CITATION: Kamrani-Ghadjar v. Anaergia Inc., 2025 ONSC 2167
COURT FILE NO.: CV-23-00000919-00CP
DATE: 20251113

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: MOHAMMAD REZA KAMRANI-GHADJAR, Plaintiff

AND:

ANAERGIA INC., ANDREW BENEDEK, and HANI EL-KAISSI, Defendants

BEFORE: The Honourable Justice Ranjan K. Agarwal

COUNSEL: Soheil Karkhanechi, Paul Bates, and Mahdi Hussein, for the plaintiff

S. Daniel Murdoch, Mark Walli, and Eric Turner, for the defendants Anaergia Inc., Andrew Benedek, and Hani El-Kaissi

HEARD: Oral submissions April 14-17, 2025; Further written submissions on September 19, 2025

REASONS FOR DECISION

I. OVERVIEW

[1] These motions arise out of alleged misrepresentations made by the defendant Anaergia Inc. in its public disclosure statements. Anaergia, a waste management company, went public in June 2021. The plaintiff Mohammad Reza Kamrani-Ghadjar alleges that Anaergia told investors that its Capital Sales division was thriving when, in fact, it only looked that way because of intersegment sales. He also claims that Anaergia predicted "explosive" growth in the first few years after going public, but this outlook was based on unreasonable assumptions and accounting mistakes. As a

result, Kamrani-Ghadjar alleges that the defendants are liable to him and other investors for making material misrepresentations.

[2] As required under our law, Kamrani-Ghadjar moves for leave to proceed with his secondary market disclosure claim under the *Securities Act*, RSO 1990, c S.5, s 138.8(1). He doesn't need leave to sue for his primary market disclosure claim. He also moves for an order certifying the action as a class proceeding under the *Class Proceedings Act, 1992*, SO 1992, c 6, s 5(1). The defendants oppose these motions, and move for summary judgment on Kamrani-Ghadjar's primary market disclosure claim.

[3] Kamrani-Ghadjar particularizes four misrepresentations: (a) Anaergia didn't disclose intersegment sales; (b) Anaergia's financial statements and quarterly filings misstated Anaergia's financial performance; (c) Anaergia's financial outlook was based on unreasonable assumptions; and (d) its officers' certifications contained the same misrepresentations. The defendants respond that: (a) only Anaergia's financial statements contained misstatements; and (b) in any event, none of the misrepresentations were material. The defendants also submit that Kamrani-Ghadjar's primary market claim is barred by the limitations period under the *Securities Act*, s 138.

[4] For the most part, the parties agree that my decision on whether to certify this class action should align with my decision on leave.

[5] I find that Kamrani-Ghadjar has proven that there's a reasonable chance this action will succeed with respect to his claims about Anaergia's financial misstatements, intersegment sales omissions, and certification misstatements. As a result, I grant leave to Kamrani-Ghadjar to sue the defendants for these claims. I don't believe he has the same chance of success for his financial outlook misstatement claim.

[6] Based on the defendants' concession, I certify this action as a class proceeding. The defendants argued that the subclasses should be limited in two ways but, as I discuss below, I reject that position.

[7] Finally, I dismiss the defendants' summary judgment motion. I accept Kamrani-Ghadjar's argument that the *Securities Act* ousts the discoverability rule. And the defendants failed to show that he had knowledge of the facts giving rise to his claims outside the limitation period.

II. BACKGROUND

A. Facts

1. The Parties

[8] Anaergia is in the business of turning organic waste, such as food scraps, manure, and sewage, into renewable natural gas. RNG can be used in place of traditional natural gas as a fuel for heating, cooking, or generating electricity, or in natural gas vehicles. It's more environmentally-friendly, but also more expensive to produce.

[9] On June 7, 2021, Anaergia went public on the TSX. The defendant Dr. Andrew Benedek is Anaergia's CEO. The defendant Hani El-Kaissi was Anaergia's CFO during most of the class period.

[10] Kamrani-Ghadjar bought 3000 shares of Anaergia's stock on the secondary market between March 14, 2022, and March 25, 2022.

2. Rialto Bioenergy Facility

[11] Anaergia operates its business through three divisions: (a) Capital Sales, which sells Anaergia's equipment and services; (b) Services, which provides operations and management; and (c) Build Own Operate (**BOO**), which develops and runs Anaergia's RNG facilities.

[12] In 2018, Anaergia began building the Rialto Bioenergy Facility, which turns waste into RNG that can be used for fuel or heating. Rialto was expected to earn revenues from: (a) fees paid by municipalities for accepting waste; (b) RNG sales; and (c) fertilizer sales. Rialto was built to meet the objectives of Senate Bill 1383, a California law that mandated the diversion of organic waste from landfills, and the conversion of that waste into renewable energy. Rialto started operations in 2021Q1.

[13] The U.S. and California governments offer financial incentives to RNG companies. Under the EPA's Renewable Fuel Standard, refiners and fossil fuel importers are required to obtains RINs, which are credits from renewable fuel production. California's Low Carbon Fuel Standard also encourages low-carbon fuels through the

sale of credits to fossil fuel producers and importers. Access to California markets allows biofuel producers with approved "pathways" to benefit from both LCFS credits and the value from RINs. These combined incentives significantly increase the price of RNG (e.g., US$67/MMBtu with RINs and LCFS credits, compared to US$2/MMBtu for traditional natural gas in June 2021).

[14] The price of LCFS credits is influenced by several factors, including the company's Carbon Intensity score. A negative CI score means that the production, transportation, and consumption of RNG yields negative emissions. Lower scores lead to more valuable credits. Rialto received the right to trade credits in late 2022.

[15] Rialto's construction was debt-financed. As a result, Anaergia had significant interest payments. In April 2020, Anaergia sold 49 percent of Rialto to First State Investments. But Rialto still had financial challenges. In December 2020, Anaergia asked its creditors for interest relief—they refused.

3. Anaergia's Financial Outlook

[16] Anaergia went public on June 7, 2021. It raised $200 million. Its shares began trading on the secondary market on June 18th.

[17] Anaergia's IPO prospectus disclosed that, in 2020, over 90 percent of its revenues came from its Capital Sales division. But the company expected the BOO division to

grow significantly, in part because of Rialto. Anaergia provided the following financial outlook:

	Revenues	**Adjusted EBITDA**
2020	$128 million	$3.1 million
2022	$360-$410 million	$50-$60 million
2023	$490-$560 million	$85-$105 million

[18] Anaergia's financial outlook was based on three assumptions at issue here:

- expected annual growth between 35 percent and 45 percent in Anaergia's Capital Sales and Services divisions, which was based on its historical growth rate of 41 percent
- Rialto would operate at capacity in 2022, generating $29 million of "proportionate Run-Rate EBITDA"
- RNG from Rialto was expected to have a CI score near -150

[19] This guidance was based on Anaergia's "opinions, estimates and assumptions" that the defendants believed were "appropriate and reasonable in the circumstances." That said, Anaergia cautioned that its targets weren't "a forecast or projection", and there was "no assurance" that it would achieve these targets, including because of delays at Rialto.

[20] KPMG, Anaergia's auditor, opined that Anaergia's consolidated financial statements were in accordance with IFRS.

[21] Some of Anaergia's later financial documents referenced the financial outlook in the prospectus: "There has been no change to the Company's outlook previously disclosed under 'Outlook' in the IPO Prospectus for Fiscal 2022 and Fiscal 2023."

[22] In August 2021, Anaergia advised investors that COVID-19 delays were causing "slower than previously anticipated escalation in the volumes of organic waste being shipped" to Rialto, which was "temporarily delaying" its expected financial contribution. Anaergia also advised investors that it didn't expect Rialto to be fully functioning until "sometime in Fiscal 2022". In November 2021, it revised the timeline to "sometime toward the end of 2022."

4. The March 2022 Financial Outlook Update

[23] On March 28, 2022, Anaergia released a "Financial Outlook Guidance Update" for 2022 and 2023:

	Revenues	**Adjusted EBITDA**
2022	~~$360-$410 million~~ $230 million	~~$50-$60 million~~ $23 million
2023	~~$490-$560 million~~ $430-500 million	$85-$105 million

[24] Again, Anaergia cautioned that these targets were not a "forecast or projection" and there was "no assurance" that it would achieve these targets.

[25] Anaergia also had a secondary offering that closed on April 19, 2022, which raised $60 million. It filed a second prospectus that month.

5. The August 2022 Press Release and Restatements

[26] On August 3, 2022, Anaergia announced that it was "revisiting its interpretation of certain technical accounting standards relating to the recognition of capital sales and related [BOO] project costs…."

[27] Anaergia had contracted with W.M. Lyles Co., a construction company, to build Rialto. Lyles, in turn, subcontracted Anaergia Technologies, a subsidiary of Anaergia, to provide services. Technologies charged Lyles a fee. Anaergia recognized Technologies's fee as revenue. In other words, some of the Capital Sales division's revenues came from indirect sales to the BOO division.

[28] KPMG had previously concluded that management's position—"that these related party costs should not be eliminated"—was reasonable. But CPAB disagreed. CPAB periodically inspects audit engagement files for quality control. As part of this regular inspection, CPAB concluded that KPMG should've recognized the Capital Sales division's revenues and COGS from the BOO projects differently.

[29] Anaergia said that this review would have some impact:

- it would negatively affect future revenue and EBITDA recognition in the Capital Sales division

- Anaergia was working with KPMG to assess the effect on its "Affected Disclosures", which was defined to include several financial statements but not its IPO prospectus

- the Affected Disclosure couldn't be relied upon

- preliminary estimates showed a reduction in 2021 revenue in the range of $25 million to $31 million, and an increase in 2021 net losses in the range of $2 million to $7 million

[30] After the markets closed on August 15, 2022, Anaergia released is 2022Q2 financial results. It also restated its 2020 and 2021 annual financial statements, interim financial statements ending March 31, 2022, and the MD&As for that period:

		Revenues ($000)	**AEBITDA ($000)**
FY20	**Original**	$128,042	$3086
	Restated	$110,532	($3243)
FY21	**Original**	$153,581	$5035
	Restated	$127,048	($2970)
2022Q1	**Original**	$39,970	$1146
	Restated	$35,616	($2289)

[31] In its August 3rd press release and on an earnings call on August 16th, Anaergia described the restatements as a "technical accounting matter only." It also told investors that it still expected to "meet the guidance" for 2022 and 2023 from March 2022.

