ALBERTA SECURITIES COMMISSION

DECISION

Citation: Re Talbot, 2024 ABASC 40 **Date: 20240307**

David Keith Talbot

Panel:	Kari Horn Matt Bootle Tom Cotter
Representation:	Peter Verschoote Carson Pillar Adam Karbani for Commission Staff Don Young, KC for the Respondent
Submissions Completed:	June 16, 2023
Decision:	March 7, 2024

TABLE OF CONTENTS

I. INTRODUCTION 1

II. BACKGROUND 2
- A. Talbot 2
- B. Weslease Entities 2
  - 1. Weslease GP 2
  - 2. Weslease Canada 2
  - 3. The Partnership 3
  - 4. The Trust 3
- C. Pinnacle 3
- D. Brief History 4

III. ALLEGATIONS 4
- A. Allegations 4
- B. Withdrawal of Certain Allegations and Effect of Withdrawal 7
  - 1. Staff's Position 7
  - 2. Talbot's Position 9
  - 3. Conclusion on Effect of Withdrawal of Certain Allegations 9

IV. PRELIMINARY MATTERS 10
- A. Standard of Proof 10
- B. Hearsay Evidence, Relevance, and Weight 10
- C. Credibility and Conflicting Evidence 10
- D. Adverse Inference 10
- E. Use of Evidence Dated After the Relevant Period 11

V. FACTUAL BACKGROUND 11
- A. Sales of Trust Units 11
- B. OMs 12
  - 1. General 12
  - 2. Certain Specific Disclosure in OMs 12
    - (a) The Business 12
    - (b) Types of Leased Assets 12
    - (c) Security 13
    - (d) Risks 13
    - (e) Redemptions 16
    - (f) Provision of Financial Statements 17
  - 3. Draft OM 17
- C. Significant Leases 17
- D. Financial Statements 18
- E. Staff's Witnesses 18
  - 1. Zurfluh 18
  - 2. Robert Anderson 20
  - 3. Jeffrey Lindskog 21
  - 4. Investor Witnesses 21
    - (a) Investor MS 21

(b) Investor JV 22
(c) Investor JK 24
(d) Investor KC 25
(e) Investor CV 26
(f) Investor LO 27
(g) Investor GB 28
F. Talbot's Witnesses 28
1. Keith Morlock 28
2. Noland Critchfield 30
3. Donald MacLean 30
4. Jones 31
5. Morawski 31
G. CCAA and Bankruptcy Proceedings 32
H. Staff's Expert Witness: Pellarin 34
1. General 34
2. Type of Report: An Estimate Report 34
3. Timing and Scope of Pellarin Report 35
4. Specifics of Pellarin Report 36
VI. ANALYSIS – MISREPRESENTATIONS 36
A. The Law 36
B. Talbot's General Submissions on Misrepresentations 38
1. Approach 38
2. Categories 38
(a) Limitations Period 38
(b) Business Success 39
(c) Context of Impugned Statements 39
(d) Hindsight 40
C. Significance of Staff's Approach to Allegations and Submissions 40
D. Talbot's Knowledge 40
E. Specific Allegations 42
1. Paragraphs 16.1 and 18.1 of the NOH 42
2. Paragraphs 16.1.1, 18.1.1, and 18.1.3 of the NOH 42
(a) Allegations and Staff's Position 42
(b) Talbot's Position 44
(c) Discussion 45
(i) Was the Statement Made? 45
(ii) Was the Statement Misleading or Untrue? 45
(d) Conclusion 47
3. Paragraph 16.1.3 of the NOH 47
(a) Allegation and Staff's Position 47
(b) Talbot's Position 48
(c) Discussion 49
(i) Was the Statement Made? 49
(ii) Was the Statement Misleading or Untrue? 49
(d) Conclusion 49
4. Paragraphs 16.1.4 and 18.1.4 of the NOH 50

(a) Allegation and Staff's Position....50
(b) Talbot's Position....51
(c) Discussion....51
(i) Were the Statements Made?....51
(ii) Context of the Impugned Statements....51
(iii) Were the Statements Misleading or Untrue? 52
(A) Statements Before January 31, 2017....52
(B) October 2017 Update 52
(d) Conclusion 52
5. Paragraphs 16.2 and 18.2 of the NOH 53
(a) Allegation and Staff's Position....53
(b) Talbot's Position....54
(c) Discussion....54
(i) Were the Statements Made?....54
(ii) Were the Statements Misleading or Untrue? 54
(A) December 2016 Newsletter....54
(B) February 2017 Newsletter....55
(C) June 2017 Newsletter....55
(d) Conclusion 56
F. Determination on Misrepresentation Allegations 57
VII. ANALYSIS – CONDUCT CONTRARY TO THE PUBLIC INTEREST 57
A. The Law 57
B. Allegations and Staff's Position 58
C. Talbot's Position....58
D. Discussion....59
E. Determination on Public Interest Allegations....60
VIII. CONCLUSION....60

I. INTRODUCTION

[1] David Keith Talbot (**Talbot**) was a principal of several entities using the name Weslease (we set out details of some of those entities below, and we use the general term **Weslease** in this decision unless the context requires otherwise). Weslease raised funds from investors by issuing trust units (**Trust Units**) in the Weslease Income Growth Fund (the **Trust**). The money was raised mostly through Pinnacle Wealth Brokers Inc. (**Pinnacle**), an exempt market dealer. The Trust loaned the money raised to the Weslease Income Growth Fund Limited Partnership (the **Partnership**). The Partnership used the funds primarily to purchase equipment and other assets which it then leased. Weslease's business model contemplated that the Partnership would earn income from leasing and pay 12% per year interest to the Trust on the money loaned. The Trust would then distribute all of that interest to investors for an annual 12% rate of return on their investment. The Partnership eventually had large financial losses and a receiver was appointed for it and another of the Weslease entities in July 2018.

[2] Staff (**Staff**) of the Alberta Securities Commission (the **ASC**) alleged in a March 31, 2022 notice of hearing (the **NOH**) that Talbot made certain materially misleading statements to Pinnacle and to current and prospective investors between April 2014 and April 2018 (the **Relevant Period**), thus breaching s. 92(4.1) of the *Securities Act* (Alberta) (the **Act**), and that he engaged in conduct contrary to the public interest.

[3] During the hearing (the **Hearing**) into Staff's allegations, we heard testimony from witnesses called by each of Staff and Talbot, and we received numerous documents into evidence. Talbot chose not to testify. We identified some witnesses only by initials (investors **MS**, **JV**, **JK**, **KC**, **CV**, **LO**, and **GB**) for privacy reasons.

[4] Most of the documents in evidence showed a date on their face, but some did not. Some, but not all, of those undated documents were assigned a date on the **Final Exhibit List** (presumably by Staff). A Staff assessment lawyer (**Taylor**) testified that Staff received a production letter from Pinnacle which listed dozens of documents. Regarding presentations made by Weslease, he stated that some documents were undated, but "I believe we were accurately able to tee up each presentation with the date provided" in the Final Exhibit List. He did not discuss the source of assumptions of dates for undated brochures and other documents.

[5] Given that uncertainty, we could not accept the dates on the Final Exhibit List without more. We examined each undated document in the context of the other evidence before us. For some of the undated documents, it was possible to confirm a date or approximate date based on other evidence or the context. For others, however, there was no satisfactory explanation or verification of a date, whether assigned on the Final Exhibit List or not. As discussed below, this uncertainty caused challenges when analyzing the evidence to determine if Talbot (or Weslease) made certain statements at certain times. When we were unable to attach a date to a particular document, we have identified that problem and used an exhibit number as a descriptor instead of a date. The uncertainty of the dates of certain documents, combined with the absence of specific linkages in Staff's submissions between specific statements and specific times and circumstances, and the absence of evidence of those circumstances (as required by the relevant legal test), obviously affected our assessment of Staff's allegations.

[6] Talbot represented himself before the Hearing began (except at an initial session to set dates) and during the evidentiary portion of the Hearing. Mr. Young, as counsel for Talbot, was not involved until the submissions stage of the Hearing. We received written and oral submissions from Staff and Talbot.

[7] As set out below, we found that Staff did not prove the allegations in the NOH. Accordingly, we dismissed the allegations.

II. BACKGROUND

A. Talbot

[8] Talbot was the president and a director of the Partnership's general partner, Weslease Income Growth Fund GP Ltd. (**Weslease GP**). He was the promoter of the Trust and was one of its trustees from its inception until July 29, 2018, when new trustees were appointed. He also held approximately 36% of the shares of Weslease GP through his company, ECS Capital Corporation (**ECS**). Talbot was paid a consulting fee by the Partnership of $15,000 per month starting in 2014, which was increased to $20,000 per month in 2017. Talbot had been president of Weslease of Canada Ltd. (**Weslease Canada**) since February 2006.

[9] Staff asserted in the NOH and written submissions that Talbot was "the" guiding mind of Weslease, but referred to him as "a" guiding mind during oral submissions. Talbot conceded during written submissions that he was "a" guiding mind. We are satisfied that Talbot was the guiding mind of Weslease, although others were also significantly involved at times. However, the distinction between "a" and "the" guiding mind was not relevant to this decision.

B. Weslease Entities

1. Weslease GP

[10] Weslease GP, an Alberta corporation, was incorporated on January 31, 2014 and struck on September 2, 2021 for its failure to file annual returns. The number of directors changed over time (for example, there were four directors as of May 9, 2014 and February 16, 2016, and six directors as of September 22, 2016), but Talbot was a director throughout. By July 10, 2018, Talbot was the only director. Talbot was also the president of Weslease GP, at least at the time of each of the OMs (hereinafter defined). The same four people who were consistently directors of Weslease GP throughout the time of the OMs (including Talbot, Neil McLennan (**McLennan**), and Rick Morawski (**Morawski**)) were also the shareholders through companies they, respectively, controlled (along with a fifth company, controlled by an apparent relative of one of those directors).

2. Weslease Canada

[11] Weslease Canada was incorporated in Alberta on November 19, 1979. It was still active as of October 28, 2021. McLennan and Talbot were directors since at least September 9, 2009. Shareholders as of November 18, 2016 were ECS (Talbot's company, owning 74.23%), McLennan (10.31%), and Talbot personally (15.46%). As of January 23, 2020, the shareholders were the same five companies (with the same percentage ownership) as for Weslease GP, but the evidence did not indicate when that changed from ECS, McLennan, and Talbot personally.

3. The Partnership

[12] Weslease GP and Weslease Canada entered into a limited partnership agreement, dated April 4, 2014, to establish the Partnership.

[13] The Partnership, an Alberta limited partnership, was registered on April 4, 2014, with Weslease GP as its general partner. The Partnership was the entity which provided lessees with financing, using the money raised from investors by the Trust and loaned to the Partnership.

[14] The Partnership had a lease committee (the **Lease Committee**) during the Relevant Period. Talbot, McLennan, Morawski, and Erin Sargent (or Sieger) (**Sargent**) were on that committee at the time of OM2 and OM3 (each as hereinafter defined) – previously, the only Lease Committee members had been Talbot and one other person. Sargent was also active on Weslease's behalf at some of the presentations and meetings for which we had evidence. There were no allegations against Sargent, but Staff referred to some of her statements when discussing Talbot's role and what he knew when.

4. The Trust

[15] The Trust was formed in Alberta by a declaration of trust dated April 4, 2014 (the **Declaration of Trust**). Talbot and two others were the original trustees of the Trust. Although some of the trustees changed over time, Talbot remained a trustee until July 29, 2018.

[16] The Trust Units were sold primarily through Pinnacle under three offering memoranda: (1) an offering memorandum dated May 9, 2014 (**OM1**); (2) an offering memorandum dated May 27, 2015 (**OM2**); and (3) an offering memorandum dated February 16, 2016 (**OM3**, and, collectively with OM1 and OM2, the **OMs**).

[17] There was a draft offering memorandum for the Trust, with the version in evidence dated November 30, 2016 (the **Draft OM**). The Draft OM was not finalized and was not used to raise funds.

[18] On July 29, 2018, Talbot and the other trustee at the time (Marvin Jones (**Jones**)) were removed and replaced by trustees chosen by Pinnacle, including Jay Simmons (**Simmons**). Simmons owned Simmons Financial Restructuring Corporation, which was connected to Durum Capital (**Durum**). Durum was eventually involved in administering the Weslease entities. The new trustees apparently resigned together at some point, but that was after the Relevant Period.

C. Pinnacle

[19] Pinnacle and its dealing representatives (the **Pinnacle DRs**) sold Trust Units to investors while the Trust was on Pinnacle's "shelf" (available for sale to investors). Pinnacle also reviewed and commented on the OMs, educated the Pinnacle DRs about the Trust Units, and arranged and participated in presentations by Talbot and others about the Trust and the Trust Units. Those presentations were made to Pinnacle, Pinnacle DRs, or current or prospective investors, and information about some of them was in evidence.

[20] Darvin Zurfluh (**Zurfluh**) was the chief executive officer (**CEO**) and ultimate designated person at Pinnacle, including from December 2014 to the time of the Hearing. He described his

responsibilities as overseeing operations, compliance, and other senior executives. Zurfluh stated that Pinnacle's "main functions are onboarding product, doing due diligence of product, and then processing investment trades, and . . . then reporting on those trades to investors".

[21] Talbot asked witnesses questions about other products sold by Pinnacle, primarily those which were unsuccessful. We did not find that line of questioning relevant or helpful in our determinations on the allegations, and did not address it in this decision.

D. Brief History

[22] Staff asserted that the Trust raised approximately $68 million from investors between May 2014 and June 2016.

[23] The Trust's purpose was described as loaning the money it raised to the Partnership, which would use that money to pay the offering costs and to carry on a business (the **Leasing Business**). The Partnership issued the Trust promissory notes at 12% per year for the loaned money, and the Trust was to use that money to pay distributions to its investors (12% per year).

[24] The OMs defined the Leasing Business as the Partnership providing lessees with financing – the lessee would choose an asset, the Partnership would buy that asset, then the lessee would lease the asset from the Partnership. From payments made by the lessee, the Partnership planned to recover the purchase cost of the leased asset and earn a profit. The leases were to earn an average of approximately 17% to 22.5% per year.

[25] On June 26, 2018, the Partnership and Weslease GP entered into protection under the federal *Companies' Creditors Arrangement Act* (the **CCAA**). They went into receivership under the federal *Bankruptcy and Insolvency Act* (the **BIA**) on July 26, 2018 pursuant to a receivership order. New trustees were appointed on July 29, 2018 following a contested vote of investors. As of that date, Talbot no longer had a role with the Trust (we refer to the Weslease entities after Talbot was no longer a trustee as **New Weslease**). On November 27, 2018, the Trust (under the control of New Weslease) purchased the Partnership's remaining assets. As the Trust had been owed approximately $75.9 million, the purchase price of $40 million was paid by way of set off against that debt, leaving over $35 million of debt owing.

III. ALLEGATIONS

A. Allegations

[26] Staff's allegations against Talbot were complicated and interconnected; the complexity was exacerbated by Staff's explanations of their late withdrawal of some allegations. We concluded that Talbot was the guiding mind of Weslease, and he was in that role for the Trust until July 2018 when he was replaced as a trustee. Staff's allegations, however, were limited to the Relevant Period, defined in the NOH as between April 2014 and April 2018.

[27] The following allegations were made by Staff. Those shown in "strikethrough" font were withdrawn by Staff, although seemingly withdrawn only conditionally, as discussed below (bold and italic font in original; we have left the term "Weslease LP" as is for ease of reading, instead of using "the Partnership" as in the rest of this decision):

Misleading Statements

16. During the Relevant Period, Talbot and/or Weslease LP made representations to Pinnacle and/or existing or prospective investors, examples of which are set out below:

    16.1 Talbot made numerous statements regarding the risk profile of the Trust and/or Weslease LP. For example, Talbot represented that:

        16.1.1 Many, if not all, of the leases entered into by Weslease LP were "highly secured" and "well-secured[",] which minimized investment risk;

        ~~16.1.2 A key aspect of Weslease LP's leasing business was that leases would typically have collateral on leased equipment on a 1.5x to 1 basis, which minimized investment risk;~~

        16.1.3 In order for Weslease LP to fail, nearly every lease would have to fail based on steps taken by Weslease LP to secure its leases; and

        16.1.4 Investors' funds were "secure[".]

    16.2 Talbot promoted Weslease LP as a profitable and successful business despite significant financial losses in 2015 and 2016.

    ~~16.3 Talbot stated that investors would be provided with full and regular reporting.~~

    ~~16.4 Talbot omitted disclosing payment holidays for leases where there were significant outstanding balances.~~

    (collectively, the **Weslease Statements**).

17. The Weslease Statements, individually and/or collectively, were statements within the meaning of section 92(4.1) of the [Act].

18. The Weslease Statements, individually and/or collectively, were misleading or untrue, or failed to contain a fact required to make the Weslease Statements not misleading. The true facts included the following:

    18.1 Talbot and Weslease LP did not maintain the risk profile that was represented to the investors. For example:

        18.1.1 Weslease LP entered into leases and loan agreements with insufficient security to meet the standard of security that was represented to investors;

        ~~18.1.2 Leases of significant value entered into by Weslease LP did not have collateral on leased equipment on a 1.5x to 1 basis;~~

        18.1.3 Weslease LP entered into related transactions with R5 Energy Services Ltd. and RND Holdings Ltd. relating to a worksite camp in the fall of 2015 without either transaction being "well-secured" or "highly secured[";] and

        18.1.4 Investor funds were not secure.

    18.2 Weslease LP lost approximately $2.6 million for the year ending December 31, 2015, and $37 million for the year ending December 31, 2016.

~~18.3 Talbot did not have the audited financial statements for the Trust or Weslease LP for the year ending December 31, 2016, prepared in a timely manner, nor did he distribute such financial statements in a timely manner to Pinnacle and/or investors.~~

~~18.4 Talbot and Weslease LP granted lessees payment holidays that were inconsistent with Weslease LP's business objective of earning 22.5 per cent from its leases and, in turn, providing unitholders with a return of 12 per cent.~~

Misleading Statements were Material

19. The Weslease Statements, individually and/or collectively, were material and would reasonably be expected to have a significant effect on the market price or value of the Trust Units.

The Respondent and Related Parties had Knowledge that Statements were Materially Misleading

20. Talbot directly or indirectly made the Weslease Statements to investors.

21. Talbot made the Weslease Statements when he knew or reasonably ought to have known the true facts set out in paragraph 18 above, and therefore, Talbot knew the Weslease Statements were misleading or untrue.

22. To the extent that any of the foregoing conduct is attributable to any of the Weslease Entities, Talbot authorized, permitted or acquiesced in such conduct during the Relevant Period as described in this Notice of Hearing.

Conduct Contrary to the Public Interest

23. Further, or in the alternative, Talbot's conduct, as described in paragraphs 12 to 22 above, constitutes conduct contrary to the public interest.

