

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

**JONATHAN A. LUBUS, MARKO STAJIC,
MORDECAI BOBROWSKY, and KYLE YAMAMURA**

Plaintiffs

and

**WAYLAND GROUP CORP., BENJAMIN ALLAN WARD,
CANACCORD GENUITY CORP., and GMP SECURITIES L.P.**

Defendants

Proceeding under the *Class Proceedings Act, 1992*

FACTUM OF THE PLAINTIFFS

(For Leave to Proceed under s. 138.8 of the *Securities Act*, R.S.O. 1990, c. S.5)

Date: September 8, 2022

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PART I – OVERVIEW

1. Wayland Group Corp. (“**Wayland**”) was a company incorporated pursuant to Ontario’s *Business Corporations Act*, which maintained its headquarters in Burlington, Ontario (it has since been liquidated and sold-off into various pieces). Wayland was a federally licensed producer and distributor of cannabis with facilities in Canada, Europe, and South America. Its main production facility was in Langton, Ontario, Canada. During the Class Period, Wayland’s common shares were listed on the Canadian Securities Exchange, the Frankfurt Stock Exchange, and the U.S. OTC Market. Wayland was a Reporting Issuer in Ontario and subject to Ontario’s *Securities Act*, R.S.O. 1990, c. S.5 (“*OSA*”).¹

2. The focus of the Plaintiffs’ causes of action concern the cost and timing of Wayland’s cannabis production facility located at 150 8th Concession Road, Langton, Ontario (a/k/a, “**Site 150**”) with its expansion phases at “Site 138” (“**Expansion**”): Phase 1 (217,000 sq. ft.), Phase 2 (635,000 sq. ft.), and Phase 3 (90,000 sq. ft.) (together, the “**Langton Facility**”).

3. During the relevant period Wayland represented to investors in the Impugned Documents, *infra*, that the Langton Facility was on-schedule, on-budget, and fully-funded, and would commence generating revenues during the Class Period, when it was none of those things. Wayland represented to investors that the monies raised in its securities-offerings would be applied to certain uses, including the Langton Facility Expansion and acquisitions of smaller cannabis companies, and they were not.

4. The truth of Wayland’s business situation, capital, and operations came in increments beginning on October 1, 2018, when Wayland raised \$35 million of new capital from investors and disclosed that it was allocating \$15 million of this capital-raising to Phase One of the Langton Facility Expansion, which Wayland had previously represented was fully-funded; moreover, Wayland disclosed that Phase One production would not be completed during 2018 but, rather, during 2019 (which Wayland ultimately disclosed in December 2019 was only 65% completed).²

¹ As reflected by Wayland’s profile listed on www.sedar.com, last viewed on September 5, 2022.

² Exhibit LL, Plaintiffs’ Supplemental Motion Record [**PSMR**], Wayland Offering Memorandum, “Acquisition or Investment Opportunity at bullet point 2 (CNTRL00011414).”

5. The final public correction was released on April 23, 2019, when Wayland issued a
6. statement that it would be forced to delay the release of its annual 2018 financial statements and MD&A and, implicitly, its Q1 2019 financial statements and MD&A,³ indicating to investors that Wayland was unable to comply with the most essential continuous disclosure obligation, without which Wayland could not ascertain such things as “on-schedule”, “on-budget”, “fully-funded”, and no additional revenues would be earned from the cannabis grown and sold within Site 138 (Phase One or Phase Two).
7. Within 8 trading days, on May 4, 2019, Wayland’s securities listed on the CSE were halted by the Ontario Securities Commission (“OSC”); and trading never resumed.⁴ By December 2, 2019, Wayland filed for bankruptcy protection under the *Companies’ Creditors Protection Act* (“CCAA”). During January 2020, Wayland made it public that Phase One was only 65% completed and Phase Two was not remotely completed. Wayland shareholders received no recovery for their investment losses in the CCAA Proceeding
8. The Plaintiff, Jonathan A. Lubus, issued a statement of claim under Ontario’s *Class Proceedings Act* (“CPA”) advancing common law and statutory primary and secondary market misrepresentation causes of action against the Defendants Wayland and Benjamin A. Ward (“**Mr. Ward**”), and common law and statutory primary market causes of action against Wayland, Mr. Ward, and Wayland’s underwriters during the Class Period, Canaccord and GMP Securities L.P. (together, the “**IBKs**”). Plaintiff Lubus alleged that Wayland’s investor documents released on SEDAR between January 24, 2018, and April 23, 2019, contained misrepresentations. On September 1, 2021, this pleading was amended to add additional representative plaintiff investors who purchased Wayland securities from primary offerings during the Class Period.⁵
9. On June 13, 2022, this Court granted the Plaintiffs’ motion to note Defendants Wayland and Mr. Ward in default because the conditions of Rules 19.01(1) and 16.04(1) of the *Rules of Civil*

³ Exhibit N, Plaintiff’s Motion Record [**PMR**], News Release and Exhibit QQ, PSMR Material Change Report dated April 23, 2019.

⁴ Exhibit II, PSMR, OSC Cease Trade Order Published on May 6, 2019.

⁵ Exhibit D, PMR, Fresh as Amended Statement of Claim issued September 1, 2021 [the “**Claim**”].

Procedure were satisfied. On August 26, 2022, the Registrar processed the Order and noted Defendants Wayland and Mr. Ward in default (collectively, the “**Defaulting Defendants**”).⁶

10. This factum is in support of the Plaintiffs’ motion for leave to proceed, pursuant to s. 138.8 of the *OSA*. The Plaintiffs seek leave to advance the statutory secondary market cause of action, pursuant to s. 138.3 of the *OSA*, against the Defaulting Defendants in respect of the following “**Impugned Documents**”:

- (a) F/2017 Annual Information Form (released on June 29, 2018);
- (b) 2Q 2018 Financial Statement and MD&A (released on August 24, 2018);
- (c) Final Short Form Prospectus (released on October 1, 2018); and
- (d) 3Q 2018 Financial Statement and MD&A (released on November 28, 2018).

11. The Plaintiffs submit that Wayland’s statements released on October 1, 2018, November 28, 2018, February 21-22, 2019, and April 23, 2019, were understood by the market to correct the alleged misrepresentations (i.e., public corrective statements).

PART II – THE PARTIES

A. The Moving Plaintiff

12. Plaintiff Marko Stajic is a resident of Windsor, Ontario. During 2018 and 2019, he purchased over 500,000 shares of Wayland listed on the CSE. At Wayland’s annual meeting, he relied upon Wayland’s 3Q 2018 MD&A material facts to vote his shares, and Wayland acknowledged his support.⁷ He held 172,750 of those shares, with a cost basis of approximately \$373,362, at the close of the proposed Class Period, and continued to hold those shares until after April 23, 2019.⁸ He suffered a total loss on those shares when the trading of Wayland shares was halted on May 6, 2019 and never resumed.

B. Defendant Wayland Group Corp.

13. Wayland was a company incorporated pursuant to the laws of Ontario, which maintained its headquarters in Oakville, Ontario. Wayland was a federally licensed producer and distributor of

⁶ Exhibit OO, PSMR, Default Order of Justice E.M. Morgan issued August 26, 2022.

⁷ Exhibit W, PSMR, Voting Details dated December 20, 2018, which reflect that Mr. Stajic with 172,000 shares voted in favour of Mr. Ward to continue as the CEO (CNTRL00024191).

⁸ Tab 3, PMR, Affidavit of Marco Stajic [**Stajic Affidavit**] at paras 9 and 10.

cannabis with facilities in Canada, Europe, and South America. Its main production facility was in Langton, Ontario.

14. As a Responsible Issuer in Ontario during the Class Period, Wayland had continuous disclosure obligations to file and release “core documents” (as defined at s.138(1) of the *OSA*) concerning its business, operations and finances, including documents identified as quarterly and annual financial statements and MD&A according to the continuous disclosure required under sections 75 to 83, Part XVIII of the *OSA*, and guided by National Instrument 51-102.

15. During the proposed Class Period for the statutory secondary market claim, Wayland conducted numerous public offerings to raise capital for acquisitions, financing its expansion of the Langton Facility, and marketing; it raised over \$120 million from investors and reached a market capitalization of approximately \$800 million.⁹

16. On April 23, 2019, Wayland released a statement that it would be forced to delay the release of its annual 2018 financial statements and MD&A for undisclosed reasons but the market was aware that Wayland’s Phase One extension was still not completed and, by extension, not generating additional revenues as well as two (2) of its key directors resigned or were invited to resign, effective immediately (February 21/22, 2019) who were important to Wayland’s business operations and capital.¹⁰

17. By May 6, 2019, Wayland’s securities listed on the CSE were halted; and trading never resumed.¹¹ Wayland never filed any financial statements or MD&A after November 28, 2018, when it released its 3Q 2018 financials for the period ending September 30, 2018.¹²

18. On December 2, 2019, Wayland filed for and was granted protection under the *CCAA* with the Superior Court of Justice, Commercial List (the “**CCAA Proceeding**”). Within the *CCAA*

⁹ Exhibit L, PSMR, Prospectus dated March 28, 2018 at pp. 134; Exhibit T, PSMR, Prospectus dated October 1, 2018; Exhibit K, PMR, Prospectus dated October 24, 2018.

