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## CHAPTER 1

### NOTICE GIVEN BY THE SECURITIES AND FUTURES COMMISSION

1. The Market Misconduct Tribunal (“**the Tribunal**”) received a notice from the Securities and Futures Commission (“**SFC**”) dated 29 March 2016 (“**Notice**”) which read as follows:

“IN THE MATTER OF THE LISTED SECURITIES OF  
YORKEY OPTICAL INTERNATIONAL (CAYMAN) LTD  
(STOCK CODE 2788)

NOTICE TO THE MARKET MISCONDUCT TRIBUNAL  
PURSUANT TO SECTION 307I(2) OF<sup>1</sup> AND SCHEDULE 9  
TO THE SECURITIES AND FUTURES ORDINANCE CAP.  
571 (“ORDINANCE”)

Whereas it appears to the Securities and Futures Commission (“**SFC**”) that a breach of the disclosure requirements within the meaning of sections 307A, 307B and 307G of Part XIVA of the Ordinance has or may have taken place in relation to the securities of Yorkey Optical International (Cayman) Ltd (Stock Code 2788) listed on the Stock Exchange of Hong Kong Limited [“**SEHK**”], the Market Misconduct Tribunal is hereby required to conduct proceedings and determine:

- (a) whether a breach of a disclosure requirement has taken place; and
- (b) the identity of any person who is in breach of the disclosure requirement.

**Persons and/or corporate bodies appearing to SFC to have  
breached or may have breached a disclosure requirement**

- (1) Yorkey Optical International (Cayman) Ltd (“**Yorkey**”)
- (2) Nagai Michio (“**Michio**”)

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<sup>1</sup> We asked SFC to let us have a soft copy of the Notice and the Agreed Facts. We have assumed that the soft copy would be a true copy of the hard copy in the hearing bundles. But we have spotted errors in the soft copy. We have adopted the hard copy version and noted the differences in this Report. The word “OF” was omitted in the soft copy.

(3) Ng Chi Ching (“Ng”)

### **Statement for Institution of Proceedings**

1. Yorkey has been listed on the Main Board of the SEHK since February 2006. Yorkey mainly makes and sells plastic and metallic parts and components of optical and optoelectronic products. Its main operating subsidiary is Dongguan Yorkey Optical Machinery Components Ltd.

2. At all material times, Michio was the Chief Executive Officer and Executive Director of Yorkey and Ng was the Financial Controller and Company Secretary of Yorkey. Michio and Ng were “officers” of Yorkey as defined in Schedule 1, Part 1 of the Ordinance by virtue of their positions at Yorkey.

3. At all material times, Yorkey’s auditors were Deloitte Touche Tohmatsu (“**Deloitte**”).

4. On 16 August 2012, Yorkey released its unaudited interim results for six months ended 30 June 2012 (“**2012 Interim Results**”). Compared to the corresponding period in 2011, Yorkey’s revenue decreased by 12.1%, from US\$54.4 million to US\$47.8 million, and its net profit decreased by 62%, from US\$3.3 million to US\$ 1.25 million. Yorkey however expressly stated in the 2012 Interim Results that regarding<sup>2</sup> its results for the second half of 2012 was expected to see “*significant growth over that in the first half of the year, alongside with increasing profitability*”.

5. Contrary to the purported expectations of the management, rather than there being significant growth and increasing profitability as compared to the first half of 2012, Yorkey in fact sustained material losses in the second half of 2012 and its financial performance deteriorated significantly (“**Deterioration**”). On a full year basis, there was a substantial decline in its 2012 profits as compared against its 2011 results *and* against its results for the first half of 2012.

6. On 25 March 2013, Yorkey announced its audited annual results for the year ended 31 December 2012 (“**2012 Final Results**”). The 2012 Final Results recorded a loss before tax of US\$136,000, compared to the profit before tax of US\$7.531 million in 2011. It also recorded a net profit (after taking into account tax credit) of US\$60,000 – this represented a decline of

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<sup>2</sup> The word “regarding” has been omitted in the soft copy of the Notice sent to the Tribunal at its request.

99% compared to a profit of US\$6.685 million in 2011. The net profit figure for the whole year was less than that reported for the first six months. Compared to the first half of 2012, Yorkey's revenue decreased by 5.9% and gross profit margin dropped from approximately 21.2% to 18.2%.

7. The share price of Yorkey dropped a total of 21.25% over the next three days, from HK\$0.80 per share at the close of business on 25 March 2013 to HK\$0.63 per share at the close of business on 28 March 2013.

8. Between the 2012 Interim Results (published on 16 August 2012) and the 2012 Final Results (published on 25 March 2013), Yorkey did not issue any profit warning announcement, nor did it inform the public of the Deterioration, which was contrary to management's previous published expectations.

#### **The Deterioration coming to the knowledge of Yorkey**

9. At the material time Yorkey compiled consolidated management accounts on a monthly basis ("**Consolidated Monthly Management Accounts**"). The Consolidated Monthly Management Accounts for each month would be available by the middle of the next month and were provided to Michio for his review.

10. The Consolidated Monthly Management Accounts showed that the Deterioration began in October 2012 and continued into November and December 2012, with Yorkey incurring significant net losses in all of those months.

11. By mid-January 2013, the December 2012 Consolidated Monthly Management Accounts and the internal management accounts for the full year of 2012 ("**2012 Internal Accounts**") were available. These accounts were provided to Michio in mid-January 2013. Michio had therefore been aware of the Deterioration since mid-January 2013 at the latest.

12. On 25 February 2013, Deloitte sent a draft consolidated financial statement to Yorkey. This document was provided to Ng in late February 2013. Ng had therefore been aware of the Deterioration since late February 2013 at the latest.

#### **Inside information**

13. The Deterioration was apparent from the relatively low turnover and loss figures contained in the Consolidated Monthly Management Accounts for October, November and December 2012, and also from the draft consolidated financial statement

prepared by Deloitte which was provided to Ng in late February 2013. The figures reported in those accounts were specific information relating to Yorkey, they were not generally known to the investing public and would, if made known to them, be<sup>3</sup> likely to materially affect the share price. The monthly results for the five months between July and November 2012 were already sufficiently poor for it to have been a clear indication to management that the results for the second half 2012 (and hence also the full year of 2012) would be much worse than expected. In the premises, information about the Deterioration, as shown by the financial figures contained in the Consolidated Monthly Management Accounts mentioned above, was inside information in relation to Yorkey.

### **Breach of a disclosure requirement by Yorkey**

14. Information about the Deterioration as apparent from the figures contained in the internal management accounts as specified above came to the knowledge of Yorkey:

- (i) from around mid-December 2012 when the Consolidated Monthly Management Accounts up to November 2012 had, or ought reasonably to have, come to the knowledge of Michio in the course of performing his functions as Chief Executive Officer and Executive Director of Yorkey; or
- (ii) from around mid-January 2013 at the latest when the Consolidated Monthly Management Accounts for December 2012 and the 2012 Internal Accounts had, or ought reasonably to have, come to the knowledge of Michio in the course of performing his functions as Chief Executive Officer and Executive Director of Yorkey.

15. A reasonable person acting as an officer of Yorkey would consider that information about the Deterioration as was apparent from the figures contained in the company's internal accounts was inside information in relation to Yorkey. The information however was not disclosed to the public as soon as reasonably practicable after it came to the knowledge of Yorkey – the public was not informed of the Deterioration until the publication of Yorkey's 2012 Final Results on 25 March 2013.

16. Under s.307(A)(2) of the Ordinance, a breach of a disclosure requirement takes place if any of the requirement in,

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<sup>3</sup> The word “be” has been omitted in the soft copy of the Notice sent to the Tribunal at its request.

inter alia, s.307B is contravened in relation to a listed corporation.

17. By reason of the matters aforesaid, Yorkey was, or may have been, in breach of the disclosure requirement as provided for in<sup>4</sup> s.307B of the Ordinance.

### **Breach of a disclosure requirement by Michio and Ng**

18. It was the responsibility of Michio and Ng, as officers of Yorkey, to take all reasonable measures from time to time to ensure that proper safeguards exist to prevent a breach of a disclosure requirement by Yorkey under the Ordinance (s.307G(1) of the Ordinance). Moreover, as officers of Yorkey, Michio and Ng are themselves in breach of the disclosure requirement if the breach of disclosure requirement by Yorkey was the result of their reckless or negligent conduct (s.307G(2)(a) of the Ordinance), or their failure to take all reasonable measures from time to time to ensure that proper safeguards exist to prevent the breach (s.307G(2)(b) of the Ordinance).

