Ontario Securities Commission
Commission des valeurs mobilières de l'Ontario
P.O. Box 55, 19th Floor
20 Queen Street West
Toronto ON M5H 3S8
CP 55, 19e étage
20, rue queen ouest
Toronto ON M5H 3S8

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

- AND -

IN THE MATTER OF SHANE SUMAN
AND MONIE RAHMAN

REASONS AND DECISION

Hearing:	July 27, 30 and 31, 2009 August 4, 5, 6, 7, 10, 12, 13 and 21, 2009 March 29, 30 and 31, 2010 April 1, 6 and 7, 2010 July 8 and 9, 2010	
Decision:	March 19, 2012	
Panel:	James E. A. Turner Paulette L. Kennedy	- Vice-Chair and Chair of the Panel - Commissioner
Appearances:	Cullen Price Matthew Britton Carlo Rossi	- For the Ontario Securities Commission
	Shane Suman	- Representing himself
	Randy Bennett Sara Erskine Mario Thomaidis	- For Monie Rahman

TABLE OF CONTENTS

REASONS AND DECISION

I. INTRODUCTION

[1] This matter arises out of a Notice of Hearing issued by the Ontario Securities Commission (the "**Commission**") on July 24, 2007 in connection with a Statement of Allegations issued by Staff of the Commission ("**Staff**") on the same day. An Amended Statement of Allegations was issued on October 7, 2008 and a Further Amended Statement of Allegations was issued on January 20, 2009.

[2] Staff alleges that Shane Suman ("**Suman**"), who was at the time an employee of MDS Sciex ("**MDS Sciex**"), a division of MDS Inc. ("**MDS**"), communicated an undisclosed material fact to his wife, Monie Rahman ("**Rahman**"). The material fact was that MDS was proposing to acquire Molecular Devices Corporation ("**Molecular**" or "**MDCC**"), a public company listed on NASDAQ in the United States (the "**Proposed Acquisition**" or the "**Acquisition**"). Staff alleges that between January 24, 2007 and January 26, 2007 (the "**Relevant Time**"), Suman and Rahman (together, the "**Respondents**") purchased securities of Molecular with knowledge of the Proposed Acquisition. The Proposed Acquisition was publicly announced on January 29, 2007 (the "**Announcement**").

[3] There is no dispute that the Respondents purchased 12,000 Molecular shares and 900 option contracts entitling the holder to purchase an aggregate of 90,000 Molecular shares (the Molecular shares and options purchased by the Respondents are referred to as the "**Molecular Securities**") between January 24, 2007 and January 26, 2007, and sold them all by March 16, 2007 for a profit of $954,938.07 (USD). Nor is there any dispute that Suman was a "person in a special relationship" with MDS, a reporting issuer, or that the Proposed Acquisition was a material fact with respect to both MDS and Molecular that had not been generally disclosed at the Relevant Time. The key issues in dispute are whether Suman learned of the Proposed Acquisition through his IT role at MDS Sciex, whether he informed Rahman of it, and whether Suman and Rahman purchased the Molecular Securities with knowledge of the Proposed Acquisition.

[4] Staff alleges that Suman contravened subsection 76(2) of the *Securities Act*, R.S.O. 1990, c. S.5 (the "**Act**") by informing Rahman of the Proposed Acquisition. Staff acknowledges that subsection 76(1) of the Act does not apply to the Respondents' purchases of the Molecular Securities because Molecular was not a "reporting issuer" as defined in the Act. However, Staff alleges that the Respondents engaged in what would have been illegal insider trading within the meaning of subsection 76(1) of the Act if Molecular had been a reporting issuer. Accordingly, Staff alleges that trading was contrary to the public interest.

II. SUBMISSIONS OF THE PARTIES

A. Staff's Submissions

[5] Staff submits that Suman, who was at the time employed in the information technology ("**IT**") group at MDS Sciex, learned of the Proposed Acquisition, which was code-named

"**Project Monument**", on or about January 23, 2007 through his IT role at MDS Sciex, and that he informed Rahman of it.

[6] Staff acknowledges that there is no direct evidence showing that Suman knew about the Proposed Acquisition at the Relevant Time or that Suman informed Rahman of it prior to the Respondents' purchases of the Molecular Securities. Accordingly, in these respects, Staff's case depends on circumstantial evidence.

[7] Staff submits that Suman had the ability and opportunity to learn of the Proposed Acquisition through his IT role at MDS Sciex. Staff also submits that the Respondents' "well-timed, highly uncharacteristic, risky, substantial and highly successful" purchases of the Molecular Securities marked a fundamental shift in their pattern of trading and give rise to the clear and overwhelming inferences that Suman learned of the Proposed Acquisition through his IT role at MDS Sciex, informed Rahman of it and that the Respondents purchased the Molecular Securities with knowledge of the Proposed Acquisition. Staff submits that the Respondents' explanation for the purchases of the Molecular Securities, that those purchases were based on financial research conducted by the Respondents, is not credible and is not the most probable conclusion based on the combined weight of the evidence.

B. The Respondents' Submissions

[8] The Respondents deny that they knew of the Proposed Acquisition when they purchased the Molecular Securities. They testified that they purchased the Molecular Securities based on financial research they had conducted. The Respondents note that Staff did not call a single witness who could directly confirm that Suman learned of the Proposed Acquisition from someone at MDS or through his role in the IT group at MDS Sciex; nor was Staff able to identify a single document showing that Suman had actual knowledge of the Proposed Acquisition at the Relevant Time. The Respondents submit that rather than drawing inferences that flow reasonably and logically from the established facts, Staff's case is based on pure conjecture and speculation that Suman "could have" or "must have" found out about the Proposed Acquisition. They submit that Staff failed to consider or investigate alternative explanations for the Respondents' purchases, and failed to make timely efforts to obtain backup data and information that could prove or disprove Staff's speculation that Suman learned of the Proposed Acquisition through his IT role at MDS Sciex.

III. RELEVANT LAW

A. Insider Trading and Tipping

1. Insider Trading

[9] Subsection 76(1) of the Act provides as follows:

> No person or company in a special relationship with a reporting issuer shall purchase or sell securities of the reporting issuer with the knowledge of a material fact or material change with respect to the reporting issuer that has not been generally disclosed.

[10] A "material fact" is defined in subsection 1(1) of the Act as follows:

> "material fact", where used in relation to securities issued or proposed to be issued, means a fact that significantly affects, or would reasonably be expected to have a significant effect on, the market price or value of such securities …

[11] There is no doubt that the Proposed Acquisition constituted a material fact with respect to Molecular. It was a proposal by MDS to acquire all of the Molecular shares at a significant premium to the market price of those shares. The market price of the Molecular shares was approximately $23 per share on January 23, 2007. The offer made by MDS for those shares was at $35.50 per share. Accordingly, MDS's intention to make the Proposed Acquisition was a fact that would reasonably be expected to have a significant effect on the market price or value of Molecular shares and options. It was, however, also a material fact with respect to MDS. MDS treated the Proposed Acquisition as a material change (as defined in the Act) and issued a news release and filed a material change report when it publicly announced the Proposed Acquisition. Counsel for Rahman acknowledged at the hearing that knowledge of an acquisition such as the Proposed Acquisition generally constitutes a material fact.

[12] There is no dispute that Molecular was a public company in the U.S. that was listed on NASDAQ. It was *not,* however*,* a "reporting issuer" as defined in subsection 1(1) of the Act.

[13] Accordingly, Staff does not allege that the Respondents breached subsection 76(1) of the Act because that section applies only to purchases and sales of securities of a "reporting issuer". Staff submits, however, that the purchases by the Respondents of the Molecular Securities would have constituted illegal insider trading prohibited under subsection 76(1) of the Act but for the fact that Molecular was not a reporting issuer.

[14] That submission rests on the allegation that Suman and Rahman were in a "special relationship" with Molecular. There is no question that if Molecular had been a reporting issuer under the Act, Suman would have been in a special relationship with Molecular within the meaning of subsection 76(5)(c) of the Act. Suman was an employee of a reporting issuer (he was an employee of MDS Sciex, a division of MDS) that was proposing to make a take-over bid for, or to become a party to a merger or other business combination with, Molecular (within the meaning of subsections 76(5)(a)(ii) or (iii) of the Act). Accordingly, Suman would have been in a special relationship with Molecular. Rahman would have been in a special relationship with Molecular within the meaning of subsection 76(5)(e) of the Act if she learned of the Proposed Acquisition from Suman (i.e., she was a "tippee"). In our view, Rahman knew or ought reasonably to have known that Suman was in a special relationship with Molecular if she learned of the Proposed Acquisition from him. Accordingly, Rahman would have been in a special relationship with Molecular within the meaning of subsection 76(5)(e) of the Act.

[15] Accordingly, Staff submits that while the Respondents' purchases of the Molecular Securities did not strictly breach subsection 76(1) of the Act, those purchases constituted conduct that was contrary to the public interest. Staff relies in this respect on *Re Danuke* (1981) OSCB 31c ("***Re Danuke***") at pp. 39c-40c and *Re Seto*, [2003] A.S.C.D. No. 270 ("***Re Seto***") at paras. 42 and 43. Staff submits that, in both those cases, the respondents had a technical defence to an

allegation of insider trading but were found by their conduct to have acted contrary to the public interest.

2. Insider Tipping

[16] Staff also alleges that Suman breached subsection 76(2) of the Act by informing ("tipping") Rahman of a material fact with respect to MDS that had not been generally disclosed, namely MDS's intention to make the Proposed Acquisition.

[17] Subsection 76(2) of the Act provides as follows:

> No reporting issuer and no person or company in a special relationship with a reporting issuer shall inform, other than in the necessary cause of business, another person or company of a material fact or material change with respect to the reporting issuer that has not been generally disclosed.

[18] There is no dispute that MDS was a reporting issuer at the Relevant Time and that Suman, as an employee of MDS Sciex, a division of MDS, was a person in a special relationship with MDS within the meaning of subsection 76(5)(c) of the Act. Nor is there any dispute that MDS's intention to make the Proposed Acquisition was a material fact with respect to MDS that had not been generally disclosed (we will refer to such a fact as an "**undisclosed material fact**".).

[19] The principal factual issues in dispute in respect of this allegation are (i) whether Suman obtained knowledge of the Proposed Acquisition through his IT role at MDS Sciex, and (ii) whether Suman communicated that undisclosed material fact to Rahman.

3. Seriousness of Insider Tipping and Trading

[20] The purposes of the Act are set out in section 1.1. That section states that those purposes are:

> (a) to provide protection to investors from unfair, improper or fraudulent practices; and
>
> (b) to foster fair and efficient capital markets and confidence in capital markets.

[21] In *Re Rankin*, the Commission made the following comments about insider trading and tipping:

> In dismissing an appeal from an insider trading conviction in *R. v. Plastic Engine Technology Corp.*, [1994] 3 C.C.L.S. 1, Mr. Justice Farley held that insider trading undermines the capital markets even where the insider did not personally profit from the trades at issue, but sold shares for the benefit of a friend. The court recognized that section 76 is aimed at ensuring that investors have an equal opportunity to consider material information in reaching their investment decisions (at 24). Both the insider trading prohibition and the tipping prohibition protect equal opportunity by restricting people who have access to

> material information before it is generally disclosed from trading or assisting others in trading with knowledge of that information, to the disadvantage of investors generally.
>
> Subsection 76(2) of the Act in effect imposes an obligation on those persons with access to confidential material information to preserve the confidentiality of that information and not to illegally communicate it to third parties. Doing so not only constitutes a clear breach of the Act but also puts a tippee in a position to both illegally trade on the basis of that information and to illegally communicate it to others. Tipping is the likely cause of many run-ups in the price of a stock in advance of the public announcement of a merger or acquisition transaction. Such conduct and the resulting market impact significantly undermine confidence in our capital markets and are manifestly unfair to investors.
>
> (*Re Rankin* (2008), 31 OSCB 3303 ("***Re Rankin***"), at paras. 28-29)

[22] The Commission generally views insider tipping and insider trading as equally reprehensible. In *Pollitt (Re)*, the Commission made the following statement in approving a settlement agreement:

> Tipping is just as serious as illegal insider trading. It is conduct that undermines confidence in the marketplace. As a result, it is in the public interest to deal swiftly and firmly with violations that constitute tipping.
>
> (*Pollitt (Re)*, (2004), 27 OSCB 9643, at para. 33)

[23] Accordingly, insider tipping and insider trading are not only illegal under the Act but also significantly undermine confidence in our capital markets and are manifestly unfair to investors. Insider tipping of an undisclosed material fact is a fundamental misuse of non-public information that gives the tippee an informational advantage over other investors and may result in the tippee trading in securities of the relevant reporting issuer with knowledge of the undisclosed material fact, or tipping others. Further, trading in securities by a person with knowledge of an undisclosed material fact engages the purposes of the Act set out in section 1.1 of the Act and is conduct contrary to the public interest, even if the trading may not technically breach subsection 76(1) of the Act. Those participating in our capital markets are well aware of the seriousness with which Canadian securities regulators view illegal tipping and illegal insider trading.

B. Standard of Proof

[24] The standard of proof in an administrative proceeding before the Commission is the civil standard of the balance of probabilities.

[25] In *F. H. v. McDougall*, the Supreme Court of Canada held that there is only one standard of proof in civil proceedings, which is the balance of probabilities, and that the requirement for evidence that is "clear, convincing and cogent" does not elevate the civil standard of proof beyond the balance of probabilities. The Court stated that:

> ... I think it is time to say, once and for all in Canada, that there is only one civil standard of proof at common law and that is proof on a balance of probabilities. Of course, context is all important and a judge should not be unmindful, where appropriate, of inherent improbabilities or the seriousness of the allegations or consequences. However, these considerations do not change the standard of proof.
>
> (*F. H. v. McDougall*, [2008] S.C.J. No. 54 ("***McDougall***"), at para. 40)

[26] The Court in *McDougall* went on to comment that:

> To suggest that depending upon the seriousness, the evidence in the civil case must be scrutinized with greater care implies that in less serious cases the evidence need not be scrutinized with such care. I think it is inappropriate to say that there are legally recognized different levels of scrutiny of the evidence depending upon the seriousness of the case. There is only one legal rule and that is that in all cases, evidence must be scrutinized with care by the trial judge.
>
> (*McDougall, supra,* at para. 45)

[27] The Supreme Court of Canada reaffirmed in *McDougall* that "the evidence must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test" (*supra,* at para. 46).

[28] The Commission has considered and adopted the analysis in *McDougall* in a number of decisions (including *Re Sunwide Finance Inc.* (2009), 32 OSCB 4671, at paras. 26 to 28 ("***Re Sunwide***"); and *Re White* (2010), 33 OSCB 1569, at paras. 22 to 25).

[29] The Respondents draw our attention to the following statement in *McDougall*:

> By contrast, in civil cases, there is no presumption of innocence. As explained by J. Sopinka, S. N. Lederman and A. W. Bryant, *The Law of Evidence in Canada* (2nd ed. 1999), at p. 154:
>
> > Since society is indifferent to whether the plaintiff or the defendant wins a particular civil suit, it is unnecessary to protect against an erroneous result by requiring a standard of proof higher than a balance of probabilities.
>
> It is true that there may be serious consequences to a finding of liability in a civil case that continue past the end of the case. However, the civil case does not involve the government's power to penalize or take away the liberty of the individual.
>
> (*McDougall, supra,* at para. 42)

[30] We recognise that society is not indifferent to the outcome of a Commission administrative proceeding and that there may be serious consequences to a finding of non-

compliance with the Act or of conduct contrary to the public interest. However, it is well settled that our authority to impose sanctions under subsection 127(1) of the Act is not a criminal power. Our powers under that subsection are regulatory in nature, prospective in operation and preventative in effect (*Re Mithras Management Ltd. et al* (1990), 13 OSCB 1600).

[31] The civil standard of proof requires us to decide whether the alleged events are more likely than not to have occurred (*McDougall, supra,* at para. 44, *Re Sunwide, supra,* at para. 28 and *Re Al-Tar Energy Corp.* (2010), 33 OSCB 5535 at paras. 32 to 34). That determination must be based on clear, convincing and cogent evidence.

C. The Importance of Circumstantial Evidence In This Matter

[32] This case turns on circumstantial evidence. There is no direct evidence that Suman learned of the Proposed Acquisition from someone at MDS Sciex or through his IT role there. Similarly, there is no direct evidence that he communicated that fact to Rahman. Accordingly, there is no direct evidence that Suman and Rahman purchased the Molecular Securities with knowledge of the Proposed Acquisition. The Respondents expressly deny having done so.

[33] The question we must answer is whether there is clear, convincing and cogent evidence that, more likely than not, Suman learned of the Proposed Acquisition through his IT role at MDS Sciex, informed Rahman of it and that the Respondents purchased the Molecular Securities with knowledge of the Proposed Acquisition.

[34] The parties agree that any inferences we make based on the evidence must arise reasonably and logically from the facts established by the evidence. They disagree, however, whether that test has been met with respect to the inferences Staff invites us to make.

[35] Staff submits that Suman's ability and opportunity to acquire knowledge of the Proposed Acquisition, together with the sequence of events culminating in the Respondents' well-timed, highly uncharacteristic, risky, substantial and highly successful purchases of the Molecular Securities, give rise to compelling inferences that Suman learned of the Proposed Acquisition through his IT role at MDS Sciex, informed Rahman of it and that the Respondents purchased the Molecular Securities with knowledge of the Proposed Acquisition.

[36] The Respondents submit that there is a complete absence of evidence from which the inferences referred to in paragraph 35 of these reasons can reasonably and logically be made. The Respondents submit that Staff's evidence in this respect is mere conjecture and speculation and that Staff has wholly failed to discharge its burden of proof.

[37] Later in these reasons, we address the law with respect to our reliance on circumstantial evidence and the making of inferences from the facts established by the evidence (see the discussion commencing at paragraph 279 of these reasons).

IV. OVERVIEW OF THE EVIDENCE

A. Purchases and Sales of the Molecular Securities

[38] Staff and the Respondents agreed to a Statement of Agreed Facts (attached as Schedule A to these reasons). The principal agreed facts are as follows:

> (a) The value of the Respondents' assets on January 23, 2007 was $370,227.86 (USD).
>
> (b) On January 24, 2007, from 9:34 a.m. to 2:42 p.m., Rahman purchased 12,000 Molecular shares for the Respondents' account in six transactions of 2,000 shares each at prices from $23.88 to $24.03. The total purchase price of those shares was approximately $287,700 (USD).
>
> (c) On January 24, 25 and 26, 2007, the Respondents purchased 900 option contracts to purchase an aggregate of 90,000 Molecular shares, all exercisable at $25.00, with expiry dates of February 17, 2007, March 17, 2007 or April 21, 2007. The purchases were made in 26 transactions carried out from 9:40 a.m. on January 24, 2007 to 12:53 p.m. on January 26, 2007. Suman made 22 of the purchases from an internet address at MDS and two from his home computer, and Rahman made one of the purchases. The total purchase price of the options was approximately $103,600 (USD).
>
> (d) The Respondents began selling the Molecular options at 11:14 a.m. on January 29, 2007.[1] By 2:47 p.m. on January 30, 2007, they had sold 350 options in ten transactions. The remaining 12,000 Molecular shares and 550 options were sold between February 1, 2007 and March 16, 2007 (or, in the case of certain options, exercised with the shares issued then being sold).

[39] The purchases of the Molecular Securities were made in Rahman's trading account over which Suman also had trading authority. Each of Suman and Rahman authorized the purchase and sale of some of the Molecular Securities in that account (see Schedule A).

[40] There is no dispute that the Respondents' purchased the Molecular Securities for approximately $391,300 (USD) in total and that the Respondents made a profit of $954,938.07 (USD) from selling the Molecular Securities.

B. Staff's Evidence

[41] Staff presented evidence on the following matters:

> (a) Suman's IT skills and his responsibilities in the IT group at MDS Sciex;
>
> (b) a conversation in December 2006 or early January 2007 about the capacity of MDS Sciex's e-mail server to handle double the number of e-mail users; that

[1] The Proposed Acquisition was publicly announced prior to 10:00 a.m. on January 29, 2007.

conversation was between Suman and two MDS Sciex managers – Lucas Racine ("**Racine**"), Suman's immediate supervisor, who was Manager of Business Information Systems at MDS Sciex, and Paul Young ("**Young**"), who was Vice President of Business Information Systems and one of the MDS Sciex employees aware of and working on the Proposed Acquisition (those employees who were aware of the Proposed Acquisition are referred to as the "**Sciex Deal Team**");

(c) Suman's involvement in helping Dawn Penner ("**Penner**") resolve a problem with her BlackBerry on January 18 or 19, 2007; Penner was Director of Human Resources for MDS Sciex at the Relevant Time and was a member of the Sciex Deal Team;

(d) Suman's interaction on January 23, 2007 with Sylvia Halligan ("**Halligan**"), a communications consultant at MDS Sciex, who asked Suman to help her retrieve from her computer a lost document she was preparing for Andrew Boorn ("**Boorn**"), the President of MDS Sciex. That document was referred to as "Andy's Monument Message";

(e) Suman's internet browsing on January 23, 2007, which included searches for the terms "MDCC" and "monument inc.";

(f) Suman's ability to view or obtain Project Monument e-mails passing through the NT Filter (the server that ran SurfControl, the spam filter program at MDS Sciex);

(g) records of Suman's telephone calls with Rahman, which indicate that he had a 104 minute telephone conversation with Rahman, who was then living in Logan, Utah, as he left the office at about 7:00 p.m. on January 23, 2007 (that telephone call is referred to in these reasons as the January 23 Call);

(h) the timing of the purchases of the Molecular Securities, which began as soon as markets opened on January 24, 2007, the percentage of the market in Molecular shares and options represented by the Respondents' purchases on the relevant days, the nature of the purchases and the Respondents' previous trading history;

(i) Suman's internet browsing on January 24, 2007, which included searches related to possible insider trading charges against Martha Stewart and searches relating to the August 2006 take-over of Loudeye Corp. ("**Loudeye**"), a digital music company in which the Respondents had held shares;

(j) a large number of calendar fragments found on one of Suman's Computers relating to meetings and events related to "Project Monument";

(k) Suman's statements to Staff investigators during voluntary interviews on February 1 and 2, 2007; and

(l) Suman's installation and running of Window Washer, a software program to permanently wipe data and information, on three of his Computers on February 3, 2007, the day after Suman's second interview with Staff.

C. Witnesses Called by Staff

[42] Staff called nine witnesses. Five witnesses were employees of MDS Sciex – Boorn, Young, Racine, Halligan and Penner – who testified about MDS Sciex, the events leading up to the Proposed Acquisition, Suman's employment history with MDS Sciex and his responsibilities in the IT group, and the opportunities Suman had to obtain knowledge of the Proposed Acquisition.