¹⁰ Exhibit N, PMR, Impugned Document dated April 23, 2019; and Exhibit M, PMR, Impugned Documents dated February 21-22, 2019.

¹¹ Exhibit II, PSMR, OSC Cease Trade Order published on May 6, 2019.

¹² Exhibit L, PMR, Wayland 3Q MD&A published on November 28, 2018.

Proceeding, Wayland acknowledged that it was only 65% completed with Phase One and had long run out of capital to complete the expansion projects.¹³

19. There was a stay of litigation order in place between December 4, 2019 and July 9, 2020 (221 days) and, concurrently, a suspension of limitation periods in Ontario, Canada, due to COVID-19 until September 13, 2020 (an additional 68 days). On February 22, 2022, the stay of litigation protecting Wayland's former directors and officers expired.

20. Although pursuant to an order dated April 17, 2020 (the "**Wind-Down and Liquidation Order**"), Wayland no longer exists, by another order dated July 15, 2020 (the "**D&O Claims Order**") investors were granted authority to advance their causes of action against Wayland up to the extent of the funds available under the relevant directors and officers insurance policies ("**D&O Policies**").¹⁴

C. Defendant Benjamin Allan Ward

21. Mr. Ward was a resident of Oakville, Ontario, until sometime during mid to late 2019, when it appears he relocated to Zug, Switzerland (e.g., where his most recent SEDI.ca disclosure identifies him as residing),¹⁵ leaving his wife Mariana Bracic, a licensee registered with the Law Society of Ontario and three children in Ontario, Canada.

22. During 2017, Mr. Ward became Wayland's President, Chief Executive Officer and a director on its board. He made or authorized the making of the alleged misrepresentations that were released during the proposed Class Period, and certified that the core Impugned Documents did not contain any untrue statements of material fact or omit to state any material facts required to make them not misleading.

23. For reasons that are still unclear, during the process of preparing Wayland's F/2018 financial statements, Wayland's board of directors engaged MNP LLP to conduct a forensic audit of Mr. Ward.¹⁶ Wayland announced Mr. Ward's resignation on August 2, 2019.¹⁷

¹³ Exhibit MM, PSMR, Wayland Offering Memorandum, "Acquisition or Investment Opportunity" at bullet point 2 (CNTRL00011414).

¹⁴ Exhibit NN, PSMR, Order of Justice E.M. Morgan issued on July 15, 2020.

¹⁵ Exhibit PP, PSMR, SEDI Profile of Benjamin Ward.

¹⁶ Exhibit GG, PSMR, Email from MNP to Mr. Ward, Re: Wayland Group Inc. dated March 30, 2019 (CNTRL00185996).

¹⁷ Exhibit R, PMR, Wayland Change of Auditor Notice published on August 2, 2019.

PART III - THE IMPUGNED DOCUMENTS AND THE MISREPRESENTATIONS

24. For purposes of this motion, the Plaintiffs submit that there is a reasonable possibility that the Impugned Documents contain the alleged misrepresentations as reflected by comparing the then total mix of information about Wayland's business, capital structure, and operations and the subsequent public corrective statements, which is the analysis mandated by the Supreme Court of Canada.¹⁸

25. The Plaintiffs submit that just prior to the release of the first (1st) impugned document for this s. 138.8 Motion, the total mix of information about Wayland's business, capital structure, and operations, created by Wayland just prior to the release of the first Impugned Document for purposes of this s. 138.8 motion was:

- (a) November 28, 2017, "Phase One, a 217,000 sq. ft. expansion is expected to be completed in Q1 2018, bringing 22,245 kg of annual production on line."¹⁹
- (b) January 11, 2018, "Phase One construction... is currently on time and within 2% of budget";²⁰
- (c) January 24, 2018, "Phase One, a 217,000 sq. ft. expansion is expected to be completed in Q2 2018, bringing 22,245 kg of annual production on line. Phase Two, a 635,000 sq. ft. expansion... expected to bring an additional 70,000 kg of annual production on line by the end of 2018...";²¹
- (d) February 28, 2018, Wayland issues a statement that although Defendant Mr. Ward is subject to an investigation into his activities as CEO of Canadian Cannabis Corp., the Board of Directors created a Special Committee headed by director Paul Pathak and represented by Osler Hoskin & Harcourt LLP, "The Company is unaware of any facts that could reasonably lead it to conclude that this investigation has had, or will have, any impact on the ability of Mr. Ward to properly and effectively carry out his duties as CEO or director of the Company";²²
- (e) March 23, 2018, Wayland released its Code of Business Conduct affirming that its officers and directors were (i) promoting honest and ethical conduct, including the handling of conflicts of interest; (ii) promoting full, fair, and accurate timely disclosure in reports provided to securities regulators, and fostering a culture of honesty and

¹⁸ *Sharbern Holding Inc. v. Vancouver Airport Centre Ltd.*, 2011 SCC 23 at paras 52-58; see also, *Green v Canadian Imperial Bank of Commerce*, 2012 ONSC 3637 at para 377 [*CIBC (Cert/Leave)*].

¹⁹ Exhibit L, PMR, 2018 3Q MD&A published on November 28, 2018.

²⁰ Exhibit D, PSMR, News Release published on January 11, 2018.

²¹ Exhibit E, PMR, F/2016 Annual Information Form published on January 24, 2018, at p. 16.

²² Exhibit G, PSMR, News Release published on February 28, 2018.

accountability. The Code of Business was approved by Wayland's full Board of Directors;²³

- (f) March 28, 2018, Wayland released a Final Short Form Prospectus that reported that its Phase One expansion was "fully funded" and "Management expected the Phase One expansion to be complete in the second quarter of 2018;" and "Completion of the grow facility shell (Phase 2)... along with the installation of operational equipment, are targeted for the fourth quarter of 2018;"²⁴
- (g) April 27, 2018, Wayland released its F/2017 MD&A reporting that "Phase One, a 217,000 sq. ft. expansion is expected to be fully completed in Q4 2018. Wayland did not change its previous statements about Phase One being fully-funded or the completion date for Phase Two;"²⁵ and
- (h) May 29, 2018, Wayland released its Q1 2018 MD&A reiterated that Phase One expansion would be fully completed in Q4 2018. Wayland did not change its previous statements about Phase One being fully-funded or the completion date for Phase Two.²⁶

26. Thus, the total mix of information about Wayland prior to the commencement of the Class Period was that the Langton Facility Expansion was on-time, on-budget and fully-funded, that substantial new cannabis production would soon start adding to Wayland's revenues, and that the business's operations were positive and being competently managed.

A. Impugned Document No.1. Wayland's F/2017 Annual Information Form

27. On June 29, 2018, Wayland released its F/2017 Annual Information Form as well as the Mr. Ward's certification on a Form 52-109F1 attesting that this impugned document did not contain any misrepresentations.²⁷

28. In this core document, Wayland represented that it:

"has developed a Phase One near term 217,500 sq. ft. expansion to support existing and future patient growth by bringing additional production on line and is expected to be fully completed in the fourth quarter of 2018."²⁸

²³ Exhibit K, PSMR, 2018 Code of Conduct published on March 23, 2018.

²⁴ Exhibit L, PSMR, Prospectus published on March 28, 2018 at pp. 15, "Business Objectives".

²⁵ Exhibit G, PMR, F/2017 MD&A published on April 27, 2018 at pp. 9.

²⁶ Exhibit H, PMR, Q1 2018 MD&A published on May 29, 2018, at pp. 7.

²⁷ Exhibit I, PMR, AIF and Certification by Benjamin Ward published on June 29, 2018. *See also*, Exhibit I, PMR, AIF at p 36, where there were 137,878,089 shares that traded at C\$1.70, giving Wayland a market capitalization of approximately \$234,400,000, which excludes the value of Wayland's warrants and options. At the commencement of the common law Class Period on January 11, 2019, Wayland's market capitalization was approximately \$453,600,000 (e.g., shares closed at C\$3.29) excluding Wayland's "convertible securities." At this stage, the Plaintiffs believe the Wayland enjoyed a market capitalization of approximately \$800 million during June 2018.

²⁸ Exhibit I, PMR, AIF at pp. 12, "Business Objectives."