19. Both Michio and Ng were aware of the Deterioration well before the publication of the 2012 Final Results. Both failed to take any steps to ensure timely disclosure of information about the Deterioration to the investing public. Such failure amounted to reckless or negligent conduct on the part of Michio and Ng. Their reckless or negligent conduct as described above resulted in, or may have resulted in, Yorkey's breach of a disclosure requirement. In these circumstances, both Michio and Ng were, or may have been, also in breach of a disclosure requirement pursuant to section 307G(2)(a) of the Ordinance.

20. Further or alternatively, neither Michio nor Ng took reasonable measures to ensure that proper safeguards exist to prevent a breach of a disclosure requirement by Yorkey. In these circumstances, both Michio and Ng were, or may have been, also in breach of a disclosure requirement pursuant to section 307G(2)(b) of the Ordinance.

Dated this 29<sup>th</sup><sup>5</sup> day of March 2016

Securities and Futures Commission"

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<sup>4</sup> The words "under s.307A(2) and" appear in the soft copy of the Notice sent to the Tribunal at its request in place of the word "in".

<sup>5</sup> The date "29<sup>th</sup>" has been omitted in the soft copy of the Notice sent to the Tribunal at its request.

## CHAPTER 2

### THE SUBSTANTIVE HEARING

#### *Preliminary Conference*

2. The Chairman held a Preliminary Conference on 20 June 2016. SFC was represented by counsel and Yorkey, Michio and Ng were represented by their respective solicitors and counsel.

3. SFC, Yorkey, Michio and Ng agreed directions for the filing and service of witness statements, expert reports, opening submissions, chronology of events, legal authorities and *dramatis personae* (cast of characters) and that the matter be set down for 10 days.

4. After consultation with counsel, 10 days (i.e. 16 January 2017 – 1 February 2017) were fixed for the substantive hearing.

#### *Yorkey, Michio and Ng's decision not to contest liability*

5. 3 ½ months *after* the preliminary conference, by a letter dated 7 October 2016 written on Iu, Lai & Li's letter paper and signed by Iu, Lai & Li (solicitors for Yorkey), Philip Tsui & Jackson Cheung (solicitors for Michio) and Keith Lam, Lau & Chan (solicitors for Ng) and addressed to SFC and copied to the Tribunal, Yorkey, Michio and Ng stated through their solicitors that:

“In the interest of saving the parties (including the SFC and MMT<sup>6</sup>) time and costs, and after careful consideration, each of

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<sup>6</sup> The Tribunal is *not* a “party” and Iu, Lai & Li, Philip Tsui & Jackson Cheung and Keith Lam, Lau & Chan ought to have known better.

the 3 Named Persons has decided not to contest liability under the captioned MMT Proceedings (the “**Proceedings**”) and to admit:-

- (a) in the case of Yorkey, to the breach of a disclosure requirement under the SFO as spelt out by the SFC at §§14-17 of the Notice; and
- (b) in the case of Michio and Ng, to the breach of a disclosure requirement under the SFO as spelt out by the SFC at §§18-20 of the Notice

on the basis of the facts and matters as stated in the synopsis prepared by the SFC dated 29.03.2016 (‘the **Synopsis**’).

...

6. For the SFC’s information, Yorkey has in fact already on 03.10.2016<sup>7</sup> made an approach to Deloitte<sup>8</sup> for the purpose of seeking its independent and professional advice to review Yorkey’s procedures for compliance on matters under the Listing Rules and/or the SFO including all necessary and applicable disclosure requirements.”

### *Statement of Agreed and Admitted Facts*

6. By a “Statement of Agreed and Admitted Facts” (“**Agreed Facts**”) dated 23 December 2016 signed on behalf of SFC, Iu, Lai & Li on behalf of Yorkey, Philip Tsui & Jackson Cheung on behalf of Michio, and Keith Lam, Lau & Chan on behalf of Ng, it was agreed that:

“For the purpose of the proceedings instituted by [‘**SFC**’] before the [‘**Tribunal**’] under section 307I(2) of and Schedule 9 to the Securities and Futures Ordinance, Cap. 571 (‘**Ordinance**’) by way of notice dated 29 March 2016 (‘**Notice**’), the facts and matters set out in this Statement of Agreed and Admitted Facts are agreed and accepted by [SFC] and the 1st, 2nd and 3rd Specified Persons, and it is agreed by all parties that the Tribunal may make a determination under section 307J(1) of the Ordinance on the basis of the facts and matters set out herein.”

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<sup>7</sup> That is to say, 4 days before the date of this letter.

<sup>8</sup> [Deloitte] were Yorkey’s auditors.

Based on the Agreed Facts (which are reproduced in Chapter 3), we find the facts and matters there set out as facts.

*The substantive hearing*

7. The substantive hearing took place on 16 & 17 January 2017. SFC was represented by Mr Horace YL Wong SC (leading Mr Norman SP Nip); Yorkey was represented by Mr Stewart KM Wong SC (leading Mr Wilson Leung who appeared only on 16 January 2017) instructed by Iu, Lai & Li; Michio was represented by Mr Abraham Chan instructed by Philip Tsui & Jackson Cheung; and Ng was represented by Mr Laurence LJ Li, instructed by Keith Lam, Lau & Chan.

8. Neither SFC nor Yorkey, Michio or Ng adduced any oral evidence.

## CHAPTER 3

### AGREED AND ADMITTED FACTS

9. Based on the Agreed Facts, we find the facts and matters set out in this Chapter as facts.

“1.1 Yorkey Optical International (Cayman) Ltd (“**Yorkey**”) breached the disclosure requirement within the meaning of section 307B of Part XIVA of the Ordinance in relation to the securities of Yorkey (Stock Code: 2788) listed on the Stock Exchange of Hong Kong Limited (“**SEHK**”).

1.2 Mr Nagai Michio (“**Michio**”) and Mr Ng Chi Ching (“**Ng**”) breached the disclosure requirement within the meaning of section 307G of Part XIVA of the Ordinance in relation to the securities of Yorkey.

1.3 Details of the above breaches are set out below.

#### **A. Introduction**

##### *The Parties*

2. Yorkey is an exempted company with limited liability incorporated in the Cayman Islands on 13 October 2004, and was registered in Hong Kong under Part XI of the [then] Companies Ordinance (Cap. 32) as an overseas company. Its shares were listed on the Main Board of SEHK on 10 February 2006 and remain so listed at the date of the Notice.

3. The registered address of Yorkey was at Century Yard, Cricket Square, Hutchins Drive, P.O. Box 2681, Grand Cayman KY1-1111, Cayman Islands, and its principal place of business was at Workshops 1-2, 6th Floor, Block A, Goldfield Industrial Centre, 1 Sui Wo Road, Shatin, New Territories, Hong Kong.

4. Yorkey is an investment holding company with 1 direct subsidiary and 2 indirect subsidiaries (collectively referred to as the “**Group**”). Its main operating subsidiary is Dongguan Yorkey Optical Machinery Components Ltd in the Mainland, which was principally engaged in the business of the manufacture and sale of plastic and metallic parts and components of optical and optoelectronic products, including digital still cameras, copiers, computer peripherals, etc.

5. Michio joined Yorkey in March 2011. At all material times, Michio was the Chief Executive Officer (“CEO”) and Executive Director of Yorkey. The sales and finance department of the Group and the daily operations of Yorkey are under the management of Michio. Prior to joining Yorkey, Michio had served various senior positions including as a division head and as a senior vice president of a Japanese multinational corporation.

6. Ng joined Yorkey in January 2006. At all material times Ng was the Financial Controller and Company Secretary of Yorkey, and was responsible for the overall finance and accounting of the Group. He has had over 10 years of experience in financial management and business management, and is a Fellow of the Hong Kong Institute of Certified Public Accountants. He reported to Michio on a regular basis.

7. Michio and Ng were “officers” of Yorkey as defined in Schedule 1, Part 1 of the Ordinance by virtue of their positions at Yorkey.

