



Ontario
Securities
Commission

Commission des
valeurs mobilières
de l'Ontario

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Citation: Katanga Mining Limited (Re), 2018 ONSEC 59

Date: 2018-12-18

File No.: 2018-76

**IN THE MATTER OF
KATANGA MINING LIMITED, ARISTOTELIS MISTAKIDIS,
TIM HENDERSON, LIAM GALLAGHER, JEFFREY BEST,
JOHNNY BLIZZARD, JACQUES LUBBE and MATTHEW COLWILL**

**ORAL REASONS FOR APPROVAL OF A SETTLEMENT
(Sections 127 and 127.1 of the *Securities Act*, RSO 1990, c S.5)**

Hearing: December 18, 2018

Decision: December 18, 2018

Panel: Timothy Moseley
M. Cecilia Williams
Lawrence P. Haber
Vice-Chair and Chair of the Panel
Commissioner
Commissioner

Appearances: Carlo Rossi
Alvin Qian
For Staff of the Commission

Alan P. Gardner
Amanda C. McLachlan
For Katanga Mining Limited

Tom Curry
Shara N. Roy
For Aristotelis Mistakidis

Nigel Campbell
Doug McLeod
For Tim Henderson

Appearances: Harry Underwood
(cont'd.) Jeffrey Haylock
James W.E. Doris
Wendy Berman
John M. Picone
Craig Lockwood
For Liam Gallagher
For Jeffrey Best and Matthew Colwill
For Johnny Blizzard
For Jacques Lubbe

REASONS AND DECISION

The following reasons have been prepared for publication in the Ontario Securities Commission Bulletin, based on the reasons delivered orally at the hearing, and as edited and approved by the Panel, to provide a public record.

- [1] Staff of the Commission has made various allegations against one corporate respondent and seven individual respondents. The purpose of today's hearing is to consider a settlement agreement between Staff and all eight respondents relating to those allegations.
- [2] Katanga Mining Limited, the corporate respondent, is a TSX-listed reporting issuer that operates copper and cobalt mining and refinery facilities in the Democratic Republic of the Congo. A substantial majority of Katanga's shares are owned by Glencore plc, a company listed on the London Stock Exchange. Glencore financed Katanga's operations and was, essentially, Katanga's only customer. Glencore is not a respondent in this proceeding.
- [3] The other seven respondents are individuals who were officers and/or directors of Katanga. They include three people who were at various times members of Glencore's senior management, and Glencore nominee directors of Katanga. Those three individuals, who exercised significant influence over operational and financial decisions at Katanga, are:
 - a. Liam Gallagher, who was also a member of Katanga's Audit Committee;
 - b. Tim Henderson; and
 - c. Aristotelis Mistakidis, to whom Messrs. Gallagher and Henderson reported.
- [4] The four other individual respondents are Jeffrey Best, Johnny Blizzard, Jacques Lubbe and Matthew Colwill. Each of them was, for some time, the CEO or the CFO of Katanga.
- [5] All eight respondents have admitted that between 2012 and 2017, they contravened Ontario securities law in a number of ways. Staff and the respondents have agreed to various sanctions and other measures, and to the payment of costs by the respondents. While the terms of the settlement have been agreed to by the parties, we must decide whether the settlement should be approved.
- [6] The background is set out in detail in the settlement agreement, and we will not repeat it here. To summarize, though, Staff's allegations fall into three categories:
 - a. first, materially misleading disclosure, over a number of years, relating to Katanga's copper production and its financial performance;
 - b. second, failures and disclosure inadequacies relating to Katanga's corporate governance, internal controls, and procedures, including a failure to disclose a material weakness in its Management Discussion & Analysis (**MD&A**); and
 - c. third, inadequate disclosure regarding Katanga's reliance on, and payments to, individuals and entities associated with one particular

individual, and regarding its operating environment, including the risk of public sector corruption in the Democratic Republic of the Congo.