That “Phase Two, a 635,000 sq. ft. expansion commenced in the second quarter of 2018 and is expected to bring an additional production on line in the first quarter of 2019, ...”²⁹

“(i) Phase One construction of the Company’s facility in Langton, Ontario progressing on schedule and within 2% of budget.”³⁰

“The Expansion is in addition to the Corporation’s current 42,000 sq. ft. existing operations and its fully funded Phase [One] 217,000 sq. ft. production facility expansion...”³¹

29. In other words, Wayland misrepresented to investors on June 29, 2018 that the Phase One expansion of the Langton Facility was fully-funded, on budget and would be completed in the fourth quarter of 2018 (i.e., within the next six months), when the reality was the Phase One expansion was not fully-funded (it was revealed on October 1, 2018 that it required an additional \$15 million of financing), not on budget (it was revealed on April 28, 2019 that Wayland was not able to produce the financial statements and MD&A that would determine this), and not on time (it was not completed in Q4 2018, or Q1 2019, or at all); when Wayland entered CCAA protection the court-appointed Monitor prepared a two-page solicitation to sell the Langton Facility (1Q 2020) and revealed at that time that Phase One was only 65% built and still required over \$10 million to complete).³²

B. Impugned Document No.2. Wayland’s 2Q 2018 Financial Statement and MD&A

30. On August 24, 2018, Wayland released its 2Q 2018 Financial Statements and MD&A as well as Mr. Ward’s certification on a Form 52-109F1 attesting that this impugned document did not contain any misrepresentations.³³

31. In this core document Wayland repeated the misrepresentation that Phase One was on time to be completed in Q4 2018,³⁴ and that Phase Two would bring additional production online in Q1 2019.³⁵ Wayland omitted the material fact that Phase One was not in fact fully-funded. Wayland

²⁹ Exhibit I, PMR, AIF at pp. 23, “Operations and Facilities.”

³⁰ Exhibit I, PMR, AIF, at pp. 9, citing the News Release published on January 11, 2018.

³¹ Exhibit K, PMR, Final Short Form Prospectus at pp. 15, “Business Objectives.”

³² Exhibit MM, PSMR, Wayland Offering Memorandum, “Acquisition or Investment Opportunity” at bullet point 2 (CNTRL00011414).

³³ Exhibit J, PMR, Wayland’s 2Q MD&A published on August 24, 2018.

³⁴ Exhibit J, PMR, Wayland’s 2Q MD&A published August 24, 2018 at pp. 4, “Company Background.”

³⁵ Exhibit J, PMR, Wayland’s 2Q MD&A published August 24, 2018 at pp. 23, “Operations and Facilities.”

omitted the material fact that neither Phase One nor Phase Two were on time or on budget, such that the promised revenues would not be generated as expected, or at all.

32. Wayland represented to investors in August 2018 that Phase One of the Langton Facility would be completed within the next 4 months, that no additional funds were required to complete it, and that completion of the Phase Two expansion was not far behind. These representations of material fact were untrue and not reasonable when made. The truth was that Phase One was in crisis and required at least \$15 million of new investment to proceed. The Phase Two expansion was not underway, was not funded, and would never be built. These misrepresentations caused investors substantial losses which this action seeks to recoup in small part.

C. Impugned Document No.3. Wayland's Final Short Form Prospectus³⁶

33. On October 1, 2018, Wayland released its final short form prospectus associated with raising approximately \$35 million as well as the Mr. Ward's certification on a Form 52-109F1 attesting that this Impugned Document did not contain any misrepresentations. Concurrently, this Impugned Document served as a partial public corrective statement because it also reported the following material facts which were known or should have been known by Wayland's executives and Defendant Mr. Ward:

- (a) Phase One was not fully-funded because approximately \$15 million of the offering would be allocated to finance the Phase One expansion;³⁷
- (b) Phase One expansion would be completed in the first quarter of 2019 (compared to Q4 2018);³⁸
- (c) Phase One expansion required an additional \$28 million to complete (compared to being 2% within budget);³⁹
- (d) Phase Two expansion was now anticipated to be completed during the third quarter of 2019 (compared to the first quarter of 2019);⁴⁰ and

³⁶ Exhibit T, PSMR, Short Form Prospectus published on October 1, 2018.

³⁷ Exhibit T, PSMR, Short Form Prospectus dated October 1, 2018 at pp. 18.

³⁸ Exhibit T, PSMR, Short Form Prospectus dated October 1, 2018 at pp. 19.

³⁹ Exhibit T, PSMR, Short Form Prospectus dated October 1, 2018 at pp. 20.

⁴⁰ Exhibit T, PSMR, Short Form Prospectus dated October 1, 2018 at pp. 20.

- (e) For the first time the Defaulting Defendants disclosed how its previous “use of proceeds” from the January 2018 offering were actually allocated opposed to how it was represented (previously reported v. actual):⁴¹

Phase One Expansion:	nil	v.	\$12.7 million
Phase Two Expansion:	\$12 million	v.	\$6 million
Phase Three Expansion:	\$1.5 million	v.	nil
Concrete foundations:	\$7.2 million	v.	\$721,400
Equipment:	\$6.3 million	v.	\$693,200
Brand development, et al:	\$4.75 million	v.	\$865,000
Working capital, et al:	\$3.2 million	v.	\$9.3 million

34. Thus, the total mix of information about Wayland as of October 1, 2018, was that completion of the Phase One expansion would be delayed up to 3 months, Phase Two would be delayed up to 6 months, and that Phase One was not fully-funded as previously reported but would be after this offering. The reality was that Phase One would be liquidated at a deep discount in 2020 with still only about 65% completion, Phase Two would never be built and was very far from completion in October 2018, and the funds raised in this offering would disappear from a lack of internal controls within the company.

D. Impugned Document No.4. Wayland’s 3Q 2018 Financial Statements and MD&A⁴²

35. On November 28, 2018, Wayland released its 3Q 2018 Financial Statements and MD&A as well as Mr. Ward’s certification on a Form 52-109F1 attesting that this impugned document did not contain any misrepresentations; curiously, Wayland discontinued to make any disclosures about the completion timings or budget for its Phase One, Two, and Three; as well as details about Wayland’s acquisition of Colma Pharmaceuticals SAS (“Colmed”).

36. This core document contains misrepresentations because it omits the information necessary to make it not misleading; in particular, by omitting the following material facts:

- (a) That Phase One was not fully-funded even with the recent capital-raise, would not be completed before the close of 2Q 2019, and Wayland would not be generating revenues from the anticipated-additional cannabis production;
- (b) That Phases Two and Three were so far off target that Wayland simply omitted all disclosures about them (e.g., when Wayland filed its CCAA Application, it was only

⁴¹ Exhibit T, PSMR, Short Form Prospectus dated October 1, 2018 at pp. 21.

⁴² Exhibit L, PMR, Wayland’s 3Q MD&A published on November 28, 2018.

65% completed with Phase One and did not even refer to Phases Two or Three)⁴³ – moreover, and critically important, even the CEO of Cryptologic submitted evidence into Wayland’s CCAA Proceeding that it was misled by Wayland because its directors and officers were negligently unaware of Wayland’s assets;⁴⁴

- (c) The acquisition of Colmed for \$22M (11 million shares at \$2.00 per share) provided Wayland with very little assets and negligently stated that Wayland (opposed to Mr. Ward himself) believed that Wayland would cultivate THC cannabis outdoors and year-round of up to 415,000 sq. ft. of processing and clone/greenhouse facilities (e.g., Wayland’s Board of Directors questioned the logic because “There is no reference to historical financial statements... business has not started yet and therefore no tax declarations... is the company already active or is it still a shelf...”,⁴⁵ Baker Tilly LLP and Wayland’s due diligence auditor/lawyers essentially conveyed to Mr. Ward not to acquire Colmed for numerous reasons (e.g., including that it has absolutely no business operations);⁴⁶ and out of the \$22 million purchase price, approximately 10% would be going to the alleged owner while 90% would be allocated to lawyers and friends of Mr. Ward;⁴⁷ and
- (d) Wayland’s management had negligently failed to recognize that MNP LLP had raised objections to various aspects of Wayland’s accounting/financial practices that would result in Wayland not being able to close its 4Q and F/2018 financial statements.

37. Concurrently, this Impugned Document served as a partial public corrective statement because it revealed that Phases One & Two of the Langton Facility no longer had completion dates.

E. The Public Corrective Statements

38. The Impugned Documents relevant to this s. 138.8 Motion were partially publicly corrected on October 1, 2018, November 28, 2018, and February 21/22, 2019, and finally publicly corrected on April 23, 2019.

i. October 1, 2018 Final Short Form Prospectus

39. On October 1, 2018, Wayland released a prospectus qualifying \$35 million worth of new securities for a public offering which had previously closed on August 10, 2018.

40. In this core document, Wayland disclosed, in contradiction to prior statements, that its Phase One expansion was not fully-funded and completion would be delayed by as much as 3 months.

⁴³ Exhibit MM, PSMR, Wayland Offering Memorandum, “Acquisition or Investment Opportunity” at bullet point 2 (CNTRL00011414).

⁴⁴ Exhibit LL, PSMR, Affidavit of John FitzGerald sworn January 10, 2020, at para 14.

⁴⁵ Exhibit S, PSMR, Email from Gerhard Muller to Ben Ward regarding Colmed Due Diligence Report dated September 14, 2018 (CNTRL00126147).

⁴⁶ Exhibit Q, PSMR, Baker Tilly Due diligence report of Colmed Pharmaceuticals S.A.S dated July 19, 2018 (CNTRL00126142).

⁴⁷ Exhibit U, PSMR, MariCann Group Inc. Treasury Directions dated November 12, 2018 (CNTRL00022187).

