ALBERTA SECURITIES COMMISSION

DECISION

Citation: Re Osum Oil Sands Corp., 2021 ABASC 81 **Date: 20210527**

Osum Oil Sands Corp. (Applicant)

-and-

WEF Osum Acquisition Corp., Waterous Energy Fund (Canadian) LP, Waterous Energy Fund (US) LP, Waterous Energy Fund (International) LP, WEF Osum Co-Invest I LP, WEF Osum Co-Invest II LP and WEF Osum Co-Invest III LP (Respondents)

Panel:	Tom Cotter Kari Horn
Representation:	Timothy Robson Tracy Clark Danielle Mayhew for Commission Staff Sean Smyth, QC John Osler, QC for the Applicant David Tupper Renee Reichelt for the Respondents
Submissions Completed:	January 26, 2021
Date of Oral Decision:	January 28, 2021
Date of Written Reasons:	May 27, 2021

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I. INTRODUCTION

[1] On January 26, 2021, we heard an application (the **Application**) made by Osum Oil Sands Corp. (**Osum**), seeking various orders under the *Securities Act* (Alberta) (the **Act**) in connection with an offer (the **Offer**) made for Osum common shares (**Osum Shares**) on November 4, 2020 by WEF Osum Acquisition Corp. (the **Offeror**), through an **Offeror's Circular** of the same date.

[2] On January 28, 2021, we gave an oral ruling dismissing the Application, stating that Osum had not established sufficient grounds for us to exercise our authority under s. 179 or s. 198 of the Act. These are the reasons for our ruling.

II. BACKGROUND

A. Parties

1. Osum

[3] Osum is a privately held corporation with its registered office in Calgary. It develops and operates in situ bitumen projects in Alberta. As at November 18, 2020, there were 132,646,877 issued and outstanding Osum Shares. As part of a sales process started in May 2020, Osum established a virtual data room (**VDR**) containing extensive information about the company.

2. Offeror and Connected Entities

[4] Several entities were connected to the Offeror and were also respondents to the Application.

[5] Initial interest in Osum was expressed in March 2020 by Waterous Energy Fund (Canadian) LP, Waterous Energy Fund (US) LP and Waterous Energy Fund (International) LP (collectively, **Waterous Energy Fund**).

[6] On July 31, 2020, a consortium comprised of Waterous Energy Fund, WEF Osum Co-Invest I LP, WEF Osum Co-Invest II LP and WEF Osum Co-Invest III LP (collectively, the **WEF LPs**) bought certain Osum Shares, as set out below.

[7] The Offeror was incorporated on October 29, 2020 for the purpose of making the Offer. It is wholly-owned by the WEF LPs (together, the Offeror and the WEF LPs are the **Respondents**, also referred to collectively as **Waterous**). For simplicity here, we use the term Waterous even when referring solely to the Offeror.

3. Staff

[8] Staff (**Staff**) of the Alberta Securities Commission (**ASC**) made submissions regarding the Application.

B. Term Loan

[9] On July 31, 2014, Osum's two wholly-owned subsidiaries entered into a term loan (the **Term Loan**) with a group of lenders. Osum and its subsidiaries are liable for the Term Loan, which had an outstanding amount of approximately US $131.7 million (CDN $171 million) at the time of the Application.

C. First GORR

[10] On September 29, 2017, an Osum subsidiary entered into a Non-Convertible Gross Overriding Royalty Agreement (the **First GORR**) with Franco-Nevada Corporation (**Franco-Nevada**). Under the First GORR, Osum provided Franco-Nevada with a 30-day right of first refusal (the **Franco-Nevada ROFR**) and consent "in respect of the grant of any and all royalties, or interests of a similar nature or effect, in and to any of the 'Royalty Lands'", as defined in the First GORR. Osum stated that the First GORR was disclosed to all Osum shareholders.

D. July 2020 Purchases

[11] On July 31, 2020, the WEF LPs purchased 60,035,152 Osum Shares, representing approximately 45% of the outstanding Osum Shares for $2.40 per share. According to the Offeror's Circular, the sellers were Blackstone Capital Partners (**Blackstone**), Warburg Pincus LLC (**Warburg**) and GIC Private Limited (**GIC**) (collectively, Blackstone, Warburg and GIC are the **Initial Selling Shareholders**).

[12] Following that share purchase, the WEF LPs were entitled to nominate four of the nine directors on Osum's board of directors (the **Osum Board**). Of the five other directors, four were classified as independent (the **Independent Directors**).

E. Lock-up Agreements

[13] Between October 27 and November 3, 2020, five Osum shareholders (the **Locked-up Shareholders**), with 26,045,953 (approximately 20%) of the outstanding Osum Shares, entered into lock-up agreements (the **Lock-up Agreements**) with WEF Management Corp., on behalf of the Offeror. The Locked-up Shareholders were Korea Investment Corporation, Caisse de dépôt et placement du Québec, Infra-PSP Canada Inc., certain funds and accounts managed by Goldman Sachs Group Inc., and certain funds and accounts managed by BlackRock Inc. The Locked-up Shareholders agreed to sell their shares at $2.40 per share, subject to various customary conditions.

F. Evidence

[14] Considerable evidence was tendered through affidavits, including a December 3, 2020 affidavit of Steven Spence, an officer and director of Osum (the **Spence Affidavit**), and a December 15, 2020 affidavit of Adam Waterous, an officer and director of each of the WEF LPs and a director of the Offeror (the **Waterous Affidavit**).

III. THE OFFER

A. Basic Features

[15] With Waterous holding Osum Shares and Lock-up Agreements for a total of approximately 65% of the Osum Shares, the Offeror made the Offer on November 4, 2020 to acquire up to 52.5 million additional Osum Shares for $2.40 per share. The Offer was open for acceptance until February 24, 2021. If the Offer were to succeed, Waterous would beneficially hold between approximately 73% and 85% of the Osum Shares.

[16] Osum stated that, at the time of the Application, 40,186,360 Osum Shares were held by over 800 institutional and retail shareholder accounts.

[17] Waterous entered into an arm's length agreement (the **Burgess Agreement**) with Burgess Energy Holdings, L.L.C. (**Burgess**) for the purpose of concluding an asset monetization transaction by Osum (the **Asset Monetization**): Burgess agreed to purchase, for $82 million, a non-operating royalty interest in hydrocarbons sold by Osum. The Asset Monetization was subject to approval by the Osum Board. The Burgess Agreement was originally dated May 15, 2020, with subsequent amendments and restatements, the latest being December 28, 2020.

[18] Osum stated that the acquisition of Osum Shares under the Offer would be a change of control under the Term Loan, which would require the outstanding indebtedness to be paid. Waterous planned for Osum to repay that outstanding indebtedness from the proceeds of the Asset Monetization and available cash on Osum's balance sheet.

B. Subsequent Acquisition Transaction

[19] Waterous stated that if it took up and paid for Osum Shares deposited under the Offer, it would effect a transaction to acquire the remaining Osum Shares (the **Subsequent Acquisition Transaction**).

C. Waterous's Loan

[20] Waterous arranged for a credit facility (the **Waterous Facility**), partial proceeds of which would be used to purchase Osum Shares tendered under the Offer.

[21] The Waterous Facility was for $150 million, to mature one year from the end of an initial one-year revolving period. Waterous asserted that: the Waterous Facility was secured by Osum Shares owned by the WEF LPs; no additional security or guarantees were required until Osum was wholly owned by Waterous; and payment for Osum Shares tendered under the Offer was not conditional on any further grant of security or guarantees to the lenders.