24. By engaging in conduct as described in paragraphs 12 to 22 above, Talbot engaged in conduct that was abusive to the capital market. For example:

~~24.1 Talbot misled Pinnacle and/or investors as to the standard of security of Weslease LP's leases;~~

~~24.2 Talbot misled Pinnacle and/or investors as to the safety and security of investing in the Trust;~~

~~24.3 Talbot misled Pinnacle and/or investors as to the profitability and success of Weslease LP as a business;~~

24.4 Key financial statements for the Trust and/or Weslease LP were not disclosed in a timely manner to Pinnacle and/or investors; and

24.5 Payment holidays given by Weslease LP to lessees for leases of significant value were not disclosed in a timely manner to Pinnacle and/or investors.

Breaches

25. As a result of the actions and circumstances set out above, Talbot breached section 92(4.1) of the [Act] by making statements that he knew, or reasonably ought to have known, were in a material respect, misleading or untrue, did not state facts that were required to be stated

> or necessary to make the statements not misleading, and would reasonably be expected to have a significant effect on the market price or value of a security.
>
> 26. In the alternative, if Talbot is not found to be in breach of the specific provision of Alberta securities laws as alleged in paragraph 25, Staff allege that Talbot is nevertheless deserving of sanctions and other orders under the [Act] as his conduct, as described in paragraphs 23 and 24, was contrary to the public interest.

B. Withdrawal of Certain Allegations and Effect of Withdrawal

1. Staff's Position

[28] Staff did not withdraw any allegations throughout the evidentiary portion of the Hearing, then sought to place several conditions on their eventual withdrawal of certain allegations. There were also some inconsistencies in Staff's written and oral submissions on this point.

[29] In their written submissions, Staff withdrew the allegation in paras. 16.1.2 and 18.1.2 of the NOH. However, Staff submitted that the representations in para. 16.1.2 fell "within the other categories of examples set out in paragraph 16.1".

[30] Following receipt of Talbot's written submissions on June 9, 2023, Staff declined to file written reply submissions. Staff stated in a June 14, 2023 email sent to the panel through the ASC Registrar that they were clarifying the previously withdrawn allegation and withdrawing others:

> Staff would also like [to] clarify the changes to the [NOH] that we made in our written merits submissions, and make a few key additional changes noted below [original emphasis]:
>
> . . .
>
> - Paragraphs 16.1.2 and 18.1.2 of the NOH: As mentioned in paragraphs 11 and 12 of our written submissions, Staff have withdrawn the misrepresentation allegations set out in paragraphs 16.1.2 and 18.1.2 of the NOH. However, as also noted in paragraphs 11 and 12 of our written submissions, the facts described in paragraphs 16.1.2 and 18.1.2 of the NOH are relevant to the other misrepresentation allegations in paragraph 16.1 of the NOH.
>
> - Paragraphs 16.3 and 18.3 of the NOH: Staff withdraw the misrepresentation allegations set out in paragraphs 16.3 and 18.3 of the NOH. However, the facts described in those paragraphs are relevant to the other misrepresentation allegations in paragraph 16 of the NOH and to the conduct contrary to the public interest (CCPI) allegation in paragraph 24.4 of the NOH.
>
> - Paragraphs 16.4 and 18.4 of the NOH: Staff withdraw the misrepresentation allegations set out in paragraphs 16.4 and 18.4 of the NOH. However, the facts described in those paragraphs are relevant to the other misrepresentation allegations in paragraph 16 of the NOH and to the CCPI allegation in paragraph 24.5 of the NOH.
>
> - Paragraphs 24.1 to 24.3 of the NOH: As alluded to in paragraph 393 of our written submissions, Staff have withdrawn the CCPI allegations in paragraphs 24.1 to 24.3 of the NOH. However, we continue to maintain the CCPI allegations set out in paragraphs 24.4 and 24.5 of the NOH.

> Therefore, in summary:
>
> - Staff continue to allege that Mr. Talbot contravened section 92(4.1) of the [Act] by making the misrepresentations set out in paragraphs 16.1, 16.1.1, 16.1.3, 16.1.4 and 16.2 of the NOH; and
>
> - Staff continue to allege that Mr. Talbot acted contrary to the public interest in the manner set out in paragraphs 24.4 and [24.5] of the NOH.

[31] As this was confusing, the panel asked Staff to clarify further during oral submissions, resulting in the following:

- Staff stated that the facts from paras. 16.1.2, 16.3, and 16.4 of the NOH were established by the evidence tendered during the Hearing, but those were not proved to be misrepresentations.

- Staff stated that facts about the financial statement delay and payment holidays were "still relevant to the -- to the narrative and -- and, in some ways, the analysis with respect to the remaining misrep[resentation] allegations".

- Staff stated that there were statements from an earlier period (2014 or 2015) regarding collateral of 1.5 to 1 on leased equipment, so Staff were maintaining that the fact was proved, but withdrawing it as "an independent misrep[resentation]".

- When pressed on the relevance of the 1.5 to 1 collateral statement, Staff acknowledged that it "is really not that relevant, frankly, because it was made at an earlier period in time".

- Regarding Weslease's promise to provide financial reporting and the delay in doing so, Staff stated that "had a significant effect on investors' understanding of the financial picture of the business in 2017 and 2018 until those financial statements were provided". Staff further claimed that was "relevant in providing narrative, but it's also relevant in -- in assessing the misrep[resentations] about investor funds being secure, the leases being highly and well secured, and the -- the successful or unsuccessful nature of the business".

- Regarding the payment holidays, Staff stated that "the failure to disclose the fact that large lessees had been given payment holidays, again, in the -- in the context of assessing those misrepresentations -- misrepresentations we've talked about today, is relevant, because, you know, investors -- had investors known that some of these large lessees had been given payment holidays, they would have questioned it, that there were problems with these leases and potentially problems with the profitability of the business".

[32] The panel also asked Staff to clarify their reasoning underlying the use of the phrase "risk profile" in paras. 16.1 and 18.1 of the NOH. Specifically, the panel queried if Staff were arguing that: para. 16.1 was an overarching allegation that Talbot made a misstatement as to the risk profile

of the investment (the word "overarching" was used by Staff in their written submissions); paras. 16.1.1, 16.1.3, and 16.1.4 were examples of such a "risk profile statement" (those were called examples by Staff in their written submissions); and para. 18.1 was alleging a misrepresentation not that the risk profile statements were untrue at the time they were made, but that Talbot and the Partnership did not maintain that risk profile.

[33] Staff responded that, despite contrary statements in their written submissions, para. 16.1 was intended to provide context to the subparagraphs following it, and it was not an independent or overarching allegation of misrepresentation. Based on Staff's explanation, we understood that neither 16.1 nor 18.1 was to be considered as an independent misrepresentation allegation.

2. Talbot's Position

[34] In written submissions, Talbot noted Staff's withdrawal by that time of paras. 16.1.2 and 18.1.2 of the NOH, and Staff's contention that the panel should keep that information in mind as part of the context of the still-maintained misrepresentation allegations. Talbot stated that if that allegation "was not sufficiently established [on the evidence], it cannot form the basis for other examples of misrepresentation in paragraph 16.1 of the NOH".

[35] During oral submissions, Talbot also expressed concern that Staff withdrew several more allegations in the June 14, 2023 email, yet again maintained that the former allegations should still be used for context or to support the allegation in para. 26 of the NOH that Talbot acted contrary to the public interest. Talbot asked for clarification from Staff:

> . . . it's hard to tell at the moment . . . [Are these allegations being withdrawn] because of the facts? Is it because of the law? What -- why are these items being abandoned? If the facts don't support those statements being made, I don't know how they can be relied upon for anything else in the notice of hearing. If the -- if the facts support those statements are made and you're pulling them as misrepresentations so that your [conduct contrary to the public interest] allegation looks better, that's not fair to Mr. Talbot. And I don't say that with any disrespect to my friends . . . but it may put Mr. Talbot at a legal disadvantage.
>
> So I would like some clarity . . . . Are those allegations being abandoned because the facts don't support that they were made, so the evidence doesn't support those facts, or because [Staff just don't] want to rely on them as misrepresentations anymore, content to have them fit somewhere else in the notice of hearing?

[36] Staff then clarified that they considered the facts to be proved, but that those facts did not support misrepresentation allegations. However, as noted, Staff were still maintaining those facts as part of the alleged conduct contrary to the public interest.

3. Conclusion on Effect of Withdrawal of Certain Allegations

[37] It is reasonable, and welcome, for Staff to withdraw allegations if Staff conclude that they did not prove those allegations based on the evidence tendered during a hearing. However, once an allegation is withdrawn, it is withdrawn. It is neither necessary nor possible to somehow maintain the allegation for any supplementary or connected purpose. That said, Staff are free to argue that any evidence tendered during the Hearing – including evidence of facts relating to former allegations – supported their remaining allegations. We considered all of Staff's submissions on that basis, while addressing only the specific allegations not withdrawn by Staff.

IV. PRELIMINARY MATTERS

A. Standard of Proof

[38] Staff have the onus to prove each allegation on the balance of probabilities. We must "be satisfied that there is sufficiently clear, convincing and cogent evidence that the existence or occurrence of any alleged fact required to be proved is more likely than its non-existence or non-occurrence" (see, for example, *Re Aitkens*, 2018 ABASC 27 at para. 48, referring to *Re Arbour Energy Inc*., 2012 ABASC 131 at paras. 38, and *F.H. v. McDougall*, 2008 SCC 53 at paras. 46 and 49).

[39] We may draw inferences from the evidence before us, including circumstantial evidence (see, for example, *Aitkens* at para. 49 and *Arbour* at para. 39). However, we must ensure that any inferences made are supported by evidence and are not speculative (see *Walton v. Alberta (Securities Commission)*, 2014 ABCA 273 at paras. 26-28).

B. Hearsay Evidence, Relevance, and Weight

[40] An ASC panel admits evidence relevant to a hearing – including hearsay evidence – then determines the weight to be given to each piece of evidence. As stated in *Aitkens* (at paras. 50-51):

> Pursuant to ss. 29(e) and (f) of the Act, while an ASC hearing panel is to "receive that evidence that is relevant to the matter being heard", "the laws of evidence applicable to judicial proceedings do not apply". Therefore, all relevant evidence – including hearsay evidence – is admissible, subject to the rules of natural justice and procedural fairness (*Arbour* at para. 45; see also *Maitland Capital Ltd. v. Alberta (Securities Commission)*, 2009 ABCA 186). However, we retain a discretion as to the relevant evidence we will admit (*Lavallee v. Alberta (Securities Commission)*, 2010 ABCA 48 at paras. 14-18).
>
> We must also determine the weight to be given to the evidence we receive. In doing so, we consider indicators of its reliability, such as corroboration by other evidence (*Arbour* at paras. 46 and 53).
> . . .

C. Credibility and Conflicting Evidence

[41] We did not have significant concerns with the credibility of the witnesses who testified at the Hearing. It was clear that some witnesses shaded their evidence to emphasize or downplay certain actions and events. That frequently occurs during hearings, and we considered all of the evidence with that in mind. There were no significant concerns with conflicting documentary evidence, although as mentioned, certain documents did not have dates on which we could rely. When assessing any particular evidence, we examined its consistency with other evidence.

D. Adverse Inference

[42] Staff made a comment in their written submissions which Talbot interpreted as possibly arguing that the panel should draw an adverse inference because Talbot chose not to testify. Neither party discussed the law relating to adverse inference or made any specific arguments on the topic.

[43] We need not address this because it was not argued by the parties. Talbot raised an issue of whether Staff were asserting an adverse inference, and Staff did not respond to that point.

[44] We note that Staff retain the onus of proving their allegations on the balance of probabilities, even if a respondent decides not to testify. Staff also had the option of tendering the transcript of Talbot's investigative interview, but chose not to do so.

E. Use of Evidence Dated After the Relevant Period

[45] The NOH defined the Relevant Period as April 2014 to April 2018. However, Staff tendered evidence, made submissions, and significantly relied on a May 2, 2018 document apparently sent by Weslease to Pinnacle and investors (the **2018 Q1 Report**). Staff asserted in their written submissions that Talbot's alleged misconduct ended "on or around April/May 2018" and that "Talbot's last formal communication with investors was the [2018 Q1 Report] which was distributed around late April/early May 2018." There was no evidence to support Staff's statement that the document was distributed in "late April" 2018, which would have put it within the Relevant Period, rather than May 2018, which put it outside of the Relevant Period. Staff did not apply to amend the NOH to extend the Relevant Period, apparently relying instead on their "late April" assertion.

[46] If Staff had evidence showing that the 2018 Q1 Report was distributed in late April 2018, Staff should have referred to that evidence. Without such evidence, we will not assume that a document was distributed two or more days before the date on its face (in any event, there was evidence that it was not disseminated until May 2018). If Staff did not have evidence showing that the 2018 Q1 Report was distributed in late April 2018, Staff should have applied to amend the NOH to extend the Relevant Period.

[47] Accordingly, we cannot consider any allegations based on statements made in the 2018 Q1 Report. Staff also relied on a May 8, 2018 letter from Pinnacle to investors, which discussed the 2018 Q1 Report, among other information. We do not discuss either of these May 2018 documents in this decision.

V. FACTUAL BACKGROUND

A. Sales of Trust Units

[48] Staff tendered evidence showing that the total amount raised by the Trust was approximately $67 million, with most of the money raised through the OMs, using the exemption in s. 2.9 of National Instrument 45-106 *Prospectus Exemptions*. Some was also raised using the accredited investor exemption in s. 2.3 of that instrument. Talbot did not dispute that information.

[49] The Trust, in a January 2015 undertaking, signed by Talbot and the other two trustees, agreed to stop delivering OM1 to purchasers and to stop distributing Trust Units or engaging in acts in furtherance of trades of Trust Units until an updated offering memorandum, acceptable to Staff, was prepared. OM2, dated May 27, 2015, was reviewed by Staff.

[50] At issue in the Hearing were various statements made by Talbot or by a Weslease entity during the Relevant Period (April 2014 to April 2018) in the course of raising money or updating current investors. We set out and assess those statements below.

B. OMs

1. General

[51] The three OMs were largely consistent in their descriptions of the basic business of the Trust. Staff did not impugn any statements from the OMs as misrepresentations in themselves, but argued that disclosure in the OMs was insufficient to counter the statements which Staff did challenge. Talbot relied on the risk disclosure in the OMs as part of the entire circumstances surrounding the impugned statements.

[52] Some significant types of information differed in the OMs, while others were the same. The specific wording in each OM, the type of disclosure, and the time at which it was made provided context for the allegations and Talbot's defence.

2. Certain Specific Disclosure in OMs

(a) The Business

[53] OM1 described the Trust as being in the start-up phase with a limited history. By the time of OM2, 2,888,648 Trust Units had been issued and $28,886,480 raised. By the time of OM3, 5,072,748 Trust Units had been issued and $50,727,480 raised. All of the OMs stated that the investments were "risky", gave details of the 12% payments from the Partnership to the Trust, and stated that investors would receive monthly distributions (other material stated that investors were to receive a return of 12% per year).

(b) Types of Leased Assets

[54] Each OM listed the types of assets for which leases would be offered.

[55] In OM1, the assets were described as:

- Industrial cleaning equipment;
- Computers and electronics;
- Restaurant equipment;
- General office and machine shop equipment;
- Light or heavy-duty construction machinery;
- Fitness equipment;
- Office equipment;
- Dental office equipment;
- Industrial equipment; and
- Retail equipment.

[56] In OM2, the asset list was the same, with the addition of "medical office equipment", "Signage", and "Other such equipment that [Weslease GP] deems beneficial to the operation of the Leasing Business".

[57] In OM3, the list was more extensive and detailed:

- Industrial cleaning equipment (categorized as Janitorial and Sanitation Equipment);
- Computers and electronics (categorized as Commercial Equipment);
- Restaurant equipment (categorized as Commercial Equipment);
- General office and machine shop equipment (categorized as Commercial Equipment);
- Light or heavy-duty construction machinery (categorized as Commercial Equipment);
- Fitness equipment (categorized as Commercial Equipment);
- Dental and medical office equipment (categorized as Commercial Equipment);
- Heavy and Light Industrial equipment (categorized as Industrial Commercial Equipment);
- Signage (categorized as Commercial Equipment);
- Retail equipment (categorized as Commercial Equipment);
- Oil and gas related servicing, exploration, transportation and pipeline related equipment (categorized as Oil and Gas Equipment);
- Municipal Water Treatment and Sewage related equipment (categorized as Industrial Commercial Equipment); and
- Other such equipment that [Weslease GP] deems beneficial to the operation of the Leasing Business[.]

(c) Security

[58] The OMs stated:

> The Leases shall be secured by way of specific security interest registered in favour of the Partnership with respect to the Equipment to which the respective Leases relate at the applicable Personal Property Registry. Leases may also be secured by personal guarantees of the principals of corporate Lessees. Additional security may also include the inclusion of [another party] to the Lease or by a guarantee from a related or third party with respect to a Lessee or other collateral security as the Partnership deems necessary in the circumstances.

(d) Risks

[59] Risks were addressed in various parts of the OMs. For example, the opening wording of each stated: "This is a risky investment", and the discussion of making payments to investors stated that the Trust's ability to pay those amounts depended on various factors, including those disclosed in the "Risk Factors" section of the OMs.

[60] The main discussion of risk in each OM was in the Risk Factors section, which began:

> An investment in the Trust is speculative and contains certain risks. Prospective Subscribers should carefully consider, among other factors, the matters described below, each of which could have an

> adverse effect on the value of the [Trust] Units. As a result of these factors, as well as other risks inherent in any investment, there can be no assurance that the Trust will meet its business objectives. The Trust's returns may be unpredictable and, accordingly, the [Trust] Units are not suitable as the sole investment vehicle for an investor or for an investor that is looking for a predictable source of cash flow. An investor should only invest in the Trust as part of an overall investment strategy. Based on, among others, the factors described below, the possibility of partial or total loss of capital will exist and Subscribers should not subscribe unless they can readily bear the consequences of such loss.

[61] The risk factors disclosed in the OMs included:

- The Trust Units were highly illiquid and subject to restrictions on redemptions – Trust Units "should only be acquired by Subscribers able to bear the economic risk of an investment in the [Trust] Units for an indefinite period of time".

- There was no guarantee of the intended monthly distributions, and distributions could be made in Trust Units, not cash.

- OM3, but not the previous two OMs, stated: "The purchase of [Trust] Units is highly speculative. A Subscriber should purchase [Trust] Units only if it is able to bear the risk of the loss of its entire investment. An investment in the [Trust] Units should not constitute a significant portion of a Subscriber's investment portfolio."

- There was no assurance of any return on investment or return of principal (original emphasis): "**there is no assurance or guarantee that the Trust and, correspondingly, the purchasers of [Trust] Units pursuant to this Offering, will earn a return on their investment. Unitholders could lose the entire amount of their investment**".

