



**In the Matter of  
*The Securities Act, 1988, S.S. 1988, C. S-42.2***

**and**

**In The Matter Of**

**Alena Marie Pastuch  
Teamworx Productions Ltd.  
Idendego Inc.  
101114386 Saskatchewan Ltd.  
101115379 Saskatchewan Ltd.  
Cryptguard Ltd.**

**(hereafter the Respondents)**

**DECISION ON PRELIMINARY MOTIONS  
Motion to Dismiss Proceedings & Motion to Recuse**

**Background:**

On September 5, 2012, the Respondents filed a Motion to Dismiss the Proceedings of the Saskatchewan Financial Services Commission citing eight (8) grounds upon which their Motion ought to be granted. The eight grounds are summarized as:

- Failure to be provided with full disclosure so that they could make full defence and answer to the allegations against them under the Securities Act, 1988;
- Failure to be provided with timely disclosure so that they could make full defence and answer to the allegations against them under the Securities Act, 1988;
- Abuse of process by the staff of the Saskatchewan Financial Services Commission in dealing with the Respondents;
- Spoliation of evidence by the staff of the Saskatchewan Financial Services Commission essential to the Respondents so that they could make full defence and answer to the allegations against them under the Securities Act, 1988;
- Apprehension and belief that the testimony of witnesses that will be called by the staff of the Saskatchewan Financial Services Commission will be unreliable;
- Interim findings of fact and interim decisions of the Hearing Panel were unsupported by the Respondents' understanding of the evidence, so as to amount to an error of law;
- A reasonable apprehension of bias on the part of the Hearing Panel;
- A lack of independence or separation between the staff of the Saskatchewan Financial Services Commission and the Hearing Panel.

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On September 20, 2012, the Respondents filed a Motion to Recuse in the proceedings of the Saskatchewan Financial Services Commission citing nine (9) grounds upon which their Motion ought to be granted. The nine grounds are summarized as:

- A reasonable apprehension of bias on the part of the Chairperson of the Hearing Panel (Gordon Hamilton);
- Abuse of process by the Chairperson of the Hearing Panel;
- Interim findings of fact and interim decisions of the Chairperson of the Hearing Panel were unsupported by the Respondents' understanding of the evidence, so as to amount to an error of law;
- A lack of independence between the staff of the Saskatchewan Financial Services Commission and the Hearing Panel and a lack of separation between the counsel for the staff of the Saskatchewan Financial Services Commission (Sonne Udemgba) and the Chairperson of the Hearing Panel;
- A potentially serious conflict of interest was brought to the Hearing Panel's attention and to the Chairperson of the Hearing Panel – this allegation was withdrawn on December 4, 2012;
- The Chairperson of the Hearing Panel failed to take any action when allegations of witness tampering were brought forward;
- The Chairperson of the Hearing Panel failed to take any action when allegations of spoliation of evidence were raised;
- The Chairperson of the Hearing Panel failed to accommodate and consider witnesses' availability in the setting of hearing dates;
- The Chairperson of the Hearing Panel has denied the Respondents' right to make full answer and defence as guaranteed by law.

In preparation for the hearing of the Preliminary Motions, the Respondents were required to provide a witness list and a brief overview of the facts which they intended to present to the Hearing Panel. The Respondents provided a list of five witnesses, which included the Chairperson of the Hearing Panel and the counsel for the staff of the Saskatchewan Financial Services Commission. After the Respondents were advised that neither of these two named witnesses would be presenting evidence, three witnesses remained – two Commission staff and Ms. Alena Pastuch. The presentation of evidence in support of these two Motions was initially set for November 16, 2012.

