Ontario

Capital Markets Tribunal | Tribunal des marchés financiers | 22nd Floor 20 Queen Street West Toronto ON M5H 3S8 | 22e étage 20, rue Queen ouest Toronto ON M5H 3S8

Citation: *TeknoScan Systems Inc (Re)*, 2024 ONCMT 32
Date: 2024-12-23
File No. 2022-19

**IN THE MATTER OF**
**TEKNOSCAN SYSTEMS INC, H. SAMUEL HYAMS, PHILIP KAI-HING KUNG and SOON FOO (MARTIN) TAM**

**REASONS AND DECISION**

**(Subsection 127(1) of the *Securities Act*, RSO 1990, c S.5)**

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| **Adjudicators**: | Andrea Burke (chair of the panel)<br>James Douglas<br>Cathy Singer | |
| **Hearing**: | January 29, 30 and 31, February 20, 21, 22, 23, 26, 27, 28 and 29, April 2, 3, 4, 5, 8, 9, 15 and 19 and May 31, 2024 | |
| **Appearances**: | Hanchu Chen<br>Amethyst Haighton | For the Ontario Securities Commission |
| | Susan Kushneryk<br>Sandeep Joshi<br>Oliver Wookey | For TeknoScan Systems Inc., Philip Kai-Hing Kung and Soon Foo (Martin) Tam |
| | H. Samuel Hyams | On his own behalf |

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# REASONS AND DECISION

## 1. OVERVIEW

[1] The Commission alleges that the respondents breached the *Securities Act* (the ***Act***)[1] by perpetrating a securities fraud and making misleading statements to investors. The Commission also alleges that two of the respondents made misleading statements to the Commission during its investigation of this misconduct.

[2] TeknoScan Systems Inc. (**TeknoScan**) and three of its officers and directors, H. Samuel Hyams, Phillip Kai-Hing Kung and Soon Foo (Martin) Tam (the **Individual respondents**), are alleged to have perpetrated a fraud against preferred shareholders of TeknoScan by presenting a sham transaction for the purchase of TeknoScan common shares with no reasonable expectation of completion. It is alleged that through dishonesty, deceit and misrepresentation, the respondents exploited preferred shareholders, enticed them to convert their preferred shares to common shares, and caused them to forfeit their rights as preferred shareholders.

[3] For the reasons that follow, we find that:

a. contrary to s. 126.1(1)(b) of the *Act*, the respondents perpetrated a fraud on TeknoScan's preferred shareholders who opted into the transaction by omitting certain information that rendered a communication to shareholders dishonest and misleading;

b. contrary to s. 126.2(1) of the *Act*, TeknoScan made a materially misleading statement to shareholders which would reasonably be expected to have a significant effect on the value of TeknoScan's common shares;

c. Hyams, Kung and Tam authorized, permitted or acquiesced in TeknoScan's breach of s. 126.2(1) of the *Act* and they are deemed liable for that breach under s. 129.2; and

[1] RSO 1990, c S.5

d. the Commission failed to establish that:

i. the Individual respondents made a materially misleading statement to shareholders; and

ii. Kung and Hyams made misleading statements to the Commission during its investigation.

## 2. BACKGROUND

### 2.1 The respondents

[4] TeknoScan was founded in 2008 with its head office located in Vaughan, Ontario. It is not a reporting issuer under the *Act*. TeknoScan is a trace chemical detection technology company. A number of witnesses confirmed that TeknoScan had developed a unique and proven technology and was actively involved in developing and building a business around that technology.

[5] In 2016 and 2017, TeknoScan's Board of Directors had four directors: the Individual respondents, and Sunil Joseph. They were the directing minds of the company.

[6] Hyams was the Chief Executive Officer of TeknoScan from 2008 until 2022, and President and a director from 2008 until 2023. His duties included managing the legal and financial aspects of the company, such as accounting, approval of financial statements, and some fundraising.

[7] During the material time, Kung was a founder, director, Chief Financial Officer, executive vice-president, and treasurer of TeknoScan. Kung was primarily focused on raising funds for the company.

[8] Tam joined TeknoScan in 2011 as a director. He became the chairman of the Board in 2013. Similar to Kung, Tam's principal role at TeknoScan was to raise funds for the company.

[9] In 2016, Hyams (11%), Kung (32%) and Tam (16%) collectively held 59% of the outstanding common shares of TeknoScan.

## 2.2 Factual background

### 2.2.1 TeknoScan's fundraising and capital structure

[10] From its inception, TeknoScan relied on investors to keep it operating. During the material time, TeknoScan did not yet have any significant sales or cash flow and continued to rely on funds raised from investors.

[11] TeknoScan began raising capital in 2008 by issuing preferred and common shares.

[12] TeknoScan sold preferred shares at US $1.00 or less until August 2016. By December 2016, TeknoScan had 108 preferred shareholders who held 39.8 million preferred shares. TeknoScan also had approximately 56 common shareholders holding approximately 59.7 million shares (including the common shares held by the Individual respondents).

[13] All preferred shares had the following rights:

a. the right to a 6% cumulative dividend paid annually; and

b. the right to convert the preferred shares to common shares on a 1:1 basis at any time.

[14] A subset of the preferred shares also had:

a. the right to receive a 5% royalty; and

b. a redemption right entitling the shareholder to require TeknoScan to redeem their preferred shares at US $3 per share after 36 months from the purchase date. Of the approximately 39.8 million preferred shares issued by December 2016, approximately 20 million had redemption rights.

### 2.2.2 The Share Purchase Transaction

[15] On December 14, 2016, TeknoScan sent to all TeknoScan shareholders a company update email (**Update Email**) attaching a notice (**Notice**). The Update Email advised shareholders that the TeknoScan Board had been in negotiations with a Canadian Strategic Investor to have that investor acquire up to 50% of the common shares held by TeknoScan shareholders at an attractive valuation. The Notice indicated that Dan Paul Davison and Double Helix Management

Services Ltd. (**Double Helix**) intended to purchase up to approximately 50% of TeknoScan common shares on a fully diluted basis at US $20 per share (**Share Purchase Transaction**).

[16] The Notice advised preferred shareholders that, if they wished to participate in the Share Purchase Transaction, they could convert all, but not less than all, of their preferred shares to common shares on a 1:1 basis. The conversion of preferred shares was not contingent on the closing of the Share Purchase Transaction.

[17] Each shareholder participating in the Share Purchase Transaction was required to exercise warrants or options to acquire common shares equal to the number of common shares sold by that shareholder under the Transaction. The exercise price for the outstanding warrants and options varied but was in the range of US $0.75 to US $3 per share. Thus, the Share Purchase Transaction was also structured to raise additional funds for TeknoScan.

[18] The Notice attached a package of transaction documents that included:

a. an Acknowledgment and Confirmation of Shareholder (**Acknowledgment and Confirmation**); and

b. the form of Share Purchase Agreement between Davison, in trust for Double Helix as purchaser, the individual TeknoScan shareholders who opt to participate in the Share Purchase Transaction and TeknoScan (**Share Purchase Agreement**).

[19] Shareholders who wished to participate in the Share Purchase Transaction were required to complete and return the Acknowledgement and Confirmation by January 31, 2017, and agree to be bound by the terms of the Share Purchase Agreement.

[20] Following the Update Email and Notice, preferred shareholders signed on to participate in the Share Purchase Transaction and converted 33,730,897 preferred shares (representing 92.3% of the outstanding preferred shares at the time) to common shares.

[21] The Share Purchase Transaction ultimately did not take place. No funds for the purchase of shares under the Share Purchase Transaction were ever advanced

by or on behalf of Double Helix. The preferred shareholders who converted their shares to common shares lost the rights associated with their preferred shares.

## 3. PRELIMINARY AND EVIDENTIARY MATTERS

### 3.1 Request for confidential conference

[22] A few weeks before the scheduled start of the merits hearing, TeknoScan, Kung and Tam (**TSI respondents**) brought a motion for an order requiring the parties to participate in a confidential conference. The TSI respondents submitted that a confidential conference would assist the parties to narrow the issues, resolve potential evidentiary issues, and potentially develop an agreed statement of facts. Hyams supported the motion while the Commission opposed it.

[23] By order dated January 11, 2024,[2] we granted the motion for reasons to follow. These are our reasons.

[24] Rule 20(1) of the Tribunal's *Rules of Procedure and Forms* (the ***Rules*** that were in place at the time of this motion) provided that a party may request or a panel may direct that the parties participate in a confidential conference to consider:

a. the settlement of any or all of the issues;

b. the simplification of the issues;

c. facts that may be agreed upon; and

d. any other matter that may further a just, expeditious and cost-effective disposition of the proceeding.

[25] The TSI respondents argued that the parties and the Tribunal would benefit from the parties' efforts to make progress in all of the areas identified in rule 20(1). They highlighted the complexity of the allegations, the significant number of merits hearing dates, and the numerous documents exchanged and anticipated witnesses.

[26] The TSI respondents confirmed that they were not looking to adjourn or delay the start of the merits hearing. In sum, the TSI respondents argued that a

[2] (2024), 47 OSCB 611

confidential conference would be the only way to ensure that the merits hearing would be conducted in a just, expeditious and cost-effective manner.

[27] Hyams supported this position and added that, as he expected to be self-represented at the merits hearing, he would benefit from participating in a confidential conference with his Litigation Assistance Program appointed counsel present to address any issues prior to the merits hearing.

[28] The Commission submitted that:

a. a confidential conference might delay the start of the merits hearing;

b. a confidential conference would distract from hearing preparation;

c. there were negative implications should the Tribunal order parties to engage in settlement discussions; and

d. the purpose of the proposed confidential conference was not clear and, in the absence of significant admissions by the respondents, a conference would not benefit the parties or the Tribunal.

[29] We found that the potential benefits of having the parties engage in a confidential conference outweighed the potential issues raised by the Commission and ordered that the parties take part in a confidential conference on an agreed date. We clarified that we were not ordering the parties to engage in settlement discussions.

### 3.2 Objection to evidence from the Commission's investigator witness

[30] The Commission's first witness at the merits hearing was its investigator, Michal Krzepkowski, whose evidence was tendered largely through an affidavit. The affidavit includes a number of exhibits. The TSI respondents objected to the admission into evidence of two exhibits to the affidavit and an additional spreadsheet the Commission intended to introduce into evidence through Krzepkowski.

[31] The documents are:

a. Exhibit A to the Krzepkowski affidavit (**Exhibit A**) – an excel chart that lists and hyperlinks to approximately 1,300 documents gathered during

the investigation, not all of which are specifically addressed in the body of the affidavit;

b. Exhibit B to the Krzepkowski affidavit (**Exhibit B**) – a spreadsheet Krzepkowski prepared that attempts to identify the number of preferred shares of TeknoScan with redemption rights attached to them; and

c. a spreadsheet (**Spreadsheet**) Krzepkowski prepared that purports to show, under different scenarios, what TeknoScan shareholders stood to gain (by selling their common shares under the Share Purchase Transaction) or lose (by giving up the redemption rights under their preferred shares) had the Share Purchase Transaction proceeded to a closing.

[32] The TSI respondents submitted that they did not understand what the Commission's intentions were regarding Exhibit A and the accompanying 1,300 hyperlinked documents and, in particular, those hyperlinked documents that are not specifically addressed in the body of the affidavit.

[33] The Commission clarified that its intention was to rely on the content of any or all of these documents, whether or not they are specifically addressed in testimony during the hearing or in the affidavit itself. Following further discussion between the parties, the TSI respondents withdrew their objection to the admissibility of the documents hyperlinked to Exhibit A on the understanding that the TSI respondents:

a. acknowledged their authenticity;

b. did not acknowledge their relevance, and reserved the right to object to their relevance; and

c. did not agree to the truth of their contents.

[34] Accordingly, we admitted Exhibit A and the hyperlinked documents based on their authenticity only, and not for their relevance or for the truth of their contents.

[35] The TSI respondents objected to Exhibit B on the grounds that it is more than just a summary of facts, is based on a number of assumptions, is speculative, and is in the nature of expert or opinion evidence. The Commission submitted

that this exhibit is simply a collation or aggregation of evidence collected during the investigation.

[36] The TSI respondents objected to the Spreadsheet on the basis that it is speculative and based on potential permutations of how the Share Purchase Transaction may have closed—none of which occurred. They also objected on the basis that, to the extent that the Spreadsheet purports to calculate potential losses to preferred shareholders under various theoretical scenarios, it is not relevant, is potentially highly prejudicial, and is in the nature of an expert damages calculation.

[37] The Commission submitted that the Spreadsheet is relevant because it shows what shareholders stood to gain or lose by participating in the Share Purchase Transaction, which goes to the materiality of the representations that were made to them and also to the deprivation element under the test for fraud. The Commission further submitted that the assumptions built into the Spreadsheet are assumptions that TeknoScan itself included in its own spreadsheet to calculate disbursement of funds under the Share Purchase Transaction.

[38] After considering the parties' submissions on Exhibit B and the Spreadsheet, we admitted them into evidence. Both documents include calculations based on information gathered during the investigation. Both exhibits also reflect certain assumptions, however, we did not find them to be in the nature of expert or opinion evidence as they largely summarize evidence gathered during the investigation and reflect straightforward arithmetic.

[39] While not ruling on the probative value of the evidence when we admitted these documents, we recognized that there was a potentially justifiable argument for relevance of the information in them. Ultimately, we exercised our discretion to admit these documents, subject to considering their probative value once we had the benefit of all the evidence tendered and submissions made later in the hearing.

### 3.3 Objection to Commission witness

[40] After the merits hearing had commenced, the Commission sought leave to call a witness not listed on its witness list previously filed with the Tribunal and

provided to the respondents. The TSI respondents objected to this witness testifying at the merits hearing. Hyams was in favour of the witness testifying.

[41] The individual, K.D., is a former preferred shareholder who converted his preferred shares to common shares in connection with the Share Purchase Transaction. This investor's name appeared on a number of documents provided to the Commission by Hyams as part of his hearing brief in December 2023.

[42] The Commission maintained that we ought to allow this individual to testify as his testimony would be helpful to the panel, notes from the Commission's calls with the individual outlining his anticipated evidence were provided to the respondents in advance of the hearing, the individual had not observed any of the merits hearing that had already been underway, he would testify fairly late in the hearing, and his testimony would be relatively brief (half a day).