This core document also pushed out the completion date for Phase Two of the Langton Facility expansion by up to 6 months. It represented to investors that \$15 million of the new money raised would go towards Phase One completion, but instead the raised-capital appears to have been so mismanaged that Wayland would discharge those likely responsible (i.e., Messrs. Fritz, Stein, Silver and Defendant Mr. Ward), and Wayland would subsequently be unable to release its F/2018 audited financial statements and MD&A (*infra.*, the April 23, 2019 public corrective statement).

41. This partial public corrective statement caused the price of Wayland's shares on the CSE to diminish from \$1.80 down to \$1.58, or a drop of approximately 12.2%.

ii. November 28, 2018 3Q Management Discussion and Analysis

42. On November 28, 2018, Wayland released its Q3 2018 financial statements and MD&A and disclosed, in contradiction to prior statements, that its Phase One and Two expansions no longer had completion dates. This had the simultaneous effect of not disclosing to investors the true state of the Langton Facility Expansion, while indicating to sophisticated investors at least that Wayland had troubles with the previously declared timelines and funding.

43. This public corrective statement caused the price of Wayland's shares on the CSE to diminish from \$1.44 down to \$1.32, or a drop of approximately 8.3%.

iii. February 21/22, 2019, News Releases concerning Directors Michael Stein and Eric Silver

44. On February 21 and 22, 2019, Wayland released statements that its board members Michael Stein, who was a member of the Company's Audit Committee, and Eric Silver, who was a member of Wayland's Corporate Governance and Compensation Committee, were resigning effective immediately with no explanation provided.⁴⁸

45. Mr. Stein was a member of the Audit Committee and Disclosure Committee,⁴⁹ and signed Wayland's core documents as representing that they did not contain misrepresentations.⁵⁰ Mr. Stein, however, also questioned or was otherwise critical of Mr. Ward's decisions, e.g., as Mr. Ward wrote,

⁴⁸ Exhibit M, PMR, Wayland News Releases published on February 21-22, 2019.

⁴⁹ Exhibit E, PSMR, Internal Wayland senior management email communication dated January 16, 2018 (CNTRL00055471)

⁵⁰ See, e.g., Exhibit F, PMR, Prospectus dated March 28, 2018, at pp.174; Exhibit K, PMR, Prospectus dated October 24, 2018 at pp. 486.

Mr. Stein had an “axe out to grind at me trying to fry [head of investor relations] as collateral damage...”⁵¹

46. The February 21/22, 2019 corrective statements caused the price of Wayland’s shares on the CSE to diminish from \$1.17 down to \$0.98, or a drop of approximately 16.2%.

iv. April 23, 2019, News Release concerning Wayland’s inability to publish its mandatory audited annual financial statements and MD&A

47. On April 23, 2019, Wayland released a statement announcing that it would delay the release of its annual 2018 financial statements and MD&A, which is a breach of the company’s statutorily required continuous disclosure obligation (see sections 77 and 78 of the *OSA*). Sophisticated investors know that failing to file quarterly financial statements and MD&A results in the trading in that issuer’s securities being halted by the OSC within 10 trading days and until the deficiency is cured, if ever. As it happened here, Wayland’s shares were halted by the OSC on the 8th trading day after the failure to file. Wayland never cured the deficiency, and trading in Wayland securities never resumed.

48. This corrective statement caused the price of Wayland’s shares on the CSE to diminish from \$0.88 down to \$0.71, or a drop of approximately 19.3%. As of that date, Wayland still had a market capitalization of approximately \$100 million.⁵² “Sophisticated investors or analysts... perhaps chose to sell their shares, leaving those unsophisticated shareholders holding their shares until after the shares were halt-traded [on May 6, 2019]”.⁵³

F. Reasonable Possibility that the Impugned Documents Contained Misrepresentations

49. Quite unusually, the Plaintiffs have obtained significant documentary discovery from Wayland prior to this leave to proceed motion. The circumstances of Wayland being liquidated in the *CCAA* Proceeding resulted in the Plaintiffs obtaining by Court Order a copy of an electronic database of documents formerly possessed by Wayland (the “**Wayland Productions**”). In the result,

⁵¹ Exhibit E, PSMR, Internal Wayland senior management email communication dated January 16, 2018 (CNTRL00055471)

⁵² Based on Wayland disclosing approximately 135 million shares outstanding as of June 29, 2018 (Exhibit I, PMR, Wayland’s AIFs), and trading in the shares being halted at \$0.74 per share (135 million shares x \$0.74/share = \$99.9 million, see Exhibit O, PMR, Wayland Trade Data).

⁵³ [Kauf v Colt Resources](#), 2019 ONSC 2179 [*Kauf*] at para 163.

the Plaintiffs have over 250,000 electronic records to assist in substantiating the allegations made in the statement of claim.

50. The Plaintiffs have also obtained third party discovery from MNP LLP, who were Wayland's former auditors (although they resigned on August 2, 2019, after refusing to sign-off on Wayland's financial statements).

51. The Plaintiffs are not proving their case; they are only seeking leave to proceed. The documentary evidence set out in the Plaintiffs' Supplemental Motion Record and referenced in this section of our factum is a very small sample of the records contained in the Wayland Productions. The Plaintiffs have only reviewed a small portion of the Wayland Productions in time for this motion, and further productions are expected from MNP LLP.

G. Evidence in the Plaintiffs' Supplemental Motion Record

52. On October 27, 2017, Wayland's then auditor, Ernst & Young LLP (Toronto) ("E&Y") sent an email to Wayland's executives, including Defaulting Defendant Mr. Ward, reporting that it was E&Y's view that Wayland lacked oversight over finance and revenue processing; that the CFO and Controller operated more like bookkeepers, there lacked a formal Expense Reporting system, questioned whether anyone at Wayland besides for the Controller reviewed published financial statements, etc.⁵⁴ Curiously, this same problem was never cured as reflected by MNP LLP resigning as Wayland's auditor, Wayland was never able to release its F/2018 financial statements, and ultimately was liquidated in a *CCAA* Proceeding.

53. On October 27, 2017, Mr. Ward responded by writing, "Sales/Marketing never coordinated with finance - they did what they wanted and gained ad hoc approvals for individual initiatives... Those consultants, Avjit Kamboj and Daniel Saks never checked any of the numbers... I agree MD&A [sic] was written by a third party consultant Avjit Kamboj."⁵⁵

54. On January 16, 2018, a director of Wayland sent an email to 3 other directors and the head of investor relations that Wayland's News Release published on January 11, 2018, likely contained

⁵⁴ Exhibit B, PSMR, Email from Kwan Song to Scott Langille dated October 27, 2017 (CNTRL00025311).

⁵⁵ Exhibit C, PSMR, Email from Ben Ward to Scott Langille dated October 27, 2017 (CNTRL00053070).

multiple errors of material fact as to certain representations about the Phase One expansion timing and costs.⁵⁶

55. Around February 2018, E&Y sent a letter to Wayland and Mr. Ward advising that in performing its audit in connection with the F/2017 financials, E&Y noticed numerous problems with Wayland's internal controls over financial reporting and its operations.⁵⁷

56. On March 23, 2018, E&Y sent an email to Wayland's executives reiterating that various problems over Wayland's internal controls over financial reporting and its operations; specifically, problems with the following areas "Accrual Process," "Officer Expenses," "Expense Policy," "IT Security," "Journal Entry Approvals," and "Third Party Firm Engagement."⁵⁸

57. On April 2, 2018, E&Y sent an email to Wayland's CFO and Defendant Mr. Ward questioning how Mr. Ward was the seller and buyer of Proimaging AG "and was this also presented to the Board for approval. We never previously obtained this agreement as part of the Q2 or Q3 review. Appreciate any insight."⁵⁹

58. On April 5, 2018, the OSC sent a letter to Wayland raising concerns about the reporting in its most recent F/2016 financial statements concerning the fair value of its biological assets, cost of sales, related party transactions, forward-looking information relating to growth rates, and the Langton Facility expansion.⁶⁰

59. On April 18, 2018, E&Y sent Wayland a memorandum about its 2017 acquisition of NanoLeaf Technologies, Inc. ("**Nano**"), and conveyed that although Mr. Ward agreed to let Wayland pay \$38.5 million for Nano, E&Y believed the fair-market-value of Nano was approximately \$7.3 million.⁶¹

⁵⁶ Exhibit E, PSMR, Internal Wayland senior management email communication dated January 16, 2018 (CNTRL00055471)

⁵⁷ Exhibit F, PSMR, Letter from E&Y to Wayland, Mr. Ward, and Audit Committee of the Board of Directors dated March 23, 2018 (CNTRL00018763).

⁵⁸ Exhibit J, PSMR, Draft Audit Recommendations from E&Y to Wayland, Mr. Ward, and Audit Committee dated March 23, 2018 (CNTRL00011921).

⁵⁹ Exhibit M, PSMR, Email from E&Y to Mr. Ward and CFO, Re: Question dated April 2, 2018 (CNTRL00012553).

⁶⁰ Exhibit N, PSMR, Letter from OSC to Wayland dated April 5, 2018 (CNTRL00012770).

⁶¹ Exhibit O, PSMR, E&Y internal letter regarding Maricann NanoLeaf Technologies Incorporated acquisition dated April 18, 2018 (CNTRL00014328).