*Relevant Personnel and Reporting Structure*

8. At all material times, the personnel within Yorkey most relevant to the preparation and/or review of Yorkey’s financial documentation were:

Name	Role(s)
Michio	Chief Executive Officer and Executive Director
Ng	Financial Controller and Company Secretary
Lai I-chun (“Lai”)	Accounting staff
Liang Li Li (“Liang”)	Assistant manager of the finance department

9. Liang was at all material times the assistant manager of Yorkey’s finance department and was based in Dongguan. She reported to Michio and would provide him with the monthly management accounts of Yorkey. She also reported to Ng on important issues, including any adjustments that needed to be made to the figures in the final version of audited financial statements.

10. Lai was at all material times an accounting staff of Yorkey and was based in Taiwan. She would report to Liang in the Mainland.

*Auditor of Yorkey*

11. At all material times, Deloitte Touche Tomatsu (“**Deloitte**”) was Yorkey’s auditor.

**B. Deteriorating Financial Performance of Yorkey**

*The 2012 Interim Results*

12. On 16 August 2012, Yorkey released its unaudited interim results dated 16 August 2012 (“**2012 Interim Results**”). Compared to the corresponding period in 2011, Yorkey’s revenue decreased by 12.1%, from US\$54.4 million to US\$47.8 million, and its net profit decreased by 62%, from US\$3.3 million to US\$1.25 million.

13. Notwithstanding this, the market was informed in the clearest of terms that Yorkey’s profitability in the second half of 2012 was expected to be significantly better than the first half of 2012:

- (1) In the “*Operational and Financial Review*” section of the 2012 Interim Results, Yorkey reported that “*The Group’s turnover for the first six months was mainly derived from the sales of components for [digital still cameras]. As consumer electronic products entered the peak period in the second six months of 2012, the players in the digital still cameras industry actively expanded their sales channels of new models, it is expected that the results of Yorkey will benefit from it directly*”. (emphasis added).
- (2) In the “*Outlook*” section of the 2012 Interim Results, Yorkey reported that “[i]ndividual brand players are actively rolling out new models to stimulate market demand. **The Group expects that its results for the second half of the year will see significant growth over that in the first half of the year, alongside with increasing profitability**”. (emphasis added).

*The 2012 Full Year Results*

14. Contrary to the purported expectations of the management, rather than there being significant growth and increasing profitability as compared to the first half of 2012, Yorkey in fact sustained material losses in the second half of 2012 and its financial performance deteriorated significantly

(“**Deterioration**”). On a full year basis, there was a substantial decline in its 2012 profits as compared to its 2011 results *and* to its results for the first half of 2012.

15. On 25 March 2013, Yorkey announced its audited annual results for the year ended 31 December 2012 (“**2012 Final Results**”). The 2012 Final Results showed the following:

- (i) A loss before tax of US\$136,000, compared to the profit before tax of US\$7.531 million in 2011.
- (ii) A net profit of US\$60,000 after taking into account a tax credit – this represented a 99% decrease compared to the US\$6.685 million in 2011.
- (iii) The net profit figure for the whole year of 2012 (i.e. US\$60,000) was significantly less than that reported for the first six months of 2012 (i.e. US\$1,252,000). Compared to the first half of 2012, Yorkey’s revenue decreased by 5.9% and gross profit margin dropped from approximately 21.2% to 18.2%.
- (iv) Yorkey’s performance in the second half of 2012 was materially worse than its performance in the first half of 2012.

16. Under the “*Management Discussion and Analysis*” section of the 2012 Final Results, various reasons were given for the decrease in Yorkey’s turnover, gross profit and net profit, including:

- (i) Slowing global economy due to the European debt crisis;
- (ii) Digital camera brand players adopting a conservative approach and focusing on inventory control in 2012; and
- (iii) Rising wages and labour costs in Mainland China.

17. On 26 March 2013, the first trading day after the release of the 2012 Results Announcement, Yorkey’s share price decreased by 13.8% and the trading volume increased by approximately 9.3 times, as compared to the average of the preceding ten trading days. The share price of Yorkey dropped a total of 21.25% over the three days following the 2012 Results Announcement, from HK\$0.80 per share at the close of business on 25 March 2013 to HK\$0.63 per share at the close of business on 28 March 2013.

18. Between the 2012 Interim Results (published on 16 August 2012) and the 2012 Final Results (published on

25 March 2013), Yorkey did not issue any profit warning announcement, nor did it inform the public of the Deterioration, when the same had come to its knowledge (by virtue of the attribution of Michio’s knowledge to Yorkey as set out in paragraph 26 below) as early as around mid-December 2012 (see Sections C and E below).

**C. The Deterioration coming to the knowledge of Yorkey**

*The Progress of the Deterioration in Yorkey’s Performance*

19. At the material time Yorkey compiled consolidated management accounts on a monthly basis (“**Consolidated Monthly Management Accounts**”). The Consolidated Monthly Management Accounts for each month would be available by the middle of the following month and were provided to Michio for his review. These accounts tabulated the key financial performance data of Yorkey in each month, including turnover, gross profit and net profit.

20. According to the Consolidated Monthly Management Accounts, Yorkey appeared to have performed to expectations in July, August and September 2012. The Deterioration began in October 2012 (net loss of US\$765,707) and continued through November 2012 (net loss of US\$604,039) and December 2012 (net loss of US\$1,446,811). The precise figures as reported in the Consolidated Monthly Management Accounts were as follows (in USD):

	<b>First 6 months combined</b>	<b>Jul</b>	<b>Aug</b>	<b>Sep</b>
Turnover	47,794,534	7,518,515	9,083,745	9,156,251
Gross Profit	10,145,928	1,908,312	2,066,512	1,868,136
Profit for Period	1,250,122	344,528	547,675	734,569
	<b>Oct</b>	<b>Nov</b>	<b>Dec</b>	<b>Second 6 months combined</b>
Turnover	6,164,365	7,467,104	5,581,841	44,971,821
Gross Profit	599,218	821,689	914,930	8,178,797
Profit for Period	(765,707)	(604,039)	(1,446,811)	(1,189,785)

*Information about the Deterioration as shown in the internal accounts coming to the knowledge of Michio and Ng*

21. The Consolidated Monthly Management Accounts were prepared monthly by Yorkey's accounting staff and were compiled from the financial figures generated from the manufacturing and sale sides of Yorkey. Lai was responsible for combining those figures into Consolidated Monthly Management Accounts each month. After Lai completed the Consolidated Monthly Management Accounts, she would email the same to Liang for her review.

22. After Liang reviewed the Consolidated Monthly Management Accounts, she would pass these consolidated financial reports to Michio.

23. The Consolidated Monthly Management Accounts for each month would be available by the middle of the following month. In particular, the December 2012 Consolidated Monthly Management Accounts was ready by mid-January 2013.

24. In respect of the internal management accounts for the full year of 2012 ("**2012 Internal Accounts**"), they became available in mid-January 2013, which were passed onto Michio also in mid-January 2013.

25. Michio was responsible for overseeing Yorkey's monthly sales and profit figures, and he was already aware of a drop in purchase orders in October 2012 which prompted him to investigate the reason for the drop. Michio also received the 2012 Internal Accounts, and was (in January 2013) aware of the profit figure for the full year of 2012.

26. In the premises, the information about the Deterioration had, or ought reasonably to have, come to the knowledge of Michio since around mid-December 2012.

27. Ng was not provided with the Consolidated Monthly Management Accounts during the course of the year, and he did not know whether Yorkey was profitable during the year. Ng was not aware of the Deterioration until near the end of February 2013, when a set of the draft financial statements prepared by the auditor was provided to him.

28. Thus, the information about the Deterioration had, or ought reasonably to have, come to the knowledge of Ng since late February 2013 at the latest.

#### **D. Inside Information**

29. The Deterioration was apparent from the relatively low turnover and the loss figures contained in the Consolidated Monthly Management Accounts for October, November and December 2012, and also from the draft consolidated financial statement prepared by Deloitte which was provided to Ng in late February 2013. Further:

- (i) The financial information contained in Yorkey's internal accounts as mentioned above was information specific to Yorkey and was not generally known to the investing public.
- (ii) Based on the statements made by Yorkey in the 2012 Interim Results (see paras 12-13 above), persons who were accustomed or would be accustomed or would be likely to deal in the shares of Yorkey would expect that, despite a decline in interim profit, performance of Yorkey would improve in the second half of 2012.
- (iii) The financial information contained in Yorkey's internal accounts as mentioned above indicated that Yorkey was sustaining a loss in the second half of 2012. This would be a significant disappointment to those who were accustomed or would be accustomed or would be likely to deal in the shares of Yorkey. Had that information been made known to them, the impact on the share price of Yorkey was likely to be material.
- (iv) The financial information contained in the Consolidated Monthly Management Accounts from July to November 2012 would have been sufficient to give a clear indication to the investing public that Yorkey's performance in the second half of 2012 would be much worse than expected, and the impact of this information (had it been made public) on the share price was likely to be material.