[43] Jordan Materna ("**Materna**"), an official with the Chicago Board of Options Exchange (the "**CBOE**"), testified about the CBOE investigation of the Respondents' options purchases. Through Materna, Staff introduced reports prepared by Staff that were based on information provided by the CBOE relating to the Respondents' purchases, as well as a chart titled "Summary of Respondents' Molecular Options Volume" (see Schedule A and paragraph 200 of these reasons for information with respect to the Respondents' purchases of Molecular options).

[44] Two Staff investigators, George Gunn ("**Gunn**"), who was Manager of Surveillance with the Commission, and Colin McCann ("**McCann**"), who was a senior investigator with the Commission, testified about the investigation, including Staff's two voluntary interviews of Suman: an unrecorded and untranscribed telephone interview on February 1, 2007 (the "**First Staff Interview**") and a transcribed interview that took place in one of the investigators' cars in the MDS Sciex parking lot on February 2, 2007 (the "**Second Staff Interview**"). Through Gunn, Staff introduced the transcript of the Second Staff Interview.

[45] Through McCann, Staff introduced the Respondents' trading records obtained from E*Trade Canada, consisting of Rahman's account statements from March 2004 to June 2007 and Suman's account statements from September 1999 to March 2004 (the "**Trading Records**").

[46] Through McCann, Staff also introduced the record of phone calls made to and from Suman's MDS Sciex BlackBerry for the period from September 1, 2006 to February 1, 2007 (the "**BlackBerry Cell Phone Records**"). Staff also introduced, through McCann, a chart titled "Suman and Rahman Prior Options Experience", which was prepared by Staff based on the Trading Records.

[47] McCann also testified about his examination of the computers used by Suman. Those computers included the two drives of Suman's home computer (which we will refer to as "**Computer Home 1A**" and "**Computer Home 1B**"), Suman's workstation computer at MDS Sciex, which also had two drives (which we will refer to as "**Computer 201A**" and "**Computer 201B**"), Suman's laptop at MDS Sciex (which we will refer to as "**Computer 204**"), a computer at Suman's workstation that Suman used to perform account recoveries on behalf of other users (which we will refer to as "**Computer 202**"), and a computer used by Suman as NT Filter administrator (which we will refer to as "**Computer 206**"). (Those computers are referred to collectively as "**Suman's Computers**" or the "**Computers**"). McCann used NetAnalysis, a

forensic software program, to generate the Internet History Reports for the Computers that Staff introduced as evidence (see paragraph 135 of these reasons).

[48] Finally, Staff called Steve Rogers ("**Rogers**"), President of Digital Evidence International, Inc. at the time of the investigation, who was qualified by us as an expert in computer forensics. Rogers testified about his analysis of the contents of Suman's Computers. Rogers prepared three reports which were admitted in evidence and were respectively dated September 3, 2007 ("**Rogers' First Report**"), January 15, 2009 ("**Rogers' Second Report**"), and March 29, 2009 ("**Rogers' Third Report**").

D. Respondents' Motions at the Completion of Staff's Case

[49] On August 13, 2009, immediately after Staff closed its case, Rahman brought two motions: a motion to exclude the NetAnalysis evidence relating to the examination of Suman's Computers and a non-suit motion. Suman joined in both motions. On October 9, 2009, we released our decision denying both motions (See *Reasons and Decision on a Motion to Exclude Evidence and a Non-Suit Motion* (2009), 32 OSCB 8375) (the "**Motions Decision**"). See paragraph 144 of these reasons for more information with respect to the Motions Decision.

E. Witnesses Appearing on Behalf of the Respondents

[50] The hearing on the merits resumed on March 29, 2010. Both Suman and Rahman testified.

[51] Suman testified that he and Rahman purchased the Molecular Securities based on their own investment research. Suman testified that the Respondents had established five criteria that they used to determine whether to invest in an issuer and that Molecular met all of those criteria (see the discussion commencing at paragraph 170 of these reasons). He identified in this respect two news releases about Molecular, dated January 10 and January 17, 2007, respectively, that he said he reviewed on or about January 23, 2007, and a print-out from Yahoo Finance reflecting a ratings upgrade of Molecular by Matrix Research on January 24, 2007. Suman testified that he reviewed the ratings upgrade that day.

[52] Through Rahman, the Respondents introduced a brief of documents relating to Molecular, including charts showing the closing prices of Molecular shares for the three months and one year periods to January 23, 2007 and Rahman's trading records for the two years following the purchase of the Molecular Securities. That brief also included the records of incoming telephone calls to MDS Sciex on its toll free telephone line for the period from November 16 to December 20, 2006 and December 28, 2006 to February 5, 2007 (the "**Toll Free Phone Records**").

[53] The Respondents called as an expert witness, Kevin Lo ("**Lo**"), who was a director in the electronic discovery practice at LECG Canada Ltd. at the time of the investigation. Lo was qualified by us as an expert in computer forensics and testified about his analysis of the contents of Suman's Computers. The Respondents introduced in evidence an affidavit by Lo dated July 25, 2008, his first report dated November 19, 2008 and a second report dated March 5, 2009 ("**Lo's Second Report**").

F. Disagreements Between the Experts

[54] A large portion of the hearing on the merits was a "battle of the experts". Rogers and Lo disagreed about a number of matters related to the data and information found on Suman's Computers. For instance, the experts disagreed about: the reliability of the Internet History Reports, especially the timing of certain searches; whether SurfControl, the spam filter software used by MDS Sciex, would allow Suman, as NT Filter administrator, to view or access other users' e-mails; whether Suman used Window Washer to manually wipe data and information from his Computers or whether Window Washer was set on an automatic function and was used simply to maintain computer efficiency; and whether the presence of a large number of calendar fragments on one of Suman's Computers reflected the normal use of Microsoft Outlook Calendar or was evidence that Suman had obtained surreptitious access to the calendars of other MDS Sciex employees.

[55] We discuss the evidence with respect to these matters in detail below.

V. THE EVIDENCE

A. Events leading up to the Announcement of the Acquisition

1. The Evidence

[56] Boorn testified that before MDS acquired Molecular, MDS's business was focused on the technology of mass spectrometry, but it "had been working for some time on ways to expand that footprint". On November 10, 2006, Molecular's financial advisors, UBS Securities LLC ("**UBS**"), contacted MDS to discuss a possible strategic transaction for an acquisition by MDS of Molecular. MDS entered into discussions with UBS and a non-disclosure agreement was signed on November 22, 2006. Initial bids from interested acquirors were made on December 8, 2006. MDS submitted a "final" bid to Molecular on January 17, 2007, priced at $31.25 per share, and was the successful bidder. After some further negotiations, an offer of $35.50 per share was accepted in principle on January 20, 2007, subject to the approval of both boards of directors and of Molecular's shareholders. The MDS board of directors gave final approval for the transaction on January 26, 2007 and the Molecular board of directors gave final approval the next day, January 27, 2007. The merger agreement was signed on January 28, 2007.

[57] A joint press release was issued by MDS and Molecular announcing the Proposed Acquisition on Monday, January 29, 2007 prior to 10:00 a.m. (the "**Joint News Release**"). The Joint News Release is titled "MDS Offers to Acquire Molecular Devices for US$615 Million in Major Expansion of MDS Sciex Business". The three bullet points immediately under the headline state:

- New MDS business unit offers broader array of customer solutions by combining leadership positions in Mass Spectrometry and Cellular Analysis

- Outstanding potential to exploit combined R&D expertise, a strengthened distribution channel and global manufacturing footprint

- Transaction expected to bring US$190 million in revenue and US$45-$50 million in EBITDA in the first year of ownership

[58] Boorn testified that the Molecular acquisition is the largest MDS has ever done, before or since. As a result of the transaction, MDS created a new unit combining the Molecular and MDS Sciex businesses, making the MDS Sciex unit the largest revenue contributor to MDS, whereas it had, in the past, been the smallest. MDS filed a material change report with respect to the Joint News Release and the Proposed Acquisition on January 29, 2007.

[59] Boorn also testified about the due diligence process related to the Proposed Acquisition. Confidential deal teams were formed, one at MDS and one at MDS Sciex. The Sciex Deal Team was comprised of fifteen members, including Boorn and Penner. Boorn testified that members of the Sciex Deal Team were reminded of the confidentiality agreement they signed when they joined the company and that the Proposed Acquisition was a confidential transaction between public companies. The MDS Global Business Practice Standards that employees of MDS were required to sign and reconfirm each year (the "**Standards**") included a statement that employees would maintain the confidentiality, privacy and security of information entrusted to them in strict accordance with legal and ethical obligations. The Standards contain an explanatory page that gives, as an example of "confidential information", "planned business acquisitions or divestitures". As part of the Standards there is an "**Insider Trading Standard**" that includes the following statement:

> **What are the Limitations on Trading?**
>
> As MDS employees, we may have information about MDS businesses that other investors do not have. This knowledge may create an unfair advantage if we buy or sell MDS shares. Therefore, if you are in possession of "material non-public information", you should not buy or sell MDS shares or otherwise use the information for personal gain. This "material non-public information" should be treated as confidential and should not be shared with anyone else. These insider trading restrictions also may apply to the shares of companies negotiating, competing, doing business or seeking to do business with MDS. These requirements apply to all MDS employees regardless of your position.

[60] The Insider Trading Standards also state that "'Material' information is any news or fact that a reasonable investor could consider important in deciding whether to buy, sell or hold the shares of a company", including "news of an acquisition or divestiture of a significant business division or subsidiary". And further: "'Non-Public' information is information that has not been previously disclosed to the general public and is otherwise not available to the general public."

[61] Boorn testified that a limited number of people at MDS Sciex had knowledge of the Proposed Acquisition, the information with respect to the Proposed Acquisition was maintained on a secure basis, and MDS took steps to preserve confidentiality and to prevent the dissemination of information related to the Proposed Acquisition. The Proposed Acquisition was given the code name "Project Monument".

[62] The prices at which the bids were submitted by MDS for Molecular were discussed only among MDS, Boorn and the Chief Financial Officer of MDS Sciex, and were not known to everyone on the Sciex Deal Team.

2. Conclusion: Events Leading up to the Announcement of the Acquisition

[63] The Respondents did not dispute Boorn's evidence with respect to the events leading up to the Announcement. We accept that evidence.

B. Suman's Skills and Responsibilities

1. The Evidence

[64] Suman testified that he started working at MDS Sciex on contract in November 2003. He worked in IT support, including e-mail administration, collaborative software and network functionalities. On December 18, 2006, he was hired as a Global Solutions Architect. He acknowledged that on December 28, 2006, he signed the "MDS Personal Pledge" stating that he had received and read the Standards and understood that "MDS expects me to carry out my duties and responsibilities in accordance with such Standards".

[65] Suman's evidence about his employment history at MDS Sciex and his responsibilities in the IT group was corroborated by Racine and Young. Both Racine and Young attested to Suman's IT skills and qualifications, which are evident from his curriculum vitae.

[66] Racine described Suman as "very technically savvy". He testified that "help-desk" problems that others could not solve would escalate to Suman, and that MDS Sciex executives would sometimes go directly to Suman for help, bypassing the help-desk ticket system. Racine described Suman as "an infrastructure generalist" and stated that Suman had the highest level of privileges within the IT group.

[67] Young described Suman as "very well qualified and very effective in applying those qualifications to most of the problems that we gave him". According to Young, relative to his peers who performed a similar function, Suman "seemed to have more knowledge, more technical knowledge than the other players, he was more creative in finding solutions than they were, he tended to work faster than they did, and he was extremely curious and inquisitive about new technologies so he would learn about new technologies very quickly." Young testified that because of his skills and expertise, Suman dealt with the most difficult problems that came to the help-desk and was often asked to help executives, who "generally had a high sense of urgency, and … wanted the problem fixed the first time".

[68] Suman also had specific "administrator" responsibilities in the IT group with respect to the NT Filter, the BlackBerry Enterprise Server and handhelds, and the Connected Backup Application (backup data was outsourced to a third-party service provider). He shared responsibility for the collaboration software and remote access software.

[69] Suman was also the e-mail administrator when he started at MDS Sciex, but well before January 2007, this function had been outsourced to CapGemini, a third-party e-mail service

provider. We heard somewhat conflicting evidence about the timing of the outsourcing and whether Suman had continuing responsibilities as e-mail administrator at the Relevant Time.

[70] Young testified in chief that the outsourcing had occurred in August or September of 2006. On cross-examination, Young was shown his statements given to Staff during his voluntary interview on April 20, 2007, that the change had occurred about a year and a half earlier. The latter time period is consistent with Suman's testimony that he was the e-mail administrator until October or November 2005, when a third-party service provider took over e-mail administration, a role that was later taken over by CapGemini.

[71] This is a relevant issue because Rogers testified that at the meeting he attended at MDS Sciex with Staff investigators on February 23, 2007, Young advised him that Suman was the e-mail administrator. This is reflected in Rogers' First Report, dated September 3, 2007, which states: "As a general comment, Suman would not have been required to undertake any type of surreptitious methods of monitoring e-mail content since he is the e-mail administrator. He would simply have to log onto the Exchange server under the normal capacity as the e-mail administrator and review whatever e-mail messages he wanted to review." This assumption carried through to Rogers' Third Report, dated March 29, 2009. When asked, in examination in chief, whether his conclusion would be affected by evidence that Suman's e-mail administrator responsibilities had been transferred to CapGemini about a year and a half prior to the Relevant Time, Rogers replied that it would. However, Rogers added that he had been told Suman was also the NT Filter administrator and the BlackBerry administrator, roles that also relate to the e-mail system (see paragraph 106 of these reasons for information with respect to the NT Filter). At the end of his examination in chief, Rogers stated that he would make no other changes to his First Report and Third Report.

[72] In cross-examination, Rogers reiterated that Young had told him on February 23, 2007 that Suman was the e-mail administrator and "subsequently told me that in March of this year [2009] when I had a discussion with him that Suman was the e-mail administrator". Rogers testified that Staff had not advised him of Young's statement that Suman was not the e-mail administrator.

[73] Lo's Second Report, dated March 5, 2009, stated: "Suman was the spam-filter administrator, not the e-mail administrator. He did not have administrative privileges on the MAIL server which hosted Microsoft Exchange, and therefore did not have the ability to read or manipulate any other employee's mailbox".

[74] In response, Rogers contacted Young. Rogers' Third Report states "CapGemini was the 'backend' administrator while Suman had administrative privileges on the Exchange server. Those privileges were not removed from Suman when CapGemini assumed their responsibilities". However, Rogers' report, dated April 10, 2009, which was prepared for purposes of a U.S. Securities and Exchange Commission ("**SEC**") proceeding, does not mention that the e-mail administrator function had been outsourced and states "[a]s the e-mail administrator for MDS Suman could review any e-mail or calendaring of events of any MDS employee at any time at his sole discretion and without concern for detection by others".

[75] The Respondents submit that Rogers' evidence on this matter shows that he lacked the impartiality required of an expert witness.

[76] We were not satisfied that Rogers' evidence showed he lacked impartiality or was biased. We stated in the Motions Decision that "[w]e are not satisfied that the Respondents have shown that Rogers is biased or that his evidence is inherently unreliable". Having said that, in coming to our conclusions, we have carefully considered the uncertainties and lack of clarity surrounding portions of the evidence of each of Rogers and Lo with respect, in particular, to Suman's internet searches, the operation of the NT Filter, the presence of calendar fragments on one of Suman's Computers, and Suman's use of Window Washer.

2. Conclusion: Suman's Skills and Responsibilities

[77] We conclude that Suman was not the MDS Sciex e-mail administrator at the time of the events that are the subject matter of this proceeding. Suman was, however, the NT Filter administrator and the BlackBerry administrator. Suman's responsibilities included walk-up enquiries and direct requests from executives with respect to computer or BlackBerry problems. Suman did not dispute that he was often approached to solve difficult computer or software problems because of his skills and his creativity in finding solutions. Suman was clearly an IT expert at MDS Sciex.

C. Suman's Conversation with Young about Expanding E-mail Capacity

1. The Evidence

[78] Young testified that in mid-December 2006, he asked Suman whether the Microsoft Exchange system could handle double the number of e-mail users. Suman's response was that the e-mail system could handle the expanded capacity. Young testified that he made no mention of Molecular, MDCC or Project Monument, but made no effort to hide the fact that the question was in the context of an acquisition because "we did that every six months for years, so it was an on-going thing. That's the only reason that I would ever need to know can we add 500 people to our e-mail system. It's hard to ask that question without implying it's an acquisition." He testified that Boorn had previously stated to employees that MDS Sciex was pursuing acquisitions. Young said that he had had similar conversations in the past with Suman and others in the IT group about scaling up e-mail capacity in the event of an acquisition.

[79] Racine was also present during this discussion. He initially testified that the conversation took place about two or three weeks before the Announcement (on January 29, 2007), but later said it happened earlier in December 2006. He testified that Young asked whether the e-mail capacity could be scaled up to accommodate double or triple the number of users. Racine recalled Suman saying yes, the system was built to grow. Racine testified that while he was unaware of the specific reason for the question, "I personally had a pretty good guess that it was related to potential acquisitions, because that was our business strategy at the time, but definitely nothing pertaining to anything, date, time, name of company, nothing like that."

2. Conclusion: Suman's Conversation with Young about Expanding E-mail Capacity

[80] We conclude that in or around mid-December 2006, Young asked Suman, in Racine's presence, whether the MDS Sciex e-mail system could handle double the number of users, and that Suman responded that it could.

[81] There is no evidence that this conversation included any reference to a specific acquisition or target company or any specific reason for expanding e-mail capacity. However, because MDS Sciex employees knew that acquisitions were part of MDS's business strategy, we find it likely that Suman would have concluded from this conversation that MDS was considering the possibility of a very significant acquisition.

D. Suman's Interactions with Penner

1. Synchronizing Penner's BlackBerry

(a) The Evidence

[82] Penner testified that on January 18 or 19, 2007, she approached Suman for help with her BlackBerry, which was not allowing her to accept meeting requests. She testified that Suman could not fix the problem immediately, so she left her BlackBerry with him for several hours while she attended a meeting. She also gave him her BlackBerry password. When Suman returned her BlackBerry, the problem had been resolved. However, within a couple of days Penner noticed that her BlackBerry e-mail was not synchronized with her computer, a problem she had not had before Suman worked on her earlier BlackBerry problem. She returned to Suman for assistance and he synchronized her BlackBerry with her computer in front of her.

[83] Suman testified that to resolve a BlackBerry problem, he would wipe the operating system on the BlackBerry, then re-install it and resynchronize it to the user's computer. He testified that, in these circumstances, the user is not concerned about past e-mails, which are already stored on the user's computer; the concern is that future e-mails be synchronized between the BlackBerry and the user's computer. However, he acknowledged that retained e-mails for some past period would also be synchronized. He testified that the default period for retaining e-mails is three days and the maximum is one or two weeks.

[84] The Respondents objected to Penner's proposed testimony as to whether specific e-mails related to Project Monument were on her BlackBerry when it was in Suman's possession. They submitted that, although Penner mentioned her BlackBerry problems in the Staff questionnaire she completed in March 2007, it was not until the Further Amended Statement of Allegations was issued on January 20, 2009 that Staff first alleged that Suman obtained access to material non-public information while resolving a BlackBerry problem for a member of the Sciex Deal Team. The Respondents then sought to obtain by summons backups and logs for Penner's BlackBerry and for the Microsoft Exchange server. However, backups and logs were no longer available at MDS or at the third-party BlackBerry service provider.

[85] The Respondents submitted that the destruction of evidence gives rise to a rebuttable presumption that the lost or destroyed evidence would not have favoured the party that destroyed it or that the evidence should be excluded. They argued that they would be unable to effectively

cross-examine Penner without the backups and logs, and therefore that the presumption is not rebuttable. In the circumstances, the Respondents submitted that the evidence related to what e-mails were on Penner's BlackBerry should be excluded to prevent an abuse of process.

[86] Staff submitted that Penner's completed questionnaire was disclosed to the Respondents on August 28, 2007, and the transcript of Staff's November 24, 2008 interview of Penner was disclosed shortly after that interview took place. Rogers addressed the issue for the first time in his Second Report, dated January 15, 2009, and it was that development that led to the issue of the Further Amended Statement of Allegations on January 20, 2009, and an adjournment of the merits hearing to allow the Respondents to attempt to obtain further disclosure.

[87] Staff submitted that the law of spoliation does not apply because Staff did not have possession of Penner's BlackBerry or the backups and logs, and because there was no evidence that Staff destroyed evidence to affect the hearing. In any event, Staff submitted that spoliation gives rise to a rebuttable presumption of exclusion, and the presumption may be rebutted by the evidence.

(b) Conclusion: Synchronizing Penner's BlackBerry

[88] We made an oral ruling on the motion to exclude Penner's evidence with respect to what e-mails were on her BlackBerry. With respect to the law of spoliation, we stated that this case can be distinguished from circumstances where information sought by a respondent is destroyed while in Staff's possession. In this case, MDS and the third-party BlackBerry service provider had possession of the information and there was no suggestion that information had been intentionally destroyed at Staff's request so that it could not be used by the Respondents.

[89] However, we recognized that the destruction of the backup evidence with respect to what e-mails were on Penner's BlackBerry meant that the Respondents would be unable effectively to challenge Penner's testimony as to what specific e-mails were on her BlackBerry at the time. In the circumstances, we ruled that Penner could not testify about the specific e-mails that were on her BlackBerry. Absent that evidence, we cannot draw any conclusion as to what e-mails may have been on Penner's BlackBerry when Suman had access to it.

2. Restoring Penner's Laptop

(a) The Evidence

[90] In Rogers' Second Report, he concluded that Computer 202, one of Suman's workstation computers, contained evidence that Suman performed an account recovery of Penner's data from her laptop computer onto Computer 202. The notify.log file on Computer 202 indicates that Computer 202 received information on January 22, 2007 relating to "Project Monument", including "organizational charts", "list of key employees" and "list of key person insurance policies." Rogers testified that in his opinion, Computer 202 continued to use Penner's user account to communicate with the data centre on a continual basis after being used to recover data for her in September 2006. There was no evidence of any other user account on Computer 202.

[91] On cross-examination, Rogers acknowledged that while the notify.log file on Computer 202 contained four entries with "Project Monument" in the drive path, the files themselves were

not found on the computer. He also acknowledged that this is consistent with how the MDS backup software works. Rogers acknowledged that the Application Event Log for Computer 202, which logs user activity, ends at December 17, 2006, and that he would have expected to see some activity if someone was using the computer after that date. For example, Rogers acknowledged that the Application Event Log for Computer 201A (one of the drives on Suman's workstation computer) confirmed that it was used more frequently than Computer 202.

[92] Suman testified that around September 15, 2006, Penner requested a restoration of a file that she had deleted and he restored the file for her, using Computer 202. Suman testified that it was not possible for Penner's laptop to back-up to any of his Computers; it would back-up to the backup server. He denied gaining access to documents on Penner's laptop, including Project Monument documents, as a result of having performed the account recovery for Penner using Computer 202.