- [7] With respect to financial disclosure, in 2017 Katanga announced that it had begun an internal review of certain of its accounting practices. That review was led by Katanga's independent directors and was undertaken with the assistance of professional external advisors, and the cooperation and assistance of management, including the individual respondents. Following that review, Katanga ended up restating certain of its financial results and its MD&A.
- [8] Katanga agrees that improper accounting adjustments had resulted in understatement of Katanga's cost of sales by approximately US\$88 million per year, and repeated overstatement of Katanga's fixed assets by approximately US\$117 million. Improper recording of copper cathode production resulted in misstatements on the order of thousands of tonnes, with resulting financial misstatements of tens of millions of dollars. The settlement agreement reviews these and other misstatements in detail.
- [9] Katanga admits that it contravened Ontario securities law by:
 - a. making statements that were materially misleading in its Annual Information Forms, financial statements and MD&A;
 - b. failing to maintain adequate internal controls over financial reporting, and adequate disclosure controls and procedures; and
 - c. failing to disclose material weaknesses in its internal controls over financial reporting.
- [10] The individual respondents have not agreed to the facts relating to Katanga's misleading risk disclosure. With respect to Katanga's other breaches of Ontario securities law, the involvement of the individual respondents varies from one respondent to another, both in terms of the relevant time period, and the extent of the involvement.
- [11] The settlement agreement contains the details, and makes the distinctions clear, but all individual respondents admit that they authorized, permitted or acquiesced in some of Katanga's breaches. In addition, Messrs. Best, Blizzard, Lubbe and Colwill, each of whom was the CEO or the CFO of Katanga at some point, contravened Ontario securities law by certifying misleading disclosure issued by Katanga.
- [12] All eight respondents admit that their conduct was also contrary to the public interest.
- [13] A central theme in this case is the inadequacies in the tone from the top and in the culture of compliance at Katanga. The individual respondents admit that they were responsible for establishing and enforcing a culture of compliance, and that their conduct undermined Katanga's corporate governance and internal controls. Their failure to discharge their obligation contributed to a culture in which staff of Katanga failed to adhere to policies, and overrode internal controls.
- [14] The misconduct in this case was serious. It resulted in material misstatements and failures to make adequate disclosure. As Staff has submitted, these failures strike at the heart of the protections afforded by proper disclosure, on which investors must be entitled to rely.

- [15] The failures warrant a substantial response, of the kind reflected in the settlement agreement. The principal terms of the settlement are as follows:
- a. Katanga has made a voluntary payment of \$28.5 million, and has paid costs of \$1.5 million;
 - b. Katanga will submit to a review, at its own expense and by an independent consultant, of its policies and procedures relating to metal accounting and the integration of production statistics into its financial accounting, and Katanga will implement necessary changes to those policies and procedures;
 - c. the individual respondents will pay administrative penalties ranging from \$350,000 to \$2.45 million;
 - d. each individual respondent will pay costs of \$50,000; and
 - e. each individual respondent will be prohibited from acting as a director or officer of any reporting issuer for a period ranging from two years to six years, with a minor, limited and temporary exception for Mr. Blizzard, the current CEO of Katanga.
- [16] Our role is to determine whether the negotiated result falls within a range of reasonable outcomes, and whether it would be in the public interest to make the order requested.
- [17] We have reviewed this agreement in detail, and we recently conducted a confidential settlement conference with counsel for all parties. We asked questions of counsel and we heard their submissions. With the benefit of that session and our review, we conclude that it would be in the public interest to approve this settlement.
- [18] In making that decision, we recognize that the agreement is the product of negotiation between Staff and the respondents, all ably represented by counsel. The Commission respects the negotiation process and accords significant deference to the resolution reached by the parties.
- [19] We have also taken account of the fact that approval of this settlement would resolve the matter promptly, efficiently and with certainty. A settlement avoids the expenditure of significant resources that would be associated with a contested hearing.
- [20] In our view, the voluntary payment, the administrative penalties and the prohibitions against the individuals acting as directors or officers properly reflect the principles applicable to sanctions, including:
- a. the recognition of the seriousness of misconduct;
 - b. the importance of fostering investor protection and confidence in the capital markets; and
 - c. the need for specific and general deterrence.
- [21] The payment of costs helps to reduce the burden on market participants to pay for investigations and enforcement proceedings.

- [22] Finally, the review to be conducted by the independent consultant, and the implementation of necessary changes, will further protect the capital markets from harm caused by improper practices.
- [23] We will therefore issue an order substantially in the form of the draft attached to the settlement agreement.
- [24] A final word: This is a complex matter involving many divergent interests, as is evident from the number of counsel involved. We have no doubt that it was not easy to reach this resolution, and that doing so involved significant commitments of time, money and effort. We appreciate those efforts and the able assistance of counsel.

Dated at Toronto this 18th day of December, 2018.

"Timothy Moseley"

Timothy Moseley

"M. Cecilia Williams"

M. Cecilia Williams

"Lawrence P. Haber"

Lawrence P. Haber