The Respondents initially indicated that they could not complete the presentation of the evidence in the one day. Once it became apparent that the evidence could not be completed on November 16, 2012, December 3, 2012 was set for the continuation of the evidence on the Preliminary Motions. After the hearing on November 16, 2012 and before the resumption of the hearing on December 3, 2012, the Respondents provided the names of two additional witnesses they wanted to add to their witness list. These witnesses would be called to contradict the previous testimony that had been led by the Respondents. The Hearing Panel had heard testimony on November 16, 2012 that one of the witnesses had refused all attempts by the Respondents to communicate with him. On that basis alone, it became clear that the Respondents were trying to convert the preliminary hearing into a

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discovery process in advance of the formal hearing, instead of presenting evidence in support of the allegations contained in the Motions. The Respondents also requested that the first two witnesses be recalled after both had completed their testimony, and before the third witness commenced her testimony. This was also denied, as the Respondents indicated that they wanted to further challenge their own witnesses on answers that they had just given. The Respondents made it clear that one additional day would not be enough to complete the planned presentation of their evidence, so two days were set aside. The evidence was completed on December 4, 2012.

### **The Hearing**

Brian Pederson acted as agent and representative on behalf of all of the Respondents. He presented the Respondents' evidence through three witnesses: Ed Rodonets, Sandy Novak and Alena Pastuch. There were no witnesses called by the legal counsel for the investigation staff. The following represents an overview of the evidence presented, rather than a detailed recitation of the evidence presented. The allegations have been re-organized in these reasons for decision into three general categories – disclosure, abuse of process and bias related issues.

#### **1. Disclosure**

In support of the inadequate and untimely disclosure allegations contained in the Motions, the Respondents pointed to several examples. It was uncontroverted that the staff of the Saskatchewan Financial Services Commission had made at least one mistake in its delivery of the required full disclosure to the Respondents. There was a failure to provide the digital audio recording of the interview of ██████████ until May 9, 2012, approximately eighteen (18) months from the date when the Hearing Panel first ordered that full disclosure must be provided to the Respondents. The Hearing Panel heard testimony that confirmed that the digital audio recording had been lost or misplaced. When it was found, the recording was provided to the Respondents shortly thereafter. The first witness, Ed Rodonets, admitted that their process was not perfect and that mistakes were possible. He and Sandy Novak both provided the factual background to this mix-up.

Other evidence in support of the allegations revealed that a legal counsel for the Respondents who accompanied Alena Pastuch to an investigation interview misplaced the original contents of a black binder that had been disclosed to the staff investigators, for about the same length of time. The original binder was not found by the Respondents' legal counsel until November 2012. The Respondents, up until it was found by their counsel, had accused the investigation staff of refusing to disclose it. In the hearing, additional allegations were submitted about missing supplier and employee contracts that were supposedly part of the black binder. However, it was unclear whether the contracts had ever been handed over to the staff investigators, or whether they had been retained with (or misplaced by) the Respondents' legal counsel.

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The untimely and inadequate disclosure allegations also focused on business documents that had been in the offices of the Respondents' accountant. The investigation staff was provided with some documents from the accountant pursuant to their investigation powers. The Hearing Panel was informed that the accountant had consistently refused to respond to any communications from the Respondents. On that basis, the Respondents were unable to confirm whether all of the documents obtained by the investigation staff had been disclosed to them, in spite of suspicions to the contrary.

All of the other evidence presented in support of the disclosure-related allegations and spoliation of evidence suffered from the same problem. The Respondents clearly expressed their strong suspicions that full disclosure had not provided and that there had been spoliation of evidence, but were unable to provide the necessary evidence. Whether it was bank records, copies of invoices, or other documents, there was no conclusive evidence that showed what evidence had been obtained by the staff investigators in order to show that full disclosure had not been provided or to show that there had been spoliation of evidence. The Respondents raised concerns about wire transfers that had not been disclosed, but were unable to show how many wires had actually been turned over to the investigators. The Respondents had questioned their first two witnesses, who were staff investigators. The investigators confirmed that everything had been turned over through the disclosure process. The Respondents raised issues around emails that they believed were missing, but were unable to show that the emails had ever been sent to or retained by the investigators.

The Hearing Panel has concluded that there was insufficient evidence upon which to support these allegations about the failure to provide full disclosure and the spoliation of evidence. However, the Hearing Panel will remain alert to these allegations throughout the formal hearing.