[93] Lo's evidence about the operation of the backup software was consistent with Suman's. Lo testified that the four entries identified by Rogers, as well as over 20,000 other entries found on Computer 202's notify.log file, reflect the normal backup actions of Penner's account. He testified that the backup software backs-up data from a user's account to a backup server maintained by a third party service provider, and maintains logs that record its actions. Because Suman had used Computer 202 to restore Penner's computer, the backup software continued to send notify.log messages to Computer 202 as well as to Penner's computer. However, this would not have allowed Suman to read the backed up file.

[94] Penner could not recall Suman helping her do an account recovery for her laptop computer.

(b) Conclusion: Restoring Penner's Laptop

[95] We found Suman's explanation for the information on Computer 202, referred to in paragraph 92 of these reasons, to be credible. That explanation was confirmed by Lo and not disputed by Rogers. Accordingly, the evidence with respect to Suman helping Penner with her laptop does not assist Staff in proving its allegation that Suman learned of the Proposed Acquisition through his IT role at MDS Sciex.

E. Suman's Interaction with Halligan on January 23, 2007

1. Halligan's Evidence

[96] On Monday, January 22, 2007, Halligan was asked to prepare a letter from Boorn for distribution to MDS employees on the day the Proposed Acquisition was to be publicly announced, as well as a slide presentation to be given to managers and employees on and after the Announcement. Halligan was not a member of the Sciex Deal Team, but her manager had recently told her "to be prepared for a lot of work the following week because we [MDS Sciex] were looking at making an offer to acquire a company".

[97] Halligan testified that she started working on the employee letter at around 7:30 a.m. the next day, Tuesday, January 23, 2007. Her manager had e-mailed her some background materials, and she conducted some more research on-line. Halligan testified that the draft letter referred to

"Project Monument" and did not include the name "Molecular Devices". However, the draft letter did include the information that the target company was located in Sunnyvale, California.

[98] Halligan's computer froze at about 9:00 a.m. on January 23, 2007. After trying to retrieve the document herself, she contacted a senior manager about getting IT assistance. She was asked to call Young who, as a member of the Sciex Deal Team, was aware of the Proposed Acquisition. At Young's suggestion, Halligan approached Racine and explained that she had lost a confidential document. Racine walked with her over to Suman's cubicle and asked Suman to help her find the document. Halligan returned to her desk with Suman.

[99] Halligan testified that she explained to Suman that she had lost a confidential document called "Andy's Monument Message" and that if he found it, he could not open it or read it. Halligan stood behind Suman the entire time he worked at her desk. Suman asked Halligan whether she had backed-up the document, but she had not. Halligan testified that Suman was at her desk for about 20 minutes but he was unable to retrieve the document. He left her office at around 10:00 a.m.

2. Racine's Evidence

[100] Racine, who was not a member of the Sciex Deal Team, testified that he first heard the term "Monument" from Halligan, who came to his office in the morning on January 23, 2007. He testified that "she was relatively upset and said she had lost a document on her computer named 'Monument' and that it was very important and it was for Boorn." Racine recalls walking with Halligan back to her office and picking up Suman on the way. Racine could not remember what Halligan said about her problem in Suman's presence, other than that "[s]he was upset. She was definitely worried about getting this document back and she mentioned several times it was for Andy [Boorn], so she was trying to relay her sense of urgency to us". Racine testified that when he left Halligan's office, Suman was sitting in front of her computer looking for the document.

3. Suman's Evidence

[101] Suman's account of his interaction with Halligan on January 23, 2007 was consistent with the testimony of Halligan and Racine on the main points. He testified that as soon as he got to work that day, probably a little after 10:00 a.m., Racine and Halligan approached him. Halligan needed help to retrieve a document called "Andy's Monument Message". Suman testified that he did not find the document and that Halligan stayed with him while he searched for it on her computer. Asked whether he knew the document was sensitive, Suman testified that all human resources documents are sensitive. He testified that he did not know that "Monument" was related to "Project Monument" and that he was not aware of the term "Project Monument".

[102] Suman was unwilling to acknowledge that there was a sense of urgency and sensitivity about Halligan's request for his assistance. In his testimony in chief, Suman was willing to say only that all human resources documents were sensitive. However, in cross-examination, Suman acknowledged knowing that "Andy" referred to Boorn and that the document was confidential. He also acknowledged that Halligan had told him not to read the document if he found it (although he insisted this was usual for human resources documents), and that she had stood over

his shoulder while he searched for it. He testified that she "may have" told him the document was for a meeting she was having with Boorn later that day but that he did not have a clear recollection of that. He acknowledged that Halligan seemed concerned about the document.

4. Conclusion: Suman's Interaction with Halligan on January 23, 2007

[103] There is no dispute that on the morning of January 23, 2007, Suman was asked to help Halligan find a document called "Andy's Monument Message". Suman's testimony was consistent with Halligan's: she stayed with him while he searched for the document on her computer, but he did not find it. There is no evidence that Suman continued to search for the document, or that he found it, after leaving Halligan's office.

[104] Suman was reluctant to acknowledge the urgency of Halligan's request and we found him evasive on this point. We accept the evidence of Halligan, which was corroborated by Racine and accords with common sense, that she would have appeared "stressed" when she approached Suman with an urgent request for help to find a document that she was preparing for the President of MDS Sciex and that was required later that day. If her manner alone was not sufficient to convey the sensitivity of the document she was looking for, her insistence on watching over his shoulder as he worked, and the presence of Racine, who was Suman's manager, for at least part of the time Suman was in Halligan's office, would have made it clear to Suman that Halligan's request for assistance in finding the lost document was not a routine request.

[105] We conclude that Suman would have understood from his interaction with Halligan that the President of MDS Sciex was about to deliver a message relating to something confidential that was referred to as "Monument". This is important evidence because it shows that Suman became aware of the term "monument" on the morning of January 23, 2007. That term relates to the Project Monument code name for the Proposed Acquisition.

F. Suman's Role as NT Filter Administrator

[106] The NT Filter was used by MDS Sciex to filter spam and other questionable e-mails entering its e-mail server. Suman was the NT Filter administrator and had access to the NT Filter. Staff alleges that as NT Filter administrator, Suman could have accessed Project Monument e-mails that were sent from the electronic data room established by Molecular to permit due diligence investigations by members of the Sciex Deal Team. Those e-mails passed through the NT Filter and Staff alleges that they included e-mails that linked "Project Monument" with "Molecular Devices" in the subject line. The evidence relied on by Staff includes certain Project Monument e-mails found on the NT Filter and an entry in the System Event Log showing that someone remotely accessed the NT Filter at 1:40 p.m. on January 23, 2007.

1. The Parties' Submissions

(a) Staff's Submissions

[107] Staff alleges that Suman, as NT Filter administrator, had access to the NT Filter and likely viewed e-mails passing through the filter that showed the name "Molecular Devices" and

the project code name, "Project Monument". That would mean that Suman knew that "Project Monument" or "Monument" involved or related to Molecular.

[108] Staff submits that:

> (a) Suman, as NT Filter administrator, could have set a rule to send any e-mails passing through the NT Filter that referred to "Molecular Devices" or "Project Monument" to another e-mail address (including, for example, his own e-mail address);
>
> (b) Suman had the ability to create, modify or delete rules in order to isolate or delay specific e-mails passing through the NT Filter;
>
> (c) the full content of any isolated or delayed e-mails, including attachments, could be viewed either through the preview pane in SurfControl or by navigating through Windows Explorer; the messages and any attachments could also be saved and/or forwarded;
>
> (d) Suman, as NT Filter administrator, could have also deleted any rules he established and there would have been no record of the rule or what it did. Further, editing or changing an existing rule would not have been logged; and
>
> (e) Suman, as NT Filter administrator, could also have viewed messages in any queues of delayed e-mail messages in the NT Filter.

[109] Staff alleges that Suman very likely accessed the NT Filter by remote access and viewed e-mails passing through the NT Filter on January 23, 2007 at 1:40 p.m. Staff alleges that five of those e-mails passing through the NT Filter had the subject line "Monument/Sunnyvale". Staff submits that the reference to "Sunnyvale" may have assisted Suman in determining that the Proposed Acquisition was an acquisition of Molecular. Staff notes that this remote accessing of the NT Filter occurred only a few hours after Suman attempted to assist Halligan to find "Andy's Monument Message" (see the discussion commencing at paragraph 96 of these reasons).

[110] Suman acknowledges that the System Event Log for the NT Filter shows that there was a log-on to the NT Filter by remote desktop protocol on January 23, 2007 at 1:40 p.m. Suman also acknowledges that he might have been the person who logged on at that time.

(b) The Respondents' Submissions

[111] Suman denied viewing or accessing any Project Monument e-mail passing through the NT Filter. He submits that Staff's allegation is based on pure speculation and that there is no evidence that he used his NT Filter administrator privileges to view or access Project Monument e-mails.

[112] Suman testified that he was not the e-mail administrator at MDS Sciex at the Relevant Time and that he did not have access through the NT Filter to view individual employees' e-mails and calendar events.

[113] Suman testified that the NT Filter screens external e-mails coming into MDS Sciex for spam. Suman testified that there is no evidence that he created, modified or deleted rules with respect to the treatment of e-mails passing through the NT Filter, only evidence related to whether the NT Filter administrator could have done so.

[114] Suman testified that the e-mails from the electronic data room which had "Molecular Devices" as the display name would not have been shown on the SurfControl screen for the NT Filter. He said that, in order to read an e-mail passing through the NT Filter, the e-mail had to be first isolated or delayed.

[115] Suman submits that there is no evidence that any e-mails passing through the NT Filter that contained reference to Project Monument were isolated or delayed. Suman says that, in fact, Rogers qualified his earlier evidence on this issue and confirmed that the evidence demonstrates that e-mails passed through the filter automatically. Suman testified that internal e-mails did not go through the NT Filter and that he would have referred any question about internal e-mails to CapGemini, the third party e-mail administrator. Further, he says that Staff did not establish that a particular e-mail queue included any e-mail referring to Project Monument.

[116] Suman testified that there were fragments of two e-mails relating to Project Monument on the Page File of the NT Filter. Both were dated at a time after the Respondents began purchasing the Molecular Securities. More important, however, he stated that this file cannot be viewed while the NT Filter is in operation and there is no evidence that it was powered down for this purpose. Therefore, Suman submits that he could not have seen the fragments of these e-mails.

[117] The Respondents submit, in any event, that no e-mails introduced into evidence relating to Project Monument disclosed that Project Monument was a proposed acquisition of Molecular.

[118] The Respondents submit that Staff's Further Amended Statement of Allegations did not include an allegation that Suman could have blind-copied an e-mail to himself. That allegation arose only in the cross-examination of Suman and Lo, after Rogers conceded in cross-examination that there was no evidence that e-mails had been isolated or delayed.

[119] The Respondents reiterate the submissions they made at the Motions Hearing challenging Rogers' expertise and the reliability of his evidence about the operation of the NT Filter. Suman added, in closing submissions, that Staff did not call any employee of MDS Sciex to testify who was knowledgeable about SurfControl or the NT Filter.

[120] Suman testified that the Remote Desktop Protocol, to which he had access, allows the NT Filter administrator to manage the NT Filter from a desktop workstation, rather than going to the main frame computer room. Suman acknowledges that he might have been the user who logged onto the NT Filter remotely on January 23, 2007 at 1:40 p.m., but he testified that there were two other employees who had access to the NT Filter and worked on it, even on days when Suman was at work.

[121] The Respondents submit that, by the standard of evidence Staff asks us to adopt, Staff's allegation could be that Suman hid in a closet while a confidential meeting was taking place and learned about the Proposed Acquisition that way. The Respondents also submit that Staff's

allegations with respect to the NT Filter and Suman's possible access to e-mails passing through it imply an impermissible reverse onus. They submit that, based on Staff's submissions, Suman has to prove that he did not gain access to information with respect to the Proposed Acquisition.

2. Discussion

(a) E-mail Delays in January 2007

[122] During the lead-up to the Announcement, MDS Sciex was experiencing delays in e-mails passing through the NT Filter. Suman acknowledges that MDS Sciex had experienced several waves of spam resulting in poor performance of the system from mid-July 2006. He also acknowledges that as NT Filter administrator, it was his responsibility to investigate e-mail delays and he did so. Ultimately, MDS Sciex decided to upgrade the NT Filter. Suman testified that he performed the upgrade and that he went into the office on Saturday, February 3, 2007 to complete that task.

[123] Suman remembers that there were delays in the e-mail system in January 2007. He acknowledges that as NT Filter administrator it was his job to investigate the problems and he did so. However, he testified that he did not remember seeing a queue of backlogged e-mails that were not automatically being sent on to the recipients on January 23, 2007. When presented with the System Event Log for the NT Filter, which shows that there was a remote log-on to the NT Filter on January 23, 2007 at 1:40 p.m., Suman testified that it could have been him logging on or it could have been someone else.

[124] We conclude that it was likely Suman who logged on to the NT Filter on January 23, 2007 at 1:40 p.m. because he was the primary NT Filter administrator, he was present at MDS Sciex that day, and while other IT employees had responsibilities for the NT Filter, they usually logged on to the NT Filter when Suman was absent.

(b) Ability to Control the Rules in SurfControl

[125] Suman would not acknowledge that the NT Filter administrator could change the rules relating to the e-mails passing through the NT Filter. We find it highly implausible, and do not believe, that Suman was unaware that the rules could be changed by the NT Filter administrator. That is apparent on a plain reading of the SurfControl manual. Suman's evidence in this respect is inconsistent with the evidence about his IT expertise and his responsibilities as NT Filter administrator.

[126] We find that as NT Filter administrator, Suman could have created, modified or deleted rules in SurfControl. This is clear from the SurfControl manual which explains, among other things, how to change SurfControl's pre-defined rules, delete a rule, or create a forwarding or blind-copy rule. Rogers testified that SurfControl would allow a user to, for example, blind-copy any e-mail with "Project Monument" in the subject line to a particular e-mail address. Lo agreed that SurfControl allowed a user to create, modify or delete a rule or change a rule's priority. He also agreed a user could create a rule to blind copy e-mails to another e-mail address.

[127] Suman acknowledges that he could set the rules, but strongly denies setting or deleting any rules for the purpose of anything related to Molecular. He also testified that any such

changes to rules would be logged. However, the SurfControl manual indicates that if the real-time console logging option is enabled, a rule could be deleted without being logged. Lo agreed that an existing rule could be changed without leaving a trace. Lo also acknowledged that if the real time console were enabled, as it was, new rules would not be logged into the system log.

[128] We conclude based on this evidence that, as NT Filter administrator, Suman could have created a rule that would, for example, blind-copy Project Monument e-mails passing through the NT Filter to any designated e-mail address, including his own, without leaving evidence of any such rule. That means that Suman had the ability, as NT Filter administrator, to obtain copies of "Monument" e-mails without leaving evidence that he had created or changed a rule in order to do so.

(c) Ability to View E-mails Passing Through the NT Filter

[129] Through Rogers, Staff introduced several NT Filter screenshots to illustrate the operation of the NT Filter. The screenshots included a list of e-mails that had been logged in the Stem Log, including information as to the sender, recipient, subject, time received and status (isolated or delivered, for example). At the bottom of the page, a preview pane would show the contents of an e-mail. Rogers testified that the contents of the e-mails are not stored in the Stem Log, but can be retrieved from the hard drive. He said that, as a result, the full content of e-mails that are isolated or delayed, including attachments, could be viewed either through the preview pane in SurfControl or by navigating to the e-mail through Windows Explorer. The messages and any attachments could also be saved and/or forwarded.

[130] Suman testified that unless an e-mail is isolated or delayed by action of a rule, it passes through the NT Filter and is delivered directly to the addressees at electronic speed and cannot be viewed by anyone. He said that none of the Project Monument e-mails are shown as having been isolated or delayed. Because he was no longer the e-mail administrator, Suman said that he did not have access to the Microsoft Exchange server where e-mails were stored. He also testified that he was not aware of the Molecular electronic data room and did not have access to it. He testified that he did not see any "Monument", "Project Monument" or Molecular related e-mails that were isolated or delayed. He testified that he believes that they all passed through the NT Filter without being isolated or delayed, and he did not make any kind of intervention to obtain any of them.

[131] Lo testified that it is not possible to view the contents of an e-mail using the SurfControl software without the e-mail being first isolated by a rule, and that there is no evidence that any Project Monument e-mail was isolated. However, in cross-examination, Lo acknowledged that SurfControl allows the NT Filter administrator to set an e-mail queue to delay e-mails for a set period of time to allow for auditing – for example, if there is a suspicion of unauthorized use – and allows the e-mails to be read to determine appropriate action, including, for example, forwarding an e-mail to a manager. He also acknowledged that the NT Filter administrator would be able to see the sender, recipient and subject line of e-mails that were logged in the "received log" or the "connection log" as a result of an e-mail backup. Lo testified that he did not know whether such an e-mail message could be viewed by double-clicking on it. Further, he acknowledged that the NT Filter administrator would also be able to review an e-mail even if it

had not been isolated. For example, the administrator could review an e-mail if it had been copied to another e-mail address or delayed.

3. Conclusion: Suman's Role as NT Filter Administrator

[132] There is no direct evidence that (i) Suman actually viewed any Project Monument e-mails passing through the NT Filter or otherwise obtained Project Monument e-mails using his privileges as NT Filter administrator; (ii) any e-mails passing through the NT Filter were isolated or delayed or that Suman created any rule to do so; or (iii) any e-mail passing through the NT Filter disclosed that Project Monument was a proposed acquisition by MDS of Molecular (although there were e-mails showing information that potentially linked Project Monument to Molecular). Further, neither of the experts were experienced with the SurfControl software. Both acknowledged relying on the user manual, and both were forced to retract some of their evidence on certain matters in cross-examination.

[133] We find that Staff has established that (i) Suman as NT Filter administrator was the principal person at MDS Sciex responsible for resolving problems with the spam filter and that there were e-mail delays in January 2007 that ultimately led MDS Sciex to upgrade the NT Filter; (ii) Suman, as NT Filter administrator, could have created a rule to isolate or delay an e-mail passing through the NT Filter or to forward it to any other e-mail address, including his own, without leaving evidence that he had done so; and (iii) the content of isolated or delayed e-mails could be viewed in the preview pane of SurfControl or by using Windows Explorer.

[134] Accordingly, we find that Suman had the ability and opportunity as NT Filter administrator to view or obtain Project Monument e-mails passing through the NT Filter. He had the skills to do that as an IT expert, the SurfControl software allows an administrator to control the spam filter function and to create and modify rules to isolate, delay or forward e-mails passing through the NT Filter, and investigating e-mail delays relating to the spam filter was one of Suman's responsibilities as NT Filter administrator.

G. Suman's Internet Searches on January 23, 2007

1. The Evidence

(a) Staff's Submissions

[135] McCann testified that forensic images of Suman's Computers were mounted as virtual drives on a forensic workstation and that Staff used NetAnalysis, a forensic software program, to generate reports of the complete history of internet usage on the drive, including active internet folders and deleted "slack space" (the "**Internet History Reports**"). NetAnalysis can also conduct keyword searches. Staff searched for, among other terms, "Molecular", "Monument", "MDCC", and "MDDC". Staff submits that the Internet History Reports indicate that on January 23, 2007, Suman conducted the following searches on Computer 204, Suman's laptop computer at MDS Sciex:

(a) at 18:57:05, he searched "mddc" on the Yahoo finance webpage;

(b) at 18:57:08, he accessed the "headline" page for MDCC on the Yahoo finance webpage;

(c) at 18:59:24, he searched "monument inc." using the Yahoo search engine;

(d) at 18:59:42, he searched "monument inc." using the Google search engine;

(e) at 19:00:17, he searched "mdcc", using the Google search engine;

(f) at 19:03:25, he accessed the six-month and one-year stock charts for MDCC on the Yahoo finance webpage;

(g) from 19:05:25 to 19:06:47, he accessed the Molecular website (www.moleculardevices.com);

(h) at 19:27:36, he accessed a discussion board on Yahoo relating to rumours of a take-over of Molecular; and

(i) at 19:29:13, he accessed a three-month stock chart for MDCC.

[136] Staff submits, and it was not disputed, that the search for "mddc" referred to in paragraph 135(a) of these reasons was a misspelled stock symbol intended to be a search for "MDCC".

(b) The Respondents' Submissions

[137] The Respondents challenge the reliability of the Internet History Reports as discussed commencing at paragraph 142 of these reasons. However, Suman did not deny making the searches referred to in paragraph 135 of these reasons, subject to his testimony below beginning at paragraph 138 and at paragraph 153 of these reasons.

[138] Suman acknowledges searching "MDCC" on January 23, 2007, towards the end of the day. He testified that Rahman had given him quite a few stock symbols that she wanted him to research, including MDCC, Exxon Mobil and Southern Copper, and that she had reminded him to do so the day before and again in the morning or around noon on January 23, 2007. He says that he finally had time to do the research that afternoon, and that he searched MDCC after searching Southern Copper and Exxon Mobil. He testified that he did not clearly remember the search for "monument inc." and that he had no independent recollection of making that search, but acknowledges, based on the Internet History Reports, that it was a "possibility" (see paragraph 155 of these reasons). He acknowledges that the Internet History Reports show that there was a search for "monument inc." on each of Yahoo and Google on January 23, 2007 (see paragraph 135 of these reasons).

[139] Suman testified that, when he commenced the searches referred to in paragraph 135 of these reasons, MDCC was already known to him because of Rahman's request that he do research on Molecular. He testified that on January 23, 2007, as a result of his searches, he read two press releases concerning MDCC, dated January 10 and January 17, 2007, and they showed that positive news was driving up the MDCC share price, which was one of the criteria the Respondents had established for investing (see paragraph 169 and following of these reasons).

[140] Rahman testified that she had asked Suman to look into certain stocks, including MDCC, in mid-January 2007, but he had procrastinated until January 23, 2007. On that day, Rahman "called him a lot, pushing him" to look into the stocks she had identified. Suman called Rahman that evening and reported on the results of his research (see paragraph 160 and following of these reasons with respect to the January 23 Call).

2. Discussion

[141] The Respondents challenge Staff's evidence about Suman's internet searches on January 23, 2007 on a number of grounds.

(a) Reliability of the Internet History Reports

[142] Staff used NetAnalysis to reconstruct the internet browser history of Suman's Computers, and the resulting Internet History Reports were entered into evidence. Rogers gave lengthy opinion evidence about the conclusions he drew based on the Internet History Reports.

[143] After the close of Staff's case, the Respondents moved for exclusion of the Internet History Reports on the basis that NetAnalysis, the software used to generate them, is inherently flawed. The Respondents submitted that the Internet History Reports should be excluded as hearsay evidence that does not possess sufficient threshold reliability to be admissible under the "principled exception" to the hearsay rule, because of an allegedly erroneous January 14, 2007 entry shown on the Internet History Reports and because of numerous duplicate entries for internet searches included on those reports (see paragraphs 146 and 149 of these reasons).