[43] The TSI respondents objected because of timing, procedural fairness, and relevance. They submitted that the Commission has been aware of the individual's involvement with TeknoScan since at least 2022, and he is not someone who has only recently come to the Commission's attention. They also objected to the addition of a witness after the merits hearing was underway.

[44] We granted leave to the Commission to call the witness. In the circumstances, we were satisfied that there would be no unfairness or prejudice to the TSI respondents and that any objections to the relevance of the witness's proposed evidence could be addressed during the witness's testimony.

### 3.4 Use of compelled transcripts in Tribunal proceedings

#### 3.4.1 Introduction

[45] During the hearing, we heard two motions for leave to tender into evidence all or part of various transcripts of pre-hearing examinations conducted by the Commission, all but one of which were compelled. The TSI respondents brought the first shortly after the hearing commenced. The Commission brought the second prior to closing its case.

[46] We dismissed both motions for reasons to follow.

[47] It was common ground that s. 15 of the *Statutory Powers Procedure Act*[3] gives the Tribunal a general discretion to admit examination transcripts as hearsay evidence. However, in the case of the Commission's motion to admit the transcripts of two respondents, we concluded that the transcripts were inadmissible against them because they had, on their examinations, invoked the protection against self-incrimination contained in s.9 of the Ontario *Evidence Act*[4] and there was otherwise no compelling basis for exercising our discretion to admit the transcripts for any other purpose and thereby dispense with oral testimony.

[48] With respect to the TSI respondents' motion to introduce the examination transcripts of two non-parties, we dismissed the motion because the TSI respondents had made no attempt to call those individuals as witnesses at the hearing before us, nor did they establish that it would be too difficult to have them provide oral testimony.

### 3.4.2 The Commission's "read-ins" motion

[49] The Commission sought to "read in" excerpts from the transcripts of the compelled examinations that it conducted of Kung and Tam pursuant to summonses issued under Part VI of the *Act*. The Commission tendered the excerpts as admissions against interest by Kung and Tam as individual respondents, and as against TeknoScan, but not as against Hyams. There were also portions that were not admissions against interest that the Commission wanted to tender for context in its case against the TSI respondents. Kung and Tam had been examined in their individual capacities, but there was no evidence to suggest that they were examined as corporate representatives of TeknoScan.

[50] At the time the motion was brought, counsel for Kung and Tam had made clear that their clients would not be testifying at the hearing, but that Joseph, a TeknoScan director, would be called as a witness on behalf of TeknoScan. Hyams, who had been the CEO of TeknoScan during the material time, had indicated that he would be testifying at the hearing on his own behalf.

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[3] RSO 1990, c S.22 (***SPPA***)

[4] RSO 1990, c E.23 (***Evidence Act***)

[51] The parties agreed that we have a general discretion to admit hearsay evidence that might otherwise be inadmissible in a court proceeding, pursuant to s. 15(1) of the *SPPA* which provides, in part:

> …a tribunal may admit as evidence at a hearing, whether or not given or proven under oath or affirmation or admissible as evidence in a court, (a) any oral testimony; and (b) any document or other thing, relevant to the subject-matter of the proceeding and may act on such evidence…

[52] The broad discretion conferred under this section is limited by the language of ss. 15(2) and (3). Section 15(2) provides that nothing is admissible in evidence at a hearing that is rendered inadmissible by statute. Section 15(3) makes clear that the general discretion to admit under s. 15(1) does not override the provisions of any statute that expressly limits the purposes for or the extent to which testimony or documents may be admitted and used in evidence. While the parties agreed that the transcript evidence of Kung and Tam was hearsay, they disagreed on whether we could, and if so whether we should, exercise our discretion to admit any portion of it into evidence.

[53] To the extent that the transcripts contained admissions against interest by Kung and Tam, respectively, as individual respondents, the Commission relied upon both:

a. the language of Part VI of the *Act*, in particular ss. 17 and 18; and

b. the past decisions of the Tribunal in *Sextant Capital Management Inc (Re)*[5] and *Agueci (Re)*[6].

[54] The Commission argued that, unless Kung and Tam undertook to testify at the hearing, the Commission had what amounted to a presumptive right to read in their evidence against them.

[55] Respecting s. 17 of the *Act*, the Commission argued that, while its express language addresses only disclosure or production in proceedings before the Tribunal of transcripts and other evidence obtained under Part VI, the section should be read expansively to permit the unrestricted use of such evidence in

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[5] 2010 ONSEC 25 (***Sextant***)

[6] 2013 ONSEC 45 (***Agueci***)

Tribunal proceedings. The Commission further argued that this expansive interpretation of s. 17 is supported by the fact that s. 18 of the *Act* contains the only express prohibition against the use of transcript evidence obtained under Part VI against the testifying party, which prohibition extends only to prosecutions under s. 122 of the *Act* or other prosecutions governed by the *Provincial Offences Act*.[7]

[56] In *Sextant* and *Agueci,* the hearing panels exercised their discretion to permit the Commission to read in, as against individual respondents, excerpts of those respondents' transcript evidence secured under Part VI of the *Act*, where the respondents did not undertake to testify at the hearing. The Commission submitted that this practice has become the standard, and it should govern the exercise of our discretion to admit the proffered excerpts of the Kung and Tam transcripts as evidence against them at the hearing. The Commission submitted, again relying on *Sextant*[8] and *Agueci,*[9] that any denial of the Commission's ability to read in excerpts of respondents' transcript evidence against them would weaken the enforcement powers of the Commission.

[57] The TSI respondents advanced two principal arguments in response. The first was that each of Kung and Tam had asserted the protection of s. 9 of the *Evidence Act* during their Part VI examinations and therefore their answers given on those examinations could not be used against them in the hearing before us. The second was that there is a general right against self-incrimination in administrative law which is subsumed within the rules of natural justice.

[58] Turning to consider the first argument, we set out s. 9 of the *Evidence Act* in its entirety:

> 9 (1) A witness shall not be excused from answering any question upon the ground that the answer may tend to criminate the witness or may tend to establish his or her liability to a civil proceeding at the instance of the Crown or of any person or to a prosecution under any Act of the Legislature.

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[7] RSO 1990, c P.33

[8] *Sextant* at para 14

[9] *Agueci* at para 123

> 9(2) If, with respect to a question, a witness objects to answer upon any of the grounds mentioned in subsection (1) and if, but for this section or any Act of the Parliament of Canada, he or she would therefore be excused from answering such question, then, although the witness is by reason of this section or by reason of any Act of the Parliament of Canada compelled to answer, the answer so given shall not be used or receivable in evidence against him or her in any civil proceeding or in any proceeding under any Act of the Legislature.

[59] The Commission submitted that, when similarly situated respondents made this same argument in *Sextant* and *Agueci*, the panels in those cases ruled that, while the evidence in question was compelled and therefore fell within s. 9(1), s. 9(2) did not apply because the Part VI examinations at issue, and the hearings before those panels, were part of the same proceeding.[10] The panels in *Sextant* and *Agueci* read in "subsequent" and "other", respectively, as qualifying "any civil proceeding" and "any proceeding under any Act of the Legislature" in s. 9(2) of the *Evidence Act.*[11]

[60] The TSI respondents argued that, regardless of whatever merit the rulings in those cases might have had, the reasoning could no longer apply after the creation of the Tribunal under the *Securities Commission Act, 2021*,[12] when the distinction between a Part VI investigation that the Commission initiated and carried out, and an administrative proceeding before the Tribunal under s. 127 of the *Act*, became manifest.

[61] Without ruling on the TSI respondents' argument that the advent of the Tribunal in its current form would be determinative of the applicability of s. 9(2) in the circumstances, we concluded that *Sextant* and *Agueci* were simply wrongly decided on this issue. While the Divisional Court heard and dismissed an appeal from *Agueci* on a separate issue, the Court was not called upon to rule on the applicability of s. 9(2) of the *Evidence Act* to the transcript evidence at issue in

[10] *Sextant* at paras 8-10; *Agueci* at paras 123-125

[11] *Sextant* at para 15; *Agueci* at para 124

[12] S.O. 2021, c 8, Sched 9

that case.[13] Part VI of the *Act* has, at all material times, prescribed a standalone extraordinary power conferred on the Commission to conduct confidential investigations and examinations in furtherance of the Commission's mandate to protect investors and preserve the integrity of the capital markets.[14]

[62] Investigations under Part VI of the *Act* are initiated by order of the Commission pursuant to which one or more persons are appointed to investigate, with power to summons witnesses to testify under oath. Possible outcomes of an investigation include:

a. the initiation of an administrative proceeding under s. 127 of the *Act*;

b. the commencement of an application under s. 128 of the *Act* before the Superior Court of Justice for declaratory and other ancillary relief;

c. the initiation of a prosecution under the *Provincial Offences Act* in respect of one or more alleged breaches of s. 122 of the *Act*; and

d. the delivery of a privileged report to the Chair of the Commission or member of the Commission as provided for in s. 15 of the *Act*.

[63] The *Act* contains no support for the suggestion that an investigation under Part VI either initiates or is part of a subsequent administrative proceeding brought under s. 127. The fact that a person appointed to make an investigation under Part VI may (or in some cases must) disclose as part of a s. 127 proceeding evidence, including transcripts of witnesses, gathered during the investigation does not, in our view, alter this finding. Similarly, that fact does not render a compelled examination transcript tantamount to a discovery transcript in a civil proceeding, where a party is entitled, in certain circumstances, to read it in as part its case. A Part VI investigation is not a s. 127 proceeding, nor is it a part of a s. 127 proceeding even if that proceeding is commenced as a result of the investigation.[15]

[64] Given that the rulings in *Sextant* and *Agueci* were, in our view, predicated on the erroneous premise that a Part VI investigation is part of, or one and the same

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[13] *Fiorillo v Ontario Securities Commission*, 2016 ONSC 6559

[14] *British Columbia Securities Commission v Branch*, 1995 CanLII 142 (SCC) at para 35

[15] *Sharpe (Re),* 2022 ONSEC 3 at para 81

as, an administrative enforcement proceeding under s. 127 of the *Act*, we decline to follow the rulings in those cases respecting the applicability of s. 9 of the *Evidence Act* when properly invoked by a witness on a compelled examination during a Part VI investigation.

[65] In this case, there was no dispute that Kung and Tam properly invoked s. 9 of the *Evidence Act* on their examinations in respect of those portions of their transcripts that were admissions against interest. As a result, their answers to questions that may tend to criminate them or establish their liability in any civil proceeding or to a prosecution under any Act of the Legislature, cannot be used against them in any proceeding under any Act of the Legislature. Accordingly, we ruled that the admissions could not be tendered against Kung and Tam because:

a. section 9 of the *Evidence Act* applies to this proceeding which is a proceeding under an Act of the Legislature; and

b. section 9(2) of the *Evidence Act* overrides the general grant of discretion in s. 15 of the *SPPA*, through operation of s. 15(2)(b) and arguably also s. 15(3), and prevents us from admitting the evidence.

[66] We do not accept that our conclusion weakens the Commission's enforcement powers. Those powers remain unchanged. Our conclusion simply means that where a respondent has properly invoked the protections of s. 9 of the *Evidence Act* and makes the election not to testify in their defence at a s. 127 proceeding, the Commission may have to present its case in a different way. For example, the Commission may consider summonsing the respondent to testify as part of the Commission's case, an option that the Commission acknowledged is available to it under s. 12 of the *SPPA*.

[67] In light of our ruling, we do not need to consider the second argument that the TSI respondents advanced (without supporting authority), namely that there is a general right against self-incrimination in administrative law which is subsumed within the rules of natural justice.

[68] As to the Commission's request that we admit the proposed read-ins as admissions against interest of TeknoScan, it bears repeating that there was no evidence that either Kung or Tam was examined on behalf of TeknoScan. Accordingly, the protection of s. 9(2) of the *Evidence Act* discussed above would

not extend to TeknoScan in respect the testimony of Kung or Tam. The general exception to the hearsay rule relating to admissions against interests of a party would also not apply.

[69] The Commission did not offer a compelling basis in support of exercising our discretion to admit the excerpts that were admissions against Kung's and Tam's interests as part of the Commission's case against TeknoScan. Similarly, the Commission did not offer a compelling basis in support of exercising our discretion to admit those portions of Kung's and Tam's transcripts, other than admissions against interest, that the Commission wanted to tender for context.

[70] As noted above, the Commission conceded that, if it required evidence from Kung and Tam to prove its case, it was open to it to summons one or both of them to give oral evidence at the hearing. The Commission's argument in response to the transcript motion brought by the TSI respondents (addressed below) that oral testimony of witnesses at a hearing is generally the "best evidence" applies with equal force to this aspect of its motion. Accordingly, we also dismissed:

a. the Commission's request to read in excerpts of the Kung and Tam transcripts that were admissions against interest as part of the Commission's case against TeknoScan; and

b. the Commission's request to read in excerpts of the Kung and Tam transcripts for context.

### 3.4.3 The TSI respondents' transcripts motion

[71] The TSI respondents sought leave to file the complete transcripts of pre-hearing examinations conducted by the Commission of Stephen Richardson and Gary Jefferson (of RGI Group Inc.). Both Richardson and Jefferson (and RGI Group) were, on the evidence before us, involved to some degree in efforts to secure third-party funding for the Share Purchase Transaction, but their precise roles were never clearly explained.

[72] Richardson was examined on a voluntary basis. He declined to be sworn or affirmed for the interview. The Commission disclosed the interview transcript to the respondents in the normal course. Richardson's name appeared on the

Commission's witness list for the hearing until January 10, 2024, at or about which time the TSI respondents learned that the Commission no longer intended to call him as a witness. Richardson's name appeared contingently on the TSI respondents' July 14, 2023, witness list.

[73] Jefferson's examination took place on a compelled basis pursuant to a summons issued by the US Securities and Exchange Commission (**SEC**) at the request of the Commission. Inadvertently, the Commission did not disclose the examination transcript to the respondents until October 27, 2023. Following some correspondence between counsel for the TSI respondents and counsel for the Commission, the TSI respondents notified the Commission that they intended to add Jefferson to their witness list. They asked the Commission to seek the SEC's assistance to compel Jefferson to attend the merits hearing. The Commission made this request, but the SEC responded that it would be inappropriate for it to lend its assistance. In the meantime, the TSI respondents delivered their notice of motion for leave to file as evidence in the merits hearing the examination transcripts of both Richardson and Jefferson.

