

IN THE MATTER OF THE SECURITIES ACT,
R.S.N.S. 1989, CHAPTER 418, AS AMENDED

- AND -

IN THE MATTER OF
ALLEN E. SHEITO and GARY A. WOODS
(collectively, the "Respondents")

Reasons for Decision of
Nova Scotia Securities Commission

Panel: Mr. J. Walter Thompson, Q.C., Commissioner, Chair of
Panel
Mr. John A. Morash, C.A. C.B.V., F.C.M.A., Commissioner
Mr. Paul Radford, Q.C., Commission Vice-Chair

Decision Date: May 7, 2013

DATES HEARD: November 19, 20 and 21 and December 10, 2012

COUNSEL:

FOR ENFORCEMENT STAFF: Stephanie Atkinson

FOR THE RESPONDENTS: Jane O'Neill and Peter Rogers, Q.C.

Introduction

[1.] Allan E. Sheito and Gary A. Woods are both geologists. Mr. Sheito graduated with a degree in geology from Mount Allison University. He worked with DeBeers in Africa and then for 30 years with INCO, ending up as president of one of their divisions called INCO Gulf. He joined Mountain Lake Resources Inc. ("Mountain Lake") in 1992. He is now 76.

[2.] Mr. Woods graduated from the University of Western Ontario with a B.Sc. in geology. He worked with BP Canada's mineral exploration arm for 12 years. Then he worked for a junior mining company known as PGE Resource Corporation. Noranda approached and hired him. He worked in New

Brunswick, Newfoundland and in Mexico. In 2007, Mr. Sheito invited him to join Mountain Lake as President and he accepted.

[3.] Mountain Lake was a gold and base metal exploration and development company. It was incorporated in British Columbia, but it has its head office in Nova Scotia. Its two principal officers, Mr. Sheito, Chairperson of the Board and Mr. Woods, President and CEO, both resided in Port Williams, Nova Scotia. Mountain Lake's 26,521,938 outstanding shares were publicly traded on the TSX Venture Exchange with the symbol MOA. Mountain Lake amalgamated with another mining company after the period in question in these proceedings.

[4.] The time period in question in these proceedings is from December 4th, 2008 to January 21, 2009 (the "Relevant Period"). Just before the Relevant Period Mr. Sheito jointly with his wife held 725,000 shares of Mountain Lake and Mr. Woods held 156,000 shares. Mr. Sheito's and his wife's holdings represented 2.7% of total outstanding shares of Mountain Lake and Mr. Woods' holdings represented 0.5% of total outstanding shares of Mountain Lake. The share price had declined significantly in the months before December, 2008. During the Relevant Period, the share price ranged between \$0.075 per share and \$0.15 per share (\$0.16 if the Respondent's broker's error in entering a bid is taken into consideration).

The Allegations

[5.] Mr. Sheito purchased an additional 71,000 shares between December 4, 2008 and January 21, 2009. The purchase prices ranged from \$0.085 to \$0.145 per share. Mr. Sheito also, during the period, made a number of other bids which did not result in purchases. On January 20, 2009, Mr. Woods purchased 12,000 shares at \$0.135. Between December 4, 2008 and January 21, 2009, 381,150 shares of Mountain Lake traded. This excludes two intentional crossed trades on two days during this period, 851,162 shares on each day between parties at arms' length to the Respondents.

[6.] The Statement of Allegations sets out the conduct of Mr. Sheito which is alleged to constitute violations of securities laws:

During the period December 4, 2008 to January 21, 2009, Sheito, without any bona fide investment intent, and for the purpose of supporting the publicly reported price of MOA shares or keeping the publicly reported price of MOA shares from falling due to selling pressure,:

- a) entered, or caused to be entered, bids for MOA shares that were immediately tradeable upon entry at prices in excess of the previously executed trade price, causing an uptick in the price of MOA shares;
- b) entered, or caused to be entered, bids for MOA shares at prices designed to rank behind existing bids for execution priority;
- c) entered, or caused to be entered, bids for MOA shares at prices equal to the market bid, but entered, or caused to be entered, at times designed to rank behind existing bids for execution priority;
- d) entered, or caused to be entered, bids for MOA shares at the same price and volume within the same day or over consecutive trading days or within short periods of time, designed to rank behind existing bids for execution priority; and
- e) cancelled, or caused to be cancelled, or permitted to expire, bids for MOA shares without receiving a fill.

