



Ontario
Securities
Commission

Commission des
valeurs mobilières
de l'Ontario

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FILE NO. 2018-16

**IN THE MATTER OF
MARTIN BERNHOLTZ**

SETTLEMENT AGREEMENT

PART I – INTRODUCTION

1. It is essential to the integrity of Ontario's capital markets that directors of public companies exhibit the highest standard of conduct. This case involves Martin Bernholtz ("Bernholtz" or the "Respondent"), a director of a publicly traded company who sold shares of the company in advance of overnight marketed offerings by the company and then reinvested for more shares in the offerings. The Respondent failed to obtain the required pre-approval and to take sufficient care as to the risk that he may have possessed material non-public information at the time he sold the company shares, which was conduct that fell below the high standard expected of him and was contrary to the public interest.

2. This matter concerns trading by Bernholtz between February and March 2016 (the "Material Time").

3. The parties shall jointly file a request that the Ontario Securities Commission (the "Commission") issue a Notice of Hearing (the "Notice of Hearing") to announce that it will hold a hearing (the "Settlement Hearing") to consider whether, pursuant to sections 127 and 127.1 of the *Securities Act* (the "Act"), it is in the public interest for the Commission to make certain orders against the Respondent in respect of the conduct described herein.

PART II - JOINT SETTLEMENT RECOMMENDATION

4. Staff of the Commission ("Staff") recommend settlement of the proceeding (the "Proceeding") against the Respondent commenced by the Notice of Hearing, in

accordance with the terms and conditions set out in this Settlement Agreement. The Respondent consents to the making of an order (the "Order") in substantially the form attached as Schedule "A" to this Settlement Agreement based on the facts set out herein.

5. For the purposes of the Proceeding, and any other regulatory proceeding commenced by a securities regulatory authority, the Respondent agrees with the facts set out in Part III of this Settlement Agreement and the conclusion in Part IV of this Settlement Agreement.

PART III - AGREED FACTS

A. Background

(1) Titan Medical Inc.

6. Titan Medical Inc. ("Titan") is a public company incorporated in Ontario.

7. The shares of Titan are listed on the Toronto Stock Exchange ("TSX") under the symbol "TMD".

8. Titan's primary business is the design, development and commercialization of new robotic surgical technologies.

(2) Martin Bernholtz

9. Bernholtz is a resident of Markham, Ontario.

10. Bernholtz had been a director of Titan from July 2008 until March 2018, when he resigned.

B. Facts

11. Titan generates no revenue and relies on the public offering of its common shares and warrants to fund its development process.

12. The Board of Directors of Titan (the "Board") receives notice of anticipated public offerings in advance.

(1) February 2016 Offering

13. On January 29, 2016, Bernholtz and other members of the Board were advised by Stephen Randall ("Randall"), the Chief Financial Officer of Titan, of a public offering that was planned to "commence as early as Tuesday, February 2 but no later than Thursday, February 11". No details of possible price or quantum were provided.

14. On February 1, 2016, Bernholtz sold 110,400 Titan shares at share prices of \$1.34 to \$1.39 for total proceeds of \$147,973.32.

15. On February 2, 2016, in response to an enquiry from IIROC Market Surveillance, Titan issued a press release announcing that it was not aware of any material undisclosed development at this time that would cause the recent movement in the company's share price.

16. On February 3, 2016, the share price of Titan opened at \$1.54. At 3:55 p.m., Titan issued a press release announcing an overnight marketed public offering (the "February 2016 Offering"), comprised of its common shares and common share purchase warrants. The share price of Titan closed at \$1.45 at the end of the trading day.

17. On February 4, 2016, the share price of Titan opened at \$1.03, went to a high of \$1.09 and closed at a low of \$0.95.

18. On February 5, 2016, the share price of Titan opened at \$0.88. At 10:08 a.m., Titan issued a press release announcing that the February 2016 Offering would consist of 8,888,889 units issued at a price of \$0.90 per unit for aggregate proceeds of \$8,000,000. Each unit would consist of one common share and one common share purchase warrant, which would be exercisable to purchase one common share at a price of \$1.00 for a period of five years after the public offering. The share price of Titan closed at \$0.80 at the end of the trading day.

19. Information regarding the February 2016 Offering had not been generally disclosed prior to the press releases on February 3 and February 5, 2016.