[74] From the outset, the Commission opposed any steps that might delay the merits hearing. However, the Commission was prepared to help the TSI respondents, if they asked, to apply under s. 152 of the *Act* to the Superior Court of Justice for letters of request, asking the appropriate foreign courts to compel Richardson's and Jefferson's attendance at the hearing.

[75] At the time of the hearing of the motion before us, the TSI respondents had taken no steps to compel Richardson's or Jefferson's attendance to give evidence at the merits hearing. The TSI respondents left open the possibility that they might seek to compel Richardson's and Jefferson's attendance if their motion to have the Richardson and Jefferson transcripts admitted was not successful.

[76] The TSI respondents argued that the Richardson and Jefferson transcripts were presumptively admissible hearsay evidence pursuant to s. 15 of the *SPPA* and, moreover, met the common law test for admissibility of hearsay evidence articulated by the Supreme Court of Canada in *R v Khelawon.*[16] In that case, the

[16] 2006 SCC 57 (***Khelawon***) at para 2

Court held "necessity" and "reliability" to be the governing requirements of admissibility. The TSI respondents further argued that there was no bar to admissibility of the transcripts under Part VI of the *Act* or, in the case of the Jefferson transcript, as a consequence of the evidence having been obtained on compulsion with the assistance of the SEC. Lastly, the TSI respondents argued that the Commission would suffer no prejudice from admission of the transcripts because the Commission had full opportunity to examine Richardson and Jefferson in the examinations it conducted.

[77] The Commission agreed that we had discretion to admit the Richardson and Jefferson transcripts under s. 15 of the *SPPA.* The Commission also agreed that neither Part VI of the *Act* nor the manner in which the transcripts were obtained presented any bar to admissibility. However, the Commission argued that we should not exercise our discretion to admit the transcripts because the TSI respondents had neither adduced any evidence of necessity respecting the transcript of either witness, nor made any effort to secure either witness's oral testimony (the "best evidence") at the hearing.

[78] Moreover, the Commission argued that it would be prejudiced in being unable to cross-examine Richardson or Jefferson if their transcripts were admitted. The Commission argued that, even though it had interviewed both Richardson and Jefferson, it was not bound to accept their transcript evidence as truthful, nor should it be prohibited from challenging their credibility in oral cross-examination.

[79] We cannot accept the TSI respondents' submission, without authority, that the Richardson and Jefferson transcripts were presumptively admissible under s. 15 of the *SPPA*. Section 15 plainly makes the question of admissibility of hearsay evidence one of discretion. In deciding whether to exercise our discretion in this administrative proceeding, we do not conclude that the proffering party must meet the full rigour of the test in *Khelawon* (a criminal case where the presumption was against admission).That said, we are of the view that necessity and reliability are factors that we may take into account in exercising our discretion under s. 15 of the *SPPA*.

[80] The TSI respondents provided no evidence of necessity regarding the admission of the Richardson or Jefferson transcripts, beyond bald assertions that it would be too onerous, too time consuming and too costly to secure their oral evidence at the hearing, whether in person or by videoconference. Indeed, counsel for the TSI respondents' only communications with Richardson and Jefferson relating to their transcripts indicated that their intention was to simply file the transcripts, unless the witnesses preferred "to testify live at the hearing". The TSI respondents did not ask either witness whether they would be willing to voluntarily give evidence at the merits hearing.

[81] We further agreed with the Commission that it is not bound to accept the truthfulness of the transcript evidence of Richarson and Jefferson merely because it interviewed them. The best evidence would be their oral evidence at the hearing, which would allow the Commission to cross-examine the witnesses, and the panel to better assess their credibility.

[82] In view of our findings, we dismissed the TSI respondents' motion to admit the Richardson and Jefferson transcripts. However, we were sympathetic to the fact that the timing of when they received the Jefferson transcript, and when they learned that the Commission was no longer planning to call Richardson as a witness, potentially prejudiced them on the eve of the hearing. Accordingly, our dismissal of the motion was without prejudice to the TSI respondents' ability to seek an adjournment of the merits hearing in order to initiate appropriate proceedings to compel the attendance at the hearing of one or both of Richardson or Jefferson and, depending on the outcome of those efforts, to renew any aspect of their motion to admit the transcripts at the hearing.

[83] No respondent sought an adjournment. We proceeded without evidence from Richardson or Jefferson.

### 3.5 The evidentiary portion of the merits hearing

[84] The evidentiary portion of the merits hearing took place over 19 days and involved testimony from 12 individuals. The Commission called 10 witnesses, including Krzepkowski, five investor witnesses, Davison, Davison's son-in-law, a valuator, and a former consultant to TeknoScan. The TSI respondents called one witness, Joseph, and Hyams called himself as his only witness.

### 3.6 Credibility of witnesses

[85] In assessing the credibility of witnesses, the Tribunal has accepted that "the most satisfactory judicial test of truth lies in its harmony or lack of harmony with the preponderance of probabilities disclosed by the facts and circumstances in the conditions of the particular case".[17]

[86] We may accept some, all or none of a witness' evidence.[18] We may find the evidence of a witness credible in some respects and not in others. Where there are sufficient instances of questionable evidence, we may, with appropriate caution, make an overall assessment of a witness' credibility and reliability.

[87] The TSI respondents urge us to find that 9 out of the 10 witnesses called by the Commission were not credible, for various reasons. They also urge us to discount the evidence of Hyams in certain circumstances.

[88] The Commission submits that little weight should be given to Joseph's testimony where it is self-serving or meant to benefit the TSI respondents, particularly where it was not based on first-hand knowledge but instead on information received from Kung, who did not testify.

[89] Rather than address the credibility of each witness in turn, to the extent that we consider and take into account the various witnesses' evidence in our consideration of the issues and allegations below, we will also address their credibility.

### 3.7 Adverse inference from failure to call witnesses

[90] The TSI respondents have asked us to draw an adverse inference from the Commission's failure to call Richardson and Jefferson (or another representative of RGI Group) as witnesses at the merits hearing, and because the Commission allegedly "blocked" the TSI respondents' ability to have these witnesses' evidence introduced at the hearing by:

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[17] *Feng (Re)*, 2023 ONCMT 12 (***Feng***) at para 22, citing *Springer v Aird & Berlis LLP*, 2009 CanLII 15661 (ONSC) at para 14

[18] *Feng* at para 23

a. inducing the TSI respondents to rely on the Commission's intention to call Richardson as a witness and changing this intention shortly before the hearing;

b. failing to disclose the Jefferson transcript until a few months prior to the merits hearing; and

c. objecting to the TSI respondents' motion to have these witnesses' transcript evidence admitted.

[91] Alternatively, the TSI respondents submit that, even if we are not inclined to draw an adverse inference against the Commission, we should not rely on the absence of evidence from Richardson and Jefferson (or RGI Group) to find that the Share Purchase Transaction was a sham.

[92] The TSI respondents submit that Richardson and RGI Group played key roles in advancing the Share Purchase Transaction. They say that their evidence, relating to efforts to arrange funding for the Share Purchase Transaction, would be directly relevant to a central issue in this case, namely whether the Transaction was "real" and not a sham. They further submit that although Richardson and Jefferson are not under the control of the Commission or the TSI respondents, the Commission is the only party authorized to seek an order from the Ontario Superior Court of Justice under s. 152 of the *Act* seeking the assistance of foreign courts to compel these witnesses to testify at the hearing.

[93] We decline to draw an adverse inference against the Commission in these circumstances. We reject the TSI respondents' submission that the Commission has in any way "blocked" the TSI respondents' ability to have these witnesses' evidence introduced at the hearing. A party has no obligation to call all the witnesses who appear on its witness list. The Commission was entitled to oppose the TSI respondents' motion to have these witnesses' transcript evidence admitted. The Commission also offered to assist the TSI respondents in bringing a s. 152 application to the Court.

[94] Ultimately, as we note above, the TSI respondents elected to proceed with the hearing without the evidence of these witnesses.

## 4. ANALYSIS

### 4.1 Introduction

[95] We now turn to our analysis of the substantive allegations in this matter, which center around the Share Purchase Transaction and how it was disclosed and represented to TeknoScan shareholders in the Notice.

[96] The following questions are before us:

a. Did the respondents contravene s. 126.1(1)(b) of the *Act* by engaging or participating in acts, practices, or courses of conduct relating to securities that they knew or reasonably ought to have known perpetrated a fraud on persons or companies?

b. Did the respondents contravene s. 126.2 of the *Act* by making statements that were misleading or untrue in light of the circumstances in which they were made and that would reasonably be expected to have a significant effect on the market price or value of a security?

c. Did the Individual respondents, as officers and directors of TeknoScan, breach s. 129.2 of the *Act* by authorizing, permitted or acquiescing in TeknoScan's contraventions of the *Act*?

d. Is a defence of reasonable reliance on legal advice available to the respondents in the circumstances?

e. Did Hyams and Kung breach s. 122(1)(a) of the *Act* by making false and misleading statements to the Commission? and

f. Did the respondents engage in activity that is contrary to the public interest?

### 4.2 Fraud allegations

#### 4.2.1 Introduction

[97] The Commission alleges that the respondents committed securities-related fraud contrary to s. 126.1(1)(b) of the *Act* by presenting shareholders with a sham transaction with no reasonable expectation of completion, thereby enticing them to convert their preferred shares to common shares and causing them to forfeit their rights as preferred shareholders.

### 4.2.2 The elements to establish securities-related fraud

[98] Clause 126.1(1)(b) of the *Act* provides, in part:

> A person or company shall not, directly or indirectly, engage or participate in any act, practice or course of conduct relating to securities…that the person or company knows or reasonably ought to know,
>
> …
>
> (b) perpetrates a fraud on any person or company.

[99] While the Commission alleges that each of the respondents breached s. 126.1(1)(b) of the *Act*, its submissions focussed primarily on establishing that each of the respondents *directly* perpetrated a fraud on TeknoScan preferred shareholders.

[100] The term "fraud" is not defined in the *Act*. Previous Tribunal decisions have repeatedly adopted and applied the framework set out in the Supreme Court of Canada's decision in *R v Théroux*[19] to determine whether a fraud has been perpetrated under s. 126.1(1)(b) of the *Act*. The framework includes the following elements:

a. the *actus reus*, or objective element, which consists of:
    i. an act of deceit, falsehood, or some other fraudulent means; and
    ii. deprivation caused by that act; and
b. the *mens rea*, or subjective element, which consists of:
    i. subjective knowledge of the act referred to above; and
    ii. subjective knowledge that the act could have as a consequence the deprivation of another.

[101] The parties agree that *Théroux* applies in this case. The parties' submissions focus primarily on the first element of the *Théroux* framework and whether the Commission has established that there was an act of deceit, falsehood or some other fraudulent means.

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[19] 1993 CanLII 134 (SCC) (***Théroux***)

### 4.2.3 *Actus reus* – acts of deceit, falsehood or other fraudulent means

[102] An act of deceit or falsehood is established by showing that a person represented a situation as being of a certain character when, in reality, it was not.[20] This includes situations where a person deliberately lies through misrepresentations.[21] Fraud by "other fraudulent means" includes acts that a reasonable person would consider to be dishonest.[22] Omission or non-disclosure of important or material facts can fall under the category of "other fraudulent means".[23]

[103] The Commission submits that the facts here satisfy both the "act of deceit or falsehood" and the "other fraudulent means" branches of the test. We note that the Commission need only satisfy one of these branches.

[104] Although the parties agree on the applicable law, they disagree in significant respects about what the Commission must actually establish in this case in order to satisfy this element of the framework. We address their differing positions below.

#### 4.2.3.a What is required to establish an act of deceit, falsehood or other fraudulent means?

[105] The Commission alleges that the respondents' representation in the Notice that Davison and Double Helix would purchase up to 50% of the TeknoScan common shares at US $20 per share was objectively misleading and dishonest because it omitted fundamental and essential facts relating to the funding, nature, and merits of the Share Purchase Transaction. The Commission submits that, as a result, the respondents represented the Share Purchase Transaction to be legitimate and unproblematic, when, in truth, it was a sham transaction conjured by them with no reasonable expectation of completion.

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[20] *Meharchand (Re)*, 2018 ONSEC 51 (***Meharchand***) at para 120

[21] *Bradon Technologies Ltd (Re)*, 2015 ONSEC 26 (***Bradon Technologies***) at para 157, citing *Théroux* at 26-27

[22] *Solar Income Fund (Re)*, 2022 ONSEC 2 (***Solar Income Fund***) at para 85, aff'd by Div Ct, *Kadonoff v OSC,* 2023 ONSC 6027; *Meharchand* at para 120; *Quadrexx Hedge Capital Management (Re)*, 2017 ONSEC 3 (***Quadrexx***) at para 20, aff'd by Div Ct, 2020 ONSC 4392 (***Quadrexx Div Ct***)

[23] *Money Gate Mortgage Investment Corporation (Re)*, 2019 ONSEC 40 at para 223, citing *Théroux* at 16; *Meharchand* at para 120; *Quadrexx* at para 20*; Bradon Technologies* at para 159

[106] The Commission further submits that the only knowledge requirement that must be satisfied at this stage of the framework is that the respondents must have had knowledge of the fundamental and essential facts that allegedly were omitted from the Notice. There is no need to establish that they subjectively knew the omission of such facts to be dishonest. All that is required is that a reasonable person (or reasonable investor) would consider the omissions to be dishonest.[24]

[107] Initially the TSI respondents submitted that this branch of the framework can only be satisfied if the Commission proves the theory of its case on a balance of probabilities — namely, that the Share Purchase Transaction was a "sham", in the sense that it was conjured by the respondents, "contrived", "false" and not a "real" transaction, and the respondents knew this to be the case. We reject this submission.

[108] Although the Statement of Allegations (issued on August 23, 2022, and amended on March 28, 2023) does assert that the Share Purchase Transaction was a "sham" transaction, it does not equate that to a "false", as opposed to "real", transaction, as the TSI respondents suggest. Instead, the Statement of Allegations ties that assertion to the concept of a transaction "with no reasonable expectation of completion" and makes clear that the focus of the Commission's allegations is on misleading investors about the Share Purchase Transaction and the failure to disclose numerous key facts, including that the purchaser had no funding.