- There was a discussion of an allowance for credit losses:

  > In connection with the Partnership's financing of Leases, it expects to record an allowance for credit losses to provide for estimated losses. The Partnership's allowance for credit losses will be based on, among other things, the past collection experience of [Weslease GP], industry data, lease delinquency data and the Partnership's assessment of prospective collection risks. Determining the appropriate level of the allowance is an inherently uncertain process and therefore the Partnership's determination of this allowance may prove to be inadequate to cover losses in connection with the Partnership's portfolio of Leases. Factors that could lead to the inadequacy of the Partnership's allowance may include the Partnership's inability to effectively manage collections, unanticipated adverse changes in the economy or discrete events adversely affecting specific leasing customers, industries or geographic areas. Losses in excess of the Partnership's allowance for credit losses would cause the Partnership to increase its provision for credit losses, reducing or eliminating the Partnership's operating income.

- Risks relating to creditworthiness, lease defaults, and security over equipment were also disclosed:

  > The Partnership will specialize in leasing equipment to small businesses. Small businesses may be more vulnerable than large businesses to economic downturns, typically depend

upon the management talents and efforts of one person or a small group of persons and often need substantial additional capital to expand or compete. Small business leases, therefore, may entail a greater risk of delinquencies and defaults than leases entered into with larger, more creditworthy leasing customers. In addition, there is typically only limited publicly available financial and other information about small businesses and they often do not have audited financial statements. Accordingly, in making credit decisions, the Partnership [relies] upon the accuracy of information about these small businesses obtained from the small business owner and/or third party sources, such as credit reporting agencies. If the information the Partnership obtains from small business owners and/or third party sources is incorrect, the Partnership's ability to make appropriate credit decisions will be impaired. If the Partnership inaccurately assesses the creditworthiness of its end user customers, it may experience a higher number of Lease defaults and related decreases in its earnings.

. . .

The failure of a future Lessee to accurately report its financial position, compliance with Lease covenants or eligibility for additional borrowings could result in the loss of some or all of the principal of a Lease including amounts the Partnership may not have advanced had it possessed complete and accurate information.

. . .

The Partnership expects that its Lease portfolio may include Leases to small and medium sized, privately owned businesses. Compared to larger, publicly owned firms, these companies generally have more limited access to capital and higher funding costs, may be in a weaker financial position and may need more capital to expand or compete. Accordingly, advances made to these types of clients entail higher risks than advances made to companies who are able to access traditional credit sources.

. . .

The Leases will be secured by security instruments including security interests registered against the Equipment acquired by the Lessees pursuant to the Leases. In the event that any of the Lessees default in their obligations under a Lease, the Partnership will have to enforce its security registered against the Equipment. There may be intervening encumbrances or other interests held by third parties that may stand in priority to the Partnership's security and may prevent the Partnership from realizing on or enforcing some or all of its security against the Equipment. There may be principles at law or in equity that may prevent the Partnership from enforcing some or all of its security against the Equipment. The Equipment may not have a sufficient value to satisfy any outstanding debt obligations of the defaulting Lessee to the Partnership.

- OM2 and OM3 had additional wording relating to the risks of lease defaults and under-deployment of funds:

The Partnership's ability to repay interest on the Loans is dependent upon the Partnership's ability to fully deploy the Gross Proceeds of this Offering, after payment of costs and commissions associated with this Offering, to fund Leases to the Lessees. In the event that funds are not fully deployed by the Partnership in any period there is a risk that the revenue from the Partnership's Leasing Business may be insufficient to satisfy interest and/or principal payment obligations to the Trust under the Loans.

- OM3 had additional wording relating to the risks of having 11 leases representing the majority of the portfolio's value:

  > As of December 31, 2015, the Equipment value of eleven individual Leases entered into by the Partnership represents 66.2% of the funds deployed by the Partnership to that date. Nine of those Leases are located in Alberta. The Partnership has provided multiple Leases to one Lessee located in Alberta which have an aggregate Equipment Value [of] $7,500,000. A second Lessee also located in Alberta has Leases with an aggregate Equipment value of $3,225,000. A third Lessee located in the United States has Leases with an aggregate Equipment value of $6,953,905. A default by one or more of the Lessees under the above Leases may adversely affect the Partnership and its ability to meet its obligations with respect to payment of principal and interest under the Promissory Notes.

- All of the OMs disclosed that economic and business factors may decrease the operating income, with delinquencies and losses generally higher during recessions or economic slowdowns, and the lessees may be more susceptible to such changes because most would be small businesses and more vulnerable.

- OM3 included additional wording about such deterioration in conditions: "Any of these events could . . . have a material adverse impact on the respective businesses, financial condition and results of operations of the Partnership and on the amount of cash available".

- Overall, the "business involves a high degree of risk, which even a combination of experience, knowledge and careful evaluation may not be able to overcome. Purchasers of [Trust] Units must rely on the ability, expertise, judgment, discretion, integrity and good faith of [Weslease GP] and its directors, officers and other personnel. This Offering is suitable for Subscribers who are willing to rely solely upon such Persons and who could afford a total loss of their investment."

- The risk factor section in each OM concluded (original emphasis):

  > **The foregoing list of risk factors does not purport to be a complete enumeration or explanation of the risks involved in an investment in the Trust. Prospective Subscribers should read this entire Offering Memorandum and consult their own counsel and financial advisors before deciding to invest in the Trust.**
  >
  > **Neither the Trust, the Trustees, [Weslease GP], nor any other Weslease Party or any affiliate or associate of the foregoing is responsible for, and undertakes no obligation to, determine the general or specific investment needs and objectives of a potential investor and the suitability of the [Trust] Units having regard to any such investment needs and objectives of the potential investor.**

(e) Redemptions

[62] All three OMs set out the investors' redemption rights. Redemption was allowed during specified times of year under specified conditions. The Trust had the option to pay for redeemed Trust Units with promissory notes in certain circumstances, including the Trust's assessment of its cash position, a redemption requested within 24 months of the Unit's certificate date, or redemption

requests exceeding 10% of the funds raised during a certain period. Promissory notes issued in redemption of Trust Units were unsecured, had a three-year term, and paid 5% per year.

(f) Provision of Financial Statements

[63] The OMs stated that the Trustees would:

> . . . send (or make available if sending is not required under applicable securities laws) to Trust Unitholders at least 21 days prior to the date of each general meeting of Unitholders, or if no general meeting is to be held in that year within six months of the fiscal year end, the annual financial statements of the Trust, together with comparative financial statements for the preceding fiscal year, if any, and the report of the Auditors thereon.

[64] OM1 and OM2 each later stated:

> The Trust will send to Unitholders within 90 days of the Fiscal Year end and, in any event, on or before any earlier date prescribed by Applicable Laws, annual financial statements of the Trust for the Fiscal Year ended immediately prior to such period, which information shall consist of a balance sheet, income statement and statement of cash flows.

[65] The comparable paragraph in OM3 used the phrase "annual audited financial statements" instead of "annual financial statements".

3. Draft OM

[66] The Draft OM was not finalized, signed, or used to sell Trust Units, and none of its statements can be the basis for misrepresentations. Staff relied on the Draft OM as showing the poor financial condition of Weslease in November 2016 and Talbot's knowledge at that time, as relevant to the misrepresentation allegations. Talbot argued that it was inconsistent for Staff to rely on the Draft OM for those points, but to contend that Talbot could not rely on the disclosure in OM1, OM2, and OM3.

C. Significant Leases

[67] Staff spent considerable time during the Hearing taking witnesses through details of some of the larger leases, particularly those connected to the oil and gas sector. A significant amount of the evidence adduced from Taylor and a Staff investigative accountant (**Ruttan**) focused on those. For example, Ruttan prepared detailed "source and use" documentation for money in and out of Weslease, much of which related to the large leases. However, as discussed elsewhere, there was little useful documentary information on the leases or the security taken for those leases. Staff acknowledged that there had been security taken on at least some of the leases (for example, a signed general security agreement (**GSA**) for the lease with Intercept Energy Services Inc. (**Intercept**)).

[68] Most of the leases were not individually relevant to Staff's allegations, which relied on general statements, such as that leases had "insufficient security" or that Talbot had falsely claimed that every lease would have to fail before Weslease could fail. Staff's submissions focused largely on leases connected to the oil and gas sector and on Staff's assertion that Weslease failed because it entered into too many large and insufficiently secured leases in that sector. We discuss those leases throughout this decision, identifiable by reference to the oil and gas sector, fracking, leases in North Dakota, and similar language.

[69] Only one lease or category of lease was specifically mentioned in the NOH. In para. 18.1.3 of the NOH, Staff asserted that the "true facts" (as opposed to the alleged misrepresentations) included that the Partnership "entered into related transactions with R5 Energy Services Ltd. [(**R5**)] and RND Holdings Ltd. [(**RND**)] relating to a worksite camp [(the **Work Camp**)] in the fall of 2015" when the transactions were not well-secured or highly secured. Although Staff labeled these as "related transactions", there were no allegations or submissions connected to any related nature of those transactions. Taylor and Ruttan both addressed the complications of the Work Camp transaction, also connecting it to other transactions for other assets in later years (although the NOH had mentioned only the initial Work Camp lease in 2015). For details of these transactions, we found most helpful the evidence of Staff's expert witness, Jeffrey Pellarin (**Pellarin**), and his report (the **Pellarin Report**).

D. Financial Statements

[70] There were several sets of financial statements in evidence. The most significant to the allegations were the 2016 financial statements for the Trust and the Partnership (respectively, the **2016 Trust Financial Statements** and the **2016 Partnership Financial Statements**, and, together, the **2016 Financial Statements**) and the 2017 financial statements for the Trust and the Partnership (respectively, the **2017 Trust Financial Statements** and the **2017 Partnership Financial Statements**, and, together, the **2017 Financial Statements**).

[71] Staff submitted that Weslease's financial disclosure was relevant in two ways. First, Staff alleged in para. 24.4 of the NOH that Talbot acted contrary to the public interest by not disclosing "[k]ey financial statements" in a timely manner. Staff asserted that delay was because Talbot did not want Pinnacle or investors to know that the Partnership was suffering losses starting in 2016, which could have affected investors' decisions to invest in or redeem Trust Units. Second, Staff relied on the content of the 2016 Financial Statements and 2017 Financial Statements as proof that Talbot knew or ought to have known that the statements he (or Weslease) was making were materially misleading, even before the 2016 Financial Statements and 2017 Financial Statements were prepared and disclosed.

E. Staff's Witnesses

1. Zurfluh

[72] Zurfluh testified that, in approximately 2013, Weslease approached Pinnacle through Marcin Drozdz (**Drozdz**) to raise capital. Drozdz ran business development and capital raising for the Trust. Zurfluh described Talbot as the CEO of Wesclean, which had led to the idea of the Trust, and that Talbot at that time was looking for more capital to expand (Zurfluh later acknowledged he was mistaken and that Talbot was the CEO of Weslease Canada, not Wesclean). Zurfluh said that Talbot was Pinnacle's main contact, very active in all parts of the business, and wrote updates for investors.

[73] Zurfluh testified that Pinnacle's due diligence branch determined that the Weslease offering had about an average risk level for an exempt market offering, noting that "all private market investments are high risk". He also stated that "we knew there was a significant amount of -- of risk in" the Weslease offering. Zurfluh testified that Pinnacle would have reviewed and approved the OMs.

[74] Zurfluh referred to a March 20, 2014 due diligence report prepared by Pinnacle's due diligence branch before OM1. That report stated that there were "no discrepancies between the [Trust's] offering documents and its marketing material". Zurfluh testified: "Had the model been done the way that it should have been done and without large leases, the risk would have been spread out amongst, you know, many different holdings and not so heavily focused necessarily in the oil and gas sector." Zurfluh confirmed that Pinnacle became aware of oil and gas leases in Weslease's portfolio in early 2015 (this was possibly as early as January 2015), and a September 2015 document in evidence showed Pinnacle asking Talbot questions about oil and gas leases. However, we note that an August 28, 2014 presentation to Pinnacle included a slide which stated that Weslease had five oil and gas leases at that time. Also in evidence was Pinnacle's October 1, 2015 due diligence report on Weslease. That report expressed some concern with the level of oil and gas concentration in Weslease's portfolio, but also stated that "the equipment that makes [up] the bulk of those leases is well securitized". It stated as well that Pinnacle needed to remain aware of Weslease's excess cash position – Weslease had not yet used a considerable amount of the cash raised from investors for new leases, but was obliged to pay investors a return on that money as if it were invested. We note that Pinnacle continued to promote and sell Trust Units for many months after that report.

[75] Pinnacle was presumably satisfied with Talbot's responses at the due diligence sessions, and OM3 was issued a few months after the September and October 2015 sessions. That was notable because Zurfluh testified that Pinnacle's concerns with Weslease's oil and gas leases developed in the few months after September 2015, yet OM3 proceeded (indicating, perhaps, that Zurfluh's recollection was not accurate).

[76] Zurfluh confirmed that he was familiar with the Draft OM, that Talbot and Craig Bentham (**Bentham**, Weslease's lawyer) provided the information in it, and that no money was raised using it. Zurfluh stated that, at that time, the significant expected operating losses meant that it did not look like a favourable investment.

[77] Zurfluh also testified about certain events once Weslease began having some financial challenges. For example, he said that Pinnacle's semi-annual reviews of the Weslease offering became "ongoing" once Pinnacle had concerns about large leases and a concentration in the oil and gas sector. During cross-examination, Zurfluh agreed with Talbot that Pinnacle questioned the value of the leases in North Dakota and was invited there to see them, but refused to go – this seemed to be some time after the leases were entered into. Zurfluh said that a site visit in winter to see snow-covered fields was not a good use of investor funds. Zurfluh also acknowledged he had seen a map of the Regional Water Service (**RWS**) water assets, along with a high-value appraisal. He questioned the accuracy of the appraisal because if it were accurate, he thought the assets should be sold and the money given to the investors.

[78] Zurfluh acknowledged that Pinnacle chose Simmons and the other two trustees who took over leadership of the Trust on July 29, 2018. Zurfluh said that, at the time of the Hearing, the majority of the leasing portfolio was "in default, wound down; some have paid out" and there were no performing leases. There was also some ongoing litigation. Investors did not receive their

capital back and had not received distributions for approximately four years. He thought that any money still collected through litigation would likely be lost to legal fees.

[79] We found that much of Zurfluh's evidence did not connect to Staff's allegations because his criticisms of Weslease's actions, leases, and business model primarily related to times later than the times at which the impugned statements were made. Zurfluh was careful in his evidence to paint Pinnacle and its role in the best possible light, but we do note that Pinnacle conducted due diligence, had access to Weslease's personnel and documents, reviewed the OMs, had the opportunity to review the security for the leases, knew of oil and gas leases by August 2014, and knew in the fall of 2015 that Weslease was giving payment holidays to some lessees. In that context, it is notable that Pinnacle did not raise any concerns at the time of the majority of the impugned statements and continued raising money for Weslease.

2. Robert Anderson

[80] Robert Anderson (**Anderson**) had been a Pinnacle DR since 2013. Anderson and his spouse invested $82,000 in the Trust in 2014 and 2015.

[81] Anderson testified about dealing representatives' duty to know the product and know the client, so that they can match clients with products suitable for them. To sell the Trust Units, that included reviewing the OMs, with Pinnacle also responsible for such review. He noted that dealing representatives also ensure clients are aware of an investment's risks and help them complete the required paperwork. He stated that he went through OM1 when Pinnacle first offered the Trust Units. There were also webinars, meetings, events held by Pinnacle or Weslease, a know-your-product quiz, and updates over the years. Anderson stated that Talbot was the primary presenter on behalf of Weslease, with Drozdz and Sargent involved to a much lesser degree.

[82] Regarding diversification of and security for the leases, Anderson stated that Weslease was described as "very diversified" and "very well securitized". He testified that the focus until the end was hundreds of different janitorial and sanitation leases and "always [security of] at least one-and-a-half times collateral on the equipment", although both statements were at odds with other evidence. He said there was "a lot of emphasis on risk mitigation and securitization", including that Weslease would own the assets until the end of the lease, required insurance, and had GSAs and personal property security agreements (**PPSAs**):

> And you certainly got the impression that -- well, it was -- it was, in fact stated numerous times that in order for the portfolio to fail, the -- there would have to be a complete collapse because there's hundreds of different leases, and so they would -- they would all have to fail. So, again -- and with all the security that was offered, there -- there was -- there was certainly a -- a comfort, I guess, you know, to -- they talked about risk mitigation and very little risk, very secure, very safe. So that -- that's kind of the message that we received.

[83] Anderson stated that the securitization message also continued until the very end: "They were still talking about how these leases were safe and secure, the fund was doing very well, very few defaults" as late as 2017.

[84] According to Anderson, he was comfortable that there was very little risk because of how Talbot, the OMs, the marketing material, and the in-person events presented the investment to investors. Anderson said that when Pinnacle asked Talbot about OM2's descriptions of US

investments and oil and gas investments, "we were assured that, no, no, no, this is still very much a -- hundreds of leases, janitorial types, dental/health care, secure leases, and small amounts, short-term, and not to worry".

[85] Anderson received annual updates from Pinnacle. He said there were to have been monthly updates from Weslease, but they did not arrive every month. He said there were "marketing updates from Weslease mostly talking about some of their clients" but not an update about the Trust itself.

[86] Anderson said Talbot delayed providing financial information to Pinnacle, and when Pinnacle finally received the information, it "revealed [a] significant increase in defaults, significant losses in the fund, huge expenses. Clearly . . . the fund had been mismanaged for quite some time." During cross-examination, Talbot asked Anderson to clarify his statement about expenses. Anderson said expenses "had increased significantly, and I believe you had profited yourself as well significantly", referring to monthly management payments to Talbot. Anderson said that he was not aware of what actions Durum had taken regarding the leases following the receivership, and acknowledged that he had received no money from New Weslease.

[87] We found Anderson sincere and credible overall. However, in light of the risk disclosure in the OMs, we considered him to be mistaken in his assessment that the Trust Units had a "[z]ero-risk profile". We also concluded that Pinnacle – and, therefore, Anderson – would have been aware of the oil and gas leases by August 2014.

3. Jeffrey Lindskog

[88] Jeffrey Lindskog (**Lindskog**) was a chartered financial analyst who had been working at Durum since about 2019. Since approximately 2021, Lindskog had been responsible for managing the Durum Opportunities Fund, a subsidiary of Durum. Lindskog described that fund as "focused on restructuring and turnaround transactions, so finding businesses, funds, and other assets that are undervalued because they're in some sort of financial distress, be it liquidity, you know, legal distress, governance issues, those types of situations".

[89] Lindskog testified that Durum was appointed as manager of New Weslease in December 2018, which meant Durum was responsible for preparing financial records, managing the lease portfolio, and managing the collections process and litigation. He stated that the assets were still owned by the Trust and, therefore, by the same investors. The Partnership had been wound up, with now a new limited partner and general partner. He testified that the majority of the value of large leases ($23.3 million) was still in litigation at the time of the Hearing.

[90] Lindskog acknowledged during cross-examination that, at the time he was dealing with the Weslease assets, he had little experience with the oil and gas business, which is why another Durum employee worked on those assets. Lindskog also did not have experience with the fracking industry. A consultant went to see the North Dakota assets, but Lindskog did not go himself.