[32] Anaergia filed additional restatements on August 16th and August 31st.

[33] There's no dispute that this error led to Anaergia overstating its revenues, profits, ROE, and AEBITDA, and understating its losses and D/E ratio over several quarters in 2021 and 2022.

6. The November 2022 Revised Financial Outlook

[34] On November 10, 2022, Anaergia released its interim financial statements ending September 30, 2022. It revised its financial outlook for 2022 downwards and withdrew its 2023 guidance altogether:

	Revenues	**AEBITDA**
2022	~~$360-$410 million~~ ~~$230 million~~ $160-$170 million	~~$50-$60 million~~ ~~$23 million~~ ($10 million)
2023	~~$490-$560 million~~ ~~$430-500 million~~	~~$85-$105 million~~

[35] Anaergia explained that it had expected Rialto and other BOO facilities to be operating at capacity, but feedstock supply issues had delayed RNG sales from Rialto. It also pointed to "significant macro-economic changes", such as interest rates and natural gas pricing, and "Company-specific matters", such as the construction of BOO facilities.

[36] In December 2022, Anaergia released its 2023 financial outlook and reaffirmed its 2022 financial outlook from November:

	Revenues	**AEBITDA**
2022	~~$360-$410 million~~ ~~$230 million~~ $160-$170 million	~~$50-$60 million~~ ~~$23 million~~ ($10 million)
2023	~~$490-$560 million~~ ~~$430-500 million~~ $280-$340 million	~~$85-$105 million~~ $25-35 million

[37] The 2023 guidance was based on several assumptions, including that Anaergia's revenue is subject to the "receipt of an LCFS pathway" and associated CI score for Rialto, over which Anaergia "has no influence or control."

7. The Pleading

[38] Kamrani-Ghadjar seeks to certify three subclasses:

(a) the IPO Subclass, which consists of investors that bought Anaergia's shares during the IPO;

(b) the Second Distribution Subclass—investors that bought shares during the secondary offering; and

(c) the Secondary Market Subclass—investors that bought shares on the secondary market.

[39] Kamrani-Ghadjar is only a member of the Secondary Market Subclass because he didn't buy shares during the IPO or secondary offering.

[40] The proposed class period is from June 7, 2021 (the IPO), to November 10, 2022 (the last public correction).

[41] Kamrani-Ghadjar alleges the following misrepresentations in the continuous disclosure materials[1]:

(a) the defendants misrepresented Anaergia's financial condition;

(b) the defendants misrepresented Anaergia's future prospects;

(c) the defendants misrepresented that Anaergia's financial statements were prepared in accordance with International Financial Reporting Standards;

(d) the defendants misrepresented Anaergia's revenue recognition policies; and

(e) the defendants failed to disclose that the Capital Sales division was generating revenues from work for the BOO division in the IPO prospectus.

[1] Anaergia defines this term to include the IPO prospectus, the second prospectus, MD&As, financial statements, annual reports, press releases, certifications, and statements from earnings calls from June 2021 to November 2022.

[42] He also alleges two additional misrepresentations:

(a) the defendants falsely claimed and certified that the IPO prospectus and the second prospectus constituted full, true, and plain disclosure of all material facts; and

(b) the defendants misrepresented the effectiveness of Anaergia's Disclosure Controls and Procedures and Internal Control Over Financial Reporting in the continuous disclosure materials and the second prospectus.

B. Litigation History

[43] Kamrani-Ghadjar started this class action in March 2023. In May 2024, Ricchetti RSJ (as he was then) assigned this proceeding to me for case management.

[44] In August 2024, the defendants moved to strike the affidavit of Lon Kirsh, which introduced Anaergia's public filings into evidence. I dismissed the motion on the grounds that Mr. Kirsh wasn't providing opinion evidence, and there's nothing wrong (and, indeed, much right) with someone like Mr. Kirsh adducing public filings in a securities case. See *Kamrani-Ghadjar v Anaergia Inc.*, 2024 ONSC 4866.

[45] In October 2024, the defendants delivered a statement of defence.

[46] In January 2025, I approved the discontinuance of this proceeding against Cidel Trust Co. and Neo International Investments Ltd. See *Kamrani-Ghadjar v Anaergia Inc.*, 2025 ONSC 499.

[47] For these motions, the parties relied on the following evidence:

- two affidavits from Kamrani-Ghadjar
- expert's reports from Daniel Thornton, an expert in financial accounting
- expert's reports from Mark Belin, an expert in quantitative financial modeling
- expert's reports from Drake Hernandez, an expert in the economics of low-carbon fuels, such as RNG
- Mr. Kirsh's affidavit
- the affidavit of Mahdi Hussein, Kamrani-Ghadjar's co-counsel
- the affidavit of Yaniv Scherson, Anaergia's COO
- an expert's report from Robert Patton, an expert in economics
- the affidavit of Karen Wang, an employee of the defendants' lawyers

[48] Kamrani-Ghadjar, Dr. Scherson, and all the experts were cross-examined on their affidavits.

C. Preliminary Issue: should Mr. Patton's affidavit be excluded?

[49] At the motions hearing, Kamrani-Ghadjar asked me to exclude Mr. Patton's evidence for two reasons. First, he claims that Mr. Patton gives opinion evidence outside his

expertise. Mr. Patton is an economist and CFA. His area of expertise is "business and financial valuation and economic damages". The defendants engaged him to respond to the expert's reports of Mr. Thornton and Mr. Belin. Mr. Patton comments on Mr. Thornton's report and methodology. Kamrani-Ghadjar argues that Mr. Patton isn't qualified to give opinion evidence about accounting and is therefore necessarily testifying about areas he's not qualified in.

[50] If an expert strays beyond their expertise, then it raises doubts about their independence, impartiality, and the reliability of their evidence even within their knowledge. See *Gould v Western Coal Corporation*, 2012 ONSC 5184, at para 85. In that case, Strathy J (as he was then) concluded that he couldn't rely on the expert's opinion for those reasons and, effectively, excluded the evidence by giving it no weight.

[51] This case isn't the same. In Section 5 of his report, Mr. Patton discusses Mr. Thornton's conclusions. At no time does he purport to give the court evidence about accounting issues. His response to Mr. Thornton's report is largely a discussion of facts that he says undermines Mr. Thornton's conclusion, combined with his opinion about the event studies he conducted, which is within his area of expertise. On cross-examination, he acknowledged the limits of his expertise and made clear that he was only responding to two paragraphs of Mr. Thornton's report.

[52] Second, Kamrani-Ghadjar submits that Mr. Patton isn't independent because Mr. Patton applied inconsistent methodologies and ignored "inconvenient" facts. That may be a reason for me to give Mr. Patton's opinion less weight. But, without more, there's no basis to challenge his independence.

[53] As a result, I'm satisfied that Mr. Patton introduced evidence that is necessary and relevant, and he is properly qualified to give evidence. See *White Burgess Langille Inman v Abbott and Haliburton Co.*, 2015 SCC 23, at paras 19 and 23. So too for the other expert witnesses. I have no difficulty in qualifying all these experts and admitting their evidence on this motion.

D. Law

1. Secondary Market Claims

[54] If a responsible issuer releases a document that contains a material misrepresentation, a person who traded in the issuer's securities after the issuer made the misrepresentation and before the misrepresentation was corrected can sue the issuer or anyone who was a director or officer at the material time. See *Securities Act*, s 138.

[55] Investors don't have to prove reliance, and "fluctuations in value" are presumed to be linked to the misrepresentation. See *Drywall Acoustic Lathing and Insulation (Pension Fund, Local 675) v Barrick Gold Corporation*, 2024 ONCA 105, at para 23.

[56] That said, secondary market claims require leave. The leave test is a "robust deterrent screening mechanism" that ensures unmeritorious cases don't proceed. See *Theratechnologies Inc. v 121851 Canada Inc.*, 2015 SCC 18, at para 38. The court must be satisfied that: (a) the action is being brought in good faith; and (b) there's a reasonable possibility that the action will be resolved at trial in favour of the plaintiff. See *Securities Act*, s 138.8(1).

[57] In sum, the legislation strikes a balance between, on one hand, reducing the proof on investors and, on the other hand, discouraging strike suits.

[58] To properly plead a secondary market misrepresentation, a plaintiff must identify: (a) the statement and its timing; (b) its falseness; and (c) the public correction and its timing. See *DALI Local 675 Pension Fund (Trustees) v Barrick Gold Corporation*, 2022 ONSC 1767, at paras 27-29, aff'd 2024 ONCA 105. At this early stage in the proceeding, the claim is to be read generously. See *Badesha v Cronos Group Inc.*, 2022 ONCA 663, at para 59.

[59] The defendants don't challenge the bona fides of Kamrani-Ghadjar's claims. Also, for these motions, Anaergia doesn't rely on the reasonable investigation defence (*Securities Act*, s 138.4(6)) or the expert's report defence (*Securities Act*, s 138.4(11)).

2. Certification

[60] The court shall certify a class proceeding if:

(a) the pleadings disclose a cause of action;

(b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff;

(c) the claims of the class members raise common issues;

(d) a class proceeding would be the preferable procedure for resolving the common issues; and

(e) there is a representative plaintiff who would fairly and adequately represent the interests of the class, with no conflict, and has produced a workable litigation plan.

See *CPA*, s 5(1).

[61] A motion for leave and a motion for certification present the same fundamental question of whether the evidentiary record suffices to permit the action to proceed to the next stage. See *MM Fund v Americas Gold and Silver Corp.*, 2022 ONSC 6515, at para 3; *Badesha v Cronos Group, Inc.*, 2023 ONSC 5678, at para 14.

[62] If the matter has sufficient evidence under the leave test, then "as a matter of logic", there's sufficient evidence for the purposes of certification. But, similarly, the decision to deny leave for statutory claims is a "relevant consideration" for whether the plaintiff has shown some basis in fact for certification. See *Bayens v Kinross Gold Corporation*, 2014 ONCA 901, at para 132.

3. Summary Judgment

[63] If, before the hearing of the certification motion, a motion is made under the rules of the court that may dispose of the proceeding in whole or in part, or narrow the issues to be determined or the evidence to be adduced in the proceeding, that motion shall be heard and disposed of before the motion for certification, unless the court orders that the two motions be heard together. See *CPA*, s 4.1.

