent with his other testimony and his statement in the Settlement that he relied on Mottahed's representations to him that the Target Board was fully informed of and had approved the Transfers.

D. Documents

1. Overview

[34] In addition to the Transfers, which Staff claimed were fraudulent, Staff alleged that Mottahed made misrepresentations or misstatements in three categories of documents, all of which Staff characterized as misleading in the circumstances because of what they said or failed to say about Performance, the Transfers, Target's cash position, and the impact of the Transfers on Target's cash position. These documents are discussed briefly here and in detail later in this decision:

- Target's interim filings for the period ended December 31, 2019 consisted of the financial statements and report (the **December 2019 Interim Financials**) and management's discussion and analysis (the **December 2019 Interim MD&A**). To comply with Target's continuous disclosure obligations, these were filed on March 2, 2020 on **SEDAR** (the securities regulators' electronic filing system in Canada at the time under former National Instrument 13-101 *System for Electronic Data Analysis and Retrieval (SEDAR)* (**NI 13-101**));
- A certificate (the **December 2019 Certificate**) signed by Mottahed as CEO on March 2, 2020, stating that there were no misleading statements in the December 2019 Interim Financials and the December 2019 Interim MD&A and that they fairly presented specific financial metrics for Target (the NOH referred to two certificates of that date, but the one signed by Wagner as CFO was no longer at issue in the Hearing after Wagner's settlement, and we did not need to discuss it further); and
- Five news releases issued by Target between August 6 and October 13, 2020 and filed on SEDAR (collectively, the **2020 News Releases**). These contained statements regarding Target missing its deadline for its required periodic disclosure, including the 2020 Annual Financials, and stated there had been "no material business developments" at Target since the previous disclosure.

[35] During the Relevant Period, when the Transfers were made, there were no loan, security, or comparable documents between Target and Performance. Zurich testified about steps taken by New Management to secure the debt, discussed below.

2. December 2019 Interim Financials

[36] The December 2019 Interim Financials reported Target's cash as \$2,032,870 as at December 31, 2019, which was higher than shown in the Target Bank Statements for that date but approximately the same as Mottahed told Turnbull, Oakes, and Volpi in February 2020. As noted, Wagner seemed to attribute the incorrect number in the December 2019 Interim Financials to a mistake on his part and to including money invested in Performance. For example, he stated that he thought he characterized the payment to Jayvee as "cash" because "it was being held on behalf of Target". He explained invoices paid by Target on behalf of Performance as maybe being in accounts receivable, otherwise "I might have accumulated the accounts wrong and may have

included them in cash. I don't know. It was flat out an error on my part." These explanations were nonsensical, very far from the standard expected of a public company CFO, and reinforced Wagner's admission in the Settlement that he knew or ought to have known that the impugned documents contained misrepresentations. As a further issue, Performance was not included in the December 2019 Interim Financials as a related party, with Wagner having no reasonable explanation for that omission.

[37] Wagner acknowledged that he and Mottahed would have discussed the presentation of the financial statements, including the presentation of the Transfers, but claimed to recall no specifics. Wagner also testified that he did not recall having conversations with Target Board members (other than Mottahed) about the December 2019 Interim Financials, and did not attend the Target Board meeting when these documents were presented (nor did he attend most other Target Board meetings).

[38] As discussed below, we do not accept Wagner's testimony unless corroborated by credible evidence. We believe he had very limited interaction with the Target Board (other than Mottahed), but we do not believe he simply forgot or overlooked certain items. Nor do we believe he was unable to recall discussions with Mottahed about how to present key financial information, such as the depletion of virtually all of Target's current assets – matters Wagner had to have known were contrary to his training and responsibilities as an accountant.

3. December 2019 Interim MD&A

[39] Wagner testified that he drafted most or all of the December 2019 Interim MD&A. He stated that he gave that to Mottahed, who said the Target Board approved it.

[40] In addition to repeating financial information from the December 2019 Interim Financials, including the incorrect cash position, the December 2019 Interim MD&A made other statements, such as:

- "[Target] continues to explore and evaluate strategic alternatives to enhance shareholder value."
- Three companies were described as related parties of Target, based on "common shareholding and/or directorship". Neither Performance nor Champions was listed.

4. December 2019 Certificate

[41] As noted, the December 2019 Certificate was Mottahed's certification that the December 2019 Interim Financials and the December 2019 Interim MD&A contained no misrepresentations and fairly presented Target's financial information. The certification date was March 2, 2020.

5. Amended and Restated 2019 Documents

[42] Although prepared after the Relevant Period, these documents are significant because they show Target's actual circumstances as at December 31, 2019. Thus, they highlight what should have been disclosed at that time. The two specific disclosure matters relevant to this Hearing are Target's financial position (specifically its cash position) and its related party connection with Performance.

[43] The Amended and Restated December 2019 Interim Financials and the Amended and Restated December 2019 Interim MD&A were issued on April 18, 2022. Zurich testified about the content of these documents and the steps New Management took in their preparation, and we accept his testimony. Mottahed did not challenge the accuracy of this restated and subsequent information.

[44] The Amended and Restated December 2019 Interim Financials were unaudited but went through a process to correct the original filings. Significant changes included that they:

- restated cash and GIC positions as at December 31, 2019 which were consistent with the Target Bank Statements
 - the total changed from \$2,032,870 to \$1,407,176;
- added related party disclosure
 - Performance was described as a related party due to Mottahed's and Wagner's positions with both Target and Performance
 - \$625,694 was disclosed as "Related party advances" from Target to Performance in the nine months ended December 31, 2019
 - \$2,283,440 was disclosed as net total advances from Target to Performance as of April 18, 2022, with \$110,000 collected from Performance as partial repayment; and
- added subsequent event disclosure about a June 16, 2021 convertible secured note of \$2,233,440 between Target and Performance (the **Secured Note**).

[45] The Amended and Restated December 2019 Interim MD&A contained similar information:

- showed the accurate cash position as at December 31, 2019, as well as subsequent events, including the additional Transfers, the Secured Note, and the change to New Management; and
- disclosed Target's decision to classify as credit impaired (as at March 31, 2021) the approximately \$2.3 million related party Transfers and to mark down their fair value to \$0.1 million, which was the amount collected from Performance.

6. 2020 Annual Financials

(a) Relevance

[46] The content of the 2020 Annual Financials was not directly the subject of any allegations. However, Staff contended these documents were relevant because preparing them during the Relevant Period formed part of Mottahed's course of conduct in concealing the Transfers, concealing his relationship with Performance, and lying to Target Board members about Target's financial position. Staff also asserted that the process showed Mottahed deliberately delaying the preparation of the 2020 Annual Financials and keeping Target Board members from seeing them.

(b) Initial Process Under Mottahed and Wagner

[47] Because Target relied on BO 51-519 to delay filing the 2020 Annual Financials, there was an extended preparation process for them. Wagner testified that the audit work on the draft 2020 Annual Financials started shortly after March 31, 2020, and he gave the Auditors the "general ledger, trial balance, draft trial balances, draft financial statements", and anything else they requested. According to Wagner, he would have discussed with Mottahed some aspects of presenting the Transfers, but said he could not recall when or exactly what was discussed.

[48] We do not believe Wagner's claims of poor recollection. Further, his testimony about the draft 2020 Annual Financials was confusing and contradictory at times. Overall, we conclude that he was not forthright in that testimony, and we do not accept his evidence about the draft 2020 Annual Financials or his interactions with the Auditors unless corroborated by other evidence, such as contemporaneous email correspondence with the Auditors.

[49] As an example of his testimony on which we could not rely, Wagner said that the draft 2020 Annual Financials presented the Transfers "as related-party transactions and [were] separated out on the balance sheet", and that he made that change from the December 2019 Interim Financials because he had "more knowledge as to what was going on and just better disclosure getting into the year-end" and thought that was sufficient disclosure. However, the version of the draft 2020 Annual Financials sent to the Auditors by Wagner in a June 22, 2020 email listed the amounts as accounts receivable, did not identify Performance by name, and continued to underreport the amount of the Transfers to that point. Further, Wagner's explanation for listing this as accounts receivable was weak: "at the time it was to either be repaid or rolled into a further investment". The draft note for this amount said: "These amounts are due on demand and will be repaid upon the borrowing company completing a financing transaction." As noted, there was no evidence of any demand notes, other documentation, or security for the Transfers at that time. The Auditors eventually reported the Transfers as related party advances with a note identifying Performance and the related party relationship. It is also significant that Wagner claimed to have a greater knowledge and understanding by June 2020, yet testified that no changes were disclosed a few months later in the 2020 News Releases because he was relying on what Mottahed told him about what was appropriate and what the Target Board wanted.

[50] Wagner stated that discussions with the Auditors throughout the process eventually led to an impairment showing on the draft 2020 Annual Financials, as well as subsequent event disclosure showing an amount for the Transfers after the March 31, 2020 fiscal year end date. Wagner provided additional information to the Auditors about Performance and its operations in a November 10, 2020 email, which stated, in part: "As I said in the call, we believe that the holding of the receivable in Performance is [both] valid at year end and supported by the ongoing activities of the company. We do not feel that there is any impairment at this time." Wagner justified that in his testimony as based on his belief in Performance, and explained that "we" referred to himself and Mottahed. He also said that he discussed impairment with Mottahed "at some point", with Mottahed taking the position that Performance "is a going concern. It's great. We just need to get this financing in place." We reject the idea that any belief in Performance's ability to repay Target was justifiable at that stage.

[51] In November 2020, Wagner sent the Auditors documents setting out projections for Champions (which the testimony essentially treated as projections for Performance). These figures were nonsensical. For example, some of the figures were projected cash and cash equivalents of US\$3,355,642 as at December 31, 2020, a "conservative" 2020 revenue estimate of US\$1,540,000, and financings of US\$1 million in October and US\$2 million in November. In reality, Performance's revenue at the time was approximately US\$70,000 to US\$80,000, no financings had occurred or were imminent, and its bank balances were CDN\$19,451.31 and US\$159.77.

[52] The Auditors were obviously not comforted by the information Wagner provided, sending a November 10, 2020 email which read:

Thank you for providing this information, I have reviewed and it still does not get us there. Regardless if this is a receivable or an investment, [International Financial Reporting Standards (IFRS) require] that these assets be fair valued at period end. There is nothing that supports that Performance will be able to repay this amount. It has been outstanding for some time, revenues generated by Performance are substantially less than the forecast and there is no estimate on when Performance will be able to repay these amounts. Any receivables over 90 days are typically fully provided for as they are deemed to be fully impaired and would be factored into Stage 3 receivables under IFRS 9.

If this amount given to Performance was set up as an investment, because this is a private entity, a full valuation would need to be completed.

We are required under IFRS to impair this asset. If and when Target recovers the amounts outstanding, the impairment can be reversed.

