ALBERTA SECURITIES COMMISSION

DECISION

Citation: Re Kitts, 2019 ABASC 173 **Date: 20191112**

Brian Arthur Kitts and Vesta Capcorp Inc.

Panel:	Tom Cotter James Oosterbaan Maryse Saint-Laurent
Representation:	Peter Verschoote Carson Pillar for Commission Staff Brian Kitts self-represented
Submissions Completed:	August 2, 2019
Decision:	November 12, 2019

TABLE OF CONTENTS

I. INTRODUCTION

[1] After a seven-day hearing, we found that Brian Arthur Kitts (**Kitts**) and Vesta Capcorp Inc. (**Vesta**, and together with Kitts, the **Respondents**) contravened s. 93(b) (now s. 93(1)(b)) of the *Securities Act* (Alberta) (the **Act**) by engaging in a course of conduct relating to securities that they knew perpetrated a fraud on investors. Our analysis and reasons are set out in *Re Kitts*, 2019 ABASC 91 (the **Merits Decision**).

[2] With the issuance of the Merits Decision, this proceeding moved into a second phase to determine what orders (if any) ought to be made against the Respondents under ss. 198, 199 and 202 of the Act. We received written submissions from staff (**Staff**) of the Alberta Securities Commission (the **ASC**), along with an affidavit sworn by Eric Keller on June 26, 2019 (the **Keller Affidavit**) and a summary of Staff's investigation and hearing costs (including supporting documentation) (the **Bill of Costs**). The Respondents did not submit evidence or written submissions, despite being given additional time to do so. Neither of the parties requested an oral hearing and the panel assessed sanctions and costs based on the record before us.

[3] Our findings and analysis in respect of sanctions and cost-recovery orders are set out below. In short, we are ordering permanent market-access bans against the Respondents, together with significant monetary sanctions and a cost-recovery order.

II. BACKGROUND

[4] The salient facts of this case are set out in the Merits Decision, which should be read together with this decision. We summarize here significant points and findings from the Merits Decision.

[5] Vesta, a federally-incorporated company throughout the relevant time, was registered as an extra-provincial corporation in Alberta from September 2014 until it was struck from Alberta's corporate registry in March 2018. Kitts, as sole director and officer, was Vesta's guiding mind.

[6] Vesta raised money from investors through the issuance of short-term promissory notes (**Notes**) that promised to repay principal and "profit sharing", whether in a single payment or through instalments, at a 20% monthly rate of return. Investors often were persuaded, or elected, to allow amounts owed to them from a maturing Note to be reinvested, or rolled over, into a new Note. Later, when Vesta's bank account balances were significantly reduced, Kitts unilaterally rolled maturing Notes into new Notes without investors' consent.

[7] We found in the Merits Decision that from February 20, 2014 to June 30, 2015, Vesta received approximately $4.3 million in Canadian funds, plus an additional US$850,000, from about 38 investors. Evidence also established that Vesta received an additional $1.26 million in Canadian funds, plus US$87,000, from 27 "possible investors". We also found that Vesta repaid about $2.8 million in Canadian funds, plus US$450,102, to its investors, with an additional $767,000 in Canadian funds and US$15,075, to "possible investors". These funds flowed through Vesta's bank accounts, for which Kitts was the sole signing authority. Evidence suggested that funds may also have flowed through Vesta Equity Partners, an entity apparently connected to the Respondents.

[8] Most investors learned of the Notes from a Vesta referral agent or from other Vesta investors. Investors generally understood that money paid to Vesta would be used to provide short-

term financing to real estate industry participants and that they would receive their principal and profit sharing payments once Vesta was repaid. Their understanding was largely based on information conveyed directly to them by Kitts, through telephone conversations, email communication or personal meetings. Many investors received an introductory email from Kitts that explained the purported investment opportunity. Some investors received similar information from Vesta's primary referral agent, who conveyed information he had been given by Kitts.

[9] After being introduced to Vesta, investors received an email from Kitts listing available Notes with various principal amounts and terms. If an investor chose a Note, Kitts emailed an electronic copy of the Note and asked the investor to countersign and return the Note, along with payment of the Note principal.

[10] We found in the Merits Decision that the Respondents were not financing real estate industry participants as represented, nor were they receiving money from borrowers to repay principal and purported returns to investors. Instead, investors' funds were pooled into Vesta's bank accounts and used for various undisclosed purposes. While some commissions were paid to referral agents, significant amounts were sent to a gaming company and to a company operating a bar in Arizona (of which Kitts had a concealed ownership interest). Further amounts from Vesta's bank accounts were diverted to the personal use of Kitts and his spouse, including the December 2014 purchase of a condominium in Vancouver, British Columbia (and registered in the name of Kitts' spouse), which was sold 16 months later for a profit of approximately $170,000.

