*This part of the report deals with questions (a) and (b) raised in the Financial Secretary's Notice under section 252(2) of the Securities and Futures Ordinance Cap. 571 dated 25 July 2011. The Market Misconduct Tribunal will make its determination in respect of question (c) of that notice and make such orders as are appropriate in due course, after which a second part of the report will be issued.*

# Report of the Market Misconduct Tribunal of Hong Kong

**on whether any market misconduct has taken place in relation to the listed securities of**

## Chaoda Modern Agriculture (Holdings) Limited

**on and between 15 June 2009 and 17 June 2009**

**and on other related questions.**

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The report of the Market Misconduct Tribunal into dealings in the shares of Chaoda Modern Agriculture (Holdings) Limited on and between 15 June 2009 and 17 June 2009

**Part I : A report pursuant to section 252(3)(a) and (b) of the Securities and Futures Ordinance, Cap 571**

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## INDEX OF APPENDICES

# CHAPTER 1

## THE FINANCIAL SECRETARY'S NOTICE

1. The Tribunal was constituted in consequence of the Financial Secretary's ("FS") Notice dated 25 July 2011.

**"IN THE MATTER OF THE LISTED SECURITIES OF CHAODA MODERN AGRICULTURE (HOLDINGS) LIMITED (STOCK CODE 0682)**

**NOTICE TO THE MARKET MISCONDUCT TRIBUNAL PURSUANT TO SECTION 252(2) AND SCHEDULE 9 OF THE SECURITIES AND FUTURES ORDINANCE CAP 571 ("THE ORDINANCE")**

Whereas it appears to me that market misconduct within the meaning of section 270 ("insider dealing") of Part XIII of the Ordinance has or may have taken place arising out of the dealings in the securities of Chaoda Modern Agriculture (Holdings) Limited (stock code 0682) ("Chaoda"), the Market Misconduct Tribunal is hereby required to conduct proceedings and determines :-

(a) whether any market misconduct in the nature of insider dealing or otherwise has taken place;

(b) the identity of every person who has engaged in the market misconduct; and

(c) the amount of any profit gained or loss avoided as a result of the market misconduct.

**Persons Specified**

(a) Mr KWOK Ho ("Kwok");
(b) Mr CHAN Chi Po Andy ("Chan"); and
(c) Mr George STAIRS ("Stairs").

## Particulars of the suspected market misconduct

1. At all material times Kwok was Chaoda's chairman and executive director and Chan was Chaoda's Chief Financial Officer and executive director. Stairs was at the material time a portfolio manager at Fidelity Management & Research Company ("FMR"), a company based in the United States that managed US-based Fidelity retail mutual funds.

**Chaoda's Announcement on 18 June 2009**

2. Trading in the shares of Chaoda on the Stock Exchange of Hong Kong Limited ("SEHK") was suspended with effect from 2:30 pm on 17 June 2009. Chaoda closed the morning trading session at the price of HK$5.35 per share.

3. Prior to the market opening on 18 June 2009, Chaoda announced that it had conditionally agreed to place up to 388,000,000 "Placing Shares" to not less than six independent placees, including professional and institutional investors, at a price of HK$4.60 per Placing Share, to raise a total of around HK$1.785 billion ("the Announcement"). The Placing Shares represented :

   (i) 14.7% of the existing issued share capital of Chaoda as at the date of the announcement, and 12.8% of the issued capital as enlarged by the Placing;

   (ii) A discount of approximately 12.9% of the closing price of HK$5.28 per share as at the close of market on 16 June 2009; and

   (iii) A discount of approximately 16.1% to the average closing price of approximately HK$5.48 per share for the last ten consecutive trading days up to and including 16 June 2009.

4. Chaoda also announced that the directors intended to use the placement proceeds for the repayment of certain debt that had previously been issued by Chaoda, and for general working capital requirements.

5. Following the Announcement, trading in Chaoda shares resumed on 18 June 2009. The price of Chaoda shares closed at HK$4.52 at the end of trading on 18 June 2009, 15.5% below its closing price prior to the

Announcement.

6. There was no publicly available information about Chaoda's intended placing exercise as set out in the Announcement in the two weeks leading up to 16 June 2009.

**Trading in Chaoda shares by Stairs of FMR prior to the Announcement**

7. At around 11:08 am on 16 June 2009 (Hong Kong Time), Stairs submitted a sell order (on behalf of the funds that he managed) of 375,000 Chaoda shares at HK$5.30 electronically to FIL Investment Management (Hong Kong) Ltd ("FIL HK"), pursuant to a trading desk agreement between FMR and FIL HK. The sell order was then handled by FIL HK staff and a sell order of 374,000 Chaoda shares at HK$5.30 was executed at around 4:09 pm on 16 June 2009, pursuant to Stairs' order (the board lot size for Chaoda shares was 2,000 shares and therefore Stairs' sell order was rounded down to 374,000 by FIL HK and then executed). The sale of 374,000 Chaoda sharexs netted proceeds of around HK$1.98 million.

8. At around 5:00 pm on 17 June 2009 (Hong Kong Time), Stairs placed a buy order (on behalf of the funds that he managed) of 630,000 Chaoda shares as part of Chaoda's placing exercise, at a cost of HK$4.60 per share. That order was executed on 18 June 2009.

**Conversation between Chaoda management and Stairs on 15 Jusne 2009**

9. A series of six telephone conference calls took place between Chaoda management and six institutional investors in the United States on 15 and 16 June 2009. The conference calls were arrangted by Merrill Lynch (Asia Pacific) Ltd ("Merrill"), who was one of the placing agents and the sole bookrunner in Chaoda's placing exercise as per the Announcement. Merrill did not take part in the six conference calls.

10. The timing and the identity of the United States participants of the conference calls were as follows :

| Name of Company | Person involved | Time of Call (HK Time) |
|---|---|---|
| Alliance Bernstein LP | Mr Matt Sigel | 8:00 pm, 15 June 2009 |

| | | |
|---|---|---|
| FMR | Stairs | 9:00 pm, 15 June 2009 |
| Wellington Management Company LLP | Mr Sabre Mayhugh | 10:00 pm, 15 June 2009 |
| Blackrock | Ms Angela Yu | 11:00 pm, 15 June 2009 |
| Boston Company Asset Management | Ms Carolyn Kedersha | 1:00 am, 16 June 2009 |
| Janus Capital Management | Mr Matt Hochstetler | 7:00 am, 16 June 2009 |

11. Kwok, Chan and Mr Ip Chi Ming (executive director of Chaoda) participated in the above conference calls on behalf of Chaoda. Chan also acted as an English/Putonghua interpreter between Kwok and the United States participants. Mr Ip Chi Ming participated only in parts of the various conference calls.

12. At the outset of the telephone conference between Chaoda and FMR, Chaoda management stated to FMR that Chaoda intended to raise approximately US$200 to $250 million in an offering of common stock at an expected price of HK$5.00 per share. Kwok and Chan also stated that Chaoda intended to use the proceeds from this offer of common stock to repay Chaoda's high yield bond when it became due.

13. The parties then went on to discuss Chaoda's financial condition and business activities.

14. Information similar to that described in paragraph 12 above was imparted by Kwok and Chan to at least three other institutional investors in the series of telephone confrerences mentioned in paragraph 10 above, including Janus Capital Management, Wellington Managementt and Blackrock.

15. The information that Kwok and Chan imparted to Stairs in the telephone conference at around 9:00 pm on 15 June 2009, as described in paragraph 12 above, amounted to relevant information about Chaoda that was likely

to adversely affect the share price of Chaoda (which closed at HK$5.60 per share at 15 June 2009), and Kwok and Chan knew that to be the case. Stairs, in possession of what he knew to be relevant information, dealt with the shares of Chaoda on 16 June 2009 (Hong Kong time) by selling 374,000 shares of Chaoda at HK$5.30 per share, and subsequently took part in Chaoda's placing exercise on 17 June 2009 by buying 630,000 shares at $4.60 per share. Kwok and Chan knew or had reasonable cause to believe that Stairs will make use of the relevant information to deal in the shares of Chaoda.

16. Accordingly, Kwok, Chan and Stairs engaged or may have engaged in market miscondeuct contrary to section 270 of the Ordinance.

Dated this 25th day of July 2011.

[Signed]
(John C. Tsang)
Financial Secretary".

# CHAPTER 2

## THE LAW

2. The Chairman has given the Tribunal the directions in law contained in this Chapter.

*Determinations of questions of law and fact*

3. Section 24(c) of Schedule 9 of the Securities and Futures Ordinance ("the Ordinance") provides that :

> "every question before the Tribunal shall be determined by the opinion of the majority of the members except a question of law which shall be determined by the Chairman alone.".

*INSIDER DEALING*

4. Section 270(1) of the Ordinance provides that :

> "Insider dealing in relation to a listed corporation takes place -
>
> (c) when a person connected with the corporation and knowing that anyinformation is relevant information in relation to the corporation,discloses the information, directly or indirectly, to another person,knowing or having reasonable cause to believe that the other person willmake use of the information for the purpose of dealing ... in the listedsecurities of the corporation ... ;
>
> (e) when a person who has information which he knows is relevant information in relation to the corporation and which he received, directly or indirectly, from a person whom he knows is connected with the corporation and whom he knows or has reasonable cause to believe held the information as a result of being connected with the corporation -
>
> (i) deals in the listed securities of the corporation ... "

*Connected with the corporation*

5. Section 247 of the Ordinance provides that :

> "(1) For the purposes of Division 4, a person shall be regarded as connectedwith a corporation if, being an individual -
>
> (a) he is a director or employee of the corporation...
>
> (b) he has a substantial shareholder of the corporation..