[64] A defendant may, after delivering a statement of defence, move with supporting affidavit material or other evidence for summary judgment dismissing all or part of the claim in the statement of claim. See *Rules of Civil Procedure*, r 20.01(3). The court shall grant summary judgment if the court is satisfied that there's no genuine issue requiring a trial with respect to a claim or defence. See *Rules of Civil Procedure*, r 20.04(2).

[65] Rule 20 concerns itself with a simple question: does a specific action require a trial for its fair and just determination on the merits? There will be no genuine issue requiring a trial when the judge is able to reach a fair and just determination on the merits on a motion for summary judgment. This will be the case when the process: (a) allows the judge to make the necessary findings of fact; (b) allows the judge to apply the law to the facts; and (c) is a proportionate, more expeditious, and less expensive means to achieve a just result. See *Hryniak v Mauldin*, 2014 SCC 7, at para 49; *Moffitt v TD Canada Trust*, 2023 ONCA 349, at para 42.

[66] The onus is on the moving party to establish the existence or lack thereof of a genuine issue requiring a trial. But each side must "put its best foot forward" with respect to the existence or non-existence of material issues to be tried. See *Ethiopian Orthodox Tewahedo Church of Canada St. Mary Cathedral v Aga*, 2021 SCC 22, at para 25.

III. ANALYSIS AND DISPOSITION

[67] Again, there are three motions being heard together. First, I begin by discussing Kamrani-Ghadjar's motion for leave to start a secondary market claim. Second, I consider Kamrani-Ghadjar's motion to certify this action as a class proceeding. Finally, I examine the defendants' motion for summary judgment on Kamrani-Ghadjar's primary market claims.

A. Issue #1: is there a reasonable chance this action will succeed?

[68] To satisfy the reasonable or realistic chance of success standard, the plaintiff must offer: (a) "a plausible analysis of the applicable legislative provisions"; and (b) "some credible evidence in support of the claim". See *Drywall Acoustic*, at para 29. Here, the defendants don't dispute that there's a "plausible legal foundation" for the claim, and Kamrani-Ghadjar's evidence is credible.

[69] But that alone isn't enough. The record must also show there's a "realistic or reasonable chance that the action will succeed." As a result, I must review and weigh all the evidence introduced by both parties. The "credibility and reliability of the evidence as a whole" are material considerations in deciding whether the plaintiff has

established a realistic or reasonable chance that their claim will succeed. See *Drywall Acoustic*, at para 32.

[70] If the defendants' evidence is "so compelling that there is no reasonable possibility that the appellant would succeed at trial", leave may be denied. But the leave motion isn't a "mini-trial". It's not my role, as the motion judge, to determine whether the matters in issue have been proven. The "realistic or reasonable chance of success" test is a "relatively low merits-based threshold". I also can't "resolve realistic and contentious issues arising from conflicting credible evidence", unless it can be established that there is no reasonable possibility that an expert's opinion would be accepted by a trial judge. And I must inquire "whether the record is capable of determining the issue" before me. See *Drywall Acoustic*, at paras 33-39; *Markowich v Lundin Mining Corporation*, 2022 ONSC 81, at para 111.

[71] To meet the "reasonable possibility" of success part of the test, Kamrani-Ghadjar must show that: (a) there was an untrue statement of fact or an omission to state a fact; and (b) the fact was material, in that it would reasonably be expected to have a significant effect on the market price or value of the securities. See *Cronos Group*, at para 47 (Ont CA); *Securities Act*, s 1(1).

[72] In oral submissions, Kamrani-Ghadjar identified four alleged misrepresentations: (a) Anaergia's omission of "sales to self"; (b) financial misstatements; (c) financial outlook misstatements; and (d) certification misstatements. These alleged

misstatements are in Anaergia's prospectus disclosure, its continuous disclosure, or its officers' certification of disclosure.

[73] The *Securities Act* requires that issuing companies planning to sell securities to the public must provide detailed disclosure in the form of a prospectus. The prospectus "shall provide full, true and plain disclosure of all material facts relating to the securities issued or proposed to be distributed." See *Securities Act*, s 56(1).

[74] Further, Anaergia, as a reporting issuer, was required to disclose certain information to its security holders and the provincial securities regulator on a regular basis. See *Securities Act*, s 75. Continuous disclosure obligations fall into two categories: periodic disclosure and timely disclosure. This case focuses on Anaergia's periodic disclosure, which must be made regularly, typically through the provision of documents such as proxy circulars, financial statements, and insider trading reports. In these regularly-issued documents, Anaergia must disclose all material facts. Continuous disclosure "creates a level playing field" for all investors. As a result, it must be "scrupulously accurate and fair". See *Wong v Pretium Resources Inc.*, 2022 ONCA 549, at para 110; *Theratechnologies*, at paras 23-25.

[75] Finally, under OSC National Instrument 52-109, Benedek and El-Kaissi had to provide certifications that there were no misrepresentations in Anaergia's disclosure.

[76] The defendants concede that Anaergia's financial statements contain untrue statements of fact: the financial statements, MD&As, and certifications were rendered

incorrect by Anaergia's August 2022 correction, as were Anaergia's representations that its financial statements were prepared in compliance with IFRS or that it had effective ICFR controls.

[77] The defendants don't make the same concession for the intersegment sales or Anaergia's financial outlook. Thus, my discussion starts with whether Kamrani-Ghadjar has a reasonable prospect of success in proving that Anaergia omitted to tell investors about its intersegment sales or that its financial outlook had untrue statements of fact. I then turn to whether Kamrani-Ghadjar has a realistic chance of proving that any of the alleged misstatements were material.

[78] I don't discuss the certification misstatements further. Kamrani-Ghadjar argues that because the prospectuses and continuous disclosure had misrepresentations, Benedek and El-Kaissi are personally liable. My decision on whether to grant leave for these claims follows my decision on the other alleged misrepresentations. If there's a reasonable chance of success that Anaergia's disclosure contains misrepresentations, then so too the certifications.

1. Issue #1(i): did the defendants fail to tell investors about the intersegment sales?

[79] The IPO prospectus says that the Capital Sales division sells to "third party customers", which are mainly "municipalities, private entities, and project developers". In a 2022Q3 earnings call, Anaergia disclosed information about Capital Sales projects to third parties in Italy, Singapore, and Japan, but said nothing about

Rialto. In August 2022, investors learned, allegedly for the first time, that the Capital Sales division's revenues came from intersegment sales.

[80] In making this argument, Kamrani-Ghadjar seems to be suggesting that the defendants were hiding something about the intersegment sales. He argues that Dr. Scherson's evidence was crafted to introduce impermissible hearsay evidence. He also points to the lack of evidence from KMPG, Benedek, and El-Kaissi, and the failure to disclose Lyles's relationship with Anaergia. Though Kamrani-Ghadjar doesn't say this directly, he implies that the defendants and KPMG deliberately inflated the Capital Sales division's revenue to mislead investors.

[81] The defendants respond that Anaergia didn't omit facts about this transaction. First, the prospectus refers to "private entities", which they say includes Technologies. Second, the market knew that Capital Sales's revenues came from Anaergia's BOO projects. For example, National Bank of Canada, in a September 2021 analyst report, stated that the Capital Sales division revenue "is derived from equipment sales to third parties, including [Anaergia's] BOO projects."

[82] To begin, there's no evidence that KPMG and the defendants intentionally inflated Anaergia's revenues.

[83] That said, I agree that Kamrani-Ghadjar has a reasonable prospect of success in proving that Anaergia's failure to disclose that some of its revenues came from intersegment sales was an omission. Though Technologies is a "private entity" in that

it's a different legal entity, it's not a "third party customer" in the ordinary sense of that term. Investors wouldn't have known from Anaergia's prospectus that the Capital Sales division's revenues were being generated from intersegment sales. Though National Bank seemed to know this fact in August 2021, it's unclear how widespread this information was. For example, Anaergia highlighted third-party sales but not intersegment sales in its 2022Q3 earnings call.

2. Issue #1(ii): was Anaergia's financial outlook misleading?

[84] A public company's "financial outlook" or guidance is "forward-looking information about prospective financial performance" based on certain assumptions that are "reasonable in the circumstances". The company must state the material facts or assumptions used to develop the outlook. The assumptions must be limited to a reasonably-estimated period and use the same accounting policies as the company's financial statements. See OSC, *National Instrument 51-102*.

[85] Misrepresentations about estimates are actionable. Forecasts carry an implied representation of objective reasonableness. In response, defendants can rely on the safe harbour defence, unless the forward-looking information is released with an IPO. See *Kerr v Danier Leather Inc.*, 2007 SCC 44, at para 49; *Trustees of the Millwright*

Regional Council of Ontario Pension Trust Fund v Celestica Inc., 2014 ONSC 1057, at paras 133-34; *Securities Act*, s 138.4(9)-(10).

[86] Kamrani-Ghadjar alleges two inter-related misstatements. First, he points to Anaergia's assumptions about its annual growth rate, its Run-Rate EBITDA, and Rialto's CI score. Second, he relies on the decreasing revenue and AEBITDA forecasts for 2022 and 2023.

[87] The defendants respond that if Anaergia's assumptions were reasonable, then there can be no misstatement. See *Dionne v Hexo Corp.*, 2023 QCCS 162, at para 156, aff'd 2025 QCCA 462. When a prospectus contains no misrepresentation on the date the document is filed, information amounting to material facts that arises subsequently can't support an action. See *Danier Leather*, at para 43.

a. Expected annual growth

[88] The first assumption at issue is: "Expected annual growth of 35 to 45% in our Capital Sales and Services segments in line with our historical compound annual growth rate from Fiscal 2018 to Fiscal 2020 of 41%."

[89] Kamrani-Ghadjar argues that this assumption was unreasonable for two reasons. First, he submits that the intersegment sales incorrectly inflated Anaergia's 2018, 2019, and 2020 growth rate. Mr. Thornton opines that Anaergia's 2020 revenues were $110.5 million, not $128 million. Anaergia's forecasted annual growth rate was

arguably based on these inflated starting points. According to Mr. Thornton, this error "doubly inflated" the extrapolated growth rates.

[90] Second, Dr. Scherson, on cross-examination, admitted that if the "underlying financial statements that derived the 41 percent are incorrect", then the "bases for justifying…the expectation would also be incorrect."