[11] Vesta also used investor funds to repay principal and fictitious profit-sharing to investors in a manner consistent with a Ponzi scheme. This gave an appearance of legitimacy to the Respondents' scheme and persuaded existing and prospective Vesta investors to invest, or to continue to invest, with Vesta. Indeed, we received evidence that Vesta consistently made payments on their Notes (or allowed investors to roll the proceeds into new Notes) until the spring of 2015. At that point, Kitts' Ponzi scheme began to unravel and he used various stall tactics and excuses to avoid making scheduled payments to Vesta investors. A common tactic was to unilaterally roll an expiring Note into a new Note. It was clear that Kitts used these artifices to forestall the inevitable collapse of the Ponzi scheme under its own weight.

[12] Ultimately, Vesta investors experienced significant financial losses. Most received at least a portion of their investments back, while a few may have realized a gain (although any gain came at the expense of other investors, since there was no legitimate business generating revenue, much less income).

[13] In the Merits Decision, we found that the Notes issued by Vesta were securities within the meaning of the Act, and that the Respondents knowingly engaged in prohibited acts that placed investors' pecuniary interests at risk. The Respondents' fraudulent misconduct included misrepresenting to prospective investors that funds invested with Vesta would be used to provide short-term financing to real estate industry participants, diverting investor funds to unidentified businesses that were not within the reasonable expectation of Vesta investors, misappropriating investor funds to the personal use of Kitts and his spouse, and using investors' capital to repay principal and imaginary profits to Vesta Note holders. We found that Kitts knew the investment opportunities presented to Vesta investors were fictitious, and that he used invested funds for unauthorized purposes, including for his own benefit and that of his spouse. We also found that

Kitts authorized and permitted Vesta's misconduct, and that Kitts was Vesta's guiding mind, such that his knowledge and conduct was attributable to the company.

A. Keller Affidavit

[14] In support of Staff's submissions on appropriate sanctions and cost-recovery orders, Staff submitted the Keller Affidavit. Mr. Keller, an investigative lawyer with the ASC, testified in the hearing into the merits of Staff's allegations against the Respondents.

[15] Mr. Keller deposed that he corresponded with various North American law enforcement agencies to obtain information relating to the Respondents. As a result, the ASC obtained the following documents:

- correspondence from the Royal Canadian Mounted Police dated June 15, 2015, which attached copies of:
    - a July 19, 2007 Criminal Information filed in the Third District Court of Utah, alleging that Kitts committed various crimes (including eight counts of securities fraud);
    - an Affidavit of Probable Cause sworn on July 19, 2007 by Susan Jones (a Securities Compliance Investigator for the Utah Department of Commerce, Division of Securities) and filed with the Third District Court of Utah; and
    - a Warrant of Arrest for Kitts issued by the Third District Court of Utah dated July 19, 2007;
- an Order on Default issued by the Utah Securities Commission in 2014, which indicated that Kitts, after failing to personally appear before the commission, was ordered to pay a fine and received a permanent ban from the Utah securities industry for violating the State of Utah's securities laws and regulations. The Order on Default recited that Kitts had resolved a related criminal proceeding by "pleading no contest to one count of second degree felony securities fraud and two counts of third degree felony theft", but he subsequently "fled the United States" and "refuse[d] to return to the United States for sentencing"; and
- correspondence from the Utah Attorney General's Office, which attached a "Sentence Judgment and Commitment" issued by a judge of the Third District Court of Utah dated November 26, 2018. According to this document, Kitts (who was "not present and in Federal custody") was given four concurrent sentences of imprisonment, each for "an indeterminate term of not less than one year nor more than fifteen years".

[16] As noted, we did not receive any evidence from the Respondents to assist in our assessment of appropriate sanction and cost-recovery orders.

III. SANCTIONS

A. The Law

[17] An ASC panel may order sanctions against a respondent pursuant to ss. 198 and 199 of the Act if it is in the public interest. These provisions authorize various sanctions, including prohibitions on certain capital-market activity (such as trading bans or director and officer bans), payment of amounts obtained from non-compliance with Alberta securities laws (commonly referred to as a "disgorgement order") and payment of an administrative penalty.