[7.] The Statement of Allegations sets out the conduct of Mr. Woods which is alleged to constitute violations of securities laws:

On January 20, 2009, Woods, without any bona fide investment intent, and for the purpose of supporting the publicly reported price of MOA shares or keeping the publicly reported price of MOA shares from falling due to selling pressure, entered, or caused to be entered, a bid for MOA shares at a price below the previous purchase price for MOA shares which resulted in a passive fill.

[8.] The Statement of Allegations alleges that the above conduct constitutes the following violations of Nova Scotia securities laws:

- a) As a result of making bids for shares of MOA, without any bona fide investment intent, and for the purpose of supporting the publicly reported price of MOA shares or keeping the publicly reported price of MOA shares from falling due to selling pressure, the Respondents engaged in a course of conduct relating to MOA shares, that they knew or ought to have known, would result in, or contribute to a misleading appearance of trading activity in MOA shares, thereby violating section 132A(a) of the Act and Part 3.1(a)

of *National Instrument 23-101*;

- b) The Respondents' conduct was contrary to the public interest and detrimental to the integrity and efficiency of the capital markets.

[9.] Section 132A (a) of the *Securities Act* R.S.N.S. 1989, c. 418, as amended provides:

132A A person or company shall not, directly or indirectly, engage or participate in any act, practice or course of conduct relating to securities or derivatives of securities that the person or company knows or reasonably ought to know

(a) results in or contributes to a misleading appearance of trading activity in, or an artificial price for, a security or derivative of a security; or

(b) perpetrates a fraud on any person or company.
2006, c. 46, s. 45.

[10.] *National Instrument 23-101* is similar, providing:

3.1 Manipulation and Fraud

(1) A person or company shall not, directly or indirectly, engage in, or participate in any transaction or series of transactions, or method of trading relating to a trade in or acquisition of a security or any act, practice or course of conduct, if the person or company knows, or ought reasonably to know, that the transaction or series of transactions, or method of trading or act, practice or course of conduct

(a) results in or contributes to a misleading appearance of trading activity in, or an artificial price for, a security or a derivative of that security; or

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

[11.] The Director, in his brief, stated:

Specifically, the Director alleges that as a result of

making bids for shares of MOA without any bona fide or genuine investment intent and for the purpose of supporting the publicly reported price of MOA shares or keeping the publicly reported price of MOA shares from falling due to selling pressure, the Respondents engaged in an act, practice or course of conduct that they knew or ought to have known would contribute to or result in a misleading appearance of trading activity in the shares of MOA.

The Evidence

[12.] The Director of Enforcement, Mr. Scott Peacock (the “Director”), was alerted by Investment Industry Regulatory Organization of Canada Market Surveillance (“IIROC”) of trading by Mr. Sheito and Mr. Woods as insiders of Mountain Lake prior to a news release by Mountain Lake on February 11, 2009 raising the issue of whether the trading was done on material information not generally known to the public. The Director wrote Mr. Sheito and Mr. Woods notifying them of the Director’s preliminary investigation into these trades and inviting them to provide a voluntary statement. They both attended an interview with the Director on June 18, 2009 and frankly discussed the situation leading up to the news release and their trading in Mountain Lake shares. The full transcript of the interview was received as evidence in this hearing. In the interview, Mr. Sheito and Mr. Woods’ answers allayed the concerns about trading on material undisclosed information but provoked another concern about whether their activities might constitute market manipulation.

[13.] The significant evidence is that of Mr. Sheito and Mr. Woods themselves in this interview with the Director. Mr. Sheito referred to a purchaser he became aware of that was placing “iceberg” bids in the market through broker 9 at a low price, and then re-entering the bids daily for some period of time and Mountain Lake stock had been falling and “we were going to hell” and so “this is why I put on these bids, you know, to try and support the stock...”

[14.] There was indeed someone bidding each day to purchase 97,500 shares at \$.06 cents a share. Mr. Sheito apparently believed this “iceberg” was driving the price down. Mr. Sheito said he believed they needed to have some bids in place, so that with “this broker guy was walloping us” the stock “wouldn't go down the toilet”. In referring to his bids he said “ ...I put in these things and...if you get hit you get hit if you don't, you know, that's great. But

it was to support the stock because of this. Remember I mentioned earlier about this broker number 9 that was...and he had these iceberg stuff in there and I was so frustrated...I called you and I said, What in the hell can we do against this, you know . I mean these people are killing our stock...you know, so that's why we put the bids in, it's as simple as that."

