CITATION: Gowanlock v. Auxly Cannabis Group Inc., 2021 ONSC 4205
COURT FILE NO.: CV-19-00617136-00CP
DATE: 20210616

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Kevin Gowanlock, Plaintiff

- AND -

Auxly Cannabis Group Inc., Defendant

BEFORE: E.M. Morgan J.

COUNSEL: *Andrew Morganti, Albert Pelletier, and Charlotte Harman,* for the Plaintiff

Lara Jackson, Christopher Horkins, and Ron Fichter, for the Defendant

HEARD: May 25, 2021

MOTION FOR LEAVE TO PROCEED

I. The motion for leave

[1] The Plaintiff seeks leave to proceed with a putative shareholders' class action for secondary market liability pursuant to s. 138.3 of the Ontario *Securities Act*, RSO 1990, c. S 5 ("*OSA*").

[2] The claim is centred on the Defendant's release of its 2018 Q3 Management Discussion and Analysis ("MD&A"), a core document issued on November 12, 2018. That document is alleged to have contained misstatements about a cannabis facility build-out project that the Defendant had previously announced it was pursuing in conjunction with its co-venturer, FSD Pharma Inc. ("FSD"). FSD's own November 2018 MD&A is the subject of a separate shareholders' action: see *Miller v. FSD Pharma, Inc*., 2020 ONSC 4054.

[3] The Plaintiff further alleges that the Defendant's misrepresentations regarding the status of the build-out project and its joint venture with FSD were publicly corrected on February 7, 2019. On that date, before the market opened in the morning, the Defendant issued a press release announcing that the build-out project was stalled and that here were contractual breaches by FSD. The day before the press release, on February 6, 2019, the Defendant's shares closed at $0.90 per share. They then fell to a low of $0.71 per share in the week to ten days following the press release, a decline of roughly 21%.

[4] Under s. 138.8(1) of the *OSA*, a plaintiff must seek leave to proceed with a statutory secondary market claim such as this one. The Court will grant leave when it is satisfied that the

action is being brought in good faith and there is a reasonable possibility that the Plaintiff will be successful at trial.

[5] The onus is on the Plaintiff to pass the test for leave. To do so, the Plaintiff must present "both a plausible analysis of the applicable legislative provisions, and some credible evidence in support of the claim": *Theratechnologies Inc. v 121851 Canada Inc.*, [2015] 2 SCR 106, at para 39.

II. The Defendant's business and the joint venture

[6] The Defendant's CEO, Hugo Alves, explains in his affidavit that it is in the business of creating a vertically integrated system of cannabis producers, researchers, and partners. He further indicates that the Defendant is also engaged in the development and distribution of consumer-packaged goods for the Canadian cannabis products market.

[7] On December 21, 2017, the Defendant issued a news release announcing that it had entered into a letter of intent with FSD to "develop all aspects of [FSD's] cannabis cultivation facility in mutually agreed staged phases…creating the largest indoor cannabis cultivation and processing facility in the world." On or about March 3, 2018, this arrangement was made firm with the signing of a so-called Definitive Agreement between the Defendant and FSD.

[8] The primary task of the arrangement, which in a March 5, 2018 press release the Defendant called a "strategic alliance", was to build out a large processing facility that FSD had acquired for cannabis cultivation in Coburg, Ontario (the "Facility"). The press release went on to explain that as part of the strategic alliance the Defendant would "receive a 49.9% stream of all cannabis (or cannabis-derived products including any immature cannabis plants and any cannabis trim) produced at the Facility, under partnership with [FSD], in perpetuity". The press release went on to note that, in exchange, the Defendant's "management team will assist [FSD] with all aspects of the design, development, financing, build-out and operations of the Facility as well as the marketing, branding and distribution of all cannabis and cannabis-derived products generated by the Facility."

[9] The following week, on March 16, 2018, the Defendant issued yet another press release announcing that it had "determined that the first phase of development of the Facility will be a retrofit of the existing building to construct a large cultivation space with an estimated cost of $35 million." Two months later, on May 15, 2018, the Defendant issued a press release to update the scope of the first phase of the build-out project. This news release announced that the Defendant "expects to commence construction on the initial 200,000 square feet of cultivation and ancillary space within the next 30 days." It also stated that the Defendant "anticipates that the 200,000 square feet will be ready for segmented review by Health Canada by the end of December 2018" and that it "expects to plant the first harvest of the new segment by the end of January 2019."