[53] On November 11, 2020, the Auditors sent revised draft 2020 Annual Financials to Wagner, showing an impairment of \$537,002 relating to Performance. A comment from the Auditors asked Wagner to provide the amount borrowed by Performance from Target subsequent to the March 31, 2020 year-end. Wagner testified that he discussed the draft with Mottahed, but could not recall Mottahed's comments or position on this disclosure issue, other than "he was still in strong belief that Performance was going to go and everything was going to be all right". We conclude that, even if Mottahed did make that statement, Wagner would have known at the time that it was not realistic.

[54] On about November 12, 2020, Wagner received the "2020 Audit Findings" draft report from the Auditors. He testified that he sent it to Mottahed. In a November 13, 2020 email, Wagner told the Auditors he was waiting for the Target Board to tell him when it would approve the 2020 Annual Financials. Wagner also asked at that time "if the loan to [Performance] is paid off before release we can restate it as an outstanding loan and report that the balance was paid off subsequent to the year end, correct"? The Auditors replied that the impairment could be reversed, but the 2020 Annual Financials would still have to include disclosure, including when the amount was returned to Target. They also said that the approximately \$1.6 million paid as Transfers after the March 31, 2020 year-end would also still have to be disclosed. Wagner then asked: "If the whole amount is paid off I would like to report that the entire balance outstanding has been settled. Would that be sufficient?", and the Auditors answered that it would be. Wagner agreed with Staff that he would have discussed that issue with Mottahed. Wagner testified that the balance could have been paid by Performance if the financing had been completed.

[55] On February 1, 2021, the Auditors sent Wagner an email asking for various updates, including whether the \$537,002 had been repaid to Target, and whether there were any additional Transfers to Performance after August 2020. Wagner stated this was in response to him reaching out to the Auditors, as Mottahed had asked him to get the draft 2020 Annual Financials ready again. Wagner testified that he understood not much had happened between November 2020 and February 2021, other than Mottahed "was still trying to raise money and get the financing in place to get every -- both companies back to square one". In that respect, Wagner's testimony was believable: nothing much had happened between November 2020 and February 2021 because Mottahed (and Wagner) had already depleted the majority of Target's cash by November 2020.

[56] Zurich testified that he did not receive any draft financials or information from the Auditors until about February 8, 2021, when he received the draft 2020 Annual Financials. He stated that "was the first information I received related to the financial transfers between" Target and Performance. We accept Zurich's testimony about the timeline and conclude that Mottahed deliberately ensured the Target Board did not receive accurate or timely information about Target's financial position in general, the Transfers in particular, and the Auditors' communications and concerns.

(c) Process Under New Management

[57] Zurich testified about the process with the Auditors after New Management took over Target in April 2021 (after the Relevant Period). The process led to the amended and restated documents for December 2019 and to the long-delayed issuance of the 2020 Annual Financials and other filings. The details of the process are not necessary for our conclusions here, other than they further revealed the extent of Mottahed's efforts during the Relevant Period to hide the Transfers from the Target Board and the capital market for as long as possible.

[58] The 2020 Annual Financials were finally filed on April 18, 2022. Zurich testified about his and Dion's roles in gathering information, working with the Auditors, and ensuring the accuracy of those, as they did with the Amended and Restated December 2019 Interim Financials and associated documents. Zurich confirmed that Hozjan was also involved. Zurich stated that a "going concern" note in the 2020 Annual Financials was necessary because of the FFCTO, trade halt, lack of income from the former income stream (the companies involved had ended the relationships due to the FFCTO and trade halt), and the treatment of the Transfers as impaired.

7. 2020 News Releases

(a) Legal Requirements Due to Pandemic

[59] As discussed, at the time Target filed the 2020 News Releases, there were Pandemic-related temporary filing exemptions for certain required corporate documents under BO 51-519. Target relied on those exemptions, one condition of which was filing news releases with certain content and at specific intervals. The conditions of the exemption depended on the nature of the document. For annual financial statements and MD&A, Target was required to issue and file on SEDAR a news release disclosing several matters, including the documents which were delayed in reliance on the exemption, the estimated date the disclosure would be made, and, importantly:

- "an update of any material business developments since the date of the last annual financial statements or interim financial reports that were filed"; or

- "confirmation that there have been no material business developments since that date".

[60] Subsequent required news releases had to disclose any material business developments (or confirmation there had been none) since the previous news release.

(b) Relevant Content of 2020 News Releases

[61] The five 2020 News Releases all referred to the company as Target doing business as "CBI² Capital", which Wagner described as an operating name. Nothing in this decision turns on that.

[62] The August 6, 2020 and August 28, 2020 news releases were similar. The first announced that Target extended its date for filing the 2020 Annual Financials from July 29, 2020 to on or before September 14, 2020, due to the Pandemic and pursuant to BO 51-519. The second confirmed the delay and the expected date of September 14, 2020 for filing. Both of these stated: "There have been no material business developments since the filing of the unaudited interim quarterly financial statements for the period ending December 31, 2019."

[63] The September 15, 2020 news release announced a further extension to October 30, 2020. Target again gave the reason as the Pandemic. Target also stated that it had applied to the ASC for the MCTO and continued: "At this time, other than matters relating to the [Pandemic] generally impacting communities and economies worldwide and not [Target] and its business specifically, [Target] has no material business developments that require disclosure to the public."

[64] The September 28, 2020 news release provided another update for the late filing of the 2020 Annual Financials, and for the set of interim filings due for the quarter ended June 30, 2020. Target stated that it had been granted an MCTO by the ASC (which prevented Target management from trading until its required filings were made). Target said that it planned to file the 2020 Annual Financials by October 30, 2020 and its June 2020 interim filings by October 15, 2020. Target again stated in this news release that: "Other than as previously disclosed by [Target] or disclosed in this press release, [Target] confirms that there have been no material business developments since the filing of the unaudited interim quarterly financial statements for the period ending December 31 2019."

[65] The October 13, 2020 news release was required as an update. It repeated the anticipated date for the late annual filings and changed the anticipated date for the late interim filings to October 30, 2020. It again stated: "Other than as previously disclosed by [Target] or disclosed in this press release, [Target] confirms that there have been no material business developments since the filing of the unaudited interim quarterly financial statements for the period ending December 31, 2019."

(c) Drafting of 2020 News Releases

[66] Wagner testified that he was involved with drafting all of the 2020 News Releases and would have presented them to Mottahed "for review and approval". Target's lawyers were possibly involved with drafts at some stage as well. Wagner said he understood from Mottahed that all news releases would be approved by the Target Board before being released. Turnbull's and Zurich's

testimony confirmed that management drafted news releases and the Target Board received at least some of them.

[67] Regarding the language of "no material business developments", Wagner said that "would've been the standard language that we would've pulled from whatever example we took this from". As noted, that language was actually from BO 51-519.

[68] Wagner further testified about the lack of information in the 2020 News Releases about the Transfers and Target's deteriorated cash position. He said that he thought Target "didn't want to announce the workings with Performance at that point", that he had no "guidance to release anything on this", and he "would've thought at the time that that is the way they viewed it. That's how they wanted to disclose it". His use of "they" meant the Target Board, and he said he believed that the Target Board knew about Performance and the Transfers.

E. Target Board's Knowledge

[69] Other than Mottahed, the Target Board members were not the subject of any allegations. Their involvement and knowledge are relevant, however, because of Staff's contention that Mottahed deliberately lied to and withheld information from Target Board members.

[70] We accept the evidence from Turnbull and Zurich that they were not informed of crucial information. For example, Turnbull testified that he was not aware of specific large transactions such as the \$267,187.50 payment to Jayvee on December 13, 2019, nor was he aware of other Transfers individually or cumulatively. Zurich was also unaware of the Transfers and of Target's true cash position when he became a director and for a significant time after. He did not know about specific large transactions, such as Target's sale in November 2020 of its YSS position, with the proceeds sent to Performance. We also accept that Wagner had limited contact with Target Board members (other than Mottahed) and would not have told them any of this information.

[71] Turnbull and Zurich both testified that they also had no knowledge at the time of the significance of Performance and Champions to Target's operations and cash holdings. Turnbull had heard by early 2020 that Mottahed was involved with something called "Legends" (that was part of Champions' name), but did not know any details. By the time of his resignation from Target in September 2020, Turnbull knew of Champions only as "another project of [Mottahed's]", but had not heard of Performance and did not know of a connection to Target. Zurich first heard of Performance and Mottahed's leadership role there in late 2020 when Mottahed told him. He had also heard the name "Champions" at some point. Zurich clarified that he referred to Performance and Champions interchangeably.

[72] Zurich stated that Mottahed raised in late 2020 the possibility of Target and Performance entering into an RTO transaction. Zurich testified that he and Hozjan said that would be a related party transaction, would need a legal review, regulatory review and other steps, and would not be possible in any event without filing the 2020 Annual Financials. At that time, Zurich was still unaware of the existence and quantity of the Transfers. In response to a question from Staff, Zurich indicated that Mottahed never mentioned that Target and Performance had a relationship or had already engaged in business (i.e., the Transfers).

[73] Zurich knew the 2020 Annual Financials were late, but understood there had been no material developments since the December 2019 Interim Financials, and therefore thought the 2020 News Releases were correct in disclosing that there were no material business developments since the last filings. We are satisfied that Zurich and other Target Board members were unaware until February 2021 of the Auditors' concerns with the Transfers, the related party status of Target and Performance, and the need for an impairment.

[74] We are also satisfied that Target Board members (other than Mottahed) did not see the draft 2020 Annual Financials until February 2021, nor did they see timely drafts for the interim June 2020 or September 2020 filings. That conclusion is supported by testimony from Zurich and Wagner, as well as from Turnbull for the time that he was on the Target Board.

F. Security for Transfers and Recovery of Money

[75] Zurich testified about New Management attempting "to securitize assets and formalize loan structures around those [Transfers], which we did in the spring and summer of 2021". That was after the Relevant Period once the Target Board learned of the existence and extent of the Transfers and began to understand Target's true cash position.

[76] That security took the form of the Secured Note and personal commitments from Mottahed and Wagner. Staff and Mottahed agreed to the latter tendering multiple exhibits regarding the Secured Note, guarantees, and related documents, although those were not relevant to the merits of the allegations in the NOH (and most appeared to be incomplete or unfinalized drafts).

[77] Zurich testified that, in 2022, New Management engaged legal counsel to try to recover on the security because it was evident by then that Performance would not be able to repay the money to Target. That process led to recovery of more than \$1.5 million: securities; personal property; and a restructured loan agreement with additional security from Mottahed (including his home). Zurich mentioned that "there was an intent to try to pay", presumably meaning Mottahed intended to pay back the money the best that he could. Zurich clarified that the \$1.5 million was predominantly from Mottahed, that some may have been from Performance, and that he was not confident \$1.5 million was the accurate number. This seemed to be part of what Zurich described as a negotiated settlement process between Target and Mottahed. Zurich did not know of any enforcement proceedings taken by Target against Wagner. Some of this information may be relevant for the sanction stage of this proceeding. The parties may choose to supplement or clarify any of this with evidence at that stage.