[15.] Mr. Sheito's reference to calling the Director was evidenced by a memo from the Director's records of a phone call received from Mr. Sheito on October 27, 2008 complaining of someone artificially depressing the share price of Mountain Lake.

[16.] Mr. Woods stated in the interview as follows: "None of the bids we put in for our shares were at market. They were all support below market values, and frankly, I was hoping I wasn't going to get hit, in a lot of these case, but I did because of the big downtrend in the market but we were there to provide some support. We're a very small volume trader and if someone decides to (sell off?) the shares they will just chew right through all the bids quite quickly and we'll have a dramatic drop. So we all decided we got to pitch in a little bit here and provide some support for the stock in case these things happen, and these things were happening especially with this iceberg guy out there, whoever he was."

[17.] The Director asked who Mr. Woods was referring to by "we" and Mr. Woods answered: "Just the directors, we said that, you know, please feel free to put in a bid and support the stock, kind of thing, anytime. It was just an effort by us to provide a bit of backdrop there to the share pricing...."

[18.] Mr. Sheito did not himself actually want to buy the stock. He said in response to the Director's enquiry about his purchases in the past five or six months that these had been "supporting the stock" and as to when he last bought stock because he really wanted to have it he answered "I don't know. A heck of a long time ago I can tell you that" and "No, I mean I have enough family stock believe me."

[19.] There were 32 trading days during the Relevant Period. Shares in Mountain Lake traded on only 20 of those days. Mr. Woods submitted one bid on January 20, 2009 which became the market bid and was passively filled resulting in a purchase of 12,000 shares at \$0.135 and he submitted no other bids or offers for Mountain Lake shares. Mr. Sheito submitted, re-entered or changed 21 bids for Mountain Lake shares on 19 of those days, of which 9 resulted in purchases on 7 days totalling 71,000 shares and he sold no shares

and submitted no offers. Of the 21 bids submitted, re-entered and changed by Mr. Sheito, 13 were below the market bid price, 2 were equal to the market bid price but behind in priority for execution, 4 were above offered price resulting in immediate fills and 2 were market bids resulting in passive fills. Of the 13 below the market price bids, 3 resulted in purchases. Mr. Sheito's and Mr. Woods' purchases represented 22% of all purchases of shares purchased in Mountain Lake during the Relevant Period, excluding two large intentional crosses representing 1,702,324 share purchases.

[20.] Of the bids submitted by Mr. Sheito the Director's allegations are that these were submitted in a manner designed to be behind other bids either in price or at the same price but behind in execution priority for the purpose of creating an appearance of greater depth of investor interest in the market for Mountain Lake shares and thereby prevent the share price from falling.

The Experts' Opinions

[21.] Ms. Kim Stewart, CFA, was admitted as an expert in trading analysis and her report was presented as expert evidence tendered on behalf of the Director. She said:

17...Sheito engaged in a course of conduct that he knew or reasonably ought to have known would result in, or contribute to, a misleading appearance of trading in MOA shares during the period December 4, 2008 through January 21, 2009.

18. Some bids were entered by Sheito not with bona fide investment intent, but rather in an attempt to "support" the price volatility and the dramatic decrease in the trading value experienced in MOA shares since August, 2008. That Sheito's bids were an attempt to support MOA shares is substantiated by many of the comments he made during his interview and by the nature of the bids entered.

19. [Seventeen] thirteen * bids were entered by Sheito at prices designed to rank behind existing bids for execution priority. In fact, only three such bids resulted in a trade. Sheito sometimes entered bids at the same price, volume and terms over consecutive

days without receiving a fill, or at prices so low that no trades had been executed at those levels in days. Other bids were entered as Day orders at prices that joined older bids that had remained unfilled over several trade days. Such bids left Sheito at the back of the queue for execution priority and ultimately with bids that expired at the end of the trading session. In the case of an illiquid stock, such as MOA, orders of this nature have the effect of “lining the book” with little hope of execution but which do contribute to a false or misleading appearance of trading activity.

20. Sheito entered four additional bids that he knew would lead to the immediate purchase of shares. The trades were not made for bona fide investment purposes as evidenced by Sheito’s words that it had been a *“heck of a long time”* since he had bought shares he wanted and that *“I mean I have enough family stock believe me”*, but rather to set higher prices for a variety of reasons...

22. Mr. Woods entered only one bid throughout the review period. On January 20, 2009, his bid elevated the market quote to a level representative of recent trading. Without his many admissions that he had no interest in acquiring shares, this isolated incident would be difficult to pursue or identify as having been entered with manipulative intent. However, based on the passive nature of the bid, that he had not entered any bid in MOA for over two months, and his many admissions during his interview that he had no interest in acquiring MOA shares in January 2009, I am of the opinion that there is sufficient evidence to conclude that this bid and subsequent passive trade contributed to a misleading appearance of trading activity [additional words deleted by agreement].