*Knows*

6. The test for knowledge is a subjective one.

*Reasonable cause to believe: that the other person will make use of the information to deal in Chaoda shares/held the information as a result of being connected with Chaoda*

7. Proof of a reasonable cause to believe requires proof of evidence that would cause a common sense, right-thinking member of the community to consider sufficient to lead such a person to believe that the other person will make use of the information to deal in Chaoda shares/held the information as a result of being connected with Chaoda. Further, it requires proof that the evidence was known to the person whose conduct is impugned, but not proof that the person possessed the actual belief. (See the judgment of the Court of Appeal in *HKSAR v Shing Siu Ming* [1999] 2 HKC 818, cited with approval in *HKSAR v Ma Zhujiang* [2007] 4 HKLRD 285 at page 294, paragraph 34 and following.) A person may have reasonable cause to believe something even though that cause may leave something to surmise or conjecture. This is so, even if there also exists a reasonable cause to believe in an alternative scenario or scenarios. (See the judgment of the Court of Appeal in *HKSAR v Wan Yet Kwai* CACC 372/2008-unreported 5 May 2009.)

*Relevant information*

8. Section 245(2) of the Ordinance provides that :

" 'relevant information' in relation to a corporation, mean specific information about -

(a) the corporation;
(c) the listed securities of the corporation ... ,

which is not generally known to the persons who are accustomed or would be likely to deal in the listed securities of the corporation but which would if itwere generally known to them be likely to materially affect the price of the listed securities;".

*Miscellaneous.*

9. Section 245(2) of the Ordinance provides that :

" 'listed' means
listed on a recognized stock market ... ;

'securities' means -
(a) Shares ... issued by, a body, ... ;".

*Dealing in listed securities*

10. Section 249 provides that :

"For the purposes of section 245(2) and Division 4, a person shall be regardedas dealing in listed securities if, whether as agent or principal, he sells ... any listed securities.".

*Specific information*

11. The term 'specific information', is not defined in the legislation. However, the same term has been considered on a number of occasions by the Insider Dealing Tribunal in the context of an identically worded provision in section 8 of the Securities (Insider Dealing) Ordinance, Cap 395.

12. In *Chinese Estates Holdings Limited*, a report dated 6 May 1999, the Tribunal said :

> "Specific information is information which possesses sufficient particularity to be capable of being identified, defined and unequivocally expressed.".

A related footnote states : " See the *dicta* of the Singapore High Court in *Public Prosecutor v GCK Choudrie* (1981) 2 Co. Law 141". In that case the Court of Criminal Appeal of the High Court of Singapore held that the District Court judge was correct in ruling that knowledge of a financial crisis in a company is (page 78E) :

> "Specific information as it is capable of being pointed to, identified and unequivocally expressed.".

13. That description resonated with the observations made in the judgment of a judge of the Supreme Court of New South Wales in *Ryan v Trigguboff* (1976) 1 NSWLR 588 at 596, to which the Court of Criminal Appeal referred, in which it was said of 'specific information', in the context of legislation in Australia dealing with insider dealing, that :

> " ... it must be capable of being pointed to and identified and must be capableof being expressed unequivocally.".

Of the nature of the information, the Court of Criminal Appeal said :

> "It is the kind of specific information anyone familiar with the market knowsthat can markedly affect the prices of the particular shares and can result in thesuspension of the trading of the shares on the Stock Exchange.".

14. In *Chinney Alliance Group Limited*, a report of the Insider Dealing Tribunal dated 24 December 2004, reference was made with approval to both

*Ryan v Triggubоff* and *Choudhury* and it was asserted of 'specific information' that (page 36) :

> "It is not necessary that all particulars or details of the transaction, event or matter be precisely known.".

15. In *Firstone International Holdings Limited*, a report of the Insider Dealing Tribunal dated 2 April 2004, it was asserted of "specific information" that :

> " ... the fact that a transaction is merely contemplated or at a preliminarystage of negotiation does not mean information concerning those negotiationscannot be specific.".

That Tribunal went on to note that :

> " ... vague hopes or wishful thinking that a transaction will occur or come to ruition does not amount to sufficient 'contemplation' or preliminary negotiation of that transaction ...".

Having regard to the particular issue the subject of its enquiry, the Tribunal went on to state :

> " ... the proposed placement whether described as under contemplation or at a preliminary stage of negotiation must, in our view, have more substance than merely being at the stage of a vague exchange of ideas or a 'fishing expedition'. Where negotiations or contacts have occurred, as in the present case, there must be a substantial commercial reality to such negotiations which goes beyond a merely exploratory testing of the waters and which is at a more concrete stage where the parties have an intent to negotiate with a realistic view to achieving an identifiable goal.".

*Information which would be likely to materially affect the price of the shares*

16. In the report of the Insider Dealing Tribunal in *Public International Investments Limited*, dated 5 August 1995, in addressing the issue of whether or not information was 'likely to affect the price' of the shares of a company (if

known to those accustomed or likely to deal in those shares) the nature of the test was described as being (paragraph 19.4.2) :

> "...hypothetical in that on the date that the insider acts on inside information, he acts when the investing public, not in possession of the inside information, either does not act, or acts in response to other information or advice. The exercise in determining how the general investor would have behaved on that day, had he been in possession of that information, has necessarily to be an assessment. It is true that an examination of how those investors react once the information is stripped of its confidentiality and becomes public knowledge, will often provide the answer, although care must be taken to ascertain whether the investors' response is indeed attributable to the information released, or whether it is wholly or in part attributable to other events, or considerations.".

17. Of the term 'materially' the report concluded ( paragraph 19.4.5) :

> "We think that the word 'materially' speaks for itself - it is to be contrasted with 'slight', 'insignificant' and 'immaterial'.".

18. In the report of the Insider Dealing Tribunal in *The International City Holdings Limited,* dated 27 March 1986, the Tribunal observed of the requirement of materiality that the information (paragraph 2.6) :

> " ... be likely to bring about a material change in the price of those securities. Thus information that would be likely to cause a mere fluctuation or a slight change in price would not be sufficient; there must be the likelihood of change of sufficient degree in any given circumstances to amount to a material change.".

*Insider dealing-certain persons not be regarded as having engaged in market misconduct*

19. Section 271(3) of the Ordinance provides that :

> "a person shall not be regarded as having engaged in market misconduct by reason of an insider dealing taking place through his dealing ... in listed securities ... or his disclosure of information if he establishes that the purpose for which he dealt ... or disclosed the information in question (as the case may be) was not, or, where there was more than one purpose, the purposes for which

> he dealt … in the listed securities ... or disclosed the information in question (as the case may be) did not include, the purpose of securing or increasing a profit or avoiding or reducing a loss, whether for himself or another, by using relevant information." [Italics added.]

*The Standard of Proof*

(i) Section 271(3)

20. In contrast to the standard of proof required to establish the ingredients of insider dealing, set out below, the standard of proof applicable to section 271(3) is satisfied, on a consideration of all the evidence not only that of the Specified Person whose case is being considered, on the bare balance of probabilities, namely that it is more likely than not.

(ii) Section 252(7) of Ordinance provides that :

> "... the standard of proof required to determine any question or issue before the Tribunal shall be the standard of proof applicable to civil proceedings in a court of law.".

That standard is the balance of probabilities, having regard to the considerations set out below.

21. In *Solicitor (24/7) v The Law Society of Hong Kong* [2008] 2 HKLRD 576 the Court of Final Appeal accepted, the correctness of the approach to the civil standard of proof expressed by Lord Nicholls of Birkenhead in *Re H & Others (Minors) (Sexual Abuse: Standard of Proof)* [1996] AC 563 at p 586 D–G :

> "The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not. When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriate in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that

the allegation is established on the balance of probability.".

22. In his judgment in the Court of Final Appeal in *Koon Wing Yee and Insider Dealing Tribunal* (2008) 11 HKCFAR 170 Sir Anthony Mason NPJ cited that acceptance with approval (see p. 202 E-G, paragraph 89). Subject to the directions referred to earlier in respect of section 271(3) of the Ordinance, that is the approach to the standard of proof that has been adopted by this Tribunal.

*Circumstantial evidence and inferences*

23. In his judgment in the Court of Final Appeal, with which all the other judges agreed, in *HKSAR v Lee Ming Tee* (2003) 6 HKCFAR 336 Sir Anthony Mason NPJ, having cited with approval the passage from the speech of Lord Nicholls quoted above, went on to address the proper approach to the drawing of inferences in circumstances of allegations of gross misconduct by senior officers of the SFC. Sir Anthony said :

> "...that conclusion was not to be reached by conjecture nor, as the respondent submitted, on a mere balance of probabilities. It was to be plainly established as a matter of inference from proved facts. It is not possible to state in definitive terms the nature of the evidence which the court will require in order to be satisfied, in a civil proceeding, that a serious allegation of this kind, is made out. It would not be right to say that the requisite standard prescribes that the inference of wrongdoing is the only inference that can be drawn (cf *Sweeney v Coote* [1907] AC 221 at 222, per Lord Loreburn) for that is the standard which applies according to the criminal standard of proof. In the particular circumstances, it was for the respondent to establish as a compelling inference that very senior officers of the SFC had deliberately and improperly terminated the investigation into Meocre Li's conduct for the ulterior purpose alleged, sufficient to overcome the inherent improbability that they would have done so (see *Aktieselskabet Dansk Skibsfinansiering v Brothers & Others* (2000) 3 HKCFAR 70 at pp. 91H, 96 G-I, per Lord Hoffmann).".