4. Investor Witnesses

(a) Investor MS

[91] MS and his spouse invested $100,000 in the Trust in February or March 2015. MS became involved with New Weslease in about 2021 as a director or trustee.

[92] MS testified that he relied on the Pinnacle DR when he invested. MS considered himself to be a "somewhat sophisticated" investor at that time and had been looking for a diversified investment with an income stream. MS stated that he was given PowerPoint presentations before he invested (seemingly by the Pinnacle DR). He identified **Exhibit 61** as a document given to him before he invested. That document did not have a date on its face, although the Final Exhibit List stated that it was from May 2015. If MS were correct about seeing it before his investment, it must have actually been from March 2015 or earlier. MS testified that he did not go to any presentations or meetings held by Pinnacle or Weslease before he invested, and he did not speak to Talbot until after making his investment.

[93] MS understood at the time of his investment that the Trust was medium risk and diversified with many small businesses, and that "the value of the leases was secured against personal assets of the lessees". According to MS, he found out shortly after investing that a large amount of the portfolio was tied to a large lease for water-heating trucks, when he had expected the majority would be in many small janitorial leases. He contacted Talbot, who explained it was proprietary technology, but offered MS his money back. MS spoke with the Pinnacle DR and decided to stay invested in Weslease, even though MS thought that the risk level was higher than his original conclusion.

[94] MS testified that he never spoke to Talbot about security, but assumed from OM1 and marketing material that "there was a process in place and that [Talbot] had experience in the leasing industry and that there was some due diligence and securitization that was going to happen". According to MS, he had expected monthly newsletters, but received them only occasionally. Instead, he spoke directly to Talbot or the Pinnacle DR for information. In 2017 when the distributions stopped, MS had discussions with Talbot about "how the business would get back on track so that distributions could be paid again and what was required on [Talbot's] part to do that". MS said Talbot told him that if Pinnacle started selling Trust Units again, Weslease could use that capital to expand or buy out more of the North Dakota pipeline to get the income stream flowing again.

(b) Investor JV

[95] JV invested four times, for a total investment of $100,000 – his purchases took place in or around September 2014, November 2014, September 2015, and January 2016. JV thought that he received approximately $18,000 in distributions, although he agreed that the higher amount in the documentary evidence ($26,578.90) could be correct. JV discussed receiving various documents and attending some meetings, and he described some of what he was told.

[96] JV testified that he initially wanted to invest with a mortgage company, but his Pinnacle DR said Weslease was very good and reputable, paid 12%, and paid like clockwork. JV met with the Pinnacle DR and Talbot at a restaurant. JV stated:

> They said, Yeah, we -- we're a very reputable company. You know, we've been in business several years now, and we always pay. We -- you know, our -- all of our investors are very happy with us. So, you know, we have good businesses, the leasing businesses to the hospitals and malls in Alberta, namely Edmonton and Calgary. Most of our -- all of our leasing [business is] for cleaning

> equipment, and that's it, and they -- and that they had a 98 to 99 percent pay -- pay structure that clients paid on a monthly basis all the time.

[97] JV stated that the first presentation was at that restaurant in early August 2014, at which Talbot spoke and there were videos and brochures. He also testified about an investors' meeting about a year later, and that both presentations were "always about the -- the leasing equipment to cleaning companies in the hospitals and malls of either Edmonton, Calgary, and a few other smaller cities in Alberta". JV identified **Exhibit 54** as a document he received, although it was not dated and he was not asked when he received it. That document said that Weslease: had "a very diversified portfolio"; "extend[ed] leases to many lessees, for a large variety of types of equipment"; and "secure[d] each lease". It also stated that "a significant market collapse would have to happen in order to have our entire portfolio fail". JV testified that he understood from that document that Weslease paid on time every month. The Exhibit 54 document listed lessees as cleaning companies, gyms, dentists, restaurants, and any company that used equipment.

[98] According to JV, water and water services were first mentioned by Weslease in about April 2016. He also referred to an August 2016 meeting with a Weslease representative (not Talbot) at which there was talk "about some other business that they were getting into" (fracking trucks for the oil business in North Dakota and South Dakota).

[99] JV confirmed **Exhibit 59** as a document he received, although it was not dated and he was not asked when he received it. Forward-looking statements discussing 2012 and 2013 would have indicated it was from about 2012, but it referred to Weslease GP, which was not incorporated until January 31, 2014, and the Trust, which was not created until April 4, 2014. JV was not referred to **Exhibit 58**, which was very similar to Exhibit 59 but lacked the references to Weslease GP and the Trust (discussed below). Given the uncertain age of Exhibit 59 and the fact that Staff asked JV no questions about the content of this document, we did not rely on it. We note, however, that even in this apparently older document, mention was made of leases for equipment other than cleaning equipment.

[100] JV confirmed that he received and reviewed OM1 before his first investment. When asked why he kept investing, he said it was because he was making money. He stated that he received OM2 and OM3, but did not review them because they "pretty well all said the same thing", which is what the Pinnacle DR told him. JV was mistaken in stating that the OMs all said the same thing, but would not have known that because he did not read them all.

[101] JV testified that, "in the beginning, they told us there was no risk" (he was not asked if that was said by Pinnacle, Weslease, or both), but he knew there was "always a possibility" of losing all his money. JV stated that he signed a risk acknowledgement form for each of his investments. He also testified that his understanding of the risk did not change at any time throughout the time he invested (the question and response appeared to cover the period through which he held the investment, not only the times at which he made the investments, the last of which was in February 2016). He described his risk tolerance as "very low", which was at odds with his stated understanding that he could lose all of his money. JV said that at every meeting with Talbot, Weslease, and Pinnacle, he was always told that Weslease was doing well and growing. He referred to Talbot specifically as saying things such as the business has "never been better" and "it's getting

better and better every time". He recalled a particular statement by Talbot in February 2016 when Talbot said "I'm glad you're an investor. Feel free to invest more. We're doing fabulous."

[102] However, at another meeting (apparently August 2016), Talbot was not present, but a Weslease representative (JV did not recall his name) said the lessees were not paying as well and needed an extra month or two to pay – JV was satisfied with that. JV confirmed receiving Weslease newsletters in August 2016 (the **August 2016 Newsletter**) and December 2016 (the **December 2016 Newsletter**). Although Staff did not ask JV questions about the content of those documents, we note that both referred to leases for equipment other than cleaning equipment.

[103] JV received an October 14, 2017 email (the **October 2017 Update**) stating, among other things, that distributions would be resuming (although they did not).

[104] We accepted JV as a truthful and credible witness overall. However, there were two points on which his testimony was not convincing. First, his stated risk tolerance level was lower than the risk level he described for the Weslease investment. We were satisfied he was aware of the actual risk level when he invested. Second, he expressed his understanding that, throughout the time he was invested in the Trust, Weslease described its business as leasing to cleaning companies. We accepted that he genuinely believed that, but his belief was contradicted by documents in evidence, including material that JV saw or received. As an additional complication (and through no fault of JV himself), Staff did not always ask him when he was told certain things or given certain documents, or by whom, which made it difficult to connect parts of his testimony to the specific allegations.

(c) Investor JK

[105] JK made six or seven investments with Pinnacle (some personally and some through a holding company), starting in 2013. She went to a Pinnacle presentation about Weslease in approximately April 2014, heard Talbot present, and bought some Trust Units for $20,000. JK described Pinnacle's presentations as having representatives of companies who "put on a song and dance" about what they hoped to do. At the Weslease meeting, Talbot said Weslease was a leasing company and "would be leasing equipment to people like dentists, gymnasiums, cleaning companies, and things like that", with lessees "spread across a wide range of industries". JK considered that diversity to be attractive.

[106] JK testified that she received a paper copy of the April 2014 PowerPoint presentation (not a smaller brochure) and reviewed that before she invested. She confirmed that some risks were listed in that presentation. JK also recalled having a discussion with her Pinnacle DR (Anderson) before investing.

[107] JK testified that the main factors which led to her investment in Weslease were: "I liked the idea of the -- the company, their premise they were -- they presented; and, again, because I had Pinnacle as a broker, and they'd done their due diligence, I felt relatively safe in that respect, and I liked the fact they had spread their leases across many industries so you don't put all your eggs in one basket". She also considered the planned rate of return.

[108] Understandably, given the high degree of similarity among some of the brochures and presentation documents in evidence, JK could not always say with certainty when (or if) she had seen a particular document, although she identified parts of several documents as being familiar. Some of the portions familiar to her were descriptions of clients, protecting investments, and securitization. She did not recall receiving the 2016 Trust Financial Statements or the 2017 Trust Financial Statements.

[109] In discussions with the Pinnacle DR, "he would say, Pinnacle has done this, this, and this, their due diligence with Weslease, and they were confident [that] everything was okay in securing our investments". JK did not recall any discussions at the presentations or with the Pinnacle DR about the size of the leases.

[110] JK recalled the December 2016 Newsletter and said that was when she noticed the wording had changed from leasing of equipment to "all of a sudden, we're funding the infrastructure for delivering water to fracking projects, and I just don't know what that means as far as are you leasing, leasing equipment for them? Like, the -- the vernacular changed over time [from the time of her investment to the time of this newsletter]. It used to be very specifically leasing, and now we're funding the infrastructure, which, to me, is not necessarily leasing." After receiving that newsletter, she had a conversation with her Pinnacle DR who said he would find out what was going on. She testified that she was not concerned at that time, but started having many conversations once the distribution payments stopped a few months later. At that point, her Pinnacle DR said: "things were not good, and they were trying to contact Weslease -- 'they' being Pinnacle -- and they were working on it". According to JK, her Pinnacle DR also said Pinnacle had not received financial statements from Weslease in six months and was having difficulty getting those.

[111] JK testified that she knew the Weslease investment was a risk, but losing her money meant she had to do without some things. She planned not to invest in high-risk products again.

(d) Investor KC

[112] KC and his spouse bought Trust Units in approximately July 2014 and November 2015 for a total exceeding $39,000. They received approximately $12,000 in distributions and received none of the principal back. KC testified that he received OM1 and OM2, reading perhaps part of the former but none of the latter. He said that he relied on Pinnacle for its expertise and extensive due diligence process, and he dealt with a Pinnacle DR.

[113] It seemed that KC attended two to four presentations by Talbot before he invested. KC described the business as leasing cleaning machines to entities, with investors getting 12% from the 22% to 24% earned on the leases. He described that understanding as coming from the presentations and from marketing materials: "not official legal documentation, but, you know, high-gloss marketing materials and stuff that would be put on the tables so that people would understand, you know, exactly what the . . . offering memorandum . . . would entail".

[114] KC testified that Talbot did not use the word "guaranteed", although KC thought it was unlikely there would be a default because the lessees were entities such as hospitals, universities, and municipalities. According to KC, the presentations and discussions were about cleaning

supplies (and inventory), and Talbot tied everything to Wesclean and did not talk about investing in oil and gas companies, oil and gas assets, or fracking. However, KC also said that he did not pay much attention to the presentations after making his investments. KC stated that he remembered Talbot talking about securitization before KC invested, and said security was important to him because of the "low probability of default". He also remembered mention of risk, but investors were told risk was mitigated. He stated that he invested because he considered the Trust Units to be low risk and secured, although he also took steps to minimize his exposure (indicating an understanding of the actual risk level).

[115] When pointed to **Exhibit 53**, Exhibit 59, and Exhibit 61 (undated presentations about Weslease), KC said that he did not recognize them because they had pictures of construction equipment, and he recalled information only about cleaning equipment. Exhibit 53 may have been from approximately 2014, as it included charts for various years and the latest of those was 2013. KC said **Exhibit 55** (an undated brochure) was more familiar to him because it was more focused on cleaning. KC recalled receiving communications and updates, but could not specifically identify the August 2016 Newsletter. KC was skeptical about distribution payments by the time of the October 2017 Update, although it was unclear if he recalled receiving a similar email himself.

[116] KC testified he did not know when he invested that so much money would be raised and that it would be used for non-cleaning assets, which created more risk. He did not think Pinnacle should have continued to sell Trust Units when Weslease did not have the ability to use the capital for cleaning equipment leases. He was aware of the change in trustees and the bankruptcy proceedings, but he did not care much about those because he had no control and there was no liquidity. He also had come to have no expectation of getting his money back.

[117] KC relied on Pinnacle for advice during the fight for control because Pinnacle "knew more about what was going on in terms of the chance of recovery than I would". He also stated that he thought the Pinnacle DR had told him that there were struggles and that Talbot was not giving financial statements to Pinnacle.

[118] We found KC to be credible. He was obviously mistaken about cleaning equipment being the only type of lease mentioned in the documents and presentations, but we did not consider that to be a credibility issue. At times, KC did not answer a question directly (such as whether he recognized a particular document), making some of his answers less helpful.

(e) Investor CV

[119] CV testified that he was invited by his friend, the Pinnacle DR Anderson, to dinner presentations, usually for two different investments. Weslease presented at one of those. CV thought that the presenter was Talbot, and testified that Talbot said the investment opportunity "was going to be solely focused on" big cleaning machines being leased to cleaning businesses. CV and his spouse invested in Weslease once – on May 26, 2014 for $20,000, with Anderson taking care of the paperwork.

[120] When asked if "Talbot or anyone else" spoke about "the security of the investment", CV replied: "It was portrayed as a very secure investment" because many small businesses were involved, so there was only a very small chance that all of the businesses would have difficulties

at the same time and endanger the investment. CV stated that he went to a second Weslease presentation. He thought that presentation "was, sort of, the same" as the first, but did not pay much attention. He could not recall details, including the date and whether Talbot spoke.

[121] CV was asked about Exhibit 58, an undated presentation about Weslease (possibly from between 2012 and 2014, and similar to Exhibit 59, discussed above). Although he thought it looked similar to a brochure he received, he was not able to recall or identify many parts when asked about them, such as the discussions of security agreements, registration, and a broad range of industries. CV said that no representatives of Weslease or Pinnacle discussed business plans other than walk-behind cleaners. He recognized a "Risk Mitigation" slide, which set out measures such as GSAs, PPSAs, and insurance. He also recalled comments about financial reporting in general, but not specifically from a Weslease presentation.

[122] CV thought that OM1 looked familiar, although he did not recognize the list of lease equipment. He did not remember who gave OM1 to him, but thought he received it from the Pinnacle DR at about the time he wrote his cheque for the Trust Units. CV said that he and the Pinnacle DR discussed OM1, but it was not a long meeting. CV also did not recognize Exhibit 55 or Exhibit 61 (undated documents), the August 2016 Newsletter, or the October 2017 Update (which was sent to JV and stated that distributions would be resuming).

[123] CV stated that he relied on Pinnacle and Anderson for information, becoming concerned when the distribution payments stopped and when he heard "about some investment in some water thing down in the States somewhere". He would have been very hesitant to invest in oil because he had been through the oil downturn in the 1980s.

(f) Investor LO

[124] LO made quite a few investments with Pinnacle through his Pinnacle DR. LO heard about Weslease during one of Pinnacle's investment meetings. The only Weslease presentation he attended was in July 2014. He invested $50,000 in July 2014 and $40,000 in December 2015. He planned to invest $20,000 in June 2016, but the distribution payments stopped, he did not get any Trust Units for that attempted investment, and he received that $20,000 back about a year later.

[125] Regarding the 2014 presentation about Weslease, LO testified that Talbot talked about the cleaning business and stated that Weslease performed better than the industry average in some respects. LO identified Exhibit 58 as the brochure he received at that presentation, and said he knew from the brochure that investments were in various industries, such as cleaning, construction, and oil. Although Exhibit 58 was undated, it referred to expenses and capital for 2012 and 2013, so a 2014 date was possible. LO recalled that the oral presentation focused more on the cleaning side of the business and on how the leases were secured. LO testified that he took the brochure home and reviewed it, then met with his Pinnacle DR to make the investment. LO said that the documentation to protect the portfolio, the security of the leases, and the steps to ensure a low default rate were all important factors to him in deciding to invest. It was unclear whether the Pinnacle DR told LO anything about Weslease when they were completing the paperwork.

[126] LO said that he was not familiar with Exhibit 55 (an undated brochure). LO stated that OM1 was available to him online, but he did not read the entire document because he was relying

on Pinnacle, which said it had gone through OM1 very thoroughly. LO did not see or review OM2 or OM3.

[127] LO testified that he did not receive any financial statements from Weslease, and that his Pinnacle DR said that Pinnacle did not receive any documents from Talbot explaining why the distribution payments stopped. LO received an update through Durum, but did not know what his investment was worth at the time of the Hearing.

(g) Investor GB

[128] GB bought Trust Units on four separate occasions: September 16, 2014 ($33,600); July 13, 2015 ($12,860); March 24, 2016 ($30,000); and April 11, 2016 ($9,580). GB testified that, before first investing, he read all of OM1 and a couple of brochures, and attended a presentation by Talbot as part of a Pinnacle meeting, after May 2014. At that presentation, according to GB, Talbot summarized Weslease's business as leasing primarily cleaning equipment so customers could rent the equipment instead of buying it themselves. GB testified that he spoke with Talbot after that presentation and before investing, with Talbot going over some details of the presentation and the nature of the business. According to GB, he made each investment anticipating a decent return and thought the cleaning business would be stable and secure. He stated that, before each investment, there was a Pinnacle presentation at which Talbot spoke about the progress and the business: "everything seemed to be going as per plan, and they had been making their payments and so on, so it -- it just seemed like . . . a good one to continue to invest into".

[129] GB said that OM1 described the business as leasing equipment to cleaning companies, but that he gave OM2 and OM3 only a cursory review. GB testified that he saw the document identified as Exhibit 59 before the first investment. He noted that it included a description of steps to reduce the risk (for example, personal guarantees, GSAs, and insurance), had pictures of areas other than cleaning ("including some industrial and office, oil field area, [and] gyms"), and stated there would be financial reporting. GB said he did not receive financial reports until after the distributions stopped; he did not remember any during the times he made his investments. GB thought that he had signed risk acknowledgement forms for his investments. He said his risk tolerance was "low to medium" when he invested in Weslease, and described the investment as "a fairly moderate risk". GB also said that his understanding of the risk level did not change for the first two investments, but implied that might have been different by the time of OM3, which included oil and gas as an area of investment.

[130] GB testified that he probably saw the August 2016 Newsletter and the December 2016 Newsletter, with both of those dated after his last investment. Staff did not ask him questions about the content of either newsletter. At the time of the Hearing, he had little expectation of getting back his investment, but he said that at the time of the first defaults there was still significant equity in the company – which he thought was disposed of at "fire-sale prices".

F. Talbot's Witnesses

1. Keith Morlock

[131] Keith Morlock (**Morlock**) was an oil and gas consultant in North Dakota who was involved in the fracking industry. He owned entities referred to during the Hearing as **640water**. He

described 640water as being in "the frac water heating business" and having an extensive water pipeline system with no real competitors. With Dale Behan (**Behan**), Morlock owned RWS. We have assumed the dollar amounts referred to by Morlock were in US currency, although the currency was not relevant to our determinations.