[18] Sanctions orders are not meant to directly punish respondents for their misconduct but are instead aimed at prospectively protecting individual investors and fostering confidence in the integrity of the capital market. Specific deterrence (preventing a particular respondent from engaging in future misconduct) and general deterrence (discouraging others from engaging in similar misconduct) are proper considerations in formulating a sanctions order, provided it is proportionate and reasonable for each respondent (*Re Cartaway Resources Corp.*, 2004 SCC 26 at paras. 52-62, *Walton v. Alberta (Securities Commission)*, 2014 ABCA 273 at para. 154).

[19] Prior ASC decisions have identified various sanctioning factors that assist an ASC panel in determining an appropriate sanctions order. The current analytical framework was recently clarified and refined in *Re Homerun International Inc.*, 2016 ABASC 95 at para. 20 to elucidate the following sanctioning factors: (i) the seriousness of the respondent's misconduct; (ii) the respondent's pertinent characteristics and history; (iii) any benefit sought or obtained by the respondent; and (iv) any mitigating or aggravating considerations.

B. Parties' Positions

[20] Staff sought permanent market access restrictions against the Respondents, and an order directing them to pay, on a joint and several basis, an administrative penalty of $600,000 and disgorgement of $1,960,457.

C. Analysis

1. Sanctioning Principles and Factors

(a) Seriousness of the Misconduct

[21] Staff submitted that the Respondents' fraudulent misconduct was "very serious". While fraud is among the most serious of contraventions of Alberta securities laws, Staff suggested that perpetration of "a Ponzi scheme is even worse", citing the following commentary in *Re Manna Trading Corp. Ltd.*, 2009 BCSECCOM 426 at para. 333:

> Ponzi schemes are a particularly sinister type of fraud because those lucky enough to get in at the beginning do in fact earn the promised returns, and lend the credibility to the scheme that it needs in order to lure investors.

[22] Staff also submitted that the seriousness of the fraudulent misconduct and Kitts' lack of remorse "are significantly aggravating sanctioning factors", and pointed to his apparent failure to recognize the seriousness of his misconduct.

[23] The Respondents' misconduct was egregious. The repayments of principal and purported returns that were made to Vesta investors lent an air of legitimacy to the Respondents' scheme and enabled them to lure new investors and assuage existing investors. This predatory conduct

prolonged the fraud and allowed Kitts to misappropriate investor funds for unauthorized purposes, a substantial portion of which went directly to his and his spouse's personal use.

[24] Kitts' attempts to delay the inevitable collapse of his Ponzi scheme by repeatedly lying to investors, together with the absence of any underlying business, confirmed for us that he planned to defraud innocent investors from the outset. Investor witnesses experienced significant financial losses, and based on their testimony, we concluded that the Respondents' misconduct has undermined confidence in the integrity of our capital market.

[25] The seriousness of the misconduct demonstrates an overwhelming need to protect against future harm at the hands of the Respondents, along with a severe message of deterrence to others who might be tempted to emulate such misconduct. Ponzi schemes such as this pose a serious risk of harm to individual investors and to Alberta's capital market, and deserve strong and unequivocal condemnation.

(b) Characteristics and History

[26] Staff relied on the Keller Affidavit as evidence of Kitts' securities regulatory and criminal record in the United States, as evidence of recidivist behaviour, requiring significant specific deterrence. We received no other evidence on Kitts' history or background.

[27] At the time of his misconduct, Kitts had pled no contest to criminal charges relating to securities fraud and theft in the State of Utah and he had been sanctioned by the Utah Securities Commission for securities-related infractions. He has since been sentenced to imprisonment on four counts of securities fraud and theft. Such misconduct apparently involved the making of misrepresentations to investors in the course of offering securities to raise funds for two companies, proceeds of which he used, in part, for his personal benefit. Rather than accept responsibility for his conduct, Kitts absconded and embarked on a new fraud in Canada and elsewhere in the United States.

[28] Kitts has developed a pattern of securities misconduct and is seemingly an unrepentant recidivist. Although the Utah proceedings did not involve a Ponzi scheme, Kitts' misconduct there was similar to that here inasmuch that he deceived investors and misappropriated their money. He continued his fraudulent capital-market activity in Alberta in the face of regulatory sanction and criminal proceedings elsewhere, thus flouting our securities laws. The heightened risk posed by his conduct mandates stiff sanctions that will convey to Kitts, and others with a history of securities-related misconduct, that recidivist behaviour is unacceptable and will not be tolerated.