60. On May 22, 2018, MNP LLP (Wayland's new auditor because E&Y was asked to resign)⁶² sent a letter to Wayland about its review of 1Q 2018 financials and reported that it could not reconcile Wayland's bank accounts for its German subsidiary, there are questions about prepaid expenses, and questions about the fair market value of inventory and biological assets.⁶³

61. On July 19, 2018, Wayland hired Baker Tilly (an accounting firm) and lawyers David Deslaurieres and Robert Kennedy (Dentons law firm) to perform a due diligence report on Colmed Pharmaceuticals S.A.S. ("**Colmed**") for a potential acquisition. This due diligence report was provided to Wayland and it highlighted that (a) the shareholder registry book had errors; (b) the shareholder registry was created on June 19, 2018, despite being represented that it was incorporated on December 9, 2016; (c) it lacked a required legal representative/liquidator; (d) Colmed had not issued share titles; (e) minutes from a shareholder meeting was never filed; (f) Alvaro Lopez (a/k/a Albert Sheeler) is identified as the only owner reported as of June 21, 2018, (g) Colmed did not have any commercial establishment, had not begun duties, had not presented declarations (i.e., revenues) to the government, which was confirmed by a certificate issued on July 18, 2018; (h) Colmed has never had withholding taxes because it had not engaged in business; (i) Colmed presented a declaration of tax returns extemporaneously for the years 2016 and 2017 but the Columbian District Secretary of Treasury never issued or opened an account for Colmed; (j) Colmed has no employees; (k) the financial statements reflect only 1 bank account with total assets of \$1.200 Colombian pesos; (l) the lease contracts over properties have numerous irregularities; (m) Colmed has no software, no trademarks (despite being told otherwise), (n) Colmed has never applied to production quotas which is mandatory under Columbian law; and (o) Colmed had no income statement, balance sheet or cash flow statement.⁶⁴

62. Nevertheless, as reported by Wayland in its 3Q 2018 MD&A, it paid \$22M worth of Wayland's securities (\$2.00 per share) for the Colmed assets.⁶⁵ What was negligently omitted from

⁶² There is a reasonable possibility that E&Y was invited to resign as Wayland's auditor because E&Y called-out Wayland's bluff to the market that the Phase One expansion was fully funded and "[E&Y] will need to include a going concern uncertainty disclosure" referring to the F/2017 annual audited financial statement. Exhibit H, PSMR, Email from E&Y to Wayland's CFO, Re Budget dated March 10, 2019 (CNTRL00081476).

⁶³ Exhibit P, PSMR, MNP Letter Q1 review questions May 22, 2018 (CNTRL00015903).

⁶⁴ Exhibit Q, PSMR, Baker Tilly Report dated July 19, 2018 (CNTRL00126142).

⁶⁵ Exhibit L, PMR, 2018 3Q MD&A at pp. 10 and 23.

Wayland's core document was that the alleged owner of Colmed, Albert Sheeler, only received 1.75 million shares out of the 11 million tendered; while Craig Bridgman received 6.375 million shares, Robert Kennedy (Dentons) received 500,000 shares (but transferred to his personal account), RG5 Investments received 1 million shares, and some individual residing at Unit 409 of the King Edward Hotel, Toronto, received 1.375 million shares.⁶⁶

63. On August 22, 2018, MNP LLP sent Wayland its interim review findings reporting that "Final materiality" is measured to be \$1.25 million, and the un-allocated goodwill from the Haxxon AG acquisition is \$8.7 million and there will be a significant audit risk.⁶⁷

64. Also on August 22, 2018, MNP LLP sent an email to Wayland that its recent news release contradicts how costs were reported in its 2Q 2018 financial statement.⁶⁸

65. On November 30, 2018, the OSC sent a letter to Wayland confirming that Wayland agreed to alter certain, but unidentified to date, financial "deficiencies" in future financial statements and that the steps did not preclude the OSC from taking future action against the Company.⁶⁹ It is noteworthy for this s. 138.8 motion that Wayland never published another financial statement or MD&A; and the OSC did, in fact, on September 23, 2019, open an investigation (although the status is unknown because, sadly, the OSC has refused to correspond with Class Counsel about this topic).⁷⁰

66. On February 20, 2019, MNP LLP prepared notes from an interview with Mr. Ward which reads that Mr. Ward hired various third-parties, which are now under investigation by the British Columbia Securities Commission ("BCSC") for fraud, "to provide legitimate investor relation services. [Wayland]'s share price had fallen, and these firms were engaged to conduct ad campaigns

⁶⁶ Exhibit U, PSMR, Wayland Treasury Direction dated November 12, 2018 (CNTRL00022187). Adding to the reasonable possibility of there being a misrepresentation in the Impugned Document 3Q MD&A dated November 28, 2018 (Exhibit L, PMR), on November 11, 2019 (prior to the *CCA* Proceeding), Wayland sold the Colmed asset back to Albert Sheeler for \$300,000 (CNTRL00011410). See also Exhibit Z, PSMR, Email from MNP LLP to Wayland Re: 2018 Audit dated through March 11, 2019 (CNTRL00201820).

⁶⁷ Exhibit R, PSMR, MNP LLP Report dated August 22, 2018 (CNTRL00059830).

⁶⁸ Exhibit R, PSMR, Email from MNP LLP to Wayland re: German Hemp dated August 22, 2018 (CNTRL00019574).

⁶⁹ Exhibit V, PSMR, Letter from OSC to Wayland dated November 30, 2018 (CNTRL00063975).

⁷⁰ Exhibit KK, PSMR, Letter from Primary Insurer to Wayland dated November 7, 2019.

to help increase the share price.” These MNP LLP notes also report 33 vendors of high risk of being fraudulent with a total cost to Wayland being well into the millions of dollars.⁷¹

67. On February 25, 2019, MNP LLP sent an email to Wayland’s executives entitled “Consulting Fee - Audit Issue” highlighting that numerous vendors brought to Wayland by Mr. Ward may be fraudulent and that the Audit Committee may have been negligent in not catching problems earlier.⁷²

68. On March 12, 2019, Wayland’s Audit Committee meeting minutes reflect that MNP’s work informed the board of directors to ask Mr. Ward to provide context and explanation of pre-paid consulting agreements and that the BCSC had opened an investigation into some of these vendors.⁷³

69. On March 16, 2019, a Wayland director sent Wayland’s CFO an email stating that accounts payables that were not approved or did not have supporting purchase orders were never recorded in Quickbooks; certain purchase orders are not recorded in Quickbooks “which therefore makes outstanding commitments hard to determine;” purchase orders are not logged into a central location within Wayland’s Quickbooks; Sales and Marketing department has a separate Quickbooks; etc.⁷⁴

70. On March 19, 2019, MNP LLP sent Wayland’s CFO and Controller an email questioning the Colmed acquisition, prepaid consulting agreements, and Wayland’s January 2, 2018 announcement of a deal with Rank Dankness, a U.S. based cannabis company.⁷⁵

71. Also on March 19, 2019, Wayland’s Audit Committee hosted another meeting whereby they questioned Mr. Ward about certain prepaid consulting agreements that were entered into throughout annual 2018; Mr. Ward advised that “the majority still have services outstanding...,” that Wayland would likely write-off the payments because the “Contracts appear to not outline the exact services that were provided.”⁷⁶

⁷¹ Exhibit X, PSMR, MNP notes regarding interview with Ben Ward dated February 20, 2019 (CNTRL00220871).

⁷² Exhibit Y, PSMR, MNP email to Wayland with the subject heading “Consulting Fee - Audit Issued dated February 25, 2019 (CNTRL00220869).

⁷³ Exhibit AA, PSMR, Audit Committee Meeting Minutes dated March 12, 2019 (CNTRL00161184).

⁷⁴ Exhibit BB, PSMR, Wayland email from Neil Smith to Scott Langille, Re: Consolidated 13 Week Cashflow dated March 16, 2019 (CNTRL00172425).

⁷⁵ Exhibit DD, PSMR, Email from MNP LLP to SL and DM, Re: O/S Info dated March 19, 2019 (CNTRL00202612).

⁷⁶ Exhibit CC, PSMR, Board meeting minutes dated March 19, 2019 (CNTRL00172924).