## 2. Abuse of Process

The concerns and allegations regarding abuse of process included allegations around the credibility of witnesses, the unreliable testimony that they would provide to the Hearing Panel, and possible witness tampering. Challenging the possible nature and credibility of the testimony of witnesses, who have not yet testified, is premature, and is dismissed on that basis. There is simply no reason to presume that any witness, who has not yet testified, will fail to tell the truth as fully and accurately as expected of any honest and forthright person.

There were numerous emails that recounted the approach of the investigators in dealing with investors and other parties that were interviewed, which questioned the appropriateness and the legality of some of the means of gaining evidence. However, aside from allegations, nothing conclusive was provided that did not involve some degree of hearsay in order to accept them. The Hearing Panel is unwilling, on the strength of unsubstantiated allegations, to conclude that certain parties obtained evidence illegally, and then turned over the illegal evidence to the staff investigators without hearing from these individuals directly.

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The evidence against the staff investigators included allegations concerning a refusal to accurately advise certain of the Respondents' investors that there was a statutory restriction in place on communications arising out of the investigation. It was clear that there was some confusion on what the restriction actually meant. There were further allegations of bullying, witness tampering, personal threats, perjury, lies, policy breaches, statutory breaches, defamatory comments, and privacy breaches. Most of these allegations were refuted by the first two witnesses, or were not put to them. In the end, none of these allegations had a sufficient evidential foundation upon which to definitively conclude at this time that improprieties had taken place. The Hearing Panel will remain alert to these allegations throughout the formal hearing.

### 3. Apprehension of Bias

The allegations concerning the apprehension of bias and the lack of independence focused on the alleged failures of staff investigators, the Hearing Panel and the Chairperson of the Hearing Panel to abide by the policies, procedures, hearing guidelines and statutory directives. The evidence presented against the Hearing Panel and the Chairperson of the Hearing Panel dealt with, among other things, their handling of the pre-hearing matters, the interim decisions, and their acceptance of affidavit materials alleged to be inaccurate.

The evidence in support of these allegations of bias (or perceived bias) against the Hearing Panel and the Chairperson of the Hearing Panel were based almost exclusively on the Respondents' opinion and perception of facts and events that are substantially different from what the Hearing Panel believed were the facts at the time, or what the Hearing Panel recalled from its collective memory of the particular events. There are two events which illustrate competing apprehensions or perceptions of bias. At one instance, the Hearing Panel through the Commission Secretary requested witness availability from only one party rather than both parties, in deciding on when a hearing would be scheduled. This oversight was improper, even though the canvassed party would be proceeding first with its witnesses. However, that hearing never proceeded on those dates, and no prejudice ensued as a result. The process of canvassing both sides (or neither side) for availability for hearing dates was conducted in a more balanced approach thereafter. On the other hand in the second instance, the Hearing Panel considered an earlier motion by the Respondents for an order to have the Notice of Hearing and Allegations removed from the Commission's website because of concerns about the details contained in it. The Hearing Panel agreed with the Respondents' motion and issued the requested order directing the investigation staff to remove the Notice of Hearing and Allegations.

Notwithstanding the allegations that might suggest otherwise, the Hearing Panel has provided more direction to the Respondents than it would with any other party, because the Respondents have consistently refused to retain legal counsel for the hearings.

4. Conclusion

The Motion to Dismiss and the Motion to Recuse are both dismissed. The formal hearing into the allegations contained in the original Notice of Hearing and Allegations dated August 27, 2010 will proceed on December 5, 2012, commencing at 9:30 a.m. in the Verdi Room of the Delta Regina. The hearing will end on December 5, 2012 at 3 p.m. and then will continue on December 10, 11 and 12, 2012 as previously scheduled. On December 10, 2012, the hearing will commence at 9:30 a.m. and continue as directed by the Hearing Panel.

This is a unanimous decision of the Hearing Panel.

Signed in Regina, this 4<sup>th</sup> day of December, 2012.



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Gordon D. Hamilton, Member  
Chairperson of the Hearing Panel