D. Conditions of Offer

[22] The Offer was subject to several conditions, including:

- a minimum tender condition, requiring that more than 50% of the issued and outstanding Osum Shares not held by Waterous must be deposited and not withdrawn;

- Waterous obtaining all third party consents, approvals and waivers (the **Third Party Consent Condition**) as it considers necessary or advisable to complete the Offer or the Subsequent Acquisition Transaction;

- Waterous exercising its sole judgment to determine that neither Osum nor any subsidiary has taken actions that would result in unrestricted cash at the time the Offer expires of less than $120 million; and

- directors nominated by Waterous (the **Waterous Directors**) must be a majority of the Osum Board before or at the time that the other Offer conditions have been satisfied or waived.

E. Effect of the Franco-Nevada ROFR

[23] According to the Waterous Affidavit, Waterous learned of the Franco-Nevada ROFR when it received the Application and accompanying Spence Affidavit. Waterous asserted that the existence of the Franco-Nevada ROFR was neither apparent in the VDR materials nor provided to Waterous's directors on the Osum Board.

[24] The Franco-Nevada ROFR entitled Franco-Nevada to notice of the Asset Monetization relating to certain lands in which Osum holds an interest, as mentioned. Franco-Nevada would then have 30 days to exercise the Franco-Nevada ROFR. After Waterous learned of the Franco-Nevada ROFR, Burgess agreed to amend the Burgess Agreement to clarify that the $82 million from the Asset Monetization would be paid to Osum once the Osum Board approved the Asset Monetization. If, however, Franco-Nevada exercised the Franco-Nevada ROFR, the proceeds of that transaction would be used to repay Burgess. In either scenario, Osum would have the funds to pay the Term Loan.

F. Special Committee

[25] The day after the Offer, Osum formed a special committee (the **Special Committee**) composed of the Independent Directors. On November 19, 2020, based on the Special Committee's recommendation, the Osum Board sent a directors' circular dated November 18, 2020 (the **Directors' Circular**) recommending that Osum shareholders reject the Offer and withdraw any Osum Shares already deposited.

IV. THE APPLICATION

A. Grounds for Application

[26] The Offer is a "take-over bid" as defined in s. 158(c) of the Act. Section 159 requires take-over bids to be made in accordance with the regulations.

[27] Osum's Application asked, under s. 179 of the Act, for orders to:

- restrain the distribution of, and cease trade, the Offer and Offeror's Circular;
- direct Waterous to comply, for any new offer and circular, with Part 14 of the Act and with Multilateral Instrument 61-101 *Protection of Minority Security Holders in Special Transactions* (**MI 61-101**); and
- grant such other relief to which Osum may be entitled.

[28] Osum relied on provisions in MI 61-101, National Instrument 62-104 *Take-Over Bids and Issuer Bids* (**NI 62-104**), and National Policy 62-203 *Take-Over Bids and Issuer Bids* (**NP 62-203**).

[29] Osum referred to s. 2.27 of NI 62-104 and s. 2.1 of NP 62-203 in arguing that Waterous's financing arrangements were inadequate at the time of the Offer, thus contravening the **Adequate Financing Requirement**. Waterous argued that it met that requirement.

[30] Because of the percentage of Osum Shares held by Waterous at the time of the Offer, Waterous was an "issuer insider" and the Offer was an "insider bid", both as defined in s. 1.1 of

MI 61-101. Therefore, the Offer had to meet the formal valuation requirement of s. 2.3 of MI 61-101 (the **Formal Valuation Requirement**), unless a s. 2.4 exemption were available. Osum argued that no exemption was available. Waterous disagreed, contending that it qualified for a s. 2.4(1)(b) exemption (the **Arm's Length Negotiation Exemption**).

[31] Osum also argued that, pursuant to s. 2.2(1)(b) of MI 61-101, Waterous should have disclosed every valuation regarding Osum from the previous 24 months (the **Prior Valuation Requirement**), but did not do so. Waterous did not believe that such disclosure was required in the circumstances.

B. Onus and Burden of Proof

[32] Osum argued that Waterous had the onus to prove that the Offer complied with all applicable securities laws. Waterous argued that, because Osum was seeking a cease trade order, there was a heavy onus on Osum to prove that such an order was available and appropriate in the circumstances (referring to *Western Wind Energy Corp. et al.*, 2013 ONSEC 25 at para. 11). Waterous acknowledged that the burden may shift to Waterous at some stage to prove that its reliance on certain exemptions was appropriate. Staff made no submissions on this point.

[33] Waterous stated that the party with the onus must prove the relevant facts on a balance of probabilities. Waterous also cited *Walton v. Alberta (Securities Commission)*, 2014 ABCA 273 at para. 26 in saying that the panel may draw inferences, only if supported by evidence and not based merely on speculation and conjecture.

[34] We are satisfied that Osum, as the applicant, has the onus of proving that the orders sought should be granted, but that Waterous has the onus on the particular issue of the availability of the exemptions it relied on when making the Offer. In reaching our conclusions, we were mindful of the *Walton* admonitions regarding speculation and conjecture.

V. ANALYSIS

A. Issue 1: Financing Arrangements

1. The Issue and the Law

[35] Waterous had to satisfy the Adequate Financing Requirement in s. 2.27 of NI 62-104:

> 2.27(1) If a take-over bid or an issuer bid provides that the consideration for the securities deposited under the bid is to be paid in cash or partly in cash, the offeror must make adequate arrangements before the bid to ensure that the required funds are available to make full payment for the securities that the offeror has offered to acquire.
>
> (2) The financing arrangements required to be made under subsection (1) may be subject to conditions if, at the time the take-over bid or the issuer bid is commenced, the offeror reasonably believes the possibility to be remote that, if the conditions of the bid are satisfied or waived, the offeror will be unable to pay for the securities deposited under the bid due to a financing condition not being satisfied.

2. Parties' Positions

(a) Osum

[36] Osum argued that Waterous did not initially meet the Adequate Financing Requirement and that changes to the Burgess Agreement were too late.

[37] Osum highlighted the general principles in s. 2.1 of NP 62-203:

> The [regime established by NI 62-104 and NP 62-203] is designed to establish a clear and predictable framework for the conduct of bids in a manner that achieves three primary objectives:
>
> - equal treatment of offeree issuer security holders,
> - provision of adequate information to offeree issuer security holders, and
> - an open and even-handed bid process.

[38] Osum also pointed to Item 12 of Form 62-104F1 *Take-Over Bid Circular* (**Form 62-104F1**), which requires an offeror to "[s]tate the source of any funds to be used for payment of deposited securities" and specifies that – for borrowed funds – the offeror must state the lender's name, the terms and financing conditions, the repayment circumstances, and the method proposed for repayment.

[39] Osum stated in the Application that Waterous would be unable to pay for its bid based on the financing arrangements in place at the time of the Offer. Osum argued that those arrangements were incomplete, inadequate and insufficiently disclosed in the Offer, and Waterous could not have reasonably believed that there was only a remote possibility of being unable to pay for securities deposited pursuant to the Offer.

(b) Waterous

[40] Waterous submitted that the financing arrangements met the Adequate Financing Requirement, as Waterous had a binding commitment for the Waterous Facility of $150 million, and Osum would have sufficient funds even if the Franco-Nevada ROFR were exercised. Waterous also argued that Osum relied on outdated case law, that the relevant date for assessing remoteness is the time of the Offer, and that Waterous had a reasonable belief at that time.