[10] The build-out project for the Facility was further updated in the Defendant's press release of July 3, 2018. This press release explained, among other things, that the Defendant would

"contribute $55,000,000 to develop the first phase of the project" and that "[t]he first phase has been updated to include the build-out of an initial 220,000 square feet of cultivation and ancillary space." The press release went on to indicate that, "The Company anticipates that the first phase of construction will be complete and ready for Health Canada approval by the end of December 2018" and that "[p]ending regulatory approval, the company expects to plant the first harvest in the first phase by the end of January 2019."

[11] These announcements were then followed up by another press release on September 20, 2018, in which the Defendant indicated to the public that it had made an equity investment in FSD of $7.5 million. This investment was described in the press release as being used "to fund the ongoing construction of the initial 220,000 square feet of cultivation space that [the Defendant] and FSD are jointly developing at FSD's 620,000 square foot facility in Cobourg, Ontario pursuant to the agreed upon construction and development budget announced on July 3, 2018."

[12] The Definitive Agreement of March 3, 2018 has been reproduced in the record for this motion. It provides, in its relevant parts, that the Defendant was to assume primary carriage of the build-out project [art. 3.1]. It also assigns the Defendant primary responsibility for financing and/or sourcing the funds required for the capital expenditures for each successive project phase at the Facility. [art. 3.4].

[13] The Definitive Agreement further provides that each project phase was to be completed within the period of time agreed upon by the parties and that the Defendant was to keep FSD apprised on a regular basis of the progress of the build-out project during each stage [art. 3.2]. In this vein, the Definitive Agreement envisioned the build-out to be a joint responsibility of the two partners and stated that the Defendant and FSD were to "create and participate in a joint relationship committee to facilitate, supervise and manage the performance of the build-out and its subsequent operation [art. 9.2].

III. The alleged material misrepresentation

[14] As already indicated, on November 12, 2018, the Defendant issued its third quarter MD&A. It is the Plaintiff's submission that this document omits material facts about the status of the build-out of the Facility which, if disclosed, would have indicated (a) that the project was then significantly behind schedule, (b) that FSD was in breach of the Definitive Agreement, and (c) that there was substantial risk that the entire build-out project would be terminated. However, nothing of this nature was disclosed in the MD&A; instead, the document suggested that all was proceeding apace and that the co-venture between the Defendant and FSD was a "key development" in its business plans.

[15] More specifically, the Defendant's third quarter 2018 MD&A provided the following update with respect to the FSD joint venture and the build-out of the Facility:

> **FSD Pharma Inc.:** The Company entered into a definitive agreement with FV Pharma ("FV"), a subsidiary of FSD Pharma, to develop a cannabis cultivation

> facility at the former KRAFT® food manufacturing facility in Cobourg, Ontario. The design and construction budget and timeline for the retrofit of the first 220,000 square foot phase of the facility was presented by Auxly and approved by FV and construction is currently underway. Auxly retains the right to offtake 49.9% of the product produced at any portion of the FV facility that is developed in partnership with the Company. The Company expects the FV project to be a key contributor to the overall supply of high-quality indoor cannabis in Auxly's upstream segment.

[16] Six days later, on November 28, 2018, FSD issued its own press release confirming that the build-out project for the Facility was on schedule to be completed by December 31, 2018. Plaintiff's counsel point out that this mirrored the schedule previously announced by the Defendant and that had been, in effect, reconfirmed by silence in the Defendant's November 12, 2018 MD&A.

[17] The Defendant itself made no public response to FSD's public announcement of th project schedule and the targeted completion date of December 31, 2018. In fact, following its 2018 third quarter MD&A, the Defendant made no further public disclosures about the build-out project until February 7 2019, when it disclosed that the project was at a standstill and that the Definitive Agreement was at an end.