III. PRELIMINARY MATTERS

A. Participation by Mottahed

[78] On the third day of the Hearing, Mottahed appeared remotely. He stated that he learned of the Hearing only the day before when he received notice of Wagner's Settlement. Mottahed said that he "further found out that all of the correspondence [about this matter] had been sent to a personal email address that I've been locked out of, just have not had access to for over one year". He also stated that he did not know who to contact, but reached out as soon as he received notice of the Settlement. Mottahed asked that the Hearing be rescheduled to give him time to organize himself, review the material, and be in a position to put his case before the panel. Staff objected to any such rescheduling.

[79] The panel noted that Mottahed had been present at – and fully participated in – a March 12, 2025 session (the **Set Date Hearing**) at which he acknowledged being served with the NOH, and this Hearing was set for September 2 to 5 and 22 to 26, 2025. The Hearing did not end up starting until September 22, 2025, but that was still a date with which Mottahed was familiar from the Set Date Hearing. At the Set Date Hearing, dates were also set for hearing management sessions to occur at intervals before the start of the Hearing. The Set Date Hearing panel explained at that time the significance of those sessions and some details of the hearing process. It was also noted then that the parties would receive an email summarizing dates and other key aspects from the Set Date Hearing and that Mottahed had access to Staff's disclosure. Despite that, he had not yet accessed that disclosure by the September 24, 2025 Hearing date at which he appeared.

[80] We find unreasonable Mottahed's explanation for his failure to participate in the process from the end of the Set Date Hearing until the third day of this Hearing. We have no reason to doubt his statement that his email address used for this proceeding was inaccessible to him. However, his reaction to apparently not receiving email messages was unacceptable. The Set Date Hearing panel told the parties that they would be receiving an email summarizing the matters discussed and resolved at the Set Date Hearing. It was Mottahed's responsibility to ensure that the ASC Registrar (the **Registrar**, responsible for communications among the parties and, when necessary and appropriate, a panel) had a functional email address for him. It was also his responsibility to contact the Registrar or Staff counsel if he did not receive the promised email communication. Contact information for Staff counsel was on the NOH, and he also saw Staff counsel when he attended the Set Date Hearing in person. Even apart from that, he knew the dates set for this Hearing.

[81] Given that background, we allowed the Hearing to continue on September 24, 2025, with Wagner testifying. However, with Mottahed's agreement and in consultation with Staff, we set additional hearing dates of November 17, 18, and 21, 2025 for Mottahed to tender evidence, although only November 17 was used. Mottahed participated remotely in parts of the September 24 and November 17 Hearing dates, but declined the opportunity to cross-examine Wagner and Turnbull and did not call any of his own witnesses. As noted, he tendered some documents, and Staff agreed to their admission despite no witness testifying about them. Mottahed provided written and oral submissions.

[82] We are satisfied that Mottahed was treated fairly throughout the pre-Hearing process and the Hearing.

B. Standard of Proof

[83] Staff have the burden of proving each allegation on a balance of probabilities by proving the underlying facts for each element to that standard. This requires us to "be satisfied that there is sufficiently clear, convincing and cogent evidence that the existence or occurrence of any alleged fact required to be proved is more likely than its non-existence or non-occurrence" (*Re Arbour Energy Inc.*, 2012 ABASC 131 at para. 38; *Re Aitkens*, 2018 ABASC 27 at para. 48; and *F.H. v. McDougall*, 2008 SCC 53 at paras. 46 and 49). As part of that assessment, we may draw inferences, mindful of the caution not to confuse inferences and speculation (*Aitkens* at para. 49; *Arbour* at para. 39; and *Walton v. Alberta (Securities Commission)*, 2014 ABCA 273 at paras. 26-28).

C. Hearsay Evidence, Relevance, Weight, and Credibility

[84] All relevant evidence, including hearsay evidence, is admissible in ASC proceedings, subject to any procedural fairness concerns (*Aitkens* at para. 50; and *Arbour* at para. 45). There were no such concerns in this case. Here, we admitted the evidence tendered by the parties, including documents agreed to between Staff and Mottahed.

[85] In determining the appropriate weight to assign to admitted evidence, we considered its reliability based on indicators such as corroboration by other evidence and the credibility of the witnesses who testified (*Aitkens* at para. 51; and *Arbour* at paras. 46 and 53). Other than Wagner, we found Staff's witnesses to be credible, with the testimony of each fundamentally consistent with the testimony of the other witnesses and with the documentary evidence.

[86] We did not find Wagner to be a credible witness and did not accept his testimony unless it was supported by other evidence, such as the testimony of credible witnesses or the documents in evidence (including contemporaneous email communications).

[87] Our concerns about Wagner's credibility were largely based on his inconsistent and unbelievable explanations for some of his actions during and after the Relevant Period. He has been a CA or CPA for decades, with a background in audits and as a CFO of at least one company other than Target and Performance, yet went along with Mottahed's schemes and cover-ups. For example, Wagner testified that he did not question the legitimacy or appropriateness of the Transfers, nor did he admit to being aware of the problems of not disclosing the Transfers or the related party status of Performance. He claimed that he thought his actions were justified because Mottahed told him the Target Board had approved the Transfers. He must have known Target's current cash position, yet did not correct Mottahed's incorrect statements and Target's incorrect disclosure about that at various points. Wagner also gave nonsensical explanations for some of his disclosure decisions for the December 2019 Interim Financials and the draft 2020 Annual Financials, claiming ignorance, mistake, or misunderstanding. However, at one point, he stated that he was simply relying on Mottahed and on what Mottahed said the Target Board wanted – we accept that explanation as the only one supported by logic and the other evidence.

[88] We conclude that Wagner testified in a self-serving manner, trying to distance himself from his own failings as CFO during the Relevant Period. It was also clear and obvious that he was trying to protect Mottahed. Therefore, as noted, we could not accept Wagner's testimony unless corroborated by reliable evidence.

D. Adverse Inference

[89] In their written submissions, Staff set out the law of adverse inferences, but did not link that law to any specific adverse inferences which they were asking the panel to draw. When questioned during oral submissions, Staff stated that they had not necessarily asked during written submissions for any such adverse inferences. However, Staff then pointed to comments made by Mottahed during oral submissions about his state of mind during the Relevant Period, and the fact that Mottahed had not testified. Staff argued that it was "appropriate in this case not to draw any inferences about Mr. Mottahed's state of mind solely based on his oral submissions today. Had

Mr. Mottahed had an innocent explanation for this misconduct, in our view, he should have testified and been subject -- subjected to cross-examination."

[90] We understood Staff's concern. However, this was not an adverse inference issue (which involves drawing an inference that evidence not called by a party would have not supported the party's case). In this situation, Staff seemed to be asking instead that the panel not rely on Mottahed's comments during oral submissions as evidence. As a matter of ordinary-course procedure, Mottahed had already been told that submissions were not evidence and would not be considered to be evidence. We considered only evidence when making our decision.

E. Related Party

[91] The concept of "related party" is fundamental to the allegations and our findings in this case.

[92] Under s. 1.1 of National Instrument 52-107 *Acceptable Accounting Principles and Auditing Standards*, "accounting principles" in Alberta securities laws include Canadian generally accepted accounting principles (referred to as Canadian GAAP) and the IFRS standards adopted by the International Accounting Standards Board (also see National Instrument 14-101 *Definitions*, s. 1.1). IFRS includes International Accounting Standard 24 (**IAS 24**), titled "related party disclosures". The stated objective of IAS 24 "is to ensure that an entity's financial statements contain the disclosures necessary to draw attention to the possibility that its financial position and profit or loss may have been affected by the existence of related parties and by transactions and outstanding balances, including commitments, with such parties".

[93] Staff submitted that Target and Performance were related parties because Mottahed held a "key management personnel" position with Target and controlled Performance as its majority shareholder (IAS 24, s. 9). Further, the Auditors considered the two to be related parties and insisted on a related party note and related party disclosure in the financial statements, including the Amended and Restated December 2019 Interim Financials. Mottahed did not dispute the characterization of Target and Performance as related parties.

[94] We are satisfied that Target and Performance were related parties and, therefore, subject to the disclosure required as such.

IV. ANALYSIS: FRAUD

A. Allegation

[95] Staff alleged that Mottahed breached s. 93(1)(b) of the Act by engaging in a fraudulent course of conduct: carrying out several alleged prohibited acts, which placed at risk the pecuniary interests of Target and investors, while Mottahed had subjective knowledge of the prohibited acts and that such acts could put at risk the pecuniary interests of Target and investors. The three alleged prohibited acts were that Mottahed:

- "diverted funds from Target to Performance by carrying out undocumented, unsecured and unauthorized Transfers that had no economic benefit for Target";
- concealed the Transfers from the Target Board; and

- "concealed the Transfers from investors and the market by causing Target to issue periodic disclosure and news releases that were misleading or untrue".

B. Law

[96] Section 93(1)(b) of the Act provides:

No person or company shall, directly or indirectly, engage or participate or attempt to 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 may

. . .

(b) perpetrate a fraud on any person or company.

[97] As stated in other decisions, ASC panels assess this based on the elements of criminal fraud. For example, the panel in *Re Ward*, 2022 ABASC 139 stated at paras. 277-279 (emphasis in *Ward*):

Because "fraud" is not defined in the Act, ASC panels have adopted the test for fraud set out by the Supreme Court of Canada (SCC) in *R. v. Thérault*, [1993] 2 S.C.R. 5 (at para. 27). That test requires Staff to prove:

- the *actus reus*, which is established by proof of a "prohibited act, be it an act of deceit, a falsehood or some other fraudulent means" and proof of "deprivation caused by the prohibited act, which may consist in actual loss or the placing of the victim's pecuniary interests at risk"; and
- the *mens rea*, which is established by proof of "subjective knowledge of the prohibited act" and "subjective knowledge that the prohibited act could have as a consequence the deprivation of another".

With respect to *actus reus*, the SCC explained that an act of deceit or falsehood may include representing that "a situation was of a certain character, when, in reality, it was not", and that "other fraudulent means" may include other dishonest acts such as "the use of corporate funds for personal purposes, non-disclosure of important facts, exploiting the weakness of another, unauthorized diversion of funds, and unauthorized arrogation of funds or property" (at para. 18). It is not necessary to prove that the fraudulent party profited from the fraud or that an investor suffered actual financial loss (at paras. 17 and 19; see also *Arbour* at para. 981).