72. On March 21, 2019, Wayland’s Audit Committee hosted a meeting whereby they questioned Mr. Ward with MNP LLP’s participation. MNP LLP stressed the significant risks due to the nature of the transactions and similarities with the BCSC’s issue with the Bridgemark Group, which were all recommended by investment bank Haywood Securities.⁷⁷

73. On March 29, 2019, MNP LLP sent Mr. Ward an email advising him that the Board of Directors decided to open an investigation into Mr. Ward’s conduct while serving as the CEO of Wayland (e.g., in stark contrast to the Board’s statement to the market published on February 28, 2018).⁷⁸

74. On April 23, 2019, MNP LLP sent Wayland’s CFO an email advising him that it is investigating certain financial transactions that he may have negligently approved.⁷⁹

75. After the Class Period, on June 24, 2019, MNP LLP sent an email to Wayland’s Audit Committee that reads, in part,

I know this news may be difficult to receive, but there is no way for MNP to get the comfort we need in order to complete the audit... The board’s response to the revelations of the facts underlying the Management Issue was inappropriate. This is an issue that fundamentally cannot be addressed by any number of forensic or other specialist examinations. There simply are no steps which could mitigate fully against the auditor’s concern over the appropriateness of the board’s prior response(s) to the fraud perpetrated by management. There is no consideration of the public interest in this case which weighs in favour of continuing on as auditors. To the contrary, we are confident that the public interest is served by our compliance with their clear direction in this case.⁸⁰

76. During the Winter 2020, after Wayland filed and received CCAA Protection, it prepared a selling memorandum of itself to potential investors which reported that Phase One of the Langton Facility was only 65% completed.⁸¹

PART IV - THE LAW

A. General Disclosure Law

77. The “primary goal” of securities regulation is investor protection. Securities laws are designed to create a “level playing field” for all investors by statutorily mandating that public

⁷⁷ Exhibit EE, PSMR, MNP’s phone call notes with Wayland dated March 21, 2019 (CNTRL00220812).

⁷⁸ Exhibit FF, PSMR, Email from MNP LLP to Mr. Ward, Re: Wayland Group Inc. dated March 29, 2019 (CNTRL00185996).

⁷⁹ Exhibit HH, PSMR, Email from MNP Re: Investigation into Auditor’s concerns dated April 23, 2019 (CNTRL00203619).

⁸⁰ Exhibit JJ, PSMR, Email from MNP to Wayland, Re: Audit Update dated June 24, 2019 (emphasis added) (CNTRL00220927).

⁸¹ Exhibit MM, PSMR, Wayland Offering Memorandum dated winter 2020, “Acquisition or Investment Opportunity” (CNTRL00011414).

companies make continuous disclosure of their business and affairs. Investors rely on management to be truthful and candid about how the businesses they operate are doing.

78. Because securities legislation is remedial, it should be interpreted broadly and purposively. In *CIBC v. Green*, the Supreme Court of Canada confirmed that Part XXIII.1 of the *OSA* is remedial legislation that should be interpreted broadly and purposively. As Justice Karakatsanis succinctly explained in writing for the minority: “Part XXIII.1 is remedial legislation intended to promote the twin purposes of facilitating and enhancing access to justice for investors and deterring corporate misconduct and negligence.”

79. In the secondary market, these policies are achieved by requiring reporting issuers, like Wayland, to make “continuous disclosure” relating to their business, operations and finances, pursuant to National Instrument 51-102 – Continuous Disclosure Obligations.

80. Part XXIII.1 of the *OSA* provides a mechanism by which aggrieved shareholders may obtain access to justice when issuers breach their continuous disclosure obligations. Secondary market liability legislation “emerged directly out of Canada-wide efforts to develop a more meaningful and accessible form of recourse for investors.”⁸²

81. This motion should be considered within this legislative and judicial framework. This case fits exactly with the purpose that the Part XXIII.1 *OSA* cause of action was designed by the legislature to address.

B. The Ontario Securities Act

82. To trigger the application of Part XXIII.1 of the *OSA*, the Plaintiff must first establish that Wayland was a responsible issuer and Mr. Ward was a director, officer, or influential person of Wayland and authorized, permitted or acquitted the release of the Impugned Documents.

83. Here, it is uncontested that Wayland was a responsible issuer when it released the Impugned Documents and, therefore, was subject to the *OSA* during the Class Period. Likewise, it is uncontested that Mr. Ward was an officer and director of Wayland and that he authorized all of the Impugned Documents.

⁸² [*Theratechnologies Inc. v. 121851 Canada Inc.*](#), 2015 SCC 18 at para 27.

84. Part XXIII.1 of the *OSA* requires reporting issuers like Wayland to provide all material facts relevant to any topic which by virtue of its materiality to the business, operations or finances of the company must be disclosed in that reporting issuer's quarterly or annual MD&A.

85. It follows that the Defaulting Defendants were required to disclose, in the Impugned Documents, all of the material facts about the Langton Facility Expansion (Phases One, Two and Three), the use of funds raised in the public offerings, as well as its re-allocation of funds pledged to the Langton Facility Expansion which were instead applied to suspect acquisitions⁸³ and engaging the services of start-up consulting firms with prepaid service fees worth well into the millions of dollars.

86. The Plaintiffs must then identify the documents released by the Defaulting Defendants that contained misrepresentations (the Impugned Documents). The *OSA* defines a misrepresentation as “(a) an untrue statement of material fact, or (b) an omission to state a material fact that is required to be stated or that is necessary to make a statement not misleading in the light of the circumstances in which it is made.”

87. As “core documents”, the Plaintiffs need only prove on the balance of probabilities at trial that they contained misrepresentations, and not any intention on the part of any defendant to mislead. At the leave to proceed stage, the Plaintiffs need only show that there is a reasonable possibility that these Impugned Documents will be proven at trial to contain the alleged misrepresentations.

C. Materiality of the Misrepresented Facts

88. “Material fact” is defined in section 1(1) of the *OSA* to mean: “...a fact that would reasonably be expected to have a significant effect on the market price or value of the securities”. This is often described as the “market impact test”.

89. The definition of material fact is broader than that of material change because it encompasses any fact that reasonably would be expected to have a significant effect on the market

⁸³ For example, the Nano transaction in 2017 (Exhibit O, PSMR, E&Y internal letter regarding Maricann NanoLeaf Technologies Incorporated acquisition dated April 18, 2018 (CNTRL00014328)), or the Colmed transaction in 2018.

price or value of the securities of an issuer and not only changes in the business, operations, assets or ownership of the issuer that would be expected to have such an effect.

90. In assessing materiality, the surrounding circumstances are important; because materiality is an objective standard, and a question of mixed fact and law. “It is for the court to determine what to an investor is a material fact or a material change under the *Securities Act*. This is a legal test.”⁸⁴

91. As Your Honour held in *Miller v. FSD*, “the market impact definition is the one that the statute embraces”; even so, materiality is a “highly contextualized issue” that takes into account the entire circumstances of the company and its industry and the market; and “if market impact is to be the measure of materiality, then the analysis of the security’s price in an open market must reflect all available information”.⁸⁵

D. The Public Corrective Statements and Their Role

92. Once the misrepresentations are identified, the Plaintiff must identify the public corrections of those misrepresentations. The statutory scheme developed under Part XXIII.1 of the *OSA* describes dates of misrepresentations and public corrections as “signposts” that can be used to specify a timeline for reference, and to assist in discerning damages. These dates are not meant to be indicative of whether a misrepresentation occurred.⁸⁶

93. Once the plaintiff meets the requirements of s.138.3(1) by showing a misrepresentation and a public corrective statement, causation is presumed and damages are implied.

94. As reported by *Drywall Acoustic v. Barrick Gold*, 2021 ONCA 104,⁸⁷ the public correction requirement is threefold:

There must be “some linkage or connection” between the alleged misrepresentation and the alleged public correction;

The public correction must share the same subject matter and, in some way, relate back to the misrepresentation; and

The public correction must be reasonably capable of revealing to the market the existence of an untrue statement of material fact or an omission to state a material fact.

⁸⁴ [Paniccia v. MDC Partners Inc.](#), 2018 ONSC 3470 at para 99.

⁸⁵ [Miller v FSD Pharma Inc.](#), 2020 ONSC 4054 at paras 63, 67 and 69.

⁸⁶ [Swisscanto Fondsleitung AG v Blackberry Ltd.](#), 2015 ONSC 6434 at paras 56-57.

⁸⁷ [Drywall Acoustics v Barrick Gold](#), 2021 ONCA 104 at paras 22, 36.

95. Regarding the third requirement, the Ontario Court of Appeal stated that:

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.⁸⁸ (emphasis added)

96. In determining the timing and effect of a public correction, “context is everything.”⁸⁹

97. This Honourable Court has previously accepted that a statement can be both a misrepresentation and a partial public correction related to the same alleged undisclosed material fact. It has also accepted that a public corrective statement exists even when only sophisticated investors might understand it.

98. In *Kauf v. Colt Resources*, the company’s announcement that two directors were resigning immediately with no further explanation “sent out a storm warning” to investors.⁹⁰ There had been no prior indications from Wayland or otherwise that these directors had any intention of stepping down.⁹¹ Investors could have reasonably connected the dots to conclude that the resignations indicated problems at Wayland. The corporation created the uncertainty of linkage because it failed to disclose a material fact in its press release.⁹² Had the Defendants complied with their disclosure obligations, there would have been no speculation required.⁹³

99. The “storm warning” provided to investors as to potential problems with Wayland’s finances and corporate governance, both proved to be true. Wayland’s strategic choice not to identify why these directors were suddenly resigning cannot be used as a shield to pretend there is no link to Wayland’s misrepresentations regarding the Langton Facility Expansion.

100. The true connection will become known in time, but at present there is sufficient credible evidence to demonstrate a reasonable possibility of success at trial on this issue.

⁸⁸ *Barrick Gold* at para 76.