[109] The Statement of Allegations makes clear, in our view, that the essence of the Commission's fraud allegation is that the representation to shareholders in the Notice that Davison and Double Helix intended to purchase up to 50% of TeknoScan common shares at US $20 per share was misleading, deceitful and dishonest in the circumstances as it conveyed an expectation about certainty of completion of the Share Purchase Transaction that was inconsistent with the known facts.

[24] *Théroux* at 16-17; *Solar Income Fund* at para 122

[110] Subsequently, the TSI respondents acknowledged that something less than establishing that the Share Purchase Transaction was a "sham" could satisfy the Commission's burden. However, they submit that, at the very least, the Commission is required to establish that the respondents knew at the time of the Notice that funding for the Share Purchase Transaction was not coming or, in other words, that the respondents knew the Transaction would not close. We also reject this submission. This is not what the Commission alleged.

[111] Instead, we accept the Commission's submission that for this element of the analysis its burden is to establish that:

a. the respondents had knowledge of fundamental and essential facts that were omitted from the Notice; and

b. a reasonable person would consider the omission of such fundamental and essential facts to be dishonest.

[112] We turn next to consider whether acts of deceit, falsehood or other fraudulent means are established in this case. This consideration requires us to address the wide-ranging evidence about the Share Purchase Transaction.

[113] For the reasons below, we conclude that the respondents had knowledge of fundamental and essential facts that were omitted from the Notice and that the omission of such facts from the Notice was objectively dishonest.

#### 4.2.3.b Alleged omissions (and misrepresentation) in the Notice

[114] The Commission alleges that the following omitted facts (and in one case an alleged related misrepresentation) in the Notice made the communication an "act of deceit" or "other fraudulent means":

a. Davison and Double Helix could not afford the Share Purchase Transaction and did not have the funds to complete it, and the Notice, including the attached Share Purchase Agreement, misrepresented that they did;

b. the third-party funding for the Transaction was implausible, nonsensical, vague and uncertain;

c. there were repeated delays in the third-party funding;

d. any such third-party funding, had it ever materialized, would have been miniscule and fallen far short of the approximately US $2 billion of funding that would be required to purchase "up to approximately 50%" of the shares;

e. the Transaction was not vetted, and the respondents did not conduct adequate due diligence into Davison/Double Helix (the buyer) or the third-party funder;

f. the Transaction was not a negotiated arm's length transaction;

g. the TeknoScan shares were not worth nearly as much as the US $20 per share that Double Helix was supposed to pay for the shares; and

h. the respondents themselves did not believe the Transaction would occur.

[115] We consider these alleged omissions and related misrepresentation below.

#### 4.2.3.c Alleged omissions relating to funding for the Share Purchase Transaction

[116] Because the first four omissions alleged by the Commission relate to funding for the Share Purchase Transaction, we consider these allegations and the evidence about the funding for the Share Purchase Transaction together.

#### 4.2.3.c.i Davison and Double Helix did not have the funds to complete the Share Purchase Transaction

[117] The Commission established that Davison had extremely limited financial means and he and his company, Double Helix, did not have the funds required to complete the Share Purchase Transaction. The Commission also established that the respondents knew this and understood that the Transaction would only proceed if Davison was successful in obtaining third-party funding.

[118] Indeed, the October 22, 2016, Letter of Intent entered into by TeknoScan and Davison regarding the Share Purchase Transaction (**Letter of Intent**) was expressly conditional upon the receipt by Davison of third-party funds. It provided that Davison (or an affiliate corporation to be incorporated for the purposes of the Transaction) was prepared to purchase up to 50% of the capital stock of TeknoScan on a fully diluted basis at a purchase price of US $20 per

share through multiple tranches "as soon as funds are available from financing activities facilitated by [Richardson] or his company, associates and relationships" (emphasis added) with the Purchase Price "payable conditional on the financing as stated above" (emphasis added).[25]

[119] In contrast to these facts known to the respondents, the Notice did not advise shareholders that the Share Purchase Transaction was expressly contingent on Davison and Double Helix receiving the funds from a third-party funder. As we find below, this third-party funding was known by the respondents to be uncertain.

[120] We note that we do not accept the Commission's related submission that the boilerplate representation in the Share Purchase Agreement that Double Helix had the capacity to perform its obligations under that Agreement was a representation (or misrepresentation) that Double Helix had the financial capacity to purchase the shares. The plain language of the representation does not support the Commission's submission and, in our experience, such standard capacity representations do not extend to financial capacity, and instead relate to legal capacity.

#### 4.2.3.c.ii The nature and source of the third-party funding

[121] The third-party funding for the Share Purchase Transaction never materialized. The evidence left unanswered questions about the precise nature and source of the funding.

[122] Kung was TeknoScan's primary contact with Davison and Richardson in connection with the third-party funding. Both Joseph and Hyams testified that their information about the third-party funding was not first-hand and instead came from Kung.

[123] Davison introduced Richardson to TeknoScan in 2010 as his advisor and as someone familiar with banking and financing who might be able to help the company raise funds. According to Hyams (and confirmed in Joseph's testimony) Richardson also introduced TeknoScan to the concept of "high leveraged trading

[25] Exhibit A, Letter of Intent titled "Purchase of Shares in the capital stock of TeknoScan Systems Inc. (the "Corporation")" at 1

programs" that could raise significant returns in the order of 50 to 100 percent per week, if provided with an asset to leverage. Hyams did not specify what kind of asset.

[124] Kung and Richardson communicated by email (copied to Davison) on June 20-21, 2016 (**June 2016 email**) about an application for financing by Davison. Richardson explained that the financing application would require Davison to show that he could produce funds equalling 0.8% of the total funding applied for. Kung confirmed in reply that he had met with an "investor" who was prepared to lend 500,000 euros "with [Kung's] backing" to Davison, on the condition that Davison can use at least US $50 million in proceeds on this first tranche of financing and buy shares of TeknoScan at US $20 per share.

[125] The TSI respondents submit, and we find, that the "investor" Kung referred to in the June 2016 email was N.B., a TeknoScan investor and long-time friend of Kung. Kung had previously been N.B.'s financial advisor. The Commission called N.B. as a witness.

[126] N.B. testified that:

a. Kung asked him to loan 500,000 euros to Davison that would be provided to RGI Group, a middleman entity in Texas. RGI Group would work to facilitate having a foreign "sovereign fund" provide funding to Davison to allow Davison to buy TeknoScan shares at US $20 per share;

b. Kung explained to him that the sovereign fund liked to fund humanitarian ventures and could not invest directly in TeknoScan. However, because of Davison's humanitarian interests it was content to fund Davison and, in turn, have Davison buy TeknoScan shares with the funds it would advance;

c. after meeting with Davison, he told Kung that the funding arrangement sounded implausible, and he did not believe the transaction was going to happen because he did not understand why anyone would give Davison money;

d. he told Kung he was willing to advance the requested funds but that, if the funding arrangement that Kung described to N.B. as "an experiment"

did not result in the purchase of TeknoScan shares at US $20 per share within six months to a year, he wanted to receive half of his money back; and

e. Kung agreed to guarantee and pay back half of the 500,000 euros advanced by N.B. if the funding did not arrive.

[127] N.B. agreed to Kung's proposal. Kung provided wire transfer instructions to N.B. and on July 18, 2016, N.B. wired the US dollar equivalent of 500,000 euros to RGI Group's account in Texas. Kung also provided to N.B. a debenture in favour of N.B. for the same amount (**Debenture**) issued by a company which N.B. understood to be Davison's company.

[128] Joseph testified that he was told by Kung in 2016 that N.B. advanced 500,000 euros to RGI Group as part of "the experiment". Joseph also testified that Kung told the TeknoScan Board in 2016 that Kung had agreed to guarantee half of the funds that were advanced by N.B. Hyams confirmed that he was aware of the Debenture in 2016 and that Kung arranged the loan to Davison from N.B. Hyams also understood the basic facts and purpose behind the advance of 500,000 euros. Text messages between N.B. and Kung as well as the June 2016 email confirm Kung's agreement to guarantee repayment of half of the amount advanced by N.B. to Davison that was forwarded to RGI Group.

[129] The TSI respondents submit that N.B.'s evidence was self-serving and not credible in key instances. They submit that it is not credible that N.B. was prepared to lose 250,000 euros, despite doubts about the use and function of the funds, simply because a friend (Kung) asked him to do something and that he must have believed money would be coming to Davison.

[130] We do not find N.B.'s evidence to be self-serving or not credible. He explained to our satisfaction that despite his doubts, he advanced the money because he trusted Kung. Taking N.B.'s testimony as a whole, it was evident that he was hopeful that the third-party funding would materialize and the Share Purchase Transaction would proceed. His projected gains from a successful Share Purchase Transaction would significantly exceed the money he thought he could potentially lose. Also, as a "sweetener" for making the loan, Kung arranged for TeknoScan

to sell N.B. an additional block of TeknoScan shares (for US $3 million) at a better per share price than was available to other investors at the time.

[131] Hyams' understanding of the third-party funding for the Share Purchase Transaction was not particularly detailed. In contrast to N.B. whose evidence was that he understood the source of funding to be a foreign "sovereign fund", Hyams' evidence was that he understood the third-party funding involved "high-leveraged trading programs" that could produce returns of up to 100 percent per week. He understood RGI Group to be a link in the chain to the traders who ran these programs. He said that Kung and Tam mentioned many times that the traders were part of a secret society and only a few senior officers in banking knew who the traders were. In cross-examination, Joseph corroborated Hyams' claims and confirmed that Kung had explained on many occasions that the funding involved an "investment program" that would provide a 50 to 100 percent return per week.

[132] No witness and no party to the proceedings provided any more detailed evidence or clarifying explanation about how the third-party funding was supposed to work.

#### 4.2.3.c.iii The funding was uncertain and this was known to the respondents

[133] The Commission submits that the third-party funding was "implausible and nonsensical" and also "vague and uncertain", and that this should have been disclosed to shareholders. The Commission submits that no witness could offer any credible explanation for why N.B. needed to send funds to a third-party in order for Davison to receive funds for the Share Purchase Transaction, and no one at TeknoScan knew the identity of the third-party funder.

[134] The TSI respondents submit that information about the source of the funding would have been available from RGI Group (Jefferson) or Richardson, but the Commission chose not to call them as witnesses. The TSI respondents further submit that there are any number of reasons why a party would provide funding to Davison to finance an investment in TeknoScan.

[135] For the reasons set out below we do not find that the Commission established that the respondents knew and believed that the third-party funding was "implausible and nonsensical" at the time of the Notice. However, we do find that

the respondents knew that the third-party funding was "uncertain" at the time of the Notice.

[136] Neither Kung nor Tam testified, so we do not have their direct evidence about what they knew or believed about the third-party funding.

[137] N.B.'s evidence was that Kung was adamant about his belief in the third-party funding, but that he also characterized it as "an experiment". The fact that Kung conceived of the third-party funding as an "experiment" was corroborated in multiple ways, including in Kung's contemporaneous text messages to N.B. and by Joseph's testimony.

[138] Hyams testified that he thought RGI Group was legitimate. He testified that he and the other TeknoScan Board members all believed in RGI Group's "reasonability of success" in securing funding for the Share Purchase Transaction.

[139] Hyams did have some doubts "because it all sounded too good to be true". However, he relied on Kung and Joseph and, because the financing "looked real", there was no associated financial risk to TeknoScan and there was a "chance" to get some significant financing for the company, he thought it was worth pursuing the Share Purchase Transaction. Indeed, we note that Hyams converted the preferred shares he owned with his spouse in order to participate in the Share Purchase Transaction.

[140] When cross-examined by Hyams about whether he had any concerns about repeated delays in the funding and whether the funding would happen, Joseph testified that whenever Kung gave an update about the funding, Hyams would comment: "God willing, it'll all happen". Hyams did not challenge this evidence from Joseph.

[141] Both Hyams and Joseph confirmed that the source of the funding, as well as the timing of receipt of the funding, was not known.

[142] It was also established that TeknoScan engaged in significant work in preparation for the funding, including preparing spreadsheets, calculating how the funds would be distributed and retaining counsel to handle the receipt of the

funds and the distribution of funds to shareholders who wanted to participate in the Share Purchase Transaction.

[143] Based on the foregoing, we conclude that both Kung and Hyams believed in the funding but recognized that whether it would actually materialize was uncertain. Given Hyams' evidence about the TeknoScan Board believing in the "reasonability of success" of RGI Group securing funding and the evidence that Kung informed the entire Board about the funding, we conclude the same to be true for Tam. Further, we conclude there was nothing in the Notice that indicated or suggested that the funding was uncertain.

#### 4.2.3.c.iv Repeated and undisclosed delays with the third-party funding

[144] The Commission established that the receipt of the third-party funding was repeatedly delayed prior to December 14, 2016, when the Notice was sent to shareholders. Hyams testified that he was concerned about these repeated delays.

[145] The Notice said nothing about the prior delays in receipt of funding. The Update Email simply advised that the "investor anticipates that the first tranche of funding for acquisition of shares from the shareholders of the Company will be available by the last week of December." The Commission, citing *Wong (Re),*[26] alleges that the respondents' failure to disclose these repeated delays was an omission that amounted to "other fraudulent means".

[146] The TSI respondents submit that the delays in funding in this case, unlike in *Wong*, were not indicative of further delays and were not material because TeknoScan did not provide any projected timeframe to shareholders for the closing of the Share Purchase Transaction.

[147] We agree with the TSI respondents that, unlike in *Wong*, the delays here did not affect the timing of when investors would see a return. However, we do view the repeated delays as indicative of and materially relevant to the matter of the uncertainty of the funding itself. The repeated delays concerned Hyams, and at

[26] 2016 BCSECCOM 208 (***Wong***) at paras 366-372

the very least served to highlight the uncertainty around the funding materializing.

#### 4.2.3.c.v Amount of third-party funding

[148] The Commission submits that, even if the third-party funding had materialized, the amount (US $50 million to US $63 million) was miniscule and would only have been sufficient to purchase about 1.5% of the TeknoScan common shares on a fully diluted basis (assuming that all preferred shares were converted to common shares) at the US $20 per share purchase price under the Share Purchase Transaction.

[149] The Commission alleges that because the expected amount of the funding fell far short of the US $2 billion that would have been required to purchase the "up to approximately 50%" of shares indicated in the Notice, the omission of this information amounted to the omission of fundamental and essential facts that were objectively dishonest and misleading.