24. Excerpts from the passage quoted above in the judgment of Sir Anthony Mason NPJ were cited with approval in the judgment of Mr Justice Ribeiro PJ (see paragraph 187) in the Court of Final Appeal in *Nina Kung alias Nina TH Wang and Wang Din Shin* (2005) 8 HKCFAR 387. In his judgment, Lord Scott of Foscote NPJ observed, in the context of allegations that Mrs Wang had procured the forgery and, in a conspiracy with another, was attempting to obtain probate as the will of a document she knew to have been forged, at paragraph 626 :

> "The probability of these allegations being true must be judged on the evidence adduced in the case. But it must also take account of propensity. If such an allegation is made against a person with a record of involvement in forgery or fraud, the strength of the other evidence necessary to satisfy the balance of probability test is obviously less than would otherwise be required. Evidence of propensity must go into the balance ... Evidence to a very high standard of cogency indeed is necessary before the court can be justified in finding either to be dishonestly involved in a conspiracy to promote a forged will.".

The Tribunal approached the drawing of inferences adverse to the Specified Persons with those considerations in mind.

*Lies*

25. In approaching the evidence of the respective Specified Persons, the Tribunal has done so mindful of the Chairman's direction that a lie in itself does not prove that the maker of the lie is culpable of the misconduct alleged against that person. People innocent of wrongdoing sometimes tell lies : perhaps, as a misguided reaction to a problem, or to postpone facing up to it or to attempt to deflect ill founded suspicion, or to fortify their defence. Nevertheless, it may be a matter relevant to credibility.

*Good character*

26. The Chairman directed the Tribunal that a Specified Person of good character is less likely than otherwise might be the case to have committed the alleged misconduct and that good character supports his credibility in respect of both his evidence in the Tribunal and in his records of interview.

*Separate consideration*

27. The Tribunal has considered the case against and for each of the Specified Persons separately.

*Statements inconsistent with oral testimony*

28. Statements made outside the Tribunal, inconsistent with the oral testimony of the maker in the proceedings before the Tribunal, are not evidence of the truth of the matters there asserted. Having had regard to whether or not, in true context, such a statement is inconsistent in a material particular with oral testimony and to any explanations proffered for that inconsistency the Tribunal may have regard to the inconsistency in respect of the credibility of the witness.

*Direct evidence: the relative weight to be attributed to statements by persons*

29. Of the relative weight to be attributed to statements made by persons the Tribunal as a whole has determined that most weight is to be attributed to oral evidence tendered to the Tribunal on oath or affirmation and tested in cross-examination. Statements made other than in oral testimony, but which are specifically adopted in oral testimony, are subsumed into the oral testimony. Relevant to the determination of the weight to be attached to statements made

other than in oral testimony is the fact that they were not made on oath or affirmation and not tested in cross-examination. Another relevant factor in those circumstances is whether or not the person making the statement has declined an invitation to give oral testimony to the Tribunal. Relevant to that issue is the explanation, if any, tendered for the refusal to give oral testimony and whether the explanation is accepted and, if so, is of substance. Statements made in responses to the SFC or the SEC given by the person directly are to be afforded greater weight than a response, made on behalf of or for the benefit of the person by a third party, by a person who did not witness the events described. Relevant to that issue is whether the person said to be the witness to the event provided information to the third party who made a statement and whether or not the former person approved/acknowledged the contents of the statement as being accurate and true.

# CHAPTER 3

## THE MATERIAL RECEIVED BY THE TRIBUNAL[1]

*Overview: the issues*

30. During the evening of 15 June and the morning of 16 June 2009 Mr Kwok Ho and Mr Chan Chi Po Andy ("Mr Andy Chan"), respectively the Chairman and Chief Financial Officer of Chaoda Modern Agriculture (Holdings) Limited ("Chaoda"), conducted a series of telephone conferences from Hong Kong with the representatives of a total of six institutional shareholders in the United States of America. One of those telephone calls, at 21:00 on 15 June 2009 (Hong Kong Time), was conducted with Mr George William Stairs ("Mr George Stairs") and Ms Jessamyn Larrabee Norton ("Ms Jessamyn Larrabee") of Fidelity Management & Research Company ("Fidelity"), who were in Boston, Massachusetts in the United States of America. Mr George Stairs was a manager and a co-manager respectively of two of Fidelity's funds, whereas Ms Jessamyn Larrabee was a research analyst, but also a manager of part of one of those funds. Exactly what information they received from Mr Kwok Ho and Mr Andy Chan in that telephone conference in respect of Chaoda is at issue. In particular, were they told that there was to be a placement by Chaoda; that it was to be launched at around $5.00 per share and that the size of the placement was between $200 million and $250 million? In any event, was that information material non-public price sensitive information?

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[1] See Appendix 1.

31. The closing price of Chaoda shares on 15 June 2009 was $5.60, whereas its high on 16 June 2009 was $5.50 and its closing price was $5.28.

32. At about 10:30 p.m. on 15 June 2009 Eastern Daylight Time ("EDT") Mr George Stairs, who was in Boston, placed an order to Fidelity Investment Management (Hong Kong) Ltd ("FIL") to sell 375,000 Chaoda shares at a price limit of HK$5.30. Upon receipt of that order in Hong Kong a slightly amended sell order, in order to fit board lot size, of 374,000 shares was uploaded into FIL's Global Trading System at 11:08 on 16 June 2009 (Hong Kong time). The order was fully executed by 16:09 on 16 June 2009. Why did Mr George Stairs sell those Chaoda shares? Did he know that the information that he had received from Mr Kwok Ho and Mr Andy Chan in the telephone conference call was relevant information, in particular material non-public price sensitive information?

33. At 14:23 on 17 June 2009, trading in the shares of Chaoda was suspended on the Stock Exchange of Hong Kong at the request of the company, pending its announcement in respect of a placement of its shares. Its closing price on that, prematurely curtailed, trading day was $5.35.

34. At 07:48 on 18 June 2009 it was announced on the website of the Stock Exchange of Hong Kong that Chaoda announced that trading in its shares would resume at 09:30 that day and that it had entered into a placing agreement with joint placing agents who had agreed, on a 'best efforts' basis, to place up to 388 million Chaoda shares, with no less than six independent placees, at $4.60 per

share. That day Chaoda's shares traded at a high of $4.95, a low of $4.41 and its closing price was $4.52.

35. At 05:02 on17 June 2009 EDT Mr George Stairs, who was in London, placed an order within Fidelity to participate in the placement of shares by Chaoda at $4.60 per share. His order was for 630,000 shares.

*Report to the SFC*

36. By a letter dated 13 July 2009, Messrs Herbert Smith, acting on behalf of Fidelity, reported to the Securities and Futures Commission ("SFC") that they had begun an internal enquiry into the dealings by Mr George Stairs in the shares of Chaoda and that they had reported the matter to the Securities and Exchange Commission ("SEC"). That earlier report had been made on 10 July 2009 by telephone to the Director of the SEC's Boston Regional Office.

*The Dramatis Personnae*

*Chaoda*

*Mr Kwok Ho*

37. In 2009, Mr Kwok Ho was the Chairman and Chief Executive Officer of Chaoda, and had been ever since it had been listed on the Stock Exchange of Hong Kong in 2000. He was the founder of the Chaoda Group and as at 30 June 2009 held 21.22% of its shares through his interest in Kailey Investment Ltd ("Kailey"). He testified that the biographical description of him in Chaoda's Annual Report of 2008/2009 was accurate. There, he was described as having, "over 25 years of experience in commercial trading in the PRC, particularly in the areas of strategic planning, management, business

development, product strategy, sales and marketing". He was born in 1955 and ceased his schooling in Primary V, when schools were closed down during the Cultural Revolution. He began work when he was 14 years of age.

*Mr Andy Chan*

38. In 2009, Mr Andy Chan was an Executive Director and the Chief Financial Officer of Chaoda. Having joined the company in February 2003, he had been appointed to those positions in August 2005. Having obtained a degree in Accounting, Financial Management and Economics in 1992 from the University of Sheffield, he had gone on to become a Fellow Member of the Association of Chartered Certified Accountants and a Fellow Member of the Hong Kong Institute of Certified Public Accountants. Having worked as an auditor from 1993 to 1998 with Coopers & Lybrand, he then worked in the Compliance Division of the Stock Exchange of Hong Kong in 1998 and 1999.