[91] The defendants have two responses. First, Kamrani-Ghadjar and Mr. Thornton are wrong that Anaergia's 2020 revenues were the only bases for its 2022 and 2023 forecasts. Anaergia uses "bottom-up" forecasting: it starts with low-level data from its regional teams and divisions, and works up to revenue. The regional budgets are consolidated to create a P&L budget for the company, along with consolidated balance sheets and cashflow forecasts. Anaergia then cross-checks this forecast against "market trends, historical performance and experience". The company also conducts quarterly reviews to measure its performance and revisit forecasts. The defendants point to the March 2022 guidance update as an example of this process at work: supply chain issues and delayed completion of a project in Tønder led to Anaergia revising its financial outlook. In making this argument, the defendants point to three words in the assumption: "in line with". In other words, the forecast doesn't say "based on" or "dependent on". Instead, the 2018 to 2020 growth rate was a "check" on the bottoms up forecast.

[92] Kamrani-Ghadjar replies that Anaergia can't rely on a "bottom-up" forecasting because it's required to use the same accounting policies as the company's financial statements.

[93] Second, the defendants say that Kamrani-Ghadjar has misunderstood the assumption. It expressly refers to annual growth in the Capital Sales and Services divisions, not Anaergia's consolidated revenues. The defendants point to Mr. Thornton's opinion that that there was "nothing wrong" with KPMG's approach. Indeed, it "must do so" to "faithfully account" for each division's operations. Mr. Thornton believes that the error was in failing to eliminate the intersegment sales in the consolidated financial statements, but the effect was to reduce historical growth rates on a consolidated basis not a segment basis.

[94] I agree with the defendants' arguments. Dr. Scherson's uncontradicted evidence and a plain reading of the assumption makes clear that Anaergia's historical growth rate was *a* factor but not *the* factor used to fix the assumption. And Mr. Thornton seems to agree with KPMG's approach at the division level. Finally, I don't agree that Dr. Scherson conceded Kamrani-Ghadjar's argument. It's not clear what Dr. Scherson was admitting to. His answer accepts the logic of Class Counsel's question, but not necessarily the premise (i.e., the financial statements are incorrect). Class Counsel's questions there and its argument here seems to blend the correction, which is to Anaergia's consolidated revenues, and the assumption, which is about divisions.

[95] But even accepting Kamrani-Ghadjar's argument that Anaergia's historical growth rate was mistakenly inflated, which led to its expected revenue assumption to be inflated, it wasn't an unreasonable assumption at the time it was made. Anaergia had the benefit of audit advice from KPMG. KPMG believed that its revenue recognition conclusion was reasonable at the time. No one at Anaergia thought differently until CPAB, as part of its periodic review, disagreed. Anaergia had no idea that KPMG's opinion was incorrect until July 2022, when KPMG advised the company that it was reviewing Anaergia's accounting. Mr. Thornton agreed with KPMG's approach, to a point.

[96] As a result, I conclude that Kamrani-Ghadjar doesn't have a reasonable prospect of success in proving that this assumption was unreasonable at the time it was made.

b. Run-Rate EBITDA

[97] The second assumption at issue is:

> [Rialto] became operational in the first quarter of 2021 and we expect operations at the [Rialto] to continue to ramp up through to the end of 2021 as COVID-19 restrictions ease and commercial waste feedstock volumes grow. In Fiscal 2022, we expect the [Rialto] will operate at full capacity and generate consolidated Run-Rate Revenue of approximately $76 million and proportionate Run-Rate EBITDA of approximately $29 million, at the Company's 51% ownership interest, based on the following full-year assumptions….

[98] Kamrani-Ghadjar argues that this assumption was unreasonable based on Mr. Hernandez's evidence:

- it's "commercially unlikely" that Anaergia would have been able to sell RNG at US$67.00/MMBtu without LCSF credits and RINs, which it couldn't do until October 1, 2022

- it wasn't possible to achieve RNG sales at an average price of $61/MMBtu in FY2022 without Rialto earning revenues from the sales of both LCFS credits and RINs throughout all of FY2022

- achieving a "Run-Rate Revenue of approximately $76 million" for FY2022 "would not have been commercially likely" without LCFS credits and RINs

[99] He also points to Dr. Scherson's evidence. Kamrani-Ghadjar argues that Dr. Scherson admitted that the process for applying for LCFS credits is variable. And applicants require five months of operating data to be eligible to apply. Anaergia started collecting samples in June 2022, meaning that it couldn't apply until at least September 2022.

[100] The defendants respond that this assumption was reasonable in June 2021 for two reasons. First, Kamrani-Ghadjar's arguments about the timeline for approval are baseless. Dr. Scherson said that the timing from submission to certification has a "pretty broad range of outcomes": "just a couple months and others that are two

years…. I don't have visibility on the statistical median or average time period for all evidence, all the applicants, and parts." The only other evidence about the expected or anticipated timelines is Anaergia's own experience. It started collecting samples in June 2022 and it was certified in March 2023, but the effective date of the approval was October 1, 2022. In its case, the certification process took nine months. And Anaergia had some reason to be believe that the LCFS start-date may be back-dated given that CARB certified Rialto effective October 2022. Also, Anaergia was approved for RINs in late 2022.

[101] Second, Anaergia argues that when it stated this assumption, it believed that there would be a "continuing ramp up in feedstock availability" in 2021 so that Rialto could be operating at capacity by the start of 2022. But then California delayed enforcing the programs that were expected to provide the necessary feedstock for Rialto. Los Angeles delayed passing the necessary ordinance requiring businesses to divert their organic waste to facilities like Rialto until December 2022 because of COVID-related closures and delays. If Anaergia had sufficient feedstock in 2021, it could've applied for LCFS credits and RINs in 2021 and started sales in 2022.

[102] I accept the defendants' arguments. In June 2021, it was reasonable for Anaergia to believe that it would have the necessary feedstock to be fully operational and gather data for the LCFS application process by early 2022. It believed that Los Angeles and other municipalities were going to adhere to their stated timelines. Further, it was reasonable for Anaergia to believe that it would be certified for LCFS credits

quickly—indeed, it was. The forecast may have been aggressive. But it wasn't unreasonable. As a result, I conclude that Kamrani-Ghadjar doesn't have a reasonable possibility of proving that this assumption was unreasonable.

c. CI Score

[103] The third assumption at issue is:

> RNG from food waste at a carbon intensity score of -150 is expected to be priced at approximately US$83.00 per mmbtu. While RNG from the [Rialto] is expected to have a carbon intensity score close to -150 over the long term, the US$54.00 per mmbtu price used to calculate the [Rialto's] spot RNG sales assumes a conservative carbon intensity score of -50 and has also deducted marketing fees incurred in connection with spot sales.

[104] Kamrani-Ghadjar argues that this assumption was unreasonable for two reasons. First, Anaergia never produced evidence of its methodology for an expected -150 score. There's some evidence that Anaergia relied on a study done by researchers at the Lawrence Berkeley National Lab on Rialto's "net greenhouse gas…footprint". The researchers concluded that Rialto would have a CI score of -187. Kamrani-Ghadjar argues that this study is from before Anaergia started construction of Rialto and uses different modelling, making it unreliable. As it turns out, Anaergia's certified CI score was -28.20.

[105] Second, the only other similar pathway had a certified score -79.91, which it received around three months before Anaergia's IPO. So, in other words, there was no basis to assume a -150 score.

[106] The defendants' response has three parts. First, Kamrani-Ghadjar didn't plead this misrepresentation. At paragraph 87 of the claim, Kamrani-Ghadjar particularizes the alleged incorrect assumptions in the financial outlook. There's no reference to this specific assumption. I disagree. Paragraph 87(d)(ii) of the claim refers to an assumption that Rialto's gas pricing is "conservatively set based on a -50" CI score. As a result, reading the pleading generously, Kamrani-Ghadjar has sufficiently pleaded this misrepresentation. At its core, Kamrani-Ghadjar alleges that the defendants misrepresented the price of RNG produced by Rialto, which led to artificially inflated revenue and AEBITDA forecasts. That is the type of claim that the *Securities Act* is designed to address. That is how the claim should be characterized.

[107] Second, the defendants argue that Kamrani-Ghadjar has mischaracterized this assumption. Anaergia was disclosing to investors that its financial outlook was based on -50 CI score. The discussion about an expected -150 CI score is narrative but doesn't factor into the financial outlook. To that end, there's no evidence about the reasonableness of a -50 CI score—Mr. Hernandez was never asked to opine on that issue.

[108] Finally, Rialto didn't achieve a -50 CI score for the same reason it took longer to get certified for carbon credits—there was insufficient feedstock, which it didn't anticipate. At the time of the IPO, Anaergia expected Rialto to be operating at capacity when it obtained the operating data, which would have resulted in a higher CI score.

[109] I agree with the defendants' position. At the time of the prospectus, it was reasonable for Anaergia to assume a -50 CI score. There was no need for Anaergia to justify a - 150 CI score because its guidance was based on the lower score. In fact, as compared to the other pathway cited by Mr. Hernandez, Anaergia might have reasonably assumed a CI score of -80 but it used a more conservative figure. Though its certified score was lower than this conservative assumption, Dr. Scherson has satisfactorily explained the unexpected delay in getting sufficient feedstock.

[110] As a result, I conclude that Kamrani-Ghadjar doesn't have a reasonable possibility of proving that this assumption was unreasonable.

d. Conclusion

[111] Anaergia's guidance about its 2022 and 2023 revenues and AEBITDA were based, in part, on these assumptions. Given that the assumptions were reasonable at the time of its financial outlook, I conclude that Kamrani-Ghadjar doesn't have a reasonable possibility of proving that the financial outlook in Anaergia's prospectus contained an untrue statement of fact.

[112] Based on the safe harbour defence, I also conclude that Kamrani-Ghadjar doesn't have a realistic chance of success in proving the financial outlooks adopted in later disclosure contained misstatements. Even if Anaergia didn't have a reasonable basis for repeatedly making these forecasts, it used reasonable cautionary language and set out its assumptions. See *Hexo*, at para 165.

3. Issue #1(c): were Anaergia's misstatements material?

[113] Again, the defendants concede that there are some misstatements in Anaergia's financial statements. The next issue in dispute is whether Kamrani-Ghadjar has a reasonability of proving that these misstatements, along with the omission about intersegment sales, were material to investors. If I'm wrong about whether Anaergia's financial outlook was reasonable, I also consider the materiality of those alleged misstatements.