(c) Benefits Sought or Obtained

[29] Staff submitted that the Respondents obtained considerable benefits from their fraud, and estimated the amount of that benefit to be $1,960,457. According to Staff's calculations, the Respondents obtained nearly $5.3 million and repaid Vesta investors more than $3.3 million. Because Kitts "completely controlled" Vesta's bank accounts, Staff submitted that he received the same net benefit. Staff alternatively calculated that Kitts personally obtained a net benefit of $1,191,015, based on certain documentary evidence clearly showing that funds were misappropriated for personal use or other unauthorized purposes.

[30] Staff also pointed to the significant financial losses experienced by Vesta investor witnesses, comprised of entrepreneurs with successful businesses who were willing to invest their

hard-earned capital into the capital market. Staff submitted that the Respondents' misconduct significantly harmed investors, many of whom were approaching an advanced age, and adversely affected the reputation and integrity of Alberta's capital market.

[31] There is no doubt that the Respondents obtained significant benefits from their capital-market misconduct. Their Ponzi scheme, masquerading as a legitimate business venture, operated from approximately February 2014 to June 2015, and garnered them substantial amounts at the expense of unwitting investors. This creates an obvious risk that Kitts, and other like-minded individuals, may be encouraged to engage in similar misconduct in hopes of reaping similar gains. It is therefore imperative that the sanction imposed provides a significant deterrent effect.

(d) Mitigating and Aggravating Considerations

[32] Staff argued that there were no mitigating circumstances but several aggravating ones, including Kitts' criminal and regulatory history, the fact that Vesta was a sham and not intended to be a legitimate business, Kitts' deception and lack of remorse and the advanced age of some Vesta investors.

[33] We agree with Staff that there are no mitigating circumstances. While most of the aggravating factors cited by Staff have been addressed, we consider the continuation and escalation of Kitts' fraudulent activity in Alberta, while a fugitive from the criminal proceedings he was facing in Utah, as a significant aggravating factor. His behaviour is indicative of a brazen scofflaw with a callous disregard for the victims he duped.

[34] These actions reinforce the need for strong sanctions against the Respondents – and Kitts in particular – that will discourage future misconduct.

(e) Conclusions From Sanctioning Principles and Factors

[35] The pertinent sanctioning factors all point to a single conclusion: the Respondents pose a pronounced risk to the public and are deserving of significant sanctions that will prevent them from future participation in the capital market. There is also a significant risk that others may be tempted to engage in similar misconduct, particularly in light of the significant amounts the Respondents pocketed in a relatively short period of time, and on the heels of similar criminal activity in Utah. Meaningful protective measures need to be ordered to send the message that similar abuses of Alberta securities laws will result in serious consequences.

2. Outcomes in Other Proceedings

[36] As mentioned in *Homerun* at para. 16: "Ensuring that sanctions are proportionate involves appropriate consideration of other decisions and settlement outcomes, while recognizing that decisions or outcomes seldom involve identical factual circumstances or wrongdoing."

[37] Staff referred to several previous cases – *Re Currey*, 2018 ABASC 34; *Re Narayan*, 2016 ABASC 228; *Re Planned Legacies*, 2011 ABASC 278; *Re Magee*, 2015 ABASC 846; *Re Harris operating as Harris Agencies*, 2011 ABASC 138 and *Re Fauth*, 2019 ABASC 102 – for "comparison purposes". Some of these cases involved settlements or admissions on the part of respondents and Staff referred to them for comparison purposes.

[38] Of the cited cases involving fraud, ASC panels ordered permanent market-access bans (with the exception of one in which 20 year bans were ordered), administrative penalties ranging

from $200,000 to $500,000 and all but one included significant disgorgement orders. In another case referenced in Staff's materials, *Re Breitkreutz*, 2019 ABASC 38, an ASC panel ordered an administrative penalty of $1 million for fraud involving a Ponzi scheme.

[39] Of these cases, we found *Harris* to be most analogous. In *Harris*, investors received promissory notes offering high interest rates and understood that their funds would be used to finance real estate and mortgage transactions. Instead, the respondent operated a Ponzi scheme with no legitimate underlying business. At least $5-6 million had been raised over a 10-year period with a modest amount used for the direct benefit of the respondent, who had previously been convicted on 42 counts of fraud in relation to an earlier Ponzi scheme. The ASC panel in *Harris* found no mitigating considerations in the circumstances despite the respondent's admission to the misconduct and the panel's finding that the respondent engaged in the Ponzi scheme "to increase his insurance business and not to make money directly". The panel ordered an administrative penalty of $500,000 and various permanent market-access bans.