IV. The corrective disclosure

[18] On February 7, 2019, prior to the opening of the stock market, the Defendant issued a press release headlined "Auxly Announces Termination of FSD Pharma Joint Venture". The press release stated, in its salient parts, that:

> (a) 'the first phase of the JV Facility Development was to be the construction of an approximately 220,000 square foot self-contained cultivation facility';
>
> (b) 'to date, the Company has invested $7.5 million in the development and construction of the…Facility';
>
> (c) there had been 'contractual breaches relating to FSD's management and staffing obligations of the [Facility], as well as significant concerns relating to the [Facility]'s infrastructure';
>
> (d) 'On January 17, 2019, [the Defendant] provided notice to [FSD] of such breaches in the hopes that FSD Pharma would work…toward a resolution'; and
>
> (e) 'FSD did not remedy the breaches and…[the Defendant] subsequently terminated the Agreement effective February 7, 2019.'

[19] Market analyst AltaCorp Capital, which covered the Defendant, concluded that there was "No Impact to Strategy or Outlook" arising from the termination of the Definitive Agreement. It

assessed that the Defendant had a sufficiently diversified portfolio of investments and project that this one failure did not impact on its long-term plans.

[20] As AltaCorp put it, "Auxly's de-risked business model insulates them from events such as this" and the expected re-deployment of nearly $50 million in capital would "make up for [the] minor decrease" in future production capacity across the Defendant's upstream vertical investments. AltaCorp had previously noted that the Facility was only expected to account for 11.5% of the Defendant's future cannabis production, with the remaining 88.5% accounted for by other assets being developed by the Defendant with other co-venturers.

[21] In a somewhat similar approach, the other market analyst covering the Defendant at this time, Mackie Research Capital Corporation, also focused on the Defendant's ultimate strategic direction. Like AltaCorp, it stated that there would likely be minimal impact of the termination of the FSD contract on the Defendant's future prospects. Mackie concluded that "the termination does not materially affect the company's strategy; Auxly will quickly determine where to most effectively deploy this capital to strengthen its pipeline of partnerships."

[22] Having said that, it is not disputed that the market price of the Defendant's shares plunged rather dramatically in the wake of the Defendant's February 7, 2019 disclosure. Within a week, the market value had fallen by approximately 21% – by any measure, is a substantial decline.

[23] Markets are multi-faceted, and one often finds a variety of matters that simultaneously impact on stock prices at a given time. The question here is whether the Defendant's share price decline in February 2019 was in response to its disclosure regarding the deterioration of the build-out project and termination of the FSD Definitive Agreement, or whether it was the result of other events or information with a significant market impact.

V. Part XXIII.1 of the *OSA*

[24] It has long been the view of the courts that securities legislation is to be interpreted broadly and purposively with a view to its character as a special form of consumer protection: *Kerr v. Danier Leather Inc.*, [2007] 3 SCR 331 at para. 32. Justice Coté, writing for the majority of the Supreme Court in *Canadian Imperial Bank of Commerce v. Green*, [2015] 3 SCR 801, at para 75, described the policy of the *OSA* and its leave to proceed requirement, along with the interpretative approach appropriate to that policy:

> Part XXIII.1 *OSA* [is] remedial in nature, and should thus be interpreted broadly and purposively. The end result of the legislature's consideration was that the scheme includes a leave requirement that serves as a precondition to the commencement of an action, a limitation period and no requirement to prove reliance on the misrepresentation. The combined effect of these features is to promote efficiency and fairness for both parties.

[25] In the secondary market, these policies are achieved by requiring reporting issuers, like the Defendant, to make "continuous disclosure" relating to their business and operations, pursuant to National Instrument 51-102 – *Continuous Disclosure Obligations*. Part XXIII.1 of the *OSA* allows shareholders to bring an action against their own company for alleged breaches of these continuous disclosure obligations. This secondary market liability legislation "emerged directly out of Canada-wide efforts to develop a more meaningful and accessible form of recourse for investors": *Theratechnologies*, *supra*, at para 27.