The SCC further explained that the *mens rea* of fraud is established if the fraudulent party had "subjective awareness that one was undertaking a prohibited act . . . which could cause deprivation in the sense of depriving another of property or putting that property at risk" (at para. 24). Stated another way, the *mens rea* is established if it is proved that the fraudulent party "knowingly undertook the acts which constitute the falsehood, deceit or other fraudulent means", and "was aware that deprivation could result from such conduct" (at para. 39). In *Arbour*, the panel explained (at para. 983):

In many cases involving allegations of fraud, a panel will reach conclusions based on inferences reasonably drawn from the evidence. Further, given the nature of fraud, it is unnecessary to prove what the transgressor was thinking at the time the dishonest act was committed – subjective knowledge can be inferred from the prohibited act and surrounding circumstances, unless there is some plausible

explanation that casts doubt on the inference. The [Alberta Court of Appeal (ABCA)] has confirmed that the trier of fact can infer subjective knowledge from the totality of the evidence ([*Alberta (Securities Commission) v. Brost*, 2008 ABCA 326] at para. 48).

C. Parties' Positions

1. Staff

[98] Staff submitted that Mottahed, in relation to a security:

- committed prohibited acts by misappropriating Target's assets (largely investor capital) to use for his separate business ventures (Performance and Champions), and by deceiving and manipulating others to achieve that goal, including by:
 - making the Transfers;
 - concealing the Transfers from the Target Board and actively deceiving Target Board members;
 - causing Target to file false and misleading December 2019 Interim Financials and December 2019 Interim MD&A;
 - preventing completion of the 2020 Annual Financials and the accompanying required audit; and
 - allowing Target to file the 2020 News Releases with false claims of no material business developments;
- caused deprivation through the prohibited acts by causing Target to suffer losses, Target to lose out on business opportunities because of its weakened financial condition, and Target investors to suffer threats to their economic interests;
- had subjective knowledge of the prohibited acts; and
- had subjective knowledge that the prohibited acts could cause deprivation.

2. Mottahed

[99] Mottahed argued that this case was not about fraud, but "about a failed start-up investment, hindsight judgment, and the retrospective recharacterization of business decisions made in real time, under uncertainty, and during an unprecedented period of market and regulatory disruption". He submitted there was "no dishonest act, no intent to deceive, and no deprivation caused by fraud", instead claiming that the Transfers were not concealed, were discussed with the Auditors, and were treated as an impairment when Performance's financial condition deteriorated. Finally, Mottahed asserted that the Transfers were for a legitimate business purpose and did not benefit him personally, so they could not be fraudulent.

D. Assessment

1. Course of Conduct Relating to a Security

[100] As a preliminary point, we are satisfied that Mottahed's impugned conduct related to a security, specifically Target securities. Allegations need not involve trading in securities to relate to them. As set out below, we conclude that Mottahed engaged in the course of conduct alleged by Staff. That involved him depleting Target's assets for the benefit of another company instead of using them to benefit Target and its shareholders. He also concealed the Transfers in multiple ways, which deprived investors and the capital market of important information about Target securities and their value. Therefore, his conduct related to Target securities.

2. Prohibited Acts Resulting in Deprivation to Others

[101] The first stage in the *actus reus* assessment is to determine if Mottahed's actions in connection with the Transfers were prohibited acts alleged by Staff in the NOH.

[102] As stated, a prohibited act may be "an act of deceit, a falsehood or some other fraudulent means".

[103] It was clear from the evidence that Mottahed directed the Transfers, using Target's money, and that the payments were for the benefit of Performance and Champions, not for the benefit of Target and its shareholders. There was no business purpose (from Target's perspective), no consideration received by Target, and no documentation or security until after the fact when New Management became aware of the Transfers. We find that Mottahed took money from Target to use for Performance, which was his own business. He also concealed the Transfers at the time, concealed his relationship with Performance for a lengthy period, and continued to lie to Target Board members and others as time went on. The testimony and documents in evidence proved that Mottahed lied about Target's cash position, including when asked directly by Turnbull – Mottahed deliberately phrased his answer to that question in February 2020 to refer to the cash balance at the end of the quarter (December 31, 2019), although knowing that even that number was incorrect. Mottahed also led Target Board members to believe that there were still funds available for an RTO when almost all of Target's money had already been squandered through the Transfers. He certified the December 2019 Interim Financials as accurate, despite the incorrect cash position and lack of related party disclosure, delayed the preparation and finalization of the 2020 Annual Financials, and kept the draft 2020 Annual Financials and the Auditors' concerns from the Target Board for months.

[104] We also note a November 2020 request from the Auditors to Wagner asking for the name of a Target Board member with whom the Auditors could "have the 'standard fraud' audit discussion". Wagner asked Mottahed, who provided Volpi's contact information, although Mottahed knew that Volpi had little to no involvement with or knowledge of Target. This purported reliance on Volpi to provide important reassurance to the Auditors reinforced that Mottahed was concealing the Transfers and their effect.

[105] We reject Mottahed's characterization of the Transfers as legitimate or justifiable business decisions. We also reject his submission that the Transfers "were recorded contemporaneously", "discussed with auditors", and "impaired in accordance with IFRS" when warranted by Performance's financial decline. The reality was that the Transfers were hidden from Target Board

members, not reflected in the relevant financial statements, and only later discussed with the Auditors by Wagner throughout the period during which Mottahed was delaying the preparation and production of the 2020 Annual Financials. An impairment was insisted on by the Auditors only in November 2020 (by which point Mottahed had already transferred most of Target's cash to benefit Performance). Mottahed ensured that the Target Board did not learn at that time about the Auditors' conclusion as to the necessity of an impairment. The Transfers were indeed "known to Target's senior management", as argued by Mottahed, but that management consisted of only Mottahed and Wagner, neither of whom informed the Target Board or the capital market. Mottahed concealed the Transfers and his relationship with Performance, although he disclosed that relationship sooner than he disclosed the Transfers.

[106] There was further support for our conclusion that Mottahed was delaying the 2020 Annual Financials in the hope of covering up his actions. As noted, Wagner asked the Auditors in November 2020 what would have to be reported about Performance and the Transfers if the Transfer amounts were paid back to Target. He acknowledged discussing that issue with Mottahed, and we accept that as logical and supported by other evidence of interactions between the two. We conclude that Mottahed's faint hope of returning the money before the Transfers were disclosed was a significant part of his motive for delay and showed an additional level of awareness that he was engaging in prohibited acts. We further conclude that he proposed Performance as a potential RTO partner for Target in late 2020 in an attempt to fix the problem he had created.

[107] Some documents Mottahed purported to rely on for his submissions were not in evidence. He claimed, for example, that a certain document would have shown that the Transfers were made for legitimate business purposes and that he did not benefit personally. Even had such a document been in evidence and we accepted it as reliable, whether Performance was an actual business and whether Mottahed benefited personally were not the issues here. A prohibited act does not require that money be stolen or used for a fabricated purpose. A prohibited act requires deceit, falsehood, or some other fraudulent means. Here, Mottahed diverted Target's money for the benefit of Performance, and Mottahed lied about and concealed the Transfers and surrounding circumstances for as long as he could. Mottahed attempted to rely on other documents which he claimed would have shown that there was security in place for the Transfers. However, the evidence of such security (for example, the Secured Note) showed that it was implemented after-the-fact by New Management and thus was irrelevant to our analysis of fraud at the time of the alleged prohibited acts. Mottahed's willingness to enter into such security and pay back some money to Target may be relevant for a later sanction hearing, should Mottahed choose to argue that as a factor.

[108] We are also satisfied that statements in the 2020 News Releases that there were no material business developments were prohibited acts in and of themselves and were additional proof of Mottahed's extensive efforts to conceal the Transfers. Target's rapid and extensive cash depletion was clearly a material business development (that materiality is discussed more below), meaning that the false statements in the 2020 News Releases were prohibited acts. Moreover, we find that Mottahed used the statements in the 2020 News Releases to continue his cover-up of the Transfers. As the Transfers were not disclosed, neither was the related party connection between Target and Performance. That aspect was also deceitful in the circumstances.

[109] The Transfers, the impugned statements in the December 2019 Interim Financials and the 2020 News Releases, Mottahed's lies to Target Board members, and his continued concealment of the Transfers, his position with Performance, and other crucial surrounding information were all prohibited acts of deceit, falsehood, or other fraudulent means.

[110] The second stage in the *actus reus* assessment is to determine if Mottahed's actions in connection with the Transfers caused deprivation to others.

[111] Again, the conclusion is simple and obvious. Transferring approximately \$2.3 million of Target's cash clearly caused deprivation to Target and its shareholders. In addition to the direct loss of the money, Target lost opportunities to find and close an RTO or other transaction. The evidence also showed Mottahed rejecting such potential transactions, and we conclude that was due to his knowledge of Target's lack of cash. Further, Target lost other sources of income because payments made from its traditional operations ceased when the FFCTO was put in place during Mottahed's concealment of the Transfers. As noted in connection with our assessment of the prohibited acts, Mottahed's justifications – including that Performance was a legitimate business and that the money did not go directly to Mottahed or to pay his personal expenses – did not change the fact that Target and its shareholders were deprived of the money and the accompanying opportunities.

[112] Mottahed's actions in concealing the Transfers and their effect from the Target Board, Target shareholders, and the market also caused and exacerbated deprivation. Had others been aware Mottahed was making the Transfers, the extent of the deprivation could possibly have been minimized.

[113] We conclude that Mottahed engaged in the following prohibited acts, as alleged in the NOH:

- "diverted funds from Target to Performance by carrying out undocumented, unsecured and unauthorized Transfers that had no economic benefit for Target";
- concealed the Transfers from the Target Board; and
- "concealed the Transfers from investors and the market by causing Target to issue periodic disclosure and news releases that were misleading or untrue".

3. Knowledge of Prohibited Acts Resulting in Deprivation to Others

[114] Mottahed stated during submissions that he did not intend to deceive anyone and he neither misappropriated funds nor personally profited from the Transfers. Staff argued, as mentioned, that Mottahed's submissions were not evidence – specifically referring to Mottahed's explanation in his submissions about his intentions and state of mind. We agree, and we do not consider Mottahed's purported state of mind to be evidence. However, we were able to discern from the evidence that Performance and Champions had actual businesses. There was no allegation or evidence that Mottahed used any of the money from the Transfers for personal expenditures. On that basis, we accept Mottahed's submission that the Transfers were in respect of a real business and that he did not use the money for personal expenses.

[115] That said, the purpose of the Transfers and Mottahed's intention in making the Transfers were completely irrelevant to our determination on the fraud allegation (although Mottahed may choose to present evidence and argument on those points during the sanction phase of this Hearing). The law is clear that Staff need not prove that a respondent intended to be dishonest or to cause others to suffer financial losses. As stated in *Thérout*, a respondent's sincere belief that there will be no losses is irrelevant. What is relevant is whether a respondent knowingly engages in the acts in question and subjectively understands that those acts could cause deprivation.