[150] The Commission relies on Hyams' testimony and what it characterizes as an admission in Hyams' cross-examination. It also relies on a drafting comment from Joseph.

[151] The TSI respondents submit that the Commission's allegation is inconsistent with the facts. According to the TSI respondents, the US $50 million to US $63 million amount was only the expected first tranche of funding and it was always understood that additional funds would come on a rolling basis. Hyams agrees with this.

[152] We find that the Commission's position fails to take into account unchallenged evidence adduced by the respondents about additional funding beyond the initial US $50 million to US $63 million tranche, as outlined below:

a. Hyams testified that he understood that the initial expected US $50 million (out of the US $63 million) tranche of funding to purchase shares from shareholders was to be the first of several subsequent tranches that would follow to complete the Share Purchase Transaction;

b. Joseph testified that US $50 million was the "total first tranche" and it was expected that further funds would come in tranches until up to 50 percent of the shares of TeknoScan were acquired;

c. a contemporaneous excel spreadsheet prepared internally at TeknoScan to calculate the amount of funds to be distributed to shareholders participating in the Share Purchase Transaction corroborates Hyams' and Joseph's evidence. The spreadsheet describes the US $50 million as the "Total 1st Tranche"; and

d. in the June 2016 email, Kung refers to Davison having funds left over from the first tranche of funding that would be used to "do another few of these" and obtain additional tranches of funding.

[153] We accept Hyams' and Joseph's evidence that at the time of the Notice there was some expectation that additional tranches of funding would be received after the initial tranche. We do not find that the respondents knew that the maximum amount of potential funding was limited to US $50 million to US $63 million. However, we also conclude that the details of any additional funding beyond the initial tranche were not established, and the expectations were not specific. This adds to our overall finding that at the time of the Notice, the respondents understood that the funding for the Transaction was uncertain.

#### 4.2.3.d Omissions relating to lack of vetting and inadequate due diligence

[154] The Commission alleges that the respondents failed to disclose that the Share Purchase Transaction was not vetted, and there was inadequate due diligence about the buyer, the third-party funder and the funding mechanisms.

[155] The Commission submits that this omission gave shareholders the false impression that TeknoScan considered the buyer and the third-party funder to be credible.

[156] The Commission was not able to point to any positive obligation, either under securities law or more generally, on a party to a transaction in TeknoScan's position to vet the transaction or perform due diligence.

[157] The Notice is completely silent about vetting and due diligence, and as we find that there is nothing in the Notice that suggests or implies that vetting or due

diligence was undertaken, we conclude that the omission of disclosure on the subject does not render the Notice objectively misleading or dishonest. Accordingly, we make no finding about whether the Share Purchase Transaction was vetted by TeknoScan and whether TeknoScan, or Richardson on TeknoScan's behalf, conducted adequate (or any) due diligence.

#### 4.2.3.e Non-arm's length transaction

[158] The Commission submits that the respondents "concocted" the Share Purchase Transaction and got Davison to participate as a "dupe", and thus it was not an arm's length transaction. The Commission submits that it established the following, all of which are hallmarks of a non-arm's length transaction:

a. Davison was unsophisticated and lacked funds;

b. Kung arranged for N.B. to lend funds to Davison in order to arrange the third-party funding for the Transaction;

c. TeknoScan created and set the terms for the Share Purchase Transaction, including the per share purchase price, with no negotiation;

d. Davison did not understand the Share Purchase Transaction;

e. TeknoScan and its outside counsel drafted the Transaction documents for Davison to sign, and there is no evidence that Davison provided any comments or substantive edits to these documents;

f. Davison did not have a lawyer or any professional advising him on the Transaction;

g. TeknoScan incorporated Double Helix for Davison;

h. there is no evidence that Davison conducted any due diligence on TeknoScan, or ever knew anything about TeknoScan's finances or share structure;

i. the Transaction would not benefit Davison; and

j. Davison's only involvement was to sign the transaction documents that he was provided by TeknoScan.

[159] The Commission submits that omitting to advise shareholders that the Share Purchase Transaction was non-arm's length conveyed the false impression that

there was a motivated and self-interested buyer on the other side when, in reality, there was not.

[160] The TSI respondents dispute that they "concocted" the Share Purchase Transaction. They submit that Davison and Richardson independently pursued funding from RGI Group, before they presented the Share Purchase Transaction to TeknoScan. Hyams submits that because he was not personally part of any meetings or conversations related to the Share Purchase Transaction and does not have any first-hand knowledge, he can neither agree nor disagree with the assertion that "TeknoScan was playing both sides of the table".

[161] Below we consider the points on which the Commission relies as allegedly establishing that the Share Purchase Transaction was non-arm's length. We conclude that the Transaction was a non-arm's length transaction and that Kung, who dealt directly with Davison and facilitated the funding for the Transaction, knew this. Although we do not conclude that Hyams and Tam knew that the Share Purchase Transaction was non-arm's length, we do find that they were aware of Kung's involvement in arranging and facilitating the third-party funding and that the third-party funding was therefore contrived and unconventional.

*a.* ***Davison was a highly unlikely counterparty and lacked funds***

[162] We have already concluded that the respondents were aware that neither Davison nor Double Helix had the funds required for the Share Purchase Transaction.

[163] We do not consider that establishing that Davison was unsophisticated is a necessary precondition to establishing that the Share Purchase Transaction was a non-arm's length transaction. A non-arm's length transaction can certainly exist in circumstances where both parties are sophisticated. Although we decline to draw any specific conclusions about Davison's level of sophistication at the time of the Share Purchase Transaction, as we think that is unnecessary, we do conclude that Davison's circumstances made him a highly unlikely counterparty to a US $2 billion transaction and not a person who readily fits the description "Canadian Strategic Investor" that was used to refer to him in the Update Email. In reaching this conclusion, we highlight the following evidence:

a. Davison has no post-secondary education. He does not have a background in law or banking and the little securities knowledge that he has came from casual conversations;

b. Davison was 78 when he testified at the merits hearing, placing him at approximately 70 years old in 2016;

c. Davison described himself as a "visionary" and explained that he has designed what he calls a micro-sustainable community. He said his design is still sitting in his files and he has not actually built any sustainable communities;

d. Davison's son-in-law, John Dingwall, is a retired police officer. He finished his policing career in the Professional Standards Unit of Durham Regional Police. Since then, he has been an investigator for the Law Society of Ontario. Since 1998 Dingwall has only known Davison to have one job — as a part-time appliance salesman for a brief period in 2007;

e. Davison did not own any real property. Between 2009 and 2019 Davison lived in Dingwall's cottage. Davison lived on an old age pension and Dingwall covered Davison's expenses for housing, utilities, and car insurance, gave him a vehicle to use and brought him groceries;

f. Dingwall stated that Davison lived in a "fantasy world". Davison's business ideas were wide-ranging but never materialized. They included "grand plans" to install windmills and cell phone towers across North America, establish self-sustaining communities, buy the Peterborough Airport and turn it into his global headquarters, build an international airport in Northern Ontario, and buy a rail line. According to Dingwall, Davison's most consistent theme was building self-sustaining and green communities and "feeding the babies";

g. Dingwall considered Davison to be unsophisticated and vulnerable. Dingwall had sincere concerns for Davison based on his alleged involvement with "Luxor Bonds" as well as funding from trading programs. Dingwall testified that Davison told him that he had been handpicked to receive $440 million in bonds and he had to get an insurance policy to assist him in monetizing them. For years Dingwall heard a myriad of

excuses as to why the bonds could not be monetized. Around 2016 Davison told Dingwall that the people he was dealing with had decided to give him a different financial instrument to replace the bonds. The financial instrument would be put into a series of trades, starting with an initial tranche of $100 million that would repeatedly multiply itself; and

h. Hyams testified that when he first met Davison in 2009, he found him to be unsophisticated.

[164] The TSI respondents submit that Dingwall's evidence should be largely disregarded as it served to discredit Davison's evidence by providing evidence of his bad character. They also submit that Dingwall displayed a clear animus against Davison in his testimony.

[165] We found Dingwall to be a very credible witness. He was careful, factual and tactful in giving his evidence. Contrary to the TSI respondents' submissions, he did not provide evidence of Davison's bad character. Instead, he simply reported what Davison told him and his wife at various points in time about Davison's business plans and interests and what he knew about other related matters. Contrary to the TSI respondents' submissions, we find that Dingwall did not display any animus towards Davison or leave us with any reason to not accept his evidence. We are satisfied that Dingwall had no reason to mislead or lie in his testimony.

### *b.* ***The origins of the Share Purchase Transaction and related third-party funding and Kung's involvement***

[166] The evidence about the origins of the Share Purchase Transaction is not entirely clear.

[167] The TSI respondents submit that the Share Purchase Transaction arose out of the ongoing collaboration between Davison and Richardson, who presented it to TeknoScan in mid-2016. They submit that the evidence establishes that Davison and Richardson independently pursued funding for the Share Purchase Transaction before presenting the opportunity to TeknoScan.

[168] The Commission submits that TeknoScan concocted the Share Purchase Transaction and took advantage of Davison by having him participate in it.

[169] No witness provided any clear or convincing evidence that confirmed or explained the precise origins of the Share Purchase Transaction. This includes Davison and Joseph, who respectively did not remember or know how the Transaction arose.

[170] Davison did not testify about his motivation for participating in the Share Purchase Transaction, other than in generalities such as: "I knew that TeknoScan was trying to progress. I also was trying to do the same thing for my micro-communities and it seemed like, you know, a team of horses side by side and maybe we could do something there",[27] and "I liked these people. I trusted these people. And like anything else, entrepreneurs, what they do, they get together and try and benefit one another, that's all it was…It's just I help people"[28].

[171] The TSI respondents point to the June 2016 email as purported evidence that Davison and Richardson, with RGI Group, pursued funding for the Share Purchase Transaction independently of TeknoScan. No witness with any direct knowledge of this email chain testified about its meaning.

[172] We do not read the June 2016 email as unambiguously confirming that the funding for the Share Purchase Transaction originated independently from Davison and Richardson, as the TSI respondents assert. We read the June 2016 email as continued communications with Kung about efforts by Richardson, with the assistance of Davison, to raise funds for TeknoScan. In particular, we note that Richardson writes to Kung and refers to money that "has been already approved for TeknoScan" as well as additional funding to inject into TeknoScan, all of which will involve Davison arranging to use a corporation "because this has been requested rather than an individual name".

[173] In the same email Richardson requests compensation for his efforts in connection with "project funding" as well as "reasonable expenses, for Dan [Davison] and myself, for activities to date and ongoing to completion requirements". Notably, Richardson's email goes on to suggest to Kung that $10,000 be paid to each of Richardson and Davison "for services rendered",

[27] Hearing Transcript, February 22, 2024 at p 27 lines 25-28
[28] Hearing Transcript, February 22, 2024 at p 65 lines 20-25

including for Davison to "accomplish his duties and set up", with such amount to be reviewed later if needed or if unanticipated expenses were required.

[174] No witness addressed the meaning of these portions of the June 2016 email or explained why Richardson was suggesting that TeknoScan should be paying Davison for expenses and services. No evidence was adduced that indicated that Davison received any payment from TeknoScan in connection with the Share Purchase Transaction and the Commission made no such allegation.

[175] However, we view the June 2016 email exchange as establishing, on a balance of probabilities, that Davison was engaged in efforts to assist TeknoScan in obtaining access to funding through RGI Group and these efforts were connected with the Share Purchase Transaction.

[176] We have previously found that Kung enlisted N.B. to lend to Davison the 500,000 euros that had to be advanced to RGI Group in order to obtain the expected third-party funding for the Share Purchase Transaction. We also previously found that N.B. required, as a condition to loaning the funds to Davison, that Kung personally guarantee repayment of 250,000 euros of the loan. All the respondents were aware of this. We conclude that Kung's direct and essential involvement in arranging the third-party funding for the Share Purchase Transaction, as well as another TeknoScan investor's (N.B.) involvement in arrangements to obtain funding for the Transaction, is consistent with the Transaction being non-arm's length.

[177] Although Kung's involvement in arranging the third-party funding is not itself conclusive of the Share Purchase Transaction being non-arm's length, we find that it demonstrates that the third-party funding was contrived and unconventional.

### *c.* ***Creation of the terms for the Share Purchase Transaction***

[178] The Commission submits that TeknoScan set the terms of the Share Purchase Transaction, including the per share purchase price and the terms of the transaction documents, without input from Davison. The Commission also submits that Davison did not receive advice regarding the Transaction, did not conduct any due diligence, and knew nothing about TeknoScan's finances and share structure.

[179] The Commission established that TeknoScan prepared three agreements related to the Share Purchase Transaction and third-party funding, namely, the Debenture, the Letter of Intent and the Share Purchase Agreement, and that Davison executed each of these without any substantive changes.

[180] Joseph testified that the US $20 per share price arose in discussions between Kung and Davison, and that Davison had his own set of advisors and they agreed on that price. We do not place much, if any, weight on this testimony, given that Joseph had no relevant direct knowledge and contemporary documentary evidence confirms that Joseph was aware that Davison had no legal representation. Hyams also testified that he understood from Kung that the terms and conditions of the Share Purchase Transaction were not imposed by TeknoScan, but instead resulted from discussions and negotiations. Hyams did not suggest that he had any direct knowledge of this, and indeed his evidence was that these matters were left to Kung and Tam, and thus we place little weight on his testimony.

[181] The Commission established that Davison did not have a lawyer or anyone assisting him with the Share Purchase Transaction. When asked whether it was his idea to purchase TeknoScan shares at US $20 per share, Davison stated that it was not. Davison did not know who he would be buying shares from. Davison did not recall ever seeing TeknoScan financial statements and saw no reason for them to have been given to him as he was just "friends" with the principals of the company. Davison did not complete any valuation of TeknoScan or any due diligence and was generally unaware of the company's capital structure.

[182] Based on the foregoing, we find that the Commission established on a balance of probabilities that TeknoScan set the price and terms for the Share Purchase Transaction with little or no input from Davison. This, along with Davison's lack of understanding and due diligence, is quite simply inconsistent with what would be expected of a self-interested arm's length purchaser entering into a US $2 billion transaction.