20. On February 11, 2016, Bernholtz purchased 200,000 Titan units at the price of \$0.90 per unit, for a total purchase price of \$180,000 pursuant to the February 2016 Offering.

21. If the 110,400 Titan shares had not been sold in advance of the announcement of the February Offering, they would have been worth approximately \$55,000 less in the days following the announcement of the February Offering.

(2) March 2016 Offering

22. On March 16, 2016, Bernholtz attended a meeting of the Board where the Board was advised of a public offering that was planned to commence "[l]ate this week or early week of March 21, 2016".

23. On March 17, 2016, Bernholtz sold 22,200 Titan shares at the share price of \$1.36 for total proceeds of \$30,192.

24. On March 18, 2016, Bernholtz further sold 12,800 Titan shares at the share price of \$1.23 for total proceeds of \$15,744.

25. On March 21, 2016, Bernholtz further sold 233,900 Titan shares at share prices of \$1.08 to \$1.20 for total proceeds of \$271,489.

26. In total during this period, Bernholtz sold 268,900 Titan shares for total proceeds of \$317,425.

27. On March 21, 2016, the share price of Titan closed at \$1.08. After the market closed, Titan issued a press release announcing its intention to undertake an overnight marketed public offering (the "March 2016 Offering"), comprised of its common shares and common share purchase warrants.

28. On March 22, 2016, before the market opened, Titan issued a further press release announcing that the March 2016 Offering would consist of units issued at a price of \$1.00 per unit. Each unit would consist of one common share and one common share purchase warrant, which would be exercisable to purchase one common share at a price of \$1.20 for a period of five years after the public offering. The share price of Titan on March 22, 2016 opened at \$0.85 and closed at \$0.92.

29. Information regarding the March 2016 Offering had not been generally disclosed prior to the press releases on March 21 and March 22, 2016.

30. On March 28, 2016, Bernholtz purchased 400,000 Titan units at the price of \$1.00 per unit, for a total purchase price of \$400,000 pursuant to the March 2016 Offering.

31. If the 268,900 Titan shares had not been sold in advance of the announcement of the March Offering, they would have been worth approximately \$78,000 less in the days following the announcement of the March Offering. Bernholtz held all of his Titan shares as the share price dropped by more than 80% over the next year.

(3) Titan Insider Trading Policy

32. Titan's Insider Trading Policy (the "Insider Trading Policy") prohibited directors, officers and employees and any person in a special relationship with Titan from buying or selling securities of Titan while having material information that has not yet been made public and required directors and officers to seek approval from Titan prior to trading shares of Titan.

33. During the Material Time, Bernholtz was aware of the Insider Trading Policy and the fact that it applied to him.

34. Bernholtz failed to seek approval prior to trading shares of Titan during the Material Time. Similarly, Bernholtz failed to inform Titan of the trades during the Material Time after they were completed.

C. Respondent's Position and Mitigating Factors

35. The Respondent requests that the Settlement Hearing panel consider the following mitigating circumstances. Staff do not object to the mitigating circumstances set out by the Respondent.

- (a) By the Respondent agreeing to this settlement, the Commission will not have to expend further resources that would have been incurred in a contested hearing;

- (b) The Respondent sold the Titan shares to permit him to buy into the offerings to show support for Titan but did not sufficiently consider the risks of selling in the circumstances;
- (c) The Respondent acknowledges that he should have conducted a more careful assessment of the materiality of the information he possessed. He accepts that the more prudent course of conduct would have been to not trade Titan securities in advance of the February and March 2016 Offerings. He also acknowledges that he should have complied with Titan's Insider Trading Policy; and
- (d) The Respondent has not been the subject of any prior Commission proceedings or orders.

PART IV - CONDUCT CONTRARY TO THE PUBLIC INTEREST

36. Bernholtz was the director of a publicly traded company. He occupied a position of high responsibility and trust. By engaging in the foregoing conduct, he failed to abide by that high standard. He was obliged to be carefully attuned to trading issues and the possible materiality of information that came to his attention. In this case, he failed to sufficiently assess the materiality of his knowledge of the pending offerings before the details were announced.

37. As a director of a public company, Bernholtz was also obliged to assiduously follow company policies and regulations respecting the reporting of his trades. Titan had a rigorous pre-trade approval process. This process was designed, among other reasons, to ensure that Titan employees did not trade while in possession of non-public material information. In this case, Bernholtz failed to pre-clear his trades in compliance with Titan's Insider Trading Policy.