25. In my opinion there is no evidence of artificial pricing by either Sheito or Woods.

* Note: Corrected to thirteen bids as it was acknowledged during hearing that four bids were

entered by Mr. Sheito's broker to correct errors it had entered and to properly reflect his insider status on bids.

[22.] Mr. Dean E. Holley, with extensive experience as an expert witness before courts and administrative tribunals in securities regulatory matters and in employment with the British Columbia Securities Commission as Deputy Superintendent of Compliance and Enforcement and as Executive Director was called on behalf of Mr. Sheito and Mr. Woods and was qualified as an expert. He prepared an expert report in reply to the report of Ms. Kim Stewart and disagreed with the conclusions of Ms. Stewart. He said in his report:

63. Bids posted by directors (or by others with a significant interest in the company) that are near current market prices are commonly referred to as 'support bids'. In my opinion, providing that these 'support bids' are real ones (that are not cancelled at the first sign that they might be filled), are not designed to mislead investors about the state of the market, do not result in fictitious trading volume (e.g., trades that do not involve a change of beneficial ownership) and do not establish prices that are inconsistent with market conditions at the time, they would not violate accepted principles of fair trading.

[23.] Mr. Holley further set out a number of indicia of manipulation:

13. In guidelines like UMIR Policy 2.2, market regulators have set out some of the factors that can, depending on the circumstances, be indicia of deceptive or improper trading practices. They include such things as:

- a) engaging in trades in a public market that do not involve a change in beneficial ownership,
- b) artificially raising, lowering or maintaining prices,
- c) creating an artificial appearance of investor participation in the market,
- d) engaging in prearranged trades that create a

misleading appearance of trading or that improperly exclude other market participants,

e) engaging in trades to defer settlement (e.g. debit kiting),

f) trading without the ability and intention of properly settling the trade,

g) unduly interfering with the normal forces of supply and demand or artificially restricting the public float,

h) engaging in manipulative trades to increase the value of a derivative position,

i) entering a series of orders that are not intended to be executed.

[24.] Mr. Holley concluded:

64. Based on the available trading data and on the content of the videotaped interview of Mr. Woods and Mr. Sheito it would be my opinion that the respondents entered their support bids as reluctant buyers of last resort, rather than buyers whose goal was to establish or maintain an artificial price or artificial trading volume for Mountain Lake. They may well have hoped that their support bids would not be filled, particularly if they believed that the shares were already undervalued by the market, but that does not mean that the bids were not bona fide buy orders or that they were entered to maintain prices at artificial levels or mislead other investors about the liquidity of Mountain Lake shares.

68. The buy orders placed by the respondents in this case were modest in size and each represented an investment of less than \$2,000. I am aware of no evidence to suggest that Mr. Sheito or Mr. Woods took any steps to prevent the buy orders they had entered

from being filled. Indeed, some of the buy orders for the Sheito account were repeatedly re-entered after they had expired. The result of these orders was that Mr. Sheito purchased and paid for 71,000 shares and Mr. Woods purchased and paid for 12,000 shares. Neither sold any shares during the Relevant Period or in the months that followed...

69. Mr. Sheito and Mr. Woods may well not have wanted to buy more shares of Mountain Lake, even at the historically low prices evident during the Relevant Period. In my experience, that is often the lot of directors and officers of junior companies who are expected, perhaps unfairly, to use their own money to provide liquidity when few other investors are paying any attention to the company's securities. That does not mean that the orders the respondents entered were not bona fide orders that they intended to honour.

70. Small companies with thinly traded securities, like MOA, can be subject to extreme short-term share price volatility due to the limited following among dealers and investors and the resulting lack of depth of bids or offers at various prices in the marketplace. During the Relevant Period, Mountain Lake traded on only 20 days, and on eight of those days, the range between the day's high price and low price was between 20% and 32% of the day's closing price. On twenty-eight occasions, the change in the price of MOA from one trade to the next was $\pm 10\%$ or more, and on thirteen of those occasions, the price change from one trade to the next was $\pm 25\%$ or more. In circumstances like this, buy orders priced below the best bid (or sell orders priced above the best offering) may very well be executed. Placing such orders is not only a sensible strategy for investors, it is an important part of the price discovery process as it helps other market participants understand the levels at which others are prepared to buy or sell the security. As noted in paragraph 39 above, it was a

strategy followed almost every day by a TD client who entered a day order to buy 97,500 shares of MOA at their \$0.06 or \$0.055 per share virtually every morning during the Relevant Period.