[132] Morlock testified that he recalled reviewing, with Behan, an August 2017 valuation of RWS, and confirmed that an appraisal valuing the water assets at approximately US$79.8 million looked correct.

[133] Morlock testified that clients were unable to pay when the oil and gas downturn hit. For example, one client owed approximately US$900,000 but could not pay. Morlock stated that he discussed the issue with Weslease because enforcing on the US$900,000 would have meant no more money in the future from that client.

[134] Morlock described conflict with the New Weslease trustees. According to Morlock, they did not come to North Dakota to look at the assets, and they did not understand how the laws and the oil and gas industry in North Dakota worked. As an example, Morlock said the New Weslease trustees sent out a notice that Weslease had new ownership, which Morlock described as catastrophic in the circumstances. Morlock also testified that 640water would have made different decisions had it known that Pinnacle would stop raising money for Weslease (for example, 640water would not have bought as much pipeline, which ended up sitting above ground because there was not enough money to complete the underground installation). He also stated that 640water lost business because it could not install the pipeline, and the business subsequently faced more difficulties with the drop in oil prices in 2019 and the COVID-19 pandemic.

[135] Morlock described a lawsuit, stating that Pinnacle told him that it would put Weslease back on Pinnacle's shelf if Morlock would settle, then 640water could use the money raised to complete the pipeline installation. (Zurfluh had confirmed that a lawsuit involving Morlock was probably a reason Weslease was removed from Pinnacle's shelf.) Morlock testified that he eventually settled in October 2016 for US$200,000 instead of the US$2 million he claimed to be owed, but that Pinnacle did not reinstate Weslease on its shelf. Morlock also said that 640water borrowed US$2 million from another entity to put the pipe in the ground, and that he explored other financing options but none worked out. Morlock confirmed that a US$50 million offering had been proposed in early 2017, and that there was a possible sale sometime before August 2018 for US$42 million. He stated that again, however, these did not materialize. He testified further about various financing options, but that was largely irrelevant to this Hearing.

[136] Morlock also discussed Intercept (which acquired 640water in March 2015), describing it as being in the frac water heating business and using trucks, among other equipment. He stated that when the market collapsed, Intercept reached an agreement with the truck manufacturer to profit-share the use of the trucks and sell most of them back. However, according to Morlock, the New Weslease group stated that it, not Intercept, owned the trucks and refused to let Intercept operate the trucks to generate money, refused a deal for the trucks, then eventually sold them for far less than originally contemplated. During cross-examination, Morlock agreed that the trucks would have depreciated over time and might have sold for less during a downturn in oil prices.

2. Noland Critchfield

[137] Noland Critchfield (**Critchfield**) described himself as a manufacturing engineer with a company which manufactured and operated high-efficiency water heating systems, primarily for fracking. At the time he testified, his company was operating 17 water heating units in North Dakota, five of which had been built for the Canadian group (which we were satisfied meant Weslease). He identified several trucks and pieces of equipment in the pictures which were in evidence.

[138] According to Critchfield, the New Weslease trustees had caused the assets to remain idle until they were sold. Critchfield bought all of those assets for approximately US$800,000 total, despite each of the four trucks originally selling for about US$680,000 and not depreciating much. Critchfield was asked how his company's board determined how much to offer. He replied that that was the amount the board thought it could afford without borrowing any money. He added that the board knew it could incorporate the equipment into its operation. Critchfield also said that the New Weslease trustees never came to North Dakota, and he did not think they had any interest in keeping the units operating.

3. Donald MacLean

[139] Donald MacLean (**MacLean**) was a retired accountant and licenced trustee in bankruptcy. He testified that he worked in insolvency and restructuring for several decades, but Talbot did not seek to qualify him as an expert witness. Accordingly, MacLean's testimony was factual, and we did not rely on any opinions he expressed.

[140] MacLean testified that Talbot called him in 2018 about problems with Weslease, and MacLean was then engaged in about mid-May 2018 by one (or more) of the Weslease entities to identify the problems and potential solutions. MacLean was working with an associate, and Talbot had also retained an insolvency restructuring lawyer.

[141] MacLean described the situation at the time he was engaged:

- Weslease was in arrears paying investors because there was not enough cash from the leasing portfolio to pay the 12%;
- there was what seemed to be "a landslide of redemption requests";
- the oil and gas industry was "in distress"; and
- lessees were defaulting, with Weslease looking at each one to repossess and sell equipment, extend payment time, give a payment holiday, or litigate.

[142] In MacLean's view, it "seemed that there -- some restructuring was feasible" to maximize investor recovery (as opposed to receivership). He started looking at a formal insolvency process to buy time for Weslease. However, because Pinnacle had Simmons take control and replaced the Partnership's trustees with Simmons' personnel, MacLean testified that he never had the chance to go to court to present a plan of arrangement, nor was he able to examine the details of Weslease's situation.

[143] MacLean noted that the Trust Units had an obvious level of risk because the leases would have to generate at least 20% to meet the 12% payouts plus expenses. He stated that a 20% lease return rate model is inherently riskier because the lessees willing to pay such rates are the ones which do not have lower-cost money available to them. MacLean called the combination of higher risk and economic conditions (including the decreasing price of oil) "a recipe for disaster", but he saw Talbot's team trying to maximize recoveries.

[144] Because MacLean was not qualified as an expert and did not have a chance to review the Pellarin Report, he was unable to comment on its content. He did mention that the valuation was done six months after the New Weslease trustees took over, so it did not show the same situation as when MacLean was briefly involved.

4. Jones

[145] Jones bought Trust Units in December 2015 for $500,000 and became a trustee of the Trust on September 16, 2016. Jones stated that he was involved in only one meeting (November 2016) and was removed on July 29, 2018, despite his experience in the oil and gas industry and with equipment such as camps and trucks. His background in the oil and gas industry included board membership with various entities. Jones stated that he had received very little information from New Weslease.

[146] Jones testified that he had known Talbot for about 10 or 12 years before the Hearing, but Talbot had not approached him about investing in Weslease. He agreed that he thought the Trust Units were a low-risk investment, although he knew there were some risky factors. He stated that he went to look at some of the assets himself at the time he invested, and agreed that Talbot told him the assets were well-secured.

[147] Jones identified the minutes in evidence from a November 11, 2016 meeting of the Weslease board and trustees. However, he did not recall much about the financial statement discussion at that meeting. He could not identify the Partnership's consolidated interim financial statements dated June 30, 2016 (the **June 2016 Interim Statements**) when Staff referred to them, although he recalled a discussion about them at the meeting. Staff noted that those statements attributed a loss of approximately $3.264 million to the Partnership. Jones agreed that there was a discussion at the November 11, 2016 meeting about decreasing the distribution rate from 12% to 10% because of Weslease's financial problems.

[148] Jones stated that he understood when he invested that Weslease was involved in a number of different industries. He also said he was aware in November 2016 that the Partnership had operating losses.

5. Morawski

[149] Morawski was a shareholder and board member of Weslease GP. He testified that he and his spouse invested about $120,000 to $160,000 and received nothing back. He also supplied some services to Weslease through his business and had experience in the oil and gas industry. Morawski testified that he had known Talbot since approximately 2006 and had worked with him before. He

confirmed that he had experienced several downturns in the oil and gas industry, including starting in 2016.

[150] Morawski was one of those listed in OM1 as a director and controlling person of Weslease GP. Morawski stated that he did not help draft OM2 and had no conversations about its content. Although OM2 said that he was on the Lease Committee, he disagreed with that – he said the committee asked him some questions, but he was not involved in any paperwork.

[151] When asked about Morawski, Lindskog from Durum said Morawski was a trustee of Weslease and had a business which entered into a lease with Weslease. Morawski's name was on a "Weslease Association Chart" prepared by Staff and tendered as evidence. He agreed that approximately $415,000 was paid out by Weslease, but said it was paid to his company, not to him, and was for building two frac water heating units for Intercept. According to Morawski, about 10% or 15% of that $415,000 was profit.

[152] Talbot pointed Morawski to a set of pictures in evidence, described in the Final Exhibit List as "Intercept Equipment North Dakota". Morawski identified two pictures as frac water heating units built by his company. Another set of pictures in evidence, described in the Final Exhibit List as "Equipment Ricks [sic] Yard Photos" was, according to Morawski, pictures of some Weslease-related equipment he stored on his property after the Fort McMurray fire in 2016. He testified that he was not compensated for storing that equipment – about 100 pieces – but had done it as a favour to Talbot.

[153] Morawski said that New Weslease was to pay him for storing the equipment, but the New Weslease trustees stopped talking to him. He felt "snubbed" because he wanted the rent, wanted the property cleaned up, and had buyers for some of the equipment. According to Morawski, New Weslease sold most of the equipment, and the pieces still on his property at the time of the Hearing were mostly "junk" by that point.

G. CCAA and Bankruptcy Proceedings

[154] On May 28, 2018 (while Talbot was still a trustee), Weslease GP and the Partnership filed a notice of intention to make a proposal under the BIA. PricewaterhouseCoopers Inc. (**PwC**) was appointed as the proposal trustee. PwC issued its first report on June 18, 2018. That report noted accounts receivable of $6,718,144, which were leases in default for which remedies were being pursued, and Weslease thought most should be collectible. Other accounts receivable of $34,641,130 were connected to oil and gas in North Dakota, and Weslease reported to PwC that discussions regarding refinancing would be beneficial to Weslease. PwC also noted that operating losses were $37,073,819 in 2016, $9,054,930 in 2017, and approximately $3.6 million for the first five months of 2018. PwC described Weslease's liquidity forecasts as "sufficient" but "tight", and said it had no reason to think there was a problem with the initial CCAA cash flow forecasts or Weslease management's assumptions. PwC reported that Weslease's plan was to reduce costs, renegotiate loans (including the extension of terms in some cases), raise new capital, and resolve litigation against the Trust. PwC concluded: "If management is afforded time to attempt to meet these objectives, there is a reasonable prospect of the [sic] filing a viable proposal by [Weslease]".

[155] The initial CCAA order was made on June 26, 2018 and included a prohibition on proceedings against Weslease until July 26, 2018. PwC became the monitor. PwC's first report as monitor was dated July 17, 2018. At that time, PwC still considered Weslease's cash position to be "tight" but also thought that liquidity was sufficient. PwC stated that it was reasonable to extend the stay of proceedings until October 5, 2018, and agreed with Weslease "that a debtor in possession wind down/sale process will likely result in a better overall recovery for the creditors than would a receivership or bankruptcy".

[156] However, on July 26, 2018, the court ended the CCAA process and appointed PwC as the receiver for bankruptcy proceedings (the **Receiver**). A February 19, 2019 summary of New Weslease's trustees' activities sent to Staff stated that New Weslease had successfully opposed extension of the CCAA process. According to PwC, Weslease GP and the Partnership owed the Trust $73,551,086.92 as of July 26, 2018.

[157] PwC's November 14, 2018 report as Receiver (the **Receiver's First Report**) stated that all assets were sold to the Trust (by then, New Weslease) for $40 million under an October 25, 2018 agreement, leaving a shortfall of over $35 million. The Receiver considered the purchase price to be reasonable, based on "a high level analysis of the Trust's offer utilizing estimated market or liquidation values of the [assets] where available and/or applicable". The sale agreement was amended as of November 16, 2018, and approved by the court on November 27, 2018. PwC was discharged as Receiver shortly after issuing a February 2020 report.

[158] Lindskog testified about the Receiver's First Report, one section of which stated (original emphasis):

> 5.4.1 **Accounts receivable (active leases)** – comprised of 213 leases in good standing (approximately $4.4 million). As reflected in the Statement of Receipts and Disbursements attached [to the Receiver's First Report], the Receiver has collected approximately $857,000 in lease payments since its appointment.
>
> 5.4.2 **Other accounts receivable (non-active leases)** – comprised of 42 leases in default where legal remedies should be pursued or the lessee is insolvent ($7.5 million), along with leases relating to certain oil and gas assets located in North Dakota and other U.S. locations where lease payments ceased in 2016 with the concurrence of Weslease ($23.3 million).

[159] Lindskog testified that a significant portion of that $4.4 million in active leases had been recovered by Durum. He said that more of the larger leases (called non-active because the lessees were not making payments) had equipment which could not be seized or had other collateral attached, such as a collateral mortgage. The assets in that non-active group typically involved significant litigation. Lindskog did not know how much of the $7.5 million had been recovered, and stated that about $1 million of the $23.3 million had been recovered, with the majority still in litigation in the US.

[160] None of the witnesses were taken to the discussion in the Receiver's First Report regarding missed opportunities to sell some of the assets due to a request by New Weslease:

> 8.3 Although there were opportunities to facilitate the sale of certain assets by lessees in the U.S. (with proceeds to be remitted to the Receiver) as well as realizing on certain assets

> owned by Weslease in Canada which would have resulted in recoveries to the Trust, the Trust requested the Receiver take no further steps of any kind to sell or dispose of the Assets or to proceed with any of the transactions set out in the Receiver's email updates. Noting that the Trust is the only affected creditor with a financial interest in the Assets, the Receiver agreed to the Trust's request on the condition that the proposed sale of Assets to the Trust (described in further detail below) was completed quickly. The Receiver notes that it raised concerns with the Trust regarding the passage of time (and risk associated with the same) since the Trust first advised on July 31, 2018 that it would be submitting an offer to purchase the Assets.
>
> 8.4 As such, at the request of the Trust the Receiver has been in a holding pattern with respect to administration of the "non-active" lease portfolio and miscellaneous assets of Weslease in light of pending sale of the Assets to the Trust.

H. Staff's Expert Witness: Pellarin

1. General

[161] Pellarin was qualified as an expert in "the valuation of the assets that are the subject of his report". Pellarin provided the Pellarin Report, titled "Estimated Fair Market Value of Lease Portfolio Held by Weslease 2018 Operating LP As at December 31, 2018". There were two versions in evidence, with the second correcting some typographical and mathematical errors. Our references are to the corrected report, dated May 15, 2019. Pellarin also provided considerable supporting documentation to Staff.

[162] There was a tremendous amount of information in the Pellarin Report, most of which was not relevant to this Hearing for two reasons: (1) the type of report and the purpose for which it was prepared; and (2) the assessment date of December 31, 2018 and the scope of the fair market value (**FMV**) estimates.

[163] In both the Pellarin Report and in his testimony, Pellarin described the three types of valuation reports. We address this in more detail below.

[164] The Pellarin Report assessed the value of various assets as at December 31, 2018. That valuation date was not helpful to us in determining the FMV of those assets when Weslease entered into the leases and when Talbot (or Weslease) made the impugned statements during the Relevant Period. We also address this in more detail below.

2. Type of Report: An Estimate Report

[165] Pellarin set out the three types of valuation reports and discussed that in his testimony. In the Pellarin Report, he stated (original emphasis):

> The types of valuation reports described in the Canadian Institute of Chartered Business Valuators Practice Standard 110 – Valuation Reports – Report Disclosure Standards and Recommendations are: (i) **Comprehensive Reports** – based on a comprehensive review and analysis of the business, its industry, general economic factors, and all other relevant factors which are adequately corroborated and documented in a detailed written report; (ii) **Estimate Reports** – based on a limited review and analysis of the business and other relevant factors which are adequately corroborated and documented in a less detailed written report; (iii) **Calculation Reports** – based on minimal review and analysis of the business and other relevant factors with little or no corroboration which is documented in a brief written report. . . .

[166] Pellarin further described the types of report in his testimony. He said that a calculation report and a comprehensive report are the two extremes. The former is used rarely because it accepts all the information given to the valuator. The latter involves a much more intensive process, not accepting the information given, "putting one's feet to the fire on key assumptions" to be sure they are reasonable, and "performing a lot more calculations". According to Pellarin, comprehensive reports are typically used for a highly material transaction or for court proceedings.

[167] Pellarin described an estimate report as a large grey area between those two extremes:

> . . . there's a certain amount of analysis, but there's a certain amount of just accepting inputs that are given to you. There's not necessarily the same effort to get third-party evidence to support facts and assumptions that are fed to you. There is an effort to look at those facts and assumptions and say, Do they make sense in light of other data, but I'm not necessarily going to, you know, really put it to the same very high standards as a comprehensive report.

[168] The Pellarin Report was an estimate report prepared for New Weslease in April 2019 (revised in May 2019). It was not prepared for this Hearing. The Pellarin Report stated that Pellarin and New Weslease agreed that an estimate report was the appropriate type of report in the circumstances.

[169] Pellarin testified that he would not likely have prepared an estimate report for a serious matter such as this securities enforcement Hearing, but would have suggested "that we need a more exacting standard to deal with a matter so serious". He also stated that the Pellarin Report was closer to the calculation end of the spectrum because there was so much information unknown at the time.

[170] Pellarin acknowledged that he did not look at or determine whether security was valid because that was a legal issue.

3. Timing and Scope of Pellarin Report

[171] As noted, the Pellarin Report set out the FMV of the assets held by New Weslease as at December 31, 2018. That date was long after the majority of the impugned statements at issue in this Hearing. The Pellarin Report also set out the limits of the particular FMV estimate: FMV was the highest price obtainable in an open market, but without considering "any special advantages that might be present for any one particular purchaser (such as economies of scale or factors making the subject assets more valuable to one particular purchaser)".

[172] The Pellarin Report relied on documents provided to Pellarin by New Weslease and on conversations with the managers at the time the report was prepared (not with Talbot or others involved before Simmons and Durum). Pellarin's primary contacts at New Weslease were Lindskog (who started working with Durum in about 2019, after the end of the Relevant Period) and Niels Versfeld (who worked at Durum at that time, managing the recovery of various Weslease assets). The scope of review was limited, which led to certain assumptions relevant here. For example, Pellarin did not have information about the "[d]etails of collateral security charged by GSAs which were granted by lessees, or of prior charges that might exist against those assets" and, therefore, valued such amounts as nil. He assumed all security interests on lessees' assets were "valid, enforceable, and represent[ed] first charges against the assets". However, he did not have

access to financial reporting by the lessees, including financial statements, and had access to appraisals for only one asset charged by any of the leases. Pellarin assumed that the value of personal covenants and floating security charges was nil because "there's an undefined pool of assets to which we have an undefined entitlement, and without a whole lot more data, there's really no way to ascribe a value to that".

4. Specifics of Pellarin Report

[173] The Pellarin Report gave the book value for the leases as at December 31, 2018, divided into current leases (using the present value of remaining payments) and leases in arrears (using the present value of remaining payments plus arrears and interest on arrears). Pellarin assumed that the delinquent leases were not expected to recover.

[174] Pellarin set out three categories of leases:

- current small leases – $1,606,502 (153 leases);
- arrears small leases – $663,603 (37 leases); and
- arrears large leases – $39,134,225 (16 leases).

[175] The Pellarin Report concluded that the estimated FMV of the lease portfolio as at December 31, 2018 was between $9,180,527 and $11,570,629. Pellarin assigned full value to the current small leases and $297,301 to the small leases in arrears. He assigned a range of $7,276,724 to $9,666,826 to the large leases in arrears.