[116] Here, Mottahed engineered and authorized the Transfers. Although the Transfers were executed by and through Target, Mottahed controlled Target for the purpose of the Transfers, particularly since he ensured that the Target Board did not know about them. We are satisfied Mottahed knew that Target's money should be used for Target's business and investors, not for the benefit of Performance and Champions. We are also satisfied that Mottahed knew he was: concealing the Transfers from the Target Board; lying to Target Board members about Target's cash position; rejecting potential RTO transactions because Target did not have the money it was supposed to have; and issuing the December 2019 Interim Financials, the December 2019 Interim MD&A, and the 2020 News Releases with false and misleading information about Target. None of these actions were honest or legitimate, and it is inconceivable that Mottahed was unaware that his statements and actions were misleading Target Board members and Target investors.

[117] Mottahed's efforts to conceal the Transfers and his connection to Performance also proved he was aware of the problems with the Transfers and was aware this was important information for the Target Board, Target investors, and the capital market – otherwise, there would have been no need to conceal the information, lie to Target Board members, and lie in the December 2019 Interim Financials, the December 2019 Interim MD&A, and the 2020 News Releases. Mottahed also was well aware of Performance's financial situation, including its dearth of revenue, the stalled progress of its financing prospects, and its consequent inability to repay the Transfers. That is further proof that he knew the prohibited acts could result in deprivation to Target and its shareholders.

[118] We conclude that Mottahed had subjective knowledge of the prohibited acts and subjective knowledge that the prohibited acts could result in deprivation to others.

E. Determination

[119] Based on the law and analysis above, we conclude that Mottahed breached s. 93(b) of the Act by perpetrating a fraud on investors.

V. ANALYSIS: MISREPRESENTATION

A. Allegation

[120] Staff alleged that the December 2019 Interim Financials, the December 2019 Interim MD&A, and the 2020 News Releases contained materially misleading or untrue statements.

[121] Staff alleged that the December 2019 Interim Financials and the December 2019 Interim MD&A:

- falsely stated that Target had more than \$2 million in cash as at December 31, 2019; and
- "failed to disclose the existence, nature and amounts of the related party transactions with Performance" for the period ended December 31, 2019.

[122] Staff alleged that the 2020 News Releases failed to disclose:

- "the existence, nature and amounts of the related party transactions with Performance"; and
- that, at the time of the 2020 News Releases, the total Transfers were approximately \$2 million and Target's cash was nearly depleted.

B. Law

[123] Section 92(4.1) of the Act provides:

No person or company shall make a statement that the person or company knows or reasonably ought to know

- (a) in any material respect and at the time and in the light of the circumstances in which it is made,
 - (i) is misleading or untrue, or
 - (ii) does not state a fact that is required to be stated or that is necessary to make the statement not misleading,
 and
- (b) would reasonably be expected to have a significant effect on the market price or value of a security, . . .

[124] In previous decisions, ASC panels have concluded that Staff must prove three elements before a finding can be made of misrepresentation under this section. As stated in *Aikens* at para. 134 and *Ward* at para. 135 (both citing *Arbour* at para. 753), Staff must prove that:

- (i) a statement was made by a respondent;
- (ii) the respondent knew or reasonably ought to have known that the statement was, in a material respect, untrue or omitted a fact required to be stated or necessary to make the statement not misleading; [and]
- (iii) the respondent knew or reasonably ought to have known that the statement would reasonably be expected to have a significant effect on the market price or value of a security.

[125] The panel in *Ward* further explained (at paras. 136-138):

Materiality – i.e., whether the statement or omission would reasonably be expected to have a significant effect on the market price or value of a security – is an objective standard based on

reasonable expectations ([*Re Chmelyk*, 2017 ABASC 13] at para. 84). Prior ASC decisions have stated that "common sense" inferences may suffice to establish materiality, and that as members of an expert tribunal, a hearing panel may draw inferences as to the objective views of a reasonable investor (see, e.g., *Arbour* at paras. 764-765). The panel in *Aitkens* explained (at para. 138):

A hearing panel will find that a statement or omission would reasonably be expected to have a significant effect on the market price or value of a security if it can reasonably be concluded that the misrepresentation would influence an investor's decision to purchase the security and the price that investor would be prepared to pay for it. Stated another way, the determination is "whether there is a substantial likelihood that such facts would have been important or useful to a reasonable prospective investor in deciding whether to invest in the securities on offer at the price asked" (*Arbour* at para. 765, citing *Sharbern [Holding Inc. v. Vancouver Airport Centre Ltd.]*, 2011 SCC 23] at para. 61).

Misrepresentations to both existing and prospective investors fall within s. 92(4.1), because "misleading information may 'prompt existing investors to continue with or augment their investments' (*Re Mandyland Inc.*, 2012 ABASC 436 at paras. 196, 203)" ([*Re Fauth*, 2018 ABASC 175] at para. 258).

Staff are not required to prove that any particular investor relied on the misrepresentation alleged ([*Re Cloutier*, 2014 ABASC 2] at para. 360).

C. Parties' Positions

1. Staff

[126] Staff's s. 92(4.1) allegations related to statements in the December 2019 Interim Financials, December 2019 Interim MD&A, and 2020 News Releases.

[127] Staff submitted that:

- Mottahed was responsible for the content of the December 2019 Interim Financials, December 2019 Interim MD&A, and 2020 News Releases because he was Target's CEO and because the evidence showed him making the decisions as to what information would be disclosed;
- specific content in those documents was misleading or untrue in a material respect, at the time and in light of the circumstances in which it was made – and Mottahed knew or ought to have known that – because:
 - the December 2019 Interim Financials and December 2019 Interim MD&A overstated Target's cash position and did not disclose the existence, nature, and effect of the Transfers, including the related party status of Target and Performance;
 - the 2020 News Releases stated that there had been "no material business developments", which did not account for the Transfers and the depletion of Target's cash; and
 - Mottahed was responsible for making the content and knew the truth; and

- the misleading or untrue information (or omissions) would all have been important information for reasonable investors and thus would reasonably have been expected to have a significant effect on the market price or value of the Target securities – and Mottahed knew or ought to have known that – because:
 - information about related party status is relevant to investors as such relationships have the potential to be abusive or unfair;
 - Target's main asset was its cash, which was needed for its RTO business strategy, and the depletion of that cash was relevant to investors; and
 - Mottahed had considerable capital-market experience and thus would have been aware that the correct information would be important to investors.

[128] Staff also argued that Mottahed was indirectly liable for Target's breach of s. 92(4.1). As explained elsewhere, we did not need to address that allegation or argument.

2. Mottahed

[129] In his written and oral submissions, Mottahed focused almost entirely on the allegation of fraud. His only brief comments relating to misleading information characterized the problem as "disclosure judgments" and acknowledged that the panel might conclude disclosure and communication could have been better.

D. Assessment

1. Statements Made by Mottahed

[130] Relevant to the misrepresentation allegation in the NOH, we find the following statements and omissions were made in Target documents:

- the December 2019 Interim Financials and December 2019 Interim MD&A disclosed Target's cash position (including GICs) as at December 31, 2019 as \$2,032,870, when it was actually \$1,407,176.47;
- the December 2019 Interim Financials and December 2019 Interim MD&A did not disclose the existence and effect of the Transfers, the fact that Target and Performance were related parties, or the fact that the Transfers were related party transactions;
- the 2020 News Releases did not disclose the Transfers as related party transactions or at all, including the significant amount of the Transfers or their effect on Target's cash position; and
- the 2020 News Releases falsely stated that there had been no material business developments.

[131] We are satisfied that Mottahed was responsible for these statements and omissions (Wagner was as well, as he admitted, but his culpability was not at issue before us and did not

change Mottahed's responsibility). We are also satisfied, as discussed above, that Mottahed intentionally kept the true circumstances from Target Board members so they could not have known of the Transfers and the related party status of Target and Performance at the time of the December 2019 Interim Financials, the December 2019 Interim MD&A, and the 2020 News Releases. In that way, Mottahed denied the Target Board the opportunity of ensuring Target's disclosure was complete and correct. We reject Mottahed's contention that this was, in part, a matter of disclosure or communication that could have been better.

2. Misleading or Untrue Statements

[132] We find that the above information was misleading or untrue (or both) in a material respect, both in what was stated and what was omitted. That is evident from the facts set out above and our findings under the fraud allegation. We need not repeat that analysis and those conclusions here.

[133] We also find that Mottahed knew or reasonably ought to have known that this information was misleading or untrue. Again, our reasoning is set out when analyzing the fraud allegation and need not be repeated here.

3. Significant Effect on Market Price or Value of Target Securities

[134] The amount of cash (or other assets) held by a company is important information because it "would influence an investor's decision to purchase the security and the price that investor would be prepared to pay for it" (*Aikens* at para. 138). The cash balance not only is one facet of the company's health, but also gives shareholders and the market a sense of what the company is able to do or not do. In Target's case, Mottahed's depletion of its cash meant it was unable to use that money for operations, entering into an RTO, or any other purpose.

[135] Related party disclosure is also important information for a company's investors and the capital market in general. As with the cash position, knowledge of this could influence an investor's decision to purchase securities and at what price. IAS 24 states the significance of related party disclosure, and this case epitomizes the need for such disclosure. Any reasonable investor would have considered it important to know that Target and Performance were related parties through Mottahed. That reasonable investor would have considered it even more important to know that Mottahed was sending approximately \$2.3 million from Target to his own company, Performance, with no formal documentation, no contemporaneous security, and no realistic prospect of repayment by Performance.

[136] We find that the misleading or untrue statements and omissions would reasonably have been expected to have a significant effect on the market price or value of the Target securities.

[137] As also stated in the fraud analysis, the fact that Mottahed hid the Transfers, hid his relationship to Performance, lied about both, and delayed the Auditors' tasks and the 2020 Annual Financials confirmed not only the significance of this information but also his knowledge and understanding of its significance. We find that Mottahed knew or reasonably ought to have known that disclosure of the true information would reasonably have been expected to have a significant effect on the market price or value of the Target securities.

E. Determination

[138] We conclude that Mottahed breached s. 92(4.1) of the Act.

VI. ANALYSIS: MISLEADING INFORMATION PROVIDED TO ASC

A. Allegation

[139] Staff alleged that Mottahed breached s. 221.1(2) of the Act by making statements in material provided to Staff which were materially misleading or untrue when made. The three categories of impugned documents were:

- the December 2019 Interim Financials and the December 2019 Interim MD&A;
- the December 2019 Certificate; and
- the 2020 News Releases.