[26] The legislation requires a claimant under Part XXIII.1 to identify two time posts between which the claim is based and in reference to which shareholder damages can be calculated: see *OSA*, s. 138.5. Those can be succinctly identified as "the time that the document containing the alleged misrepresentation was publicly released and the time that the misrepresentation was publicly corrected": *Swisscanto Fondsleitung AG v. BlackBerry Limited*, 2015 ONSC 6434, at para 57.

[27] In identifying a public correction, a plaintiff must show (a) "some linkage or connection" between the alleged misrepresentation and the alleged public correction, (b) that it shares the same subject matter and relates back to the misrepresentation; and (c) that the public correction is reasonably capable of revealing to the market the existence of an untrue statement or omission of a material fact: *DALI Local 675 Pension Fund (Trustees) v. Barrick Gold*, 2019 ONSC 4160, at para 17.

[28] Furthermore, "[a] key identifier of a public correction is that it can be shown to have a statistically significant impact on market prices": *Paniccia v. MDC Partners*, 2018 ONSC 3470, at para 65. Making this determination is necessarily a context-driven analysis, where all of the relevant factors effecting the market, including those that are company-specific and those that are market-wide, are to be taken into account: *FSD Pharma*, *supra*, at para 36.

a) The burden for leave to proceed

[29] In order for the Plaintiff to proceed with the claim, he must obtain leave of the court. Section 138.8 of the *OSA* requires that the Plaintiff establish that the action has been brought in good faith and that there is a reasonable possibility that it will be resolved at trial in favour of the Plaintiff.

[30] The "reasonable possibility" language in section 138.8(1)(b) imposes a "low merits-based threshold" for proceeding with the action, *Mask v. Silvercorp Metals Inc.*, 2015 ONSC 5348., at para 45. This threshold is lower than the usual proof on a balance of probabilities. As the Supreme Court has explained it, "the evidentiary requirements should not be so onerous as to essentially replicate the demands of a trial": *Theratechnologies*, at para 38.

[31] Accordingly, the "reasonable possibility" test does not require the over 50% certainty that civil proof generally demands. In fact, the test under section 138.8(1)(b) was described by my

colleague Belobaba J. in *Barrick Gold*, at para 35, as very much stacked in the moving party's favour:

> The 'reasonable possibility' test means that in many cases the defendant may have persuaded the leave judge on the evidence before the court that the defendant will *probably* prevail at trial. This doesn't mean that the judge is obliged to dismiss the motion for leave. The judge may still conclude that the plaintiff has a 'reasonable possibility of success' at trial. For example, if the judge thinks in terms of percentages, the judge may say to herself that the chances of the defendant succeeding at trial are excellent - 80 or even 90 per cent. This still leaves a 10 to 20 percent chance of success for the plaintiff, enough to clear the 'reasonable possibility' hurdle.

b) Good faith

[32] The "good faith" requirement in section 138.8(1)(a) of the *OSA* means that a plaintiff has brought the action in the honest belief that there is an arguable claim and for reasons that are consistent with the purpose behind the statutory remedy; it excludes cases brought for an oblique or collateral purpose, and that demonstrably lack a genuine intention and capacity to prosecute the claim if leave is granted: *CIBC*, *supra*, at para 356. In light of this requirement, the analysis necessarily entails "a consideration of the subjective intentions of the plaintiffs in bringing their action, which is to be determined by considering the objective evidence": *Silver v. Imax*, [2009] OJ No 5585, at para 308.

[33] Generally, unless something untoward appears on the face of the evidence in the record, the good faith of a claimant does not face strict scrutiny. It is a preliminary threshold test, and as such is of a nature that it would be "unfair to the parties and to the court to expect the motion judge to engage in a finely calibrated weighing process": *Mask v. Silvercorp Metals Inc.*, 2015 ONSC 5348, at para 145. It is therefore sufficient, absent any evidence to the contrary, for plaintiffs to depose that "they bring the action in good faith to recover the losses that they and Class Members have suffered and 'to ensure that the defendants are held accountable' for their alleged misrepresentations": *CIBC*, at para 357.