3. Sanctions Ordered

[40] Based on our analysis of the sanctioning factors described above, and consistent with outcomes in other proceedings, we consider it to be in the public interest, taking into account all of the circumstances, that the Respondents be subject to a combination of permanent market-access bans and monetary sanctions consisting of a disgorgement order and an administrative penalty.

(a) Market-Access Bans

[41] Section 198(1) of the Act provides for a variety of market-access bans that can be ordered in the public interest. Such bans serve to "prohibit those who contravene Alberta securities laws from future participation in the market, and make it apparent to others they risk losing the privilege of participation if they undertake similar misconduct" (*Fauth* at para. 68).

[42] Staff submitted that both Respondents must be permanently banned from Alberta's capital market. Staff recommended orders that restrict Kitts from trading in or purchasing any securities or derivatives and from relying on any exemptions in Alberta securities laws, from engaging in investment relations activities, from becoming or acting as a director or officer of any issuer or other person or company authorized to issue securities, from advising in securities or derivatives, from becoming or acting as a registrant, investment fund manager or promoter, and from acting in a management or consultative capacity in the securities market. Although Vesta was struck from the Alberta corporate registry, Staff pointed out that the company could potentially be revived. In light of this, and the fact that it was the instrument through which Kitts perpetrated the fraud, Staff sought similar bans against Vesta, along with a permanent ban on trading in or purchasing of Vesta securities.

[43] We agree that the bans proposed by Staff are appropriate in the circumstances. As a matter of clarification, certain provisions in s. 198 of the Act have been amended subsequent to the issuance of Staff's notice of hearing but prior to the Merits Decision; we are making orders under the current provisions of s. 198.

[44] We also agree that the public interest requires nothing less than the complete and permanent removal of the Respondents from the capital market, and we therefore order the market-access bans have permanent effect.

(b) Monetary Sanctions

[45] While market-access bans are an important component to an overall sanctions order, we are not satisfied that they sufficiently achieve the necessary specific and general deterrence required. In our view, effective deterrence also requires a disgorgement order that prevents the Respondents from retaining the significant financial benefits they obtained from their misconduct, along with an administrative penalty to ensure that they bear a direct and proportionate cost for their contravention of Alberta securities laws.

(i) Disgorgement

[46] Section 198(1)(i) of the Act authorizes an ASC panel to make a disgorgement order against any person or company who has not complied with Alberta securities laws and requires payment to the ASC of "any amounts obtained or payments or losses avoided as a result of the non-compliance".

[47] We adopt here the summary of the law relating to disgorgement orders as recently set out by the ASC panel in *Fauth* at paras. 78-87:

> To determine whether disgorgement should be ordered in a particular case, we agree with the two-step approach developed in British Columbia (B.C.) Securities Commission (BCSC) jurisprudence and recently approved and adopted by the B.C. Court of Appeal. First, the adjudicator should "'determine whether a respondent, directly or indirectly, obtained amounts arising from his or her contraventions of the Act'" in order to establish whether a disgorgement order can be made at all (*Poonian v. British Columbia Securities Commission*, 2017 BCCA 207 at para. 144, citing *Re SPYru Inc.*, 2015 BCSECCOM 452 at para. 131). Second, the adjudicator should "'determine if it is in the public interest to make such an order'", including by considering the goals of specific and general deterrence (*Poonian* at para. 144, citing *SPYru* at para. 132).
>
> With respect to the first step, the "amounts obtained" by individual respondents as a result of the misconduct at issue includes amounts obtained by corporate entities under their direction and control: see, e.g., *Schmidt* [2013 ABASC 320] (at paras. 8, 12, 18, 77). As stated by the Ontario Securities Commission (OSC), "[i]n our view, individuals should not be protected or sheltered from administrative sanctions by the fact that the illegal actions they orchestrated were carried out through a corporation which they directed and controlled" (*Re Limelight Entertainment Inc.* (2008), 31 OSCB 12030 at para. 59).
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> In *Pro-Financial*, [2018 ONSEC 18] despite the fact that there was no evidence the individual respondent received any direct financial benefit from the misconduct at issue, the OSC ordered him and the corporate respondent – of which he was directing mind – to disgorge the sum obtained by the corporation on a joint and several basis (see paras. 55, 60-61, 117-118, 121). In *Phillips v. Ontario (Securities Commission)*, 2016 ONSC 7901, the Ontario court upheld the OSC's decision to order individual respondents to disgorge amounts they had not received personally, but were instead received by entities under their control that were not named as respondents in the proceeding (see paras. 65-80).
>
> Staff have the initial burden to prove on a balance of probabilities the amount they say a respondent obtained as a result of the misconduct; the burden then shifts to the respondent to disprove the reasonableness of that amount (*Planned Legacies* at para. 72; see also *Arbour* [2012 ABASC 416] at para. 37 and *Poonian* at para. 129). Further, it has been accepted that "any risk of uncertainty in calculating disgorgement should fall on the wrongdoer whose non-compliance with the Act gave rise to the uncertainty" (*Limelight* at para. 53; see also *Poonian* at paras. 101, 129, 140).
>
> It is important to note that s. 198(1)(i) of the Act – like the equivalent sections contained in the B.C. and Ontario securities acts – stipulates that a disgorgement order may be directed at "<u>any</u> amounts <u>ob</u>tained . . . as a result of the non-compliance" (original emphasis). The section is not limited to