[114] As discussed above, a fact is material if it "would reasonably be expected to have a significant effect on the market price or value of the securities". See *Securities Act*, s 1; *Cronos Group*, at para 47 (Ont CA). At the motions hearing, there was some debate about whether the test for materiality depends on whether the alleged misrepresentation is a misstatement of fact or an omission, and whether it's in a financial outlook or financial statement.

[115] The Supreme Court of Canada and the Court of Appeal for Ontario have been clear about the legal test for a material fact in the context of securities disclosure:

- materiality is a question of mixed fact and law, determined objectively, from the perspective of a reasonable investor

- an omitted fact is material if there is a substantial likelihood that its disclosure would have been viewed by the reasonable investor as having significantly altered the total mix of information made available

- the proof required is whether there was a substantial likelihood it would have assumed actual significance in a reasonable investor's deliberations

- it's a fact-specific inquiry, to be determined on a case-by-case basis given all the relevant considerations and from the surrounding circumstances forming the total mix of information made available to investors

- the materiality of a fact, statement, or omission must be proven through evidence by the party alleging materiality, except in those cases where common sense inferences are sufficient

- the court must start with the disclosed information and the omitted information—it may also consider contextual evidence which helps to explain, interpret, or place the omitted information in a broader factual setting and evidence of concurrent or subsequent conduct or events that would shed light on potential or actual behaviour of persons in the same or similar situations is relevant to the materiality assessment

- the focus must be on a contextual consideration of what information was disclosed, and what facts or information were omitted from the disclosure documents provided by the issuer

See *Sharbern Holding Inc. v Vancouver Airport Centre Ltd.*, 2011 SCC 23, at para 61. Though *Sharbern* is a material change case, these propositions have been applied in restatement cases. See *Pretium Resources*, at paras 73-76; *Hexo Corp.* (QCCA).

[116] The impact on the market "lies at the heart" of whether a fact or omission is material. Whether a misrepresentation is material is not "a matter of semantics". Instead, it requires: (a) insight into how a specific correction would be understood in an efficient market; and (b) a statistical analysis of the effect of the correction. See *Cronos Group*, at paras 53-54, 66 (Ont CA); *Terry Longair Professional Corporation v Akumin Inc.*, 2025 ONCA 606, at paras 48-55.

[117] The market impact can be objectively determined by how the stock price moves after the alleged misstatement. The market's reaction, which reflects "economically rational investor behaviour", shows what a reasonable investor might think. See *Gowanlock v Auxly Cannabis Group Inc.*, 2021 ONSC 4205, at para 39.

[118] On the other hand, inaccuracies might not be "material" under the *Securities Act* because they had a minimal impact on the stock's value. See *Cronos Group*, at paras 53-54 (Ont CA). For example, in *Cappelli v Nobilis Health Corp.*, 2019 ONSC 2266, Perell J found that the defendant's misstatement wasn't material because market analysts treated the public correction favourably or as a non-event, and the stock's price rose the next day.

[119] At bottom, did the market understand the company's corrective statement to require a correction to the stock price? See *Gowanlock v Auxly Cannabis Group Inc.*, 2021 ONSC 4205, at para 39. Even though I have found that Kamrani-Ghadjar is unlikely to prove that the financial outlook was an untrue statement of fact, I consider its materiality first given the chronology.

a. Financial Outlook

[120] Kamrani-Ghadjar argues that the financial outlook generally, and the expected revenues and AEBITDA specifically, are material misstatements. He has five arguments. First, financial outlooks that include expected revenues are prima facie material. The OSC considers "most financial outlooks", such as expected revenue, to be "material forward-looking information." See OSC, *Companion Policy 51-102CP*, 4A3. In *Celestica*, Perell J held that "forward-looking statements are an important type of information to purchasers and sellers of corporate equity and debt instruments" (at para 133).

[121] Second, Kamrani-Ghadjar argues that Anaergia treated the financial outlook as material. It included cautionary language in the guidance. OSC National Instrument 51-102 requires issuers to include cautionary language when disclosing material forward-looking information. It mentioned the guidance in its quarterly MD&As, press releases, and earnings calls.

[122] Third, he submits that Anaergia described EBITDA and AEBITDA as "useful" measures for "assessing performance and highlighting trends on an overall basis." Anaergia believed that EBITDA and AEBITDA were "frequently used by securities analysts and investors". Between the IPO and the November 2022 correction, Anaergia had decreased its 2022 expected revenues by over 50 percent.

[123] Fourth, Kamrani-Ghadjar claims that investors treated the financial outlook as material. For example, TD Securities, in November 2022, stated that Anaergia's November 2022 disclosure "forced [it] to re-evaluate [its] investment thesis for Anaergia." On an earnings call in November 2022, a TD Securities analyst suggested that Anaergia knew "a lot of the rationalizations that [it] used to reduce service and guidance" when it reported its 2022Q2 guidance. BMO Capital Markets decreased its target price for Anaergia's stock after the March 2022 and November 2022 corrections. Kamrani-Ghadjar also points to an analyst's report from July 2021, where Barclays observes that a CI score of -150 has "material upside potential".

[124] Finally, Kamrani-Ghadjar points to Mr. Belin's opinion that Anaergia's stock had "abnormal one-day returns" following the March 2022 and November 2022 corrections. Mr. Belin concludes that these abnormal returns (-21.5 percent and -40 percent respectively, when expected returns were 0.5 percent and 9.2 percent) were statistically significant. Mr. Patton found that the price drop in March 2022 wasn't statistically significant using a cumulative two-day event study. But he did agree that the November 2022 drop was.

[125] The defendants make three inter-related arguments in response. First, they argue that the March 2022 revised guidance wasn't a public correction because it didn't correct any of the impugned assumptions.

[126] Public corrections of an alleged misrepresentation are a "necessary time-post" for a statutory misrepresentation action and calculating damages. The motion judge must determine whether an alleged public correction is "reasonably capable of being understood in the secondary market as correcting what was misleading in the impugned statement". See *Akumin*, at para 50.

[127] I don't accept this argument from the defendants. I find that the revised guidance in March 2022 and November 2022 were public correction dates. I acknowledge that Anaergia didn't specifically correct the assumptions underlying its guidance in March 2022. But it did correct the financial outlook, which might have suggested to the market that Anaergia's assumptions weren't reasonable at the time of the IPO prospectus. And its November 2022 guidance was based on different assumptions, at least one of which was directly contradictory to an earlier assumption.

[128] Second, the defendants submit that the assumptions were corrected long before March 2022:

2021Q2

- in August 2021, Anaergia announced, "slower than previously anticipated escalation in the volumes of organic waste being shipped" to Rialto, which "temporarily [delayed] the expected financial contribution from this facility"

- it also advised investors, through its quarterly MD&A, that it was "seeing slower than previously anticipated escalation in the volumes of organic waste being shipped" to Rialto, and it expected Rialto's operations "to fully ramp up sometime in Fiscal 2022"

- Anaergia expected that the "increasing number of project opportunities in Europe will compensate" for any slow-down in California—for this reason, Anaergia maintained its guidance from the IPO prospectus, and didn't expect "any material changes to the revenue and EBITDA target"

- on the earnings call, Dr. Scherson repeated that capital sales growth came from "capital projects being sold in Italy to our projects"

2021Q3

- in its November 2021 MD&A, Anaergia advised that Rialto's "revenue ramp-up" will be slow, and it won't be at capacity until "sometime toward the end of 2022"

- in both the MD&A and earnings call that month, Anaergia said that as more BOO facilities become operational, "the revenue composition will shift towards the recurring BOO revenue"

- also, increased revenues from "Capital Sales project revenue in the U.S." has been offset with "production and revenue generation from our BOO projects in North America."

- on the earnings call, an analyst asked if feedstock issues implied that Rialto wouldn't get its CI score until early 2023—Dr. Scherson responded that Anaergia could get its CI score sooner, but it needs to be at capacity for "applications to go through"

[129] Then, in March 2022, Anaergia revised some of its financial guidance downwards. That said, Anaergia continued "to believe that the assumptions regarding" its 2022 and 2023 guidance from the IPO prospectus were "reasonable in the current circumstances", with some exceptions. The exceptions don't say anything about

expected annual growth. They also don't say anything about Rialto's CI score, though Anaergia did now state that Rialto would be capacity by 2023Q1.

[130] In 2021Q3, Anaergia acquired a Danish subsidiary that would build, own, and operate a new facility in Tønder. Through 2021, Anaergia assumed that Tønder's revenues would make up most of Rialto's shortfall. But, in March 2022, it didn't expect that assumption any longer because of "global supply chain limitations". On the earnings call that quarter, Benedek repeated the slow-down in revenue growth: "the slowness of the ramp up in Rialto and also somewhat slower supply line related issues."

[131] Finally, the defendants argue that the share price didn't drop after the March 2022 press release using a two-day event study. Mr. Patton opines that the "market and industry-adjusted cumulative movement in Anaergia's price over those two days was not statistically significant at the standard 5-percent level." Anaergia's shares closed at $14.68 on Friday, March 25, 2022. They dropped to $11.90 on March 28th, the next trading day, and rose to $13.24 on March 29th. Mr. Patton agreed with Mr. Belin that the drop on March 28th was statistically significant, but the cumulative return over two days was not.

[132] Taking all this together, the defendants argue that Anaergia maintained its guidance for revenues and AEBITDA because it had other sources of revenue that offset any slow-down at Rialto. It repeatedly told investors about the slow-down and, eventually, restated its guidance once it became clear that those other sources were

taking longer than expected to generate anticipated revenue. It submits that though it updated its financial outlook, two assumptions remained the same: expected annual growth, albeit based on different revenue sources, and an anticipated CI score of -50 at Rialto. It did change the assumption about Rialto's Run-Rate EBITDA. And, according to the defendants, the market responded accordingly: despite an initial drop on the first day after the revised guidance, the share price bounced back.

[133] Kamrani-Ghadjar replies that Mr. Patton is engaged in some creative math by doing two things: (a) using a two-day event study instead of just one day; and (b) assuming Anaergia's shares would drop 0.41 percent every day, independent of market factors. Kamrani-Ghadjar argues that these two "departures from standard practice" allowed Mr. Patton to conclude that the cumulative stock price decrease only reached a 94 percent significance level, meaning that it's not statistically significant.