(c) Staff

[41] Staff agreed with the submissions made by Waterous regarding Osum's reliance on outdated case law. Staff stated that the key question for the panel was whether Waterous's belief at the time of the Offer was reasonable.

3. Discussion

[42] Osum argued that adequate financing was not secured before the Offer was made – in fact, not until six weeks later on December 14, 2020. The key deficiency in Waterous's original financing plan was the lack of a provision accounting for the Franco-Nevada ROFR. Waterous acknowledged that deficiency and amended the financing plan. Osum relied on that change as proving its contention that the original financing was inadequate, pointing to the different structure of Waterous's financing outlined in the Offeror's Circular (dated November 4, 2020) compared to the Waterous Affidavit (dated December 15, 2020).

[43] Osum relied on the wording "before the bid" in s. 2.27 of NI 62-104, as well as cases in which the adequacy of financing arrangements was assessed at the time of the bid, not based on later disclosure (see *Linedata Services S.A. v. Katotakis*, 2005 CarswellOnt 645 (SC), affirmed

2005 CarswellOnt 632 (CA); and *Calgary Power Ltd. v. Atco Ltd.*, 1980 CarswellAlta 88 (QB)). Osum also relied on *Nalcap Holdings Inc. v. Kelvin Energy Ltd.*, 1988 CarswellQue 1129 (SC) at para. 37, which highlighted the unfairness of a shareholder tendering to a cash take-over bid, then learning that the offeror did not have the financing to pay for the shares.

[44] In *Linedata*, the first funding commitment letter conveyed that the lender could withdraw its funding commitment if the other financing conditions were not complied with to its satisfaction. Knowing that information, two shareholders delivered selling notices to the offeror by the deadline of December 29, 2004, and those were accepted by the offeror in acceptance notices the same day. However, a second funding commitment letter – dated December 29, 2004 – was executed and delivered on January 4, 2005. That second funding commitment letter removed the discretion given to the lender in the first funding commitment letter.

[45] The court held that the notices of acceptance were non-compliant and thus non-binding because the wording of the first funding commitment letter as of December 29, 2004 was not an "adequate arrangement" to ensure the funding would be available to pay for the shares in full (at para. 5):

> "Adequate arrangements" has been interpreted to mean that there must be accurate, clear and unequivocal assurance that the financing is in place in the sense that a public shareholder contemplating tendering his or her shares to the bid can be unequivocally assured that the funds are available to complete the purchase.

[46] The court also stated that the subsequent removal of the lender's discretion was irrelevant because the legislation required the funding to be in place when the bid was made and the case law required shareholders to "have the benefit of accurate, clear and unequivocal information that the funding is available" (at para. 8). The appellate court confirmed the disposition by the Superior Court of Justice, but did not address the issue of adequate financing (at para. 19).

[47] In *Calgary Power*, the offeree contended that the offeror had not made adequate arrangements to ensure that funds would be available to take up shares sought in a take-over bid (at para. 9). It was determined during the hearing that the actual financial arrangements were somewhat different from what was disclosed to offeree shareholders (at para. 34). As the offeror had definite financing for only 50.1% of the offeree's shares, the offeror had not complied with the requirement to have funds available if more than 50.1% of the shares were tendered (at paras. 72, 74) – the financing obligation is to provide "an accurate, clear and unequivocal assurance, in such words as are necessary to satisfy a reasonable shareholder" that adequate arrangements have been made (at para. 74).

[48] Waterous and Staff both submitted that the reasoning in *Linedata* and *Calgary Power* has been superseded by s. 2.27 (2) of NI 62-104, and each set out various regulatory developments subsequent to those decisions:

- July 2005 request for comments by the Ontario Securities Commission (**OSC**) on proposed OSC Rule 62-503 *Financing of Take-over Bids and Issuer Bids* (**OSC Rule 62-503**) ((2005) 28 O.S.C.B. 5689), to clarify the law subsequent to *Linedata*, with s. 1.1 of the proposed rule providing:

> For the purposes of section 96 of the [*Securities Act* (Ontario)], the financing arrangements required to be made by the offeror prior to a bid may be subject to conditions if, at the time the bid is commenced, the offeror reasonably believes the possibility to be remote that the offeror will be unable to pay for securities deposited under the bid solely due to a financing condition not being satisfied.

- October 2005 publication of the final OSC Rule 62-503 (since repealed), with slightly modified wording for s. 1.1:

> For the purposes of section 96 of the [*Securities Act* (Ontario)], the financing arrangements required to be made by the offeror prior to a bid may be subject to conditions if, at the time the bid is commenced, the offeror reasonably believes the possibility to be remote that, if the conditions of the bid are satisfied or waived, the offeror will be unable to pay for securities deposited under the bid due to a financing condition not being satisfied.

- September 2005 guidance by the Canadian Securities Administrators (**CSA**): Staff Notice 62-304 *Conditions in Financing Arrangements for Take-over Bids and Issuer Bids*:

> CSA staff consider that an offeror has complied with the bid financing requirement if the offeror reasonably believes the possibility is remote that it will not be able to pay for tendered securities because of a financing condition not being satisfied. In these circumstances, there is sufficient assurance that the funds are available to complete the purchase even though there is some conditionality in the financing arrangements. Staff will continue to interpret the financing requirement in this manner.

- February 2008 publication of Multilateral Instrument 62-104 *Take-Over Bids and Issuer Bids* (now NI 62-104), s. 2.27 of which had the same wording as in NI 62-104, reproduced above.

[49] We agree with Waterous and Staff that *Linedata* and *Calgary Power* do not assist Osum here.

[50] Osum erred by attempting to parse the Adequate Financing Requirement into separate components: (1) "before the bid" and "adequate" (both from s. 2.27(1) of NI 62-104); (2) clearly and unequivocally disclosed in the offeror's circular (from *Calgary Power* at para. 74); and (3) Waterous "reasonably believes the possibility to be remote" that Waterous will be unable to pay if a financing condition is not satisfied (from s. 2.27(2) of NI 62-104). None of Osum's arguments on those points were persuasive.

[51] Regarding Osum's contentions that Waterous's financing arrangements must be completed "before the bid" and must be "adequate", s. 2.27(1) of NI 62-104 is explicitly subject to s. 2.27(2), which allows for conditions to the financing arrangements in certain circumstances. Regarding

Osum's suggestion that there must be a "clear and unequivocal assurance" in an offeror's circular so target shareholders will know deposited shares can be paid for, that phrase from *Calgary Power* has been superseded by developments in the law.

[52] Osum's remaining contention was that Waterous could have easily obtained the important information about the Franco-Nevada ROFR before making the Offer. In Osum's view, the Franco-Nevada ROFR information was readily ascertainable because rights of refusal and other pre-emptive rights "are endemic in the oil and gas industry". Therefore, according to Osum, because Waterous knew of the First GORR, that would put "a knowledgeable participant in the oil and gas industry on notice to look for and address such related rights and prohibitions", including the Franco-Nevada ROFR.

[53] In addition to its position on the change in law, Waterous had two responses. First, Waterous distinguished a condition of an offer itself from a condition of the financing for an offer – a financing condition does not arise unless the offer conditions are satisfied and the offer succeeds. Second, Waterous contended that the relevant time for assessing the reasonableness of an offeror's belief is at the time the offer is made – information learned after the offer is made is thus not relevant, and Waterous could not reasonably have known of the Franco-Nevada ROFR before making the Offer.