71. In my opinion, there is no basis on which to conclude that the unfilled buy orders placed for the Sheito account created a misleading appearance of market depth or trading activity.

73. I have already set out my opinion that Mr. Sheito's participation in the MOA markets, albeit as a reluctant buyer, does not mean that his bids were not bona fide bids that he intended to honour. The fact that Mr. Sheito entered orders that led to immediate fills provides further evidence that he intended to be a buyer, as does the fact that the shares he purchased were not sold despite increased trading prices. The Sheito purchases were made at the best offering prices available at the time and I am aware of no evidence that the shares were acquired from anyone other than an arms' length seller. In my view one cannot conclude that the purchases were improper absent evidence that the trades were made to establish artificial prices or were otherwise intended to deceive other market participants.

75. Mr. Woods made a single purchase of \$1,620 worth of MOA shares on one day during the Relevant Period. That purchase was made at a price \$0.015 lower than the previous (independent) trade. Mr. Woods was responsible for only 0.6% of the trading volume over the period. In my opinion, the fact that Mr. Woods would rather not have been a buyer at that time is not relevant. His order was properly entered, settled and disclosed on his insider reports, and the shares he acquired have never been sold. His purchase was at a price consistent with market conditions at the time. In my opinion there is no foundation for concluding that the January 20th, 2009 order and trade for the Woods account was improper

or abusive.

Standard of Proof

[25.] The decision of MRS Sciences Inc. (2011), 34 OSCB 1547, a panel of the Ontario Securities Commission, dated February 2, 2011, sets out the Standard of Proof applicable to securities commissions' proceedings:

141. It is well established that Staff must prove its case on a balance of probabilities. As the Commission stated in Re Limelight Entertainment Inc. (2008), 31 O.S.C.B.1727 (Limelight) at para 126, "...we conclude that Staff must prove its case on a balance of probabilities, based on clear, convincing and cogent evidence".
142. In F.H. v. McDougall, [2008] 3 S.C.R.41 ("McDougall"), the Supreme Court of Canada reaffirmed that "there is only one civil standard of proof at common law and that is proof on a balance of probabilities", which requires the trier of fact to decide "whether it is more likely than not that the event occurred" (McDougall, supra, at paras.40 and 44). The Court noted, "the evidence must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test" (McDougall, supra, at para.46).

The Issue

[26.] The task facing this Panel is to determine whether the Director has established on a balance of probabilities based on clear, convincing and cogent evidence that the Respondents as a result of making bids for shares of Mountain Lake, without any bona fide investment intent, and for the purpose of supporting the publicly reported price of Mountain Lake shares or keeping the publicly reported price for Mountain Lake shares from falling due to selling pressure, engaged in a course of conduct relating to Mountain Lake shares, that they knew, or ought to have known, would result in, or contribute to a misleading appearance of trading activity in Mountain Lake shares, thereby violating section 132A (a) of the *Securities Act* and Part 3.1(a) of National Instrument 23-101.

[27.] The Panel must also decide, using the same Standard of Proof, whether or not the Respondents' conduct was contrary to the public interest and

detrimental to the integrity and efficiency of the capital markets.

Analysis

[28.] In considering whether the provisions have been contravened, as was done in Re Podoriesz, [2004] A.S.C.D. No. 360 at para. 72, a decision of the Alberta Securities Commission, and in Re Siddiqi, [2005] B.C.S.C.D. No. 542 at para. 110, a decision of the British Columbia Securities Commission, we need to consider three elements:

- a) have the Respondents engaged in an act, practice or course of conduct relating to securities or derivatives of securities;
- b) did the act, practice or conduct result in or contribute to a misleading appearance of trading activity;
- c) If so did the Respondents know or ought reasonably to have known that a misleading appearance of trading activity would result or might have resulted from their actions.

[29.] The conduct of the Respondents, who are both residents of Nova Scotia, of placing of bids to purchase shares of Mountain Lake through brokers in Nova Scotia are clearly established through evidence as acts of the Respondents which are within the jurisdiction of the Commission and subject to the *Securities Act* and National Instrument 23-101.

[30.] In these proceedings there is no allegation of causing an artificial price, rather the allegations are of causing or contributing to a misleading appearance of trading activity. Thus the Director must establish that the Respondents' conduct of placing bids resulted in or contributed to a misleading appearance of trading activity.