[134] At this stage, I can't find that Mr. Patton's methodology or assumptions mean that there's no reasonable possibility that his opinion won't be accepted by the trial judge. Mr. Patton wasn't cross-examined on his assumption, so the impact of this argument on his credibility is diminished. There's no dispute that 95 percent is a common significance level. The fact that the two-day price drop doesn't reach this threshold doesn't necessarily mean that Mr. Patton is fudging the numbers. That's an issue for trial. It's not for me, at this gatekeeping stage, to decide on the reasonableness of a one-day event or a two-day event study.

[135] At bottom, I agree with the defendants on this issue. Both parties' experts agree that the share price slumped the day after Anaergia revised its guidance in March 2022. But even accepting a statistically-significant share price drop on the first trading day after the revised financial outlook, Kamrani-Ghadjar is unlikely to be able to prove that this price drop is related to the alleged unreasonable assumptions about Anaergia's expected annual growth, Rialto's operations, or the CI score. Anaergia did release new guidance that showed a marked decrease in expected revenues and AEBITDA. But this revised guidance was based on new developments since June 2021, and new assumptions.

[136] Put another way: the stock price didn't drop on March 28th because Anaergia's assumptions about its expected growth rate, EBITDA, or CI score were wrong—these assumptions proved to be incorrect because of new facts.

b. Financial Misstatements

[137] Kamrani-Ghadjar has four arguments why he has a reasonable possibility of success in proving that Anaergia's financial misstatements are material.

[138] First, Mr. Thornton opines that the financial misstatements distorted Anaergia's stated revenues, profits, losses, and AEBITDA, which he says are "virtually every metric investors and analysts use" to value a company's shares. These figures were found in Anaergia's quarterly and annual financial statements, MD&As, annual information forms, press releases, and earnings calls from before the IPO. His

conclusion: "these distortions would significantly increase the prices investors would be willing to pay for [Anaergia's] shares." Kamrani-Ghadjar argues that I can reach the same conclusion from both the period of disclosure and the size of the misrepresentation. He relies on *Cronos Group*, where the misrepresentation was only for two quarters, unlike seven quarters here.

[139] Second, he argues that analysts and investors relied on these metrics to assess Anaergia's financial health. For example, in a July 2021 analyst's report, Barclays seems to base its price target for Anaergia's stock on these metrics.

[140] Third, Anaergia allegedly described the misrepresentations as material. For example, in its December 2021 MD&A, Anaergia concluded that there were "no remaining material inaccuracies or omissions of material fact". Kamrani-Ghadjar argues that this statement is an admission that the misstatements disclosed in August 2022 were "material" inaccuracies. The defendants respond that materiality from an accounting perspective is different from materiality under the *Securities Act*. Kamrani-Ghadjar replies that this can't be so—otherwise, Anaergia wouldn't have told investors that its previous disclosure couldn't be relied on.

[141] Finally, Mr. Patton and Mr. Belin opined that Anaergia's stock price had a statistically significant decline after the August 3rd announcement. Mr. Belin concludes that Anaergia's stock price lost 14.6 percent of its value, when the estimated expected

return was 0.2 percent. Mr. Patton agreed—he opined that the stock price declined 14.18 percent. Both experts agree that this decline is statistically significant.

[142] The defendants respond that Kamrani-Ghadjar is using the wrong public correction date. The defendants argue that the court should examine the materiality of Anaergia's restated financial statements from August 15th, rather than Anaergia's press release from August 3rd. And, if the court does that, the correction wasn't material. They make four points.

[143] First, the defendants submit that the August 3rd press release was tentative. KPMG told Anaergia only the day before that the previously audited statements may be incorrect. The press release only discussed the 2021 financial statements. It used cautionary language (e.g., the statements "may be incorrect").

[144] Second, analysts didn't think the press release was material. For example, on August 3rd, the headline of Scotiabank's report was: "Profitable Growth Thesis Intact as Revenue Recognition Issue May Prompt Restated Financials". TD Securities, that same day, concluded that the accounting issue would be applied only on a "go forward" basis and had "absolutely no impact on the company's operations, cash position, or future cash flows." But it's unclear how these analysts came to these conclusions.

[145] Third, in contrast, after the release of its restatements on August 15th, analysts didn't change their assessment of Anaergia's stock price. For example, NBC, BMO Capital

Markets, ROTH Capital Partners, and TD Securities all maintained their previous stock ratings.

[146] Finally, Mr. Patton's opinion is that Anaergia's share price didn't significantly move after the company announced, on August 12th, that it would be releasing restated financial statements on August 15th, and climbed the day after the restatement. The restatement on August 15th affirmed the August 3rd press release and provided the market with "complete information" about the effect of the intersegment transactions.

[147] Kamrani-Ghadjar replies that Mr. Patton's methodology is, again, flawed. He alleges that Mr. Patton "spliced" together event studies to rebut the fact that Anaergia's share price had a material drop on August 3rd. Kamrani-Ghadjar also argues that there were several events after the market closed on August 15th that impacted the stock price.

[148] On this issue, I agree with Kamrani-Ghadjar. Despite the use of some cautionary language in the August 3rd press release, the disclosure in it mirrors what the company eventually told the market on August 15th. The market responded negatively to the press release, and there's no evidence of other constating factors that would've impacted the share price that day. Scotiabank and TD Securities didn't think the press release was a big deal but, even then, investors did, as shown by the unusual drop in the share's price. Moreover, it's not clear to me that Scotiabank and TD Securities

weren't just parroting Anaergia's press release—there's no evidence of any independent analysis. As a result, I find that Kamrani-Ghadjar has a reasonable possibility of proving that the August 3rd press release was a public correction and thus that the financial misstatements were material.

C. Intersegment Sales

[149] Kamrani-Ghadjar says that Anaergia's omission of intersegment sales from the IPO prospectus is prima facie material. First, 40 percent of Anaergia's revenues and 52 percent of AEBITDA in 2022 was expected to come from the BOO division. And most of BOO division's contribution to AEBITDA ($29 million) was supposed to come from Rialto.

[150] Second, he argues that Anaergia described the Capital Sales segment as providing Anaergia with a "technology focused asset-light model that generates cash", which the company could use elsewhere. But, in fact, a lot of this division's sales weren't recurring or generating cash because they were intersegment sales. The defendants respond that the IPO prospectus made clear that only the Services and BOO divisions generated recurring revenues.

[151] I agree with Kamrani-Ghadjar, largely for the same reasons that I find that the financial misstatements were material: there was a market impact from the public correction that disclosed these sales in August 2022. As a result, I find that Kamrani-

Ghadjar has a reasonable possibility of proving that the omission of intersegment sales from the IPO prospectus was material.

4. Conclusion

[152] In sum, I find that Kamrani-Ghadjar has proven that he has a realistic chance of proving that Anaergia's failure to disclose that some of its revenues came from intersegment sales was an omission to state a fact. Further, he also has a realistic chance of proving that this omission and the conceded financial misstatements are material. It follows that he has a realistic chance of proving that the certifications provided by Benedek and El-Kaissi were also material misrepresentations.

[153] That said, I don't find that there was a misstatement in Anaergia's financial outlook, either in its prospectuses or subsequent disclosure. Anaergia's assumptions were reasonable at the time it gave them. Even if the assumptions were unreasonable, Kamrani-Ghadjar hasn't shown that he has a realistic chance of success in proving that the facts were material.

B. Issue #2: should this action be certified as a class proceeding?

[154] The parties agreed that if I granted leave to Kamrani-Ghadjar to start a secondary market disclosure action, then the action should be certified as a class proceeding. The only dispute is about the class definition.

[155] That said, the parties didn't make alternative submissions on all the possible outcomes of the leave motion. Given my decision to grant leave to some but not all of Kamrani-Ghadjar's claims, the parties' positions on certification may now differ. The parties may request a case conference in the context of settling the order if that is the case.

1. Cause of action

[156] The defendants don't dispute that the pleadings disclose a cause of action.

2. Identifiable class

[157] The court shall certify a class proceeding if there's an identifiable class of two or more persons that would be represented by the representative plaintiff. The plaintiff must define the class with precision and in a way that is neither over-inclusive nor under-inclusive. See *Hollick v Toronto (City)*, 2001 SCC 68, at para 21. The purposes of the class definition are:

(a) to identify persons who have a potential claim against the defendants;

(b) to define the parameters of the lawsuit to include persons who should be bound by the result; and

(c) to describe who is entitled to notice of certification.

See *Amyotrophic Lateral Sclerosis Society of Essex v Windsor (City)*, 2015 ONCA 572, at para 35.

[158] Kamrani-Ghadjar proposes the following subclass definitions:

> **IPO Subclass**
>
> all persons, other than Excluded Persons, wherever they may reside or be domiciled, who acquired Anaergia's securities during the period of distribution relating to the IPO.
>
> **Second Distribution Subclass**
>
> all persons, other than Excluded Persons, wherever they may reside or be domiciled, who acquired Anaergia's securities during the period of distribution relating to the Second Distribution.
>
> **Secondary Market Subclass**
>
> all persons, other than the IPO Subclass, the Second Distribution Subclass, and Excluded Persons, wherever they may reside or be domiciled, who acquired Anaergia's securities during the Class Period and who held some or all of those securities at the close of trading on either March 25, 2022, August 2, 2022, or November 9, 2022.

[159] The defendants argue that the IPO Subclass and Second Distribution Subclass definitions should be changed. They submit that these two subclasses should be limited to persons: (a) who acquired Anaergia's securities "from a Canadian underwriter"; and (b) "who held some or all of those securities at the close of trading on either March 25, 2022, August 2, 2022, or November 9, 2022".

i. Canadian underwriter

[160] The defendants make two arguments. First, they argue that it's "inappropriate" to include non-Canadian underwriters. They submit that Part XXIII of the *Securities Act* provides for liability only where the purchaser bought the security from a Canadian underwriter. Though Part XXIII doesn't expressly limit liability to purchases from

Canadian underwriters, Strathy J, in *McKenna v Gammon Gold*, 2010 ONSC 1591, said it was inappropriate to include persons who bought securities from non-Canadian underwriters: the purchase of securities outside Canada wouldn't "give rise to a reasonable expectation that the acquiror's rights would be determined by a court in Canada" (at para 116). Strathy J repeated this proposition in *Green v Canadian Imperial Bank of Commerce*, 2012 ONSC 3637, at para 588.