[54] Osum responded that the Franco-Nevada ROFR was a condition of the financing because it could cause Waterous's financing arrangements to fail – if Franco-Nevada exercised the Franco-Nevada ROFR or took more than three days to decide, the Asset Monetization would derail, causing Osum to be unable to repay the Term Loan, which would prevent Waterous from accessing the Waterous Facility and being able to pay for the Osum Shares.

[55] In contrast, Waterous submitted that both the Franco-Nevada ROFR and the Asset Monetization required third parties to cooperate before the Offer could succeed, according to the Third Party Consent Condition.

[56] We agree with Waterous that the potential consequence relating to the Franco-Nevada ROFR was a condition of the Offer, not of the financing.

[57] Even had that been a condition of the financing, we also agree with Waterous that it could not reasonably have known of the Franco-Nevada ROFR before Waterous made the Offer. The First GORR had not been specifically provided to Waterous (Osum pointed only to a brief mention of a GORR in its 2019 annual report) and pre-dated Waterous's involvement on the Osum Board. Osum provided no evidence – expert or otherwise – to support the contention that a knowledgeable industry participant ought to have known of the Franco-Nevada ROFR. In the absence of such evidence, we would not have found that Waterous should have known of the Franco-Nevada ROFR before making the Offer.

[58] Accordingly, Waterous satisfied the Adequate Financing Requirement in s. 2.27 of NI 62-104 because it reasonably believed the possibility to be remote that it would not be able to pay for Osum Shares tendered under the Offer.

B. Issue 2: Formal Valuation Requirement

1. The Issue and the Law

[59] As the Offer is an insider bid, Waterous had to meet the Formal Valuation Requirement. Section 2.3(1) of MI 61-101 required Waterous – unless qualifying for an exemption – to have a formal valuation of the Osum Shares prepared by an independent valuator and to provide a summary of that valuation as part of the Offer.

[60] Waterous did not obtain a formal valuation, instead relying on the Arm's Length Negotiation Exemption in s. 2.4(b) of MI 61-101, which requires seven conditions to be satisfied. Osum disputed Waterous's compliance with two of those conditions, s. 2.4(b)(v) and s. 2.4(b)(vii):

> (v) at the time of each of the agreements referred to in subparagraph (i) [arm's-length agreements with one or more selling security holders], the offeror did not know of any material information in respect of the offeree issuer or the offeree securities that
>
> (A) had not been generally disclosed, and
>
> (B) if generally disclosed, could have reasonably been expected to increase the agreed consideration,
>
> . . .
>
> (vii) the offeror does not know, after reasonable inquiry, of any material information in respect of the offeree issuer or the offeree securities since the time of each of the agreements referred to in subparagraph (i) that has not been generally disclosed and could reasonably be expected to increase the value of the offeree securities[.]

[61] The concepts of "material information" and "materiality" are important in assessing whether Waterous could properly rely on the Arm's Length Negotiation Exemption.

[62] Additional guidance is found in s. 2.6(2) of the companion policy to MI 61-101:

> We note that the previous arm's length negotiations exemption is based on the view that those negotiations can be a substitute for a valuation. An important requirement for the exemption to be available is that the offeror . . . engages in "reasonable inquiries" to determine whether various circumstances exist. In our view, if this requirement cannot be satisfied through receipt of representations of the parties directly involved or some other suitable method, the offeror . . . is not entitled to rely on this exemption.

2. Parties' Positions

(a) Waterous

[63] Waterous contended that it would be redundant in these circumstances to require a formal valuation when fair market value (**FMV**) is discernable from recent arm's length transactions.

[64] In particular, Waterous relied on two transactions for the applicability of the Arm's Length Negotiation Exemption:

- the July 31, 2020 acquisition from the Initial Selling Shareholders at $2.40 per Osum Share; and

- the Lock-up Agreement made with each Locked-up Shareholder at $2.40 per Osum Share.

[65] Waterous denied that it was in possession of material undisclosed information regarding Osum, such that the Arm's Length Negotiation Exemption would be unavailable.

[66] Waterous emphasized that the Initial Selling Shareholders had similar access to relevant information about Osum in several ways. First, they were long-standing investors holding large blocks of Osum Shares, with the right to nominate a majority of directors to the Osum Board for several years before the July 31, 2020 acquisition of their Osum Shares. Second, their respective investment agreements gave them extensive rights to receive and access information. Third, they had access to Osum's VDR. Fourth, they had access to Osum's public disclosure, which was comparable to that of a reporting issuer in the Canadian energy sector. Fifth, Osum's business plan was known to its shareholders and had not changed.

[67] Waterous noted that the Locked-up Shareholders "are highly sophisticated institutional investors with similar knowledge, sophistication, and negotiating abilities as the WEF LPs". The Locked-up Shareholders also had access to observe the Osum Board, participate on the Osum Board, or both.

[68] Waterous disputed conclusions reached in the Doran Report (as defined later in these reasons), particularly his conclusion that $2.40 did not reflect FMV.

[69] Waterous also stated that the Directors' Circular did not disclose any material changes between September 30, 2020 and November 18, 2020.

(b) Osum

[70] Osum submitted that neither set of transactions relied on by Waterous fell within the Arm's Length Negotiation Exemption. Osum contended that Waterous possessed undisclosed material information not known to at least some of the sellers in those transactions, leading to an information asymmetry and a corresponding inability to rely on the claimed exemption.

[71] Osum asserted that there were two types of undisclosed material information. First, Osum contended that the Burgess Agreement was material because it led to the $82 million Asset Monetization, and that none of Osum, the Initial Selling Shareholders and the Locked-up Shareholders knew of the Burgess Agreement when Waterous made the respective agreements with the Initial Selling Shareholders and the Locked-up Shareholders. Second, Osum referred to certain information provided to Waterous since July 31, 2020 "as the result of [Osum] Board and committee meetings at which the [Waterous Directors] were in attendance, through the receipt of materials canvassed at [Osum] Board and committee meetings and otherwise in the normal course" (the **Additional Information**). According to Osum, only Osum shareholders with representation on the Osum Board received the Additional Information.

[72] In written submissions, Osum set out four categories of Additional Information known to the Waterous Directors:

- "Material improvement in Osum's financial results due to changes in commodity pricing and forecasted commodity pricing";

- "Detailed support for the assumptions underpinning the forecast financial results", for example, production, transportation costs, operating costs, capital spending and future capital projects;

- "Material increase in the rate at which Osum could build its unrestricted cash balance"; and

- "Osum approaching zero debt".

[73] However, in oral submissions, Osum slightly recast those points (and maintained the Burgess Agreement argument, which we address separately):

- "an increase in the unrestricted cash";

- a transportation services agreement; and

- butane blending.

[74] In addition to arguing an information asymmetry (leading to what it alleged was an inaccurate indication of value from the two sets of transactions on which Waterous relied), Osum also alluded to some of the Initial Selling Shareholders or Locked-up Shareholders needing the liquidity of a sale, thus being willing to accept a lower price per share. However, there was no evidence that those sellers were motivated by a need for liquidity in contrast to merely a desire for liquidity. Accordingly, we need not address that point further.

(c) Staff

[75] Staff compared the present situation to *Western Wind*, an OSC decision considering knowledge of material information in a different context of MI 61-101 (the "lack of knowledge and representation" exemption in s. 2.4(1)(a)). In that context, the OSC decided (at para. 30) that "material information" included "material facts" or "material changes" respecting the target, as those terms are defined in the OSA. Staff suggested that conclusion should apply here. The OSC panel in *Western Wind* also adopted Item 23 of Form 62-104F1 in deciding that material information comprised "any material facts concerning the securities of the offeree issuer" and "any other matter not disclosed in the take-over bid circular that has not previously been generally disclosed, is known to the offeror, and that would reasonably be expected to affect the decision of the security holders of the offeree issuer to accept or reject the offer".