B. *Kienapple* Issue

1. Relevance and Brief Conclusion

[140] Before analyzing Staff's allegations under s. 221.1(2) of the Act, we address Staff's submissions on the *Kienapple* principle. Staff argued that the *Kienapple* principle did not bar us from making findings under both s. 92(4.1) and s. 221.1(2) against Mottahed for the same actions.

[141] We conclude below that the *Kienapple* principle applies and that there is a legal and factual nexus between the two sections of the Act and the misconduct alleged under both. Therefore, the *Kienapple* principle prevents us from making findings under both sections for the same misconduct. Accordingly, we did not proceed with an analysis or determination under s. 221.1(2) for the overlapping allegations (the content of the December 2019 Interim Financials, the December 2019 Interim MD&A, and the 2020 News Releases).

[142] Regarding the 2019 Interim Certificate, Staff made an allegation under only s. 221.1(2), not under both that section and s. 92(4.1). Accordingly, after discussing the *Kienapple* issue, we proceed with the analysis under s. 221.1(2) for that allegation.

2. Parameters and Application of *Kienapple* Principle

[143] In criminal law, there is a "rule against multiple convictions", which was set out in the decision of the SCC in *R. v. Kienapple*, [1975] 1 S.C.R. 729. The SCC clarified and refined the parameters of the rule in *R. v. Prince*, [1986] 2 S.C.R. 480.

[144] The relevant issues here and our brief analysis (explained further below) are:

- Does the *Kienapple* principle apply in this securities regulatory proceeding?
 - We conclude it is appropriate to apply the *Kienapple* principle in this proceeding.

- As it is a criminal law concept, the *Kienapple* principle cannot apply exactly as in a criminal proceeding, but we will refer to it by that name. (For example, we refer to allegations and misconduct, not charges and offences.)
- What are the parameters of the *Kienapple* principle here?
 - The *Kienapple* principle is relevant when both a factual nexus and legal nexus exist for two or more allegations being made against a respondent.
 - Staff acknowledged that there is a factual nexus here: the same acts by Mottahed were the basis for the overlapping allegations under both ss. 92(4.1) and 221.1(2) of the Act.
 - It is, therefore, necessary for us to determine if there is a legal nexus – that is, whether the elements of one allegation are substantially the same as, or subsumed within, the elements of the other allegation.
- Is there a legal nexus between ss. 92(4.1) and 221.1(2) of the Act in these circumstances or is s. 221.1(2) subsumed in s. 92(4.1)?
 - The lesser s. 221.1(2) allegations are subsumed within the greater s. 92(4.1) allegations.
 - Accordingly, we make no finding on the s. 221.1(2) allegations for the December 2019 Interim Financials, the December 2019 Interim MD&A, and the 2020 News Releases.
 - There was no s. 92(4.1) allegation for the 2019 Interim Certificate, so consideration of the *Kienapple* principle did not arise. The remainder of the analysis in this section is, therefore, relevant only for the December 2019 Interim Financials, the December 2019 Interim MD&A, and the 2020 News Releases.

3. *Kienapple* and *Prince*

[145] Although the rule against multiple convictions is still referred to as the *Kienapple* principle, we focus on *Prince* because the SCC in that decision clarified the principle. We need not expand on the statements in *Prince* about the factual nexus (at para. 20) because that aspect was met in the present case – the same acts by Mottahed grounded each of the relevant allegations. However, the SCC's comments on the legal nexus are key because some post-*Kienapple* decisions had focused solely on the need for a factual nexus. The SCC in *Prince* re-emphasized the equally important need for a legal nexus (*Prince* at paras. 16 and 22) and stated that the principle would not apply to a single act which involves "two or more delicts against society which bear little or no connection the one to the other" (*Prince* at para. 24).

[146] The SCC focused on "the presence or absence of additional, distinguishing elements" (*Prince* at para. 27; original emphasis). The SCC referred to examples from other cases, including

from *Krug v. The Queen*, [1985] 2 S.C.R. 255. In *Krug*, the SCC concluded that the *Kienapple* principle did not apply when one charge was robbery (with an element of being armed with a weapon) and the second was using the weapon – the requirement in the latter that that weapon be used was not necessarily encompassed in the charge of being armed with the weapon and was, therefore, an additional element (*Prince* at para. 30). Having such "additional, distinguishing elements" is an expression of legislative intent that more than one conviction should be entered in those circumstances (*Prince* at para. 31).

[147] It can be challenging to determine if an element is substantially the same as another or is sufficiently distinct. The SCC addressed this in *Prince*, stating that there are at least three types of correspondence sufficient to allow the *Kienapple* principle to be applied (subject always to indications of legislative intent to the contrary). First, the particularization of an element is generally not sufficient to preclude the *Kienapple* principle – for example, pointing a firearm at a person is a particular of using a firearm, so there should not be convictions for both offences (*Prince* at paras. 35-36). Second, the same offence may be proved in two different ways, each represented by a separate offence – for example, perjury and giving evidence contrary to one's own previous evidence. The latter is merely logical proof of the former, because if one person gives two contradictory versions under oath, one must be perjury (*Prince* at para. 37). Third, Parliament may effectively deem an element to be proved in a different way, such as the difficult concept of impairment of driving ability being proved by the blood measurement of "over 80" – thus engaging the *Kienapple* principle if a person were charged with both impaired driving and "over 80" (*Prince* at para. 38).

[148] Although the test is whether there is an additional or distinguishing element, the SCC also set out a necessary corollary for lesser offences (*Prince* at para. 33):

... Where the offences are of unequal gravity, *Kienapple* may bar a conviction for a lesser offence, notwithstanding that there are additional elements in the greater offence for which a conviction has been registered, provided that there are no distinct additional elements in the lesser offence. For example, in *R. v. Loyer*, [1978] 2 S.C.R. 631, *Kienapple* was applied to bar convictions for possession of a weapon for the purpose of committing an offence when convictions were entered for the more serious offence of attempted armed robbery by use of a knife. Although the robbery charges contained the element of theft which distinguished them from the weapons charges, there were no elements in the weapons charges which were additional to or distinct from those in the robbery charges. Accordingly, it was appropriate for the Court to apply *Kienapple* to bar convictions on the lesser weapons charges rather than on the robbery charges.

4. Parties' Submissions

(a) Staff

[149] Staff raised the issue of whether the panel could or should make findings against Mottahed on the allegations under both ss. 221.1(2) and 92(4.1) of the Act, or whether the panel is limited to making findings under only one of those.

[150] Staff acknowledged that the *Kienapple* principle has been applied in some securities regulatory proceedings in Canada (examples are discussed below). However, as noted, Staff argued there is only a factual nexus here. In other words, Staff asserted that the legal elements of ss. 221.1(2) and 92(4.1) are too different to be considered overlapping.

[151] Staff described s. 92(4.1) as having "the additional, distinguishing elements of actual or constructive knowledge and reasonably anticipated market impact", with s. 221.1(2) having an additional requirement of material being provided to the ASC. Staff also contended that the two sections have different purposes: s. 221.1(2) as "promot[ing] candour and care in communication with the regulator"; and s. 92(4.1) as promoting "a fair and efficient capital market and protection of investors".

(b) Mottahed

[152] Mottahed's written submissions focused almost exclusively on the fraud allegation. He referred to the alleged misrepresentations as relating to concealment or mischaracterization of the advances to Performance, which he asserted Staff tried to use as evidence of dishonesty.

[153] Mottahed did not directly address the allegations that he breached ss. 221.1(2) and 92(4.1) of the Act, nor did he address Staff's submissions on the *Kienapple* principle in connection with those allegations.

5. Application of *Kienapple* Principle in ASC Proceedings

(a) Comment on Parties' Submissions

[154] We reviewed the cases cited by Staff and other relevant decisions to determine how Alberta and certain other provinces approach the application of the *Kienapple* principle in securities matters.

[155] Unfortunately, because Mottahed was self-represented, we did not receive the benefit of a full legal argument from counsel on his behalf. As mentioned above, Mottahed made no submissions on this point. As stated by the panel in *Aitkens* (at para. 244), it would have been preferable to have full arguments by all parties before determining this issue. However, we are satisfied that Mottahed did not suffer any unfairness through his lack of legal counsel to make such arguments. We ultimately rejected Staff's submissions on the *Kienapple* principle, resulting in no findings against Mottahed under s. 221.1(2) of the Act relating to the December 2019 Interim Financials, the December 2019 Interim MD&A, and the 2020 News Releases.

(b) Approaches to Non-Criminal Proceedings

(i) General

[156] There are three main approaches for considering the *Kienapple* principle in non-criminal proceedings in general and administrative and securities regulatory proceedings in particular: (1) the principle applies (with natural modifications in wording for administrative proceedings); (2) the principle does not directly apply but is used as guidance on the same general basis; or (3) the principle does not apply.

(ii) Directly Applicable

[157] Regarding the first approach, the ABCA has applied the *Kienapple* principle in non-securities disciplinary proceedings: see *K.C. v. College of Physical Therapists of Alberta*, 1999 ABCA 253; and *Danyluik v. Institute of Chartered Accountants of Alberta (Complaints Inquiry Committee)*, 2014 ABCA 78. In *K.C.*, the ABCA applied the *Kienapple* principle when quashing one set of disciplinary convictions because a finding under the second count "necessarily result[ed] in a finding of guilt under" the first count (at para. 64). In *Danyluik*, the ABCA stated that the

Kienapple principle can clearly be applied to disciplinary proceedings (at para. 20). Both of these cases relied on the application of the *Kienapple* principle in disciplinary proceedings as discussed in *Carruthers v. College of Nurses of Ontario* (1996), 31 O.R. (3d) 377 (Div. Ct.), which stated: "There would seem no reason in principle to permit the application of the doctrine in respect of 'regulatory' offences under provincial law, yet deny it to members of self-regulated professions", given the "public" aspect of such discipline.

[158] Specifically in the securities context, *Rudolph v. Nova Scotia (Attorney General)*, 2023 NSCA 34 was an appeal from a securities panel decision. The Nova Scotia Court of Appeal stated at para. 99 that the *Kienapple* principle applies in securities regulatory proceedings, relying on *K.C.*, *Danyluik*, and *Carruthers*. That court also noted (at paras. 99-100) that the *Kienapple* principle was applied by adjudicative panels of the Ontario Securities Commission (the **OSC**; now the Ontario Capital Markets Tribunal (the **OCMT**)) in *Re Natural Bee Works Apiaries Inc.* (2019), 42 O.S.C.B. 5905 and *Re Boock* (2013), 36 O.S.C.B. 9361. In *R. v. White*, 2000 BCSC 1081 at para. 26, the British Columbia Supreme Court directly applied the *Kienapple* principle in an appeal from a British Columbia Provincial Court determination on securities law allegations – the court and the parties all appeared to assume that the *Kienapple* principle should be considered in that quasi-criminal proceeding, although it ultimately found no factual or legal nexus.