[176] Talbot did not seem to dispute Pellarin's conclusions, given the information Pellarin had, the assumptions he made, and the time at which the Pellarin Report was done. However, Talbot argued that Pellarin did not have the information necessary to conduct a proper appraisal, and that his conclusions said nothing about what the situation was at the time and in the circumstances of Talbot's alleged misrepresentations – other than Pellarin's testimony that all of the large leases were secured. Talbot pointed to Pellarin's opinion that an estimate report was not appropriate for this Hearing, and that he lacked certain important information (such as the value of some security, including some GSAs and personal guarantees). Talbot also contended that testimony from his own witnesses was a better indicator of the situation at the relevant times.

[177] One example Talbot challenged was the Pellarin Report's notation that four trucks and additional assets sold for US$800,000 compared to the insurance value paid for one truck of $676,200. Pellarin agreed during cross-examination that the numbers seemed unusual. He speculated that a reason could have been that the trucks were different, the market had shifted in the 18 months between the two events, the trucks were at the end of their life-cycle, or the vendor did a bad job.

VI. ANALYSIS – MISREPRESENTATIONS

A. The Law

[178] Section 92(4.1) of the Act states:

> No person or company shall make a statement that the person or company knows or reasonably ought to know
>
> (a) in any material respect and at the time and in the light of the circumstances in which it is made,
>
> (i) is misleading or untrue, or
>
> (ii) does not state a fact that is required to be stated or that is necessary to make the statement not misleading,
>
> and
>
> (b) would reasonably be expected to have a significant effect on the market price or value of a security[.]

[179] In this decision, we use the phrase "misleading or untrue" to mean "misleading or untrue, or both misleading and untrue". Staff and Talbot agreed that the Trust Units were "securities" as defined in the Act.

[180] This provision has been discussed in many ASC panel decisions, including *Arbour* (at para. 753; also see, for example, *Re Ward*, 2022 ABASC 139 at para. 135), which held that a breach is established if Staff prove that:

> (i) a statement was made by a respondent;
>
> (ii) the respondent knew or reasonably ought to have known that the statement was, in a material respect, untrue or omitted a fact required to be stated or necessary to make the statement not misleading; [and]
>
> (iii) the respondent knew or reasonably ought to have known that the statement would reasonably be expected to have a significant effect on the market price or value of a security.

[181] In the present case, it is also important to emphasize the legislative requirement that each impugned statement be misleading or untrue "at the time and in the light of the circumstances in which it [was] made".

[182] As stated in *Ward* (at para. 136): "Materiality – i.e., whether the statement or omission would reasonably be expected to have a significant effect on the market price or value of a security – is an objective standard based on reasonable expectations". The panel in *Arbour* (at para. 764) cited *Sharbern Holding Inc. v. Vancouver Airport Centre Ltd.*, 2011 SCC 23 (at paras. 58 and 61) in stating that "[c]ommon sense inferences about materiality may suffice in certain cases". The panel in *Arbour* further stated (at para. 765; also see, for example, *Aitkens* at para. 137 and *Ward* at para. 136) that an ASC panel is "an expert tribunal with specialized knowledge of the Alberta capital market and securities regulation, [thus] well positioned and able to draw inferences as to the objective view of a reasonable investor".

[183] The panel in *Aitkens* stated (at para. 138):

> A hearing panel will find that a statement or omission would reasonably be expected to have a significant effect on the market price or value of a security if it can reasonably be concluded that the misrepresentation would influence an investor's decision to purchase the security and the price that investor would be prepared to pay for it. Stated another way, the determination is "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" (*Arbour* at para. 765, citing *Sharbern* at para. 61).

[184] Further, misrepresentations may be found in statements made to existing investors, as well as to prospective investors, because the former may be prompted "to continue with or augment their investments" (see *Ward* at para. 137, citing *Re Mandyland Inc.*, 2012 ABASC 436 at paras. 196 and 203). However, Staff need not prove that any particular investor actually relied on the misrepresentation alleged (see *Ward* at para. 138, citing *Re Cloutier*, 2014 ABASC 2 at para. 360).

B. Talbot's General Submissions on Misrepresentations

1. Approach

[185] Talbot made several general submissions which were relevant to all of the misrepresentation allegations. We set those out here, along with Staff's position and our assessment. Talbot argued: (1) many of the impugned statements relied on by Staff were made before the March 30, 2016 limitations date; (2) the ASC's role is not to ensure that businesses succeed; (3) the context in which impugned statements were made is crucial; and (4) hindsight cannot be used. We outline those arguments here, then consider them later if relevant to the various misrepresentation allegations.

2. Categories

(a) Limitations Period

[186] Staff referred to s. 201 of the Act, which states that no proceeding may be commenced "more than 6 years from the day of the occurrence of the last event on which the proceeding is based". The NOH was issued on March 31, 2022. Staff argued that, in these circumstances, s. 201 did not limit the allegations to only the portion of the Relevant Period after March 30, 2016. Talbot accepted March 30, 2016 as the limitations date, but argued that s. 201 did limit the allegations (we are satisfied that a date of March 16, 2016 in Talbot's written submissions was a typographical error).

[187] Staff contended that the impugned statements made before March 30, 2016 were part of a continuing course of conduct, so that "the limitation period [did] not begin until the entire transaction is complete. That is, [the date that] the misrepresentations cease." In making that argument, Staff pointed to: *Re Breitkreutz*, 2018 ABASC 37; *Re Fauth*, 2018 ABASC 175; and *Re Williams*, 2016 BCSECCOM 18. Staff asserted that the allegations against Talbot showed a continuing course of conduct, such that statements made before March 30, 2016 were properly before the panel. Staff used those cases – which all involved fraud – to argue that Talbot engaged in a continuing course of conduct. Staff claimed:

> Each misrepresentation was part of a series of separate illegal acts substantially of the same character which constituted a single, continuing transaction. Each misrepresentation was part of Talbot's effort to deceive investors regarding material aspects of [the Partnership] as a business and the Trust as an investment.

> Further, the ongoing nature of Talbot's failure to accurately represent the Weslease risk profile and its financial condition was a continuing deception that prevented investors from having access to all material information when deciding whether or when to exercise their redemption rights as unitholders in the Trust.

[188] Talbot argued that a "misrepresentation cannot be a continuing contravention" because s. 92(4.1)(a) of the Act requires that a respondent "knows or reasonably ought to know" that a particular statement is misleading or untrue "in any material respect and at the time and in the light of the circumstances in which it is made". Talbot also submitted that the cases cited by Staff involved either fraud or fraud and misrepresentations together, but not misrepresentations on their own without fraud. In Talbot's view, that was significant because fraud, by its nature, can be an ongoing scheme, and misrepresentations can be a part of that ongoing scheme if the fraud and misrepresentations are based on the same facts or the fraud was itself based on the misrepresentations. Here, Talbot contended that misrepresentations, absent fraud, cannot be the basis for extending a limitations period, particularly in this case in which Staff did not specify in the NOH when the alleged misrepresentations were made.

[189] Given our conclusions on Staff's allegations, we did not need to discuss this limitations issue in our analysis below.

(b) Business Success

[190] Talbot cited *Re Platinum Equities Inc.*, 2014 ABASC 71 at para. 76 for the principle that "Alberta securities laws do not mandate any particular level of business ability". Talbot extrapolated from that to suggest that Alberta securities laws also do not mandate any particular level of success for a business. Staff did not directly respond to that point, but did maintain the allegation in para. 16.2 of the NOH that Talbot's promotion of the Partnership "as a profitable and successful business" was a misrepresentation.

[191] We agree that securities laws are not designed to police business ability, acumen, or success. However, they are designed to create a structure in which certain disclosure is required so that investors can make an informed decision about the product in which they are being asked to invest. We are satisfied that Staff's allegations were made in that latter sense, and we address them below as such.

(c) Context of Impugned Statements

[192] Staff and Talbot agreed that the context of the impugned statements was important. Talbot referred to the phrase in s. 92(4.1)(a) of the Act that any such statement must be considered "at the time and in the light of the circumstances in which it is made" (also referring to *Re Ogilvie*, 2022 ABASC 106 at paras. 97 and 112).

[193] At the conclusion of the evidentiary portion of the Hearing, the panel asked Staff to be diligent in their submissions in linking oral and written statements from particular dates to the timing of investment decisions and to each specific allegation. However, instead of focusing on making those connections, Staff seemingly relied on their assertion that the alleged misrepresentations were an "ongoing" series of separate acts "substantially of the same character which constituted a single, continuing transaction" and "part of Talbot's effort to deceive investors".

[194] We agree the context was important and discuss that below for the various impugned statements.

(d) Hindsight

[195] Talbot argued that hindsight cannot be used when assessing materiality. That is, an ASC panel is not able to look at what occurred after a statement was made when assessing whether that statement was misleading at the time and in the light of the circumstances in which it was made (citing *Re Kapusta*, 2011 ABASC 322 at para. 255; and *Re Stan*, 2013 ABASC 148 at para. 224). Talbot also asserted that this was only logical, given the wording of s. 92(4.1)(a) of the Act. Staff did not directly respond to this point.

[196] We did not use hindsight when assessing the impugned statements. We examined each as at the time and in the light of the circumstances in which it was made.

C. Significance of Staff's Approach to Allegations and Submissions

[197] As discussed earlier, Staff's written and oral submissions were inconsistent for some of the allegations, such as whether para. 16.1 of the NOH was a separate or overarching allegation and which allegations were being withdrawn. This caused confusion for both Talbot and the panel.

[198] Also, as discussed, Staff's allegations and the evidence tendered in support were vague as to exactly when some of the impugned statements were made, what the circumstances were at the time those statements were made, and what (if any) investment decisions would have been affected. Timing is important when considering a misrepresentation allegation because one of the required elements of such an allegation is that the person "knows or reasonably ought to know" that the statement made is misleading or untrue "in any material respect and at the time and in the light of the circumstances in which it is made". It must also be established that the person knew or reasonably ought to have known that the statement "would reasonably be expected to have a significant effect on the market price or value of a security".

D. Talbot's Knowledge

[199] We were satisfied that Weslease management – specifically Talbot – would have known certain information by certain dates.

[200] On October 28, 2016, Weslease approved the June 2016 Interim Statements. We concluded that Weslease knew of the information contained in those statements by at least a short time before October 28, 2016.

[201] The 2016 Financial Statements were for the year ended December 31, 2016. The auditors' report appended to those financial statements was dated February 21, 2018, and the statements were apparently distributed on about April 10, 2018. The 2017 Financial Statements were for the year ended December 31, 2017. The auditors' report appended to those financial statements was dated April 18, 2018, and those statements were apparently distributed on about April 26, 2018. As the 2016 Financial Statements were dated February 21, 2018, there is uncertainty as to the timing and extent of Talbot's knowledge of the negative financial information in those statements.

[202] Staff argued that Talbot knew or should have known that Weslease "was experiencing significant financial losses in 2016". In support of this, Staff referred to Pinnacle removing the Trust Units from its shelf in May 2016 and the November 2016 Weslease meeting at which financial difficulties were discussed. Staff also cited the Draft OM with its draft disclosure of some financial problems.

[203] We assessed Weslease's financial situation, and Talbot's knowledge of that situation, at certain times. We recognized that some information in financial statements is more accurately known sooner than other information in those statements. Certain factual information would be in the former category – more accurately known sooner. That would include items such as a cash balance, the amount of overdue lease payments, and the amount of assets repossessed. Other information would be in the latter category – not accurately known as soon, and requiring some amount of estimation, judgment, and hindsight.

[204] An example of information not necessarily available as at the date of the financial statements would be the amount of a loan impairment provision for repossessed assets. For the year ended December 31, 2016, Weslease had repossessed assets with a book value of approximately $10.2 million. However, the estimated fair value of those repossessed assets would not have been known as at December 31, 2016, meaning that the impairment amount (if any) would also not be known then. The actual value may not be determined for several months, perhaps then showing an impairment based on a low disposition amount of the assets or based on an occurrence after that date which would cause a decrease in the asset value.

[205] Overall, we were not convinced by Staff's assertion that Talbot would have known about definite "significant financial losses" in 2016. However, we agree Talbot should have known the following by the end of January 2017, and perhaps should have known some of this information in December 2016:

- Cash flows were less than the amount required to pay interest to investors, so that at least a portion of payments to investors appeared to have been from sales of additional Trust Units.

- More than 50% of the lease portfolio (in dollar value) was comprised of leases with some payments more than 90 days overdue.

- Approximately $9.8 million of assets had been repossessed by June 30, 2016, compared to the approximately $10.2 million of assets repossessed by December 31, 2016. The repossessions indicated that there were financial concerns. There appeared to be no disposition by October 2016 of the assets repossessed by June 30, 2016, which could indicate some challenges in disposing of them for a reasonable price.

- There was insufficient information by January 31, 2017 to reach a conclusion as to the potential disposition value of the additional $500,000 of assets repossessed between July 1 and December 31, 2016.

E. Specific Allegations

1. Paragraphs 16.1 and 18.1 of the NOH

[206] The wording in paras. 16.1 and 18.1 of the NOH that Talbot and Weslease had failed to maintain a certain risk profile concerned us because it seemed to be in the nature of an alleged breach of a covenant rather than an alleged misrepresentation. We accepted Staff's assurance during oral submissions that they were not arguing a separate or overarching breach for failing to maintain a certain risk profile. Accordingly, we did not make a finding on the general statement about the "risk profile of the Trust" (para. 16.1 of the NOH) or the statement that "Talbot and [the Partnership] did not maintain the risk profile" (para. 18.1 of the NOH).

[207] However, that led to some other concerns, because we read Staff's written submissions as arguing just that. In other words, part of Staff's theory of the case changed fairly significantly from their written submissions (the allegations "should be viewed in the context of how Talbot misled investors as to the risk profile of the investment") compared to their oral submissions (Talbot or Weslease made particular statements which were misrepresentations unconnected to an overarching "risk profile" concept). Talbot's written submissions responded, of course, to Staff's written submissions. We remained mindful of this during our analysis below, so that Talbot was not put at a disadvantage from this inconsistency.

2. Paragraphs 16.1.1, 18.1.1, and 18.1.3 of the NOH

(a) Allegations and Staff's Position

[208] Staff alleged Talbot represented that: "Many, if not all, of the leases entered into by [the Partnership] were 'highly secured' and 'well-secured[',] which minimized investment risk", but that the "true facts" were: "[The Partnership] entered into leases and loan agreements with insufficient security to meet the standard of security that was represented to investors" (paras. 16.1.1 and 18.1.1 of the NOH). Staff made a connected "true facts" statement in para. 18.1.3 of the NOH that: "[The Partnership] entered into related transactions with [R5 and RND] relating to [the Work Camp] in the fall of 2015 without either transaction being 'well-secured' or 'highly-secured'". This did not follow the parallels Staff seemed to use for most of the allegations in para. 16.1 of the NOH and the alleged true facts in para. 18.1 of the NOH; we assessed para. 18.1.3 as a specific example of Staff's assertion that leases were wrongly touted as well-secured.

[209] In support of the allegation in paras. 16.1.1 and 18.1.1 of the NOH, Staff cited several passages from Weslease's written materials and Talbot's oral communications, including:

- May 12, 2014 presentation to Pinnacle – Talbot said security was one of Weslease's "biggest concerns", accomplished through "securitization of the lease", "making sure that we have GSAs in place", taking a collateral mortgage if possible, and registering certain security interests.

- August 28, 2014 presentation to Pinnacle – Talbot said "we are well securitized, and that is really one of the focuses that we look at".

- September 22, 2015 – Weslease stated in a Pinnacle due diligence questionnaire and Talbot stated in a due diligence call that declining oil prices would not affect

the Partnership. That contention was summarized by Talbot's comment: "If you do your credit checks, if you do your securitization, if you've got the comfort level, which we have been doing for a long time, [then] we know that our impairment is going to be minimal."

- November 23, 2015 presentation to Pinnacle – Talbot discussed the securitization of leases in the context of mitigating risk, including in the oil and gas leases. He stated: "So the single most important thing about the oil and gas, uh, segment is -- is how we've securitized our product. Last week we had a number of the -- uh, of Pinnacle people from the, uh, corporate head office up to Edmonton and showed them exactly how well we are securitized".

- March 24, 2016 presentation to Pinnacle – Sargent said that the oil and gas leases were "extremely well securitized", and Staff stated that Talbot "implicitly endorsed" that comment.

- June 8, 2016 call with Pinnacle – Talbot said: "Every time we advance more, we take more security that is in excess of the value that we advance. Now we have homes, we have properties, we have take-or-pay contracts, we have infrastructure, we absolutely do not advance more money without getting more security." Talbot also stated that Weslease was "extremely well" securitized.

- February 17, 2017 presentation to Pinnacle – Talbot said that Weslease could have taken back assets and sold them for the amount owing "because of the security that we hold on these assets". Although not referred to by Staff, Talbot also discussed slides accompanying the February 2017 presentation and setting out "Restructured Leases" in the total amount of $18,430,799 and "Leases in Work-Out Strategies" in the total amount of $9,938,397.

- February 2017 investor newsletter (the **February 2017 Newsletter**) – the newsletter stated that: "Every lease is secured with the value of the lease in collateral and a personal guarantee from the lessee".

- June 23, 2017 investor newsletter – the newsletter mentioned that Weslease was continuing with "diversifying our well-secured portfolio".

[210] Staff argued few specifics relating to the statements in para. 18.1.3 of the NOH and the Work Camp. Staff characterized the Work Camp lease as "baffling", "perplexing", "convoluted", and "another example of the misuse of a significant proportion of investor funds in ways that were directly contradictory to representations that leases held by [the Partnership] were well secured". Staff's theory seemed to be that the Partnership loaned $1 million to R5 in September 2015, and that the money "was papered as part of the $7.5 million loan to [RND], which purchased the [Work Camp] from R5 after it was purchased from" the original vendor. Staff also stated that the original transaction was then "written up to $5.6 million at one point and then up to $7.5 million at another point in time".

[211] Staff contended that Talbot knew or ought to have known that the leases entered into "carried risk with respect to security over equipment" (based, in part, on the fact that such risk was disclosed in the OMs). Staff's characterization – that there was a "risk with respect to security" – emphasized the risk level of realizing on the security in the future rather than the amount of security in place at the time each lease was entered into.

[212] Staff quoted a passage from each of the OMs stating that the leases would be secured by security instruments, but that there may be difficulties with realizing on or enforcing that security. Staff relied on that statement in the OMs that the leases would be secured, but contended that Talbot could not rely on the accompanying risk disclosure in the OMs because that was "[t]echnical language in a lengthy OM". Staff also noted that some investors bought under the accredited investor exemption, not the offering memorandum exemption, meaning that disclosure in the OMs would not have been relevant to their investment decisions.

[213] Staff argued that Talbot knew or should have known about Weslease's financial problems by May 2016 when Pinnacle removed the Trust offering from its shelf. Staff were implying that the financial problems meant there was investment risk by that time and the security was, therefore, inadequate.