[144] We dismissed the exclusion of evidence motion and made the following comments in the Motions Decision with respect to the NetAnalysis evidence:

> We note that if the NetAnalysis evidence is hearsay evidence, it is hearsay that can be assessed and challenged by the Respondents through their own analysis of the information on Suman's computers and by themselves running NetAnalysis on those computers. The Respondents have been able to do that and have made a number of important points in cross-examination as a result. In our view, the Respondents' vigorous testing of the NetAnalysis Evidence through cross-examination of McCann and Rogers shows that the NetAnalysis Evidence possesses sufficient threshold reliability to be admitted under the principled exception to the hearsay rule. We also find that the NetAnalysis evidence is necessary because analysis of the raw data presented on the forensic copies of Suman's computers is outside our experience and knowledge.
>
> The Commission has stated that: "Although hearsay evidence is admissible under [subsection 15(1) of the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22], the weight to be accorded to such evidence must be determined by the panel. Care must be taken to avoid placing undue reliance on uncorroborated evidence that lacks sufficient indicia of reliability" (*Re Sunwide Finance Inc.* (2009), 32 OSCB 4671, at para. 22). It is for us to decide the relevance and weight to be given to the NetAnalysis Evidence and, in doing so, we will take

> into account the matters that the Respondents have successfully challenged through cross-examination.
>
> We are not satisfied that the Respondents have shown that Rogers is biased or that his evidence is inherently unreliable. He has modified his evidence and conclusions where the Respondents' cross-examination has raised questions. While he was admitted by us as an expert, he has also acknowledged those areas where he does not have expertise. The Panel will carefully consider the relevance and weight to be given to Rogers' expert evidence and, in doing so, we will take into consideration the submissions made to us by the Respondents with respect to the weaknesses of that evidence demonstrated by cross-examination.
>
> (Motions Decision, paras.11-12)

[145] The Respondents identified two significant issues with the Internet History Reports during McCann's cross-examination.

(b) The January 14, 2007 Entry

[146] The Internet History Reports show searches on Computer 204 (Suman's laptop computer at MDS Sciex) for "MDCC" on the Yahoo finance website at 18:24:40 on January 14, 2007, producing 286 hits. McCann testified that the January 14, 2007 entry was "anomalous" and "erroneous" and did not reflect a search that had occurred on January 14, 2007. Rogers testified that the January 14, 2007 entry was a fragment of a later search conducted on January 25, 2007. In his opinion, Suman first searched "mddc", "MDCC" and "monument inc." on January 23, 2007 (see paragraph 135 of these reasons). Staff's evidence on this point is consistent with the evidence of the Respondents, who testified that it was on January 23, 2007 that Suman finally conducted research with respect to Molecular, along with other stocks, at Rahman's request.

[147] Rogers testified that there is no evidence on the Computers of any search for "MDCC", "monument" or related terms before January 14, 2007.

[148] We conclude, on balance, that the January 14, 2007 entry on Computer 204 is likely a fragment of a later search conducted by Suman after January 23, 2007 for "MDCC". We do not accept, however, that the existence of that fragment undermines the other evidence of Suman's January 23, 2007 searches identified in the Internet History Reports.

(c) Duplicate Entries

[149] The second issue with the NetAnalysis evidence is that the Internet History Reports include numerous duplicate entries that indicate exactly the same search being made exactly five hours apart. Time-stamped entries on the Internet History Reports show Suman making trades through his trading account from his IP address at work at a time when the MDS Sciex building access records indicate that he was not yet in the office and exactly five hours before the time-stamped entries on the Trading Records, which indicate that he made the trades from home. The entries relating to Suman's searches for "mddc", "MDCC" and "monument inc." show the same duplicate entries exactly five hours apart. So, for example, the first search for "mddc" is

recorded at 13:57:05 and at 18:57:05 on January 23, 2007 (see paragraph 135(a) of these reasons).

[150] This issue first arose during cross-examination of McCann, who initially had no explanation for the duplicate entries. When the hearing resumed the next day, McCann testified on re-examination that he had verified that the duplicate entries appeared in the Internet History Reports because he had set NetAnalysis to local (Toronto) time, but he believed NetAnalysis had added a duplicate entry, exactly 5 hours earlier, in Greenwich Mean Time ("**GMT**"). McCann testified that he believed that the first of each duplicate entry was incorrect and that the second entry was correct.

[151] Rogers offered an explanation for the time discrepancy in the Internet History Reports. He testified that internet history is stored in the index.dat file of a computer in three types of records – the main internet history file, a daily internet history and a weekly internet history. The main internet history file uses GMT, the daily internet history file uses local time but uses GMT for the last-visited time, and the weekly internet history file uses local time. When NetAnalysis analyzes the files, it has to decode these various times based on other information associated with each record, including the time-stamp on source data. In this case, most of the files had been deleted and the temporary internet files were erased, making the analysis more complicated. Rogers stated that all of the anomalies related to the weekly entries, which should have been set to GMT, not local time.

[152] Staff submits that the later of any two duplicate entries in the Internet History Reports is the correct one, and it is the later entries that are referred to in the parties' submissions and in these reasons. There is no evidence to suggest that the time-stamps on the Internet History Reports are inaccurate, apart from the matter of the duplicate entries and the anomaly with respect to the January 14, 2007 entry (referred to in paragraph 146 of these reasons). We have concluded, on balance, that notwithstanding the duplicate entries exactly five hours apart, the later entries on the Internet History Reports reflect the actual times at which the internet searches were conducted.

(d) Analysis

[153] Subject to his testimony below related to his searches on January 23, 2007, Suman does not deny making the internet searches on Computer 204 shown by the Internet History Reports. He submits, however, that Staff's allegations are inconsistent with the fact that his first relevant internet search was for "mddc", not "monument". What the Internet History Reports show, he says, is that the stock symbol "MDCC" (initially entered erroneously as "mddc") was already known to him before he searched "monument inc.". Suman also notes that the Internet History Reports indicate that MDCC was not the only stock he searched on January 23, 2007. His searches that day also included searches for Exxon Mobil and Southern Copper. The Internet History Reports show those searches.

[154] Suman also submits that even if the Internet History Reports are accurate and show what Staff submits that they show, the internet is "public knowledge space" and could not be the source of material non-public information. We agree that there is nothing improper in his internet searches and that they would not have been the source of any material non-public information.

[155] Suman testified that he does not remember searching for "monument inc.", although he conceded that is possible. A portion of his evidence about his searches on January 23, 2007 is as follows:

> And my searches would be related to – I believe on that day, I got a chance to look for Exxon Mobil's performance, Southern Copper under stock symbol PCU. So I did research on that as well. Then I got to Molecular Devices, MDCC.
>
> Q. What time was that?
>
> A. So it would be -- my independent recollection is after I did Exxon Mobil and PCU. So it couldn't be -- it would be later, much later in the day, towards the end of the day, after I'm done with Southern Copper and Exxon Mobil.
>
> Q. Okay. Paragraph --
>
> CHAIR: Just before you go, I just want to make sure I understood what you said. So you are saying you did search Molecular?
>
> THE WITNESS: I did look into the Molecular Devices performance, the stock symbol that Monie gave me earlier. I looked for that. I looked for PCU, which is a symbol for Southern Copper. I looked into that. I looked into Exxon Mobil. I looked into that.
>
> CHAIR: What about Monument Inc.?
>
> THE WITNESS: Now, my independent recollection, I do not clearly remember my search on Monument Inc. If that search happened -- I have looked through the net analysis report and other testimony, and it looks like there was a search on Monument Inc. So that's a possibility, but I don't have an independent recollection of it directly.
>
> (Hearing Transcript, March 29, 2010, pp. 102-103)

[156] The Internet History Reports show that on January 23, 2007, Suman searched "monument inc." on Computer 204 using the Yahoo search engine at 18:59:24 and using the Google search engine at 18:59:42 (see paragraph 135 of these reasons).

[157] "Monument inc." was not the first search term Suman tried on January 23, 2007; it was the third, after "mddc" and "MDCC". Staff's explanation is that Suman had already learned that "monument" and "MDCC" were linked. Suman's explanation is that Rahman had already asked him to research MDCC and he learned about that company from public sources. However, that does not explain the search for "monument inc.".

3. Conclusion: Suman's Internet Searches on January 23, 2007

[158] Suman testified that he did "not clearly remember" the search for "monument inc." but it was "a possibility" that he made it. We find that Suman made the "monument inc." searches referred to in paragraph 135 of these reasons at the times submitted by Staff. Those searches are significant. If Suman had learned of MDCC from Rahman or their research, why would he search "monument inc.", a term related to the confidential code name for the Proposed Acquisition? Suman provided no explanation for making that search.

[159] We know that Suman was aware of the term "monument" at the time of his searches on January 23, 2007 (see paragraph 105 of these reasons). What the Internet History Reports show is that Suman searched the terms "monument inc." and MDCC within minutes of each other in the late afternoon on January 23, 2007. We find that the most likely conclusion is that Suman had learned that the term "monument" or "monument inc." related to MDCC and he was searching the internet to find more information and to confirm his understanding. That is an important finding in the circumstances.

H. The Respondents' January 23, 2007 Phone Call

1. The Evidence

(a) Staff's Evidence

[160] Through Young, Staff introduced MDS Sciex's record of Suman's entries to and exits from its building for the period January 1 to February 7, 2007. Those records show that Suman left work at 19:44 on January 23, 2007, about 15 minutes after viewing the three-month stock chart for MDCC (see paragraph 135(i) of these reasons). The BlackBerry Cell Phone Records indicate that Suman called Rahman at 19:41:42, just before he left work, and that conversation continued for one hour and 40 minutes (we refer to that telephone conversation as the "**January 23 Call**"). Staff alleges that was an unusually long telephone call in which the Respondents were primarily discussing the possibility of purchasing Molecular securities based on knowledge of the Proposed Acquisition.

(b) The Respondents' Evidence

[161] Suman testified that the January 23 Call "was not an unusual length of time" for the Respondents to spend on the telephone. He testified that along with his calls to Rahman from his BlackBerry, they also communicated using Skype, and Rahman would also use the toll-free telephone line at MDS Sciex to call him at work. Suman says it would be very unusual if they spoke for less than two hours in total on any given day.

[162] Rahman confirmed Suman's testimony that while she lived in Utah they talked "all the time, every day" by phone and using Skype, and that she phoned Suman frequently at MDS Sciex using the MDS Sciex toll free telephone line and sometimes his BlackBerry number. In addition to the BlackBerry Cell Phone Records, which show outgoing calls from Suman's BlackBerry to Rahman's Utah phone number, the MDS Sciex Toll Free Phone Records corroborate the Respondents' testimony that they talked many times a day every day.

[163] The Respondents also testified that they discussed the Five Criteria on the January 23 Call in considering whether to purchase Molecular securities (see paragraph 170 of these reasons).

2. Conclusion: The Respondents' January 23, 2007 Phone Call

[164] The Respondents' testimony about the January 23 Call seemed rehearsed and implausible in some respects. Asked if he could recall their conversation, Suman began his testimony as follows:

> There were quite a few things that we had discussed in that 100-minute phone call. In any of our phone calls, usually multiple things would be discussed. They would involve discussion about her day.
>
> They would involve discussion about what was new on that day, what she has done, what she has eaten, where did she go, come back, those things. We would have lots of talk about stocks and their performance and trades. We would have talks about her neighbourhood.
>
> Q. Do you remember anything specific about this call?
>
> A. So what I remember on that call is she went out. And that call was -- I believe I left my work, and I was driving towards home, and I called her from the car. And usually, around that time, she is not home.
>
> She usually -- trade -- trading day finishes, and she goes out for a walk. And then several hours, she walks around and then comes back. So usually, at that time, she is not home. So when I called her on that day, I didn't expect her home. But sometimes I do just to see if she is home.
>
> So I was driving from my work to my home, and I called her. And when she picked up, I was surprised. So found out that she went to the bank to deposit a cheque. And then she had to use the washroom. So she came back home quickly, and then she was about to go out.
>
> So I was insisting that I'm driving home, and I'm bored, why don't you stay on the phone and talk to me. And she said, no, I have to go use the washroom. So I said, okay, I'll hold. It's sometimes harder to redial again from the BlackBerry when you are driving. So I said, I will just hold. You go use the washroom and come back to the phone. And that's what I remember.
>
> So after she came back, initial conversations were basically around -- she had – there were neighbours, and they had cats. And both of us are cat lovers. So we talked about their cats. We talked about how her day was, those type of things. And then, I believe --
>
> MR. PRICE: Could you speak up?

> THE WITNESS: Sure. And then I got a chance to tell her about the stocks and my search.
>
> (Hearing Transcript, March 29, 2010, pp. 108-109)

[165] Rahman described the beginning of their conversation as follows:

> When I came to the phone [after using the washroom], I remember -- he was asking me, like, you know, Did I go out for a walk already? I'm like, "No, I tried, but it's so cold that I had to come back home, but I'm going to go out again." So he says, "Since you're on the phone, talk to me." Because he's driving. He always does, when he drives, he calls me so that I can talk to him. So as I'm talking to him he asks me, like, How was my walk and if I had seen any cats or birds, as usual. Then he asked me how my day was, what I have eaten, how the market was. And then he told me that -- now he got a chance to -- because the whole day I had been calling him about the stocks. I didn't actually look into the stocks right at that moment. But he told me he got a chance to look into the stocks.
>
> (Hearing Transcript, March 31, 2010, p. 137)

[166] The Respondents' evidence about the January 23 Call appeared to us to be contrived to suggest that their conversation about the possibility of purchasing Molecular securities was nothing out of the ordinary and that Molecular was not the main topic of the conversation. We do not accept that characterization.

[167] The Respondents acknowledge that they discussed buying Molecular shares and options during the January 23 Call. The question is whether that topic arose as a result of their own research or as a result of Suman's knowledge of the Proposed Acquisition that he had obtained through his IT role at MDS Sciex. The evidence related to the January 23 Call provides no assistance to us in answering that question.

[168] We conclude only that (i) Suman had the opportunity to communicate knowledge of the Proposed Acquisition to Rahman on the January 23 Call; (ii) the call was a long one that occurred after Suman's internet searches that day; and (iii) the Respondents decided on that call to purchase Molecular shares the next day and to think overnight about whether to buy options.

I. The Five Criteria

[169] The Respondents testified that they purchased the Molecular Securities as a result of their own research and, in particular, because the Molecular Securities satisfied the Five Criteria discussed below. The Respondents testified that the Five Criteria were discussed by them on the January 23 Call.

1. The Respondents' Testimony

[170] Suman testified that Rahman had developed five criteria for investing in stocks. Those criteria were that (i) the stock cannot be at its 52-week high or 52-week low; (ii) the stock should

be about 20% to 40% higher than the 52 week low; (iii) the increase from the 52-week low to the current price should be a steady rise rather than a sudden jump; (iv) the increase should be explained by positive news about the company; and (v) the sector should be a particular sector they favoured (these criteria are referred to as the "**Five Criteria**").

[171] Suman testified that in the middle of January 2007, Rahman had asked him to do some investment research on Exxon Mobil, Southern Copper and Molecular. When they spoke by phone on the January 23 Call (see paragraph 160 of these reasons), Suman told her about his research after they talked about the details of her day. He told her that Exxon Mobil and Southern Copper were trading at close to their 52-week highs, but Molecular was a good fit because it met all of the Five Criteria. Suman testified that:

> We were discussing the stock. And she was looking at the three-month chart, six-month chart, looking at the news reports, and looking at the performance.
>
> So our conversation around Molecular Devices on that call was she agreed with me that it matches all of those five rules, and she agreed that this is a good stock to put some more of our money in there. We tried to determine, at that point, what would be our price target on that stock.
>
> And on that day, I believe the price was around $23 for Molecular Devices. And that three-month chart, performance chart, it looks like in the three or four months prior to that, the stock went from $17 to $23. So it looked like it was a steady rise, very gradual, steady rise.
>
> So we tried to determine what would be our price target if we actually buy Molecular Devices. And she proposed – she suggested that $27 sounds like a good price target. And to me also, that seems like – seemed like a very reasonable price target. So we both had agreement that $27 would be our price target. The stock price on that day was $23, around $23, I believe. So that was the conversation.
>
> The other thing that happened on that day was -- I should also mention that for a long time, ever since Monie started trading and even before that, from time to time, I would push her or try to convince her to invest in options or trade options. And I would tell her we should go into options, and we should look into that.
>
> And Monie had reservations about options. She would usually turn it down, and she would say, no, I don't really understand it completely, or it seems more risky to me. I think I will stick with stocks and avoid options.
>
> And usually, I would try to come up with arguments and try to convince her to go into options. So I try to push options on Exxon Mobil and other stocks that she should go into. But usually, she would turn it down.
>
> So same way on that day, once we agreed on the $27 price target, I looked at the options, and it looked like there were $25 strike price options available. So I

> tried to push that to her. And I said, we should also look into options. If you think it's going to go to $27, there are $25 options available that we can get. And if it goes to $27, you can also make money on the options of this stock.
>
> So that was the other conversation related to options. We did not agree on options on that day. Monie said she's going to think about it but didn't really agree that we should buy options. However, we did agree that we are going to buy stocks of this company, Molecular Devices, and we agreed on a price target of $27.
>
> (Hearing Transcript, March 29, pp. 113 to 114)

[172] Rahman confirmed Suman's testimony and said that, in January 2007, she asked Suman to look into certain stocks, including Molecular, but he procrastinated in doing so. She testified that on January 23, 2007, she called him a lot (at least seven times), yelled at him, and pushed him to look into the stocks she had identified. He called her back that evening (on the January 23 Call).

[173] According to Rahman, Suman told her that of the three stocks she had asked him to look at, only Molecular satisfied the Five Criteria. She then did a search for "MDCC" on Yahoo Finance and found a January 17, 2007 news release about a patent ruling and a January 10, 2007 news release about a new technology. She says that she also looked at Molecular's 3-month, 6-month and 1-year stock trading charts. Those charts are no longer available because Molecular is no longer a public company, but the Respondents introduced in evidence a chart showing MDCC's closing prices from January 3, 2006 to January 23, 2007. Rahman testified that the chart shows that MDCC satisfied the Five Criteria: the price on January 23, 2007 (about $23 per share) was approximately 20% to 40% higher than the 52 week low ($18.03 on September 27, 2006), it was not near the 52 week high ($35.92 on April 6, 2006), the increase from the 52-week low was a gradual one, and it was based on good news about the company reflected in the two news releases. Further, the biotechnology sector was a business sector the Respondents favoured.

[174] Rahman testified that Suman asked her "where do you think it [the Molecular share price] will go in the near future?" and she answered "definitely $27"; she added "that was my exact line". According to Rahman, they made the decision to invest in Molecular. She testified that she was willing to buy MDCC shares, but Suman had been encouraging her to buy options. He asked her in what time period she thought the shares would go up, and she answered that she couldn't tell when, only that it would go to at least $27. She testified that she had never bought options before, although Suman had, and she was unsure whether to do so. So they decided to buy Molecular shares and she would think overnight about the possibility of purchasing Molecular options. They ultimately purchased Molecular options as well.

2. Staff's Submissions

[175] Staff submits that the Five Criteria are not the reason for and do not explain or justify the Respondents' purchases of the Molecular Securities. Staff submits that the Five Criteria are an after-the-fact attempt by the Respondents to provide any innocent explanation for their purchases of the Molecular Securities.

3. Discussion

[176] Although Rahman was an experienced day trader, she acknowledged in her testimony that the purchases of the Molecular Securities marked the first time she had applied the Five Criteria. As discussed below, those purchases reflected a significant shift in the nature of the Respondents' trading. Further, we note that the Five Criteria do not reflect any substantive analysis of Molecular's financial performance or status. They are little more than rules of thumb and there seems to be little rationale for why Rahman set a share price target of $27.00 for the Molecular shares. In our view, the Five Criteria provide little justification for the Respondents to risk an amount equal to the value of their total assets in an investment in a single issuer in which they had never before invested. Although Rahman's trading history demonstrates that she was not adverse to risk and to the use of leverage when she was day trading, we find that the purchases of the Molecular Securities represented a much higher order of risk and a significant change in the nature of their trading (see the discussion below commencing at paragraph 180 of these reasons).

[177] Based on the Trading Records, the purchases of the Molecular Securities were the largest purchases the Respondents had ever made in one issuer and the first time they had purchased such a large number of options of any issuer. Further, the purchase of the options, which expired over a relatively short period of time, constituted a very significant increase in the risk that the Respondents were prepared to take. In our view, the Five Criteria do not explain or justify this sudden shift into options trading.

[178] We note that, while Suman stated in the Second Staff Interview that the purchases of the Molecular Securities were based on the Respondents' research, he made no specific reference to the Five Criteria in that interview.

4. Conclusion: The Five Criteria

[179] We do not find the Respondents' testimony about the Five Criteria credible and we reject that explanation for the purchases of the Molecular Securities. We find that the Five Criteria were most likely developed after the fact in an attempt to provide an innocent explanation for the Respondents' purchases of the Molecular Securities. Accordingly, in our view, the Respondents have not provided an innocent explanation for their well-timed, highly uncharacteristic, risky and highly profitable purchases of the Molecular Securities. These are important findings in the circumstances.

J. The Nature and Timing of the Purchases

1. Staff's Submissions

[180] Staff submits that the Respondents' purchases of the Molecular Securities marked a fundamental shift in the nature and pattern of their trading. Staff submits that those purchases were fundamentally different from the Respondents previous trading of securities in the following respects:

(a) the Respondents had never purchased Molecular shares or options before;

(b) the Respondents had purchased options only once before, in 2004; at that time, the Respondents purchased a total of 93 options contracts for Nortel at a total cost of $7,986.23; the options expired worthless;

(c) until the purchase of the Molecular Securities, Rahman had engaged primarily in day-trading;

(d) Rahman had never before purchased 12,000 shares of any issuer in a single day;

(e) the total cost of the Molecular Securities purchased by the Respondents was approximately $391,300 (USD), which was more than the value of the Respondents' total assets on January 23, 2007 of $370,227.86 (USD); that total cost was more than three times Suman's yearly salary;

(f) on January 23, 2007, the day before the Respondents began purchasing the Molecular Securities, Rahman deposited $48,000 to her trading account; on January 24, 2007, she sold her holdings in shares of five other companies for a total credit to her account of approximately $366,000 (USD);

(g) the purchases of the Molecular Securities were all made on margin;

(h) the Respondents' purchases on January 24, 2007 represented approximately 7.8% of the total market volume for Molecular shares traded that day (12,000 of 153,900 shares traded); the 900 options that were purchased represented the right to purchase an additional 90,000 Molecular shares;

(i) the Respondents' purchases of Molecular options represented a very large proportion of the total market volume on the CBOE for Molecular options on the days the Respondents purchased options; the Respondents purchased 77.2% of all series of Molecular options traded on January 24, 2007, 69.3% of all series of Molecular options traded on January 25, 2007 and 58.8% of all series of Molecular options traded on January 26, 2007;

(j) Rahman's purchases were inconsistent with her stated investment objectives; the investor profile for her account, which was updated on June 25, 2006, was for 30% short term, 30% medium term, 30% low risk and 30% medium risk; and

(k) the total profit from the sale of the Molecular Securities was $954,938.07 (USD).