[76] Apart from discussing materiality, Staff's only submissions on this ground of the Application expressed concern with Osum characterizing the Burgess Agreement as material information in respect of Osum or the Osum Shares. Staff viewed the Burgess Agreement as relating to Waterous not to Osum because Osum was not a party and nothing in the Burgess Agreement would be binding on Osum unless the Offer were successful. Therefore, in Staff's view,

the Burgess Agreement would be relevant only to Waterous's certainty of financing, not to the availability of the Arm's Length Negotiation Exemption.

3. Expert Reports

[77] Osum and Waterous each provided an expert report regarding the relative importance of certain information in determining the value of Osum Shares. Osum provided a December 11, 2020 expert report by Robert Doran (respectively, the **Doran Report** and **Doran**). Waterous provided a December 18, 2020 expert report by Brian Heald (respectively, the **Heald Report** and **Heald**). The experts were cross-examined on their respective reports.

(a) Doran Report

[78] The Doran Report summary stated:

> Based on the analysis described herein, I find that the Confidential Information provided to Waterous could reasonably be expected to increase the value of Osum's shares than would otherwise be determined in the absence of the Confidential Information. [Emphasis in original.]

[79] In Doran's view, perhaps the most significant information not available to those Osum shareholders without Osum Board representation or observer status (over 85% of shareholders, representing approximately 35% of the issued and outstanding Osum Shares) was the forward-looking financial information disclosed to the Osum Board. During cross-examination, it was pointed out to Doran that Osum discussed that it had little faith in the predictive accuracy of commodity price projections.

[80] Doran also noted that the original business plan for Osum had involved a liquidity event, but that timeline had been protracted (Osum was formed by amalgamation in 2007). He stated that the interests some founding shareholders had in Osum no longer seemed to align with their investment objectives, which may be why they sold their shares to Waterous (or committed to sell as Locked-up Shareholders). He also stated that he understood the sellers of Osum Shares "may have been driven by a need for liquidity".

[81] Doran set out recent and historical market conditions and financial implications for Osum specifically and for the oil and gas industry generally, in particular the impact of the COVID-19 pandemic and the OPEC-Russia price war. He summarized the share prices at certain dates, including and between December 31, 2019 and December 9, 2020, of four publicly traded oil and gas issuers which he believed were comparable to Osum. While those issuers had experienced considerable share price volatility during that period, he was of the view that those prices were inherently more volatile than FMV for the intrinsic worth of an issuer based on its fundamentals.

[82] Doran noted that there was no process for a sale of the entire company to attract strategic buyers (which he believed would be willing to pay more than would "financial investors") because an Osum shareholder with the right to approve a change of control (as defined in its investment agreement with Osum) was unwilling to disclose a price at which it would sell. Doran also stated that Waterous initially sought to acquire Osum at $0.75 per share plus a contingent payment, eventually submitting a bid of $1.80 per share, then increasing that to $2.40 per share. Doran concluded from this that Waterous was willing to pay significantly more once it had better information (obtained through the summer 2020 sales process).

[83] Doran considered the confidential information available to Waterous but not others to be:

> . . . materials provided to Waterous by virtue of its representatives being members of Osum's Board of Directors and not provided to other shareholders. These materials consisted of Board packages provided to the directors and related Board discussions with management in Board meetings held between July 31, 2020 and November 4, 2020. However, I note that the information shared with Waterous, through the VDR in support of the earlier share sales, involved materials that were not otherwise known to the public or shareholders outside of the Osum Board (which also required Waterous to sign a confidentiality agreement).

[84] Based on his review of the information available to Waterous, Doran concluded that that material contained many insights into Osum's business and underlying assets. He also stated that investors discount uncertainty and that "a deeper insight into a well-run business should provide a higher degree of confidence and less perceived risk". He stated that even investors who knew certain information could change their minds about its effect on the value of the company if they also knew how management intended to deal with that information.

[85] Doran compared the information available to Waterous through its Osum Board representation to the content of financial due diligence a strategic buyer might collect. Doran acknowledged that Osum provided disclosure to its shareholders (including improved third-quarter results) that was comparable to that provided by reporting issuers, although he characterized the confidential information known to Waterous as more detailed.

[86] Doran concluded that the $2.40 paid by Waterous to the Initial Selling Shareholders "would not be a good indicator of fair market value" (emphasis in original) because those shares were not a controlling interest, so that the price the sellers accepted "was likely influenced by liquidity concerns and the inability to control the direction of the company". However, he agreed that the Initial Selling Shareholders and the Locked-up Shareholders were sophisticated and at arm's length to Waterous, that the Initial Selling Shareholders had access to Osum Board information through seats on the Osum Board, and that the Initial Selling Shareholders had a similar level of access to information as did Waterous. Doran also acknowledged that Osum used the $2.40 per share in Osum's third quarter reporting.

[87] Doran acknowledged that he did not conduct a valuation of Osum or the Osum Shares, although he had previously been involved in assessing Osum's valuation for employee compensation purposes (the **KPMG Compensation Valuations**, discussed below).

(b) Heald Report

[88] The Heald Report concluded that information not publicly disclosed "would not reasonably be expected to lead to a material change in the fair market value estimate of [Osum Shares] when considered by an informed and prudent investor, acting at arm's length and under no compulsion to act", concluding also that the KPMG Compensation Valuations were not relevant FMV estimates of the value of the Osum Shares at the time relevant for this matter.

[89] The Heald Report was limited to the two MI 61-101 clauses at issue in relation to the Arm's Length Negotiation Exemption, and was not intended to be a formal valuation or appraisal. It noted that 12 observers attended each of the September 23, 2020 and November 5, 2020 Osum Board

meetings, that Heald understood those observers were direct representatives of significant institutional shareholders, and that he assumed those observers attended other Osum Board meetings and received the same materials as the Osum Board members.

[90] Heald stated that the common definitions of FMV "do not require a seller to conduct a competitive process, do not require that all potential buyers be canvassed and do not require that the negotiating parties have similar knowledge, sophistication, negotiating abilities or financial strength", nor "require that all parties have access to all available and relevant information pertaining to the corporation". The Heald Report concluded that the secondary sales process was a competitive process, with all involved parties presumably having equal access to the VDR, which contained information both publicly available and not.

[91] Given this, the Heald Report concluded that the transactions with the Initial Selling Shareholders and the Locked-up Shareholders were at FMV, as these "very sophisticated" investors "have done their own analysis and evaluation and have determined to . . . sell their shares at [$]2.40 a share" – they were "fully informed arm's-length investors, prudent and under no compulsion to act, [which] decided to act in a free and open market". He also acknowledged that the Initial Selling Shareholders made their decisions to sell Osum Shares after the COVID-19 pandemic had been declared and about three months after the OPEC-Russia dispute's negative effect on global oil prices, again emphasizing that these were sophisticated sellers.

[92] The Heald Report disputed many assumptions and conclusions in the Doran Report. Heald agreed that certain information was known only to Osum Board members between the time board packages were released on October 30, 2020 and the time results were publicly reported on November 5, 2020.

[93] Osum challenged the Heald Report on various grounds, including its discussion of materiality, and claimed that the Heald Report conflated the two different concepts of material information and an increase in securities' value. Heald confirmed that his assessment of materiality started with the guideline that information (individually or in the aggregate) was material if it would lead to a variance of more than 10% on the estimated value of the Osum Shares.