[183] These findings, considered along with our findings that:

a. Davison's circumstances made him a highly unlikely counterparty to such a transaction;

b. Davison was engaged in efforts to assist TeknoScan in obtaining access to funding through RGI Group and the Share Purchase Transaction was connected to these efforts; and

c. Kung had a direct and essential involvement in arranging the third-party funding;

support our overall conclusion that the Share Purchase Transaction was not an arm's length transaction.

#### 4.2.3.f Value of TeknoScan shares

[184] The Commission alleges that the respondents knew that the per share purchase price under the Share Purchase Transaction grossly overstated the value of TeknoScan and was not defensible, and this should have been disclosed to shareholders. The Commission bases this allegation on a valuation that TeknoScan obtained in 2016 from a certified valuator, Raghu Ram of Sageview Valuations & CFO Advisory Services (**Valuation**). The Valuation concluded that as of April 30, 2016, the estimated fair market value of TeknoScan's common shares was between $0.54 and $1.44.

[185] The TSI respondents submit that the Valuation was not an indicator of the fair market value of the company for a proposed share acquisition transaction, and there is evidence to support TeknoScan's valuation of the company at US $4 billion, consistent with the per share purchase price under the Share Purchase Transaction. Hyams also submits that the Valuation did not properly value TeknoScan's technology.

[186] Hyams and Joseph testified that in 2016 TeknoScan had a self-assessed market value of US $4 billion and also testified to it being reasonable in their view. Joseph explained that the valuation was based on anticipated sales of $400 million (including a signed contract for $150 million over 10 years) to which a conservative 10 times multiplier was applied. Hyams explained that the value was arrived at by considering a spreadsheet of opportunities and potential revenues.

[187] The evidence established, and we find, that the Valuation was obtained by TeknoScan for the purpose of facilitating s. 85(1) rollovers for the TeknoScan

directors under the *Income Tax Act*[29] and was not to determine the fair market value of the company for a proposed share acquisition transaction.

[188] Ram readily acknowledged that the Valuation had a very limited scope, and because it was for rollover purposes it did not require an extensive assessment of the potential value of the enterprise. The Valuation was based on discounted projected financial results, and he did not undertake an extensive assessment of the potential value of the enterprise.

[189] Ram acknowledged that the Valuation was not based on a comprehensive valuation of TeknoScan's high-end technology, which would have taken substantial effort and was something he was not able to do. Ram also agreed that there is a difference between value and price, that the Valuation was not prepared for an acquisition transaction, and that the Valuation did not account for what a strategic or special interest investor might pay.

[190] Given Ram's evidence, we conclude that the Valuation was not an indicator of the sale price for TeknoScan. We find that the Commission did not establish that the respondents knew that the per share purchase price under the Share Purchase Transaction grossly overstated the value of TeknoScan.

#### 4.2.3.g Belief that the Share Purchase Transaction would occur

[191] The Commission alleges that the respondents themselves did not believe that the Share Purchase Transaction would take place and failed to inform shareholders. As evidence of this, the Commission points to:

a. the fact that Hyams and Kung sold common shares back to TeknoScan in June 2017 at $3 per share; and

b. in 2016 and 2017, Hyams, Tam and Kung exercised options to acquire TeknoScan common shares priced at $0.00001, but did not exercise millions of options with strike prices between $0.27 and $3.

[192] We find both points relating to behaviour in 2017 after the Notice was sent to shareholders to be irrelevant.

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[29] RSC 1985, c 1 (5th Supp)

[193] There could be many explanations for the Individual respondents not exercising options around the time of the Share Purchase Transaction, but this was not explored by the Commission with any witness. We decline to draw the conclusion that this is evidence that the Individual respondents did not believe that the Share Purchase Transaction would take place. This does not displace our conclusion that the respondents knew that the receipt of third-party funding was uncertain.

#### 4.2.3.h Was the Notice objectively dishonest and misleading?

[194] We conclude that the Notice omitted the following information that was known by TeknoScan's Board, including each of the Individual respondents:

a. Davison and Double Helix did not have the funds to close the Share Purchase Transaction;

b. the Transaction was expressly contingent on Davison and Double Helix receiving funds from a third-party funder;

c. it was uncertain whether any third-party funds for the Transaction would ever materialize; and

d. the third-party funding arrangements were contrived and unconventional, in that Kung was directly engaged in facilitating the funding for the Transaction, including arranging for a loan to Davison by a TeknoScan investor and giving a personal guarantee for half of the loan, without which loan there could be no chance of third-party funding for the Transaction.

[195] We find that each of these omissions rendered the Notice objectively misleading and dishonest. These were fundamental and essential facts related to the funding for the Share Purchase Transaction, the purchaser's ability to close the Transaction and satisfy its obligations, and the risks of the Transaction not closing. In omitting this information, the Notice conveyed the false impression that shareholders (including preferred shareholders) merely needed to opt in to participate in a transformative and lucrative transaction and that funding for the Transaction was not an issue.

[196] We have also found that the Share Purchase Transaction was a non-arm's length transaction which was known to Kung (the individual who had all of the interactions with Davison regarding the Transaction) and was not disclosed in the Notice. We do not have a sufficient evidentiary basis to conclude that Tam also knew that the Transaction was non-arm's length. Based on Hyams' testimony and the fact that he had no direct involvement with Davison in connection with the Transaction, we are satisfied, on a balance of probabilities, that he did not know that the Transaction was non-arm's length. We make this finding despite his awareness of the N.B. loan to Davison and Kung's guarantee of half of that loan.

[197] The Notice was also objectively misleading and dishonest in omitting that the Transaction was non-arm's length. In omitting this information, the Notice conveyed, amongst other things, the false impression that Davison was a self-interested and independent purchaser, and US $2 billion was an arm's length negotiated price for 50 percent of the company.

[198] Each of the Individual respondents (and, indeed, TeknoScan's entire Board) was involved in drafting, reviewing, commenting on and approving the Notice before it was sent to shareholders. They did so with knowledge of the omitted facts identified above, and Kung did so with the additional knowledge of the omitted fact that the Share Purchase Transaction was non-arm's length.

[199] At this stage, it is not necessary for us to find that the respondents were subjectively aware that the omissions were misleading or dishonest. Our finding that they rendered the Notice objectively misleading and dishonest satisfies this branch of the test.

[200] Hyams' general submission that he was not directly involved in arranging the Share Purchase Transaction, and he relied upon others (including Kung and Joseph) to ensure that it was a "real" transaction, is no defence to the Commission's allegation, given our findings above. Hyams' evidence and submissions that Kung and Tam effectively controlled the Board and made the decisions for TeknoScan are also not a defence to the Commission's allegation, given that Hyams readily acknowledged that he approved the Notice and did not object to TeknoScan proceeding with the Transaction. Hyams' role as President,

CEO and a director of TeknoScan were not mere formalities and, in approving the Notice, he assumed responsibility for its omissions that were known to him.

[201] Accordingly, we find that the Individual respondents' conduct *(i.e.*, the omission of fundamental and essential facts from the Notice) amounted to "other fraudulent means".

### 4.2.4 *Actus Reus* - deprivation caused by the fraudulent acts

[202] The second part of the *actus reus*, or objective part of the fraud framework, requires a finding that the dishonest act caused a deprivation. Deprivation is established by proof of either actual loss, or the risk of or actual prejudice to investors' economic interests.[30]

[203] We conclude that the objectively dishonest and misleading Notice and its promise of the Share Purchase Transaction is what caused 92 percent of preferred shareholders to opt in to the Transaction and convert their preferred shares to common shares. As a consequence, the preferred shareholders forfeited rights associated with their preferred shares, including the right to receive a dividend and, in some cases, redemption rights and the right to receive royalties. We find that this forfeiture of rights attached to their preferred shares amounted to a deprivation in the form of a risk of prejudice to these shareholders' economic interests.

[204] The Commission submits that this forfeiture of rights resulted in actual loss to the converting preferred shareholders. This took the form of the loss of redemption rights which the Commission submits were valued at approximately US $58 million (calculated as the US $3 redemption price multiplied by the number of converted preferred shares with redemption rights, approximately 19.5 million). The Commission also submits that potential future earnings from dividend and royalty rights, which were not quantified or valued by the Commission, were lost.

[205] The Commission did not prove the amount of the actual loss to the preferred shareholders who converted their shares. The Commission did not establish that the redemption right attached to preferred shares was worth US $3 at that time,

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[30] *Mughal Asset Management Corporation (Re)*, 2023 ONCMT 39 (***Mughal***) at para 47

given TeknoScan's liquidity issues and lack of revenues. The value of the dividend and royalty rights were dependent on potential future earnings, which were also not established.

[206] Notwithstanding our finding that the Commission did not quantify actual loss, given that it did establish deprivation in the form of risk of prejudice, the Commission has proved both parts of the objective element of the fraud analysis as against the Individual respondents.

[207] We now turn to consider the subjective element of the fraud analysis.

### 4.2.5 *Mens rea*

[208] The *mens rea*, or subjective element of the framework, consists of two branches:

a. subjective knowledge of the act of deceit, falsehood, or some other fraudulent means; and

b. subjective knowledge that the act could have, as a consequence, the deprivation of another.

[209] We turn now to consider this element.

#### 4.2.5.a Subjective knowledge of the fraudulent acts

[210] To prove that the respondents were subjectively aware that they were undertaking a prohibited or dishonest act, it is not required to show that the respondents regarded the act as dishonest or knew that it was prohibited. Subjective awareness is proved where the person knowingly undertook the act.[31]

[211] In this case, each of the Individual respondents prepared the Notice and approved it for issuance to shareholders, knowing that it omitted certain facts as outlined above. We conclude that this satisfies the first branch of the subjective element.

#### 4.2.5.b Subjective knowledge of deprivation

[212] The second branch requires that the respondents have subjective awareness that their dishonest conduct will put the property or economic expectations of others

[31] *Mughal* at para 52; *Théroux* at 19-20

at risk.[32] In appropriate cases, the inference of subjective knowledge of the risk may be drawn from the facts as the respondent believed them to be.[33] Subjective awareness of the consequences may also be inferred from the dishonest act itself.[34] Subjective knowledge of deprivation can also include recklessness as to deprivation, which presupposes knowledge as to the likelihood of deprivation.[35] If one is aware that there is a danger that their conduct could bring about the prohibited result, but persists despite the risk, that person is reckless and the subjective element is proved.[36]

[213] The Commission submits that each of the respondents had actual knowledge that the omission of important facts from the Notice could result in deprivation to shareholders, as they knew that preferred shareholders who were induced by the Notice to convert to common shares would forfeit their redemption, dividend and royalty rights.

[214] Hyams submits that he did not understand that preferred shareholders who converted their shares to common shares would forfeit their rights as preferred shareholders if the Share Purchase Transaction did not close. He also submits that he was not aware that preferred shareholders would not be able to convert back and regain those rights. He thought that shareholders had rights to reverse the conversion. Although not explicitly framed as such, we take this to be a submission that Hyams did not have subjective awareness of deprivation, given that the Commission's allegation is predicated on each of the respondents knowing that the conversion of shares would permanently forfeit the rights attached to preferred shares.

[215] Hyams' testimony in support of this submission was that there was a "right" to reverse this aspect of the transaction, but he did not provide any evidence for the existence of such right. His evidence referred to the fact that the conversion "did not restrict the preferred shareholder from requesting a reversal of the

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[32] *Théroux* at 21
[33] *Théroux* at 21
[34] *Mughal* at para 56
[35] *Théroux* at 20
[36] *First Global Data Ltd (Re)*, 2022 ONCMT 25 (***First Global***) at para 387

conversion" and also that there "was nothing in the documentation preventing [the preferred shareholders] from converting back".

[216] The Commission submits, notwithstanding Hyams' testimony, that Hyams was aware that preferred shareholder rights were forfeited and there was no ability to convert from common shares back to preferred shares. The Commission relies on the fact that Hyams prepared and approved the Notice.

[217] The Acknowledgment and Confirmation attached to the Notice expressly stated that upon conversion of a preferred shareholder's shares to common shares, the shareholder:

a. irrevocably releases TeknoScan from all claims to redemption, royalty and dividend rights related to the preferred shares; and

b. disclaims any right to receive dividends and any redemption or royalty rights associated with the preferred shares.

[218] There is nothing in the Acknowledgement and Confirmation that confirms or grants a right to preferred shareholders to reverse their conversion to common shares in the event that the Share Purchase Transaction did not proceed.

[219] Hyams reviewed and approved the Notice as well as the Acknowledgement and Confirmation. We find that he therefore knew that those preferred shareholders who opted in to the Share Purchase Transaction disclaimed their preferred share rights, including their rights to dividends, redemption and royalties. Despite his evidence and submissions to the contrary, we find that Hyams knew there was no right to convert back to preferred shares; at best, he thought that there was nothing preventing a shareholder to ask.

[220] In the circumstances, we find that the Commission has established on a balance of probabilities that Hyams had subjective knowledge of deprivation and therefore has established that Hyams perpetrated a fraud on preferred shareholders who opted into the Share Purchase Transaction.

[221] The TSI respondents place emphasis on the following statement by Justice Sopinka in his concurring reasons in *Théroux* about the consequence of an honest belief that a future event will happen:

> "If the risk of deprivation is dependent on some future event not happening but the accused honestly believes that the future event will happen and there will be no deprivation, a trial judge who accepts this evidence should acquit. The Crown will not have proved *mens rea* with respect to deprivation."[37]

[222] The TSI respondents acknowledge that they knew that the shareholders would lose their preferred share rights if they chose to participate in the Share Purchase Transaction and highlight the fact that in preparing the Notice they ensured that it disclosed the loss of those rights.

[223] However, relying on the above passage from *Théroux*, the TSI respondents submit that because they held a "genuine and reasonable belief" that the Share Purchase Transaction would close, they did not have subjective knowledge of the risk to preferred shareholders. This is because any deprivation to preferred shareholders would only result if the Share Purchase Transaction did not close, as the Transaction (at US $20 per share) would have resulted in a significantly greater benefit to the participating shareholders than what they were giving up, *i.e.,* an exercise of their redemption rights (at US $3 per share).The TSI respondents say that they could only be found to have the requisite subjective knowledge of deprivation if they knew, as a fact, that the Share Purchase Transaction would not close.

[224] We reject this submission for two reasons.