30. Information about the Deterioration, as shown by the financial figures contained in the Consolidated Monthly Management Accounts mentioned above, was inside information in relation to Yorkey which required disclosure under section 307B of the Ordinance.

#### **E. Breach of a disclosure requirement by Yorkey**

31. Information about the Deterioration as apparent from the figures contained in the internal management accounts as specified above came to the knowledge of Yorkey (by virtue of the attribution of Michio's knowledge to Yorkey as set out in

paragraph 26 above) in or around mid-December 2012 when the Consolidated Monthly Management Accounts up to November 2012 had, or ought reasonably to have, come to the knowledge of Michio in the course of performing his functions as CEO and Executive Director of Yorkey.

32. A reasonable person acting as an officer of Yorkey would consider that information about the Deterioration as was apparent from the figures contained in the Yorkey's internal accounts was inside information in relation to Yorkey. The information however was not disclosed to the public as soon as reasonably practicable – the public was not informed of the Deterioration until the publication of Yorkey's 2012 Final Results on 25 March 2013.

33. In the 13 weeks between mid-December 2012 and 25 March 2013, the investing public had been trading on a false premise that Yorkey had performed significantly better in the second half of 2012 as compared to the first half of 2012 (as so stated by Yorkey in the 2012 Interim Results). The delay in the disclosure of the information about the Deterioration was in the circumstances unreasonable and unjustified.

34. Under section 307(A)(2) of the Ordinance, a breach of a disclosure requirement takes place if any of the requirements in, inter alia, section 307B is contravened in relation to a listed corporation.

35. By reason of these matters, Yorkey was in breach of the disclosure requirement as provided for in section 307B of the Ordinance.

#### **F. Breach of a disclosure requirement by Michio and Ng**

36. As officers of Yorkey, Michio and Ng are themselves in breach of the disclosure requirement if the breach of disclosure requirement by Yorkey was the result of their reckless conduct (section 307G(2)(a) of the Ordinance), or their failure to take all reasonable measures from time to time to ensure that proper safeguards exist to prevent the breach (section 307G(2)(b) of the Ordinance).

#### *Breach of section 307G(2)(a) of the Ordinance*

37. Both Michio and Ng were aware of the Deterioration well before the publication of the 2012 Final Results. Both were aware of the risk that failure to make timely disclosure of the information about the Deterioration may result in Yorkey's breach of section 307B of the Ordinance. However, both failed

to take any steps to ensure timely disclosure of information about the Deterioration to the investing public.

38. The failure of Michio and Ng to take any steps to ensure timely disclosure of information about the Deterioration amounted to reckless conduct in that they were unreasonably taking the risk that might result in Yorkey's breach of section 307B of the Ordinance. Their reckless conduct as described above resulted in Yorkey's breach of a disclosure requirement. In these circumstances, both Michio and Ng were also in breach of a disclosure requirement pursuant to section 307G(2)(a) of the Ordinance.

*Breach of section 307G(2)(b) of the Ordinance*

39. Further or alternatively, it was the responsibility of Michio and Ng, as officers of Yorkey, to take all reasonable measures from time to time to ensure that proper safeguards exist to prevent a breach of a disclosure requirement by Yorkey under the Ordinance (section 307G(1) of the Ordinance). However, neither Michio nor Ng took reasonable measures to ensure that proper safeguards exist to prevent a breach of a disclosure requirement by Yorkey.

40. In respect of Michio:

- (i) He was the CEO and executive director of Yorkey and was responsible for overseeing Yorkey's monthly sales and profit figures.
- (ii) Michio failed to set up a system to ensure that price sensitive information relating to the performance of Yorkey would be identified and then disclosed in a timely manner. He did not know if there were any system in place to ensure that price sensitive information would be disclosed in a timely manner.
- (iii) Michio failed to apprise himself of the disclosure requirements under the law. In his interview with [SFC], Michio first claimed that at the time he was not aware of the new disclosure requirements under the Ordinance, and then later on stated that he was aware of the disclosure requirements but he was not clear as to the timing and method of disclosure and did not have the ability to judge when and how the disclosure should be made.
- (iv) Michio accepted in his interview with [SFC], that he did not seek professional advice as to whether or not the Deterioration should be disclosed to the public.

41. In respect of Ng:
- (i) He was the Financial Controller and Company Secretary of Yorkey and was responsible for ensuring Yorkey's compliance with its legal obligations.
  - (ii) He failed to set up a system to ensure that price sensitive information relating to the performance of Yorkey would be identified and then disclosed in a timely manner.
  - (iii) Despite being aware of the disclosure obligation under the new regulation, Ng did not put in place any system to ensure that price sensitive information would be disclosed in a timely manner.
  - (iv) He should have kept himself up-to-date with Yorkey's financial performance. There was no system in place whereby the Consolidated Monthly Management Accounts would be sent to him.
  - (v) Ng accepted in this interview with [SFC] that he did not suggest to the Board of Yorkey to issue a profit warning prior to the 2012 Final Results, nor check to see if anyone had done the same. He simply thought that there was nothing he could do in the circumstances and allowed himself to sit on the information without taking any steps.
42. In these circumstances, both Michio and Ng were also in breach of a disclosure requirement pursuant to section 307G(2)(b) of the Ordinance.

#### **G. Investors' Loss**

43. [SFC's] expert analyzed the trading data of the shares of Yorkey during the period between 1 December 2012 and 15 April 2013. She is of the view that had the information relating to the Deterioration as contained in the Consolidated Monthly Management Accounts up to November 2012 been disclosed to the public prior to 25 March 2013, the share price of Yorkey should have been traded at the price of HK\$ 0.6845 ("**re-rated price**").

44. As a result of Yorkey, Michio and Ng's breaches of the disclosure requirements under sections 307B and 307G of the Ordinance, investors who bought shares in Yorkey during the period between Monday 17 December 2012 (around the time when the Information came to the knowledge of Yorkey) to 25 March 2013 (date of announcement of the 2012 Final Results) ("Relevant Period") were denied material information

about Yorkey and bought shares at prices higher than HK\$ 0.6845, namely, the re-rated price.

45. Based on the trading information gathered from the brokers for the Relevant Period, [SFC's] expert calculated that the notional losses suffered by investors due to the delay in Yorkey's disclosure of the Deterioration amounted to an aggregate amount of HK\$ 1,528,695."

## CHAPTER 4

### RELEVANT STATUTORY PROVISIONS

#### *Jurisdiction of Tribunal under Part XIVA*

10. Except otherwise stated, references below to sections are to sections in the Ordinance.

11. Section 307H provides that:

“The Tribunal has jurisdiction to hear and determine in accordance with this Part, Part XIII and Schedule 9 any question or issue arising out of or in connection with any proceedings instituted under section 307I.”

#### *Institution of disclosure proceedings*

12. Section 307I provides that:

“(1) If it appears to the Commission that a breach of a disclosure requirement has or may have taken place, the Commission may institute proceedings (disclosure proceedings) in the Tribunal concerning the matter.

(2) The Commission institutes disclosure proceedings by giving the Tribunal a notice in writing containing a statement specifying the matters prescribed in Schedule 9.”

#### *Object and conduct of disclosure proceedings*

13. Section 307J provides as follows:

“(1) Without limiting section 307H, the object of disclosure proceedings is for the Tribunal to determine—

- (a) whether a breach of a disclosure requirement has taken place; and
  - (b) the identity of any person who is in breach of the disclosure requirement.
- (2) Subject to section 261(3), the standard of proof required to determine any question or issue before the Tribunal in disclosure proceedings is the standard of proof applicable to civil proceedings in a court of law.
- (3) Sections 253 and 254 apply to disclosure proceedings as if a reference in those sections to proceedings instituted under section 252 were a reference to disclosure proceedings.”