"the amount retained, the profit, or any other amount calculated by considering expenses or other possible deductions" (*Arbour* at para. 37, emphasis added; see also *Limelight* at para. 49, *Pro-Financial* at para. 49, and *Poonian* at para. 85). As discussed in D. Johnston, K. Rockwell and C. Ford, *Canadian Securities Regulation*, 5th ed. (Markham: LexisNexis Canada Inc., 2014 at para. 14.32), ". . . the relevant amount is what a respondent obtained through misconduct, not what the respondent retained or spent inappropriately". The B.C. Court of Appeal explained the rationale for this in *Poonian* (at para. 88):

> One way to deter is to remove the incentive for non-compliance. However, if the disgorgement amount is based on profits, then wrongdoers would not be deterred from contravening, or attempting to contravene. They would only face the risk of having to disgorge amounts *if their schemes succeeded*. However, the public is still harmed. A profit-oriented interpretation would undermine the statute's remedial and protective purpose. The failure to "turn a profit" on the wrongdoing should not prevent the regulator from requiring the wrongdoer to give up money received from the wrongdoing. [Original emphasis.]

In *North American Financial Group Inc. v. Ontario (Securities Commission)*, 2018 ONSC 136, the Ontario court similarly explained (at para. 218):

> If the aim is to preserve confidence in the capital markets by ensuring that fraudulent behaviour does not occur as opposed to punishing those who commit fraud, there is less reason to focus on whether the fraudsters pocketed the money for themselves. What they did with the money does not lessen the seriousness of the effect of the behaviour when looked at through the framework of restoring confidence in the market.

It therefore does not matter that there are no funds remaining in Espoir and that Fauth is impecunious. Disgorgement may still be ordered. The panel in *Magee* stated (at para. 191):

> We are mindful of what was said about a respondent's ability to pay in *Walton* . . ., but it would seem inapplicable to disgorgement orders. Indeed, it would seem perverse that disgorgement could be ordered against a respondent who has retained amounts illegally obtained, but not against a respondent who has squandered such amounts.

We agree. A contrary approach could conceivably encourage wrongdoers to spend funds raised as soon as possible, and would in effect reward them for doing so by removing the consequent possibility that they could be held liable for those funds in the future. Obviously, that is not in the public interest. Moreover, we observe that in *Walton*, the [Alberta Court of Appeal]'s comments with respect to proportionality and a respondent's ability to pay were focused on the assessment of appropriate administrative penalties . . ., rather than on the disgorgement orders made by the ASC panel below. The panel charged with reconsidering sanction following the successful appeal to the ABCA noted that the disgorgement orders were not in issue: *Re Holtby*, 2015 ABASC 891 (at para. 18).

That said, there may be other reasons for a panel to order disgorgement of a sum less than the full amount obtained by a respondent as a result of his non-compliance with Alberta securities laws. Like other sanction orders, disgorgement orders are discretionary, and s. 198(1)(i) provides that an order may be made with respect to "any amounts obtained", rather than all amounts obtained (*Re Sino-Forest Corporation*, 2018 ONSEC 37 at paras. 201-202; see also *Poonian* at paras. 92, 138 and *Pro-Financial* at para. 50).