[161] Perell J, in *Yip v HSBC Holding plc*, 2017 ONSC 5332, at para 271, said something similar: "The place of trading qualification for actions for misrepresentations in a prospectus reflects the prevailing international standard that securities litigation should take place in the forum where the securities transaction took place."

[162] Second, the defendants submit that there's no basis in fact that the securities were sold in the U.S. The IPO prospectus states: "The Offered Shares…subject to certain exceptions, may not be offered or sold in the United States."

[163] I disagree with the defendants. The *Securities Act* doesn't expressly limit claims to Canadian underwriters. I don't read *Gammon Gold*, *Green*, or *Yip* as interpreting Part XXIII to limit liability only to Canadian purchases. The issue in *Gammon Gold* was whether the court has jurisdiction over a global class (i.e., investors anywhere in the world). Strathy J's point is made in his overall discussion about whether the court should exercise jurisdiction over non-Canadian, absent class members who bought securities from foreign underwriters. He concluded that non-residents that bought

the securities through a Canadian underwriter should be included in the class (para 115). His conclusion at para 116 was really about non-residents who bought the securities from a non-Canadian underwriter. In *Green*, Strathy J cited *Gammon Gold*. But, in that case, there was no issue about foreign underwriters. In *Yip*, the issue was whether the court had jurisdiction over a foreign company whose shares didn't trade in Canada. Perell J's statement must be read in that context.

[164] Here, the defendants didn't challenge certification of a global class. So, non-Canadians are, on their definition, included. Without any binding authority, I don't see why a global class should exclude purchasers who bought from non-Canadian underwriters.

[165] Further, if I accept the defendants' change, there will be orphaned class members. The prospectus states that "Underwriters may offer the Subordinate Voting Shares outside of Canada." The language cited by the defendants is "subject to certain exceptions". The defendants' limitation would exclude Canadian purchasers who bought, on an exceptional basis, from foreign underwriters and anybody who bought from Anaergia itself.

ii. Correction dates

[166] The defendants argue that there's no basis in fact that "early sellers" have a cause of action. In other words, if an IPO Subclass member bought shares on the primary

market but sold them before the corrections, they didn't suffer a loss due to the misrepresentation.

[167] In *Gammon Gold*, Strathy J accepted this general proposition but nonetheless included early sellers in that case. A class may include persons who may not ultimately have a claim against the defendant. The class definition determines who is bound by the decision. It doesn't determine who's entitled to relief. See *Gammon Gold*, at paras 4-7.

[168] Candidly, this issue wasn't fully briefed by the parties. It was an add-on argument on the last day of the hearing. Without a fuller briefing, I'm not prepared, at this early stage, to inadvertently exclude early sellers. If necessary, the defendants can move to amend the order certifying this action as a class proceeding. See *CPA*, s 8(3).

3. Common issues

[169] The defendants don't dispute that the claims or defences of the class members raise common issues:

(a) Did the IPO prospectus, the second prospectus, or the continuous disclosure material contain misrepresentations under the *Securities Act*, the *Securities Act*, RSA 2000, c S-4, the *Securities Act*, RSBC 1996, c 418, *The Securities Act*, CCSM c S50, the *Securities Act*, SNB 2004, c S- 5.5, the *Securities Act*, RSNL 1990, c S-13, the *Securities Act*, SNWT 2008, c 10, the *Securities Act*, RSNS 1989, c 418, the *Securities Act*, SNu 2008, c 12, the *Securities Act*, RSPEI 1988, c S-3.1, the *Securities Act*, RSQ c V-1.1, *The Securities Act*, 1988, SS 1988-89, c S-42.2, and

the *Securities Act*, SY 2007, c 16? If so, who made these representations, when, and how?

(b) Are any of the defendants liable for damages payable to class members under the *Securities Act*, s 130, and comparable legislation? If so, for which defendants?

(c) Are any of the defendants liable for damages payable to class members under the *Securities Act*, s 138.3, and comparable legislation? If so, for which defendants?

(d) What is the method of calculating the damages payable to the class members under the *Securities Act*, Part XXXIII, and the comparable legislation?

(e) What is the method of calculating the damages payable to the class members under the *Securities Act*, Part XXXIII.1, and the comparable legislation?

4. Preferable procedure

[170] The defendants don't dispute that a class proceeding would be the preferable procedure for resolving the common issues.

5. Representative plaintiff

[171] The defendants don't dispute that Kamrani-Ghadjar would fairly and adequately represent the interests of the class, he has no conflict with the interests of other class members, and he's produced a workable plan for the proceeding.

[172] The only contentious issue is that paragraph 20(c) of the plan would require Anaergia to post the notice of certification in a "prominent location on its website." The defendants say that there's no need for that. I don't see any reason why Anaergia should hide from the fact that a class action has been certified against it. It's only a procedural step and says nothing about the merits. Given that there's an "Investor Relations" page on Anaergia's website that provides information to shareholders, the notice can be posted there.

6. Conclusion

[173] For the reasons discussed above, I endorse an order that this action is certified as a class proceeding against Anaergia, Benedek, and El-Kaissi. The class is defined as stated in paragraph 158 above. Kamrani-Ghadjar is appointed as the representative plaintiff on behalf of the class. SMK Law PC are appointed as Class Counsel. The certified common issues are as stated in paragraph 169 above.

C. Issue #3: is the primary market claim limitations-barred?

1. Overview

[174] The defendants argue that Kamrani-Ghadjar's claims on behalf of the IPO Subclass and the Second Distribution Subclass are time-barred under the *Securities Act*, s 138. Kamrani-Ghadjar responds that the limitations issue depends on a factual inquiry, so it should be resolved after the common issues trial. The defendants reply that they aren't seeking a class-wide order. Instead, they only want judgment on Kamrani-

Ghadjar's claim on the basis that he should've started his claim within 180 days of when he ought to have know the material facts for his misrepresentation claim, which was August 16, 2022.

[175] Kamrani-Ghadjar counters that: (a) the limitations period at issue turns on actual knowledge not diligence; and (b) he didn't know or couldn't have known about Anaergia's misrepresentations until November 2022.

2. Issue #3(i): can the defendants' limitation defence be decided now?

[176] No action for damages shall be commenced to enforce a right created by the *Securities Act*, Part XXII, more than: (a) 180 days after the plaintiff first had knowledge of the facts giving rise to the cause of action; or (b) three years after the date of the transaction that gave rise to the cause of action. See *Securities Act*, s 138(b).

[177] Both parties rely on Strathy J's decision in *Gammon Gold*, at paras 37-38:

- a class action can be dismissed, even before certification, where the claim of the proposed representative plaintiff is time-barred on the face of the pleading (citing *Stone v Wellington County Board of Education* (1999), 120 OAC 296 (CA))

- where the resolution of the limitations issue depends on a factual inquiry, such as when a plaintiff knew or ought to have known of the facts constituting the action, the issue should not be resolved at certification (citing *Serhan (Trustee of) v Johnson & Johnson* (2006), 85 OR (3d) 665 (Div Ct))

[178] The defendants argue that, on Kamrani-Ghadjar's own pleading, the material facts to support a claim for misrepresentation (i.e., a material misstatement or omission of fact) ought to have been known by August 16, 2022, when Anaergia released its financial restatements. Thus, Kamrani-Ghadjar's claim should have been started by February 2023, and it's out of time because he started it in March 2023.

[179] Kamrani-Ghadjar responds that the defendants are moving for a class-wide dismissal, which is inappropriate at this stage. The limitations issue here depends on a factual inquiry: when did class members know about the alleged misrepresentations? As a result, the issue should not be resolved at certification. He also points to the Court of Appeal's decision in *Fresco v Canadian Imperial Bank of Commerce*, 2012 ONCA 444, as binding authority that limitations can't be decided on a class-wide basis through summary judgment.

[180] The defendants reply that they're only seeking to dismiss Kamrani-Ghadjar's claim on behalf of the IPO and Second Distribution subclasses. That said, they acknowledge that my ruling may end up discouraging any fresh claims for prospectus misrepresentation.

[181] To unpack these arguments, each of these cases must be read in their context. In *Stone*, the defendants delivered a statement of defence and moved, before certification, to dismiss the plaintiff's environmental class action. The certification judge dismissed the action but without prejudice to another member of the class. The

Court of Appeal, at paragraphs 10-11, saw no problem with defendants bringing dispositive motions before certification: if a representative plaintiff has no claim because of the expiry of a limitation period, they can't be a member of the class.

[182] In *Serhan*, the defendants raised the issue that class members outside Ontario may be subject to different limitation periods. The defendants hadn't filed a defence or moved for summary judgment. This issue was raised, for the first time, on appeal. It's unclear whether the defendants were seeking judgment dismissing the non-Ontario claims. The Divisional Court held that it was premature to decide this issue only based on the statement of claim. Instead, it should be decided on a factual record.

[183] In *Gammon Gold*, Strathy J declined to grant the defendant underwriters' request to move for summary judgment at the same time as the plaintiff's certification motion (2009 CanLII 66994 (Ont Sup Ct)). In addition to the risk of inefficiency and delay, the defendants hadn't delivered a statement of defence, and summary judgment wouldn't completely dispose of the action (at paras 19-22). At the certification motion, the defendants appear to have renewed their limitations defence, now under the *CPA*, s 5(1)(a). Strathy J held that it wasn't "plain and obvious" that either the plaintiff's or class's claims were time-barred. He left open the option of adding limitations as a common issue or the defendants moving for summary judgment before the common issues trial.

[184] *Fresco* is more complex. The certification judge refused to certify the proceeding as a class action (2009 CanLII 31177 (Ont Sup Ct)). The Court of Appeal overturned that decision. It didn't certify a common issue about applicable statutory limitation periods (which would've reduced the 16-year class period to 6 years). Winkler CJO held that the limitations issue was an individual issue that should be resolved after the common issues trial (at para 108).

[185] There was no common issues trial. Instead, both parties moved for summary judgment on the common issues. Notwithstanding Winkler CJO's direction, CIBC argued that its evidence supported a time-bar that would narrow the certified claims. At paragraphs 12 to 18 of the limitations decision (2020 ONSC 6098), Belobaba J summarized the caselaw governing the timing of limitations defences in class actions. On one hand, "deciding whether a claimant is time-barred by a statutory limitation period typically requires an individualized assessment" (at para 12). On the other hand, it's possible "where there is clear evidence of class-wide commonality (in class members' personal circumstances) that a class-wide limitations order can be made" (at para 18).