(iii) Guidance

[159] The second approach is set out in *Re Hogg*, 2024 ONCMT 15, in which an OCMT panel declined to find indirect liability against a respondent for authorizing, permitting, or acquiescing in misconduct (at paras. 228-230) because the panel had found him to be directly liable for the same misconduct. The panel concluded (at paras. 220 and 227) that the *Kienapple* principle is not binding because it is a criminal law principle, but that it provides useful guidance. The panel stated (at para. 227):

... On occasion the [OCMT] has, either with or without reference to *Kienapple*, applied the principle that having found a respondent directly liable for breaches of Ontario securities law there is no need to also consider whether they are also deemed to have breached the law under s. 129.2 [of the *Securities Act* (Ontario)]. We think this is the correct approach.

(iv) Not Applicable or Not Addressed

[160] In an apparent instance of the third approach, an OSC panel in *Re Coventree Inc.* (2012), 35 O.S.C.B. 119, *aff'd (sub nom. Cornish v. Ontario (Securities Commission))*, 2013 ONSC 1310 (Div. Ct.) expressed doubt that the criminal-law based *Kienapple* principle would apply to securities regulatory proceedings (at para. 65). That panel concluded that failing to file a material change report and failing to file a news release (for the same material change) were distinct failures, and that the legislature had granted panels the power to order administrative penalties for each failure to comply. There are other decisions, by panels of the ASC and other securities commissions in Canada, which made findings on apparently or potentially overlapping allegations, but with no mention of the *Kienapple* principle (for example, *Re Shire International Real Estate Investments Ltd.*, 2011 ABASC 608 and *Re Donald Bergman and others*, 2021 BCSECCOM 302). It was not possible to determine if the parties in those matters raised the *Kienapple* principle.

[161] *Hogg* referred to *Natural Bee Works* and *Coventree* as dealing with the *Kienapple* principle "with limited analysis" (at para. 233). Given that reference and the relative recency of *Hogg*, the latter can be taken to be the OCMT's current approach.

(v) ASC Decisions

[162] ASC panels have not previously indicated a preferred approach in two decisions briefly discussing the *Kienapple* principle:

- *Aitkens*
 - Among other allegations, Staff alleged breaches under s. 92(4.1) for misrepresentations in OM's and under s. 221.1(2) for providing misleading OM's to the ASC. The same facts were relied on for both allegations.
 - The panel noted that the *Kienapple* principle could possibly apply, but that the parties had not made submissions on *Kienapple* (at paras. 241-243). The panel made findings under s. 92(4.1), but not under s. 221.1(2), and left the *Kienapple* issue to "be argued fully by all parties" in a future case (at para. 244).
- *Re Kilimanjaro Capital Ltd.*, 2021 ABASC 14
 - Among other allegations, Staff alleged breaches under ss. 221.1(2) and 93.4 – the former for providing misleading statements to Staff during an investigation, and the latter for obstruction of justice by providing misleading statements to Staff during an investigation.
 - The panel held that one respondent breached s. 221.1(2) by admittedly making untrue statements which the panel found to be material. Staff withdrew the s. 93.4 allegation against that respondent, so the panel considered the potential *Kienapple* issue to be moot and did not comment further on it (at para. 9).

(c) Conclusion on *Kienapple* Principle in ASC Proceedings

[163] Based on the ABCA decisions in other administrative law contexts, we are satisfied that the *Kienapple* principle should be applied in ASC proceedings, with any necessary modifications in language and analysis (such as reference to allegations rather than charges).

6. Analysis: *Kienapple* Principle – Sections 92(4.1) and 221.1(2)

(a) Legislative Provisions

[164] We earlier set out the text of s. 92(4.1) of the Act. During the Relevant Period, s. 221.1(2) of the Act provided:

No person or company shall make a statement, whether oral or written, in any document, material, information or evidence provided to the [ASC], 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.

(b) Context of Documents

[165] Staff contended that we should find breaches under both ss. 92(4.1) and 221.1(2) for alleged misleading or untrue statements in the December 2019 Interim Financials, the December 2019 Interim MD&A, and the 2020 News Releases.

(c) Purpose of Sections 221.1(2) and 92(4.1)

[166] Staff submitted that the purpose of s. 221.1(2) is to promote "candour and care in communication with the regulator", while the purpose of s. 92(4.1) is to promote "a fair and efficient capital market and protection of investors". This suggested an argument that if the purpose of s. 221.1(2) were communication with the regulator, then the provision to the ASC of these documents would be a key element of the section.

[167] We disagree with Staff's position. We are not convinced that an underlying purpose could change the nature of a legal requirement and, therefore, affect our determination of the legal nexus. We also do not accept Staff's characterization of the purposes of the two sections. As discussed below, the impugned documents were not filed with the ASC for the purpose of communication but for the purpose of fulfilling Target's continuous disclosure obligations. Staff's attempted distinction also faltered when examining their claim that the purpose of s. 92(4.1) is different because it is to promote investor protection and an efficient capital market. Those are the fundamental principles of our entire securities regulatory system, and thus do not distinguish s. 92(4.1) from s. 221.1(2) or from any other part of Alberta securities laws.

(d) Additional, Distinguishing Elements

(i) Section 92(4.1)

[168] Although s. 92(4.1) is similar to s. 221.1(2), Staff pointed to additional, distinguishing elements on the face of s. 92(4.1), specifically the materiality test and the knowledge element of both the material misrepresentation and of the reasonably expected effect of that misrepresentation on the security's market price or value.

[169] We also must be mindful of the statement above from *Prince* – even if there are additional elements, the *Kienapple* principle may bar a conviction for a lesser offence if "there are no distinct additional elements in the lesser offence" (at para. 33). Accordingly, we must examine s. 221.1(2) – and the breaches alleged by Staff – in that light.

(ii) Section 221.1(2)

(A) Staff's Asserted Distinctions

[170] Staff argued that s. 221.1(2) has an additional, distinguishing element because the material at issue must be "provided to the [ASC]" for the section to apply. We already addressed Staff's related point that the sections have different purposes.

(B) "Provided to the ASC"

[171] We disagree with Staff's assertion that provision to the ASC is an additional, distinguishing element.

[172] The impugned documents listed below were provided to the ASC pursuant to Target's continuous disclosure requirements:

- the December 2019 Interim Financials and the December 2019 Interim MD&A were required to be filed with the ASC under Parts 4 and 5 of National Instrument 51-102 *Continuous Disclosure Obligations*; and
- the 2020 News Releases were required to be filed with the ASC to comply with the exemption requirements of BO 51-519.

[173] The categories of documents at issue here were all required to be filed (and were filed) through SEDAR, where they could be accessed by the public and the regulator.

[174] We conclude that Target was required to file these documents as part of its continuous disclosure requirements. Continuous disclosure is a crucial aspect of our securities regulatory system, premised on investors and prospective investors being able to make investment decisions based on the receipt of timely and material information about the issuer. Such filings also support the secondary market disclosure statutory civil liability regime in Part 17.01 of the Act.

[175] We view the element of "provided to" the ASC in this sense as part of the continuous disclosure requirements. In and of itself, this provision of documents was neither additional nor distinguishing. In some circumstances, a panel may determine that providing material to the ASC is an additional element, such as during the course of an investigation, but that was not the situation before us.

(iii) Materiality Test and Knowledge Elements

[176] As part of its argument on distinctions between the two sections, Staff submitted that the materiality test is different under each section: s. 92(4.1) requiring knowledge and market impact; and s. 221.1(2) requiring an assessment of "the significance of the misstatement, in terms [of] the degree of its departure from the truth". Staff acknowledged that ASC panels have used the market impact test for s. 221.1(2) allegations relating to certain filed documents (as in *Aitkens* at paras. 142-144), and the departure or divergence from the truth test for s. 221.1(2) allegations relating to statements or material provided during investigative interviews (as in *Re Hagerty*, 2014 ABASC 237 at paras. 209-211). However, Staff argued that only the divergence from the truth test should be used under s. 221.1(2) because that section does not use the words "misrepresentation" or "material fact" and, unlike s. 92(4.1), does not incorporate a market impact test.

[177] Staff also relied for this proposition on *Bergman*, in which a panel of the British Columbia Securities Commission (the **BC Commission**) made findings under two sections of the *Securities Act* (British Columbia) (the **BCSA**) which were, at that time, somewhat comparable to those before us. The impugned statements were in three offering memoranda (**OMs**). The BC Commission panel made findings under both sections and applied a divergence from the truth test when examining the documents required to be filed (at paras. 60-70 and 78-83). We do not consider *Bergman* persuasive because it did not discuss the *Kienapple* principle, nor did it mention the significance of certifications importing the concepts of misrepresentation and material fact.

[178] We rely instead on the rationale outlined in *Aitkens*, when considering certain material provided to the ASC in a non-investigative context. The panel in *Aitkens* relied on the fact that OM's include certificates stating that the OM does not contain a "misrepresentation" (at para. 141). Therefore, depending on the document or material at issue, the concepts of "misrepresentation" and "material fact" may be imported into certain allegations under s. 221.1(2). That would mean the materiality test in s. 92(4.1) is not an additional or different element in such situations.

[179] Apart from the interpretation of the materiality test in the two sections, s. s. 92(4.1) has an explicit knowledge element. Even if there is no implied knowledge element in s. 221.1(2), a finding under s. 221.1(2) could be subsumed by a finding under s. 92(4.1). As mentioned in *Aitkens* (at para. 144, citing *Re TransCap Corporation*, 2013 ABASC 201 at para. 89), there is a close parallel between the two sections in some circumstances. Staff made their submissions on s. 221.1(2) before their submissions on s. 92(4.1), perhaps inviting us to conclude that the materiality and knowledge elements are fatal to the application of the *Kienapple* principle. We consider the appropriate analysis to be the reverse – the more serious allegation with the stricter parameters would logically be the first to be analyzed. In such an analysis, it is difficult to envision a circumstance in which the same factual nexus would lead to a finding under s. 92(4.1) but not under s. 221.1(2). The reasoning in *Prince* would then apply, and the lesser allegation would be subsumed in the greater.

[180] We conclude that, in at least some non-investigative circumstances, a purported difference in the materiality and knowledge elements may be subsumed one into the other. That is the situation before us here.

7. Conclusion on *Kienapple* Principle

[181] For the reasons above, we conclude that the *Kienapple* principle applies here, and that the allegations made by Staff under s. 221.1(2) of the Act cannot be sustained once findings have been made for the same misconduct under s. 92(4.1).

[182] Therefore, we dismiss the allegation that Mottahed breached s. 221.1(2) of the Act by making the impugned statements in the December 2019 Interim Financials, the December 2019 Interim MD&A, and the 2020 News Releases.