Some adjudicators, for example, have considered it appropriate to deduct amounts that were repaid to victim investors: see *Planned Legacies* (at paras. 73-75) and *Poonian* (at para. 91). Others have chosen to deduct the amount of funds raised which were actually used for the benefit of the investors, in the manner investors were told their funds would be used: see *Re 509802 BC Ltd. (c.o.b. Michaels*

> *Wealth Management Group)*, 2014 BCSECCOM 457 (at para. 46; aff'd. *Michaels v. British Columbia (Securities Commission)*, 2016 BCCA 144), *Poonian* (at para. 139, citing *Re Streamline Properties Inc.*, 2015 BCSECCOM 66 at para. 100), and *Mandyland* [2013 ABASC 69] (at paras. 31, 59-60).

[48] Staff submitted that Kitts "realized considerable benefits" from his misconduct and that a disgorgement order "is necessary to strip Kitts of these benefits and to promote specific and general deterrence". In light of Kitts' misconduct and his role with Vesta, Staff submitted that all amounts obtained by Vesta were also obtained by Kitts.

[49] We determined in the Merits Decision that Vesta raised approximately $4.3 million and US$850,000 from identifiable investors during the relevant period, and that these investors were repaid approximately $2.8 million and US$450,102. As mentioned, Staff calculated the benefit obtained to be $1,960,457. Given the evidence of additional funds derived from "possible investors", we accept that the actual benefits were probably higher. Nonetheless, we accept as reasonable the amount calculated by Staff. The Respondents did not disprove the reasonableness of this amount.

[50] Although the funds flowed through Vesta's bank accounts, Kitts – as Vesta's sole director and officer and its guiding mind – had signing authority over Vesta's bank accounts and controlled investors' funds. From the totality of the evidence, including our finding that Vesta had no legitimate underlying business, we attribute amounts obtained by Vesta to Kitts for the purpose of assessing an appropriate disgorgement order.

[51] We also find that the $1,960,457 was obtained by the Respondents from their non-compliance with Alberta securities laws. Vesta investors were persuaded to invest their money in the Respondents' fictitious investments, and those funds were not used in a manner consistent with the Respondents' representations but were instead diverted to various unauthorized purposes, including for the personal benefit of Kitts and his spouse.

[52] We consider a disgorgement order to be in the public interest, taking into account the seriousness of the Respondents' misconduct, the harm to investors and necessary deterrence – both specific and general. Were we not to make a disgorgement order, we would be allowing the Respondents to retain misappropriated investor funds from their Ponzi scheme.

[53] We therefore order the Respondents to pay, on a joint and several basis, a disgorgement order of $1,960,457.

(ii) Administrative Penalty

[54] Notwithstanding the imposition of any other sanction, s. 199 of the Act authorizes an ASC panel to order any person or company who has contravened Alberta securities laws to pay an administrative penalty of not more than $1 million for each contravention. Accordingly, we are not precluded from issuing an administrative penalty in conjunction with a disgorgement order, so long as the global sanction is proportionate and appropriate to the individual circumstances (*Walton*, at para. 156). Among the relevant circumstances are "the magnitude of the illegality and the need to encourage lawful conduct by those involved with securities", while also ensuring that the amount of the administrative penalty "ought not be so low that [it] amount[s] to nothing more

than another cost of doing business": *Alberta Securities Commission v. Brost*, 2008 ABCA 326 at para. 54.

[55] Staff submitted that an administrative penalty of $600,000 would be appropriate and that it should be paid jointly and severally by the Respondents. According to Staff, this would provide adequate specific and general deterrence.

[56] As mentioned, of the cases cited by Staff, we considered the facts in *Harris* to be the closest to those here. One important distinguishing fact is that the Respondents here were able to raise larger amounts from investors in much less time. We also take into account the aggravating factor that this Ponzi scheme was undertaken after Kitts had fled from criminal proceedings in Utah involving similar misconduct.

[57] We conclude that an administrative penalty of $600,000 is appropriate, proportionate and in the public interest.

4. Conclusion on Sanctions

[58] For the reasons above, we are issuing permanent market-access bans against the Respondents, along with orders requiring them to pay, on a joint and several basis, disgorgement of $1,960,457 and an administrative penalty of $600,000.

IV. COSTS

A. The Law

[59] Section 202(1) of the Act provides that an ASC panel may order a respondent who has contravened Alberta securities laws or acted contrary to the public interest to pay "costs of or related to the hearing or the investigation that led to the hearing, or both". A cost-recovery order is not a sanction but "a means of recovering, from a respondent found to have engaged in capital-market misconduct, certain investigation and hearing costs that would otherwise be borne indirectly by law-abiding market participants whose fees fund the [ASC's] operation" (*Re Marcotte*, 2011 ABASC 287 at para. 20). Staff's claimed costs are subject to an assessment as to their reasonableness and "examined in the context of the efficiency (or lack thereof) brought to the proceeding by a party" (*Re Spaetgens*, 2017 ABASC 38 at paras. 108-09).