### *Powers of the Tribunal*

14. The powers of the Tribunal under section 253 (which are applicable to disclosure proceedings by virtue of section 307J(3)) include the following:

- “(1) Subject to the provisions of Schedule 9 and any rules made by the Chief Justice under section 269, the Tribunal, for the purposes of any proceedings instituted under section 252, may, on its own motion or on the application of any party before it-
- (a) receive and consider any material by way of oral evidence, written statements or documents, even if the material would not be admissible in evidence in civil or criminal proceedings in a court of law;
  - ...
  - (i) stay any of the proceedings on such grounds and on such terms and conditions as it considers appropriate having regard to the interests of justice;
  - (j) determine the procedure to be followed in the proceedings;
  - (k) exercise such other powers or make such other orders as may be necessary for or ancillary to the

conduct of the proceedings or the carrying out of its functions.

...

- (4) A person is not excused from complying with an order, notice, prohibition or requirement of the Tribunal made or given under or pursuant to subsection (1) only on the ground that to do so might tend to incriminate the person.”

### *Definition of inside information*

15. Section 307A(1) defines “inside information” as follows:

“inside information (内幕消息), in relation to a listed corporation, means specific information that —

- (a) is about—
  - (i) the corporation;
  - (ii) a shareholder or officer of the corporation; or
  - (iii) the listed securities of the corporation or their derivatives; and
- (b) is not generally known to the persons who are accustomed or would be likely to deal in the listed securities of the corporation but would if generally known to them be likely to materially affect the price of the listed securities”.

### *Breach by listed corporation of disclosure requirement*

16. Section 307A(2) defines a breach by a listed corporation of a disclosure requirement as follows:

- “(2) For the purposes of this Part—
- (a) a breach of a disclosure requirement takes place if any of the requirements in section 307B or 307C is contravened in relation to a listed corporation; and
  - (b) in those circumstances, the listed corporation is in breach of the disclosure requirement.”

*Listed corporation’s disclosure requirements*

17. Section 307B lays down a listed corporation’s disclosure requirement as follows:

- “(1) A listed corporation must, as soon as reasonably practicable after any inside information has come to its knowledge, disclose the information to the public.
- (2) For the purposes of subsection (1), inside information has come to the knowledge of a listed corporation if—
- (a) information has, or ought reasonably to have, come to the knowledge of an officer of the corporation in the course of performing functions as an officer of the corporation; and
  - (b) a reasonable person, acting as an officer of the corporation, would consider that the information is inside information in relation to the corporation.”

18. Section 307C prescribes the manner of disclosure as follows:

- “(1) A disclosure under section 307B must be made in a manner that can provide for equal, timely and effective access by the public to the inside information disclosed.
- (2) Without limiting the manner of disclosure permitted under subsection (1), a listed corporation complies with that subsection if it has disseminated the inside information required to be disclosed under section 307B through an electronic publication system operated by a

recognized exchange company for disseminating information to the public.”

### *Officers’ disclosure requirements*

19. Section 307G lays down the circumstances when an officer of a listed corporation is also in breach of the disclosure requirement:

- “(1) Every officer of a listed corporation must take all reasonable measures from time to time to ensure that proper safeguards exist to prevent a breach of a disclosure requirement in relation to the corporation.
- (2) If a listed corporation is in breach of a disclosure requirement, an officer of the corporation —
  - (a) whose intentional, reckless or negligent conduct has resulted in the breach; or
  - (b) who has not taken all reasonable measures from time to time to ensure that proper safeguards exist to prevent the breach,is also in breach of the disclosure requirement.”

### *Definition of “officer (高級人員)”*

20. An “officer” is defined in Schedule 1 Part 1 of the Ordinance thus:

- “(a) in relation to a corporation, means a director, manager or secretary of, or any other person involved in the management of, the corporation; or
- (b) in relation to an unincorporated body, means any member of the governing body of the unincorporated body.”

## **CHAPTER 5**

### **DETERMINATION BY TRIBUNAL**

21. The Tribunal was required by the Notice:

“... to conduct proceedings and determine:

- (a) whether a breach of a disclosure requirement has taken place; and
- (b) the identity of any person who is in breach of the disclosure requirement.”

22. Based on the Agreed Facts, we determine that:

- (i) A breach of the disclosure requirement has taken place;  
and
- (ii) The identities of the persons who are in breach of the disclosure requirement are:
  - (a) Yorkey [Optical International (Cayman) Ltd];
  - (b) [Nagai] Michio; and
  - (c) Ng [Chi Ching].

## CHAPTER 6

### SECTION 307N

23. Section 307N provides that:

- “(1) Subject to section 307K, at the conclusion of any disclosure proceedings the Tribunal may make one or more of the following orders in respect of a person identified under section 307J(1)(b) as being in breach of a disclosure requirement—
- (a) an order that, for the period (not exceeding 5 years) specified in the order, the person must not, without the leave of the Court of First Instance—
    - (i) be or continue to be a director, liquidator, or receiver or manager of the property or business, of a listed corporation or any other specified corporation; or
    - (ii) in any way, whether directly or indirectly, be concerned or take part in the management of a listed corporation or any other specified corporation;
  - (b) an order that, for the period (not exceeding 5 years) specified in the order, the person must not, without the leave of the Court of First Instance, in Hong Kong, directly or indirectly, in any way acquire, dispose of or otherwise deal in any securities, futures contract or leveraged foreign exchange contract, or an interest in any securities, futures contract, leveraged foreign exchange contract or collective investment scheme;
  - (c) an order that the person must not again perpetrate any conduct that constitutes a breach of a disclosure requirement;
  - (d) if the person is a listed corporation or is in breach of the disclosure requirement as a director or chief executive of a listed corporation, an order

that the person pay to the Government a regulatory fine not exceeding [\$8,000,000];

- (e) without prejudice to any power of the Tribunal under section 307P, an order that the person pay to the Government the sum the Tribunal considers appropriate for the costs and expenses reasonably incurred by the Government in relation or incidental to the proceedings;
- (f) without prejudice to any power of the Tribunal under section 307P, an order that the person pay to the Commission the sum the Tribunal considers appropriate for the costs and expenses reasonably incurred by the Commission, whether in relation or incidental to—
  - (i) the proceedings;
  - (ii) any investigation of the person's conduct or affairs carried out before the proceedings were instituted; or
  - (iii) any investigation of the person's conduct or affairs carried out for the purposes of the proceedings;
- (g) an order that any body which may take disciplinary action against the person as one of its members be recommended to take disciplinary action against the person;
- (h) if the person is a listed corporation, any order that the Tribunal considers necessary to ensure that a breach of a disclosure requirement does not again take place in respect of the corporation including, but not limited to, an order that the corporation appoint an independent professional adviser approved by the Commission to review the corporation's procedure for compliance with this Part or to advise the corporation on matters relating to compliance with this Part;
- (i) if the person is an officer of a listed corporation, any order that the Tribunal considers necessary to ensure that the officer does not again perpetrate any conduct that constitutes a breach of a disclosure requirement including, but not limited to, an order that the officer undergo a training program approved by the Commission on

compliance with this Part, directors' duties and corporate governance.

- (2) When making an order in respect of a person under subsection (1), the Tribunal may take into account any conduct by the person which—
- (a) previously resulted in the person being convicted of an offence in Hong Kong;
  - (b) previously resulted in the person being identified by the Tribunal—
    - (i) under section 252(3)(b) as having engaged in any market misconduct; or
    - (ii) under section 307J(1)(b) as being in breach of a disclosure requirement; or
  - (c) at any time before the commencement<sup>9</sup> of Part XIII resulted in the person being identified as an insider dealer in a determination under section 16(3), or in a written report prepared and issued under section 22(1), of the repealed Securities (Insider Dealing) Ordinance.
- (3) The Tribunal must not impose a regulatory fine on a person under subsection (1)(d) unless, in all the circumstances of the case, the fine is proportionate and reasonable in relation to the breach of the disclosure requirement. For that purpose, the Tribunal may take into account, in addition to any conduct referred to in subsection (2), any of the following matters—
- (a) the seriousness of the conduct that resulted in the person being in breach of the disclosure requirement;
  - (b) whether or not that conduct was intentional, reckless or negligent;
  - (c) whether that conduct may have damaged the integrity of the securities and futures market;
  - (d) whether that conduct may have damaged the interest of the investing public;

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<sup>9</sup> Commencement date: 1 April 2003.