[34] Under the circumstances and on the basis of the record before me, I see no reason to doubt the Plaintiff's good faith in seeking leave to bring this action.

c) The materiality test

[35] The essence of the Plaintiff's claim, both under section 138.3 of the *OSA* and at common law, is contained in paragraphs 6 through 9 of the Statement of Claim. Those paragraphs assert that the Defendant misrepresented material facts about the Facility build-out venture with FSD, and that in February 2019 the Defendant publicly corrected those facts. The Plaintiff further claims that this public correction prompted its previously inflated share price to drop, causing financial losses to investors.

[36] The question for leave is whether there is a reasonable possibility that the Plaintiff will succeed in proving this at trial.

[37] A reporting issuer such as the Defendant is required under section 75(1) of the *OSA* to issue a press release where there has been a "material change" in its business or affairs. The press release is to disclose the material change, which is defined in section 1(1) of the *OSA* as "a change…that would reasonably be expected to have a significant effect on the market price or value of any of the securities of the issuer".

[38] In *Cornish v Ontario Securities Commission*, 2013 ONSC 1310, at para 52, the Divisional Court indicated that the question of what constitutes a "material change" is to be analyzed objectively by a company when confronted with the question in advance of any market impact taking place: "When a reporting issuer is considering material change disclosure, it must apply an objective test as to the expected market impact as it will not have the benefit of actual market impact information." At that point, the question of materiality in the market is determined objectively "from the perspective of the reasonable investor": *Cappelli v Nobilis Health Corp*., 2019 ONSC 2266, at para 177.

[39] The court, on the other hand, comes to the event in retrospect, after the market impact (or lack thereof) has taken place. In the circumstances, the task at hand is to determine whether the alleged public correction was understood in the market as a correction. At this point, the market impact can be objectively determined by an examination of the stock's subsequent price movements, and the market, reflecting economically rational investor behaviour, becomes the determinant of what the reasonable investor might think: *FSD Pharma*, *supra*, at para 69.

[40] In *CIBC*, at para 76, the Court of Appeal embraced this analysis with respect to determining whether an alleged public correction disclosed a material change:

> The public correction need not specifically identify the omitted material fact or specifically relate the information in the correction to the omitted material fact. As stated earlier, if the alleged public correction does not, on its face, reveal the existence of the alleged misrepresentation, the motion judge must engage in a reasoned consideration of evidence concerning the context in which the alleged public corrections were made and how the alleged public corrections would be understood in the secondary market. The critical question for the motion judge is whether the alleged public correction was reasonably capable of being understood in the secondary market as correcting what was misleading in the impugned statement.

[41] As discussed above, the market did exhibit a significant adverse response following the Defendant's February 7, 2019 press release. Counsel for the Defendant submit that while the share price may be an indicator of a material change, it is necessary to examine the February 7th press release in context in order to identify what it is that has prompted the market reaction. I agree with

that proposition. As I indicated in *FSD Pharma*, at para 36, context is everything when it comes to interpreting such events.

[42] In the Defendant's view, the 21% fall in share price in the week following that press release does not relate to what Plaintiff's counsel has called a public corrective with respect to the FSD Definitive Agreement and build-out of the Facility. Rather, Defendants' counsel contend that the market had by that time already absorbed the news about a delay in the timing of the build-out project and, in fact, any subsequent decline in share price was a response to other matters and not to the news about the FSD relationship contained in that press release.

[43] The market impact of the February 7, 2019 press release is addressed by two pieces of evidence contained in the Defendant's responding record – the affidavit of Mr. Alves and the expert report of the Defendant's economics expert, Professor Paul Gompers. Turning first to Mr. Alves, he notes in his affidavit that the Defendant's press release announcing the termination of the Definitive Agreement with FSD specifically stated that the termination "does not materially impact the [Defendant's] strategy nor its supply pipeline. [The Defendant] has a robust pipeline comprised of a combination of wholly owned assets, streaming partnerships, joint venture partnerships, and commercial offtake arrangements, and will quickly evaluate where to most effectively deploy its capital."

[44] For his part, Professor Gompers took account in his report that the FSD arrangement was projected to be no more than 11% of the Defendant's business. He then prepared what he called an "event study" to determine the market impact of the alleged misrepresentation in November 2018 and the alleged public corrective in February 2019. As Professor Gompers explained it, financial economists use studies of this nature "to determine whether an observed change in stock price, if any, provides reliable economic evidence that the change is associated with information specific to the company as opposed to random noise typically observed in the trading of the stock."