B. Parties' Positions

[60] Staff's Bill of Costs totaled $186,267.56. Staff acknowledged in their submissions that a "small portion" of the investigative costs related to Kitts' spouse and Vesta Equity Partners Inc., neither of whom were named in Staff's notice of hearing. Staff also submitted that Kitts' conduct increased the time and expense of Staff's investigation. Accordingly, Staff sought a cost-recovery order of $150,000, payable by the Respondents on a joint and several basis.

C. Analysis and Conclusion on Costs

[61] From a review of the Bill of Costs, and taking into account Staff's proposed reduction of the investigative costs of two unnamed parties, we consider Staff's claimed costs for both the investigation and the hearing to be reasonable and appropriate. No allegations made against the Respondents were withdrawn or dismissed by the panel.

[62] Although Staff submitted that Kitts' conduct increased the time and expense of Staff's investigation, we received no evidence in relation to Staff's investigation to support that contention.

We did take note of Kitts' conduct during the hearing – it did not contribute to an efficient hearing, though this was a relatively minor consideration. Several accommodations were made for Kitts (at his request) to allow him to effectively participate in the hearing, though he failed to avail himself of these opportunities thus causing unnecessary delay.

[63] We consider it appropriate that Kitts bear a significant proportion of the costs of the investigation and hearing process. As noted, Kitts and Vesta were functionally indistinguishable as it related to the contraventions found, and therefore both Respondents should bear the costs.

[64] We therefore order the Respondents to pay investigation and hearing costs of $150,000 on a joint and several basis.

V. CONCLUSION

[65] For the reasons given, we make the following orders.

[66] In respect of Kitts, we order in the public interest with permanent effect:

- under ss. 198(1)(b) and (c) of the Act, Kitts must cease trading in or purchasing securities or derivatives, and all of the exemptions contained in Alberta securities laws do not apply to Kitts;

- under ss. 198(1)(d) and (e), Kitts must resign all positions he holds as a director or officer of any issuer, registrant, investment fund manager, recognized exchange, recognized self-regulatory organization, recognized clearing agency, recognized trade repository, designated rating organization or designated benchmark administrator, and he is prohibited from becoming or acting as a director or officer (or both) of any issuer or other person or company that is authorized to issue securities, or of a registrant, investment fund manager, recognized exchange, recognized self-regulatory organization, recognized clearing agency, recognized trade repository, designated rating organization or designated benchmark administrator;

- under s. 198(1)(c.1), (e.1), (e.2) and (e.3), Kitts is prohibited from engaging in investor relations activities, from advising in securities or derivatives, from becoming or acting as a registrant, investment fund manager or promoter, and from acting in a management or consultative capacity in connection with activities in the securities market;

- under section 198(1)(i), Kitts must pay, jointly and severally with Vesta, to the ASC $1,960,457 obtained as a result of non-compliance with Alberta securities laws;

- under s. 199, Kitts must pay, jointly and severally with Vesta, an administrative penalty of $600,000; and

- under s. 202, Kitts must pay, jointly and severally with Vesta, $150,000 of the costs of the investigation and hearing.

[67] In respect of Vesta, we order in the public interest that:

- under s. 198(1)(a) of the Act, all trading in or purchasing of securities or derivatives of Vesta must cease;
- under ss. 198(1)(b) and (c) of the Act, Vesta must cease trading in or purchasing securities or derivatives, and all of the exemptions contained in Alberta securities laws do not apply to Vesta;
- under s. 198(1)(c.1), (e.1), (e.2) and (e.3), Vesta is prohibited from engaging in investor relations activities, from advising in securities or derivatives, from becoming or acting as a registrant, investment fund manager or promoter, and from acting in a management or consultative capacity in connection with activities in the securities market;
- under section 198(1)(i), Vesta must pay, jointly and severally with Kitts, to the ASC $1,960,457 obtained as a result of non-compliance with Alberta securities laws;
- under s. 199, Vesta must pay, jointly and severally with Kitts, an administrative penalty of $600,000; and
- under s. 202, Vesta must pay, jointly and severally with Kitts, $150,000 of the costs of the investigation and hearing.

[68] This proceeding is concluded.

November 12, 2019

For the Commission:

"original signed by"
Tom Cotter

"original signed by"
James Oosterbaan

"original signed by"
Maryse Saint-Laurent