[181] Accordingly, Staff submits that the Respondents' "well-timed, highly uncharacteristic, risky, substantial, and highly successful" purchases of the Molecular Securities marked a fundamental shift in their pattern of trading and that fundamental shift strongly supports the inference that the purchases were made by the Respondents with knowledge of the Proposed Acquisition.

2. The Respondents' Submissions

[182] The Respondents testified that they purchased the Molecular Securities based on their research and the Five Criteria (see paragraph 170 of these reasons).

(a) Rahman's Submissions

[183] Rahman also submits that her purchases of the Molecular Securities were consistent with her trading history. She testified that she began day trading in July 2006 when she took over trading for the Respondents. She said that she took large positions in stocks – for example, buying $740,000 (USD) worth of Titanium Metals on June 26, 2006, $360,000 (USD) worth of Southern Copper in two transactions in September 2006 and $352,000 (USD) worth of Boeing stock on December 5, 2006. (We note, however, that those numbers ignore contemporaneous sales of those securities.) All of those shares were purchased on margin. She was successful: between July 1, 2006 and January 1, 2007, she increased the value of the securities in her portfolio from approximately $257,000 to $510,000. Rahman had also increased her margin during this period to approximately $310,718, leaving the equity value of her portfolio on January 1, 2007 as $199,476. She submits that her prior trading shows her lack of aversion to risk.

[184] Rahman also testified that options trading was a natural progression for her trading. In response to Materna's evidence that the Respondents' options purchases were "very unusual", Rahman notes that while the Molecular stock was relatively illiquid, there was a bid and ask for each series of options the Respondents purchased and the bid prices fluctuated but were approximately 20% to 30% below the ask prices. In addition, Rahman bought stock and options at limit prices (meaning she would specify a limit to the purchase price she would pay) and she testified that she disagreed with Suman's approach of buying securities at whatever the market prices might be. Rahman submits that this trading practice is inconsistent with the allegation that the Respondents were purchasing the Molecular Securities with knowledge of the Proposed Acquisition.

[185] Rahman also notes that she continued to use options and margin to leverage her stock purchases after January 2007. She purchased large positions in Exxon Mobil and Freeport-McMoran on margin. By the end of July 2008, the value of her account was approximately $2.5 million, with an equity value of approximately $2 million. The value of her portfolio fell to $84,138.85 in October 2008 when the market crashed and her securities were sold in response to a margin call. Rahman continued to trade, however, and her account had an equity position of $260,000 by March 2010.

[186] Rahman's counsel described Rahman as "a speculator. She is an aggressive trader, she takes big risks, and she looks for big rewards if she can get them. None of that is prohibited activity or activity contrary to the public interest. As a matter of fact, those are the people we need to create liquidity in the market." Counsel for Rahman submits that Rahman's purchases were "entirely inconsistent ... with the acts of a rapacious insider trader or rapacious tippee trading on non-public information".

(b) Suman's Submissions

[187] Suman testified that on the January 23 Call, he and Rahman discussed the performance of the MDCC shares and were impressed with that performance in the months leading up to January, 2007, including the steady and gradual rise in the Molecular share price and the positive news articles that were appearing about it. He says that he and Rahman had discussed buying options in the past, although they had not reached a definite decision about it until the purchases of the Molecular options.

[188] Suman testified that on the morning of January 24, 2007, there was a ratings upgrade for Molecular shares by Matrix Research. (In reply, Staff notes that the ratings upgrade was only from "sell" to "hold".) The price was a little more than a dollar higher than at closing the day before, and the volume was three times higher. (In reply, Staff submits that the volume was approximately twice the volume of the day before, not three times, as Suman testified. It appears that the volume was approximately 2.4 times higher than the previous day.)

[189] Suman submits that the upgraded rating for Molecular shows that there was increased market interest in the Molecular shares. Suman also testified that he ultimately convinced Rahman to purchase Molecular options. Initially, he purchased options pursuant to "market" orders, as was his practice, but he switched to "limit" orders at Rahman's request.

[190] In response to Staff's submission that Rahman deposited $48,000 into her trading account on January 23, 2007 in order to allow her to purchase the Molecular Securities, Suman notes that the money was deposited into the Canadian dollar account, not the USD account that was used for the purchase of the Molecular Securities.

3. Discussion

[191] We have considered the following facts and circumstances in assessing the nature, timing and implications of the Respondents' purchases of the Molecular Securities.

(a) Nature of the Purchases

[192] In the six months between July 2006, when Rahman took over trading for the Respondents, and the first of her purchases of Molecular shares on January 24, 2007, Rahman was day trading. That meant that she was actively buying and selling the shares of various issuers on the same day and she testified that a position would be held overnight only when it could not be turned over quickly. (That trading pattern includes the purchases referred to in paragraph 183 of these reasons.) For example, the Trading Records for December 2006 show almost all of her trades were in the amount of 1,000 shares. Of the 121 trades during the month, 64 were purchases of shares and 57 were sales. On December 5, 2006, the records show that, in alternating purchases and sales of 1,000 shares each, she purchased 4,000 shares of Boeing in four trades for $352,489.91 (USD) and sold 3,000 of those shares for $264,438.91 (USD). An additional 1,000 Boeing shares were sold the next day. Thereafter, on December 15, 2006, she sold and then bought 1,000 shares of Boeing. At the end of the month, she held in her account 500 Boeing shares with a market value of $44,420 (USD). She also held significant positions in the shares of seven other issuers that she had been day trading ranging in value from

approximately $54,000 to approximately $91,000. The month end total portfolio value was $171,297.59 (USD) after a cash debit balance of $266,825.15 (USD).

[193] The Trading Records show that until mid-January 2007, Rahman continued to day trade, buying and selling blocks of 1,000 shares in 12 different issuers. Then, on January 24, 2007, in six transactions effected between 9:34 a.m. and 2:42 p.m., Rahman purchased 12,000 shares of Molecular at a total cost of approximately $287,700 (USD). The Trading Records show starkly the change in her trading pattern from day trading to purchasing and holding Molecular shares.

[194] We find that Rahman's purchase of 12,000 shares of Molecular, in a single day, at a total cost of approximately $287,700 (USD), and the holding of those shares until January 29, 2007, was highly uncharacteristic of Rahman's previous day trading. In our view, the Respondents, in effect, acknowledge that by testifying that the purchases of the Molecular Securities were based on the Five Criteria.

[195] Rahman testified that she increased the value of the shares in her account from approximately $257,000 to $510,000 between July 1, 2006 and January 1, 2007, and she increased her margin from approximately $86,000 to approximately $310,000 during the same period. Given Rahman's prior use of margin in her purchases, we place little weight on the fact that the purchases of the Molecular Securities were made on margin. We also place little weight on the fact that the Respondents' trading had departed from the stated investment objectives for Rahman's account.

[196] The Respondents submit that the research Suman conducted on Molecular, Southern Copper and Exxon Mobil on January 23, 2007 is inconsistent with Staff's allegation that Suman had learned of the Proposed Acquisition by that time and that the Respondents had purchased the Molecular Securities with knowledge of that acquisition. The Respondents also submit that placing "limit" rather than "market" orders for the Molecular Securities was also inconsistent with those allegations. We do not find those submissions convincing in all the circumstances.

(b) Purchases of Options

[197] The Respondents' purchases of 900 Molecular options at a cost of approximately $103,600 (USD), reflected an even more significant shift in their trading pattern. Their only previous experience with options trading was the purchase of Nortel options. The Trading Records show that from March through May 2004, the Respondents purchased 93 Nortel 100 call options, all at a strike price of $7.50, with expiry dates of January 2005 and January 2006. All 93 options expired worthless, resulting in a total loss of $7,986.23.

[198] In contrast to their previous trading pattern, between 9:40 a.m. on January 24, 2007 and 12:53 p.m. on January 26, 2007, the Respondents purchased, in 26 transactions, 900 Molecular options representing the right to purchase 90,000 Molecular shares. Despite the Respondents' attempt to characterize these purchases as a natural progression for a speculative day trader, we find that the Respondents' purchases of Molecular options marked a dramatic shift in their trading pattern. Except for the purchases of Nortel options almost three years previously, the Respondents had never before purchased options, let alone such a large number. Further, the Molecular options expired on February 17, March 17 or April 21, 2007. That was a very large

investment that was particularly high risk given the short expiry dates of the options purchased (those expiry dates were approximately three weeks, seven weeks and twelve weeks after the date of the relevant purchases).

(c) Market Volume Represented by the Respondents' Purchases

[199] Rahman's purchases of 12,000 Molecular shares on January 24, 2007 represented approximately 7.8% of the total number of shares traded that day. Rahman had rarely purchased such a large number of shares in a single day.

[200] The 900 Molecular options purchased by the Respondents represented the right to purchase an additional 90,000 Molecular shares. The Respondents' purchases of options represented 77.2%, 69.3% and 58.8% of all series of Molecular options traded on the CBOE on January 24, 25 and 26, 2007, respectively. Those percentages were even higher for some of the specific series of options purchased:

Purchase Date	Series of Molecular Options (by expiry date)	Percentage of Market Volume Per Series of Options Purchased by the Respondents
January 24, 2007	February 2007	92.3%
January 24, 2007	March 2007	79.6%
January 24, 2007	April 2007	None Purchased
January 25, 2007	February 2007	85.7%
January 25, 2007	March 2007	44.4%
January 25, 2007	April 2007	100%
January 26, 2007	February 2007	86%
January 26, 2007	March 2007	77.4%
January 26, 2007	April 2007	74.1%

That level of purchases attracted the attention of the CBOE. Materna testified that these purchases were "aberrant" and that "this account effected an extremely large number of option contracts relative to all other option contracts traded. And we deemed that very unusual."

[201] The Respondents had never before purchased options for a price of more than approximately $8,000. Not only did they purchase options for more than $100,000 but the size of the Respondents' purchases of Molecular options dominated the market on January 24, 25 and 26, 2007. Accordingly, that level of trading is highly uncharacteristic of the Respondents' previous trading.

(d) Freeing up Funds before Making the Purchases of the Molecular Securities

[202] On January 23, 2007, Rahman deposited $48,000 into her trading account. The next day, January 24, 2007, Rahman liquidated her holdings in five stocks – Allegheny Technologies, Boeing, Genyzme, Nucor and Southern Copper – for a total credit to her account of $366,048.78 (USD). She acknowledges that she did this "partly" to free up funds to buy the Molecular Securities, but she disagrees with Staff about her reasons for selling those securities.

[203] As a day trader, Rahman typically bought and sold securities in multiple offsetting trades. Rahman's sales of securities on January 24, 2007 referred to in paragraph 202 of these reasons represented a high dollar value and the sale of all the shares of five different issuers. Further, those sales were the only sales of securities that day or for the next three days: all the other transactions were purchases of the Molecular Securities. We find that the deposit to Rahman's trading account on January 23, 2007, and the sales of securities on January 24, 2007, were primarily motivated by the need to free up funds for the purchase of the Molecular Securities and was not consistent with day-trading.

4. Conclusion: The Nature and Timing of the Purchases

[204] As discussed above, we find that the Respondents' purchases of the Molecular Securities represented a fundamental shift in the nature of their trading. The Respondents, in effect, acknowledge that by testifying that the Five Criteria were the reason for their purchases of the Molecular Securities. The Respondents did not suggest that the Five Criteria had ever been applied by them prior to the purchases of the Molecular Securities. Applying the Five Criteria in purchasing the Molecular Securities is clearly a trading strategy inconsistent with and quite different from day trading.

[205] We also find the timing of the purchases to be significant. The purchases began one day after the interaction with Halligan (see paragraph 103 of these reasons) and the internet searches for MDCC and "monument inc." referred to in paragraph 135 of these reasons. The purchases were made over the period between January 24 and January 26, 2007, beginning only five days prior to the public announcement of the Proposed Acquisition on January 29, 2007.

[206] We note that the Respondents made a profit of $954,938.07 (USD) from their purchases of the Molecular Securities. The size of that profit was unprecedented for an investment by the Respondents in a single issuer in their trading history. That is a consideration in assessing the totality of the evidence related to the purchases of the Molecular Securities.

[207] We find that the Respondents' purchases of the Molecular Securities represented a fundamental shift in the nature of their trading and that their well-timed, highly uncharacteristic, risky and highly profitable purchases strongly support the inference that the Respondents purchased the Molecular Securities with knowledge of the Proposed Acquisition.

K. Suman's Internet Searches on January 24, 2007

[208] Staff submits that Suman's internet browsing on January 24, 2007 discloses an interest in (i) the insider trading allegations made against Martha Stewart in 2003, and (ii) the effects of a take-over bid on the share price of a target in the case of a search of "Loudeye". Staff submits

that this internet browsing supports the inference that the Respondents purchased the Molecular Securities with knowledge of the Proposed Acquisition.

[209] Apart from challenging the reliability of the Internet History Reports, Suman testified that he could not remember conducting any searches relating to Martha Stewart or Loudeye on January 24, 2007, and suggested that he might have come across the Martha Stewart pages from another website, and might have come across the Loudeye page while searching for information about Nokia.

1. The Evidence

(a) The "Martha Stewart" Searches

[210] The Internet History Reports show that at 12:39:43 on January 24, 2007, the day the Respondents began purchasing the Molecular Securities, Suman used Computer 204 (his laptop at MDS Sciex) to access a news story, dated December 4, 2003, titled "Martha Stewart under criminal investigation", which related to the possible insider trading charges against Martha Stewart. Suman also accessed information about Martha Stewart's possible insider trading charges on the SEC website (at 12:35:34), on Wikipedia (at 12:51:40), and by conducting a Google-search (at 12:42:09) which took him to a blog called "whitecollarcrime_blog/ Martha_Stewart".

[211] The Internet History Reports include duplicate entries for these searches exactly five hours apart (consistent with the duplicate entries in the NetAnalysis evidence discussed at paragraph 149 of these reasons). Staff relies on the later entries as the accurate time of the searches. Suman testified that these entries may have in fact occurred ten days earlier, consistent with the evidence related to the January 14, 2007 "MDCC" entry in the Internet History Reports (see paragraph 146 of these reasons). We have concluded, on balance, that the earlier entry was likely a fragment of a later search (see paragraph 148 of these reasons). We find that the January 24, 2007 searches on Computer 204 were made on the dates indicated in the Internet History Reports.

[212] Suman denied that he had insider trading on his mind on January 24, 2007, and testified that "I do not have an independent recollection of this sort on that specific day. What I do have recollection of, that is after Colin McCann and George Gunn contacted me in February. That is when I had quite a few searches on insider trading, OSC and so on". In this respect, the Internet History Reports indicate that at 10:04:22 on Saturday, February 3, 2007, the morning after the Second Staff Interview, Suman googled "Ontario insider trading". We do not accept this explanation for the searches on January 24, 2007 referred to in paragraphs 210 and 214 of these reasons.

[213] Suman further submits that the Internet History Reports for January 24, 2007 suggest that he came across the "Stewart pages" on a newspaper or movie site without doing an independent search. That seems unlikely, and we do not accept that Suman had any interest in the media articles tendered by his counsel concerning Stewart's attempt to trademark the name of the town where she lives.

(b) The "Loudeye" Searches

[214] Suman appears also to have been interested in the effects of a previous take-over on the target's share price. The Internet History Reports for Computer 204 indicate that starting at 15:36 on January 24, 2007, Suman did a series of Google searches relating to Loudeye, a digital music company that was sold to Nokia on August 9, 2006. Suman accessed an August 9, 2006 article from the Seattle Times, headlined "Loudeye being sold to Nokia". The Trading Records indicate that as of July 31, 2006, Rahman held 600 shares of Loudeye which were then trading at $1.79 per share. A month later, after the take-over, the same 600 shares were trading at $4.38 per share, an increase of 144%. Rahman sold the shares in October 2006 for approximately $2,700. On cross-examination, when asked by Staff counsel whether he had ever had an experience holding stock in a company that was the subject of a take-over, Suman testified that he did not remember Loudeye.

[215] Suman testified that he could not remember what articles he looked at on January 24, 2007, questioned the time-stamps for the entries in the Internet History Reports, and suggested that he might have been searching for information about Nokia.

2. Conclusion: Suman's Internet Searches on January 24, 2007

[216] We do not accept Suman's testimony with respect to the searches referred to in paragraphs 210 and 214 of these reasons. We find that those searches show that Suman had an interest in the topic of insider trading on the same day the Respondents began purchasing the Molecular Securities and a week before Suman was first contacted by Staff in connection with their investigation. Suman was also interested that day in the effect of a take-over on a target's share price.

L. Project Monument Calendar Fragments

1. The Parties' Submissions

(a) Staff's Submissions

[217] In Rogers' Second Report, Rogers stated that a search for the term "Monument" on Computer 201A (Suman's workstation computer at MDS Sciex) identified a large number of fragments of Microsoft Outlook Calendar entries relating to meetings and events concerning Project Monument to which Suman was not invited and for which there is no explanation.

[218] The calendar entries included (i) an appointment from the calendar of Diane Yee, who was in-house counsel to MDS Sciex; (ii) several entries titled "Updated: Monument" with respect to disclosure schedules and the timing of the Announcement; (iii) an appointment for a conference call, as well as meetings at the premises of MDS Sciex and travel to San Francisco; and (iv) reference to "MDC Road to Close (MDS Internal Call)". The entries pre-date the Announcement and Staff submits they show that Suman had accessed them before the Announcement.

[219] One of the fragments, an appointment called "Updated Monument - **Agenda Changed: Review of Disclosure Schedule**", corresponds to an appointment in Boorn's calendar sent on

January 24, 2007 at 10:23 a.m.; a corresponding entry is found in the e-mails passing through the NT Filter on January 24, 2007.

[220] In Rogers' opinion, Suman likely used Computer 201A to access the calendar entries, including the subject lines, from which the fragments came, either by using his e-mail access or the access of a member of the Sciex Deal Team who was a participant in the Monument meetings.

(b) The Respondents' Submissions

[221] The Respondents submit that Rogers could not say how or when the calendar fragments were written to Suman's Computer because Microsoft Outlook Calendar was a shared resource at MDS Sciex. They say that Staff did not rule out alternative explanations for the presence of the fragments on Computer 201A because no testing was ever undertaken to determine whether similar fragments could be found on other users' computers.

[222] When asked by Rahman's counsel whether he recalled accessing the relevant calendars, Suman gave the following answer:

> A. February 5th -- I believe it was a Monday. And it was after I was contacted about the OSC investigation. I had my interview. At that point, I was meeting Colin McCann in the parking lot of MDS Sciex, giving him [my] computer, picking up [my] computer from him, and all that.
>
> So at that point, it just seemed appropriate for me that I notify MDS directly about this investigation. And it was in the evening of, I believe, Monday, February 5th, as far as I remember, when I decided that I should set up an appointment with somebody appropriate at MDS Sciex and notify them of this investigation.
>
> So I had -- initially, I had -- the people I had in my mind was Andy Boorn, Diane Yee, and Paul Young. And I tried to set up an appointment with either one of them. So I had accessed Andy Boorn's calendar. I had accessed Diane Yee's and Paul Young's calendars.
>
> And I remember finally not finding anything -- an appropriate gap on the immediate following day. So what I decided was then -- on Monday evening, I ended up calling Paul Young directly and spoke with him about this investigation and asked him what I should do, if I should set up an appointment with Andy Boorn or Diane Yee or with himself to talk about it more.
>
> (Hearing Transcript, March 29, 2009, p. 96)

[223] The Respondents also submit that the entry referred to in paragraph 219 of these reasons was entered into Boorn's calendar on January 24, 2007 at 10:23 a.m. – almost an hour after the Respondents' first purchases of the Molecular Securities. The Respondents submit that this is inconsistent with Staff's theory that Suman obtained knowledge of the Proposed Acquisition

from the calendar fragments. By the time of the Boorn calendar entry, the Respondents' had already begun purchasing the Molecular Securities.

[224] The Respondents also question whether the "MDC Road to Close" entry (referred to in paragraph 218 of these reasons) came from Boorn's calendar. Boorn testified that, although he had checked his calendar, he was unable to find that entry. Rahman's counsel suggested that these fragments might not have come from Boorn's calendar at all, but from the calendar of another MDS employee scheduled to participate in the meetings.

[225] The Respondents also noted that none of the entries identified by Rogers refer to "Molecular Devices", but only to "Monument" or "MDDC".

2. Discussion

[226] There is no dispute that a large number of Project Monument calendar fragments were found on Suman's Computer 201A. That is one of the two drives on Suman's workstation computer at MDS Sciex. The two principal factual issues with respect to the calendar fragments are (i) whether the calendar fragments were written to Computer 201A on the evening of February 5, 2007, as Suman contends, or prior to the Announcement, as alleged by Staff; and (ii) whether the calendar fragments were written to Computer 201A in the normal course because Microsoft Outlook Calendar is a shared resource at MDS Sciex, as Suman suggests, or because Suman manually accessed and viewed the calendars of certain members of the Sciex Deal Team prior to the Announcement, as alleged by Staff.

(a) When were the Calendar Fragments Written to Computer 201A?

[227] Rogers acknowledged that he could not tell when the calendar fragments were written to Computer 201A. Lo agreed. As a result, the only evidence on this point was Suman's testimony, set out at paragraph 222 of these reasons, that he accessed the calendars of Boorn, Young and Yee on the evening of February 5, 2007.

(b) Why were the Calendar Fragments Written to Computer 201A?

[228] We heard evidence about whether calendars were an open resource at MDS Sciex and about the operation of Microsoft Outlook.

[229] Suman testified that MDS Sciex "had a policy of open calendars" and that "by default, the calendars were all shared".

[230] Young testified that some MDS Sciex employees, especially executives, would turn on the "calendar sharing" function to allow their administrative assistants – or other MDS Sciex employees – to look at their calendars to check their availability for meetings. What the person viewing the calendar would see is "free" and "busy" time, but they could also look at the details of scheduled meetings unless the person whose calendar it was had marked the entry "private". In addition, when a meeting was scheduled, it appeared on the "boardroom" calendar, which can also be viewed by others. Young believes he was sharing his calendar in January 2007 because he generally did. Young also testified that Suman had helped source software to "scrub" confidential information from meeting invitations so that such information would not appear on

the boardroom page. Suman had worked with CapGemini, MDS Sciex's third-party e-mail administrator, to resolve recurrent problems with the software.

[231] Boorn agreed that if a meeting room was required, the same calendar entry would appear in the calendars of all the participants in the meeting and on the boardroom calendar. However, Boorn testified that it would be unusual for a member of the Sciex Deal Team to put an entry relating to the Proposed Acquisition into Microsoft Outlook because of the concern about confidentiality. As noted in paragraph 224 of these reasons, he checked his calendar and did not find the "MDC Road to Close" entry. Rahman's counsel suggested that the calendar fragments may have come from the calendar of someone who sought Suman's help with an IT problem.