*Merrill Lynch*

*Mr Rodney Tsang*

39. In 2009, Mr Tsang Ling Kai Rodney ("Mr Rodney Tsang") was the Managing Director and Head of Private Sector Coverage of China Investment Banking in Merrill Lynch. He was employed by them from April 2007 until September 2009, when he resigned. Shortly afterwards he became Managing Director of China Global Banking at Citigroup. He is a Chartered Public Accountant in Australia and holds a Bachelor's degree from the University of New South Wales in Sydney, having majored in Accounting and Finance.

*Mr Nicholas Lee*

40. In 2009, Mr Lee Nicholas Rensselaer ("Mr Nicholas Lee"), who is a graduate of Princeton University, was a Vice-President of Merrill Lynch and Head of Executions of Asia Equity Capital Markets. He had been employed by Merrill Lynch since 2000 and is still so employed.

*Fidelity*

*Mr George Stairs*

41. In 2009, Mr George Stairs was a Portfolio Manager in Fidelity, by whom he had been employed since September 2005. He was the manager of the 'International Value Fund', which has been launched in May 2006, and the co-manager of the 'Total International Equity Fund'. Having graduated with the degree of Bachelor of Engineering in 1972 from McGill University he had worked in nuclear engineering. Then, in 1983 he began his studies at the Sloan School of Management in the Massachusetts Institute of Technology, from which university he graduated in 1985 with a Masters degree in Business Administration. In 1986, he began a new career as an equity analyst, which he pursued for the next decade. In 1989, he became a Chartered Financial Analyst. In 1996, he became a fund manager with his then employer Putnam Investments.

42. In 2007, Mr George Stairs bought shares in Chaoda for one of the funds under his management for the first time. In late April 2009, the holding of Chaoda shares in the International Value Fund was valued at US$1.38 million. That was the maximum holding that he had of Chaoda shares.

*Ms Jessamyn Larrabee*

43. Ms Jessamyn Larrabee was a Chartered Financial Analyst, and the holder of an MBA, who had joined Fidelity in 2007 as an equity research analyst. One of the companies that she followed was Chaoda. Having been contacted by e-mail on 12 June 2009 by Mr Tim Lynch of Merrill Lynch in Boston she had accepted his offer that she and Mr George Stairs participate in a telephone conference call with the management of Chaoda on 15 June 2009. She chose 9:00 a.m. EDT as the scheduled time for the call.

*BACKGROUND*

44. Mr Rodney Tsang met Mr Kwok Ho, the Chairman of Chaoda, after he had joined Merrill Lynch. They spoke to each other in Putonghua. He did not communicate with Mr Kwok Ho by e-mail. Similarly, most of his contacts with Mr Andy Chan, the Chief Financial Officer of Chaoda, were oral rather than written.

*Chaoda and Merrill Lynch*

45. In May and June 2009, Mr Rodney Tsang had been the primary negotiator on the Merrill Lynch side with Mr Kwok Ho, on the Chaoda side, in discussions that led to the announcement on 18 June 2009 of a placement agreement of 17 June 2009 for the placement of up to 388,000,000 Chaoda shares to more than six independent placees at $4.60 per share. For his part, Mr Nicholas Lee, together with other Merrill Lynch employees, played a part in the arrangements leading up to the agreement and its execution.

*Chaoda's February 2009 placement*

46. On 19 February 2009, Chaoda announced it had entered into a placing agreement and top-up subscription agreement with UBS AG ("UBS") as placing agent to place just over 80 million of its shares at HK$5.00 per share, that being at an 11% discount to the closing price that day of HK$5.62 per share. Kailey, the company stated to be wholly owned by Mr Kwok Ho, had agreed to subscribe for an equivalent number of subscription shares as were placed at HK$5.00 per share. It was stated that the net proceeds were estimated to be HK$391 million. The intended use of the funds was stated to be, "for expansion of operations such as acquisition of farmland; and general working capital."

*Lock-up*

47. Further, in a lock-up provision it was stated that Kailey and Chaoda had agreed respectively not to dispose of or issue Chaoda shares other than "with the prior consent of the placing agent" in the period of 90 days following the completion of the placing. The completion date was stated to be 23 February 2009, or such later date as might be agreed between Chaoda and UBS.

48. For his part, Mr Kwok Ho said that he had been persuaded into making the agreements by Mr Zhang Hua Qiao Joe ("Mr Joe Zhang") of UBS. He knew him as an analyst at UBS who, after having left their employment, had recently returned to UBS. He had been persuaded that the very fact of being able to achieve a placement in a difficult market would be to Chaoda's benefit. His concerns and misgivings about the lock-up provision had been assuaged by

the provision to him, at his request, of a letter on the letterhead of UBS dated 23 February 2009, marked 'Keep in strict confidence' signed by Mr Mark Williams and Mr Joe Zhang. The letter confirmed that UBS had the discretionary power to give a written waiver of the lock-up provision, as stipulated in clause 8 of the placing agreement.

*Attempts at an April 2009 placement by Chaoda*

*27 April 2009: suspension of trading in Chaoda shares*

49. In late April 2009, Mr Rodney Tsang had been involved on behalf of Merrill Lynch, acting with three other banks, in an unsuccessful attempt to place Chaoda shares. At 9:49 a.m. on Monday, 27 April 2009, trading in Chaoda shares on the Hong Kong Stock Exchange had been suspended at the request of the company "pending the release of an announcement by the company regarding the placement of shares". Of his initial involvement in the matter, Mr Rodney Tsang said that, having received an invitation by telephone from Mr Kwok Ho in the early morning, he had attended a meeting in the offices of Chaoda. Mr Nicholas Lee accompanied him. Representatives of three other banks were already at those offices when they arrived. Discussions ensued of a possible placement of Chaoda shares.

50. For his part, Mr Andy Chan said that he had learnt from Mr Kwok Ho in a telephone conversation on a Sunday evening of his decision to do a placement of Chaoda shares. As a result, he was present at the meeting with bankers in Chaoda offices the following morning, after which trading in Chaoda's shares was suspended.

*29 April 2009: Announcement not to proceed with the placement*

51. After the meeting the four banks set about 'sounding out' the appetite of potential placees. However, at 19:18 on 29 April 2009 Chaoda announced its decision, "not to proceed with the proposed placing", advancing as its reasons :

> "recent market volatility and the possible adverse impact on international capital markets resulting from the potential outbreak of swine flu".

52. In cross-examination by Mr Huggins SC, Mr Rodney Tsang agreed that one of the reasons that the placement had not been proceeded with was that the four bankers have been unable to solicit sufficient demand from potential placees for the placement at the price sought by the company. Other reasons for that course of action included the fact that the company had been unable to obtain a waiver from UBS in respect of a 'lock-up' provision in the agreement for the placement of shares by the company announced on 19 February 2009.

53. Mr Nicholas Lee said that during conversations with Mr Andy Chan after the announcement that Chaoda was not proceeding with the placement he had been given to understand that the reason was that the Chairman, Mr Kwok Ho, was not satisfied with the price at which the shares were to be offered if the placement was to go ahead.

54. Mr Kwok Ho said that while he was working with the four investment banks on the proposed placement in April 2009 Mr Joe Zhang of UBS, having learned of that development, had approached him offering to become involved in the proposed placement, saying that UBS was prepared to take 50% of the

size of the placement. Prior to that, it had not occurred to him to contact UBS in respect of a waiver of the lock-up provision in the February 2009 placement. He had reassured the Chaoda Board of Directors and Mr Andy Chan, who had raised the issue of the lock-up, that it was "no problem". However, in response to Mr Joe Zhang's offer to participate in the proposed placement he asked him to obtain a written waiver of the lock-up provision as soon as possible.

55. Mr Kwok Ho said that he had a meeting at the Four Seasons Hotel on either 26 or 27 April 2009 with a UBS banker, whom he described as a 'foreigner', and Mr Joe Zhang, in which the foreigner promised to give him a waiver letter in respect of the lock-up. As a result, either he had received a faxed copy of a letter in English, which had been translated to him on the telephone by either Mr Joe Zhang or a female employee of UBS, or the letter had been read to him over the telephone. He was furious that the letter contained so many terms. In response, he was advised by UBS that the waiver of a lock-up that had been publicly announced in the placement was a serious matter and it was necessary that the shareholders be given information of the difficulties that Chaoda faced. He asked that the terms set out in the draft letter be reduced in size. Subsequently, he had been provided with a letter on UBS letterhead dated 28 April 2009, signed by Mr Mark Williams and Mr Samuel Kendall, setting out UBS's conditional waiver of the lock-up provision. Although he had not given much of the information described as "representations and warranties" asserted to have been given by him to UBS, if it had proved possible to proceed with the placement, he was prepared to sign the letter and, as required as a condition of the waiver, to have made a public announcement containing those representations and warranties.

56. Mr Kwok Ho said of the proposed April 2009 placement that he had wanted a placement price of $5.00 per share with a size of the proceeds of the placement of $200 - $250 million. However, the four investment banks that were working on his behalf, including Merrill Lynch, had come back to him with a price for the placement shares in the range $4.50 to $4.70. Also, they had suggested to him a size of placement in the range $150 - $200 million. Both size and price were reasons for his determining not to proceed with the proposed placement in April 2009. He told his bankers, "We are not going ahead with the placement." He said that the lock-up restriction in favour of UBS in the February 2009 placement had got nothing to do with the decision not to proceed with the April placement. He had mentioned the placement to UBS and believed that they would have given him a waiver from the lock-up if needed because in April 2009 they had sent a representative to discuss with him their intention to take a 50% participation in the proposed placement. In the event, "when the market sentiment wasn't good" he decided not to proceed with the placement.

