

IN THE MATTER OF

**MAJD KITMITTO, STEVEN VANNATTA, CHRISTOPHER CANDUSSO, CLAUDIO
CANDUSSO, DONALD ALEXANDER (SANDY) GOSS, JOHN FIELDING AND FRANK
FAKHRY**

File No. 2018-70

**MOTION
OF JOHN FIELDING**

(For an Order directing Staff to disclose Investigator Notes Under Rule 28 of the Rules of
Procedure)

A. Order Sought

The Moving Party, John Fielding, requests with notice that the Ontario Securities Commission make the following Order(s):

1. An Order directing that Staff disclose all relevant investigator information. This includes notes and information not yet reduced to writing. Without limiting the generality of the above, Staff should disclose:
 - a. All investigator notes and information from the commencement to the end of the investigation or to date, whichever is later;
 - b. All handwritten and/or original investigator notes, including notes taken during interviews and hearings;
 - c. All internal communications at the OSC relating to the investigation into the Respondents' trading in Amaya save for privileged communications involving the lawyers prosecuting the case.
2. In addition, an Order directing that if Staff refuse to disclose notes or information, Staff produce a reviewable log of all documents and information it refuses to disclose. The log should indicate the date of the document, the author and recipient of the document, and the basis for Staff's refusal.

B. Grounds:

The grounds for the motion are:

1. Rule 27(1) of the *Ontario Securities Commission Rules of Procedure and Forms* requires Staff to provide to every other party “copies of all non-privileged documents in Staff’s possession that are relevant to an allegation.” This rule mandates a broad disclosure standard similar to that imposed on the Crown in criminal proceedings by *Stinchcombe*.
2. Disclosure is an aspect of the Respondents’ right to full answer and defence. The applicable standard requires Staff to:
 - a. Err on the side of inclusion of documents;
 - b. Disclose both inculpatory and exculpatory information; and
 - c. Disclose all relevant material gathered in the investigation relation to the allegations, whether the Staff intends to rely on the material or not.

Inadequate Disclosure

3. The OSC’s investigation into Amaya trading by the Respondents started at the latest in early 2015 and Staff filed its Statement of Allegations against Mr. Fielding in November 2018. The documentary disclosure should reflect that investigation. The document production database currently contains over 76,000 documents.
4. Despite the volume of documents in the production database, there is still outstanding disclosure to which Mr. Fielding is entitled. In particular, the Respondents are missing disclosure from the three investigators that the Staff intend to call as witnesses in this case (Christine George, Anne Paiement, and Stuart Mills) and other internal OSC correspondence.
5. In particular, Staff must provide the following to Mr. Fielding:
 - a. *All Investigators’ Notes from the Start to the End of the Investigation into the Respondents’ Trading*: In a document database of 76,000 documents, only 46 documents are investigator notes. It is implausible that OSC investigators took notes only 46 times in the course of a three-year investigation. Further, the OSC started investigating the Respondents’ trading in Amaya in early 2015. Not only

did the OSC receive correspondence in January 2015 regarding Amaya trading, the OSC wrote to FINRA for assistance in March 2015. Despite the early dates of these investigatory steps, there are no investigation notes disclosed that pre-date May 28, 2015.

- b. *Original Investigatory Notes:* The notes provided to the Respondents are not all contemporaneous with the events that they purport to capture. The notes are all typed and some have creation times that appear to be hours (even up to a day) after the event the notes purport to record. Staff did not disclose any contemporaneous handwritten notes, which are typically the most accurate record created. In any event this is the best practice in disclosure and the Respondent Fielding seeks this disclosure.
 - c. *Internal OSC Communication Not Involving Lawyers Prosecuting this Case:* In the entire database, there is a single document sent from one investigator (Anne Paiement) to another (Christine George). Mr. Fielding seeks emails sent between the investigators, emails sent between the investigators and other OSC staff, and emails between the OSC staff relating to the investigation into the Respondents' trading in Amaya save for privileged communications involving the lawyers prosecuting the case.
 - d. *Disclosure of the Investigators' Notes:* Anne Paiement, Stuart Mills, and Christine George routinely attend hearings held in relation to this case. When they attend, they take notes in notebooks. Counsel for the parties discuss legal and factual issues relevant to the prosecution at these hearings. If the investigators made handwritten, contemporaneous notes and observations (which they were seen doing) the Respondents are entitled to those notes and observations. The Respondents do not have copies of those notes.
6. The documents sought are relevant to Mr. Fielding's ability to make full answer and defence. The Staff has a responsibility to disclose them. The fruits of the investigation are not the property of the prosecution. They belong to the public to ensure that justice is done.
 7. Such further and other grounds as the Respondent will advise and the Commissioner will permit.

C. Evidence

Mr. Fielding intends to rely on the following evidence for the motion:

8. The affidavit of Samiyyah Ganga, dated February 10, 2020;
9. The statement of allegations; and
10. Such further and other evidence as the Respondent will advise and the Commissioner will permit.

Dated this 10th day of February, 2020.

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