[232] Rogers acknowledged in cross-examination that (i) he did not make any attempt to determine whose calendar the fragments came from and did not speak to anyone at MDS Sciex about it; (ii) he did not know whether fragments of calendar entries not marked private can be found on a user's hard drive if the calendar is a shared resource at MDS Sciex; (iii) he did not know that Suman was occasionally called upon to make sure the software was appropriately scrubbing private calendar entries from the Exchange Server so that they could not be accessed by other users; (iv) he could not tell from the calendar fragments when they were stored on the hard drive; and (v) he did not make any attempt to find out whether similar calendar fragments might have been found on the computers of other MDS Sciex users.

3. Conclusion: Project Monument Calendar Fragments

[233] It is not possible, based on the evidence, to determine when the calendar fragments referred to in paragraphs 217 and 218 of these reasons were written to Computer 201A. Suman presented two innocent explanations for the presence of the calendar fragments on Computer 201A (i) that similar fragments might appear on the computers of other MDS Sciex employees as a result of Microsoft Outlook Calendar being a shared resource; and (ii) that the calendar fragments were on Suman's computer because of his involvement in sourcing and troubleshooting the "scrubbing" software. The expert evidence about the operation of Microsoft Outlook Calendar was not sufficient to allow us to draw any conclusions as to why the calendar fragments appear on Computer 201A. Staff did not submit any direct evidence that Suman accessed anyone's Microsoft Outlook Calendar showing references to Project Monument.

[234] We would add, however, that we are sceptical of Suman's evidence referred to in paragraph 222 of these reasons. It does not make sense to us that Suman would access the calendar of the President of MDS Sciex for the purpose of setting up a meeting with him to discuss Staff's investigation of Suman's trading. It makes much more sense that he would contact Racine, his immediate supervisor, or Young, who was Vice-President of Business Information Systems. Suman testified that he ultimately contacted Young to discuss Staff's investigation. Suman's testimony that he accessed Boorn's calendar for that purpose does not have the ring of truth.

[235] All we can conclude, however, is that Suman's Computer 201A contained a large number of calendar fragments that referred to Project Monument.

M. Suman's Statements during the First Staff Interview

1. The Evidence

[236] Staff alleges that when Suman was first contacted by telephone by Staff on Thursday, February 1, 2007 (the First Staff Interview), Suman denied purchasing the Molecular Securities the previous week.

[237] Staff relies on the affidavit of Stephen Carpenter ("**Carpenter**"), a Staff investigator, which describes the First Staff Interview as follows:

> On February 1, 2007, I, along with George Gunn, Manager of Surveillance in the Enforcement Branch of our office, along with representatives of the United States Securities and Exchange Commission, contacted Shane Suman by telephone. The number used was that known to E*Trade Canada Securities Corporation in respect of an account in the name of Monie Rahman, No. [redacted].
>
> During the course of the approximately 45-minute interview, Suman declined to provide information in response to the majority of the questions asked, stating that he did not wish to respond. However, he did state that:
>
> a. his date of birth is August 19, 1972; and
>
> b. he did not purchase any securities of Molecular Devices Corporation in the week of January 22 to 26, 2007, nor did he tell anyone else to acquire the securities.

[238] Carpenter's handwritten notes of the conversation are appended to his affidavit. The relevant excerpt from the notes states:

> Have not conducted trades in MDCC?
>
> → No have not

[239] The following two questions and answers are noted at the bottom of the page:

> Did you purchase? "No"
>
> Tell anyone to purchase? "No"

[240] Apart from the three questions and answers on which Staff relies, the other five questions were: "is there is [*sic*] reason for not answering?", "did you need to speak with a lawyer?", "anyone use your cell phone?", "are you willing to cooperate with us?" and "do they know about the freeze?". No answers are noted for these questions.

[241] Carpenter did not testify.

[242] Gunn, who was also a participant in the First Staff Interview, testified about the investigation and that interview. He testified that the Commission's Surveillance Unit opened its investigation after receiving a request for assistance from the SEC, on or about January 30, 2007, with respect to trading in Molecular shares and options. Staff obtained account documents that indicated that Rahman was the accountholder and that Suman was her husband. The account documents included a telephone number, which Staff determined to be Suman's cell phone.

[243] Gunn testified that, on Thursday, February 1, 2007, Staff called Suman on his cell phone. On the call were Gunn and Carpenter, as well as four SEC investigators. According to Gunn, Suman answered and, after identifying himself and others on the call, Carpenter began asking him questions. Gunn testified that Suman, after identifying himself and giving his date of birth, chose not to answer any further questions. According to Gunn, when asked if he purchased Molecular shares or options the previous week, Suman "said plainly no", and Suman also answered "no" to the question whether he had told anyone else to buy Molecular shares or options. Gunn stated that the conversation lasted approximately 45 minutes.

[244] On cross-examination, Gunn acknowledged that the conversation was not recorded or transcribed and that the only notes of the conversation, to his knowledge, are the notes made by Carpenter.

[245] Suman testified that he was in the middle of something when Staff first called him at work on the afternoon of February 1, 2007. He said there were a number of people from the Commission and the SEC on the call, but he did not know how many. After answering basic questions – his name, date of birth, address and employment – he did not feel comfortable answering additional questions. He denied saying that he did not make the purchases of the Molecular Securities; he testified that he did not answer that question, although the Staff investigators continued to ask questions after he said he did not feel comfortable answering anything further. Suman also testified that when he was interviewed by Staff in the MDS Sciex parking lot the next day (in the Second Staff Interview), he stated truthfully that he and Rahman purchased the Molecular Securities, that the relevant trading account was in Rahman's name and that he placed some of the orders and that Rahman placed other orders.

2. Discussion and Conclusion

[246] The Respondents submit that Suman's evidence with respect to the First Staff Interview should be preferred in the absence of a transcript of that interview.

[247] Staff says that, because Carpenter was not available to testify at the hearing of this matter, the Respondents were given the opportunity to cross-examine him on his affidavit but they did not do so. Staff also submits that we should accept Carpenter's affidavit evidence, which was confirmed by Gunn's testimony.

[248] We are not persuaded that the lack of a transcript of the First Staff Interview prevents us from considering the evidence we received related to that interview and from making a finding whether Suman denied making the purchases of the Molecular Securities. As we stated in the Motions Decision (see paragraph 144 of these reasons), hearsay evidence is admissible in Commission proceedings although care must be taken to avoid placing undue reliance on

uncorroborated evidence that lacks sufficient indicia of reliability. In this case, Carpenter's affidavit was supported by his handwritten note. While the handwritten note is very brief, it is clear on the main point: that Suman denied purchasing the Molecular Securities or telling anyone else to purchase the Molecular Securities. Carpenter's affidavit evidence is consistent with the testimony of Gunn, who also participated in the First Staff Interview. We find the evidence of Carpenter and Gunn to be consistent and credible and we conclude that, in the First Staff Interview, Suman denied making the purchases of the Molecular Securities.

[249] That leaves the question why Suman denied making those purchases. Rahman's counsel described the February 1, 2007 call as "an ambush" that involved as many as six people, all of whom could ask questions. Suman had no advance warning of the call and he was at work when the call came in. Moreover, while Suman had made some of the purchases of the Molecular Securities, other purchases were made by Rahman. In any event, the Respondents submit that Suman clarified his answers during the Second Staff Interview the next day by confirming the facts related to the Respondents' purchases of the Molecular Securities.

[250] It seems to us unlikely that Suman would have denied during the First Staff Interview making the purchases of the Molecular Securities if there was an innocent explanation for making them (such as that the purchases were made as a result of the Respondents' research and the application of the Five Criteria). Further, it is likely that Suman had reconsidered his denial by the time of the Second Staff Interview the next day because he knew that Staff would be able to prove that he and Rahman had made the purchases of the Molecular Securities.

[251] In our view, Suman's denial in the First Staff Interview that he made the purchases of the Molecular Securities shows a consciousness of guilt and supports the inference that the Respondents purchased the Molecular Securities with knowledge of the Proposed Acquisition.

N. Suman's Use of Window Washer

1. The Parties' Submissions

[252] Staff alleges that on February 3, 2007, Suman installed Window Washer, a software program used to erase data and information from a computer on his work computers – Computers 201A, 201B and 204 – and on his home computers – Computer Home 1A and 1B. Window Washer is a software program used to "sanitize" or permanently erase data and information from a computer without leaving any evidence of what the computer was used for or what data and information the computer contained (we refer to that as "**wiping**" a computer" or "**wiping**" data and information from a computer). Staff alleges that Suman ran Window Washer to wipe data and information from his Computers that would have assisted Staff in their investigation and this proceeding. Staff submits that February 3, 2007 was the day after Suman's Second Staff Interview, at which he had been expressly warned by Staff not to delete data or information from his office computer or tamper with it.

[253] Suman testified that he used Window Washer only as a performance optimizing program and not a data wiping program. He said that he made no deliberate manual wiping of data and information from his Computers and that Window Washer was operating automatically on

February 3 and 4, 2007. Suman also said that he believes that he updated Window Washer on his Computers on those dates and did not install it for the first time.

2. The Evidence

[254] Near the end of the Second Staff Interview, which lasted about an hour, Staff asked Suman whether Staff could get access to his computer, which led to the following exchange:

> Q. Would you be willing to turn your computer over to us for a couple of hours to allow us to have a look at it?
>
> A. Yes.
>
> Q. Okay. Can we go get it now?
>
> A. I wanted to go back to work now, but at a later time, I don't have a problem to do that.
>
> Q. Well, that won't do us very much good because you could go home and delete everything that we would want to see.
>
> A. I wouldn't do that.
>
> Q. Well, you may be the most honest person in the world, but I don't know that right yet Shane.
>
> A. Okay.
>
> Q. Can you get out of work?
>
> A. No, I would have to -- I'd have to wait until the 4 o'clock meeting –
>
> Q. Okay. Do you know that -- I mean, you're probably pretty good at computers, but we're pretty good at computers as well.
>
> A. Understood.
>
> Q. You know that we would be able to tell if anything had been tampered with the computer, correct?
>
> A. Correct.
>
> Q. Okay. You know what? You know that probably as well as I do.
>
> A. Yes.
>
> Q. So if we get the computer at a later time, and we find that it's been played with or altered --

A. M'hmm.

Q. How do you think that would look?

A. That would look bad.

(Second Staff Interview, p. 27 to 28)

[255] McCann testified that at 18:32:17 on Friday, February 2, 2007, about three hours after the Second Staff Interview, Suman used Computer 201A to search the "Computers & Internet" page at answers.yahoo.com. When McCann accessed the same URL, he found an entry titled "How do I permanently delete porn files from my computer?" The answers posted by users included: reformat the hard drive a few times, run a disc defragmenter, and "Download Window Washer from Limewire.com – any remaining bit will be eliminated. This will also get rid of all the rubbish on your system and help to ensure your programs run faster". In cross-examination, Lo acknowledged that the "How do I permanently delete porn files from my computer?" discussion board was likely accessed on February 2, 2007, although because of the duplicate time-stamp issue, he could not confirm whether it was viewed at 18:32:17 that day.

[256] Young testified that Window Washer is one of a number of software programs that are used to "sanitize" a computer; that is, to wipe it of data and information, as much as possible, without leaving any evidence of what the computer was used for or contained. He testified that Window Washer was not an approved program at MDS Sciex and that Suman would have had no legitimate business purpose for using it on his Computers.

[257] Rogers testified that Window Washer was used to wipe files from three of the drives on Suman's Computers – Computers 201A and 201B, Suman's workstation computer at MDS Sciex, and Computer 204, Suman's laptop computer at MDS Sciex.

[258] Rogers testified that on February 3, 2007, the day after the Second Staff Interview, Window Washer was installed on Computer 201A at 11:55 a.m., that it was used to wipe files from that drive and then again some time after 3:39 p.m. that afternoon, and that it was last accessed at 11:14 a.m. on February 6, 2007. In his Second Report, he stated that there is evidence that files contained in the "sumansb" profile were wiped on February 3, 2007 at approximately 12:18 p.m. using Window Washer. The erased files included files in the Outlook temporary files folder, a personal Outlook e-mail database and an Outlook Express e-mail file. An appendix to the report included examples of 10 files in one folder and 12 files in another folder with unreadable names that had been wiped.

[259] It was also Rogers' opinion that Window Washer was installed on Computer 204 at approximately 12:05 p.m. on February 3, 2007, about 10 minutes after it was installed on Computer 201A, and that it was used to wipe files from that drive. However, the Internet History Reports for Computer 204 indicate that the drive was not completely wiped. Rogers explained that if an internet history file had previously been wiped manually or in the normal course of the operation of Internet Explorer, or wiped by automatic operation of Window Washer, the file would no longer be available to the user and could not be manually selected for wiping by Window Washer.

[260] Rogers testified that Computer 201B was once a bootable drive that was used to browse the internet and review trading account balances, although only fragments of data remained. He believes that at 1:06 p.m. on February 3, 2007, about an hour after Window Washer was used on Computer 204, an attempt was made to wipe the drive of Computer 201B using Window Washer or other similar software.

[261] McCann testified that there was a limited internet history for the period from January 13 to February 5, 2007 on Computer Home 1A, and no internet history at all for the period from January 16 to February 3, 2007 on Computer Home 1B. Suman testified that internet history files are typically stored on a computer's C drive, which is Computer Home 1A in this case. When presented with the limited internet history on Computer Home 1A, Suman testified that he had no memory of erasing any internet history from his home computer.

[262] Suman testified that he used Window Washer only as a performance optimizing program, not as a data wiping program. He testified that on Saturday, February 3, 2007, he was in the office to do a scheduled upgrade to the NT Filter. While that process was underway, he filled his time by talking with Rahman, browsing the internet and running maintenance work, including Window Washer, on his computer. Suman testified that any wiping of his computer resulted from the automatic operation of Window Washer and that there had been no selective wiping.

[263] On cross-examination, Suman insisted that he made no deliberate attempt to erase data or information from his Computers. He said he believes that he updated Window Washer on his Computers, rather than installing it for the first time, on the weekend of February 3 and 4, 2007. When questioned about Staff's warning to him during the Second Staff Interview about destroying evidence, Suman stated that he was not told to seize up his computers, but to carry on business as usual. He testified that he had no independent recollection of viewing the page, "How do I permanently delete porn files from my computer", or of erasing internet history files from January 16 to February 3, 2001 on Computer Home 1A.

3. Discussion

[264] Suman did not deny running Window Washer on his Computers on February 3, 2007 but stated that he did so as a performance optimizing program. Neither Suman nor Lo disputed that Window Washer had been used to wipe files on Suman's Computers. The question is whether Suman, after the Second Staff Interview, installed and ran Window Washer in an attempt to cover his tracks, as Staff alleges, or in the normal course of maintaining computer efficiency. If he did run Window Washer other than in the normal course, the question is what, if any, inference we should draw from that.

[265] Rogers and Lo disagreed on two factual issues that bear on this question: (i) whether the February 3, 2007 installation of Window Washer on Computer 201A was the first time Window Washer was installed on that drive or was an update of previously installed software; and (ii) whether Window Washer was used manually to wipe files or was functioning on an automatic setting.

(a) When was Window Washer first installed on Computer 201A?

[266] The Respondents provided little evidence disputing Rogers' testimony that Window Washer was installed on Computer 201B and Computer 204 for the first time on February 3, 2007. The dispute between the experts over Window Washer was focused on Computer 201A. In response to Rogers' conclusion that Window Washer (version 6) was installed on Computer 201A on February 3, 2007 at approximately 11:55 a.m., Lo testified that he found evidence in the registry of Computer 201A that an earlier version of Window Washer (version 5.5), was installed on that computer in May 2006. He testified that one possibility was that version 6 was installed on top of version 5.5 as part of an update on February 3, 2007. He did not think it likely that both versions were installed on February 3, 2007 because a regular user downloading the software for the first time will go to the website and download the latest version, ignoring earlier versions.

[267] On cross-examination, Lo acknowledged that a possible explanation for the May 2006 entry for Window Washer on Computer 201A was that Window Washer version 5.5 was installed for the first time on February 3, 2007 together with an update to version 6; he did not check whether there was a software update notification in Window Washer version 5.5. Lo later acknowledged that he believed the May 2006 date was a "created" date, not a "modified" date, and that it was possible May 2006 was the date the Window Washer software was created or modified, not the date it was installed on Computer 201A. On further cross-examination, when presented with a list of files relating to Window Washer found on Computer 201A, Lo acknowledged that it was likely that the "file created" date given for all 19 entries on February 3, 2007 at approximately 11:55 a.m. was the date Window Washer was installed on Computer 201A, and that the earlier "last written" dates relate to the dates the software was written or modified, not the dates it was installed on Computer 201A. Moreover, given Rogers' evidence, Lo acknowledged that it is likely that earlier "last written" dates on Window Washer files, going back to May 17, 2004, relate to the software, not its installation on Computer 201A. Finally, when presented with a list of "prefetch" files for Computer 201A, which are typically loaded before the first time an application is run, and which appear to indicate that Window Washer was first run on Computer 201A shortly before noon on February 3, 2007, Lo testified that he did not review prefetch files and was not comfortable in drawing that conclusion.

[268] In our view, there is no question that on February 3, 2007 Suman installed Window Washer for the first time on Computer 201B and Computer 204. We have also concluded based on the evidence that it is likely that Window Washer was also installed by Suman for the first time on Computer 201A on that date. Accordingly, we find that Window Washer was installed on all three computers for the first time on February 3, 2007.

(b) Was Window Washer used manually to wipe files?

[269] Rogers' conclusion was that files contained in the "sumansb" profile on Computer 201A were selectively wiped on February 3, 2007 at about 12:18 p.m. using Window Washer. Lo's opinion in his Second Report was that because Window Washer makes wiped files unrecoverable, it is not possible to retrieve the relevant files to determine whether they had anything to do with the allegations in this matter, or to determine whether Window Washer was used as part of a regular maintenance routine. Lo also testified that had Suman used Window Washer to erase evidence relating to the allegations in this matter, there should have been no

internet "cookies" or temporary internet files relating to searches for "MDCC" and "Monument" on Suman's workstation computer.

[270] Lo challenged Rogers' opinion that Window Washer had been used manually to wipe internet files. Lo testified that by right-clicking on a file name, a user can manually erase that file using Window Washer. However, only one file or folder at a time can be manually wiped; there is no way to select a number of files or folders in a list to establish a batch to be erased. On cross-examination, Lo acknowledged that manual wiping and automatic wiping are the only two options and he testified that he could not tell which had occurred.

[271] The Respondents do not challenge Staff's allegation that certain temporary internet files were wiped from Computer 201A using Window Washer on February 3, 2007. Rogers and Lo ultimately agreed that the evidence is inconsistent with automatic operation of Window Washer, and Lo was led to acknowledge that the best explanation of the evidence is that multiple files were manually wiped in quick succession.

[272] We do not accept the submission that Window Washer was operating automatically when it wiped files on Suman's Computers on February 3, 2007. We find that it is more likely that Window Washer was used manually to wipe specific files.

[273] It would certainly have been preferable for Staff to have obtained backups of the data and information on Suman's Computers so that one could attempt to determine what information was permanently wiped as a result of his use of Window Washer. We do not know whether obtaining that backup would have shown the specific data and information that was erased by Window Washer. We are not prepared, however, to disregard the fact that Suman installed and ran Window Washer on three of his Computers on February 3, 2007 to wipe data and information after being expressly warned by Staff against deleting data or information from his office computer or tampering with it.

4. Conclusion: Suman's Use of Window Washer

[274] We recognize that Window Washer can be used to improve computer efficiency as well as to ensure privacy. We note, however, that improving computer efficiency means permanently wiping data and information from a computer. We recognize, as well, that we have no way of determining whether the files that were wiped from Suman's Computers using Window Washer had anything to do with the allegations in this matter. We are also mindful of the Respondents' submission that Staff has not presented evidence of backup files from MDS Sciex that might have resolved that question.

[275] We note, however, that there is evidence that Suman installed Window Washer following an internet search on Computer 201A on February 2, 2007 that accessed an entry "How do I permanently delete porn files from my computer?" That search supports the inference that Suman's use of Window Washer was not in the normal course.

[276] Window Washer was not an approved program at MDS Sciex and Suman would have had no work related reason for using it on his Computers. The key facts are that, the day after the Second Staff Interview, an interview in which he was expressly warned by Staff not to erase data or information from his office computer or to tamper with it, Suman likely installed and ran

Window Washer on Computers 201A, 201B and 204, and by doing so permanently wiped data and information from those Computers, rendering that data and information unrecoverable. Suman did not deny that Window Washer operated that day. He disputed only when Window Washer was first installed on Computer 201A, the purpose for which it was used and whether the wiping was made manually or automatically.

[277] Suman could not have believed that using Window Washer for any reason to permanently wipe data and information from any of his Computers was consistent with Staff's warning not to tamper with his office computer. To the contrary, he would have been very conscious of that warning. He knew that he should not be doing anything to wipe information from his Computers, yet he did so. We do not accept his evidence that he used Window Washer solely as a performance optimizing program.

[278] We find that Suman likely installed Window Washer on Computer 201A on February 3, 2007 as he had unquestionably also done on Computers 201B and 204. We also find that it is likely that Suman used Window Washer to manually wipe data and information from Computers 201A, 201B and 204 on February 3, 2007 after having been expressly warned by Staff not to delete data and information from his office computer or to tamper with it. We find that Suman's use of Window Washer on February 3, 2007 shows consciousness of guilt and supports the inference that the Respondents purchased the Molecular Securities with knowledge of the Proposed Acquisition.

VI. DRAWING INFERENCES BASED ON CIRCUMSTANTIAL EVIDENCE

A. Circumstantial Evidence

[279] This case turns on circumstantial evidence. There is no direct evidence that Suman learned of the Proposed Acquisition from someone at MDS Sciex or through his role in the IT group at MDS Sciex. Similarly, there is no direct evidence that he informed Rahman of it. It follows that there is no direct evidence that Suman and Rahman purchased the Molecular Securities with knowledge of the Proposed Acquisition. The Respondents deny having done so. Accordingly, the question is whether we can properly make inferences from the evidence that Suman learned of the Proposed Acquisition through his IT role at MDS Sciex, that he informed Rahman of it and that Suman and Rahman purchased the Molecular Securities with knowledge of the Proposed Acquisition.

1. Staff's Submissions

[280] Staff submits that absent an admission, allegations of insider tipping or insider trading may be inferred from circumstantial evidence. Staff submits that courts and securities regulators in Canada, the U.S. and the U.K. have identified the types of circumstantial evidence that may properly support an inference of knowledge of a material fact in issue.

[281] In particular, Staff submits that a respondent's conduct can provide evidence that he or she was in possession of an undisclosed material fact. For example, in *Re Danuke*, the Commission rejected the respondents' submission that the information they obtained was mere rumour because "their subsequent [trading] conduct refutes this suggestion." Similarly, the Cour

du Quebec has held that the conduct of an accused following a particular telephone conversation "must be considered in determining the significance of the information" conveyed (*R. v. Smith*, [1994] Q.J. 2732 (Q.C.), at paras. 49-50).