[31.] In evaluating whether the Respondents' conduct results in a "misleading" appearance of trading activity we have considered the following quotes from *In Re Podoriesz* (supra) in which the Alberta Securities Commission stated at paragraphs 69 and 70 in relation to manipulation of price:

69. Our securities regulatory regime is destined to protect investors and to foster fair and efficient capital markets and investor confidence in those markets. The achievement of these objectives turns on the integrity of the capital markets

and those who participate in them. It is essential to the integrity of the capital markets that the price of publicly traded securities reflects true market supply and demand, not deception or manipulation.

70. If market participants improperly interfere with the price of securities, that price is no longer a true reflection of genuine market supply or demand. Not only might investors unknowingly pay or receive a distorted price for a security but, more broadly, the fair and efficient functioning of the capital market and investor confidence in the market are placed in jeopardy. As Judge Woolsey said in *United States v. Brown*, 5 F. Supp. 81, (S.D.N.Y. 1933) at 85, affirmed on those grounds, 79 F. 2d 321 (2nd Cir. 1935):

When an outsider, a member of the public, reads the price quotations of a stock listed on an exchange, he is justified in supposing that the quoted price is an appraisal of the value of that stock due of a series of actual sales between various persons dealing at arm's length in a free and open market on the exchange, and so represents a true chancering of the market value of that stock thereon under the process of attrition due to supply operating against demand.

[32.] Although the above quote refers to the results of a respondent's conduct on the price of a security, the same principles apply to determine if conduct results in a misleading appearance of trading activity in a security, namely whether the conduct constitutes a true reflection of genuine market supply or demand or deception or manipulation. The Director argues that Mr. Sheito's actions of placing bids at prices that he hoped would not be successful in being "hit" resulted in a misleading appearance of trading activity because it was done without bona fide investment intent. Decisions of numerous securities commissions and self-regulatory organizations have addressed the fact that conduct involving indicia of manipulation will result in a misleading price or misleading appearance of trading activity, as applicable, if motivated by improper intent but will not be misleading if improper intent is not present [for example Re Anderson, 2007 ABASC 97, at para. 45]. Thus the analysis of whether conduct results in a misleading appearance of trading activity must examine whether there is indicia of manipulation and if so whether the intent or motive reflects genuine market supply or demand or reflects manipulation and deception.

[33.] Unlike many cases of alleged market manipulation, there is in this case candid evidence from the Respondents' interview with the Director of their intentions and motives. Their intentions were to place support bids to provide a counteraction to the declining prices and potential effect of an "iceberg" bid, as they felt was their duty as a directors of a thinly traded venture exchange listed company. A number of techniques or indicia of manipulation from the Universal Market Integrity Rules are listed in paragraph 13 of Mr. Holley's report quoted above, and these are also set out in section 3.1 of the Companion Policy of *National Instrument 23-101*.

[34.] In the present case we conclude none of the following classic indicia of manipulation are present: effecting transactions which do not affect the beneficial ownership of securities, wash trading, entering bids at end of day, prearranged trades, high closings, kiting, entering orders at artificial prices, etc. The Director's allegations reference the Respondent's conduct of making two bids "resulting in an uptick": on January 24, 2008 a market bid for 1,000 shares at \$0.145 per share (\$145.00 total price) when the market quote was \$0.09 bid/\$0.145 offered and on December 31, 2008 a bid for 15,000 shares at a limit price of \$0.12 when the market quote was \$0.09 bid/\$0.115 offered (\$1,800 total price). However since there is no allegation of the Respondents contributing to an artificial price, and since Ms. Stewart's report concludes "there is no evidence of artificial pricing", then we consider these trades only in respect to the issue whether they contribute to a misleading appearance of trading activity. The Director's allegations do however directly relate to one of the enumerated indicia of manipulation, namely entering a series of orders for a security that are not intended to be executed, given the Respondents' comments that they hoped their bids wouldn't be "hit".

[35.] Ms. Stewart's report describes each of the Respondent's 22 bids in relation to the market quotes and concludes, based on the Respondents' comments in the interview with the Director, that some of the bids by Mr. Sheito were entered not with bona fide investment intent but rather in an attempt to "support" the price volatility and dramatic decrease in trading value of Mountain Lake shares. She says Mr. Sheito made 17 bids (which was corrected to 13 bids after four bids were found to have been entered by the broker to correct its errors in entering the original bids) below market with three resulting trades. She says this was "lining the book." Then she finds manipulation in "the four additional bids that he knew would lead to the immediate purchase of shares." We question how Mr. Sheito's pattern of conduct can be criticized as misrepresenting trading volume both for bidding

below the market without bona fide investment intent hoping that his bids will not be hit and for actually buying at the market. In Mr. Woods case, there can be no pattern. He simply bid on and bought some shares, once.