*The role of UBS*

57. In response to notices issued by the Tribunal, UBS provided copies of the letters they had provided to Mr Kwok Ho dated 23 February 2009 and 28 April 2009. Also, on 3 March 2012, they provided copies of internal e-mails in respect of the issue of waiver of the lock-up provision in the placing agreement that led to the February 2009 placing by Chaoda of which UBS was the placing agent. An e-mail sent at 11:13 on 28 April 2009 by Ms Mary Koo to various colleagues within UBS including Mr Mark Williams, a signatory of both of the

above mentioned letters, and Mr Duncan Bell, described as Head of Legal, Asia provided notes of a meeting between Ms Mary Koo and Mr Joe Zhang, of UBS, with Mr Kwok Ho and Mr Andy Chan earlier that morning. At the outset UBS explained that Chaoda was subject to the lock-up provision. Chaoda set out changes said to have occurred in its position since the February placement. Although Chaoda had funds in RMB in the Mainland, there were difficulties in remitting money out of the PRC. Further, although Chaoda had told UBS in February 2009 that it had enough funds to meet the redemption of the convertible bond in May 2009 at that time it had received no indication of the level of bond redemptions. Now, notice had been received. Finally, Chaoda explained that other financing possibilities were not practicable.

58. Attached to an e-mail from the Legal Department circulated within UBS sent at 17:34 on 28 April 2009 was a draft letter of waiver by UBS of the lock-up provision. There followed e-mails addressing revisions of the text proposed by Chaoda. In an e-mail sent by Mr Joe Zhang to his colleagues in UBS at about 9:00 a.m. on 29 April 2009, Mr Joe Zhang said that he had a telephone conversation with Mr Kwok Ho, whom he described as "angry" and "furious" at learning of the extent of the public disclosure of the circumstances in which Chaoda found itself, that UBS required as a condition to waiving the lock-up provision. However, subsequent e-mails evidence the fact that the amended text in that respect proposed by Chaoda was acceptable to UBS, so that there was discussion about having Mr Kwok Ho acknowledge receipt of the UBS letter of waiver. Then, in an e-mail sent to her colleagues within UBS at 12:12 on 28 April 2009, Ms Mary Koo said that she had been told by Mr Kwok Ho that Chaoda, "will not proceed with the share placement today". Finally, in

an e-mail sent shortly afterwards Ms Mary Koo said that she had informed Mr Kwok Ho that UBS would rescind the letter of waiver sent earlier.

*Mr George Stairs: 'going over the wall'*

59. Mr George Stairs said that, in what turned out to be information in respect of Chaoda's attempted placement of April 2009, he had been contacted by Ms Suzanne Joyce, an assistant of Mr Andrew Boyd, Fidelity's Designated Attorney, and asked if he wished to 'go over the wall', namely to receive material non-public price sensitive information, with the consequence that his ability to trade in shares would be restricted. He agreed to do so on 27 April 2009.

60. Having 'gone over the wall' he was told of information in respect of a contemplated placement by Chaoda. An e-mail, sent by Ms Suzanne Joyce at 11:29 a.m. 27 April 2009 EDT, forwarded earlier e-mails dated 27 April 2009 from Ms Kirsty Mactaggart which made reference to the details of the contemplated placement by Chaoda, and noted "You are now restricted, although you can't trade anyway." That appears to be a reference to the fact that trading in the shares of Chaoda had been suspended at 09:49 on 27 April 2009 (HK time).

*28 April 2009: conference call between Mr Kwok Ho/Mr Andy Chan: Mr George Stairs and Ms Jessamyn Larrabee*

61. Mr George Stairs testified that he and Ms Jessamyn Larrabee had participated in a conference call with Mr Kwok Ho and Mr Andy Chan on 28 April 2009. Mr George Stairs produced to the Tribunal his contemporaneous

handwritten notes of the conversation that had taken place in the conference call. He confirmed that his 'Note' as to the size of the contemplated placement, namely "150 - 200 M USD", was information provided to him by Mr Kwok Ho and Mr Andy Chan in the conference call. Mr Kwok Ho could not recall such a conference call, but said that if it had taken place it would have been at the initiative of the investors or Merrill Lynch. He was not told that Mr George Stairs and Ms Jessamyn Larrabee had gone through Fidelity's protocols in respect of the receipt of price sensitive information.

*Arrangements for the conference call*

62. An e-mail from Ms Jessamyn Larrabee to Ms Meredith Pendleton, whom Mr George Stairs testified was Ms Jessamyn Larrabee's secretary, and copied to Mr Simon Davey sent at 12:59 on 28 April 2009 thanked the recipients for setting up a call "for 9 p.m. tonight. Is it Andy?" Mr Simon Davey's particulars were: "(GMI-NY Equity Sales) <simon_davey @ml.com>. In a reply by e-mail shortly afterwards Ms Meredith Pendleton informed Ms Jessamyn Larrabee, "It's Andy and chairman Kwok". Of the participation of Mr Kwok Ho in the conference call, Ms Jessamyn Larrabee observed in an e-mail sent at 16:25 that day to Mr George Stairs and others :

> "Wow, I guess the chairman is going to join tonight."

63. Mr Andy Chan accepted, from the documentation, that he understood that Merrill Lynch had arranged the conference call. Ms Jessamyn Larrabee responded to Mr George Stairs's enquiry by e-mail by identifying "Merrill" as the initiator of the conference call.

64. When taken to the contemporaneous notes of the conference call made by Mr George Stairs, in handwriting, and by Ms Jessamyn Larrabee, in computer type font, Mr Andy Chan said that he had no recollection of what was said in the conference call. When his attention was drawn to Ms Jessamyn Larrabee's note, which asserted that he had identified the size of the placement as being, "US $D 150-200mn", he said he had no recollection of mentioning that figure. Similarly, he had not much recollection of Mr George Stairs asking, "Why would you sell Chaoda at this price (5)". He did not recall mentioning the figure himself. He was only the interpreter.

65. For his part, Mr George Stairs said that whilst he accepted that some of the details contained in Ms Jessamyn Larrabee's note were not reflected in his own notes, his notes reflected matters that he had raised in the conference call, in particular under the statement, "We don't like placements that are unnecessary (George)". By that he meant if, as Chaoda stated to be the position, they were in a position to repay debts as they came due why were they planning to raise funds in a placement? He raised a number of arguments against such a course of action, including the dilutive effect it would have on the holdings of existing shareholders.

*29 April 2009: Chaoda's worldwide simultaneous conference call*

66. Mr Kwok Ho testified that he and Mr Andy Chan had participated as the representatives of management of Chaoda in a simultaneous worldwide telephone conference call with multiple shareholders of the company at 23:00 on 29 April 2009. The telephone conference call lasted more than one hour. Mr Kwok Ho spoke in Putonghua and Mr Andy Chan acted as an interpreter to and

from English. He said that the purpose of the telephone conference call was to inform shareholders of the circumstances which had led to the decision of the board of directors not to proceed with the placement of shares, which reason has been given for the suspension of shares on 27 April 2009. Also, it was to permit shareholders to ask questions of management.

67. In response to a Notice of the Tribunal dated 14 February 2012, the Company Secretary of Chaoda provided the Tribunal with an audio recording of those proceedings, a list of the participants and a partial transcript. The list of 67 participants identified representatives of Wellington, Wellington Management, Fidelity Investments, Blackrock, Alliance Bernstein as having taken part. The representatives of Blackrock and Alliance Bernstein were identified as being Ms Lindsay Watson and Mr Matthew Sigel respectively.

68. In an initial presentation in the telephone conference call Mr Kwok Ho asserted that, having become aware of market concerns about the liquidity of the company in light of its future debt repayments, the management of the company had met the previous weekend and resolved to consider a financing exercise. As a result, four banks, Deutsche Bank, Merrill Lynch, Morgan Stanley and Nomura had been invited to be joint book runners. He said that it had been his thinking in respect of the size and price of the offering that they would be in the range of US $150 - $200 million at a price of not less than HK$5.00. Mr Kwok Ho told the conference call participants that the Hang Seng Index had fallen on the day that Chaoda's shares had been suspended and the following day. In that context, and having been told that the banks proposed "a discount of 12% - 17% ", Mr Kwok Ho said that he had terminated the transaction, as not

being fair or in the best interest of Chaoda's shareholders. In the course of his presentation, Mr Kwok Ho told his audience, "Andy and I have had many conference calls with our investors."

69. The closing price of its shares on 24 April 2009, and at its suspension, was $5.47. At the close of business on 24 April 2009 the Hang Seng Index was 15,258. It closed on 27 and 28 April 2009 at 14,840 and 14,555 respectively. On 29 April 2009 it closed at 14,956.

*THE ROLE OF MERRILL LYNCH AFTER THE DECISION NOT TO PROCEED WITH THE APRIL PLACEMENT*

70. Mr Rodney Tsang said that although the late April 2009 placement had not been proceeded with, he judged that Mr Kwok Ho was open to further proposals of fund raising for the company. E-mail communication within Merrill Lynch between various employees evidenced the ongoing consideration that was given to making a fund raising proposal to Mr Kwok Ho.

