



Ontario
Securities
Commission

Commission des
valeurs mobilières
de l'Ontario

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**IN THE MATTER OF THE *SECURITIES ACT*
R.S.O. 1990, C. S.5, AS AMENDED**

- AND -

**IN THE MATTER OF PAUL AZEFF, KORIN BOBROW,
MITCHELL FINKELSTEIN, HOWARD JEFFREY MILLER AND
MAN KIN CHENG (a.k.a. FRANCIS CHENG)**

**REASONS AND DECISION REGARDING
NON-SUIT MOTIONS
(Rule 3 of the Commission's *Rules of Procedure* (2014), 37 O.S.C.B. 4168)**

Hearing: October 30, 2014

Decision: November 25, 2014

Panel: Alan J. Lenczner - Commissioner and Chair of the Panel
AnneMarie Ryan - Commissioner
Catherine E. Bateman - Commissioner

Appearances: Simon Bieber - For Howard Miller
Tyler Hodgson - For Paul Azeff and Korin Bobrow
Donna Campbell - For Staff of the Ontario Securities Commission

REASONS AND DECISION

I. OVERVIEW

[1] At the close of Staff's case and before we heard any evidence or explanation from the respondents Mitchell Finkelstein ("**Finkelstein**"), Paul Azeff ("**Azeff**") or Korin Bobrow ("**Bobrow**"), the respondents Howard Miller ("**Miller**"), Azeff and Bobrow brought motions to dismiss certain allegations in the Fresh As Amended Statement of Allegations dated August 14, 2014 (the "**Fresh SOA**").

[2] On November 3, 2014, we rendered our decision with reasons to follow.

[3] Our decision was:

1. With respect to Miller:
 - (a) we dismissed his non-suit motions relating to allegations against him with respect to Masonite International Corporation ("**Masonite**") and Dynatec Corporation ("**Dynatec**"); and
 - (b) we granted his motion with respect to the limitation period applicable to the allegation in paragraph 45 of the Fresh SOA that he recommended Dynatec contrary to the public interest.
2. With respect to Bobrow, we granted his non-suit motion relating to allegations regarding MDSI Mobile Data Solutions Inc. ("**MDSI**").
3. With respect to Azeff:
 - (a) we dismissed his non-suit motion relating to the allegations that he tipped Client A with respect to Dynatec; and
 - (b) we dismissed his non-suit motion relating to the allegations that he acted contrary to the public interest in relation to MDSI.

IV. THE LAW

1. Test for Granting a Non-Suit Motion

[4] The test for a non-suit motion is whether "there is any evidence which, if taken at its highest, establishes or gives rise to a reasonable inference in favour of the party responding to the motion." (*Toronto (City) v. Toronto Civic Employees' Union, Local 416 (Espinola Grievance)*, [2000] O.L.A.A. No. 890, 93 L.A.C. (4th) 372 (QL) at para. 22).

[5] The Commission adopted this test in *Re ATI Technologies Inc.* (2005), 28 O.S.C.B. 9667 at para. 23 ("**ATI**") and *Re Suman* (2009), 32 O.S.C.B. 8375 ("**Suman**") at para. 24.

[6] As the Commission concluded in *Suman*, "[w]hether ultimately we conclude that Staff has proven its case on a balance of probabilities is a matter to be decided at the conclusion of the hearing on the merits based on all of the evidence" (*Suman, supra* at para. 24).

[7] We have reviewed the evidence on a *prima facie* standard, not on the standard of a balance of probabilities, a level of assessment that we will apply after all the evidence is complete and final arguments have been received.

2. The Statutory Limitation Period

[8] Section 129.1 of the Act provides that: “[e]xcept where otherwise provided in this Act, no proceeding under this Act shall be commenced later than six years from the date of the occurrence of the last event on which the proceeding is based.”