[214] Staff relied on two other arguments. First, Staff submitted that if the lease portfolio had been as highly secured as Talbot claimed, Weslease would have solved its financial problems by repossessing assets and realizing on the security. Second, Staff contended that when assets were repossessed and sold, Weslease suffered losses. Some of that latter argument was made in reliance on the Pellarin Report. As one example, Staff pointed to the October 2015 Intercept lease for frac water trucks and other assets, for which Talbot said there was security. Relying on the Pellarin Report, Staff stated that the security ultimately could not be fully realized on because of proprietary technology and a right of first refusal. Staff concluded this line of reasoning by stating that New Weslease eventually sold the assets for $1 million to $2 million, far less than the amount owing (which Staff said was $9.1 million as at December 31, 2018).

[215] Staff's written submissions gave other examples, all relying on the Pellarin Report and the eventual disposition of assets as justifying an inference that there was insufficient security when the leases were entered into. Staff also argued that some of the Weslease transactions were loans or financing, not leases, so that the Partnership did not own the equipment or assets in those transactions.

[216] Staff's conclusion on this allegation was that the Partnership "entered into leases and loan agreements with insufficient security to meet the standard of security that was represented to investors". Staff also argued that the statements about securitization would reasonably be expected to have a significant effect on the market price or value of the Trust Units.

(b) Talbot's Position

[217] Talbot contended that Sargent (and likely Drozdz and Bentham) shared Talbot's belief that "the leases were well secured" when they were entered into because those three were involved in meetings and presentations in which such statements were made. Talbot emphasized that leases over $25,000 were approved by the Lease Committee, and that all those involved had confidence

in the leases. Talbot also relied on Pellarin's testimony that the large leases were secured at the time they were entered into.

[218] Talbot pointed out that Pinnacle conducted due diligence of the leases and presumably had no concerns about the level of security for the leases – and, therefore, Weslease's business – at the time the leases were entered into.

[219] Talbot argued there was evidence indicating that he was trying to work things through to recover on some of the assets and leases. For example, Brian Koscak (**Koscak**, Pinnacle's General Counsel) said in February 2017 that Talbot had a plan, stating "the portfolio seems to be working through this [although it is] not quite there yet" and "obviously there's a recovery happening [in the oil and gas sector], and there's always a lag". Talbot also stated that Zurfluh acknowledged – and other evidence supported – that Talbot had a potential workout for 640water which would have covered the entire debt. Some of Talbot's witnesses referred to possible workouts, and some documents (including some given to Pellarin by New Weslease) supported Talbot's claim that workouts were being pursued. All of that, according to Talbot, indicated that the security taken for those leases was sufficient at the time the leases were entered into.

[220] Talbot contended that Staff approached their argument backwards by stating that the leases and the Partnership failed, so there must have been a problem with the security for the leases. Staff did not tender any of the leases directly (although some lease documents were in the Pellarin Report materials), nor did Staff examine any leases – or the security taken by Weslease – in detail. Therefore, according to Talbot, Staff did not prove the allegation in paras. 16.1.1, 18.1.1, and 18.1.3 of the NOH that the leases had insufficient security at the time they were entered into.

(c) Discussion

(i) Was the Statement Made?

[221] Staff had to prove that Talbot made (or was responsible for) the statement that: "Many, if not all, of the leases entered into by [the Partnership] were 'highly secured' and 'well-secured[',] which minimized investment risk". The evidence was clear that Talbot often referred to various leases as being well-secured. He described the types of security that would be put in place when a lease was made, including GSAs, collateral mortgages, and personal guarantees. We are satisfied that Talbot made the impugned statement at various times. (Although para. 18.1.1 of the NOH also referred to "loan agreements" being entered into with insufficient security, a distinction between leases and loans was not relevant to our conclusions.)

(ii) Was the Statement Misleading or Untrue?

[222] This misrepresentation allegation was specifically limited to the time at which each of the leases was entered into. Paragraphs 16.1.1 and 18.1.1 of the NOH alleged that the Partnership "entered into" leases which it claimed were "highly secured" or "well-secured", when it instead had "insufficient security to meet the standard of security that was represented to investors".

[223] Accordingly, the relevant time to assess the adequacy of the security for each lease was at the time the particular lease was entered into. Staff did not provide evidence or make submissions on that point.

[224] We were directed to no evidence that security was non-existent or insufficient at the time the leases were entered into. The evidence we had was to the contrary:

- Staff's expert witness, Pellarin, acknowledged that there was security in place for the large leases at the time they were entered into.

- Staff conceded that there was some security – for example, a signed GSA for the Intercept lease – and Lindskog agreed that Durum had seen that documentation.

- Pellarin confirmed that the security for some of the leases included GSAs and personal guarantees (although he assigned a nil value to those because his mandate and materials did not allow him to ascertain what any such value might have been as at December 31, 2018).

- Pinnacle's own due diligence conducted before it started selling Trust Units showed that the OMs and marketing material were consistent, with the OMs setting out details of the leases, the risks, and the security at the time the leases were entered into. Pinnacle's October 1, 2015 due diligence report stated that "the equipment that makes [up] the bulk of [the oil and gas] leases is well securitized".

- There was evidence that the Lease Committee evaluated some of the prospective lessees and leases. That was disclosed in the OMs and was confirmed by Staff's witness, Zurfluh, who said that larger prospective leases would go to the Lease Committee and related-party decisions would go to the independent directors. Zurfluh did not testify that Pinnacle had concerns with leases or security on those leases at the time they were entered into.

- Taylor testified that he "did not review specific security", but relied on Pellarin and Lindskog's evidence and review, as "there was no reason to disbelieve what they had found". However, neither Pellarin's nor Lindskog's review addressed the sufficiency, or not, of the security taken at the time each lease was entered into.

- Ruttan testified that she did not confirm leases or lease documentation, rather she was looking at funds coming into and going out of Weslease.

[225] Specifically relating to para. 18.1.3 of the NOH and the Work Camp, the Pellarin Report described the Work Camp lease differently than did Taylor and Ruttan (it appeared that Pellarin had access to additional documents in preparing his report). The Pellarin Report described a series of leases totalling $7,462,219 and made to what Pellarin defined as the CNC Group. The first set of leases was for $3,225,000 on October 30, 2015 for the Work Camp. Security was a GSA on the Work Camp and the lessee's other assets. The second set of leases was for $3,700,000 in March 2016 for a waste water treatment plant. Security was a GSA on the equipment and the lessee's other assets, as well as two mortgages (totalling $2,200,000) and $3,700,000 in promissory notes from an individual. Pellarin noted that the mortgages were declared invalid by a 2018 court decision. He assessed the value of the promissory notes as nil because he had no information as at December 31, 2018 about the individual's assets. The final lease was for $537,219 on

November 20, 2017 for "electrical distribution buildings or 'gensets'". Security was to be a GSA on the equipment and the lessee's other assets, as well as a promissory note for $537,219 from the same individual. Pellarin noted that the GSA and promissory note related to the gensets had apparently not been executed, and we were not directed to an executed version of those documents. Overall, the evidence indicated that those leases were secured when entered into (and we also note parts of those leases were later affected by the Fort McMurray fire in 2016 and the oil and gas downturn).

[226] We further note that the book value ascribed to the delinquent leases in the Pellarin Report and in the supporting documentation included not only the original lease amounts, but also the outstanding payment arrears and interest on overdue accounts. The security Weslease took at the time a lease was entered into could have been sufficient for the value of the lease but not for the value of the lease plus payment arrears plus interest on overdue accounts. Staff neither raised nor addressed that complication or the associated implications of their reliance on the Pellarin Report to impugn the adequacy of the security at the time the assets were leased.

[227] In summary, Staff's argument was focused on events and circumstances after the leases were entered into, including: payment holidays given to lessees struggling after a downturn in the oil and gas industry; the amount of money repossessed assets were eventually sold for; and what the Pellarin Report concluded (based on limited information) about the FMV of various leases as at December 31, 2018. Staff essentially asked us to assume that the leases had insufficient security when entered into because Weslease failed and because the Pellarin Report (an "estimate report" prepared for a different purpose and months after the end of the Relevant Period) assigned certain security a low or nil value as at December 31, 2018. That simply was not relevant to the allegation as phrased by Staff. The only evidence we did have regarding security of the various leases was that security was in place at the time the leases were entered into. We are satisfied that there was, or appeared to be, security in place at the time the leases were entered into. Further, the evidence did not support a conclusion that the security taken was insufficient at the time the assets were leased.

(d) Conclusion

[228] We conclude that Staff did not prove that there was insufficient security at the time the leases were entered into. Therefore, Staff did not prove that the statements were misleading or untrue. This allegation is dismissed.

3. Paragraph 16.1.3 of the NOH

(a) Allegation and Staff's Position

[229] Staff alleged in para. 16.1.3 of the NOH that Talbot represented: "In order for [the Partnership] to fail, nearly every lease would have to fail based on steps taken by [the Partnership] to secure its leases".

[230] Staff cited the following examples from Weslease's written materials and Talbot's oral communications:

- May 12, 2014 presentation to Pinnacle – Talbot stated that Weslease had many leases and a small lease size, so that "in order for us to fail in any way, shape, or

form, every lease that we have has to fail" and "For us to fail as a group, when you look at the number of leases that we have, we have to have every single lease in our portfolio fail, which is almost -- which is literally impossible for it to happen."

- August 28, 2014 presentation to Pinnacle – Talbot stated that "every single one of those leases pretty well has to fail in order for us to fail".

- Staff stated that Weslease said the following in several brochures: "Because [the Partnership extends] leases to many lessees, for a large variety of types of equipment, and [they] secure each lease, a significant market collapse would have to happen in order to have the entire portfolio fail." That statement did appear in those documents. However, as discussed earlier, some of the documents were not dated on their face and Staff did not establish the date on which they were created or disseminated. The documents relied on by Staff for this statement were all undated: Exhibit 54, **Exhibit 56**, **Exhibit 57**, and **Exhibit 62**. We could not rely on Staff's assertion that Exhibit 62 was from October 2015 (that date was given on the Final Exhibit List but the document itself was not dated), and we were not directed to any evidence that would prove a date for any of the four exhibits relied on for this particular statement.

- February 2017 Newsletter – Weslease said the lease portfolio was diversified with "hundreds of small businesses" and, therefore, had a "very low" risk of failure.

[231] Staff argued that the Partnership failed because Talbot decided to invest in a few large leases in the oil and gas industry, not because every or nearly every lease failed. According to Staff, the Partnership's "portfolio became heavily concentrated in oil and gas with insufficient security – this made it much more likely that Weslease could fail". Staff therefore submitted that Talbot knew or should have been aware that the risk of Weslease failing had to be considered in the context of increasing exposure to the oil and gas industry, "not framed as the risk that nearly every lease would fail".

[232] Staff argued that Talbot knew or ought to have known that the failure of Weslease was a risk even without virtually all of the leases failing, and making such claims would reasonably be expected to have a significant effect on the market price or value of the Trust Units.

(b) Talbot's Position

[233] Again, Talbot emphasized the requirement for a misrepresentation analysis to consider the context of the impugned statement – the time and the circumstances in which it was made. In this case, Talbot argued, the actual impugned statement was made at the latest in August 2014 (before the increased exposure to the oil and gas industry), and no evidence after that date was relevant to whether it was a misrepresentation at the time it was made. Talbot pointed out that statements noted by Staff after that date were framed quite differently.

(c) Discussion

(i) Was the Statement Made?

[234] Staff had to prove that Talbot made (or was responsible for) the statement that "for [the Partnership] to fail, nearly every lease would have to fail based on steps taken by [the Partnership] to secure its leases" (para. 16.3 of the NOH).

[235] The evidence showed that Talbot (or Weslease) stated on May 12, 2014 and August 28, 2014 that, for Weslease to fail, "nearly every lease would have to fail". Although Anderson testified that "it was . . . stated numerous times" (presumably by Weslease or by Talbot speaking for Weslease) that all the leases would have to fail before Weslease could fail, he was not asked when that was stated, and there was no corroborating documentary evidence of the statement being made after August 28, 2014. Anderson's testimony was, therefore, not proof of the statement being made after that date.

[236] Staff argued that later, and differently worded, statements also supported this allegation – that there would have to be a "significant market collapse" (alleged to have been made in October 2015), and that the business was diversified and had "very low" risk (made in February 2017). The documents in evidence relied on for the former statement were not dated on their face, and Staff did not prove the date that those documents were created. We reject Staff's contention that the "significant market collapse" and "low risk" wording was a continuation of the "nearly every lease" failing language. Those were different statements made at a different time and in a different context. We conclude those statements were irrelevant to this allegation.

[237] We find that Talbot made the statement on May 12, 2014 and August 28, 2014 that every lease would have to fail before Weslease would fail.

(ii) Was the Statement Misleading or Untrue?

[238] Staff did not tender evidence proving that it was misleading or untrue in May and August 2014 to say that every lease would have to fail before the Partnership could fail. All of the evidence Staff relied on was from later. The fact that Weslease eventually failed in 2018 was not proof that statements made in 2014 were misleading or untrue at the time they were made. Nor was the fact that Weslease changed its portfolio over time to be weighted more heavily in the oil and gas sector. We also note that: Pinnacle had reviewed OM1, dated May 9, 2014, at approximately the time the impugned statements were made; Pinnacle had access to Weslease's leasing documentation; and Pinnacle representatives were present at the time Talbot made the statements in May and August 2014. Pinnacle's acceptance of that material would indicate that Pinnacle did not consider the statements to be misleading or untrue at the time and in the light of the circumstances in which they were made.

(d) Conclusion

[239] Staff did not prove that the impugned statements were misleading as of May or August 2014 (or both). This allegation is dismissed.

4. Paragraphs 16.1.4 and 18.1.4 of the NOH

(a) Allegation and Staff's Position

[240] Staff alleged Talbot represented that "Investors' funds were 'secure'", but that the "true facts" were that "Investor funds were not secure."

[241] Staff's written submissions listed their examples of statements supporting this allegation and stated that some statements cited earlier in those submissions were also relevant for this allegation. We considered the statements from Staff's written submissions which seemed relevant to this allegation:

- May 12, 2014 presentation to Pinnacle – Talbot said security was one of Weslease's "biggest concerns", accomplished through "securitization of the lease", "making sure that we have GSAs in place", taking a collateral mortgage if possible, and registering certain security interests.

- May 24, 2014 presentation to Pinnacle – Talbot said: "It's extremely important for us that -- that the investors' capital is protected. That's the key for us. And that we make sure that our -- our portfolio performs as well as we possibly can make it perform."

- May 24, 2014 presentation to Pinnacle – one slide stated (original emphasis): "SECURITY…WESLEASE OFFERS A HIGHER LEVEL OF SECURITY FOR THE INVESTOR".

- November 23, 2015 presentation to Pinnacle – Talbot again emphasized securitization, stating that we "make sure that the company . . . and the funds are extremely well protected in that regard".

- October 2017 Update, when Weslease gave the following response to the hypothetical question "Is my investment secure?":

  > Absolutely, the security structure that Weslease has in place in all of our lease contracts ensures that your investment dollars are secure. When you initially invested in Weslease, those funds were deployed into lease contracts in the form of physical assets. We utilize these funds by engaging with our lease clients, purchasing equipment they need to grow their business, and creating a lease contract to pay back the funded amount plus interest. Every lease contract we write includes security over the physical asset. In the event that a lessee is unable to pay their lease, Weslease still retains ownership over that asset. Although the formal process takes time to enforce our security over that asset, it is that same process that ensures your investment remains secure.

[242] Staff argued that Talbot should have been aware of the Partnership's significant financial losses and the risks posed by the leases related to oil and gas, certainly by the time of OM3 (February 16, 2016). Staff contended that Talbot knew or ought to have known that claiming investors' funds were secure would reasonably be expected to have a significant effect on the market price or value of the Trust Units.

(b) Talbot's Position

[243] Talbot's written submissions acknowledged that he made several statements about the leases and funds being well-secured, while other Weslease personnel either said the same or were present when such statements were made. Talbot equated lease security and investment security: "If the leases were appropriately secured at the time, so was the investment – as that was the business of the Partnership". Talbot also argued that there was "objective evidence to support Talbot's faith in the lease and investment security", referring to the beliefs of Talbot, three other Weslease representatives (Sargent, Dozdz, and Bentham), the members of the Lease Committee (responsible for approving leases over $25,000), and Pinnacle representatives (the latter for at least part of the Relevant Period, including the October 2015 due diligence conclusion that "the equipment that makes [up] the bulk of [the oil and gas] leases is well securitized").

[244] Talbot repeated the argument that Staff did not lead objective evidence that there was no or insufficient security at the time the impugned statements were made, but relied on the fact that Weslease ultimately failed as evidence that "the claimed security must have been lacking".

[245] Talbot characterized some of the later statements as "clearly promotional", but said that he and his team were replaced and thus not able to "prove the business was viable" by implementing the workout plans they had started. Talbot argued that "the evidence established the replacement trustees and Durum made little effort to travel and meet with the various parties and lessees".

(c) Discussion

(i) Were the Statements Made?

[246] We are satisfied that Talbot made, or was responsible for, the impugned statements.

(ii) Context of the Impugned Statements

[247] When we examined the context in which those statements were made, it was clear the statements that investors' funds were secure were merely restatements of the concept that the leases were secure. That was also evident from Staff relying on several of the same statements for both allegations.

[248] In other words, we disagree with Staff's contention that the impugned statements should be considered in connection with the time at which "substantial financial losses started occurring". Instead, the appropriate context is whether the investor funds (through the security on the leases) were secure at the time the statements were made.

[249] As already discussed, the evidence showed that there was security for the leases at the outset, even if some security later proved inadequate. Weslease's eventual failure and the Pellarin Report's assessment as at December 31, 2018 were not relevant to the security of the funds (via the security on the leases) at the time of the impugned statements. We need not repeat that analysis here.

(iii) Were the Statements Misleading or Untrue?

(A) Statements Before January 31, 2017

[250] We earlier stated our conclusion that Staff did not prove that Talbot knew or ought to have known the extent of Weslease's financial difficulties until January 2017 or, perhaps, December 2016.

[251] Accordingly, we need not consider the statements cited by Staff from May 2014 and November 2015 for this allegation (although we would not have found those misleading or untrue at the time and in the light of the circumstances in which they were made).

(B) October 2017 Update

[252] At the time of the October 2017 Update, investors knew:

- Distribution payments had not been made since June 2017, and the 2016 Financial Statements had not been provided.

- The July 2017 distribution payments would be made by October 16, 2017, with the August, September, and October distributions to be paid "as soon as possible", once Weslease successfully pursued "funds owed to Weslease by lessees in default of their payments".

- Defaulting lessees were being pursued by Weslease, and measures taken included selling repossessed lease equipment.

[253] The impugned statement in the October 2017 Update was written as the response to the hypothetical question: "Is my investment secure?", which followed the description of the late distribution payments and Weslease's plans for recovering funds from delinquent leases. Evidence from investor witnesses indicated that they were and remained suspicious about Weslease's prospects at that time. For example, investor KC said that he was skeptical by the time of the October 2017 Update (although it was unclear if he had received it). Investor JV received the email and almost immediately complained to his Pinnacle DR about the "game" being played by Weslease.