71. In an e-mail, dated 5 May 2009, Mr Rodney Tsang informed his colleagues, including Mr Nicholas Lee and Mr Kevin Su, that he had been informed by Chaoda that they had funding in place to make repayment on a convertible bond, which he judged to be positive to its stock price. He concluded that, "a possible deal is still on the card(s)." Mr Nicholas Lee was asked to engage with "Big holders" of Chaoda stock to assess their reaction to the announcement of 29 April 2009 that the company was not to proceed with the proposed placement. Mr Rodney Tsang acknowledged that they "may be upset with the confusion and inconsistency the chairman has created". Further,

Mr Nicholas Lee was asked to "condition" the investors to get them ready at the right time.

*8 May 2009: Chaoda's announcement of the repayment of the Convertible Bond*

72. On 8 May 2009, Chaoda announced that on 7 May 2009 it had repaid $1,422 million due in respect of a convertible bond. Mr Kwok Ho testified that following the decision announced on 29 April 2009 not to proceed with the placement of Chaoda shares he had embarked on urgent efforts to arrange for the availability of money to make the repayment of the convertible bond as it fell due. He returned to the Mainland to do so. One difficulty he encountered was the fact of the week-long holiday following 1 May 2009. In the event, he had managed to borrow $500 million.

73. Mr Rodney Tsang's attempts to advance a 'sole book' proposal to Mr Kwok Ho were adverted to it in an e-mail from Mr Kevin Su to Mr Nicholas Lee and Ms Melody Ngan on 14 May 2009. He said that he had 'sounded out' several hedge funds and listed their indicated demand for Chaoda, noting that at a discount of 15% "three hedge funds may be good for US$ 35-55 mm size." Mr Nicholas Lee was asked to call a "couple of long only accounts who have shown interest last time and see whether their interests are still there so we can have a better idea of what to do for a meeting with Chairman next week." Mr Nicholas Lee testified that he understood the reference to "long only accounts" was to mutual funds, rather than hedge funds, who had expressed an interest in the April placement.

*The interest in conference calls: investors and Chaoda management*

74. Concerns amongst shareholders at the decision of Chaoda not to proceed with the April placement were addressed specifically in an e-mail dated 16 May 2009 from Mr Nicholas Lee to Mr Rodney Tsang in respect of Mr Matt Hochstetler of Janus Capital Management LLC ("Janus"), which company was a significant shareholder in Chaoda :

> "We spoke to Matt Hochstetler at Janus who had given us a $50 mm indication last time. In short he says we shouldn't count on them at this point. He is confused with what is going on with the company's funding plans ..."

Mr Nicholas Lee went on to state of Mr Matt Hochstetler's position :

> "he was clear that if management is contemplating a deal, Andy needs to speak to Matt directly to explain what really happened and what the *company's funding needs really are.*" [Italics added.]

That was a reference to Mr Andy Chan.

75. In his reply e-mail of the same date Mr Rodney Tsang confirmed that he had spoken to Mr Kwok Ho who had said that "a few big shareholders have spoken to them, initially expressing their anger on the last placement, the timing and what is Chaoda's real fund needs". He went on to write of Mr Kwok Ho :

> "I think he would want to do a deal at a better level than our last time so we have to wait for the stock to trade up a bit for that to be possible (don't know how long it'll take) and his desire size level (I know as a minimal, we have to give him hope of getting above US$200m. I don't think we are there yet on either of these matrix ..."

76. For his part, Mr Kwok Ho said that he had not been told of the contents or the effect of that communication between Mr Matt Hochstetler of Janus and Mr Nicholas Lee.

77. In an e-mail dated 18 May 2009 addressed to Mr Kevin Su, and copied to others including Mr Nicholas Lee and Mr Rodney Tsang, Mr Andrew Cooper listed four options available to the company :

1. Do nothing;
2. Try placement again;
3. Vanilla CB; and
4. Structured CB.

78. Of a potential placement he said, "wait for a bounce and risk a heavily discounted equity deal, pushing against the confusion created on real cash needs and suggestions of financial incompetence."

79. Having had dinner with Mr Kwok Ho that evening Mr Rodney Tsang replied to the e-mail asking Mr Nicholas Lee and Mr Kevin Su, to "... work on something for me (with a timeframe by end of next week) for me to go back to him with."

*The 'Gameplan'*

80. The result of that direction by Mr Rodney Tsang to his colleagues, was addressed in an e-mail dated 25 May 2009 from Mr Nicholas Lee and copied to Mr Rodney Tsang and Mr Kevin Su amongst others :

> "Rodney and I just spoke about a gameplan for Chaoda ... Rodney will call Chairman on Wednesday to lock him down for an evening of conference calls with US investors on Monday (Janus, Alliance, Putnam, Fidelity, CREF) to smooth over the funding issues raised in the last attempt. If Monday night calls go well and our hedge funds friends are still good, we could launch a deal Tuesday."

*Early June 2009*

81. Although there then followed an hiatus of more than a week, in an e-mail to various colleagues dated 2 June 2009, Mr Rodney Tsang said that he wanted to "restart Chaoda." Noting that he had been speaking to Mr Kwok Ho and that the share price of Chaoda's shares had risen to $5.30, he wrote :

> "I want to get the deal done early next week. I will be speaking to him tonight to agree a game plan. Pls get ready. I know I owe you a Chairman conference calls with 3-4 existing shareholders. I think his requirement will be a minimum US 150m deal upsizeable to US $200m. Let's work on this. So long stock price stay where it is or a bit better than now, if I can get the placement price as close to HK$5 as possible, I think I can get the table."

82. In e-mails dated 3 June 2009 to Mr Nicholas Lee and others, Mr Rodney Tsang noted that Chaoda's share price had reached $5.50 and said that he would "push" the chairman "into agreeing to phone meetings with these large shareholders and do a deal after that." He concluded that he thought that Merrill Lynch would "get a crack at this on a sole basis next week".

83. In an e-mail dated 6 June 2009, Mr Rodney Tsang informed his colleagues, including Mr Nicholas Lee, that Mr Kwok Ho had :

> "agreed that he will do a conf call with some existing shareholders *with us* when he gets back and potentially do the deal next week." [Italics added]

In his testimony, Mr Rodney Tsang explained that, notwithstanding the text, he did not mean that Merrill Lynch would participate in the conference call with existing shareholders. Mr Allan Wong was reminded by Mr Rodney Tsang to get ready to update existing due diligence on the company by contacting Mr Andy Chan, but was advised, "... don't approach him now as he has no idea what Kwok agreed with me now."

84. For his part, Mr Kwok Ho said that, although Mr Rodney Tsang had told him that investors wanted to have a conference call with the management of Chaoda, he had not agreed at that stage to that course, saying that he would discuss it with him on his return to Hong Kong. Further, Mr Rodney Tsang had not even raised the subject of launching a 'deal' after such conference calls, let alone had he agreed to that proposal.

85. By an e-mail dated 8 June 2009, Mr Rodney Tsang advised colleagues that Mr Kwok Ho would be returning to Hong Kong and that he would meet him on Friday (12 June 2009). He concluded :

> "Most likely have the investor meeting Monday night HK time if feedback is good, then do it Tue (next week). Let's hope the stock price hold up."

*12 June 2009*

86. By an e-mail dated 07:46 12 June 2009, Mr Rodney Tsang advised colleagues, including Mr Nicholas Lee, that he had met Mr Kwok Ho the previous evening and that he had "agreed to do investor calls on Monday night." Further, that "We then look to do it Tue morning suspending the stock for Tue." Mr Nicholas Lee was directed to liaise with Mr Andy Chan and set up the timing and logistics of the conference calls. Mr Rodney Tsang noted that Mr Kwok Ho had several requests :

- Of the issue of the price of placement shares, he noted that Mr Kwok Ho did not want a "price range", rather he wanted a fixed price which, although they had not discussed the matter specifically, he judged that Mr Kwok Ho would accept only $5.00 or above.

- Of the issue of the size of the placement, he wrote that Mr Kwok Ho wanted US$ 250 million "ideally", although he had suggested a "managed down" target of US$ 200 million.

87. Finally, he directed Mr Allan Wong to contact Mr Andy Chan later that morning, in respect of updating due diligence, and that he address other documentation, "so that we are ready to action on Tue morning." Mr Rodney Tsang said that he expected that the documentation and due diligence would begin with the company on Monday 15 June 2009.

88. In respect of the issue of the price of the placement shares, Mr Rodney Tsang wrote in the e-mail of Mr Kwok Ho, "He presume we would have spoken to his shareholders right after his call Mon night about the deal and get feedback from them on price and size". In his testimony Mr Rodney Tsang explained :

> "...it was always my understanding that-from the Equity Capital Market colleagues, that these investors had these concerns, so they are reluctant to indicate whether they would like to participate in a potential transaction. So, upon these investors meetings obviously hoping that they were happy with some of these explanation, then when we approach them - re-approach them on a potential transaction they may participate."

89. Of which of the existing shareholder would be approached and by whom, he said :

> "well, I would expect that our salesperson or our equity capital market colleagues, after the investor's meeting, would approach these fund managers to seek their indication."

He added that he did not know the fund managers, only the names of the funds involved.