[36.] We accept Ms. Stewart's proposition that conduct which involves a pattern of placing bids to attempt to "line the book" intending to mislead the market as to the demand of true buyers and thereby misrepresenting the true market demand and supply could constitute market manipulation. This could be considered an example of the technique described in UMIR Policy 2.2 and section 3.1 of the Companion Policy of *National Instrument 23-101* as entering a series of orders that are not intended to be executed. However, the Respondents' conduct must be analyzed to determine if there is misrepresentation or deception as to the volume of demand, and if their intent was improper within the concepts expressed in *Re Podorieszach* (supra).

[37.] Paragraph 70 of Mr. Holley's report, quoted above, concludes that due to the volatility on a trade to trade and on a day to day basis of Mountain Lake's share price, the bids submitted by the Respondents did have a realistic chance of being executed. Ms. Stewart's conclusions on the manipulative effect of the 13 below market bids is dependent on the Respondents' statements that these were made with hope their bids would not be "hit" and to support the price and her conclusion that this means the bids were made without bona fide investment intent and were therefore manipulative and contributed to a misleading appearance of trading activity.

[38.] Mr. Holley's report points out several instances of market participants submitting bona fide orders that they hope will not be filled, such as investors holding shares who place stop-loss orders so that their shares will be sold if the price declines to a specified price level. Thus considered in isolation, there are instances where intent expressed by the respondents that they hoped their bids wouldn't be "hit" isn't in itself evidence of manipulation or improper motive.

[39.] Mr. Sheito and Mr. Woods bid into the market. The stock was volatile and easily moved due to its low volume of trading. Their bids were within the market range. In the volatile market, the bids certainly might be filled as indeed some were. Those filled bids represent real trades on the market. They were at arms' length to strangers. Both Respondents each used only one account. Although bids were time limited, none were cancelled. Mr. Sheito did not seek to avoid his bids being filled. Their combined purchases, representing less than 22% of the volume for the relevant period, did not

dominate the market. Both spent real money and, once bought, held on to their shares. No evidence was received if or when they sold any shares. Their trading activity was real. They had faith in the value of their work, their company, its prospects and the share price. They believed the shares to be undervalued.

[40.] Mr. Holley's opinion states that directors of TSXV-listed companies are expected to be buyers of last resort when trading volumes are thin and when bid-ask spreads are significant. He says "providing that these support bids are real bids (that are not cancelled at the first sign that they might be filled), are not designed to mislead investors about the state of the market, do not result in fictitious trading volume (e.g. trades that do not involve a change of beneficial ownership) and do not establish prices that are inconsistent with market conditions at the time, they would not violate accepted principles of fair trading." He stated in cross-examination that this is the first time he has given expert evidence on "support bids" by directors.

[41.] The Director's submissions on "support bids" are that if this Panel accepts that directors' support bids, entered for the purpose of seeking to prevent the price from falling further, do not have an improper motive then the "purity of the system will be corrupted" and it will be dangerous to the investment industry because "people could not rely on information depicted by the markets".

[42.] We were not referred to any jurisprudence considering directors' support bids and whether they are considered motivated by improper intent and if within fair trading rules what limitations apply to them.

[43.] Mr. Holley did not categorically approve of support bids. He said "the trading analysis must try to determine if and when activity becomes misleading or deceptive or when prices become artificial. This is not a formulaic exercise. Any indicia of trading misconduct must always be considered in the context of the market in which it occurred, and with appropriate consideration of the circumstances, consequences and purpose of the activity." He said, and we agree, "In each case, the nature of an order or trade must be viewed within the context of the market at the time, the way the activity was undertaken, the effect it had on the markets and on other market participants, and the purpose that the order or trade was intended to achieve."

[44.] We found Mr. Woods and Mr. Sheito to be credible and sincere. Mr. Sheito and Mr. Woods are geologists. They explore and develop mines with

money obtained through the sale of shares. They are not stock market speculators. As they put it, they raise money through the markets and spend it, raise money and spend it. Without it, Mr. Sheito said, “you close your doors.” Price is important for the purpose of raising money. Mr. Sheito and Mr. Woods had faith in Mountain Lake and its prospects. They believed that the properties they had explored and wanted to develop had real potential. They believed that the stock was, at the prices at which it was trading, significantly undervalued.