38. Bernholtz's failure to abide by Titan's Insider Trading Policy and his failure to conduct a more careful assessment of the materiality of the information concerning the financings engages the fundamental purposes and principles in subsections 1.1(a) and (b) and subsection 2.1(2)(iii) of the Act.

PART V - TERMS OF SETTLEMENT

39. The Respondent agrees to the terms of settlement set forth below.

40. The Respondent consents and agrees to make a voluntary payment in the amount of \$225,000.

41. The Respondent agrees to the terms of settlement listed below and to the Order in substantially the form attached as Schedule "A" to this Settlement Agreement, to be made by the Commission pursuant to section 127 and section 127.1 of the Act, the terms of which include that:

- (a) this Settlement Agreement be approved;
- (b) the voluntary payment of \$225,000 by the Respondent is designated for allocation or use by the Commission in accordance with paragraph 3.4(2)(b)(i) or (ii) of the Act;
- (c) trading in any securities or derivatives by the Respondent cease for a period of three (3) years commencing on the date that is 45 days from the date of the Order, pursuant to paragraph 2 of subsection 127(1) of the Act;
- (d) the acquisition of any securities by the Respondent be prohibited for a period of three (3) years and 45 days commencing on the date of the Order, pursuant to paragraph 2.1 of subsection 127(1) of the Act;
- (e) the Respondent be reprimanded, pursuant to paragraph 6 of subsection 127(1) of the Act;
- (f) the Respondent immediately resigns any position that the Respondent holds as a director or officer of any reporting issuer or registrant, pursuant to paragraphs 7 and 8.1 of subsection 127(1) of the Act;
- (g) the Respondent be prohibited from becoming or acting as a director or officer of any reporting issuer or registrant for a period of seven (7) years, pursuant to paragraphs 8 and 8.2 of subsection 127(1) of the Act; and

(h) the Respondent pays costs in the amount of \$75,000, pursuant to section 127.1 of the Act.

42. The Respondent consents to a regulatory order made by any provincial or territorial securities regulatory authority in Canada containing any or all of the sanctions set out in subparagraphs 41(c) through 41(g). These sanctions may be modified to reflect the provisions of the relevant provincial or territorial securities law.

43. The Respondent acknowledges that this Settlement Agreement and the Order may form the basis for orders of parallel effect in other jurisdictions in Canada. The securities laws of some other Canadian jurisdictions allow orders made in this matter to take effect in those other jurisdictions automatically, without further notice to the Respondent. The Respondent should contact the securities regulator of any other jurisdiction in which the Respondent intends to engage in any securities- or derivatives-related activities, prior to undertaking such activities.

44. The Respondent agrees to make the voluntary payment specified in subparagraph 41(b) and the costs payment specified in subparagraph 41(h) by separate bank drafts or certified cheques payable to the Ontario Securities Commission prior to the issuance of any Commission order approving this settlement Agreement.

PART VI - FURTHER PROCEEDINGS

45. If the Commission approves this Settlement Agreement, Staff will not commence or continue any proceeding against the Respondent under Ontario securities law based on the misconduct described in Part III or Part IV of this Settlement Agreement, unless the Respondent fails to comply with any term in this Settlement Agreement, in which case Staff may bring proceedings under Ontario securities law against the Respondent that may be based on, among other things, the facts set out in Part III or Part IV of this Settlement Agreement as well as the breach of this Settlement Agreement.

46. The Respondent acknowledges that, if the Commission approves this Settlement Agreement and the Respondent fails to comply with any term in it, the Commission is entitled to bring any proceedings necessary.

47. The Respondent waives any defences to a proceeding referenced in paragraph 45 or 46 that are based on the limitation period in the Act, provided that no such proceeding shall be commenced later than six years from the date of the occurrence of the last failure to comply with this Settlement Agreement.

PART VII - PROCEDURE FOR APPROVAL OF SETTLEMENT

48. The parties will seek approval of this Settlement Agreement at the Settlement Hearing before the Commission, which shall be held on a date determined by the Secretary to the Commission in accordance with this Settlement Agreement and the Commission's *Rules of Procedure (2017)*, 40 O.S.C.B. 8988.

49. The Respondent will attend the Settlement Hearing in person.

50. The parties confirm that this Settlement Agreement sets forth all of the agreed facts that will be submitted at the Settlement Hearing, unless the parties agree that additional facts should be submitted at the Settlement Hearing.