[225] First, we accept the Commission's submission that the passage from *Théroux* on which the TSI respondents rely is found in concurring reasons, and not the majority reasons. The majority reasons, which are binding, establish that a mistaken belief that placing a person's economic interests at risk will not result in actual loss, does not rebut a subjective knowledge of a risk of loss.[38]

[226] Second, as a matter of fact, we have not concluded that the respondents held a "genuine and reasonable belief" that the Share Purchase Transaction would close and, as a result, there would be no deprivation to preferred shareholders.

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[37] *Théroux* at 10 (Sopinka, J., concurring)

[38] *Théroux* at 24

Instead, we found above that the respondents believed that the Share Purchase Transaction could close, but this was known to them to be uncertain, because of the uncertainty as to whether the third-party funding would materialize.

[227] Accordingly, we find that the Commission has proved both parts of the subjective element of the fraud analysis against all of the Individual respondents and therefore has also established that all of the Individual respondents perpetrated a fraud on those preferred shareholders who opted into the Share Purchase Transaction.

### 4.2.6 Did TeknoScan, the corporation, perpetrate a fraud?

[228] A corporation cannot be described as having "knowledge" in the same way that an individual does.[39] Previous decisions of this Tribunal have held that a fraud allegation under s. 126.1(1)(b) of the *Act* against a corporation is established where the corporation's directing minds knew or reasonably ought to have known that the corporation perpetrated a fraud.[40]

[229] In this case we find that TeknoScan's Board (including each of the Individual respondents) were the directing minds of TeknoScan.

[230] We find that the mental elements of the *Théroux* framework have also been established against TeknoScan because:

a. we have found that TeknoScan's Board (including each of the Individual respondents):

   i. had knowledge of omissions that rendered the Notice objectively dishonest and misleading; and

   ii. had subjective knowledge of the fraudulent act; and

b. TeknoScan (along with the other TSI respondents) acknowledged in submissions that it had knowledge that the shareholders would lose their rights as preferred shareholders if they chose to participate in the Share Purchase Transaction (*i.e.*, knowledge of deprivation).

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[39] *First Global* at para 347

[40] *First Global* at para 347

[231] We found above that Kung was also aware of an additional omission in the Notice (*i.e.,* that the Share Purchase Transaction was non-arm's length). No submissions were made by any party about the consequence to our findings about TeknoScan's knowledge in the event that the Individual respondents and directing minds of TeknoScan were found to have different levels of knowledge of the alleged omissions. In the circumstances, we decline to find that TeknoScan had Kung's knowledge of this omission.

#### 4.2.7 Conclusion regarding s. 126.1(1)(b) fraud

[232] In summary, we find that the respondents perpetrated a fraud on TeknoScan's preferred shareholders who opted into the Share Purchase Transaction by omitting fundamental and essential facts from the Notice.

### 4.3 Misleading statements to shareholders

#### 4.3.1 Introduction

[233] The Commission alleges that the respondents made misleading or untrue statements and omitted several important facts in the Notice, contrary to s. 126.2(1) of the *Act*. In making this allegation*,* the Commission relies on the very same omissions underpinning the Commission's fraud allegation that we considered in detail above.

[234] Subsection 126.2(1) of the *Act* makes it an offence for a person or company to make a statement that they know or reasonably ought to know,

a. in a material respect and at the time and in the circumstances under which it is made, is misleading or untrue or omits a fact required to be stated or necessary to make it not misleading; and

b. would reasonably be expected to have a significant effect on the market price or value of a security.

[235] Before we turn to consider whether the omissions in the Notice meet the two prongs of s. 126.2(1), we first consider two preliminary issues:

a. whether the Notice was a statement made by any of the Individual respondents, or was simply a statement of the corporate respondent, TeknoScan; and

b. whether the fact that we have found a contravention of the fraud provision of the *Act* precludes us from finding a breach of s. 126.2(1) that is based upon the same omissions.

### 4.3.2 Did the Individual respondents make the statements in the Notice?

[236] The Notice was addressed to the shareholders of TeknoScan, from TeknoScan. Hyams signed the Notice on behalf of TeknoScan, and sent the Update Email, in his capacity as President and CEO. As we previously found above, all of the directors of TeknoScan, including the Individual respondents, were involved in preparing and approving the Notice.

[237] The Commission submits that the Individual respondents were communicating with investors through the Notice and, therefore, that they personally made the statements in the Notice, thus engaging s. 126.2(1) of the *Act*. We reject this submission. As a factual matter, the Notice was issued on behalf of TeknoScan, which was a fully functioning corporate entity, and the Notice was not a statement made by each of the Individual respondents. Accordingly, the factual predicate to finding that the Individual respondents contravened s. 126.2(1) of the *Act* (namely, that they "made the statement" in question) has not been established.

### 4.3.3 Does our finding of s. 126.1(1)(b) fraud preclude a finding of a breach of s. 126.2?

[238] We accept the Commission's submissions that we are not precluded from finding a contravention of s. 126.2 of the *Act* simply because the alleged contravention is based upon the same omissions that we have already found underlie the fraud contravention. Clause 126.1(1)(b) fraud and s. 126.2(1) misrepresentation are different prohibitions and each has different elements that must be established.

[239] We will now turn to consider whether the two elements under s. 126.2(1) have been established with respect to the statements made by TeknoScan in the Notice.

### 4.3.4 Misleading or untrue statements

[240] We have previously found that TeknoScan knew of omissions in the Notice (as set out in paragraph [194] above) by virtue of the Board's knowledge. These

same omissions must now be considered by us under the s. 126.2(1) framework. For the same reason that we declined to attribute Kung's knowledge that the Transaction was non-arm's length to TeknoScan for the purposes of the fraud allegation, we also decline to do that for purposes of our consideration of the misleading statement allegation.

[241] We turn now to consider whether TeknoScan knew or ought to have known that the omissions rendered the Notice misleading "in a material respect".

[242] Tribunal decisions have established that the words "in a material respect" impose a standard of materiality. This is a question of mixed fact and law that requires a contextual determination that takes into account relevant circumstances, including the size and nature of the issuer and its business, the nature of the statement, and the circumstances in which the statement was made.[41]

[243] Materiality at this stage is based on the objective reasonable investor standard.[42] It is established if there is a substantial likelihood that a reasonable investor would consider the statement to be important in making an investment decision. This requires us to determine whether the statement or omission would have assumed actual significance to a reasonable investor.[43]

[244] We find that the omissions in the Notice made the Notice misleading in a material respect. In the circumstances, there is a substantial likelihood that the omissions in the Notice would have assumed actual significance to a reasonable investor, including a preferred shareholder, in deciding whether to opt in to the Share Purchase Transaction. This is because each of these omissions were fundamental and essential facts related to the funding and success of the Transaction, and the risks of the Transaction not closing. As a result of the omissions, the Notice conveyed the false impression that shareholders could participate in what would be a transformative and lucrative transaction merely by opting in, that funding for the Transaction was not an issue, and that common shares were each worth, or could realize, US $20.

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[41] *Factorcorp Inc (Re)*, 2013 ONSEC 6 (***Factorcorp***) at para 260, citing *Biovail Corporation (Re)*, 2010 ONSEC 21 (***Biovail***) at paras 63 and 69

[42] *Biovail* at para 74

[43] *Factorcorp* at para 261, citing *Biovail* at paras 63, 69, 74 and 80

[245] It is not necessary to establish that there was investor reliance on the statement in order to satisfy the first prong of s. 126.2(1) of the *Act*.[44] In this case, each of the investors called by the Commission who opted into the Share Purchase Transaction testified that, in addition to receiving the Notice, they also received information about the Transaction in discussions with Kung, Tam or Joseph. Because of this, the evidence was not clear about the extent to which these investors relied on the Notice itself.

[246] The TSI respondents submit that none of the investors called by the Commission who converted their preferred shares provided any credible evidence that, had the omitted information been included in the Notice, they would have decided differently and not opted into the Transaction. The TSI respondents point to investor N.B.'s behaviour as a significant counterfactual, given that he converted his preferred shares with knowledge that Davison could not self-fund the Transaction and needed to receive third-party funding to complete it.

[247] The TSI respondents cite no authority for the proposition they advance that the reasonable investor test for materiality under s. 126.2(1)(a) of the *Act* is only satisfied if the Commission establishes that disclosure of the omitted fact would have caused the investors to change their behaviour. Indeed, we understand the test, as confirmed by the Divisional Court, to not require such proof.[45] Instead, it requires that there be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the investor as having significantly altered the "total mix" of information made available.[46] We find that the omissions from the Notice would have been viewed by investors in this way.

### 4.3.5 Impact on market price or value of a security

[248] Clause 126.2(1)(b) of the *Act* requires a determination of the effect of a statement on the market price or value of a security.[47] The relevant securities in this case are either the TeknoScan common shares or the preferred shares.

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[44] *Coventree Inc (Re)*, 2011 ONSEC 25 (***Coventree***) at para 396

[45] *Cornish v Ontario Securities Commission,* 2013 ONSC 1310 (***Cornish***) at para 63, citing *TSC Industries Inc v Northway Inc*, 426 U.S. 438 (1976) at 449

[46] *Cornish* at para 63

[47] *Coventree* at para 385

[249] Clause 126.2(1)(b) requires application of the market impact test, another objective test of materiality, distinct from the reasonable investor test applied under s. 126.2(1)(a).[48] Although a statement that would reasonably be expected to have a significant effect on the market price or value of a security will also be a statement that a reasonable investor would consider to be important in making an investment decision (*i.e.,* that would satisfy the requirements of s. 126.2(1)(a)), the converse does not necessarily follow.[49]

[250] The Commission submits that the misleading statements in the Notice had a clear and significant effect on the value of both TeknoScan's common shares and preferred shares. This is because the Notice resulted in 92% of preferred shareholders converting to common shares. Preferred shareholders did not convert their shares prior to the Notice and only did so because of the expectation that they would receive US $20 per common share through the Share Purchase Transaction.

[251] The TSI respondents submit that the Commission's case is based on speculation. They submit that there was no market for TeknoScan shares and, as a result, the Notice could not have had an effect on the market price. They further submit that, although the Notice could have had an effect on the value of TeknoScan shares, there was no clear, convincing or cogent evidence about any effect on value, or that the Notice would have had a *significant* effect on value. The TSI respondents' submissions do not specify which TSI shares, common or preferred, they refer to.

[252] We find that there is a sufficient factual foundation from which to draw the inference that the Notice would reasonably be expected to have a significant effect on the value of the common shares of TeknoScan.

[253] All of TeknoScan's preferred shareholders had the right, separate from the Share Purchase Transaction, to convert their preferred shares to common shares on a 1:1 basis at any time. There was no evidence of widespread, or any, conversion of preferred shares to common shares prior to the announcement of the Share Purchase Transaction in the Notice. From this we conclude that, prior to the

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[48] *Cornish* at para 60

[49] *Biovail* at para 73

issuance of the Notice, the preferred shares (both those with and without redemption and royalty rights) either had a greater value than the common shares, or at least an equivalent value.

[254] The value of the preferred shares prior to the Notice was not specifically established or quantified, however we would expect the value to reflect the present value of potential future dividends and convertibility to common shares and, where applicable, the present value of the US $3 redemption right and any potential future royalties — all subject to the risk of dividends and royalties not materializing and TeknoScan not having sufficient funds to pay the redemption price.

[255] The market price of the preferred shares just prior to the Notice was also not specifically established or quantified. However, it was established that TeknoScan issued and sold preferred shares for US $1.00 or less until August 2016. We would expect that TeknoScan would issue and sell preferred shares for as much as the market can bear. We conclude, therefore, that this is evidence of what investors were willing to pay for preferred shares in the time frame prior to the announcement of the Share Purchase Transaction, taking into account their understanding of the discounted value of the rights and the liquidity risk attached to the preferred shares. Because there was no secondary market for preferred shares, we conclude that the US $1.00 price for newly issued preferred shares was a proximate value (in rough orders of magnitude) of the preferred shares just prior to the announcement of the Share Purchase Transaction in the Notice.

[256] The Notice informed shareholders that the Share Purchase Transaction would be a transformative liquidity event, resulting in the purchase of "up to" 50% of the common shares for US $20 per share. The Update Email indicated that the purchase of common shares would be at "an attractive valuation". Hyams testified to this and said that US $20 "sounded incredible" and he thought at the time that he and the other shareholders would have been "very happy" with US $5. The purchase price put TeknoScan, which was still in a start-up phase without any significant revenues or contracts, at a $4 billion enterprise valuation, making it a "unicorn" (*i.e.*, a company with a valuation of at least $1 billion). This, together with the evidence of the value of the common shares as compared

to the value of the preferred shares (something less than or equal to approximately US $1) prior to the announcement of the Transaction, establishes that the Notice would reasonably be expected to have a significant effect on the value of TeknoScan common shares.

[257] The Commission submits that the behaviour of preferred shareholders demonstrates that the misleading statements in the Notice caused the "perceived" value of the common shares to increase significantly. We note that the response of preferred shareholders to the Notice was significant. In response to the Notice, 93 out of the 102 preferred shareholders (who were not Individual respondents or related to the Individual respondents), collectively holding 92% of the preferred shares, converted their shares to common shares in order to participate in the Share Purchase Transaction. While this may tend to confirm that the announcement of the Transaction (without disclosure of any attendant uncertainty or risk around its completion at US $20 per share) led to a significant increase in the value of the common shares, our earlier finding is not based on this evidence. In making our finding, we have been mindful that the language of the *Act* and the relevant jurisprudence make clear that the market impact test is forward looking.

[258] Based on the foregoing, we conclude that TeknoScan breached s. 126.2(1) of the *Act.*

### 4.4 Responsibility for misconduct – s. 129.2 of the *Act*

[259] The Commission seeks a finding that the Individual respondents be deemed liable for TeknoScan's non-compliance with the *Act* pursuant to s. 129.2 of the *Act*.

[260] Section 129.2 of the *Act* provides that a director or officer is deemed to be liable for a breach of securities law by a company where the director or officer authorized, permitted or acquiesced in the company's non-compliance with the *Act*.

[261] Some recent Tribunal decisions have concluded that where an individual has been found directly liable for a breach of the *Act* it is not necessary to consider whether the individual is also "deemed liable" under s. 129.2 for the same

breach by a company.[50] The Commission urges us to make findings of s. 129.2 liability even where direct liability is found, and to address any potential redundancy in the findings at the sanctions stage of this proceeding.