[45] Professor Gompers' event study employs a regression model that is designed to control for that portion of the company's share price changes that are due to changes in overall market returns and industry returns. Using this model, he hopes to filter out movements in share price that can be explained by changes in overall market or industry prospects, and to isolate that portion of the share price change that is unexplained by factors external to the company itself. Using this methodology, he then assesses whether the residual return – which, having factored out the market and industry-wide developments is presumably a result of company-specific developments – is statistically significant or unusual. In his view, the stock price movement in mid-February 2019 was not statistically significant once non-company specific developments are factored out.

[46] The economics methodology and elaborate charts presented by Professor Gompers are very impressive looking. I do admire the effort to reduce the issue to a technical one of data collection and mathematical calculation. But I am not convinced that the study demonstrates that the Plaintiff cannot prove that the drop in the Defendant's share price following the February 7, 2019 press release was caused by the information in that release, and that the market had not already absorbed the news of delay in the build-out project with FSD.

[47] I say this with respect, but the Gompers report suffers from what I would characterize as too much science and not enough art. In fact, it is reminiscent of computer-generated legal research results in which the researcher has collated and calculated the statistical occurrences of key words and phrases in a database of case law, but has not actually read the cases themselves: see Peoples, Lee F., "The Death of the Digest and the Pitfalls of Electronic Research: What is the Modern Legal Researcher to Do?", (2005) 97 Law Library Journal 661. The collation of data, while undoubtedly helpful, does not always on its own tell the most accurate story.

[48] For one thing, Professor Gompers does not appear to have examined in any close way the source which he identifies as having already revealed to the market the delay in the Facility build-out with FSD – i.e. FSD's own January 8, 2019 press release. It is his view that this FSD press release had been so well absorbed by the market that by the time the Defendant disclosed the termination of its co-venture with FSD a month later its impact was already spent. Any movement in its share price at that point would therefore have to be a result of something else.

[49] In its own separate shareholder litigation over these events, FSD made a similar argument. That is, it contended that in its January 8, 2019 press release it had disclosed that the Facility build-out was delayed, and that the revelation had little market impact. Like the Defendant, it was not until FSD's press release dealing with this issue in early February 2019 that its share price took a substantial drop. FSD's defense to the leave motion with respect to a secondary market claim was that its February 7, 2019 press release announcing the end of its deal with the Defendant was not a public correction since that news had already been released a month earlier.

[50] In the *FSD Pharma* leave motion, I found that the reason the lack of an adverse market response to FSD's January 8, 2019 press release was that while it did disclose relevant information, it did so in too obscure a way to be noticed or absorbed as important. The disclosure was contained not in the text of a short press release devoted to the subject, but in a half-sentence, in parenthesis, buried in a footnote to a longer press release that was headlined as being about other good news regarding the company. I concluded in *FSD Pharma*, at para 21, that, "The statement was as physically unobtrusive as could be – one had to literally read the 'fine print' to even see it let alone to register its significance."

[51] I do not say that the matter at hand is *res judicata* or that the *FSD Pharma* judgment is binding in the present action. The litigating parties were different and the two companies, although involved in a joint venture and in parallel events, are different businesses. I also do not say that Professor Gompers has to agree with my assessment of FSD's January 8, 2019 press release when he evaluates it; indeed, principled debate among alternate perspectives is very much what the law is about.

[52] But with that in mind, it is nevertheless surprising to me that Professor Gompers did not address the fact finding in *FSD Pharma* even to explain his rejection of the view stated therein or to distinguish his view from it. In fact, the otherwise rather lengthy bibliography to Professor Gomers' report does not contain the *FSD Pharma* judgment, even though it squarely considers the identical events and the identical press release on which his report relies.