[186] Ultimately, Belobaba J concluded that even though class members had information about a loss caused by CIBC, the court needed individual evidence about whether taking legal action was appropriate (Ont Sup Ct at para 52). The Court of Appeal agreed (at paras 101, 103, and 105).

[187] In sum, these decisions, taken together, stand for the propositions that:

- before or after an action is certified as a class proceeding, the defendant can, on delivering a defence and a motion for summary judgment, move to dismiss the representative plaintiff's claim

- like with summary judgments in other types of actions, the plaintiff's claim will be dismissed if the defendant proves that there's no issue requiring a trial with respect to the limitation period (see, e.g., *AssessNet Inc. v Taylor Leibow Inc.*, 2023 ONCA 577, at paras 34-36)

- in doing so, the court should consider whether the dismissal is without prejudice to another class member seeking to be appointed as the representative plaintiff (see *e.g.*, *CPA*, s 10(1))

- after an action is certified as a class proceeding, the defendant can move for class-wide summary judgment—if the analysis requires individual evidence, it's an individual issue that should be resolved after the common issues trial

[188] The disposition of this issue matters because it dovetails with whether the discoverability principle applies. I turn to that issue next.

3. Issue #3(ii): does the *Securities Act* oust the discoverability principle?

[189] There's no Ontario caselaw discussing whether the *Securities Act*, s 138(b)(i), should be interpreted through the lens of the discoverability rule.[2] The parties disagree on this issue.

[190] The defendants submit that the discoverability principle applies to this limitation period. They rely on *Roberts v E. Sands & Associates Inc.*, 2014 BCCA 122, which relates to a substantively identical section of the B.C. *Securities Act*. The B.C. Court of Appeal held that the discoverability principle applied to the B.C. *Securities Act*, s 140(b). See *Roberts*, at para 34.

[191] Under the discoverability rule, "a cause of action arises for purposes of a limitation period when the material facts on which it is based have been discovered or ought to have been discovered by the plaintiff by the exercise of reasonable diligence". See *Scott v Golden Oaks Enterprises Inc.*, 2024 SCC 32, at para 44. The reasonable diligence requirement obligates plaintiffs to acquire facts "to be fully apprised of the material facts" for their claim. See *Soper v Southcott* (1998), 39 OR (3d) 737 at 744 (CA), cited in *Roberts*, at paras 40-42. As a result, if this rule applies, plaintiffs suing for market misrepresentations will be statute-barred unless they can show that they knew or

[2] In *Gilani v BMO Investments Inc.*, 2021 ONSC 3589, Justice Glustein held that it was unclear whether discoverability applied to section 138(b)(ii) (the three-year limitation period). None of the cases he cited discuss s 138(b)(i).

ought to have known about the misrepresentation less than 180 days before they started a claim.

[192] Kamrani-Ghadjar responds that the general discoverability rule is limited or ousted "by clear legislative language" of the statute. Assessing whether a provincial legislature has codified, limited, or ousted the common-law rule is a matter of statutory interpretation. See *Pioneer Corp. v Godfrey*, 2019 SCC 42, at para 42.

[193] On that basis, Kamrani-Ghadjar argues that reasonable diligence isn't required if the words of the *Securities Act* are read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the statute, the object of the statute, and the intention of the legislature. See *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27, at para 21.

[194] First, he points to the words of the statute. The limitation period is triggered only by the "knowledge of the facts" (or, in French, "connaissance des faits"). It says nothing about reasonable diligence or "ought to have known".

[195] Second, the context of the statute strikes a balance between encouraging timely claims and a "guarantee of repose". The limitation period is triggered by the earlier of 180 days after discovering the material facts, or three years from the transaction.

[196] Third, Kamrani-Ghadjar argues that the legislature expressly didn't include the words "ought to have known" in section 138(b)(i), even though this concept is found in several other sections of the *Securities Act* (e.g., ss 126.1(1), 126.2(1), and 134(1)(b)).

Where express reference is expected, the court can infer that the failure to mention something is the result of a deliberate decision to exclude it. See *R v Wolfe*, 2024 SCC 34, at para 35.

[197] Finally, he relies on *Coulson v Citigroup Global Markets Canada Inc.*, 2012 ONCA 108, as binding. In that case, at para 13, the Court of Appeal described the test under section 138: the limitation period imposed by *Act* on a plaintiff's section 130 claim "began to run with his knowledge of the misrepresentations…." The Alberta Court of Appeal, in *Abt Estate v Cold Lake Industrial Park GP Ltd.*, 2019 ABCA 16, at para 66, interpreted "knowledge of the facts" in a similar provision of the Alberta *Securities Act* to mean "knowledge that the misrepresentations had been made".

[198] I'm persuaded by Kamrani-Ghadjar's arguments. Though *Roberts* suggests otherwise, it's not clear to me from either the motion judge's decision or the Court of Appeal's decision in that case that those courts were called on to interpret the statute in this way.

[199] Moreover, the plaintiff's interpretation aligns with the courts' basis for a misrepresentation claim. As discussed above, an actionable misstatement or omission must be material, which is often determined in securities actions through event studies done by experts (as here). It's inconsistent with this definition for the limitation period to require investors to retain a lawyer to investigate the share price's materiality, which would necessarily require the plaintiff to hire an expert, all within

six months of financial restatements or updated guidance. In *Soper*, the Court of Appeal held that reasonable diligence in a medical negligence case may require a plaintiff to request and receive a medical opinion. But the limitation period for negligence claims is two years. The plain words of the statute, which don't include a due diligence requirement, reflect the legislature's acknowledgment that securities misrepresentation claims require complex evidence, which may take time to gather. That said, the legislature has given issuers the certainty of repose by invoking a short ultimate limitation period of three years.

[200] In sum, the common law discoverability principle has been ousted by the clear legislative language of the *Securities Act*, section 138(b)(i). As a result, the limitation period starts to run when the plaintiff has actual knowledge of the alleged misrepresentation.

[201] The result of this analysis is that, at this stage, I can only consider when Kamrani-Ghadjar had actual knowledge of the misrepresentation to start the limitation period. Whether other class members had actual knowledge is necessarily an individual issue and should be decided after the common issues trial.

4. Issue #3(iii): should the primary market claims be dismissed based on Kamrani-Ghadjar's knowledge?

[202] There's no dispute that, on the merits, Kamrani-Ghadjar didn't know about any misrepresentations until November 10, 2022, after participating in an earnings call. He learned about the alleged accounting irregularities in January 2023. He never read

any analysts' reports or Anaergia's disclosure on SEDAR. As a result, the defendants have failed to prove that there's no genuine issue requiring a trial whether Kamrani-Ghadjar had knowledge of the facts giving rise to the cause of action before September 28, 2022 (i.e., 180 days before the start of his claim). As a result, the defendants' motion for summary judgment is dismissed.

[203] Kamrani-Ghadjar makes two other points, which I deal with for completeness. First, he argues that he bought more shares on August 16, 2022, though this fact cuts both ways. On one hand, there's an inference that he knew nothing about Anaergia's misrepresentations, or else he wouldn't have invested further in the company. On the other hand, there's an inference that the company's misrepresentations presented a buying opportunity, which should've clued him into the fact that something was amiss.

[204] In addition, Kamrani-Ghadjar submits that primary market claims don't require a public correction date. If a primary market investor bought shares in the IPO and then sold them before August 16, 2022, they would still be entitled to damages under the *Securities Act*, s 130(1). This argument isn't persuasive. The plaintiff could acquire knowledge after the sale that there was a misrepresentation, and then have 180 days to sue the issuer (provided it was less than three years after the IPO).

[205] Kamrani-Ghadjar asks me in oral submissions to make a "boomerang order" granting a declaration that Kamrani-Ghadjar's action was not time-barred by the *Securities Act*,

s 138(b)(ii). There's no cross-motion. This relief wasn't sought in Kamrani-Ghadjar's factum. The defendants didn't agree to this disposition if I dismissed their motion. I don't think it's appropriate for me to make that order now. See *Saxberg v Seargeant Picard Inc.*, 2024 ONCA 931, at para 40.

5. Issue #3(iv): if I am wrong about the discoverability principle, should summary judgment be granted?

[206] If I'm wrong, and the *Securities Act*, s 138(b)(ii), includes the concept of diligence, I would still not grant summary judgment at this stage.

[207] The defendants have failed to show that there's no genuine issue requiring a trial that Kamrani-Ghadjar should've diligenced whether the defendants made a material misstatement in the 180 days following the August 16, 2022, restatements.

[208] Kamrani-Ghadjar couldn't have learned about the misrepresentations before November 10th. Benedek, El-Kaissi and other directors didn't correct their certifications of the misstated financial statements until then. The assumptions underlying the 2022 and 2023 guidance were revised in November 2022. Anaergia underplayed the restatements as a "technical accounting matter", which wouldn't have alerted investors, especially investors that had sold their shares, to its materiality. Another law firm investigating Anaergia in August 2022 was only looking into secondary market claims.

[209] I also wouldn't extrapolate this analysis to other class members. The *Securities Act*, s 138(b)(ii), is about the plaintiff's knowledge. It doesn't say anything about class members or claimants. To that end, whether an individual class member ought to have known that the defendants made a material misstatement or omission on August 16, 2022, is something the legislature has indicated should be determined by reference in the context of the individual class member's claim (when they effectively become plaintiffs in the case).

IV. CONCLUSION

[210] As discussed above, I find that Kamrani-Ghadjar has proven that there's a reasonable chance this action will succeed with respect to his claims about Anaergia's financial misstatements, omission of intersegment sales, and certification misstatement claims. As a result, I grant leave to the Kamrani-Ghadjar to sue the defendants for these claims. I don't believe he has the same chance of success for his financial outlook misstatement claim.

[211] Based on the defendants' concession, I certify this action as a class proceeding. I reject the defendants' submission that the subclasses should be limited.

[212] Finally, I dismiss the defendants' summary judgment motion. The *Securities Act* ousts the discoverability rule. And the defendants have failed to show that Kamrani-Ghadjar had knowledge of the facts giving rise to his claims before September 2022.

[213] If the parties have agreed on costs, they shall advise the court of their agreement by December 4, 2025. If there's no agreement, the parties shall deliver and upload their costs outlines by December 4th. I shall then set a process for fixing costs.

November 13, 2025

Agarwal J