[94] Regarding unrestricted cash, Heald emphasized that actual amounts were publicly disclosed. He noted that a reference to Osum having unrestricted cash of approximately $130 million to $140 million was an Osum management forecast. He also stated that, although news of Osum reducing its gross net debt was positive for Osum shareholders and was publicly available on November 5, 2020, the plan for such reduction had been announced earlier.

[95] Heald also discussed the $82 million royalty payment that could result from the Asset Monetization. He considered that knowledge of that would not reasonably be expected to increase the value of the Osum Shares because Osum's financial obligations reflected on its balance sheet would increase at the same time as the cash would increase. Further, he considered the $82 million to be publicly disclosed because it was in the Offeror's Circular.

4. Discussion

[96] We agree with Osum and Waterous that the definition of "fair market value" from s. 1.1 of MI 61-101 applied here: "the monetary consideration that, in an open and unrestricted market, a prudent and informed buyer would pay to a prudent and informed seller, each acting at arm's length with the other and under no compulsion to act".

[97] We also accept that the purpose of the Formal Valuation Requirement in this context is to protect minority security holders when an insider making a take-over bid has a material conflict of interest with the target and may have access to information or influence that the minority security holders do not have. If such information is available in another way, there is no information asymmetry, making a formal valuation redundant. As stated in *Western Wind* at para. 19:

> The policy rationale for the formal valuation requirement is that insiders may have access to more or better information about an issuer than other shareholders, including undisclosed material information. That may give the bidder an unfair advantage in valuing the securities of the target. The purpose of the formal valuation requirement is to ensure that all target shareholders are able to make an informed decision whether or not to tender to the bid and that shareholders have the benefit of an independent assessment of the fair market value of an issuer when assessing an insider bid for the issuer. This rationale is consistent with the overall policy objectives of the take-over bid regime, which include, in particular, protecting the interests of target shareholders.

[98] Osum relied on *Sharbern Holding Inc. v. Vancouver Airport Centre Ltd.*, 2011 SCC 23 (at para. 61) in arguing that the determination of materiality is objective, from the perspective of a reasonable investor – a fact is material if "there was a substantial likelihood it would have assumed **actual significance in a reasonable investor's deliberations**" (emphasis added by Osum). Osum equated that interpretation of *Sharbern* to "if a reasonable investor would have considered the information in coming to a decision, that information is material".

[99] Waterous contended that Osum's two statements regarding the materiality standard were inconsistent, with Osum's latter statement ("would have considered the information in coming to a decision") a much weaker standard than its former statement ("actual significance in a reasonable investor's deliberation"). Waterous noted that the materiality standard set out in *Sharbern* was in the context of assessing the materiality of a statement in a disclosure document. Waterous referred to the definitions of "material fact" and "material change" in the Act, as well as to the definition of "material information" in National Policy 51-201 *Disclosure Standards* (**NP 51-201**) (s. 3.1, footnote 8, which states that "material information" in NP 51-201 means both material facts and material changes).

[100] We are satisfied that the materiality standard in the present context is comparable to that used in the disclosure and misrepresentation context; to be clear, we reject Osum's reframing of that standard as information a reasonable investor would have considered – a level of significance is required. Therefore, we rely on the discussion of materiality as set out in recent decisions by panels of the ASC. In *Re Rustulka*, 2020 ABASC 93 at paras. 234-35, an ASC panel stated:

> The last element addresses the materiality of a misstatement or omission. As explained in *Re Fauth* (2018 ABASC 175 at para. 258):
>
> > The inquiry as to whether or not a statement or omission "would reasonably be expected to have a significant effect on the market price or value of a security"

> may be usefully restated as an inquiry into "whether there is a substantial likelihood that such facts would have been important or useful to a reasonable prospective investor in deciding whether to invest in the securities on offer at the price asked" [*Re Arbour Energy Inc*., 2012 ABASC 131 at para. 765, citing *Re Capital Alternatives Inc.*, 2007 ABASC 79 at para. 239 and *Sharbern* at para. 61].
> . . .

With respect to how this element may be proved by Staff, the panel in *Re Aitkens* explained (2018 ABASC 27 at para. 137):

> . . . "[c]ommon-sense inferences . . . may suffice in certain cases" (*Arbour* at para. 764, citing *Sharbern* . . . at paras. 58 and 61). While investors' evidence with respect to the impact the information may have had on their investment decisions may be considered (see, for example, [*Re*] *Aurora*[, 2011 ABASC 501] at para. 146), neither that evidence nor expert evidence on market price or value is required to meet the legal test (*Arbour* at paras. 763-66; see also *R. v. Zelitt,* 2003 ABPC 2 at paras. 32-34, distinguishing, *inter alia*, *R. v. Coglon*, [1998] B.C.J. No. 2573 (British Columbia Supreme Court)). That is because an ASC panel is itself an expert tribunal with the specialized knowledge and experience necessary to "draw inferences as to the objective view of a reasonable investor" (*Arbour* at para. 765).

[101] Accordingly, we examine the evidence to determine what, if any, information was not disclosed by Waterous and whether there was a substantial likelihood that any such information would have been important or useful to a reasonable Osum shareholder in deciding whether to tender that shareholder's Osum Shares to the Offer.

(a) Burgess Agreement

[102] Osum's first claimed category of material information not properly disclosed by Waterous was the Burgess Agreement. Waterous had not disclosed the Burgess Agreement to the Initial Selling Shareholders or to the Locked-up Shareholders. As noted, Osum argued that the Burgess Agreement was material because it was ultimately (through the Asset Monetization) to lead to a sale of a royalty interest in Osum's lands and to the payment of $82 million to Osum. Both Waterous and Staff characterized the Burgess Agreement as relating solely to Waterous and therefore not material information of Osum. Waterous also contended that the Burgess Agreement was merely a commitment to pursue a royalty transaction in the future, therefore not certain enough to be material. Further, Waterous submitted that the potential benefit to Osum from the eventual Asset Monetization would be used to pay part of the Term Loan, so that the Asset Monetization was not an $82 million windfall to Osum.

[103] In our view, the Burgess Agreement and Asset Monetization cannot properly be characterized as information about Osum at the time Waterous acquired Osum Shares from the Initial Selling Shareholders or at the time of the Lock-up Agreements. At both those times, the Burgess Agreement represented the possibility of negotiating future financing that would not be needed unless the Offer succeeded. The Asset Monetization was not information about Osum, as the money it provided would not be used unless the Offer succeeded. The Burgess Agreement and Asset Monetization were, therefore, information about Waterous, not Osum.

[104] Even had the Burgess Agreement and Asset Monetization been information about Osum, the degree of commitment evident in the Burgess Agreement did not rise to the level of certainty required to be considered as material information relating to Osum. It was essentially an agreement to pursue a transaction. The level of certainty in particular circumstances – and the consequent assessment of the need for disclosure – must be balanced with the parties' need to preserve a competitive advantage by maintaining confidentiality for a time.

[105] Further, money from the Asset Monetization would be used to pay part of the Term Loan. On the evidence before us, we were unable to conclude what, if any, monetary benefit Osum would gain from the Asset Monetization once the Term Loan was paid. The best evidence on this was from Heald, but that was inconclusive. Heald suggested that the $82 million was effectively a financial commitment to a third party monetizing future production, which would reduce the discounted cash flow to Osum's shareholders by an unspecified amount. Waterous stated that the $82 million would be used to repay the Term Loan, and Osum would be committed to pay royalty payments on future production. This would replace one liability with a new liability, with no evidence that the relative value of the two types of liability would be different. Osum argued that $82 million of cash flowing to Osum would increase the value of the Osum Shares by 59 cents per share, stating that this was "free money" until the royalty became payable when oil reached $60 per barrel. We were not persuaded by Osum's reasoning on that point.