- (e) whether that conduct resulted in any benefit to the person or any other person, including any profit gained or loss avoided;
  - (f) the person's financial resources.
- (4) An order made under subsection (1)(a) may specify a corporation by name or by reference to a relationship with any other corporation.
- (5) Subject to any rules made by the Chief Justice under section 307X, Order 62 of the Rules of the High Court (Cap 4 sub. leg. A) applies to the taxation of any sum ordered under subsection (1)(e) or (f) for costs reasonably incurred in relation or incidental to the proceedings.
- (6) In this section—
- chief executive* (最高行政人員) has the meaning given by section 308(1).”

## CHAPTER SEVEN

### SANCTIONS AGAINST YORKEY

24. In his comprehensive and helpful submission, Mr Horace Wong SC took us through the facts and authorities. We have carefully considered his entire submission which was of great help in our deliberation on the appropriate sanctions.

25. Mr Horace Wong SC sought the following sanctions against Yorkey:

- (1) A cease-and-desist order under section 307N(1)(c);
- (2) A regulatory fine of HK\$1 million under section 307N(1)(d);
- (3) An order to pay the Government's costs and expenses under section 307N(1)(e);
- (4) An order to pay SFC's costs and expenses under section 307N(1)(f); and
- (5) An order appointing independent professional adviser under section 307N(1)(h).

26. Mr Stewart Wong SC submitted that:

- (1) There was no need for a cease-and-desist order;
- (2) A sum not considerably more than the HK\$600,000 ordered in *AcrossAsia Limited* is the appropriate amount for regulatory fine;

- (3) Yorkey accepted that Yorkey itself, Michio & Ng should pay the costs and expenses of SFC and the Government; and
- (4) There is no need to appoint an independent professional adviser.

27. We accept the following mitigating factors urged on behalf of Yorkey:

- (1) We accept that it was a first offence. However, we do not accept it was a “one-off” offence. The breach of the disclosure requirement continued day after day for 13 weeks during which there were 103 investors who were single-sided buyers of Yorkey shares and 12 investors who bought and sold Yorkey shares resulting in net-buy positions. These 115 investors suffered a total notional loss of HK\$1,528,695;
- (2) We accept that there was no benefit to, no profit gained or loss avoided by, Yorkey, Michio or Ng; and
- (3) We also accept that there was no intentional or deliberate breach. SFC’s case is that the breaches were caused by the reckless conduct of Michio and Ng.

### *Regulatory fine*

28. It is trite that the purpose of citing authorities is to extract legal principles, not to seek to draw analogies on the facts. A decision on a case’s own facts is hardly helpful.

29. Yorkey had no system in place to ensure that inside information relating to the performance of Yorkey would be identified and then disclosed, timeously or at all.

30. The reckless conduct of Michio and Ng resulted in Yorkey's breach of its disclosure requirement.

31. Yorkey's breach continued for 13 weeks.

32. The notional loss suffered by investors due to the delay in Yorkey's disclosure of the Deterioration amounted to an aggregate amount of HK\$1,528,695.

33. According to Yorkey's 2016 Interim Results, it had net current assets of over US\$111 million and total equity of over US\$122 million.

34. Yorkey contended that the fine should be reduced on account of its admission of liability. It did not admit liability at the earliest practical moment. The indication of admission of liability was made 3 ½ months *after* the preliminary conference, saying that it was “[i]n the interest of saving the parties (including the SFC and MMT) time and costs”.

35. The Tribunal is not a “party” and Iu, Lai & Li, Philip Tsui & Jackson Cheung and Keith Lam, Lau & Chan ought to have known better.

36. There was then *no* expression of remorse. Yorkey, Michio and Ng's concern lied in the saving of costs.

37. Yorkey also claimed that it had approached Deloitte for advice. Deloitte was not an appropriate choice in view of its apparent conflict as Yorkey’s auditors.

38. PricewaterhouseCoopers (“**PwC**”) wrote to Yorkey by letter dated 1 December 2016 (“**Appointment Letter**”) on the engagement of PwC as Yorkey’s advisors. That was 1 ½ months before the substantive hearing and yet there was *no* agreed timetable. All we have is an agreement to agree in these terms (written exactly as it stands in the original):

“The scope of services will be carried out in accordance to (*sic*) a timetable to be agreed with the Client. This timing is dependent on the availability of client management and staff to participate in interviews and no restrictions on access to information that we may consider to be necessary to complete the assignment efficiently. The timetable is not contractually binding by [*sic*] either party.”

39. Yorkey relied on its publication of a number of announcements between June 2014 and 8 June 2016.

40. Having considered all relevant matters, we hold that the proportionate and reasonable amount of regulatory fine for Yorkey is HK\$1 million. We shall make an order accordingly.

#### *Costs and expenses*

41. Yorkey accepted that it should be ordered to pay the costs and expenses of SFC and the Government and we shall order accordingly.

42. Yorkey had no authority to commit Michio and Ng on costs and expenses.

*Appointment of professional advisers*

43. The terms of the Appointment Letter are not satisfactory.

44. We shall make an order under section 307N(1)(h) so as to require SFC's approval for the appointment.

*Cease-and-desist order*

45. Section 307N(1) empowers the Tribunal to "make one or more of the following orders". The cease-and-desist order has been described by Mr Horace Wong SC as a permanent injunction. It may also be likened to a permanent good behaviour order.

46. It was understandable for SFC to ask for the cease-and-desist orders. It had a duty to protect the investors and the integrity of the market. Mr Horace Wong SC contended that a cease-and-desist order should be made on the following grounds:

- (1) There was no attempt to address wrong;
- (2) There was risk by reference to subsequent conduct;
- (3) The concern was to protect the public;
- (4) The Legislature placed more importance on protecting the public;
- (5) There was a real risk of posing a danger to the public; and

- (6) “Recent” announcements do not mean proper safeguards having been put in place.

47. Having given Mr Horace Wong SC’s contentions careful consideration, we are not persuaded to make a cease-and-desist order in this case.

48. The Tribunal is given the discretion to decide whether to make a cease-and-desist order and is not bound to do so in every case of breach of the disclosure requirement. The question is whether it is proportionate and appropriate in all the circumstances of each case to make such an order against a first offender, bearing in mind the other sanctions which the Tribunal intends to impose. This is a fact sensitive balancing exercise. As against Yorkey, the Tribunal intends to impose a regulatory fine of HK\$1 million; to order Yorkey to pay the costs and expenses of both SFC and the Government; and to order the appointment of independent professional advisers. In the circumstances and having regard to the mitigating factors accepted by the Tribunal, we have decided to give Yorkey a chance to behave itself without a cease-and-desist order.

## CHAPTER EIGHT

### SANCTIONS AGAINST MICHIO

49. Mr Horace Wong SC sought the following sanctions against Michio:

- (1) A disqualification order for 18 months under section 307N(1)(a);
- (2) A cease-and-desist order under section 307N(1)(c);
- (3) A regulatory fine of HK\$1 million under section 307N(1)(d);
- (4) An order to pay the Government’s costs and expenses under section 307N(1)(e);
- (5) An order to pay SFC’s costs and expenses under section 307N(1)(f); and
- (6) A training programme order under section 307N(1)(i).

50. In his written ‘Skeleton Submissions for Mr Michio’ (“**Michio’s Submissions**”), Mr Abraham Chan submitted that:

- (1) “Mr Michio does not seek to contest or make further submissions on any of the orders proposed against him at §6.1 and §6.4 (disqualification and fine<sup>10</sup>)”<sup>11</sup>.
- (2) “Moreover, Mr Michio understandably placed a high degree of day to day reliance and trust on Mr Ng’s competence, knowledge and judgment. The undisputed facts are that Mr Ng ‘was responsible for the overall finance and

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<sup>10</sup> §6.4 of SFC’s Skeleton asked for costs, not a fine. §6.3 asked for a regulatory fine.

<sup>11</sup> §2(2) of Michio’s Submissions.

accounting of the Group’, was a Fellow of the Hong Kong Institute of Certified Public Accounts with ‘over 10 years of experience in financial management and business management’ and had been with Yorkey since January 2006 (compared with Mr Michio’s then less than 2 years at the helm). See Agreed Statement §§5-6.”<sup>12</sup>

- (3) “Assuming (as submitted above) Mr Michio is in fact less culpable than Mr Ng for the non-disclosure, or alternatively that their culpability is roughly on par – or even that Mr Michio is marginally greater – the practical overall position is that Mr Michio will be sanctioned far more heavily than Mr Ng; by being both disqualified for a significant period and fined a large sum (even if less than the \$1m suggested by the Commission).”<sup>13</sup>
- (4) “... a period of no more than 9 - 12 months is ample and fitting in all the circumstances”.<sup>14</sup>
- (5) “Mr Michio respectfully proposes an amount by way of a fine of no more than HK\$250,000 having regard to all relevant factors ...”.<sup>15</sup>
- (6) “Mr Michio’s financial resources (the relevance of which is specifically confirmed by s.307N(3)(f)) are by comparison insubstantial and even in more standalone terms, modest. The Tribunal may wish to note that:
  - (a) As recorded in the 2015 Annual Report, Mr Michio’s total annual compensation is US\$156,000 before tax

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<sup>12</sup> §5(2) of Michio’s Submissions.