[282] In this case, Staff led a great deal of evidence about the opportunities Suman had to learn of the Proposed Acquisition through his role as an IT expert at MDS Sciex. Staff concedes that opportunity alone does not prove possession of the relevant undisclosed material fact. Staff submits, however, that in this case proof of opportunity, combined with evidence of well-timed, highly uncharacteristic, risky, substantial and highly successful purchases, creates a compelling inference that Suman learned of the Proposed Acquisition through his IT role at MDS Sciex, informed Rahman of it and that the Respondents purchased the Molecular Securities with knowledge of the Proposed Acquisition.

[283] Staff submits that it is not required to directly prove that Suman viewed the information that he had access to at MDS Sciex; the inference of viewing and thus possession of that information can be based on the strength of the combined circumstances. Staff relies, in particular, on three U.S. cases: *U.S. v. Larrabee*, 240 F.3d 18 (1st Cir. 2001) ("***Larrabee***"), at p. 24; *S.E.C. v. Warde*, 151 F.3d 42, 46-49 (2nd Cir. 1998) ("***Warde***"), at p. 48; and *S.E.C. v. Musell*a, 578 F. Supp. 425, 440-41 (S.D.N.Y. 1984) ("***Musella***"), at p. 441. Staff also relies on the decision of the Regulatory Decisions Committee of the U.K. Financial Services Authority (the "**FSA**") in *FSA Final Notice to Mr. John Shevlin* (July 1, 2008) ("***Shevlin***").

2. The Respondents' Submissions

[284] The Respondents submit that Staff's allegations in this case are pure speculation. They submit that Staff has failed to call a single witness who could directly confirm that Suman knew about the Proposed Acquisition. Further, they submit that there is a complete absence of evidence from which it could reasonably and logically be inferred that the Respondents knew about the Proposed Acquisition when they purchased the Molecular Securities. The Respondents submit that Staff's evidence in this respect is mere conjecture and speculation and that Staff has failed to discharge its burden of proof.

[285] The Respondents do not dispute that circumstantial evidence can support appropriate inferences. They rely on *R. v. Morrissey*, [1995] O.J. No. 639 (Ont. C.A.) ("***Morrissey***"), *R. v. Munoz*, [2006] O.J. No. 446 (S.C.J.) ("***Munoz***") and *R. v. Khan*, [2009] O.J. No. 2902 (S.C.J.) ("***Khan***") for the proposition that where a case rests on circumstantial evidence, the inferences drawn by the trier of fact must arise reasonably and logically from the facts otherwise established.

[286] The Respondents submit that in *Larrabee*, *Warde*, *Musella* and *Shevlin*, the court or adjudicator was able to establish the source of the material non-public information in drawing the inference that the respondents made the trades while in possession of that information. The Respondents submit that, in this case, Staff has not satisfied its burden of proving that Suman learned of the Proposed Acquisition from a specific source.

[287] The Respondents also submit that Staff is asking us to engage in the kind of impermissible inference drawing criticized in *R. v. Portillo*, [2003] O.J. No. 3030 (Ont. C.A.)

("***Portillo***"). The Respondents submit that the one objective fact that Staff can prove is the "seductive fact" that the Respondents purchased the Molecular Securities just before the Announcement. But to make its case, Staff must prove that the purchases were made with actual knowledge of the Proposed Acquisition. The Respondents submit that we are being asked to infer actual knowledge based on events that "could have" or "might have" occurred, and that is speculation, not the proper drawing of an inference.

B. Discussion of the Law

1. Circumstantial Evidence

[288] *The Law of Evidence* in Canada makes the following statement with respect to circumstantial evidence:

> In cases where there is a civil standard of proof, circumstantial evidence is treated just as any other kind of evidence. The weight accorded to it depends on the strength of the inference that can be drawn from it.
>
> (*The Law of Evidence in Canada*, 2nd ed., J. Sopinka, S.N. Lederman, and A.W. Bryant (Toronto: Butterworths, 1999 ("***The Law of Evidence***"), at p. 41)

[289] In *Khan*, a decision of the Ontario Superior Court of Justice, the Crown's case, which relied "almost entirely" on circumstantial evidence, was dismissed. The reasons include the following excerpt from *Watt's Manual of Criminal Evidence*, 2006 ("***Watt***"), section 9.01, at p. 42:

> Circumstantial evidence is any item of evidence, testimonial or real, other than the testimony of an eyewitness to the material fact. It is any fact from the existence of which the trier of fact may infer the existence of a fact in issue. It is for the trial judge to determine whether circumstantial evidence is relevant.
>
> (*Khan*, *supra*, at para. 47)

[290] In *Re Podorieszach*, a market manipulation case, the Alberta Securities Commission (the "**ASC**") made the following comment:

> A consideration of allegations of improper trading activity more often than not turns on circumstantial evidence, requiring us to draw inferences from facts. Often, simply because there has been no admission, we are asked to infer motive, intent or knowledge. In those cases we may begin by considering factual evidence as to actions and consequences, such as an unusual trading pattern or an unusual change in a reported price. We then consider whether it is reasonable to infer from those facts the requisite … knowledge.
>
> Knowledge … can therefore, be inferred from circumstantial evidence.
>
> (*Re Podorieszach*, [2004] A.S.C.D. No. 360 ("***Re Podorieszach***"), at paras. 76-77)

[291] The ASC reiterated this view in *Re Kusumoto*:

> There was no dispute that the evidence before us was largely circumstantial. Kusumoto seemed to suggest that circumstantial evidence alone cannot amount to clear and cogent evidence. We disagree … In many cases involving securities laws, circumstantial evidence will be the only sort of evidence available. It is not to be excluded or disregarded by reason of being circumstantial. If it is relevant it will be received and considered. In some cases, relevant circumstantial evidence will be decisive.
>
> (*Re Kusumoto*, 2007 ABASC 49 ("***Re Kusumoto***"), at paras. 73-74)

[292] Most recently, in *R. v. Landen*, [2008] O.J. No. 4416 (O.C.J.) ("***Landen***"), a quasi-criminal insider trading and tipping case, the Ontario Court of Justice relied upon circumstantial evidence to draw the inference that the relevant individual possessed and traded with knowledge of material undisclosed information, and convicted him of insider trading.

2. Drawing Inferences

[293] In *Morrissey*, the Ontario Court of Appeal said:

> A trier of fact may draw factual inferences from the evidence. The inferences must, however, be ones which can be reasonably and logically drawn from a fact or group of facts established by the evidence. An inference which does not flow logically and reasonably from established facts cannot be made and is condemned as conjecture and speculation.
>
> (*Morrissey*, *supra*, at para. 52)

[294] *Watt* states in section 9.01, at p. 42:

> Where evidence is circumstantial, it is critical to distinguish between inference and speculation. Inference is a deduction of fact that may logically and reasonably be drawn from another fact or group of facts found or otherwise established in the proceedings. There can be no inference without objective facts from which to infer the facts that a party seeks to establish. If there are no positive proven facts from which an inference may be drawn, there can be no inference, only impermissible speculation and conjecture ... .

This statement is referred to with approval in *Khan, supra,* at para. 47.

[295] Accordingly, it is clear that we may properly make inferences that are reasonably and logically drawn from the facts established by the evidence. Staff and the Respondents agree that is the applicable legal test. Any such inferences must be based on clear, convincing and cogent evidence. The question is whether the inferences that Staff invites us to draw from the evidence in this matter are reasonable and supportable inferences or impermissible speculation.

3. Improper Inferences

[296] In *Munoz*, an order committing the accused to stand trial on charges of conspiracy to commit murder and counselling to commit an indictable offence was quashed on the basis that the preliminary inquiry judge had drawn inferences that could not reasonably be drawn from the evidence before him. After quoting from *Watt* and *Morrissey*, the Court stated that "there are two ways in which inference drawing can become impermissible speculation" (*Munoz*, *supra*, at para. 26).

[297] The first requires facts to be assumed that are not proven. In *Portillo*, the Crown led evidence consisting of "two primary facts: two partial shoeprints found at the scene were similar to impressions from two shoes found by the police in the course of their investigation, and the shoes were found in the vicinity of the accused's apartment" (*Portillo*, *supra*, at para. 31). The Crown asked the jury to infer that the two accused had been at the scene of the homicide on the night the deceased was killed. The defence challenged the admissibility of that evidence, but the trial judge admitted it on the basis that it had some probative value and no potential prejudicial effect. The two accused were convicted.

[298] On appeal, the convictions were overturned. The Court concluded that the evidence related to the shoeprints and shoes "could not, absent assumption of facts not proved, or speculation, support either the inference that the shoes made the prints found at the scene or that the shoes belonged to [the accused]." The Crown's reasoning, although "seductive", was circular (*Portillo*, *supra*, at paras. 29 and 37).

[299] The second kind of impermissible inference drawing occurs when the established primary facts are not sufficiently linked to the inferences sought to be drawn. The Court in *Munoz* referred to and approved the following statement:

> [W]ith circumstantial evidence, there is, by definition, an inferential gap between the evidence and the matter to be established – that is, an inferential gap beyond the question of whether the evidence should be believed … The judge must therefore weigh the evidence, in the sense of assessing whether it is reasonably capable of supporting the inferences that the Crown asks the jury to draw.
>
> (*Munoz, supra*, at para. 28)

The Court in *Munoz* also stated that: "… it is not enough simply to create a hypothetical narrative that, however speculative, could possibly link the primary fact or facts to the inference or inferences sought to be drawn" (*Munoz, supra*, at para. 31).

[300] Accordingly, in drawing inferences, we must ensure that we are not assuming facts that have not been proven, and that the facts that have been proven are reasonably capable of supporting the inferences we draw.

4. Relevant U.S. and U.K. Cases

[301] As noted above, there are three U.S. cases Staff referred us to that are relevant in the circumstances: *Larrabee*, *Warde*, and *Musella*. While those cases are not binding on us, they are helpful in discussing the circumstances in which knowledge by a person of material non-public information may properly be inferred.

[302] In *Larrabee*, a case applying the criminal standard of proof, the U.S. Court of Appeal looked at the circumstances surrounding the alleged insider tip, which the accused denied receiving. The Court held that while "opportunity alone does not constitute proof of possession, opportunity in combination with circumstantial evidence of a well-timed and well-orchestrated sequence of events, culminating with successful stock trades, creates a compelling inference of possession by the [tippee]." The Court considered the following factors: (i) the tippee's access to the information; (ii) the relationship between the tipper and the tippee; (iii) the timing of the contact between the tipper and the tippee; (iv) the timing of the trades; (v) the pattern of the trades, including their uncharacteristic size; and (vi) the attempts to conceal the trades or the relationship between the tipper and the tippee. The Court concluded:

> When assembled, the pieces of the puzzle create a picture that supports the inference that Larrabee did possess material, non-public information about the bank merger [and misappropriated it].
>
> (*Larrabee*, *supra*, at p. 24)

[303] Similarly, in *Musella*, the Court relied on the most likely inference drawn from the evidence:

> The evidence offered, like pieces to a puzzle, takes on significance only when one attempts to arrange the individual proof into some coherent, larger picture. Although gaps remain to be sure, I can suggest no more credible explanation for the picture that emerges than the fact that Alan Ihne was tipping to James Covello non-public material information gathered during the course of his employment at Sullivan & Cromwell and that the disclosures prompted the Covellos to purchase the securities they did at the times that they did… Any innocent explanation incorporating the proof offered is less plausible than an inference of wrongdoing.
>
> (*Musella*, *supra*, at p. 441)

[304] In *Shevlin*, the FSA alleged that the respondent had obtained material non-public information about his employer, Body Shop plc, through his job as an IT technician. One day before a surprise public announcement of poor operating results, the respondent traded short on a contract for differences ("**CFD**"), netting a total profit of £38,472. The FSA alleged that the respondent had been given passwords that allowed him access to e-mail accounts of certain senior executives that contained material non-public information. The FSA alleged that by accessing those e-mails, the respondent had learned about poor operating results over the Christmas season. The FSA acknowledged, however, that there was no proof as to when the respondent accessed the e-mails. The respondent denied the allegation, and claimed that he

traded based on his own research, not based on non-public information. He argued that the FSA improperly relied exclusively on circumstantial evidence. The Regulatory Decisions Committee of the FSA found that there was cogent and compelling circumstantial evidence against the respondent, including evidence that:

> (a) the respondent had the opportunity and ability to log into the e-mail accounts of certain senior executives at the Body Shop plc during the course of his employment, although such access was unlikely to be traceable to him;
>
> (b) he arranged substantial finance on an urgent basis to enable him to effect the CFD trade before the surprise announcement;
>
> (c) he placed the CFD trade on the day before the announcement and was keen that his trade take place on that day;
>
> (d) his CFD trade was of a considerable size; one which accounted for approximately 26.7% of the trading volume in the stock that day;
>
> (e) his CFD trade was significantly larger than any CFD he had previously traded; the underlying value of the trade was £213,536, which represented more than double the respondents' net assets; and
>
> (f) the level of financial risk undertaken by the respondent was much higher than he had undertaken on previous trades and was such that it could have resulted in serious financial hardship if the trade had gone against him.
>
> (*Shevlin, supra*, at paras. 11.1-11.2)

C. Conclusion: Drawing Inferences Based on Circumstantial Evidence

[305] In an insider trading or tipping case, a respondent may deny knowledge or tipping of the relevant undisclosed material information. Accordingly, key determinations may have to be made based on inferences from circumstantial evidence. In this case, the Respondents deny that Suman had knowledge of the Proposed Acquisition at the Relevant Time and that he informed Rahman of it.

[306] We accept that the inferences we draw from the evidence must arise reasonably and logically from the facts established by the evidence. We agree that Staff cannot discharge its burden of proof by creating "a hypothetical narrative" that is not grounded in the facts. To prove that Suman learned of the Proposed Acquisition, we cannot *assume* that he did and that therefore he *must have* used his abilities and the opportunities that came with his IT role in order to obtain that information. That would be circular reasoning and impermissible speculation.

[307] At the same time, Staff does not have to bring direct evidence to prove that Suman viewed any particular document or e-mail or otherwise obtained knowledge of the Proposed Acquisition by any specific means through his IT role at MDS Sciex. Knowledge of an undisclosed material fact may be properly inferred based on circumstantial evidence that includes proof of the ability and opportunity to acquire the information combined with evidence

of well-timed, highly uncharacteristic, risky and highly profitable trades. Clearly, the more facts and evidence supporting an inference, the stronger and more compelling that inference will be. At the same time, however, even when an inference is properly drawn, there will always be a gap between the direct evidence and the inference made. The existence of that inferential gap does not mean that an inference is simply conjecture or speculation. Further, the fact that inferences as to knowledge of an undisclosed material fact can be properly made based on the evidence does not mean that a reverse onus is being imposed on a respondent to disprove possession of the particular knowledge.

[308] Staff is not required to prove that the inferences they invite us to draw are the only inferences that can be drawn from the evidence. We agree with the Court's statement in *Munoz* that "... this requirement of 'logical probability' or 'reasonable probability' does not mean that the only 'reasonable' inferences that can be drawn are the most obvious or the most easily drawn" (*Munoz*, *supra*, at para. 31).

[309] What Staff must prove based on clear, convincing and cogent evidence is that it is more likely than not that Suman learned of the Proposed Acquisition through his IT role at MDS Sciex, that he informed Rahman of it, and that the Respondents purchased the Molecular Securities with knowledge of the Proposed Acquisition. We can infer these conclusions from the evidence submitted to us provided the inferences arise reasonably and logically from the facts established by the evidence. We base our conclusions in this matter on the combined weight of the evidence and the findings we have made.

VII. FINDINGS ON CREDIBILITY AND INFERENCES MADE

A. Credibility

1. Staff's Submissions

[310] Staff submits that the credibility of the Respondents is a critical issue in this case because the Respondents testified that they purchased the Molecular Securities based on their own research and not with knowledge of the Proposed Acquisition. Staff asks us to reject that evidence.

[311] Staff submits that in a civil case, where the standard of proof is the balance of probabilities, finding the evidence of one party credible may well be conclusive of the result (*McDougall, supra*, at para. 86). Further, Staff submits that disbelieving the Respondents' testimony may be determinative in an insider trading case based on circumstantial evidence. Staff relies in this respect on *Re Bennett*, [1996] 34 B.C.S.C.W.S. 55, an insider trading and tipping case before the B.C. Securities Commission ("***Bennett***"). That Commission stated in connection with the respondents' purchases of the relevant shares that:

> … We do not believe the testimony of Doman and R.J. Bennett that they never discussed Doman Industries. We do not believe R.J. Bennett's testimony that he bought because his brother bought. We do not believe W.R. Bennett's testimony that he bought because of his research and analysis. We find that the purchases of Doman shares made by each of the Bennetts must have been made on

> information received from Doman about his decision to sell Doman Industries that had not been generally disclosed. Further, we find that the purchases of Doman shares made by Mills must have been made on information received from the Bennetts about the sale of Doman Industries that had not been generally disclosed.
>
> (*Bennett*, *supra*, at p. 93)

[312] Staff submits that the test of a witness's evidence is its harmony with the preponderance of probabilities disclosed by the evidence (*Springer v. Aird & Berlis LLP* (2009), 96 O.R. (3d) 325 ("***Springer***")). Staff submits that in this case the Respondents' testimony was inherently implausible and reflected "selective memory".

2. The Respondents' Submissions

[313] The Respondents submit that Staff's submissions about the Respondents' credibility are not sufficient to prove Staff's allegations on a balance of probabilities. Staff has to prove its allegations based on clear, convincing and cogent evidence. They submit that Staff has failed to do so. Further, the Respondents submit that the *Bennett* case is distinguishable because, in that case, the insider source of the information (Doman) was established and the issue was whether there had been communication of the information and trades by the tippees. The Respondents submit that, in this case, Staff has not proven the source of the material undisclosed information upon which Suman and Rahman are alleged to have traded.

3. Discussion

[314] The main factual issues in dispute in this matter are whether Suman learned of the Proposed Acquisition through his IT role at MDS Sciex, whether he informed Rahman of it and whether Suman and Rahman purchased the Molecular Securities with knowledge of the Proposed Acquisition. Because the Respondents deny having that knowledge at the Relevant Time, their credibility is a crucial issue.

[315] The Court stated in *Springer*, *supra*, that:

> The judge is not given a divine insight into the hearts and minds of the witnesses appearing before him. Justice does not descend automatically upon the best actor in the witness box. 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.
>
> (*Springer*, *supra*, at para. 14).

[316] In assessing the Respondents' credibility, we have carefully considered whether their evidence is "in harmony with the preponderance of probabilities disclosed by the facts and circumstances" of this case. We have concluded that it is not. There were a number of instances in which we rejected the Respondents' testimony or evidence or found it evasive, not consistent with the weight of the evidence or not believable. That evidence includes the following:

(a) We do not believe Suman's evidence that he could only speculate about whether SurfControl allowed the NT Filter administrator to create, modify or delete a rule. As an IT expert, he would have known that (see paragraphs 125 and 126 of these reasons).

(b) We do not believe Suman's evidence that there is just a "possibility" that he searched "monument inc." on January 23, 2007 (see paragraphs 155 and 156 of these reasons). We have found that Suman made that search. He had no explanation for why he would conduct that search within seconds of searching "mddc" and "MDCC". In our view, the most likely conclusion is that he had learned that the term "monument" or "monument inc." was related to MDCC and he was searching the internet to find more information and to confirm his understanding (see paragraph 159 of these reasons).

(c) We do not find the Respondents' evidence that their purchases of the Molecular Securities were based on the Five Criteria credible. We have rejected that explanation and have found that the Respondents' evidence about the Five Criteria was most likely an after-the-fact attempt to provide an innocent explanation for the Respondents' purchases of the Molecular Securities (see paragraph 179 of these reasons).

(d) We do not accept Suman's evidence that he does not recall his internet searches on January 24, 2007 relating to the alleged insider trading charges against Martha Stewart and the searches relating to the Loudeye take-over (see paragraph 216 of these reasons).

(e) We do not believe Suman's testimony that he did not deny, in the First Staff Interview, making the purchases of the Molecular Securities (see paragraph 248 of these reasons).

(f) We do not believe Suman's evidence that he installed and ran Window Washer only to enhance the performance of his Computers and that he did not manually wipe data and information from three of his Computers. We have found that he likely installed and ran Window Washer to manually wipe data and information from his Computers after being expressly warned by Staff not to delete data and information from his office computer or to tamper with it (see paragraph 278 of these reasons).

[317] The Court stated in *McDougall* that:

> … in civil cases in which there is conflicting testimony, the judge is deciding whether a fact occurred on a balance of probabilities. In such cases, provided the judge has not ignored evidence, finding the evidence of one party credible may well be conclusive of the result because that evidence is inconsistent with that of the other party. In such cases, believing one party will mean explicitly or implicitly that the other party was not believed on the important issue in the

> case. That may be especially true where a plaintiff makes allegations that are altogether denied by the defendant..."
>
> (*McDougall, supra*, at para. 86)

[318] The Court in *McDougall* also approved the following statement:

> Disbelief of a witness's evidence on one issue may well taint the witness's evidence on other issues but an unfavourable credibility finding against a witness does not, of itself, constitute evidence that can be used to prove a fact in issue.
>
> (*McDougall, supra*, at para. 95)

The Court went on to find that the trial judge had not relied solely on her unfavourable assessment of the defendant's credibility, but had concluded that the plaintiff's evidence satisfied the burden of proof.

[319] Further, under section 22 of the Ontario *Evidence Act*, a witness may be questioned as to whether that witness has been convicted of any crime. The purpose of cross-examining a witness on his or her prior convictions was explained by the Supreme Court of Canada in *R. v. Morris*:

> Cross-examination as to prior convictions is not directly aimed at establishing the falsity of the witness's evidence; it is rather designed to lay down a factual basis—prior convictions—from which the inference may subsequently be drawn that the witness's credibility is suspect and that his evidence ought not to be believed because of his misconduct in circumstances totally unrelated to those of the case in which he is giving evidence. The evidentiary value of such cross-examination is therefore purely inferential.
>
> (*R. v. Morris* [1979] 1 S.C.R. 405, at p. 432)

[320] Suman, in cross-examination, admitted that he was convicted in the United States of forgery, issuing a bad cheque and theft of a service on December 15, 1993. He was also convicted of mail fraud on June 24, 1994. These matters are only relevant in assessing Suman's credibility as a witness.

4. Conclusion: Credibility

[321] We recognize that we cannot make our decisions in this matter based only on credibility. Staff bears the burden of proving the allegations on a balance of probabilities based on clear, convincing and cogent evidence. However, at the end of the day, we did not find the evidence of the Respondents on key points to be credible. In particular, based on the combined weight of the evidence, we do not believe the Respondents' testimony that Suman did not learn of the Proposed Acquisition through his IT role at MDS Sciex, that he did not inform Rahman of it and that the Respondents did not purchase the Molecular Securities with knowledge of the Proposed Acquisition. These are key findings in the circumstances.