*11 June 2009 – meeting: Mr Kwok Ho and Mr Rodney Tsang*

90. For his part, Mr Kwok Ho testified that he had returned to Hong Kong from Beijing at about three o'clock in the afternoon of 11 June 2009. He thought that Mr Rodney Tsang had come to see him at his offices in the early evening. Whilst he had agreed to make the investor calls on Monday night, he had not asked for feedback following those calls, as to price and size of demand. There had been no discussion, "... regarding $5 or the amount of US$250 million, not a single word regarding that was mentioned." He said that Mr Rodney Tsang had proposed that the placement be advanced within a 'price range'. He had disagreed and required it to be at a fixed price. Mr Rodney Tsang did not mention suspending trading in the shares of Chaoda on Tuesday morning and he had not raised it himself. Mr Rodney Tsang had suggested that Chaoda agree to a lock-up, saying that would put the hearts and minds of Chaoda's investors at ease. He had agreed to a lock-up.

*Steps taken to arrange the conference calls 15/16 June 2009*

*12 June 2009*

91. By e-mail, sent at 21:17 on 12 June 2009 to Mr Patrick Doyle Head of Merrill Lynch Asian Equity Sales in New York, Mr Nicholas Lee responded to Mr Rodney Tsang's direction that he set about making arrangements for the prospective conference calls with Mr Kwok Ho and selected existing shareholders. The importance of the e-mail was described as, 'High'. Mr Nicholas Lee confirmed the accuracy of the assertion in the text that he had discussions with Mr Patrick Doyle prior to sending the e-mail. He thought that would have been by telephone in the period 06:45-07:45 am in New York. In

the e-mail Mr Nicholas Lee indicated that he wished to set up, "calls with accounts on this coming Monday morning Eastern Time with the management of Chaoda". The attendees from the management of Chaoda were described as being the Chairman, Mr Kwok Ho, and the Chief Financial Officer, Mr Andy Chan.

*The purpose of the conference calls*

92. Of the purpose of the conference calls, it was asserted in the e-mail that it was :

> "... for management to update key shareholders about their business and financial status. Our role is simply that the management team has asked us to set up the calls."

93. What were described as the "key target accounts" (from last time), were set out as being :

- Janus-Matt Hochstetler-key account
- Fidelity-George Stairs and Jessamyn Larrabee
- Putnam-Ava Ora and Mike Mercauto and Shigeki Makino
- Alliance Bernstein-Matthew Sigel
- Blackrock-Lindsay Watson and Angela Yu and Kent Hogshire.

An attached schedule listed the shareholding, and the percentage of the issued share capital that represented, for some 26 shareholders.

94. Of the issue of why it was that Merrill Lynch had not used Fidelity's protocols in making arrangements for and conducting the telephone conference calls on 15 and 16 June 2009, Mr Nicholas Lee denied that that was because Mr Rodney Tsang was determined to get feedback from those investors and did not

wish to risk investors declining to take part in the calls. Of the purpose of those telephone conference calls, he said:

> "... the conference call(s) were not, as set up, to discuss a proposed placement. The placement that we were discussing separately with company was, at the time, and you know, we weren't expecting the company to be discussing in detail the proposed placement."

Later, he added:

> "we weren't expecting any material non-public information to be discussed on these calls."

95. For his part, by an e-mail sent at 09:37 EDT on 12 June 2009, Mr Patrick Doyle forwarded the e-mail he had received earlier from Mr Nicholas Lee to multiple persons on the sales side of Merrill Lynch in United States of America. They included Mr Tim Lynch, a managing director of Bank of America Merrill Lynch Securities in Equity Research in Boston Massachusetts, and Ms Liane Hack and Ms Carmen Schwender in New York.

*The role of Mr Tim Lynch-Merrill Lynch, Boston*

96. In turn, Mr Tim Lynch sent e-mails to some of the shareholders listed in the schedule on Mr Nicholas Lee's e-mail to Mr Patrick Doyle offering them the opportunity to participate in a conference call with the Chairman of Chaoda, Mr Kwok Ho, and the Chief Financial Officer, Mr Andy Chan, on Monday morning, EDT.

*Fidelity*

97. One such e-mail was sent by Mr Tim Lynch at 10:10 on 12 June 2009 to Ms Jessamyn Larrabee and Mr George Stairs of Fidelity, "Want a slot? Please call if you want to chat about. Regards Tim." Beneath the text of each

of the e-mails that Mr Tim Lynch sent out, including the one sent to Fidelity, there appeared the following text, identical to that which appeared in the e-mail from Mr Nicholas Lee to Mr Patrick Doyle, except that it was set out in quotation marks :

> "The purpose of the calls with the management is to update key shareholders about their business and financial status. Our role is simply that the management team has asked us to set up these calls."

98. Although Mr Tim Lynch had extended an invitation to Ms Jessamyn Larrabee and Mr George Stairs to "call if you want to chat about (it)", when Ms Jessamyn Larrabee replied several minutes later in the affirmative musing, "Wonder what this is all about:) maybe more about the cash buffer", and although Mr Tim Lynch responded shortly thereafter to the e-mail, he did not address the implicit enquiry she made. He agreed in his oral testimony that he was not in a position to do so. He did not know what it was all about. He had not been told. In the result, Ms Jessamyn Larrabee chose to have the conference call at 09:00 EDT.

*Wellington*

99. Mr Tim Lynch sent an identically worded e-mail of invitation, apart from appellations, to Mr Sabre Mayhugh of Wellington Management Company at 10:15 on 12 June 2009. By an interchange of e-mails sent on behalf of Mr Sabre Mayhugh it was arranged that he would participate in the conference call at 10:00 EDT on 15 June 2009.

*The Boston Company*

100. For their part, by an interchange of e-mails with Mr Tim Lynch, initiated by the latter at 10:21 on 12 June 2009, arrangements were made for the Boston Company to participate in a conference call at 1 p.m. EDT on 15 June 2009. By a letter to the SFC dated 7 December 2009, the Chief Compliance Officer of the Boston Company identified Ms Carolyn Kedersha, a managing director of the company, as having been present in and/or having participated in the conference call and enclosed what were said to be notes taken by Ms Carolyn Kedersha during the conference call.

*Blackrock*

101. Ms Angela Yu Yi Ming ("Ms Angela Yu"), then and now a research associate at Blackrock Financial Incorporated, testified that having been contacted by telephone by Ms Carmen Schwender, a salesperson of Merrill Lynch in New York, she had responded in the affirmative to the offer of the opportunity to participate in a telephone call with Chaoda management "to get an update". An e-mail sent at 2 p.m. EDT on 12 June 2009 from Ms Carmen Schwender to Ms Angela Yu confirmed Ms Angela Yu's choice of 11 a.m. on 15 June 2009 as the time to conduct the telephone call.

*Alliance Bernstein*

102. Mr Matthew Sigel, now a director of Credit Lyonnais Securities Asia but in June 2009 an Assistant Vice-President Research Analysist at Alliance Bernstein, testified that he had received an e-mail sent at 14:09 on 12 June 2009 from Ms Lianne Hack, an employee of Merrill Lynch. She was not his usual sales contact with Merrill Lynch. Part of the text of the e-mail stated, "we've

been asked by the mgmt of Chaoda to organise a conf call between you and them." Then, he was asked if he wished to participate and was provided with a telephone number with which to respond. Mr Matthew Sigel said that during the telephone conversation that ensued between the two of them there had been 'banter' between them about the possibility of an equity placement by Chaoda. In cross-examination, he said that as far as he could recall he had not been chasing Merrill Lynch or the company to speak to senior management. He had been offered the conference call and he had agreed to participate. Then, Ms Lianne Hack had responded by e-mail confirming that he would participate in a conference call at 8 a.m. on 15 June 2009.

*Janus*

103. Finally, by an e-mail sent at 06:34 on 12 June 2009 from Jung Kim, a salesperson in the Merrill Lynch office in San Francisco, Mr Matt Hochstetler of Janus was asked to contact Jung Kim in respect of, "the scheduling of a call this coming Monday morning." In an e-mail sent at 22:28 on 12 June 2009 Jung Kim confirmed Mr Matt Hochstetler's participation in the conference call at "11 pm HKT" on 15 June 2009.

*Schedule: conference calls*

104. By an e-mail sent by Mr Tim Lynch to Mr Nicholas Lee and copied to Mr Patrick Doyle at 04:07 EDT on 13 June 2009 Mr Lynch confirmed the participants secured for the prospective conference call :

> "Good schedule. Ended up w/ Alliancebernstein, Fido, Wellington, Blackrock, Boston Co. See roadshow."

105. The attached 'Roadshow Schedule' provided details of the participants, telephone and passcode numbers and the scheduled times of the conference calls for the five companies identified in the e-mail and also in addition for Janus. Mr Nicholas Lee explained that the Roadshow schedule was an internal internet information system within Merrill Lynch and that in context the term was not used to describe a sales campaign.

*Conference calls: a script?*

106. In an e-mail sent to Mr Nicholas Lee at 22:59 on 12 June 2012, Mr Rodney Tsang wrote :

> "... Just spoke to Kwok. He will work with Andy in the morning Mon to finalise *script* with investors on *source and use of funds*. He also promised he will not see anyone before Tue morning. If we think we can get US$200m when we launch, I think he is also willing to let us do the deal sole. Let's work towards that goal." [Italics added.]