[183] The sole remaining allegation under s. 221.1(2) of the Act relates to the impugned statements made in the December 2019 Interim Certificate, because Staff did not make a s. 92(4.1) allegation for that document.

C. Law

[184] We earlier set out the text of s. 221.1(2) of the Act. A determination under this section requires Staff to prove three elements (also see, for example, *Aitkens* at para. 143 and *Hagerty* at para. 130):

- a statement was made in material provided to the ASC;
- the statement was misleading or untrue or omitted a required or necessary fact at the time and in light of the circumstances under which it was made; and

- the statement was misleading or untrue or made omissions in a material respect.

D. Parties' Positions

1. Effect of *Kienapple* Principle

[185] As noted, we determined that the *Kienapple* principle applied here so that we did not consider Staff's allegations under s. 221.1(2) of the Act relating to the December 2019 Interim Financials, the December 2019 Interim MD&A, and the 2020 News Releases.

[186] Accordingly, we set out Staff's position relating only to the December 2019 Certificate.

2. Staff

[187] Staff submitted that ASC panels in previous decisions have distinguished between the materiality test for statements during investigative interviews and the materiality test for documents otherwise provided to the ASC.

[188] Staff contended that the test for any statement's materiality under s. 221.1(2) should be assessed based on the degree of its divergence from the truth. For example, in *Kilimanjaro*, the ASC panel stated (at para. 295):

... 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.

[189] We agree with that reasoning in the context of information provided as part of an investigation. However, we note that the underlying rationale (the effect on the direction of an investigation) does not apply to documents generated and provided as part of a company's continuous disclosure obligations. We return to that below.

[190] In contrast, Staff pointed to the test from previous decisions involving documents otherwise provided, for example, the OMs at issue in *TransCap*. The ASC panel stated that, in those circumstances, ss. 92(4.1) and 221.1(2) of the Act both essentially prohibited a "misrepresentation" as defined in s. 1 (at para. 89) and the included concept of "material fact", which has a market impact test. Staff contended that approach should not be taken here because s. 221.1(2) does not use the terms "misrepresentation" and "material fact". The relevant decisions and Staff's contention are discussed below.

[191] Staff argued that the December 2019 Certificate "was false and misleading in a material respect" because of the omission from the December 2019 Interim Financials and the December 2019 Interim MD&A of the Transfers and their effect on Target's cash position. Staff characterized those as "glaring errors" and "misrepresentations". Staff also submitted that Mottahed either knew the December 2019 Interim Financials and the December 2019 Interim MD&A "did not fairly present Target's financial circumstances and contained misrepresentations, or he did not exercise reasonable diligence in his review".

3. Mottahed

[192] As noted, Mottahed's submissions focused almost entirely on the fraud allegation. He acknowledged the panel might conclude that disclosure and communication could have been better.

E. Assessment

1. Clarification of Legal Principles

[193] In *TransCap*, the ASC panel considered Staff's allegation that an OM certificate contained misrepresentations. The certificate there stated that the OM did "not contain a misrepresentation", which therefore engaged the definition of "misrepresentation" from s. 1(ii) of the Act. "Misrepresentation" is defined as an untrue statement of a material fact, an omission to state a required material fact, or an omission to state a material fact necessary so that a statement made is not misleading. The panel stated that the definition in s. 1(gg) of "material fact" was thus also applicable when assessing the statements made in that OM certificate (at paras. 88-89). As a material fact is defined as a fact which "would reasonably be expected to have a significant effect on the market price or value of . . . securities", there is a market impact component to a s. 221.1(2) allegation involving a document which certifies that no misrepresentations exist.

[194] Filings by a company were also considered in *Re North America Frac Sand Ltd.*, 2022 ABASC 110 and *Aitkens*. In *Frac Sand*, Staff alleged that the corporate respondent's filing of certain documents contravened s. 221.1(2) of the Act because two specific facts were not disclosed (relating to corporate leadership and funding). In *Aitkens*, Staff alleged that certain respondents contravened s. 221.1(2) by providing materially misleading OMs to the ASC.

[195] The panels in *Frac Sand* and *Aitkens* commented on the parallel between ss. 221.1(2) and 92(4.1) of the Act, as both prohibited misrepresentations in the context of the allegations at issue in those cases (at para. 560 and para. 144, respectively). That, as noted, means the test in such non-investigative circumstances is one of market impact, not divergence from the truth. In *Frac Sand*, the panel made no findings under s. 221.1(2) because Staff did not prove the underlying alleged facts. In *Aitkens*, the panel had already made misrepresentation findings under s. 92(4.1) and was concerned that there might be a sufficient legal and factual nexus such that the s. 221.1(2) allegations could be subsumed within the s. 92(4.1) allegations. The panel, therefore, made no findings on the s. 221.1(2) allegations, leaving the discussion of subsuming and the *Kienapple* principle for a future case (at paras. 243-244), as set out above.

[196] In making their submission that the test under s. 221.1(2) should be the same for statements during investigative interviews and the contents of documents filed with the ASC, Staff did not mention that the documents at issue in the decisions discussed incorporated the concepts and, accordingly, the definitions of "misrepresentation" and "material fact". Staff also did not seem to consider that the wording they referred to from *Kilimanjaro* (at para. 295), as quoted above, specifically links the test of divergence from the truth to an investigation because the greater the variance from the truth, the more likely the investigative path will be affected, which undermines the investigation's efficiency and efficacy. Such a potential effect on the investigative path is simply not relevant in the context of a document filed as part of an issuer's continuous disclosure obligations.

2. Application of Legal Principles to Facts

[197] Two clauses of the December 2019 Certificate were at issue here.

[198] The first clause was the misrepresentation clause, stating that the December 2019 Interim Financials and the December 2019 Interim MD&A contained no misrepresentations, contained no untrue statements of a material fact, and did not omit a required material fact, in light of the circumstances. This clearly imported a market impact test.

[199] We earlier found that there were misrepresentations in the December 2019 Interim Financials and the December 2019 Interim MD&A, contrary to Mottahed's assertion in the December 2019 Certificate. As stated there – and as should be obvious to all capital market participants – information about a company's financial position is vitally important to the market, including to current investors, prospective investors, and regulators. It is essential that the market has accurate information about a company's financial situation, cash position, and management's potentially conflicting relationships with other entities. This is precisely the type of information which would reasonably have been expected to have a significant effect on the market price or value of the Target Shares.

[200] The second clause was the fair presentation clause, stating that the financial information in the December 2019 Interim Financials and the December 2019 Interim MD&A "fairly present[ed] in all material respects the financial condition, financial performance and cash flows of [Target]" as of December 31, 2019. Given that Staff did not address the reason for the market impact test in the *TransCap* line of cases, no arguments were made as to whether the fair presentation aspect of the December 2019 Certificate was more akin to the market impact test documents or to the divergence from the truth investigative interview statements. Staff did refer to *Bergman*, in which a panel of the BC Securities Commission applied the divergence from the truth test when considering representations made in OMs about the registration and priority status of certain mortgages. The panel there concluded that the divergence from the truth was substantial and was of fundamental importance to investors in making investment decisions (at para. 83). However, we do not find *Bergman* persuasive for the reasons set out earlier in this decision.

[201] As a final point, Staff's written submissions on this allegation did not apply the rationale of a divergence from the truth test. To the contrary, after setting out the test, Staff asserted that certifications such as this one "are meant to improve the quality, reliability and transparency of periodic disclosure by requiring members of senior management to assume personal responsibility". As seen from that submission, this was not a case of care and candour in communications with regulators, nor was it a case of misdirecting an investigation. It was a case of Mottahed falsely stating that crucial continuous disclosure documents were not misleading to the market and to market participants.

[202] We are satisfied that the market impact test is the appropriate test for materiality here, as in *Aitkens* and *Frac Sand*. The December 2019 Certificate (which used the wording required under Alberta securities laws) itself clearly imported a market impact component for a materiality assessment. Further, as the December 2019 Certificate was not provided during the course of an

investigation, the danger of a false statement leading investigators to pursue erroneous lines of inquiry did not apply in these circumstances.

[203] After applying the legal test to these circumstances, we conclude that Mottahed made the statements in the December 2019 Certificate, those statements were misleading or untrue or made omissions at the time and in light of the circumstances in which they were made, and those statements were misleading or untrue or made omissions in a material respect.

F. Summary of Determination

[204] To summarize our findings on Staff's allegations under s. 221.1(2) of the Act:

- we dismiss the allegation relating to the December 2019 Interim Financials, the December 2019 Interim MD&A, and the 2020 News Releases, given our findings under s. 92(4.1) and the application of the *Kienapple* principle; and
- we find that Mottahed breached s. 221.1(2) of the Act relating to the December 2019 Certificate.

VII. ANALYSIS: AUTHORIZED, PERMITTED, OR ACQUIESCED

A. Allegation

[205] Although Staff did not directly allege any breaches of Alberta securities laws by Target, Staff made an additional or alternative allegation against Mottahed that he authorized, permitted, or acquiesced in breaches by Target of ss. 92(4.1) and 221.1(2) of the Act.

B. Determination

[206] Given our findings that Mottahed directly breached those two sections, we need not consider this allegation that he breached them indirectly as well.

VIII. CONCLUSION

[207] We find that Mottahed:

- breached s. 93(1)(b) of the Act by perpetrating a fraud on investors;
- breached s. 92(4.1) by making materially misleading or untrue statements or making omissions in the December 2019 Interim Financials, the December 2019 Interim MD&A, and the 2020 News Releases; and
- breached s. 221.1(2) by making materially misleading or untrue statements or making omissions in the December 2019 Certificate provided to the ASC.

[208] Based on the *Kienapple* principle, we dismiss the allegation that Mottahed breached s. 221.1(2) of the Act by making materially misleading or untrue statements or making omissions in the December 2019 Interim Financials, the December 2019 Interim MD&A, and the 2020 News Releases provided to the ASC.

[209] We dismiss the allegation that Mottahed authorized, permitted, or acquiesced in breaches by Target of ss. 92(4.1) and 221.1(2) of the Act because we determined that he directly breached those provisions.

[210] This proceeding now moves to a second phase to determine what, if any, sanction and cost-recovery orders ought to be made against Mottahed.

[211] By noon on Friday, October 16, 2026, Staff and Mottahed are directed to inform each other and the Registrar in writing: (a) whether they intend to adduce new evidence on the sole issue of appropriate sanction and cost-recovery orders; and (b) if so, their expected timing for the same and suggested dates.

[212] After we have received and considered the parties' responses to this direction (or after the date and time specified for such responses has passed), the Registrar will inform the parties of the timing for the next steps in this proceeding.

October 2, 2026

For the Commission:

"original signed by"
Kari Horn, K.C.

"original signed by"
Tom Cotter

"original signed by"
Karen Kim