<sup>13</sup> §7(1) of Michio’s Submissions.

<sup>14</sup> §12 of Michio’s Submissions.

<sup>15</sup> §14 of Michio’s Submissions.

(p.61). A HK\$1m fine is therefore equivalent to an entire year of Mr Michio's gross earnings.

(b) Further, Mr Michio has significant financial responsibilities in the form of the expenses of his wife and his youngest child (who is in university) in Japan. These expenses come to about US\$65,000 annually. When Mr Michio's modest personal living expenses of about US\$35,000 are factored in, this leaves a post-tax annual income of about US\$33,000, or HK\$256,000.”<sup>16</sup>

(7) “Given the absence of any suggestion that Mr Michio is a dishonest person, and the private nature of the information, and Mr Michio's wish to act proportionately and not cause additional costs, Mr Michio respectfully does not propose to produce documentation by way of formal evidence.”<sup>17</sup>

51. Michio's Submission gives the impression that he was trying to blame Ng. In answer to a question from the Tribunal Chairman, Mr Abraham Chan said he was not trying to put the blame on Ng. “Not at all. Not at all”, Mr Abraham Chan said. Not much later, he suggested there was no evidence and Michio did not know that a copy of the management account was not sent to Ng.

52. Blaming somebody else is of no help to Michio. Trying to find a scapegoat does not demonstrate true remorse. Whether Ng receives a heavier penalty as a result of Mr Abraham Chan's submissions should be

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<sup>16</sup> §17(2) of Michio's Submissions.

<sup>17</sup> Footnote at the end of the passage quoted in §50(6)(b) above.

of no concern to Michio. Michio's concern should be to address matters personal and pertinent to himself.

53. (1) In this regard, we note that Michio agreed that the finance department of the Group and the daily operations of Yorkey are under *his* (not Ng's) management (§5 of the Agreed Facts).
- (2) Michio also agreed that Liang was at all material times the assistant manager of Yorkey's finance department and was based in Dongguan. *She reported to Michio, not Ng*<sup>18</sup>. *Liang would provide Michio, not Ng, with the monthly management accounts of Yorkey.* (§9 of the Agreed Facts).
- (3) Michio further agreed that Ng was *not* provided with the Consolidated Monthly Management Accounts during the course of the year, and Ng did *not* know whether Yorkey was profitable during the year. Ng was *not* aware of the Deterioration until near the end of February 2013, when a set of the draft financial statements prepared by the auditor was provided to him. (§27 of the Agreed Facts).
- (4) Last but not least, Michio agreed that there was *no* system in place whereby the Consolidated Monthly Management Accounts would be sent to Ng. (§41(iv) of the Agreed Facts).

54. More importantly, Michio has *inescapable personal* responsibilities<sup>19</sup> to comply with the disclosure requirement. He failed miserably in the discharge of his *inescapable personal* responsibility. Michio headed a listed corporation in which the Financial Controller was

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<sup>18</sup> Liang and Michio were both based in the Mainland. Ng was based in Hong Kong.

<sup>19</sup> Per Lord Woolf, MR in *Re Westmid Packing Services Limited* [1998] 2 BCLC 646 at 654g; per Kwan J in *The Official Receiver v Wong Kwan Pui and others* [2003] 1 HKLRD 621 at §21.

plainly bypassed in respect of the Consolidated Monthly Management Accounts as if the Financial Controller did not exist. Michio knew that forecasts of “significant growth” and “increasing profitability” had been made in the 2012 Interim Results. He knew that contrary to those forecasts, Yorkey’s results dropped significantly in the second half of 2012. Yet he took no steps to publish any profit warning to disabuse the investing public and to stop them from continuing to be misled.

55. Returning to mitigating factors, we consider the mitigating factors referred to in §27 above applicable to Michio.

#### *Disqualification order*

56. Mr Horace Wong SC drew our attention to what Dillon LJ said *In re Sevenoaks Stationers (Retail) Ltd* [1991] Ch 164 at p. 174:

“I would for my part endorse the division of the potential 15-year disqualification period into three brackets, which was put forward by Mr. Keenan for the official receiver to Harman J. in the present case and has been put forward by Mr. Charles for the official receiver in other cases, viz.: (i) the top bracket of disqualification for periods over 10 years should be reserved for particularly serious cases. These may include cases where a director who has already had one period of disqualification imposed on him falls to be disqualified yet again. (ii) The minimum bracket of two to five years’ disqualification should be applied where, though disqualification is mandatory, the case is, relatively, not very serious. (iii) The middle bracket of disqualification for from six to 10 years should apply for serious cases which do not merit the top bracket”

57. As the maximum period of disqualification under section 307N(1)(a) is 5 years, compared with the maximum period of 15 years, the periods for the 3 brackets should be adjusted proportionately.

58. The reckless conduct of Michio resulted in Yorkey's breach of its disclosure requirement. Yorkey's and Michio's breach continued for 13 weeks. The notional loss suffered by investors due to the delay in Yorkey's disclosure of the Deterioration amounted to an aggregate amount of HK\$1,528,695.

59. Michio contended that the period of disqualification should be reduced on account of his admission of liability. He did not admit liability at the earliest practical moment. The indication of admission of liability was made 3 ½ months after the preliminary conference, saying that it was "[i]n the interest of saving the parties (including the SFC and MMT) time and costs". There was then no expression of remorse. Michio's interest lied in the saving of costs.

60. No submission has been made on the correct approach on the adjustment of the starting point.

#### *Ngo Van Nam*

61. On 2 September 2016, the Court of Appeal handed down its judgment in *HKSAR v Ngo Van Nam* [2016] 5 HKLRD 1. The Court of Appeal analysed the cases in Hong Kong and overseas, relevant considerations and statistics. A draft of that judgment was circulated to all other members of the Court of Appeal, all of whom had indicated that they supported the revision of the general practice of affording a discount of one-third on a plea of guilty, set out in paragraphs 193-236 of that judgment.

*Strength of SFC's case*

62. We have not heard arguments on *Ngo Van Nam*. Nor on whether the general practice as revised should be applied to discounts for admission of breach in market misconduct cases. The Preliminary Conference in this case was held before the Court of Appeal handed down its judgment on 2 September 2016.

63. We say no more about *Ngo Van Nam* except to note that at §193 of the Judgment, Lunn VP said:

“... the practice of not having regard to the strength of the prosecution case in determining the discount to be afforded to a defendant for his plea of guilty is not only well established and of long-standing in Hong Kong but also this Court has provided cogent reasons for the change from the earlier practice, where regard was had to that factor”.

This is in contrast to what was said in §10.4 (2) of the Report of the Insider Dealing Tribunal of Hong Kong in *Success Holdings Limited*, 24 June 1992:

“The fact of an admission before the Insider Dealing Tribunal, especially at an early stage, is a fact which goes in mitigation of the penalty, *though in a strong case that will carry less weight than in a case where the evidence is not strong.*” (emphasis added).

64. Returning to the facts of this case, we agree that this case is in the lower range of the middle bracket and a starting point of 2 years is appropriate.

65. Having regard to the mitigating factors accepted by us and in all the circumstances of this case, we give Michio a discount from the starting point of 2 years and shall reduce the period of disqualification to 18 months.

#### *Regulatory fine*

66. A specified person's financial resources is a matter peculiarly within the personal knowledge of the specified person. If a specified person wishes to raise financial resources as a ground for a lower regulatory fine, he should make a *full and frank* disclosure of his financial position, assets and liabilities, income and expenditure. Making *selective and partial* disclosure does not prove his financial position. It is not open to him to hide under the excuse of privacy and disclose only such information as he chooses to let the Tribunal know. Michio has again put forward "costs" as an excuse. This is a lame excuse. Costs pale in significance compared with the difference between HK\$1 million asked for by SFC and HK\$250,000 suggested by Michio. Michio has failed to establish that he has any difficulty paying a HK\$1 million regulatory fine.