⁸⁹ *Miller v FSD Pharma Inc* at para 36.

⁹⁰ *Kauf* at para 159.

⁹¹ *Kauf* at para 161.

⁹² *Kauf* at para 162.

⁹³ *Kauf* at para 165.

E. The Plaintiff’s Burden at the Section 138.8 Motion

101. Section 138.3(1) of the *OSA* creates a statutory cause of action against responsible issuers for releasing misrepresentations in the secondary market in favour of any person who acquires, or disposes of, a reporting issuer’s securities between: (1) the time when a document containing a misrepresentation was publicly released; and (2) the time when the misrepresentation was publicly corrected. Upon showing a misrepresentation and a later public “correction”, causation and damages are presumed.

102. In order to advance a s. 138.3(1) *OSA* claim, however, the plaintiff must obtain leave from the court pursuant to s. 138.8 of the *OSA* by establishing that: (a) the action is being brought in good faith, and (b) there is a reasonable possibility that the action will be resolved at trial in favour of the plaintiff.

103. With respect to s. 138.8 of the *OSA*, “good faith” has been interpreted to mean that a plaintiff has brought the action in the honest belief that there is an arguable claim, for reasons that are consistent with the purpose behind the statutory remedy, not for an oblique or collateral purpose, and with the genuine intention and capacity to prosecute the claim if leave is granted.⁹⁴

104. When the Supreme Court of Canada first weighed in on the reasonable possibility of success test, it ultimately adopted the approach suggested by Justice Belobaba in *Dugal v. Manulife Financial* (referred to as “Ironworkers” in the Supreme Court’s decision):

I agree with the Court of Appeal, however, that the authorization stage under s. 225.4 should not be treated as a mini-trial. A full analysis of the evidence is unnecessary. If the goal of the screening mechanism is to prevent costly strike suits and litigation with little chance of success, it follows that the evidentiary requirements should not be so onerous as to essentially replicate the demands of a trial. To impose such a requirement would undermine the objective of the screening mechanism, which is to protect reporting issuers from unsubstantiated strike suits and costly unmeritorious litigation. What is required is sufficient evidence to persuade the court that there is a reasonable possibility that the action will be resolved in the claimant’s favour.⁹⁵ (Emphasis added).

105. This articulation of the reasonable possibility of success test was affirmed by the Supreme Court of Canada again in *CIBC (SCC)*.⁹⁶ When the Court of Appeal for Ontario considered the

⁹⁴ *Silver v Imax Corporation*, [2009] OJ No 5573 at para 308; *CIBC (Cert/Leave)* at paras 354-356.

⁹⁵ *Theratechnologies* at paras 38-39.

⁹⁶ *Canadian Imperial Bank of Commerce v. Green*, 2015 SCC 60 [*CIBC (SCC)*] at paras 121-123.

leave test in *Silvercorp* (Appeal) following the release of *CIBC* (SCC), Strathy C.J.O. confirmed that the leave test remained a “relatively low merits-based threshold.”⁹⁷

106. As Justice Strathy (as he then was) reasoned in *CIBC* (Cert/Leave),⁹⁸ many of the issues engaged on a s. 138.8 OSA leave motion are exceedingly complex, involving the interplay of disclosure standards, accounting practices and regulatory requirements, making it “unfair to the parties and to the court to expect the motion judge to engage in a finely calibrated weighing process”. A motions judge should keep “in mind the relatively low merits-based threshold, and the limitations of the record before them.”⁹⁹

107. Ultimately, this standard is much lower than a balance of probabilities. Even if there is only a ten to twenty percent chance of success, the “reasonable possibility” hurdle is cleared.

PART V - ANALYSIS

108. The misrepresentations were material because the market, as evidenced by Wayland’s core documents that identified were material facts and material change facts, published IBK research reports, Defendant Wayland represented that it was going to use the proceeds from each of the Company’s Class Period offerings and revenues from ongoing operations would be used, how much each phase of the expansion of the Langton Facility would cost and when it would be completed, that the expansion of the Langton Facility was fully-funded, and how much cannabis the Company would produce beginning in 2019.

109. There is a reasonable possibility that each of the Impugned Documents, *supra*, contained misrepresentations because they omitted material facts resulting in *the total mix of information* about Wayland’s business, finances, and operations being materially distorted.¹⁰⁰

1. A. SECTION 138.8(1)(a): THE PLAINTIFF BRINGS THIS CLAIM IN GOOD FAITH

110. There is no evidence or suggestion before this Honourable Court that any party believes that this action is frivolous, vexatious or being prosecuted for some collateral purpose. In fact, there is

⁹⁷ *Mask v. Silvercorp Metals Inc.*, 2016 ONCA 64 [*Silvercorp* (Appeal)] at para 45.

⁹⁸ *CIBC* (Cert/Leave) at para 374.

⁹⁹ *Silvercorp* (Appeal) at para 45.

¹⁰⁰ See, e.g., *Sharbern* at para 54; *Paniccia* at paras 69-72 and 100; *Miller v. ESD* at para 26; and *Kauf* at para 60.

evidence to the contrary as Plaintiff Lubus has attested to the fact he started this action in good faith in order to recover his investment losses and hold the Defendants accountable for their actions.¹⁰¹ The moving Plaintiff satisfies the good-faith requirement.

2. B. SECTION 138.8(1)(b): REASONABLE POSSIBILITY OF SUCCESS AT TRIAL

111. On the present motion for leave to proceed, the question for the court is whether there exists a reasonable possibility that the Plaintiffs will be able to prove at trial, on a balance of probabilities, that (a) the Impugned Documents contain misrepresentations, and (b) the alleged public corrective statements reveal the alleged misrepresentations contained in the Impugned Documents.

1. The Impugned Documents Contain the Alleged Misrepresentations

112. The Plaintiffs submit that based on the evidence currently available, there is a reasonable possibility that they will prove at trial that the Impugned Documents contain the alleged misrepresentations because the Plaintiffs can already show that:

(a) Wayland represented to investors on June 29, 2018 and August 24, 2018 that:

- (i) Phase One of the Langton Facility Expansion was fully-funded, when it was not (the funds raised in March 2018 were not used in the manner set out in those offering documents,¹⁰² but rather used for things like the suspect Colmed acquisition);¹⁰³
- (ii) Phase One of the Langton Facility Expansion was on budget when in fact Wayland did not have sufficient internal controls in place to make such a determination;¹⁰⁴
- (iii) Phase One of the Langton Facility Expansion would be completed before the end of Q4 2018, when it was not reasonable to promise that timeline because (we now know) Wayland did not have sufficient internal controls in place to make such a determination reasonably;

(b) Wayland represented to investors in a Final Short Form Prospectus on October 1, 2018 that:

- (i) \$15 million of the \$35 million raised would be applied towards completing Phase One of the Langton Facility Expansion (spoiler alert: it was not);

¹⁰¹ Tab 3, PMR, Stajic Affidavit at paras 11 and 12.

¹⁰² Exhibit L, PSMR, Prospectus published on March 28, 2018 at pp. 15, "Business Objectives".

¹⁰³ See paragraphs 35(c), 60 and 61 of this factum.

¹⁰⁴ Exhibits F, H and I, PSMR, Communications from E&Y to Wayland, Mr. Ward, and Audit Committee of the Board of Directors dated March 10 and March 23, 2018 (CNTRL00018763; CNTRL00081476; CNTRL00121949).

- (ii) Phase One of the Langton Facility Expansion would be completed by Q1 2019, when in fact Wayland still did not have the internal controls in place to make such a determination;
 - (iii) Phase Two of the Langton Facility Expansion was now anticipated to be completed during the third quarter of 2019, when Wayland had no real plan to get this done;
 - (iv) one and insufficient internal controls, and Wayland did not even mention Phase Two in its solicitation to sell the Langton Facility during the *CCAA* Proceeding.
- (c) Wayland represented to investors by omission on November 28, 2018, that all continued to be as previously represented regarding the Langton Facility Expansion when in fact the project was in crisis and the business would soon file for *CCAA* Protection and be liquidated.

113. The evidence against the Defendants will only increase as the Plaintiffs complete their review of the Wayland Productions and the documents it has obtained and will continue to obtain from MNP LLP (Wayland's former auditor).

114. For all these reasons, the Plaintiffs respectfully submit they have demonstrated a reasonable possibility of proving at trial that the Impugned Documents contain the alleged misrepresentations.

2. The Alleged Misrepresentations are Material

115. It is not sufficient for the Plaintiffs to only identify false statements in an issuer's core documents. In order to be actionable under Part XXIII.1 of the *OSA*, the false statements must be in respect of material facts, which is to say facts "...that would reasonably be expected to have a significant effect on the market price or value of the securities".¹⁰⁵

116. When assessing materiality, the Supreme Court of Canada instructs us to use common sense,¹⁰⁶ and, by the time it is being judicially considered, the actual market impact that occurred.¹⁰⁷

117. Beginning with the common sense analysis, it must first be pointed out that the Langton Facility Expansion was Wayland's primary operation during the Class Period, and the future success of the business depended upon Wayland completing the Expansion on time and on budget (i) so that new revenues would begin to stream on schedule, and (ii) to avoid new money having to be raised to complete the Expansion which would have the effect (and in October 2018 did have the

¹⁰⁵ Section 1(1) of the *OSA*.