B. Inferences Made Based on the Evidence

[322] The question we must address is what inferences we can properly make based on the totality of the evidence submitted to us.

1. Evidence of Opportunity

[323] There is evidence that Suman was aware that MDS was considering a very significant acquisition and of the term "Monument" (see paragraphs 81 and 105 of these reasons). As stated at paragraph 134 of these reasons, we are satisfied that Suman had the ability and opportunity to view or obtain Project Monument e-mails passing through the NT Filter. He had the skills to do that as an IT expert, the SurfControl software allows an administrator to control the spam filter function and to create and modify rules to isolate, delay or forward e-mails passing through the NT Filter, and investigating e-mail delays was one of Suman's responsibilities as NT Filter administrator.

[324] We recognize that this case is unlike tipping cases where the actual source of the material non-public information, and knowledge by an alleged tipper of that information, are known with certainty because, for instance, the alleged tipper is a senior executive who clearly had knowledge of the particular undisclosed material information (see, for instance, ***Bennett, supra***; ***Donnini v. Ontario Securities Commission*** [2003] O.J. No. 3541, [2005] O.J. No. 240 (Ont. C.A.); and ***Landen, supra***). In this case, Suman was not a member of the Sciex Deal Team and there is no direct evidence that Suman learned of the Proposed Acquisition from a member of the Sciex Deal Team or by viewing a specific e-mail or calendar entry.

[325] In this respect, the circumstances resemble those in ***Shevlin***, ***supra***, where a member of the IT group at the head office of Body Shop plc provided IT support services to a wide range of staff, including senior executives (***Shevlin, supra***, at para. 4.2). That is similar to Suman's role at MDS Sciex. In ***Shevlin***, the FSA acknowledged that they were "unable to confirm with any precision when Mr. Shevlin is alleged to have logged into the e-mail accounts of certain senior executives and accessed the relevant information" (***Shevlin, supra***, at para. 10.4). Shevlin denied any wrongdoing and argued that in the absence of clear evidence that he had access to material non-public information and did access it, and based his decision to trade on it, the FSA had failed to prove its case (***Shevlin, supra***, at paras. 10.1 and 10.3). The FSA's Regulatory Decisions Committee dismissed this argument stating:

> The FSA acknowledges it is unable to demonstrate conclusively Mr. Shevlin's access to non-public information at the Body Shop. However, the FSA is able to draw inferences from the weight of the circumstantial evidence surrounding this matter when it is considered as a whole and draw conclusions from that material.
>
> (***Shevlin, supra***, at para. 11.1)

[326] The Regulatory Decisions Committee found against the respondent based on circumstantial evidence that included his opportunity to obtain the material non-public information, the nature and timing of the trades and other circumstantial evidence. We note that in ***Shevlin***, passwords had been given to the respondent that allowed him access to e-mail

accounts that contained the material non-public information. That fact does not, in our view, distinguish *Shevlin* or affect the inferences we can properly draw in this case.

[327] We have concluded, based on the evidence, that Suman had the ability as an IT expert at MDS Sciex to obtain knowledge of the Proposed Acquisition and that he had the opportunity to do so. That is an important finding in the circumstances.

2. Fundamental Shift in the Nature of Trading

[328] In *Shevlin*, the FSA rejected the respondent's evidence that he "based his trading strategy on information obtained by research or analysis" and found that he made the trades "based on non-public information obtained from the computers of certain senior executives at the Body Shop" (*Shevlin, supra*, at para. 11.3). In reaching that conclusion, the FSA held that the respondent's arguments did not "provide sufficient grounds to outweigh the strong circumstantial case established by the FSA showing that Mr. Shevlin had the opportunity and the motive to commit market abuse and that he was willing to take on significant additional debt in order to maximize his profit from what was otherwise a very risky trade in the face of market expectations" (*Shevlin, supra*, at para. 9.4).

[329] In *Warde*, the Court held that Downe (the alleged tipper) and Warde (the alleged tippee) "engaged in uncharacteristic, substantial and exceedingly risky investments in Kidde warrants shortly after speaking with one another, suggesting that they discussed not only the non-public information, but also the best way to profit from it" (*Warde, supra,* at p. 48).

[330] In *Bennett*, it was alleged that the sales by the respondents of the relevant shares were based on an illegal tip. The B.C. Securities Commission made the following comment about the high proportion of market sales by the respondents:

> We find it impossible to believe that he simply thought about the situation and decided to sell, unless he knew information that others in the market did not know.
>
> W.R. Bennett would have us believe that it was just a coincidence that 99% of the Doman shares sold on November 4 were sold by he [*sic*] and his brother and Mills, Steed, Duhamel and Dunn after the commencement of Doman's call to R.J. Bennett and before the shares of Doman Industries were halted by the Toronto Stock Exchange.
>
> (*Bennett, supra*, at p. 121)

[331] The size of the trades was also a factor in *Michel*, where the Court noted that the tippee's purchases of the subject securities "represented as high as 14 percent of the national [market] volume, and averaged 11 percent for the six days" of the trades (*S.E.C. v. Michel*, 521 F. Supp. 2d 975 at para. 107).

[332] A substantial, uncharacteristic and highly risky investment relative to the trader's previous trading patterns and net worth can also constitute a fact supporting an inference of insider trading. For example, in *Bennett*, the B.C. Securities Commission stated:

> Here we have two brothers whose assets were mostly in real estate and who were unfamiliar with the stock market, each make an unsolicited investment in Doman shares, not recommended by their brokers, that was substantial in absolute terms, that represented a significant part of each of their net worths, that one broker thought was "very substantial" and the other had never handled purchases of this magnitude in his 41 years in the business, that both brokers thought were made with knowledge of something, and where both brothers borrowed the money to make the purchases on terms we found outside banking industry practice, with annual interest charges that neither could meet beyond a few months without selling assets, including the Doman shares. We find that there was nothing ordinary about these circumstances, in fact, we find that taken together these circumstances were most unusual, and, especially so, when we consider these circumstances were the same for both R.J. Bennett and W.R. Bennett.
>
> (*Bennett, supra*, at p. 90)

[333] In *Musella*, the "substantial amounts of money invested by [the tippees] on the rare occasions when they entered the market" was considered, along with other factors, in concluding that "[a]ny innocent explanation ... is less plausible than an inference of wrongdoing" (*Musella, supra*, at p. 441).

[334] While all of the cases we refer to above made inferences based on circumstantial evidence, the specific circumstantial evidence varied. For instance, in *Shevlin*, the respondent arranged substantial financing on an urgent basis to enable him to trade before the relevant public announcement. In *Bennett, supra*, (i) the respondents were unfamiliar with the stock market; (ii) sales were made immediately after the telephone call allegedly imparting the material non-public information; and (iii) sales by the persons with knowledge of that information represented 99% of the shares sold on the exchange on the relevant day. However, in each case, the question to be decided was the same: whether the combined weight of the evidence led reasonably and logically to the inferences that were made.

[335] We have found that the Respondents' purchases of the Molecular Securities represented a fundamental shift in the nature of their trading and that their well-timed, highly uncharacteristic, risky and highly profitable purchases strongly support the inference that the Respondents purchased the Molecular Securities with knowledge of the Proposed Acquisition (see paragraph 207 of these reasons).

3. Consciousness of Guilt and After-the-Fact Conduct

[336] Staff submits that Suman's conduct after the Respondents began purchasing the Molecular Securities shows a consciousness of guilt and supports the inferences that Staff invites us to make. In this respect, Staff relies on Suman's denial during the First Staff Interview that he and Rahman made the purchases of the Molecular Securities and Suman's use of Window Washer on February 3, 2007.

[337] In *Landen*, the trial judge stated:

> Not only is his possession of that information the natural inference from his attendance at the meetings, there are a number of circumstances which shade his actions with consciousness of guilt.
>
> (*Landen, supra*, at para. 109)

[338] Staff submits that Suman's use of Window Washer, after he was expressly warned by Staff not to delete data or information from or tamper with his office computer, supports the inference that the information erased from his Computers was inculpatory. Staff relies on the law of spoliation, which states that where a party has intentionally destroyed evidence relevant to ongoing or contemplated litigation in circumstances where a reasonable inference can be drawn that the evidence was destroyed to affect the litigation, a presumption arises that the destroyed evidence would have been unfavourable to the party who destroyed it. The presumption is rebuttable by evidence that although the destruction was intentional, it was not aimed at affecting the litigation but was done in the regular course of business before litigation was contemplated (*St. Louis v. the Queen* (1894), 25 S.C.R. 649 (Q.L.), *Dickson v. Broan-NuTone Canada Inc.*, [2007] O.J. No. 5114, at paras. 38 and 44 (Ont. S.C.J.), and *McDougall v. Black & Decker Canada Inc.*, [2008] A.J. No. 1182 (Alta. C.A.), at para. 18).

[339] The Respondents caution us that, in considering consciousness of guilt and after-the-fact evidence, it is important to consider any alternative explanations for such evidence because it may be ambiguous (*R. v. Diu*, [2000] O.J. No. 1770 (Ont. C.A.), at paras. 119-120).

[340] In our view, a person's conduct after committing an alleged offence can show a consciousness of guilt that will support an inference that the person committed the relevant offence. In this case, there is evidence of Suman's consciousness of guilt by reason of his denial in the First Staff Interview of the purchases of the Molecular Securities and by reason of his use of Window Washer on February 3, 2007 to wipe data and information from three of his Computers (see paragraphs 251 and 278 of these reasons). Both circumstances evidence a consciousness of guilt and, taken together, strongly support the inferences we make in paragraph 345 of these reasons.

4. Conclusion: Inferences Made Based on the Evidence

[341] It is clear that Suman had the ability and opportunity to acquire knowledge of the Proposed Acquisition through his IT role at MDS Sciex (see paragraphs 77 and 134 of these reasons).

[342] We have also found that the Respondents' well-timed, highly uncharacteristic, risky and highly profitable purchases of the Molecular Securities constituted a fundamental shift in the nature of their trading that was not satisfactorily explained (see paragraphs 179 and 207 of these reasons). That finding is supported by the following evidence:

> (a) the fundamental shift in the Respondents' previous pattern of day trading and their first purchases of a large number of Molecular shares and of a very large number of Molecular options (see paragraphs 194 and 201 of these reasons);

(b) the timing of the Respondents' purchases of the Molecular Securities, which began shortly after the markets opened on January 24, 2007 and just five days before the public Announcement of the Proposed Acquisition;

(c) the fact that the Respondents' purchases of Molecular shares on January 24, 2007 represented approximately 7.8% of the total market volume for Molecular shares traded that day (see paragraph 180(h) of these reasons);

(d) the fact that the Respondents' purchases of Molecular options on the CBOE represented 77.2% of all series of Molecular options traded on January 24, 2007, 69.3% of all series of Molecular options traded on January 25, 2007, and 58.8% of all series of Molecular options traded on January 26, 2007 (see paragraph 180(i) of these reasons);

(e) the total cost of the purchases of the Molecular Securities which was more than the value of the Respondents' total assets (see paragraph 180(e) of these reasons); and

(f) the total profit from the sales of the Molecular Securities which was $954,938.07 (USD).

Taken together, this is strong circumstantial evidence supporting the inferences we make in paragraph 345 of these reasons.

[343] The evidence in this matter also includes:

(a) Suman's knowledge that MDS was considering the possibility of a very significant acquisition as a result of his conversation with Young (see our finding in paragraph 81 of these reasons);

(b) Suman's interaction with Halligan in the morning on January 23, 2007, when he became aware of a confidential document being prepared by her for the President of MDS Sciex described as "Andy's Monument Message" (see our finding in paragraph 105 of these reasons);

(c) Suman's internet searches for "MDCC" and "monument inc." later that day, which show that Suman had made the connection between "monument inc." and MDCC (see our finding in paragraph 159 of these reasons); Suman had no explanation for the "monument inc." search;

(d) Suman's long telephone conversation with Rahman at the end of the day on January 23, 2007, which the Respondents acknowledge included a discussion about investing in Molecular securities (see our finding in paragraph 168 of these reasons);

(e) Suman's internet searches on January 24, 2007, which included searches related to possible insider trading charges against Martha Stewart and searches for Loudeye (see our finding in paragraph 216 of these reasons);

(f) the timing of the sequence of events referred to in paragraphs (a), (b), (c), (d) and (e) of this paragraph;

(g) Suman's denial in the First Staff Interview that he purchased the Molecular Securities or told anyone else to purchase them (see our findings in paragraphs 248 and 251 of these reasons); and

(h) Suman's use of Window Washer on February 3, 2007 to permanently wipe data and information from three of his Computers, after being expressly warned by Staff not to delete data or information from or tamper with his office computer (see our finding in paragraph 278 of these reasons).

Taken together, this is strong circumstantial evidence supporting the inferences we make in paragraph 345 of these reasons.

[344] The evidence of Suman's ability and opportunity to acquire knowledge of the Proposed Acquisition through his IT role at MDS Sciex, the fundamental shift in and the nature of the Respondents' trading referred to in paragraph 342 of these reasons, and the circumstantial evidence referred to in paragraph 343 of these reasons, taken together, constitute clear, convincing and cogent evidence supporting the inferences we make in paragraph 345 of these reasons. In our view, the combined weight of the evidence overwhelmingly supports those inferences. Any innocent explanation for the Respondents' purchases of the Molecular Securities is not plausible in all the circumstances.

[345] Accordingly, we infer, based on the combined weight of the evidence, that Suman learned of the Proposed Acquisition through his role in the IT group at MDS Sciex, that he informed Rahman of it, and that the Respondents purchased the Molecular Securities with knowledge of the Proposed Acquisition. In our view, the combined weight of the evidence leads reasonably and logically to those conclusions. In our view, that is the most likely explanation for the Respondents' purchases of the Molecular Securities in all the circumstances.

VIII. CONCLUSIONS

A. Findings

[346] Based on the evidence, we find that, at the Relevant Time:

(a) MDS was a "reporting issuer" within the meaning of the Act;

(b) as an employee of MDS Sciex, a division of MDS, Suman was a person in a special relationship with MDS within the meaning of subsection 76(5) (c) of the Act;

(c) MDS's proposal to acquire Molecular was a fact that would reasonably be expected to have a significant effect on the market price or value of the MDS shares and options and was therefore a "material fact" with respect to MDS, within the meaning of the Act; and

(d) Suman informed Rahman, other than in the necessary course of business, of the material fact referred to in paragraph (c) above before that material fact had been generally disclosed.

[347] Based on the findings set out in paragraph 346 of these reasons, we find that Suman contravened subsection 76(2) of the Act by informing Rahman of the Proposed Acquisition.

[348] Molecular was a public company whose shares were listed on NASDAQ, but it was not a "reporting issuer" within the meaning of the Act.

[349] If Molecular had been a "reporting issuer", we find that, at the Relevant Time:

(a) MDS was proposing to make a take-over bid for the Molecular shares or to become a party to a merger or similar business combination with Molecular within the meaning of subsection 76(5)(a)(ii) or (iii) of the Act;

(b) Suman was an employee of MDS Sciex, a division of MDS, and was therefore a person in a special relationship with Molecular within the meaning of subsection 76(5)(c) of the Act;

(c) MDS's proposal to acquire Molecular was a fact that would reasonably be expected to have a significant effect on the market price or value of the Molecular shares and options and was therefore a "material fact" with respect to Molecular, within the meaning of the Act;

(d) Rahman learned of the material fact referred to in paragraph (c) above from Suman, and Rahman knew or ought reasonably to have known that Suman was a person in a special relationship with Molecular as we have found in paragraph (b) above;

(e) as a result of our findings in paragraph (d) above, Rahman was a person in a special relationship with Molecular within the meaning of subsection 76(5)(e) of the Act;

(f) options to purchase shares of Molecular are "securities" of Molecular within the meaning of subsection 76(6)(a) of the Act;

(g) the Molecular Securities were purchased in an account in the name of Rahman and some of those purchases were made by each of the Respondents; and

(h) based on the foregoing, the Respondents each purchased Molecular Securities with knowledge of a material fact with respect to Molecular that had not been generally disclosed.

[350] Based on our findings set out in paragraphs 348 and 349 of these reasons, the Respondents' purchases of the Molecular Securities did not contravene subsection 76(1) of the Act but would have contravened that subsection if Molecular had been a reporting issuer within the meaning of the Act.

[351] The Respondents' purchases of the Molecular Securities with knowledge of the Proposed Acquisition was inconsistent with the underlying policy objectives of subsection 76(1) of the Act. Accordingly, we find that the conduct of the Respondents in purchasing the Molecular Securities with knowledge of the Proposed Acquisition was contrary to the public interest.

B. Summary Conclusions

[352] Based on the foregoing, we find that Suman informed Rahman of the Proposed Acquisition contrary to subsection 76(2) of the Act. We also find that the conduct of the Respondents in purchasing the Molecular Securities with knowledge of the Proposed Acquisition was conduct that was contrary to the public interest.

[353] The parties should contact the Office of the Secretary within 30 days of this decision to schedule a sanctions and costs hearing.

DATED at Toronto this 19th day of March, 2012.

"James E. A. Turner"	*"Paulette L. Kennedy"*
James E. A. Turner	Paulette L. Kennedy

SCHEDULE A

STATEMENT OF AGREED FACTS

1. The value of the Respondents' assets on January 23, 2007 was $370, 227.86 (USD).

MDCC Shares

2. The 12,000 MDCC shares in the Respondents' account were purchased by Ms. Rahman between January 24, 2007 and January 26, 2007, as summarized in the following table:[2]

Respondent	Date	Time	Quantity	Price
Rahman	Jan 24	9:34 a.m.	2000	23.98
Rahman	Jan 24	10:22 a.m.	2000	24.03
Rahman	Jan 24	11:55 a.m.	2000	24.03
Rahman	Jan 24	12:03 p.m.	2000	23.97
Rahman	Jan 24	12:17 p.m.	2000	23.88
Rahman	Jan 24	2:42 p.m.	2000	23.96

3. A chart containing the respondents' transactions (identified by IP address) relating to MDCC shares in January 2007 can be found at Appendix 1 [omitted].

MDCC Options

4. The Respondents purchased 900 option contracts, all exercisable at $25.00 between January 24, 2007 and January 26, 2007:

Respondent[3]	Date	Order Time	Expiry Date	Quantity[4]	Fill Price	Order Price
Suman*	Jan 24	9:40 a.m.	Feb 17/07	10	0.80	Market
Suman	Jan 24	11:03 a.m.	Feb 17/07	20	0.85	Market
Suman	Jan 24	11:05 a.m.	March 17/07	30	1.40	Market
Suman	Jan 24	11:11 a.m.	Feb 17/07	20	0.85	Market
Suman	Jan 24	11:13 a.m.	March 17/07	20	1.40	Market
Suman	Jan 24	11:27 a.m.	Feb 17/07	30	0.85	Market
Suman	Jan 24	11:38 a.m.	Feb 17/07	20	0.89	Market

[2] All the shares were purchased through IP address 70.57.88.87

[3] The transactions marked with a "*" were made from Mr. Suman's home computer (IP address 74.121.94.96). The others made by Mr. Suman were made through Sciex's internet address (206.221.252.133).

[4] Each option was for a unit of 100 shares in MDCC.

Respondent[3]	Date	Order Time	Expiry Date	Quantity[4]	Fill Price	Order Price
Suman	Jan 24	11:41 a.m.	March 17/07	30	1.40	Market
Suman	Jan 24	11:50 a.m.	March 17/07	50	1.40	1.40
Suman	Jan 24	1:34 p.m.	Feb 17/07	50	0.83	0.85
Suman	Jan 24	2:06 p.m.	March 17/07	10	1.40	1.40
Suman	Jan 24	2:34 p.m.	March 17/07	20	1.40	1.40
Suman	Jan 24	2:51 p.m.	Feb 17/07	30	0.85	0.85
Suman*	Jan 25	9:51 a.m.	Feb 17/07	30	0.75	0.75
Suman	Jan 25	10.49 a.m.	Feb 17/07	30	0.80	0.80
Suman	Jan 25	12:06 p.m.	March 17/07	40	1.17	1.25
Suman	Jan 25	12:23 p.m.	April 21/07	50	1.55	1.55
Suman	Jan 25	12:47 p.m.	Feb 17/07	30	0.80	0.80
Suman	Jan 25	1:24 p.m.	April 21/07	50	1.65	1.65
Rahman	Jan 25	1:41 p.m.	Feb 17/07	30	0.80	0.80
Suman	Jan 26	10:25 a.m.	Feb 17/07	50	0.65	0.65
Suman	Jan 26	10:36 a.m.	March 17/07	60	1.10	1.10
Suman	Jan 26	10:43 a.m.	April 17/07	50	1.50	1.50
Suman	Jan 26	11:56 a.m.	April 17/07	50	1.56	1.60
Suman	Jan 26	11:57 a.m.	March 17/07	60	1.15	1.20
Suman	Jan 26	12:53 p.m.	Feb 17/07	30	0.80	Market

5. A chart containing the transactions (identified by IP address) relating to MDCC options purchased or sold by the Respondents in January 2007 can be found at Appendix 2 [omitted]. As indicated in Appendix 2, the option purchase orders were good for the day of order only ("GTD" or Good Through Date") and were not "All or Nothing" (AON) orders.

6. The Respondents began selling their options at 11:14 a.m. on January 29, 2007. By 2:47 p.m. on January 30, 2007 they had sold 350 options, as follows:

Trade Date	Quantity	Price	Expiry Date
January 29	10	10.10	February 17
January 29	10	10.10	February 17
January 30	80	10.20	February 17
January 30	50	10.20	February 17
January 30	50	10.20	February 17

Trade Date	Quantity	Price	Expiry Date
January 30	50	10.20	February 17
January 30	40	10.20	February 17
January 30	30	10.20	February 17
January 30	20	10.20	February 17
January 30	10	10.50	April 21

7. The remaining 12,000 shares and 550 options that the Respondents held as of January 31, 2007, were all liquidated by March 16, 2007 as follows:

Settlement Date	Activity	Share/Option	Quantity	Price	Note
Feb 1	Sold	Shares	500	35.208	
Feb 2	Sold	Options	40	10.20	Feb 17 expiry
Feb 2	Sold	Options	100	10.30	March 17 expiry
Feb 2	Sold	Options	10	10.30	March 17 expiry
Feb 14	Sold	Shares	210		Exercised – 21,000 shares added to account on Feb 16
Feb 16	Sold	Shares	6,500	35.253	
Feb 16	Sold	Shares	5,000	35.25	
Feb 16	Sold	Shares	5,000	35.25	
Feb 16	Sold	Shares	6,000	35.25	
Feb 16	Sold	Shares	10,000	35.25	
March 13	Sold	Options	4	10.50	
March 13	Sold	Options	186		Exercised – 18,600 shares added to account on Mar 15
March 16	Sold	Shares	18,600	35.407	