67. Having considered all relevant matters, we hold that the proportionate and reasonable amount of regulatory fine for Michio is HK\$1 million. We shall make an order accordingly.

#### *Costs and expenses*

68. Michio accepted that he should be ordered to pay the costs and expenses of SFC and the Government and we shall order accordingly.

*Training programme*

69. This is a clear case for a training programme order.

70. We shall order a training programme for Michio.

*Cease-and-desist order*

71. The Tribunal intends to order Michio to pay a regulatory fine of HK\$1 million and the costs and expenses of both SFC and the Government and to undergo a training programme. In the circumstances and having regard to the mitigating factors accepted by the Tribunal, and for reasons given in §§45 - 48 above, we have decided to give Michio a chance to behave himself without a cease-and-desist order.

## CHAPTER NINE

### SANCTIONS AGAINST NG

72. Mr Horace Wong SC sought the following sanctions against Ng:

- (1) A disqualification order for 15 months under section 307N(1)(a);
- (2) A cease-and-desist order under section 307N(1)(c);
- (3) An order to pay the Government's costs and expenses under section 307N(1)(e);
- (4) An order to pay SFC's costs and expenses under section 307N(1)(f);
- (5) An order that the Hong Kong Institute of Certified Public Accountants ("HKICPA") be recommended to take disciplinary action against Ng under section 307N(1)(g); and
- (6) A training programme order under section 307N(1)(i).

73. Mr Laurence Li who represented Ng on the instructions of Keith Lam, Lau & Chan obtained permission of the Tribunal to file his written submissions out of time.

74. Mr Laurence Li argued that on the basis that the disqualification was restricted to being a director, Ng did not challenge SFC's suggestion of a period of 15 months. He opposed the making of a cease-and-desist order and a recommendation to HKICPA.

75. We consider the mitigating factors referred to in §27 above applicable to Ng.

*Disqualification order*

76. Ng was not a director of Yorkey. To disqualify him only as a director makes *no* logical sense. The disqualification should be in terms of section 307N(1)(a).

77. As Ng is junior to Michio, we shall give Ng a further discount of 3 months so that the disqualification period shall be 15 months.

*Costs and expenses*

78. Ng accepted that he should be ordered to pay the costs and expenses of SFC and the Government and we shall order accordingly.

*Training programme*

79. This is a clear case for a training programme order.

80. We shall order a training programme for Ng.

*Recommendation to take disciplinary action*

81. Certified public accountants play an important role under the listing regime. The investing public rely on the expertise and competence of professional accountants. Certified public accountants audit the accounts of listed corporations. They are often appointed to the audit committees of listed corporations and some certified public accountants are appointed to chair the audit committees. They are also appointed as

compliance officers of some listed corporations. Ng was appointed as compliance officer of Yorkey. His reckless conduct resulted in breach of the disclosure requirement by Yorkey. Despite acquiring knowledge of the Deterioration on receipt of the draft 2012 financial statements, he did nothing.

82. In this case, Ng is a member of HKICPA. He was the Financial Controller and Company Secretary of Yorkey and was responsible for ensuring Yorkey's compliance with its legal obligations. But he failed to set up a system to ensure that inside information relating to the performance of Yorkey would be identified and then disclosed in a timely manner. We consider that HKICPA should be recommended to take disciplinary action against Ng.

*Cease-and-desist order*

83. The Tribunal intends to disqualify Ng for 15 months; to order Ng to pay the costs and expenses of both SFC and the Government and to undergo a training programme. We also intend to make a recommendation to HKICPA to take disciplinary action against Ng. In the circumstances and having regard to the mitigating factors accepted by the Tribunal, and for reasons given in §§45 - 48 above, we have decided to give Ng a chance to behave himself without a cease-and-desist order.

## CHAPTER TEN

### CONCLUSIONS

84. We have made the Determination in Chapter 5 above, i.e. we determine that:

- (1) A breach of the disclosure requirement has taken place;  
and
- (2) The identities of the persons who are in breach of the disclosure requirement are:
  - (a) Yorkey [Optical International (Cayman) Ltd];
  - (b) [Nagai] Michio; and
  - (c) Ng [Chi Ching].

85. In respect of Yorkey, we order:

- (1) Yorkey pay to the Government a regulatory fine of HK\$1 million (under section 307N(1)(d));
- (2) Yorkey pay to the Government the sum the Tribunal considers appropriate for the costs and expenses reasonably incurred by the Government in relation or incidental to the proceedings. Such costs and expenses are to be taxed if not agreed (under section 307N(1)(e));
- (3) Yorkey pay to SFC the sum the Tribunal considers appropriate for the costs and expenses reasonably incurred by SFC, whether in relation or incidental to—
  - (i) the proceedings;

- (ii) any investigation of the person's conduct or affairs carried out before the proceedings were instituted; or
- (iii) any investigation of the person's conduct or affairs carried out for the purposes of the proceedings.

Such costs and expenses are to be taxed if not agreed (under section 307N(1)(f)); and

- (4) Yorkey appoint an independent professional adviser approved by SFC to review the Yorkey's procedure for compliance with Part XIVA of the Ordinance or to advise Yorkey on matters relating to compliance with Part XIVA of the Ordinance (under section 307N(1)(h)).

86. In respect of Michio, we order:

- (1) For the period of 18 months, Michio must not, without the leave of the Court of First Instance—
  - (i) be or continue to be a director, liquidator, or receiver or manager of the property or business, of a listed corporation; or
  - (ii) in any way, whether directly or indirectly, be concerned or take part in the management of a listed corporation (under section 307N(1)(a)).
- (2) Michio pay to the Government a regulatory fine of HK\$1 million (under section 307N(1)(d));
- (3) Michio pay to the Government the sum the Tribunal considers appropriate for the costs and expenses reasonably incurred by the Government in relation or incidental to the proceedings.

Such costs and expenses are to be taxed if not agreed (under section 307N(1)(e));

- (4) Michio pay to SFC the sum the Tribunal considers appropriate for the costs and expenses reasonably incurred by SFC, whether in relation or incidental to—
  - (i) the proceedings;
  - (ii) any investigation of the person's conduct or affairs carried out before the proceedings were instituted; or
  - (iii) any investigation of the person's conduct or affairs carried out for the purposes of the proceedings.

Such costs and expenses are to be taxed if not agreed (under section 307N(1)(f)); and

- (5) Michio undergo a training program approved by SFC on compliance with Part XIVA of the Ordinance, directors' duties and corporate governance (under section 307N(1)(i)).

87. In respect of Ng, we order:

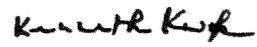
- (1) For the period of 15 months, Ng must not, without the leave of the Court of First Instance—
  - (i) be or continue to be a director, liquidator, or receiver or manager of the property or business, of a listed corporation; or
  - (ii) in any way, whether directly or indirectly, be concerned or take part in the management of a listed corporation (under section 307N(1)(a)).
- (2) Ng pay to the Government the sum the Tribunal considers appropriate for the costs and expenses reasonably incurred by

the Government in relation or incidental to the proceedings. Such costs and expenses are to be taxed if not agreed (under section 307N(1)(e));

- (3) Ng pay to SFC the sum the Tribunal considers appropriate for the costs and expenses reasonably incurred by SFC, whether in relation or incidental to—
  - (i) the proceedings;
  - (ii) any investigation of the person's conduct or affairs carried out before the proceedings were instituted; or
  - (iii) any investigation of the person's conduct or affairs carried out for the purposes of the proceedings.

Such costs and expenses are to be taxed if not agreed (under section 307N(1)(f));

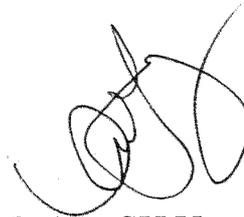
- (4) The Hong Kong Institute of Certified Public Accountants be recommended to take disciplinary action against Ng (under section 307N(1)(g)); and
- (5) Ng undergo a training program approved by SFC on compliance with Part XIVA of the Ordinance, directors' duties and corporate governance (under section 307N(1)(i)).



Mr Kenneth Kwok SC  
(Chairman)



Mr Vincent PC Kwan  
(Member)



Ms Ann SH Young  
(Member)

Dated the 27th day of February 2017