[53] Readers of press releases, like people everywhere, respond to the stimuli put before them. As I described in *FSD Pharma*, at paras 21-22, FSD's January 8, 2019 press release was headlined: "FSD Pharma Completes Harvest and passes analytical testing of second lot". The news was all positive, including the message about the build-out of the Facility and the co-venture between FSD and the Defendant, the great earning potential of which was featured in the release. It was only in a footnote, in parenthesis, that the press release noted "(to be completed in 2019)".

[54] One would have to be the most careful of readers to pay attention to that parenthetical, and one would have to have either FSD's or the Defendant's previous press releases or MD&As in hand to get the full message. Only by comparing the previously announced completion dates with the footnote reference would one realize that the January 8, 2019 release contains an advisory of a serious delay in the build-out project. The message was as understated as could be, in my view prompting a correspondingly understated market response: *Ibid*., at para 22.

[55] There is no indication in Professor Gompers' report that he factored this human response to visual messaging in his charting and analysis of market data. He describes the January 8, 2019 press release as if the delay in the FSD build-out project was the centrepiece of its message:

> 67. As described in this section, information was available prior to the alleged 'Public Corrective Statement' on February 7, 2019 regarding the delay associated with the build-out of phase one of the JV Facility. Specifically, FSD's January 8, 2019 disclosure and other commentary provided information about the status of the build-out of phase one of the JV Facility.
>
> 68. On January 8, 2019, FSD, Auxly's partner in the joint venture, disclosed that phase one of the JV Facility would be completed in 2019, as opposed to being ready for Health Canada approval in December 2018 as previously reported…
>
> 69. On this date, Auxly's residual return was negative, but not statistically significant. This indicates that there was no discernable impact on Auxly's stock price from the January 8, 2019 disclosure.

[56] Professor Gompers followed up this observation with a description of a number of market analysts who follow the Defendant's stock. As previously noted, he described the contemporaneous assessments by AltaCorp Capital and Mackie Research Capital Corporation, both of whom continued to be positive on the Defendant's prospects following January 8, 2019. From this, Professor Gompers concluded that, "If the information contained in the January 8, 2019 was deemed important by analysts, the analysts would have been expected to comment on it."

[57] The Gompers Report did not say that the market analysts had explained away the significance of the new disclosure, as they had not. Rather, Professor Gompers' point about the analysts was that they were silent with respect to the disclosure of problems in the FSD build-out project. One might, of course, conclude that this silence indicates that they did not consider the new information to represent a significant development. But one might equally conclude that if

the information were disclosed in a way that did not simultaneously obscure it the analysts would have twigged to its importance instead of ignoring it.

[58] In addition to all of this, Plaintiff's counsel points out that the Gompers Report does not analyze the Defendant's share behaviour in accordance with the standard calculation provided under the *OSA*. They note, in fact, that Professor Gompers did not use any data on the Defendant's share price after February 7, 2019. That price decreased by 10.71% on February 8, 2019 alone, one day after the February 7th press release.

[59] In his report, Professor Gompers never turned his attention to this price drop, despite this being the predetermined calculation provided by the *OSA* for analyzing the impact of a public correction. While this alone may not render the Gompers Report entirely unreliable as Plaintiff's counsel suggest, it does increase the skepticism about the merits of the Defendant's position which I take from the balance of their expert's approach.

[60] I accept that Professor Gompers is qualified as an expert economist. I also accept the admissibility of his report, which Plaintiff's counsel opposes. But I do not agree with the logic of his report and its conclusion.

[61] In my view, the Gompers Report does not establish that the section 138.8 criteria have not been met and that there is no reasonable possibility that the claim will be resolved at trial in favour of the Plaintiff. There certainly exists at least a reasonable possibility that the Plaintiff will prevail in his claim that there has been a material misrepresentation that caused him (and, if certified, other class members) loss.

VI. Disposition

[62] The Plaintiff is granted leave under s. 138.8(1) to commence an action under s. 138.3 of the *OSA*.

[63] Counsel may make written submissions on costs. I would ask that Plaintiff's counsel provide me with their brief submissions (no more than 3 pages) and any supporting materials within two weeks of today, and that Defendant's counsel provide me with their equally brief submissions and any supporting materials within two weeks thereafter.

[64] The costs materials may be emailed directly to my assistant.

Morgan J.

Date: June 16, 2021