¹⁰⁶ *Sharbern* at para 52.

¹⁰⁷ *Gowanlock v. Auxly*, 2021 ONSC 4205 at para 39.

effect) of diluting existing shareholders to pay for an operation that Wayland had previously represented was fully-funded.¹⁰⁸

118. Of course it mattered to shareholders when any Phase of the Langton Facility Expansion was delayed and by how much, or any deviations from the budgeted costs occurred. Accordingly, it of course mattered to shareholders when Wayland revealed on October 1, 2018 that Phase One of the Expansion was not fully-funded, but rather required up to \$28 million more to complete.¹⁰⁹

119. The October 1, 2018 offering issued 23,376,100 new common shares at a time when, according to Wayland's Q2 2018 financial statements, Wayland had approximately 135 million shares outstanding. Simple math reveals that existing shareholders were therefore diluted by approximately 17.3% when the October 1, 2018 offering was made.¹¹⁰ Stated differently, existing shareholders lost approximately 17.3% of their investment value when Wayland raised funds *again* for an operation it had represented was fully-funded.

120. It also clearly mattered to shareholders that Wayland in fact did not have the internal controls to faithfully allocate raised funds to the uses disclosed in the offering documents, or even to prepare financial statements without the auditor resigning.¹¹¹

121. Turning to the market impact analysis, the trade data indicates that:

- (a) **October 1, 2018:** the price for Wayland shares declined by approximately 12.2%¹¹² on October 1, 2018 when its Short Form Prospectus was released raising an additional \$35 million of new monies for the previously fully-funded Phase One expansion. These funds would go missing within a year with the Phase One expansion never progressing beyond 65% completion;¹¹³
- (b) **November 28, 2018:** the price for Wayland shares declined by approximately 8.3%¹¹⁴ on November 28, 2018 when Wayland released its Q3 2018 financial statements and MD&A and declined to provide any information update on the Langton Facility Expansion;

¹⁰⁸ Exhibit L, PSMR, Prospectus published on March 28, 2018, at pp. 15 "Business Objectives".

¹⁰⁹ Exhibit T, PSMR, Prospectus published on October 1, 2018.

¹¹⁰ Calculated as $23,376,100 / 135,000,000 * 100 = 17.3\%$.

¹¹¹ Exhibit R, PMR, News Release published August 2, 2019.

¹¹² Exhibit O, PMR, Wayland Trade Data.

¹¹³ Exhibit MM, PSMR, Wayland Offering Memorandum, "Acquisition or Investment Opportunity" at bullet point 2 (CNTRL00011414).

¹¹⁴ Exhibit O, PMR, Wayland Trade Data.

- (c) **February 21/22, 2022:** the price for Wayland shares declined by approximately 16%¹¹⁵ on February 21/22, 2022 when Wayland issued news releases advising that its board members Michael Stein, who was a member of the Company's Audit Committee, and Eric Silver, who was a member of Wayland's Corporate Governance and Compensation Committee, were resigning effective immediately with no explanation provided.¹¹⁶ As discussed in *Kauf v. Colt*,¹¹⁷ a director resigning without explanation from a company in circumstances where the company is choosing not to disclose the reasons for the resignation, at a minimum gives the plaintiff a reasonable possibility of proving at trial that the omitted facts are material and therefore capable of giving rise to liability at trial for misrepresentations under Part XXIII.1 of the *OSA*;
- (d) **April 23, 2019:** the price for Wayland shares declined by approximately 19.3%¹¹⁸ on April 23, 2019 when Wayland issued a news release stating that it would delay the release of its annual 2018 financial statements and MD&A, in contradiction to the most fundamental regulatory requirement of all Reporting Issuers; ss. 75, 77, 138.1 "failure to make timely disclosure", of the *OSA*.

3. The Public Corrective Statements reveal the misrepresentations

122. The last thing a plaintiff must demonstrate at leave to proceed is a reasonable possibility that at trial it will be proven that the alleged public corrective statements reveal the misrepresentations alleged to be contained in the Impugned Documents. Again, the plaintiff need not meet the balance of probabilities threshold at leave, but rather the much lower "reasonable possibility of proving at trial" threshold.

123. Here, the alleged Public Corrective Statements reveal the misrepresentations in the Impugned Documents because:

- (a) **On October 1, 2018,** Wayland released a prospectus in which Wayland disclosed, in contradiction to prior statements, that Phase One of the Langton Facility Expansion was not fully-funded when the clear representation it had made in its March 28, 2018 prospectus was that it was. Moreover, the October 2018 prospectus continued to promise completion dates for Phase One and Two which were not realistic when made.
- (b) **On November 28, 2018,** Wayland released its Q3 2018 financial statements and MD&A and omitted important information concerning Phases One and Two of the Langton Facility Expansion falling behind schedule and Wayland being unable to predict its costs or even apply the raised funds as promised due to a severe lack of internal controls at the company.

¹¹⁵ Exhibit O, PMR, Wayland Trade Data.

¹¹⁶ Exhibit M, PMR, Wayland News Releases published on February 21-22, 2019.

¹¹⁷ *Kauf* at para 172.

¹¹⁸ Exhibit O, PMR, Wayland Trade Data.

- (c) **On February 21/22 2019**, Wayland issued news releases announcing the immediate resignation of two directors without further explanation. One of the directors was a member of Wayland’s Corporate Governance Committee and the other a member of Wayland’s Audit Committee. The sudden departure of these two independent directors without explanation provided a “storm warning” to the market of larger problems to come.¹¹⁹ This storm warning was accurate and it would soon be revealed that Wayland had crippling issues with its corporate governance and financials such that Wayland would never again file financial statements, Mr. Ward would flee the country to Switzerland, and the company would file for *CCAA* protection;
- (d) **On April 23, 2019**, Wayland released a statement announcing that it would delay the release of its annual 2018 financial statements and MD&A, in contradiction to the most fundamental regulatory requirement of all Reporting Issuers; ss. 75, 77, 138.1 “failure to make timely disclosure”, of the *OSA*. Sophisticated investors know that failing to file quarterly financial statements and MD&A results in the trading in that issuer’s securities being quickly halted by the OSC until the deficiency is cured. As it happens here, Wayland’s shares were halted by the OSC within 5 business days, Wayland never cured the deficiency, and trading in Wayland securities never resumed. The mostly unsophisticated investors who were left holding the stock lost approximately \$100 million more than they had already lost up to that date.

PART VI – ORDER REQUESTED

123. The Plaintiffs request that this Honourable Court issue an order:

- (a) pursuant to s. 138.8 of the *OSA*, granting leave to the Plaintiffs to proceed with a statutory claim for secondary market misrepresentation under s. 138.3 of the *OSA* against the Defaulting Defendants, for releasing the Impugned Documents dated June 29, 2018, August 24, 2018, October 1, 2018 and November 28, 2018, that were partially publicly corrected on October 1, 2018, November 28, 2018, and February 21/22, 2019, and finally publicly corrected on April 23, 2019; and
- (b) awarding costs of this motion, fixed and payable forthwith, in favour of the Plaintiffs, payable within thirty (30) days of the Order.

¹¹⁹ [Kauf](#) at para 159.

ALL OF WHICH IS RESPECTFULLY SUBMITTED BY:

Date: September 8, 2022



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SCHEDULE “A” – LIST OF AUTHORITIES

1. [Sharbern Holding Inc. v. Vancouver Airport Centre Ltd.](#) 2011 SCC 23
2. [Green v Canadian Imperial Bank of Commerce](#), 2012 ONSC 3637
3. [Kauf v Colt Resources](#), 2019 ONSC 2179
4. [Theratechnologies Inc. v. 121851 Canada Inc.](#), 2015 SCC 18
5. [Paniccia v. MDC Partners Inc.](#), 2018 OSNC 3470
6. [Miller v FSD Pharma Inc.](#), 2020 ONSC 4054
7. [Swisscanto Fondsleitung AG v Blackberry Ltd.](#), 2015 ONSC 6434
8. [Drywall Acoustics v Barrick Gold](#), 2021 ONCA 104
9. [Silver v Imax Corporation](#), [2009] OJ No 5573
10. [Canadian Imperial Bank of Commerce v. Green](#), 2015 SCC 60
11. [Mask v. Silvercorp Metals Inc.](#), 2016 ONCA 64
12. [Gowanlock v. Auxly](#), 2021 ONSC 4205

SCHEDULE B - LEGISLATION

1. [Securities Act, R.S.O. 1990, c. S.5.](#)
2. [National Instrument 51-102 – Continuous Disclosure Obligations.](#)
3. [Form 51-102F1 – Management’s Discussion and Analysis.](#)

JONATHAN A. LUBUS *et al.*
Plaintiffs

and

WAYLAND GROUP CORP., et al.
Defendants

ONTARIO
SUPERIOR COURT OF JUSTICE
PROCEEDINGS COMMENCED AT TORONTO

FACTUM OF THE PLAINTIFFS

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