[262] Having found the Individual respondents directly liable for a breach of s. 126.1(1)(b) of the *Act* based upon the same facts that established TeknoScan's breach of s. 126.1(1)(b), we decline to also deem them liable for TeknoScan's breach. To do so would be redundant. We are not inclined to find multiple breaches of laws based on the same facts and wrongdoing, where the deemed breach would be derivative of the direct breach already found.

[263] However, given their roles in preparing and approving the Notice, and the fact that they were not found directly liable for a breach of s. 126.2(1) of the *Act*, we find that the Individual respondents authorized, permitted or acquiesced in TeknoScan's s. 126.2(1) breach pursuant to s. 129.2 of the *Act*.

### 4.5 Legal advice defence

[264] The TSI respondents submit that, if one or more of them are found to have breached ss. 126.1(1)(b) or 126.2(1) of the *Act*, they have the defence available to them that they reasonably relied on legal advice. Hyams also submits that he relied on Kung, Tam and Joseph to provide all necessary information to TeknoScan's counsel and expected counsel to have pointed out any issues or questions regarding the information in the Notice. We take Hyams to also be asserting a defence of reliance on legal advice.

[265] For the reasons set out below, we conclude that the respondents have not met the requirements to establish a defence of reasonable reliance on legal advice.

[266] At the time of the Notice and proposed Share Purchase Transaction, Fogler Rubinoff LLP (**Foglers**) had been regular corporate counsel to TeknoScan for some eight years. Rudy Morrone was Foglers' lead lawyer for Teknoscan during this period, including in connection with the advice and assistance provided on the Share Purchase Transaction. Given that Foglers' client was TeknoScan, and

[50] *Mughal* at para 108; *Stinson (Re),* 2023 ONCMT 26 at para 78; *Feng* at paras 72-73

not the Individual respondents, we focus on the advice that Foglers gave to TeknoScan.

[267] Reasonable reliance on legal advice is available as a defence to an allegation under a section of the *Act* that expressly provides a due diligence defence or requires proof of an intentional or willful act, such as fraud under s. 126.1(1)(b) of the *Act*.[51] As a result, the defence of reasonable reliance on legal advice is potentially available as a defence to the fraud finding in this case. Whether it is also available as a defence to the breach of s. 126.2(1) for misleading statements, which entails an objective negligence standard and no express due diligence defence, was not specifically argued. In any event we do not need to decide this point, given our conclusion that the defence has not been made out.

[268] A respondent who asserts the defence of reasonable reliance on legal advice must establish that:

a. the lawyer had sufficient knowledge of the facts on which to base the advice;

b. the lawyer was qualified to give the advice;

c. the advice was credible given the circumstances under which it was given; and

d. the respondent made sufficient enquiries and relied on the advice.[52]

[269] In order to establish that the lawyer had sufficient knowledge on which to base the advice, as is required by the first criterion, the respondent must show that disclosure was made to the lawyer of all of the facts and circumstances relevant for them to be able to provide the advice.[53]

[270] In order to establish actual reliance on the advice, as is required by the fourth criterion, the respondent must show that the advice was sufficiently clear, specific and connected to the impugned act, by addressing the question raised

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[51] *Solar Income Fund* at para 240; *Pushka v Ontario Securities Commission*, 2016 ONSC 3041 at para 244

[52] *Solar Income Fund* at para 241; *Mega-C Power Corporation (Re),* 2010 ONSEC 19 at para 261

[53] *Sino-Forest Corporation (Re),* 2017 ONSEC 27 at para 1237

by that impugned act.[54] A person seeking to rely on the defence must adduce clear evidence of the communications they had with their lawyer so that it can be determined with reasonable certainty the question asked and the answer given.[55]

[271] The TSI respondents submit that they adduced evidence that supports each element required to establish the defence.

[272] The Commission submits that the defence is not available here because:

a. TeknoScan did not provide Morrone with sufficient knowledge of the facts related to the Share Purchase Transaction, including the relevant facts that were omitted from the Notice; and

b. neither Morrone nor anyone else at Foglers provided legal advice regarding the proper disclosures to make to investors relating to the Share Purchase Transaction, or the adequacy of the disclosure.

[273] The respondents submit that they provided Morrone with "all the facts" related to the Share Purchase Transaction, such that he was able to help implement and execute the Transaction and draft documents, including the Notice, in compliance with legal requirements.

[274] We heard evidence from Joseph that communications with Morrone were in-person, by email and by telephone. Joseph also testified that, at the outset of Morrone's retainer in early October 2016, he and the Individual respondents met with Morrone to discuss the transaction in detail and were totally reliant on him to make sure that they were not in the wrong when putting this deal forward to shareholders. Joseph stated that he remembered Kung explaining the entire transaction to Morrone, but he could not recall the specifics of what was said.

[275] The burden of establishing the basis for the defence rests with the persons asserting it. Here, we conclude that the TSI respondents' general and non-specific evidence about what information was provided to Morrone, as well as the written record of the communications with Morrone, is insufficient to establish

[54] *Solar Income Fund* at para 243

[55] *First Global* at para 594

that Morrone had all of the facts he required to advise that the issuance of the Notice would not perpetrate a fraud.

[276] Although we do not accept the Commission's submission that the failure of a respondent to call the lawyer as a witness to establish the foundation for the defence is necessarily fatal, we note that the respondents' choice not to call Morrone to testify in the circumstances of this case makes it difficult for them to establish this defence.

[277] In coming to our conclusion, we have considered whether the respondents have established that Morrone was aware of the information that we found was omitted from the Notice and that rendered the Notice objectively dishonest and misleading. Although there is evidence that Morrone received and reviewed the Letter of Intent after it was signed and was likely aware that the Share Purchase Transaction was contingent on Davison and Double Helix receiving funds from a third-party, it was not established that Morrone knew:

a. about the third-party funding arrangements or that Kung was directly engaged in facilitating this funding;

b. that Davison did not have the funds to close the Transaction;

c. that it was uncertain that the funds would ever materialize and the Transaction would close; and

d. that the Transaction was non-arm's length.

[278] Without knowledge of these omitted facts, it follows that Morrone did not have the required facts on which to base his advice.

[279] The TSI respondents submit that TeknoScan retained Morrone to provide advice and assistance on the Share Purchase Transaction, and the advice was squarely related to and focused on the contents of the Notice. The respondents further submit that the advice was sufficiently clear, specific and connected to TeknoScan's request and the advice was reflected in the contents of the final version of the Notice that Morrone drafted with the assistance and input of the respondents.

[280] The Commission submits that while Morrone advised on the Transaction structure, acted as escrow agent and drafted certain documents, including the

Notice, there is no evidence that he advised on what facts needed to be disclosed in the Notice or on the adequacy of that disclosure. The Commission asserts that there was no opinion or memorandum with such advice.

[281] We agree that the respondents must adduce clear evidence of communications they had with their lawyer so that it can be determined with reasonable certainty that the right questions were asked and advice was given. However, we note there is no requirement that the legal advice be in the form of a formal memorandum or legal opinion.

[282] Hyams submits that as he was not directly involved in the Share Purchase Transaction and was not TeknoScan's primary contact with Morrone. He was entirely reliant on Kung, Tam and Joseph to provide the facts to the lawyers and ensure the draft documents and Notice were appropriate. We find that, regardless of the extent of Hyams' direct involvement with counsel, he nevertheless has the burden to show that he reasonably relied on legal advice, which he failed to establish. There was no evidence that he made any specific enquiries to establish the scope of what Morrone was retained to do in relation to the Notice, nor any evidence that he was advised that Morrone had represented or opined that the Notice was compliant with Ontario securities laws.

[283] We find that the respondents did not meet the burden required to establish that, in connection with the Share Purchase Transaction, Morrone was asked to provide advice on what facts needed to be disclosed in the Notice in order to ensure compliance with Ontario securities laws, or that he gave such advice.

### 4.6 Alleged misleading statements to the Commission

[284] The Commission alleges that Kung and Hyams made misleading statements to the Commission during its investigation.

[285] Clause 122(1)(a) of the *Act* makes it an offence for any person to make a statement to a person appointed to make an investigation under the *Act* that, in a material respect, is misleading or untrue or does not state a fact that is necessary to make the statement not misleading. This clause establishes liability even without proof of a specific mental element.[56] We reject the TSI

[56] *Black Panther (Re)*, 2017 ONSEC 1 at para 154

respondents' submission that we do not have jurisdiction to decide this allegation as it is well-established that a breach of s. 122(1)(a) is subject to administrative sanctions under s. 127 of the *Act*.[57]

[286] The Tribunal and the courts have noted the importance of providing truthful information during an investigation.[58] The Ontario Court of Appeal has stated that it is difficult to imagine anything that could be more important to protecting the integrity of capital markets than ensuring that those involved in those markets, whether as direct participants or as advisors, provide full and accurate information to the Commission.[59]

[287] During the hearing, the Commission requested that we admit into evidence excerpts from the transcripts of the compelled interviews of each of Kung and Hyams for the purpose of establishing the s. 122(1)(a) allegations. Kung and Hyams did not object and the transcript excerpts were admitted for this purpose. Kung did not submit that our subsequent ruling on the Commission's motion to have excerpts from Kung's (and Tam's) compelled examinations transcripts "read in" (see section 3.4.2 above) had any implication on our earlier admission of the s. 122(1)(a) excerpts, or that their admissibility should be revisited.

[288] The Commission's allegations of misleading statements center around the valuation of TeknoScan. The Commission submits that both Kung and Hyams knew about the Valuation when they responded to questions in their compelled interviews in 2021 and 2022 relating to valuations of TeknoScan. The Commission asserts that the questions asked of Kung and Hyams relating to the Valuation were clear, and that they gave false and misleading responses, contrary to s. 122(1)(a) of the *Act*.

[289] The Statement of Allegations also alleges that each of Kung and Hyams failed to produce a copy of the Valuation when required by summons to produce copies of "any valuations of TeknoScan", in breach of their respective summonses. In oral

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[57] *Wilder v Ontario (Securities Commission)*, 2011 CanLII 24071 (ONCA) (***Wilder***) at paras 23-24

[58] *Kitmitto (Re)*, 2022 ONCMT 12 at para 210 aff'd by Div Ct, 2024 ONSC 1412, citing *Wilder* at para 22; *Agueci (Re),* 2015 ONSEC 2 at para 636

[59] *Wilder* at para 22

closing submissions the Commission confirmed that this allegation was not being pursued as part of its case.

[290] With respect to Kung, the Commission alleges that he made false and misleading statements in two instances during his compelled interview by not referring to the Valuation.

[291] Kung submits that in both instances the Commission selectively and inappropriately excerpted answers from Kung's interview to support its allegation. Kung submits that it is clear from a basic review of the transcript in its proper context that, in the first instance, he was responding to whether a valuation had been done to support the $4 billion valuation used in the Share Purchase Transaction and, in the second instance, he was referring to the valuation mentioned in his preceding answer, and not to whether any valuation of TeknoScan had been done.

[292] Kung submits that there is no evidence that he saw or received a copy of the Valuation. Kung also submits that, even if his answers were misleading, they are not of the nature or quality that warrant a finding that he misled Commission investigators.

[293] With respect to Hyams, the Commission submits that he denied there being an independent valuation of TeknoScan even though the Valuation was relevant to the line of questions he was asked. During his compelled interview, Hyams described the Share Purchase Transaction value as significant, and expressed a view of TeknoScan's valuation based on potential revenues. The Commission asserts that Hyams should have thought of the Valuation when responding to questions given the fact that the Valuation also used potential revenues as a means to value TeknoScan.

[294] Hyams submits that he never considered the Valuation as, in his view, it did not have any relevance to the Commission's line of questions. He asserts that the questions were asked in the context of the $20 per share and $4 billion total valuation related to the Share Purchase Transaction, whereas the Valuation was done for the specific purpose of determining the value of the shares for a tax rollover and did not relate to the Transaction.

[295] We find that neither Kung nor Hyams made misleading statements to Commission investigators.

[296] The Commission may have been seeking specific responses and disclosures related to any valuations of TeknoScan, but its line of questioning and its use of language could reasonably suggest the Commission was inquiring about a narrower category of valuations, being those related to or supporting the value of the Share Purchase Transaction or referenced in the context of the preceding answers given. It is incumbent on the Commission, when alleging that respondents make false or misleading statements to its investigators, to establish that the Commission was clear in its questioning.

[297] For these reasons, the allegation that Kung and Hyams breached s. 122(1)(a) of the *Act* is dismissed.

### 4.7 Conduct contrary to the public interest

[298] In the Statement of Allegations, the Commission alleges that the respondents engaged in activity that is contrary to the public interest. The Commission did not provide any particulars in the Statement of Allegations or in its submissions to support the allegation.

[299] This allegation was formally abandoned by the Commission in its oral closing submissions, and we decline to make any additional findings against the respondents.

## 5. CONCLUSION

[300] For the reasons above, we find that:

a. the respondents perpetrated a fraud on TeknoScan shareholders contrary to s. 126.1(1)(b) of the *Act*;

b. TeknoScan made a materially misleading statement to shareholders contrary to s. 126.2(1) of the *Act*;

c. Hyams, Kung and Tam authorized, permitted or acquiesced in TeknoScan's breach of s. 126.2(1) of the *Act* and are deemed liable for that breach pursuant to s. 129.2 of the *Act*; and

d. the Commission has failed to establish that:

i. the Individual respondents made a materially misleading statement to shareholders contrary to s. 126.2(1) of the *Act*; and

ii. Kung and Hyams made misleading statements to the Commission contrary to s. 122(1)(a) of the *Act*.

[301] We therefore require that the parties contact the Registrar by 4:30 p.m. on January 13, 2025, to arrange an attendance, to schedule a hearing regarding sanctions and costs, and the delivery of materials in advance of that hearing. The scheduling attendance is to take place on a mutually convenient date that is fixed by the Governance & Tribunal Secretariat, and that is no later than January 27, 2025.

[302] If the parties are unable to present a mutually convenient date for the scheduling attendance to the Registrar, each party may submit to the Registrar, for consideration by a panel of the Tribunal, a one-page written submission regarding a date for the attendance. Any such submission shall be submitted by 4:30 p.m. on January 13, 2025.

Dated at Toronto this 23rd day of December, 2024

*"Andrea Burke"*

Andrea Burke

*"James Douglas"*

James Douglas

*"Cathy Singer"*

Cathy Singer