[45.] The evidence was that Mr. Sheito and Mr. Woods had filed all required reports of trades by insiders.

[46.] Some argument was presented as to whether the Respondents’ conduct could be legitimized as market making, but this argument was not pressed and we do not consider it applicable as there was no recognized rules for market makers on the TSX Venture Exchange and there was no evidence that the Respondents bought and sold shares as a market maker would do; the Respondents only bought shares.

[47.] The question we are to answer is whether the conduct of the Respondents in making a total of 22 bids, including 13 below market bids, of which 10 of the total bids resulted in purchases with an aggregate purchase price of \$9,060.00 resulted in or contributed to a misleading appearance of trading activity. One of the Respondents’ arguments is that because the bids were real bids and were honoured when “hit” that the bids were representative of actual demand and were not manipulative. This argument in itself is not determinative; if it was then it would legitimize all trades that are not wash trades or don’t involve a change in beneficial ownership. The threshold for proper intent is higher than that.

[48.] The Director frames the issue as requiring proof of bona fide investment intent. We consider that framing it as such simply replaces one question with another as it begs the question of what constitutes bona fide investment intent. There are some recognized concepts of bona fide investment intent but intent is more often characterized by when it constitutes improper intent. Improper intent exists where trading activity is not reflective of true market supply and demand and done in violation of fair trading practices.

Conclusion

[49.] We accept the expert evidence of Mr. Holley that it is not in breach of fair

trading practices for directors of junior listed companies to make support bids for their company shares if done within certain bounds and limitations. Those limitations include that such bids are near current market prices, are not cancelled at the first sign that they might be filled, are not designed to mislead investors about the state of the market, do not result in fictitious trading volume (e.g., trades that do not involve a change of beneficial ownership) and do not establish prices that are inconsistent with market conditions at the time. Such support bids would have to be viewed within the context of the market at the time to determine if such activity is otherwise misleading or deceptive or if prices become artificial.

[50.] Mr. Sheito's and Mr. Woods' transactions did reflect the amount of their own money they were prepared, albeit reluctantly, to pay towards purchasing shares and, in the circumstances of this case, fell within the purview of genuine and legitimate support bids of the company of which they were directors and whose shares they considered undervalued, thus constituting real demand. We conclude their actions, including placing 13 bids at or below market prices were not manipulation and did not comprise improper intent for several reasons. First, the bids were within a reasonable trading range that reasonably could result in a "hit", despite that the Respondents did not want to be "hit". Second, their motivation was not improper but was to provide "support bids" as they perceived their duty to do as directors of a junior mining company and their "support bids" were made within bounds and limitations described in Mr. Holley's expert report and fair trading rules. Third, the small number of bids and small aggregate of purchase prices paid in the circumstances of this case did not constitute sufficient activity that a person would know or ought to know would result in or contribute to a misleading appearance of trading activity.

[51.] Upon considering all the evidence, including the testimony of Messrs. Sheito and Woods who we found credible, and the two experts who gave evidence, we are of the opinion that on a balance of probabilities the Respondents did not engage in a course of conduct relating to Mountain Lake shares which resulted in or contributed to a misleading appearance of trading activity in Mountain Lake shares, and that they did not violate Section 132A (a) of the *Securities Act*, nor did they violate Part 3.1 (a) of National Instrument 23-101 and accordingly we dismiss the allegations.

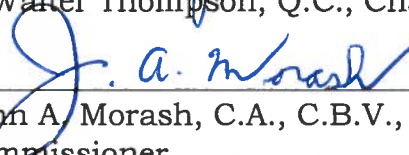
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[52.] Further, we are of the opinion that the Respondents' conduct in this matter was not contrary to the public interest nor was it detrimental to the integrity and efficiency of the capital markets.

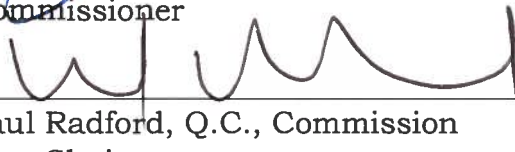
Dated at Halifax, Nova Scotia this 7th day of May, 2013



J. Walter Thompson, Q.C., Chair of Panel



John A. Morash, C.A., C.B.V., F.C.M.A.,
Commissioner



Paul Radford, Q.C., Commission
Vice-Chair