[254] We are satisfied that the October 2017 Update as a whole was sending the message that – despite the financial difficulties which were known to investors and Pinnacle – Weslease was trying to work through its problems, relying, at least in part, on the lease security.

[255] Staff did not prove that the security on the leases was inadequate at the time of the October 2017 Update, which meant that the impugned statement was not a misrepresentation. We reiterate that Weslease used the security on the leases as a last resort, trying first to work out problems with delinquent leases. The existence of delinquent leases and workouts on those leases during those times therefore did not prove inadequacies in the security.

(d) Conclusion

[256] The impugned statements were not misrepresentations at the time and in the light of the circumstances in which they were made. This allegation is dismissed.

5. Paragraphs 16.2 and 18.2 of the NOH

(a) Allegation and Staff's Position

[257] Staff alleged that: "Talbot promoted [the Partnership] as a profitable and successful business despite significant financial losses in 2015 and 2016", contrary to the "true facts" that: "[The Partnership] lost approximately $2.6 million for the year ending December 31, 2015, and $37 million for the year ending December 31, 2016."

[258] In support of this allegation, Staff's written submissions set out several statements made by Weslease, for which they argued Talbot was responsible:

- The December 2016 Newsletter was titled "Celebrating a Great Year!"
- The February 2017 Newsletter stated: "Weslease Income Growth Fund is a solid investment choice."
- The June 2017 Newsletter stated:
    - "Our visionary approach will allow us to further advance on new and exciting opportunities in a variety of industries while diversifying our well-secured portfolio."
    - "By identifying clients that have long-term contracts, strong security and fixed costs, we can focus on these clients within specifically targeted industries and who have demonstrated stable and long-term growth.

      This allows us to support the kinds of businesses that are able to generate consistent, recurring revenue for the most profitable returns for our lease portfolio."

[259] Staff argued that Talbot should have been aware that the statements quoted above were untrue because he should have been aware that the Partnership experienced significant financial losses in 2016. Staff also submitted that the Trust lost $41.5 million in 2016 and the Partnership lost $37 million in 2016, which Talbot would have known by late February 2017.

[260] In connection with the impugned statements from the June 2017 Newsletter, Staff relied on a June 25, 2017 email from Koscak to Talbot and Bentham (with a copy to others at Pinnacle). In that email, Koscak said that the June 2017 Newsletter was misleading because it was "overly promotional and not providing investors with an update on the true status of the Weslease portfolio".

[261] Staff contended that all of the quoted information was "designed to make investors feel confident in investing in the Trust or keep[ing] their investment in the Trust" (rather than redeeming), when they would have made different decisions had they been "given an accurate picture of [the Partnership's] financial situation starting around mid-2016".

(b) Talbot's Position

[262] Talbot argued that Staff's allegation was generic because none of Talbot's statements used the phrase "profitable and successful". That made it challenging to analyze Talbot's comments in the light of the circumstances in which they were made.

[263] Talbot made several specific points:

- Investors received payments continuously until June 2017, with a July 2017 payment eventually made late.

- Pinnacle's October 1, 2015 due diligence report made positive comments about the security of Weslease's assets, including oil and gas assets.

- During a March 24, 2016 update call about Weslease, Drozdz and Sargent spoke positively about Weslease, including the $25 million in potential deals.

- Talbot and an accounting firm provided financial modeling to Pinnacle in 2017 showing that Weslease could continue and succeed, but Pinnacle took steps to remove Talbot and his team soon after. (Zurfluh acknowledged meeting with Talbot and the accounting firm to discuss that model, although Zurfluh thought the meeting was in 2016.) This did not affect our analysis as there was insufficient detail about the model and meeting.

- Although the 2016 Financial Statements showed large losses, there was also "a massive increase in net cash flow [from operating activities] from 2015 to 2016 – from approximately $70,000 to at least $5,000,000". Talbot argued that much of the reported losses were due to lease write downs, which would have been offset by revival of lease payments or compensation from recovery efforts. However, "[Talbot] and his team were removed and what could have resulted was never determined".

(c) Discussion

(i) Were the Statements Made?

[264] We were pointed to no evidence of Talbot (or Weslease) stating that Weslease was "a profitable and successful business". In their written submissions, Staff relied on several specific statements (set out above). We were satisfied for the purpose of this analysis that Talbot was responsible for the statements made by Weslease in those documents. We address each statement cited by Staff, first setting out the context of each, including that Weslease's newsletters were marketing material and promotional in nature.

(ii) Were the Statements Misleading or Untrue?

(A) December 2016 Newsletter

[265] As discussed earlier, Staff did not prove that Talbot knew or ought to have known the extent of Weslease's financial difficulties until January 2017 or, perhaps, December 2016. The required knowledge threshold may, therefore, have been reached by the time of the December 2016 Newsletter, and we discuss that document here.

[266] Staff's argument referred to only the title of the December 2016 Newsletter: "Celebrating a Great Year!" That document also stated: "Another year has come and gone! We have had an incredible year. Our portfolio continues to grow, and we see a big year ahead with lots of new opportunities." One part of the document showed the percentage of equipment value in each industry: 34% oil and gas; 3% janitorial and sanitation; 51% industrial commercial; and 12% commercial. Two of the projects specifically criticized by Staff were also mentioned: (1) Weslease "[c]ontinued to fund and support the growth of [a particular] company throughout Canada and now into the US"; and (2) a second particular company was described as: "An innovative project in North Dakota funding the infrastructure for delivering water to fracking projects with guaranteed Take or Pay water contracts. Primarily the water is sold on an annualized basis to the oil and gas industry, but seasonally the water system also supplies livestock hydration and crop irrigation."

[267] None of this stated that Weslease was profitable and successful. There was no metric given for the "Great Year", "incredible year", "growing portfolio", or "new opportunities" phrases. In the context of the one-page document, Weslease did not say that Weslease had a profitable and successful year or that the business was profitable and successful.

[268] In addition to this being a clearly promotional document, Staff made a very specific allegation that Talbot promoted Weslease "as a profitable and successful business". Staff did not prove their allegation for this document.

(B) February 2017 Newsletter

[269] Staff quoted a single sentence from the February 2017 Newsletter, which stated that Weslease was "a solid investment choice". That document also said that: the Weslease investment was diversified and "spread out amongst hundreds of small businesses, [so that] the risk of failure is very low"; and every lease was "secured with the value of the lease in collateral and a personal guarantee from the lessee". It further stated: "With a growing demand for [e]quipment leasing, and the solid track record[,] you have a reliable option adding Weslease to your investment portfolio." It set out a success story about a lessee, what appeared to be a thank you note for a product launch, and an invitation for readers to an investor presentation on February 21, 2017.

[270] This was clearly a promotional document. Nothing in it said that Weslease was "profitable and successful" in those words, and it would be inappropriate to infer from the entire document and in all the circumstances that "a solid investment choice" equated to "profitable and successful". Staff did not prove their allegation for this document.

(C) June 2017 Newsletter

[271] The June 2017 Newsletter was sent to Koscak on June 23, 2017. We assume it was sent to at least some investors, but that was ultimately irrelevant to our decision because we determined that that document did not support Staff's allegation.

[272] Several statements were made in the ten-page June 2017 Newsletter, in addition to those quoted by Staff:

- The title was: "A $75 Million Lease Portfolio Flows Monthly Income To Investors For 35th Consecutive Month".

- It referred to a high demand for water in North Dakota "to support the booming oil business", stating that Weslease "capitalized on an exclusive lease financing opportunity in this sector". That appeared to be the RWS financing, described in the next sentence of the document as "an exclusive opportunity".

- It highlighted two particular leases, stating that as one of those continued to grow, "so will Weslease's ability to provide the right equipment financing to help them get the job done".

- It stated that "we have the knowledge and experience to identify lease-financing opportunities that are both secure and profitable".

- It addressed raising money for charities.

[273] The June 2017 Newsletter was clearly a promotional document, even identified by Koscak in his response letter as "overly promotional".

[274] Staff's allegation used the phrase "profitable and successful". Weslease did not use that phrase, nor the word "successful". There were only two instances of the word "profitable" in the June 2017 Newsletter, and only one of those instances was cited by Staff. Weslease used "profitable" in the context of stating that it supported businesses able to generate "revenue for the most profitable returns for our lease portfolio", and in saying that it had "the knowledge and experience to identify" profitable opportunities. We did not find that the statements in the June 2017 Newsletter were misrepresentations as alleged by Staff, given the phrasing of Staff's allegation and in light of the circumstances in which the June 2017 Newsletter was created.

[275] Staff did not prove their allegation for this document.

(d) Conclusion

[276] For the reasons discussed, we did not find that any of the instances cited by Staff supported their allegation that "Talbot promoted [the Partnership] as a profitable and successful business despite significant financial losses in 2015 and 2016". Although Staff established that there were significant losses in those years, they did not prove that Talbot (or Weslease) called the Partnership "profitable and successful". Talbot obviously emphasized the positive more than the negative in presentations and newsletters. However, that did not equate to a misrepresentation in the forms alleged at the time and in the light of the circumstances in which the impugned statements were made.

[277] This allegation is dismissed. While we have concerns with some of Talbot's (and Weslease's) statements and actions, none of them supported Staff's specific allegation.

F. Determination on Misrepresentation Allegations

[278] We conclude that Staff did not prove that Talbot breached s. 92(4.1) of the Act because the impugned statements were not misleading or untrue at the time and in the light of the circumstances in which they were made. Given that conclusion, we did not need to address whether Talbot knew or reasonably ought to have known that the statements would reasonably be expected to have a significant effect on the market price or value of the Trust Units.

[279] In the above analysis, we focused on the allegations in relation to current and prospective investors of the Trust. In the NOH, Staff asserted that the alleged misrepresentations were made "to Pinnacle" as well as to investors. As we did not find that Staff proved any of the misrepresentations, we did not need to specifically address Pinnacle in that context. We do think it important to note, however, that had we made any misrepresentation findings, such findings would not have been for any representations made to Pinnacle (for example, in a presentation made to Pinnacle but not to any current or prospective investors). Pinnacle is an exempt market dealer. It had the access, input, and expertise to understand Weslease's Leasing Business (and its flaws) and to understand the risks as set out in the OMs. Pinnacle knew that it was raising more money than Weslease could invest in its traditional leasing categories, and knew early on about the leases in the oil and gas sector. Pinnacle was able to review the leasing documents, including those for the oil and gas leases. As an exempt market dealer, Pinnacle was responsible for ensuring that it understood the product it was selling – the Trust Units – and that it knew the investors' circumstances and risk profiles. In fulfilling those responsibilities, Pinnacle would have been aware if Talbot (or Weslease) had been making statements which were misleading or untrue at the time and in the light of the circumstances in which they were made.

VII. ANALYSIS – CONDUCT CONTRARY TO THE PUBLIC INTEREST

A. The Law

[280] An ASC panel has the jurisdiction to find conduct contrary to the public interest in the absence of a specific contravention of securities legislation, although such jurisdiction is to be exercised with great care. As stated in *Re Bluforest Inc.*, 2020 ABASC 138 at para. 446:

> The ASC has a broad (but not unlimited) discretion to issue orders under s. 198(1) of the Act in circumstances where specific Alberta securities laws have not been breached, so long as it is in the public interest to do so (*Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, 2001 SCC 37 at para. 45). This jurisdiction is to be exercised with caution and restraint, and only in situations where the impugned conduct is so egregious that it is clearly abusive of shareholders and the capital market generally (*Re PointNorth Capital Inc.*, 2017 ABASC 121).

[281] In *Re Kilimanjaro Capital Ltd.*, 2021 ABASC 14, an ASC panel expanded on the need for caution (at para. 306):

> . . . Because this authority should only be exercised with restraint and caution after taking into account all relevant considerations, it is only in rare circumstances that public interest orders will be issued where Staff failed to establish that a respondent's conduct breached a specific provision of the Act (*Re Carnes*, 2015 BCSECCOM 187 at paras. 128-32). The discretion to issue orders in the public interest "is not a substitute for a near miss of an essential element of a breach of a section of the Act" (*Re Azeff*, 2015 ONSEC 11 at para. 66). Otherwise, a public interest order may result in a lower threshold for prescribed statutory misconduct and restrain market participants from relying

> on provisions of the Act when they structure their business affairs. At a minimum, Staff must demonstrate that the impugned conduct is abusive of capital markets . . . .

[282] In their written submissions, Staff suggested that the minimum requirement stated in *Kilimanjaro* – that the impugned conduct must be shown to be "abusive of capital markets" – potentially contemplated a lower threshold than the "clearly abusive" test in *PointNorth* and *Bluforest*. We disagree with that suggestion. An assessment that conduct is "clearly abusive" requires us to determine that it is clear the conduct in question is abusive. In any event, Staff contended that the allegations met the clearly abusive standard.

B. Allegations and Staff's Position

[283] Staff originally alleged that Talbot's conduct described in paras. 12 to 22 of the NOH (which included the misrepresentation allegations) was contrary to the public interest and abusive of the capital market. As set out above, Staff later withdrew some of the misrepresentation allegations but maintained the two particular allegations of conduct contrary to the public interest in paras. 24.4 and 24.5 of the NOA.

[284] Staff contended that the alleged late financial statements and the alleged non-disclosure of payment holidays was behaviour "egregious and abusive to the investors in the Trust, in that it precluded them from having full information on which to base investment decisions including the important decision of when to exercise their redemption rights and withdraw their investments from the Trust". Staff asserted that investors suffered actual harm from that particular conduct and that the capital market in general also suffered harm as "demonstrated by the diversion and loss of tens of millions of dollars that could have been invested in opportunities that provided full and frank disclosure to investors on an ongoing basis, and in the testimony of investors as to their loss of faith in Alberta's capital market".

C. Talbot's Position

[285] Talbot emphasized that an ASC panel's jurisdiction to make a finding of conduct contrary to the public interest should be exercised with restraint and caution, and that public interest findings should not be a substitute for the failure or near-failure of an allegation of a specific breach of the Act. In that context, Talbot noted that Staff dedicated far more effort and space in their written submissions to the misrepresentation allegations, with only a few paragraphs addressing the public interest allegations. In Talbot's view, Staff withdrew some of the misrepresentation allegations because they could not prove them, but relied on the same conduct as the basis for public interest findings.

[286] Talbot argued that the impugned conduct was not egregious and not clearly abusive of the capital market and, therefore, not contrary to the public interest. When Staff's written submissions still maintained the misrepresentation allegations relating to the 2016 Financial Statements and the payment holiday disclosure, Talbot responded with two points. We concluded that those points also applied to the public interest allegations made on similar grounds. First, Talbot argued that the evidence showed there was full and regular reporting throughout, with a delay only in releasing the 2016 Financial Statements. In a document in evidence summarizing some information from the 2016 Financial Statements, Talbot stated that Weslease decided to delay the finalization of those statements "until specific leases in default had been resolved in 2017". Second, Talbot

submitted that the payment holidays were business decisions, and that Weslease had said from 2014 that other steps would be taken before it would act on the lease security.

D. Discussion

[287] Staff's original public interest allegations were problematic on their own and when read in conjunction with the rest of the NOH. Staff seemed to recognize this by withdrawing some allegations after receiving Talbot's written submissions, including paras. 24.1, 24.2, and 24.3 of the NOH. Staff did not withdraw the allegation that the conduct set out in paras. 12 to 22 of the NOH was contrary to the public interest. Those paragraphs covered background information and the misrepresentation allegations. Despite that remaining inconsistency, we are satisfied that Staff were maintaining the allegations of conduct contrary to the public interest only as set out in paras. 24.4 and 24.5 of the NOH.

[288] Therefore, the public interest allegations to be considered were that:

- "Key financial statements for the Trust and/or [the Partnership] were not disclosed in a timely manner to Pinnacle and/or investors"; and

- "Payment holidays given by [the Partnership] to lessees for leases of significant value were not disclosed in a timely manner to Pinnacle and/or investors".

[289] Although Staff used two separate introductory paragraphs (paras. 23 and 24 of the NOH) for their public interest allegations – one stating that the conduct was contrary to the public interest and the other stating that the same conduct was abusive to the capital market – it is clear that the standard Staff had to meet for proving conduct contrary to the public interest was that the conduct was "so egregious that it is clearly abusive of shareholders and the capital market generally" (*Bluforest* at para. 446).

[290] Staff spent little time on this allegation in their written and oral submissions. Although they did not specify exactly which financial statements were the "[k]ey" ones allegedly not disclosed in a timely manner, they focused in other parts of their written submissions on the 2016 Financial Statements, when the allegations in paras. 16.3 and 18.3 of the NOH were still live. Staff stated that the Declaration of Trust provided that annual financial statements of the Trust were to be delivered to investors within six months of the fiscal year end, at the latest, and that the OMs provided that such statements were to be delivered to investors within 90 days of the fiscal year end. However, we note that the OMs also each said that such statements were to be delivered within six months, depending on the circumstances. Talbot highlighted that the Trust was not a reporting issuer and, therefore, was not required to make specific continuous disclosure filings, including financial statements.

[291] The 2016 Financial Statements and the 2017 Financial Statements were received by Pinnacle (and, presumably, by investors) on approximately April 10 and April 26, 2018, respectively. The 2016 Financial Statements were late, based on the promises made in the OMs, and Talbot admitted that. It was less clear that the 2017 Financial Statements were late because, as mentioned, one provision in the OMs promised them within 90 days and the other within six months of the year end.

[292] The 2016 Financial Statements were obviously provided to investors later than promised in the OMs. The delivery of financial statements later than required or promised is undesirable, but is generally dealt with as a compliance matter, not an enforcement matter. Without more, such late disclosure will not rise to the level of "clearly abusive", and it did not rise to that level here.

[293] The fact that payment holidays could be given to some lessees had been disclosed in various documents and presentations. There had been communication to investors (and Pinnacle) that Weslease had, for many months, engaged in workouts which included or could include payment holidays. Weslease's level of disclosure about payment holidays was not clearly abusive.

E. Determination on Public Interest Allegations

[294] We conclude that Talbot did not act contrary to the public interest as alleged by Staff. These disclosure issues, while concerning, were not so egregious as to warrant a finding that they constituted conduct that was clearly abusive of shareholders, the capital market, or both.

VIII. CONCLUSION

[295] Weslease's business plan appeared to be challenging from the outset. The plan contemplated paying a 12% return to investors very soon after each tranche of the distribution of Trust Units was made, even if the money raised had not yet been deployed profitably. Further, the original plan seemed to contemplate raising considerably less money overall, not tens of millions of dollars which were used almost immediately for larger leases and other transactions. The underlying challenges were then exacerbated by rapidly changing economic and other conditions – what was described by one witness as a recipe for disaster.

[296] Poor business decisions were clearly made. The due diligence efforts of those involved were problematic at times. However, the evidence did not support the very specific allegations in the NOH.

[297] The allegations are dismissed, and this proceeding is concluded.

March 7, 2024

For the Commission:

"original signed by"
Kari Horn

"original signed by"
Matt Bootle

"original signed by"
Tom Cotter