[106] Accordingly, even if the Burgess Agreement were sufficiently certain, we were unable to determine if it (and the subsequent Asset Monetization) would be material.

[107] Therefore, we conclude that Waterous's non-disclosure of the Burgess Agreement and the Asset Monetization did not prevent Waterous from relying on the Arm's Length Negotiation Exemption.

(b) Additional Information

[108] Osum's second claimed category of material information not properly disclosed by Waterous was the Additional Information.

(i) Increase in Unrestricted Cash

[109] Osum stated that its directors were told on October 28, 2020 that unrestricted cash was $120 million, but that Osum shareholders were not told this until November 5, 2020 (having been told earlier that that the unrestricted cash was $90 million). That was after the October 27 to November 3, 2020 period during which the Lock-up Agreements were made. Although the Spence Affidavit showed that Osum started in August 2020 to project unrestricted cash of over $100 million by November 2020, Osum contended that those projections were in Osum Board and other materials, but not publicly available.

[110] Waterous submitted that the Locked-up Shareholders were almost all aware of the projected increases in unrestricted cash because of their access to Osum Board materials or other knowledge of Osum. Waterous also pointed to Osum's "November 2020 Corporate Presentation", which disclosed Osum's unrestricted cash as $99 million as of September 30, 2020. This was an increase of $46 million from December 31, 2018, but a decrease from the $114 million as of December 31, 2019 (disclosed in Osum's 2019 annual report). Finally, Waterous argued that

information about unrestricted cash (and other Additional Information) was not material, given other downward pressures on Osum's value.

[111] There was some conflicting evidence about Osum's unrestricted cash position – and future projections of its unrestricted cash position – at various times leading up to the Offer and to the Lock-up Agreements. The majority of the evidence indicated that Osum continuously updated its unrestricted cash position in publicly available materials. Further, there was sufficient evidence that at least some of the Locked-up Shareholders would have been aware of recent unrestricted cash projections given to the Osum Board at the time they entered the Lock-up Agreements.

[112] We consider that Osum had the onus on this point to prove that there was an information asymmetry regarding unrestricted cash, such that Waterous should not be able to rely on the Arm's Length Negotiation Exemption. We find no such asymmetry here and dismiss this ground of Osum's argument.

(ii) Transportation Services Agreement

[113] Osum submitted that the Osum Board, but not the shareholders, knew about the transportation services agreement (**TSA**), which would be worth approximately $2 million per year over 10 years (Osum characterized that as a present value increase of $20 million).

[114] Waterous acknowledged that the TSA was not publicly disclosed, but contended that the TSA was only at the negotiation stage and had, therefore, not been finalized. Waterous also compared potential annual savings of $1.45 million from the TSA to Osum's gross annual sales of $562.5 million and to Osum's annual field netback of approximately $230 million, arguing that both comparisons showed the TSA amount to be immaterial.

[115] We find that the TSA was not concluded and that its value was immaterial compared to Osum's overall financial position. This was not material information. Accordingly, we dismiss this ground of Osum's argument.

(iii) Butane Blending

[116] Osum stated that the Osum shareholders were not told about the additional revenue from butane blending until November 5, 2020. Again, November 5 was after the October 27 to November 3, 2020 period during which the Lock-up Agreements were made.

[117] Waterous characterized the butane blending project as a relatively minor and routine optimization that would neither surprise investors nor be considered a material event. Waterous also considered the information and assumptions about butane blending to be too underdeveloped. In addition, Waterous stated the amount at issue was immaterial, as with the TSA amount.

[118] In our view, the amount of any additional butane blending revenue was immaterial. We dismiss this ground of Osum's argument.

(iv) Financial Model in VDR

[119] Osum raised an argument related to the financial modeling tool in the VDR. In written submissions, Osum stated that not all of the Locked-up Shareholders "had the proprietary,

confidential and detailed financial model of Osum's entire business". Although Osum's written submissions concentrated on the Burgess Agreement and the three categories of Additional Information, Osum also mentioned the VDR financial model as an instrument that parties with access to the VDR could use with the other information – leaving parties without access to the VDR at a comparative disadvantage.

[120] Waterous submitted that the financial model in the VDR was based on various assumptions, and even allowed prospective bidders to use their own assumptions. Waterous also noted that some information for the assumptions had already been disclosed by Osum. In addition to arguing that the financial modelling did not involve undisclosed material information, Waterous cautioned against a ruling that would remove the ability to rely on the Arm's Length Negotiation Exemption if a data room had a modelling tool.

[121] We were not persuaded by Osum's argument on this point. The existence of a financial model in the VDR was insufficient to transform information that was disclosed or immaterial (or both) into material undisclosed information.

(c) Cumulative Effect of Burgess Agreement and Additional Information

[122] Osum also argued that there was a cumulative effect of the Burgess Agreement and the Additional Information discussed above, even if we were to decide that each element was immaterial on its own.

[123] We earlier concluded that the Burgess Agreement was not information about Osum; it is not properly considered as part of any alleged cumulative effect. We concluded there was insufficient evidence regarding unrestricted cash. The TSA and butane blending factors were not material, even when considered together.

[124] Accordingly, we did not find material undisclosed information separately or cumulatively.

[125] We note one further aspect of Osum's argument. Osum contended that none of the retail Osum shareholders and not all of the Locked-up Shareholders had access to all of the information to which Waterous was privy. We do not consider that relevant in the present circumstances. The purpose of the Formal Valuation Requirement – or a properly used exemption to that requirement – is to prevent an information asymmetry that would put certain shareholders at a disadvantage. Waterous relied on the Arm's Length Negotiation Exemption. We were satisfied that certain of the Locked-up Shareholders had access to the material information in Waterous's possession, meaning that at least some of the Lock-up Agreements were made with no information asymmetry. We do not interpret the Arm's Length Negotiation Exemption as requiring that every transaction in a category relied on must have identical information access. In light of the Arm’s Length Negotiation Exemption, it is also irrelevant that the retail Osum shareholders did not have access to the same information as Waterous.

5. Conclusion

[126] Waterous was properly able to rely on the Arm's Length Negotiation Exemption, thus did not need to meet the Formal Valuation Requirement.

C. Issue 3: Prior Valuation Requirement

1. The Issue and the Law

[127] Under the Prior Valuation Requirement, an offeror must provide a summary of every prior known valuation of the target from the past 24 months. Waterous did not provide any prior valuations.

[128] Section 1.1 of MI 61-101 defines a "prior valuation" as:

> . . . a valuation or appraisal of an issuer or its securities or material assets, whether or not prepared by an independent valuator, that, if disclosed, would reasonably be expected to affect the decision of a security holder to vote for or against a transaction, or to retain or dispose of affected securities or offeree securities . . .

[129] Five exceptions to that definition are listed, but Waterous did not rely on any of those.

[130] Section 6.8(3) of MI 61-101 states that no prior valuation need be disclosed if "the contents are not known to the person required to disclose the prior valuation" and "the prior valuation is not reasonably obtainable by the person required to disclose it". Sections 2.2(1)(b) and 6.8(2) refer to the person needing to disclose prior valuations as knowing of such prior valuations "after reasonable inquiry".