V. ANALYSIS

3. Miller

[9] Miller submits that Staff has failed to lead evidence that establishes or gives rise to a reasonable inference of a constituent element of the charges against Miller; namely, that Miller was in a special relationship with both Masonite and/or Dynatec.

[10] We dismiss Miller’s non-suit motion relating to allegations with respect to Masonite and Dynatec. It is our opinion on a limited weighing of the evidence that Staff has made out a *prima facie* case that Miller was in a special relationship with each of the issuers.

[11] In coming to this conclusion we considered the specificity of information that Miller had, the evidence regarding the source of that information, the communications between Miller and Client A and the proximity of trading activity by Miller and others.

[12] Miller also submits that the allegation that he recommended Dynatec contrary to the public interest in paragraph 45 of the Fresh SOA in this matter is barred by the statutory limitation period in section 129.1 of the Act.

[13] Section 129.1 of the Act provides that no proceeding under the Act shall be commenced later than six years from the date of the occurrence of the last event on which it is based. The Fresh SOA of August 14, 2014 included, for the first time, an allegation that Miller recommended investing in Dynatec. We interpret the “event” in this instance to be the act of recommending Dynatec shares on April 18 and 19, 2007. It is a new, specific and discrete allegation, although it might be said to be based on many of the same facts that were pleaded in a timely way in the Amended Amended Statement of Allegations of April 18, 2011. We have concluded that it is different in nature and character from the prior allegations. Therefore, it is beyond the six year limitation period and the allegation is struck.

4. Bobrow

[14] Bobrow submits that there is no evidence that he traded MDSI, no evidence that he profited or received commission for any purchase of MDSI shares and no evidence that he recommended MDSI to any of the three persons alleged to have traded in MDSI.

[15] We are not satisfied that Staff has made out a *prima facie* case linking Bobrow to the allegation in question. We grant Bobrow’s non-suit motion relating to allegations that he acted contrary to the public interest in relation to MDSI.

5. Azeff

[16] Azeff submits that, with respect to allegations relating to MDSI, Staff’s case at its very highest gives rise to suspicion, speculation and conjecture. Azeff submits that, of the three individuals who purchased MDSI, none purchased shares through him, one was not a client, he

made no commission on the sale of MDSI shares and there is no evidence that, following the MDSI announcement, he met with Finkelstein, the alleged tipper, in person and gave him cash. Azeff contends that Staff's case, at its highest, is limited to an opportunity to speak with Finkelstein about MDSI prior to the announcement and contact with one client six days prior to the client's purchase of MDSI.

[17] With respect to Dynatec, Azeff submits that the only logical and reasonable inference that can be drawn from the trading pattern in Dynatec is that Client A was not provided with material non-public information. Azeff submits that Client A testified to several reasons why he invested in Dynatec, that he did not agree that he was told by Azeff that Dynatec was in play and that, although Client A began purchasing Dynatec on April 18, 2007, he sold 100% of his wife's position at a loss on April 19 after speaking with Azeff.

[18] We dismiss Azeff's non-suit motion relating to allegations that: (i) he acted contrary to the public interest with respect to MDSI; and (ii) tipped Client A with respect to Dynatec, as it is our opinion on a limited weighing of the evidence that Staff has made out a *prima facie* case in relation to those allegations.

[19] On a *prima facie* standard, we conclude that the access by Finkelstein to deal documents in July 2005, the telephone contacts between Azeff and Finkelstein and the timing of trades by Azeff's clients gives rise to reasonable inferences that support the allegations relating to MDSI.

[20] We also conclude that, with respect to Dynatec, Staff's evidence, on a *prima facie* standard, gives rise to reasonable inferences capable of supporting the allegations. In coming to this conclusion we have considered the relationship between Azeff and Client A, the testimony of Client A and the proximity of communications and trading activity by Azeff's clients.

DATED at Toronto this 25th day of November 2014.

"Alan Lenczner"

Alan J. Lenczner

"AnneMarie Ryan"

AnneMarie Ryan

"Catherine Bateman"

Catherine E. Bateman