51. If the Commission approves this Settlement Agreement:

- (a) the Respondent irrevocably waives all rights to a full hearing, judicial review or appeal of this matter under the Act; and
- (b) the parties will not make any public statement that is inconsistent with this Settlement Agreement or with any additional agreed facts submitted at the Settlement Hearing.

52. Whether or not the Commission approves this Settlement Agreement, the Respondent will not use, in any proceeding, this Settlement Agreement or the negotiation or process of approval of this Settlement Agreement as the basis for any attack on the Commission's jurisdiction, alleged bias, alleged unfairness or any other remedies or challenges that may be available.

PART VIII - DISCLOSURE OF SETTLEMENT AGREEMENT

53. If the Commission does not make the Order:

- (a) this Settlement Agreement and all discussions and negotiations between Staff and the Respondent before the Settlement Hearing will be without prejudice to Staff and the Respondent; and
- (b) Staff and the Respondent will each be entitled to all available proceedings, remedies and challenges, including proceeding to a hearing on the merits of the allegations contained in the Statement of Allegations in respect of the Proceeding. Any such proceedings, remedies and challenges will not be affected by this Settlement Agreement, or by any discussions or negotiations relating to this Settlement Agreement.

54. The parties will keep the terms of this Settlement Agreement confidential until the Settlement Hearing, unless they agree in writing not to do so or unless otherwise required by law.

PART IX - EXECUTION OF SETTLEMENT AGREEMENT

55. This Settlement Agreement may be signed in one or more counterparts which together constitute a binding agreement.

56. A facsimile copy or other electronic copy of any signature will be as effective as an original signature.

DATED at Toronto, Ontario this "15th" day of May, 2019.

"C. Batulis"

"Martin Bernholtz"

Witness:

Martin Bernholtz

DATED at Toronto, Ontario, this "16th" day of May, 2019.

**STAFF OF THE ONTARIO SECURITIES
COMMISSION**

By: *"Jeff Kehoe"*
Name: Jeff Kehoe
Title: Director, Enforcement Branch

SCHEDULE "A"



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FILE NO.: 2018-16

**IN THE MATTER OF
MARTIN BERNHOLTZ**

Timothy Moseley, Vice-Chair and Chair of the Panel
Garnet W. Fenn, Commissioner
Heather Zordel, Commissioner

May ____, 2019

**ORDER
Sections 127 and 127.1 of the
Securities Act, RSO 1990, c S.5**

WHEREAS on _____, 2019, the Ontario Securities Commission held a hearing at the offices of the Commission located at 20 Queen Street West, 17th Floor, Toronto, Ontario to consider the approval of a settlement agreement dated _____, 2019 (the **Settlement Agreement**) between Martin Bernholtz (the **Respondent**) and Staff of the Commission (**Staff**);

ON READING the Statement of Allegations dated March 28, 2018, and the Settlement Agreement and on hearing the submissions of representatives of Staff and the Respondent;

IT IS ORDERED THAT:

1. this Settlement Agreement is approved;
2. the voluntary payment of \$225,000 made by the Respondent is designated for allocation or use by the Commission in accordance with subclause 3.4(2)(b)(i) or (ii) of the of the *Securities Act*, RSO 1990, c S.5 (the **Act**);
3. trading in any securities or derivatives by the Respondent cease for a period of three (3) years commencing on the date that is 45 days from the date of the Order, pursuant to paragraph 2 of subsection 127(1) of the Act;
4. the acquisition of any securities by the Respondent be prohibited for a period of three (3) years and 45 days commencing on the date of the Order, pursuant to paragraph 2.1 of subsection 127(1) of the Act;

5. the Respondent be reprimanded, pursuant to paragraph 6 of subsection 127(1) of the Act;
6. the Respondent immediately resign any position that the Respondent holds as a director or officer of any reporting issuer or registrant, pursuant to paragraphs 7 and 8.1 of subsection 127(1) of the Act;
7. the Respondent be prohibited from becoming or acting as a director or officer of any reporting issuer or a registrant for a period of seven (7) years, pursuant to paragraphs 8 and 8.2 of subsection 127(1) of the Act; and
8. the Respondent pay costs in the amount of \$75,000, pursuant to section 127.1 of the Act.

Timothy Moseley

Garnet W. Fenn

Heather Zordel