2. Parties' Positions

(a) Osum

[131] Osum argued that Waterous failed to meet the Prior Valuation Requirement by failing to provide the KPMG Compensation Valuations. Those were two valuations: a March 18, 2019 valuation by KPMG as at December 31, 2018 stating that the FMV of the Osum Shares was in the range of $2.80 to $3.40 per share; and a March 10, 2020 valuation by KPMG as at December 31, 2019 stating that the FMV of the Osum Shares was in the range of $4.00 to $4.80 per share.

[132] Osum submitted that the KPMG Compensation Valuations were prior valuations within the meaning of MI 61-101. Osum further argued that Waterous did not make sufficient inquiries as to the existence of any prior valuations – had Waterous done so, it would have learned of the KPMG Compensation Valuations. Osum also stated that Waterous should have learned of the KPMG Compensation Valuations through other public materials. Accordingly, Osum submitted that, by failing to describe the KPMG Compensation Valuations as part of the Offer, Waterous misled the Osum shareholders. This was significant, according to Osum, because the price range per share of the KPMG Compensation Valuations was higher than the price per share under the Offer.

(b) Waterous

[133] Waterous contended that it was unaware of any relevant prior valuations, that the KPMG Compensation Valuations were not prior valuations within the meaning of MI 61-101, and that any failure to disclose was immaterial or cured.

[134] Waterous stated that the KPMG Compensation Valuations were not prior valuations because they would not reasonably be expected to affect the decision of a security holder to tender

or retain the Osum Shares. In Waterous's view, a reasonable security holder would not rely on those estimates for determining management compensation as being equivalent to a comprehensive valuation of Osum's business for the purpose of a sale.

[135] Waterous also contended that: the assumptions underlying the KPMG Compensation Valuations were no longer valid; Doran did not closely examine the KPMG Compensation Valuations when preparing the Doran Report; the second KPMG Compensation Valuation would have reached a different conclusion if prepared for a point later in 2020 rather than for December 31, 2019; and Osum's own actions showed that it did not treat the KPMG Compensation Valuations as prior valuations.

[136] In addition, Waterous submitted that it had made reasonable inquiries as to the existence of any prior valuations.

[137] Finally, Waterous stated that, if there were any defects in its disclosure of prior valuations, such defects were procedural only, were cured, and had a limited effect on Osum shareholders. Waterous referred to s. 6.8(3) of MI 61-101, which would have required Waterous to disclose only the existence of prior evaluations, with the content disclosed in Osum's later Directors' Circular. Therefore, according to Waterous, if we found it to have breached the Prior Valuation Requirement, the only prejudice to Osum shareholders would have been learning of both the existence and content of the KPMG Compensation Valuations in the Directors' Circular, rather than learning of the former in the Offeror's Circular and the latter in the Directors' Circular.

(c) Staff

[138] Staff contended that the KPMG Compensation Valuations were prior valuations within the meaning of MI 61-101 because a typical shareholder without the background of "an experienced business valuator or other financially sophisticated reader" may reasonably have been affected by knowledge of the KPMG Compensation Valuations' price range estimates.

[139] Staff did not express an opinion on the issue of whether Waterous sufficiently inquired as to the existence of any prior valuations, merely noting that the KPMG Compensation Valuations were referred to in Osum's financial reports, but only in a single sentence. Staff stated that, even if Waterous should have disclosed the KPMG Compensation Valuations, it gained no benefit and Osum shareholders were not harmed because Osum disclosed the KPMG Compensation Valuations in the Directors' Circular.

3. Discussion

(a) Prior Valuation

[140] We are satisfied that the KPMG Compensation Valuations are prior valuations within the meaning of s. 1.1 of MI 61-101. Each is a valuation of Osum's securities, even though not for the purpose of valuing Osum for a sales process. We conclude that sophisticated institutional investors may not have found such information useful in deciding whether to tender Osum Shares to the Offer, and thus the KPMG Compensation Valuations would not reasonably be expected to affect their decisions. However, the relevant provisions in Alberta securities laws are in place to decrease the information asymmetry between an offeror with sufficient sophistication and resources to gather and assess information and a retail offeree security holder who typically lacks such levels

of sophistication and resources. In these circumstances, we conclude that the content of the KPMG Compensation Valuations, if disclosed, would reasonably be expected to affect such retail investors' consideration of whether to tender their Osum Shares to the Offer.

[141] We note Waterous's assertions that the KPMG Compensation Valuations were limited by the scope of those assessments and the dramatic disruptions in 2020 from the COVID-19 pandemic and the substantial decrease in oil prices. Those concerns do limit the relevance of the Osum Share price ranges given in the KPMG Compensation Valuations. However, those concerns do not change the nature of the KPMG Compensation Valuations, instead adding a context that Waterous could have set out had it disclosed the KPMG Compensation Valuations.

(b) Reasonably Obtainable and Reasonable Inquiry

[142] Osum did not include the KPMG Compensation Valuations as part of the more than 1,500 documents in the VDR. Their content was referred to only briefly in an annual report in the VDR, which stated that share-based compensation expenses increased in 2019, "largely due to the impact of increases in the estimated fair value of [Osum's] share price from $3.10 at December 31, 2018 to $4.40 at December 31, 2019". Waterous argued that it was reasonable for Waterous to conclude that there were no prior valuations because none were included in the VDR or brought to the attention of the Waterous Directors during the July 2020 sales process or in the course of any Osum Board business. The Waterous Affidavit stated that Waterous did not ask Osum directly for confidentiality reasons.

[143] We accept Waterous's position in the circumstances. Waterous had a duty to disclose prior evaluations which were reasonably obtainable and obtainable on reasonable inquiry. We find that Waterous acted reasonably in both respects.

[144] First, we do not consider it unreasonable for Waterous to have missed a reference in a single sentence in an annual report in the VDR when there were more than 1,500 documents in the VDR. Requiring perfection would be neither reasonable nor realistic, particularly when Osum itself made the decision not to include the KPMG Compensation Valuations in the VDR.

[145] Second, we agree that Waterous did not need to ask Osum directly about any prior valuations. There are competitive reasons for not making direct inquiries. The take-over bid process contemplates that an offeror may not learn of prior valuations: this is shown by the two aspects of reasonableness and by the requirement that an offeree disclose in its directors' circular any prior valuations not disclosed by an offeror.

(c) No Harm

[146] Even if we had concluded that the KPMG Compensation Valuations were reasonably obtainable by Waterous, we would find that there was no harm to the Osum shareholders in these circumstances.

[147] Osum prepared and sent the Directors' Circular only 14 days after Waterous sent the Offer to the Osum shareholders, and Waterous stated that the Osum shareholders had been advised to wait for the Directors' Circular before deciding whether to tender to the Offer. The Directors' Circular was dated November 18, 2020, which was more than three months before the deadline

for tendering shares to the Offer. The information about the KPMG Compensation Valuations was in the Directors' Circular. As mentioned, the requirements for a directors' circular specifically contemplate a situation in which offeree shareholders have been told of the existence of a prior valuation but not its content or have not been told of the existence of a prior valuation. In both situations, the content of a prior valuation would be in the directors' circular. Therefore, Osum shareholders received the prior valuation information with sufficient time to assess it in making their decisions whether to tender their Osum Shares to the Offer, and their attention was specifically drawn to the valuation information.

[148] As with the rest of MI 61-101, the Prior Valuation Requirement protects target security holders from information disparities. The requisite level of protection was present here.

VI. CONCLUSION

[149] The Application is dismissed.

May 27, 2021

For the Commission:

"original signed by"
Tom Cotter

"original signed by"
Kari Horn