107. Notwithstanding his specific reference to both "source and use" of funds, Mr Rodney Tsang testified that what he intended to say was in respect of the use of the funds.

108. For his part, Mr Kwok Ho said that Mr Rodney Tsang never mentioned the subject of having a script to which to refer in the conference calls. Neither he nor Mr Andy Chan had a script available in the conference calls.

109. In the context of his reference to a 'script' to be used in the conference calls with investors, Mr Rodney Tsang testified that he was, "expecting some of these investors will ask about why and the use of proceeds of the last placement

and, hence, whether you will be looking to execute another financing, equity-related financing." He said that certainly he was not expecting Chaoda management to divulge the size and price of the potential placement :

> "They've been a listed company for over 10 years, even at that time ... That is why I have reminded them that 'That question will be directed at you and, therefore, you should handle that question carefully'."

110. Of the advice he had given, he went on to say, :

> " ...you need to devise and think carefully about how you respond to that question. And, therefore, I've advised them to come up with a script that actually is acceptable, you know, for the investors. And, I ... I think, by that statement, when I spoke to them, I clearly reminded them that, obviously stay away from price sensitive stuff but, hypothetically speaking, if you are armed with another US $200 million, where are you going to spend it."

111. Although Mr Nicholas Lee said initially that he had not foreseen the risk that some investors might enquire in the conference calls as to whether or not Chaoda intended to try another placement he soon resiled from that answer and accepted that it was "likely to happen". He said that as a matter of "general practice" the standard answer was to say, "We're always evaluating our options". He had not told anyone at Chaoda that was the response to give if the issue was raised. Although the issue of Chaoda having a 'script' of what to say in the telephone conference calls had been raised with him by Mr Rodney Tsang, he had done nothing about it. He accepted Mr Huggins's assertion that it was not "acceptable practice", without invoking 'wall crossing' protocols, to arrange telephone conference calls between management and its investors, and potential subscribers to a placement, in circumstances where it was foreseen, "that the company's management may say something specific and price sensitive about the proposed placement". Mr Tim Lynch assented to the same proposition.

112. For their parts, Mr Kwok Ho and Mr Andy Chan testified that Mr Rodney Tsang had never warned them about disclosing material non-public price sensitive information about Chaoda in the prospective conference calls to be held on the evening of 15 June and morning of 16 June 2009.

113. Mr Rodney Tsang said that he had never seen a physical script. However, from conversations that he had with Mr Kwok Ho and Mr Andy Chan, together with the due diligence conducted on Monday, 15 June 2009, he had some idea of what was in the script.

114. In cross-examination by Mr Huggins, Mr Rodney Tsang explained that his advice to Mr Kwok Ho and Mr Andy Chan was that they should advance a "consistent line" in what it they said to their investors in the conference calls. In answer to the question as to whether he was concerned that Mr Kwok Ho might divulge information about the proposed placement that was not in the public domain, Mr Rodney Tsang repeated his answer that at that time the company had been listed for over 10 years, "I didn't feel I need to ask the team to prepare a script or, indeed, ask them to follow a script".

115. For their parts, Mr Kwok Ho and Mr Andy Chan said that no script had been prepared for or used in the telephone conference calls conducted on the evening of 15 June and the morning of 16 June 2009.

*13 June 2009*

*The involvement of Mr Andy Chan*

116. Mr Andy Chan said that on the morning of Saturday 13 June 2009 he received a telephone call from Mr Rodney Tsang whilst he was at home. He was informed that Mr Rodney Tsang had suggested to Mr Kwok Ho that Chaoda make a placement of its shares and that Mr Kwok Ho was interested in the proposal. Then, he was informed of the need for telephone conference calls to be conducted on Monday evening by Mr Kwok Ho and Mr Andy Chan with existing shareholders of Chaoda. Mr Rodney Tsang said that the investors had requested such conference calls. At the time, so he testified, he did not draw an inference of a nexus between the two events.

117. Out of prudence, Mr Andy Chan said that he called Mr Kwok Ho to confirm what he had been told by Mr Rodney Tsang. Although in his witness statement Mr Andy Chan said that Mr Kwok Ho, "broadly confirmed what Rodney said. I do not recall whether I asked Mr Kwok what the terms of the contemplated placement were", Mr Andy Chan said that he had not even raised with Mr Kwok Ho the assertion made by Mr Rodney Tsang that Mr Kwok Ho was contemplating a placement of Chaoda shares. Of that issue, he said that Mr Kwok Ho would inform him "when everything was finalized".

118. Having been advised by Mr Nicholas Lee in an e-mail at 09:21 on Saturday, 13 June 2009 of the identity of the six participants in the prospective conference call, at 10:40 Mr Rodney Tsang e-mailed Mr Andy Chan and Mr Kwok Ho's personal assistant, Ms Yue Zhang, advising them that arrangements

had been made for conference calls with "existing large shareholders". The text went on to assert :

> "They will be in particular interested to hear the Company's latest update as well as your funding requirement. Andy, as discussed, a few of them even suggested they want to understand the *sources and uses of cash* the company in the next 18 months so that they understand if there is any financing requirement." [Italics added.]

119. For his part, Mr Kwok Ho explained that Ms Yue Zhang was in the Mainland. She spoke simple English and would telephone him to inform him of such messages. If necessary, arrangements would be made for documents in English to be translated into Chinese, for Mr Kwok Ho's benefit. That would be done in Hong Kong.

120. Mr Rodney Tsang explained the issue that he was addressing in the e-mail, namely, that given that Chaoda generated a huge cash flow and profitability, investors had indicated that :

> "they wanted to understand that if you have such a strong cash flow generating ability in the company, they want to understand how much money, cash is coming back from your ongoing business, and then how-what-where are you going to use the money, and then hence, why there is a gap that you need financing."

121. Mr Andy Chan confirmed in his witness statement that he understood, from the reference in the e-mail to enquiries that would be made by investors in the future conference calls, that the investors wished to be told "how the company would find funds to meet its needs" and "to understand the sources of cash". He went on to say that although Mr Rodney Tsang had never warned him specifically not to disclose material non-public price sensitive information

in respect of the contemplated placement, as a director of a listed company, he was aware of his duties in that respect. In his testimony, he said that Mr Kwok Ho had not told him, nor had he asked Mr Kwok Ho, not to discuss the contemplated placement in the conference calls. Similarly, he had not discussed with Mr Rodney Tsang what to tell investors in the conference calls as to the future source of funds for Chaoda.

*15 June 2009*

122. By an e-mail sent at 08:58 on Monday, 15 June 2009 Mr Nicholas Lee provided Mr Andy Chan and Mr Kwok Ho's personal assistant with that evening's schedule of conference calls :

> "8:00pm-AllianceBernstein-Matt Sigel
> 9:00pm-Fidelity-Jessamyn Larrabee & George Stairs
> 10:00pm-Wellington- Wei Li and Sabre Mayhugh
> 11:00pm Blackrock-Lindsay Watson and Angela Yu
> 1:00am-Boston Company-Tom Grant
> Tomorrow-7AM- Janus-Matt Hochstetler."

123. In an e-mail sent at 10:47 on 15 June 2009 Mr Nicholas Lee responded to Mr Kevin Su's enquiry as to whether the placement was to be launched the following day, indicating if that was the case he wished to give a "heads-up call" to the hedge funds that had shown an interest "the last time" :

> "Yes planning to have calls with US long-only names tonight. Wasn't planning on speaking to the Asian funds until tmrw because the deal hinges on the feedback tonight, if the US guys aren't there, no deal."

124. Mr Nicholas Lee explained the context of the issues being addressed :

> "Well, when this whole thing was set up, it's two separate things. You have the shareholders, and large US funds, who had been requesting for calls. I think what we've been thinking all along is we don't know, you know, if these

> investors were really angry with the company or, sort of, what they're feeling was basically the way we went about this once, let's have these calls, how the company deal with their shareholders first and then, if it comes out that, you know, there's no major issues arise, then we would go check back in with the investors who have given us interest for them and see if they're still there, and that's what he was referring to."

125. In an e-mail sent at 15:39 on 15 June 2009, Mr Rodney Tsang informed Mr Allan Wong :

> "Kwok summoned me over to talk after the mkt close so I am heading off to see him now."

Mr Rodney Tsang confirmed that intention in an e-mail sent to Mr Nicholas Lee at 15:43, noting that Chaoda's stock price was down at $5.50 and that he was going to see Mr Kwok Ho, anticipating "to go get yell at".

*Steps taken in preparation for the contemplated placement: due diligence and preparation of legal documentation*

126. Mr Kwok Ho said that he was aware that on 15 January 2009 Mr Andy Chan and Chaoda's lawyers, Messers Sidley Austin, had begun preparing the necessary placement documentation. Similarly, he was aware of a request by Merrill Lynch to begin the due diligence process. For his part, Mr Andy Chan testified that he had worked on the telephone in respect of matters of due diligence with Mr Allan Wong and Mr Gary Kwok of Merrill Lynch. As he recalled, that had begun after 4 p.m. on 15 January 2009. In an e-mail sent at 16:52 Mr Allen Wong informed Mr Gary Kwok that he had just spoken to Mr Andy Chan and suggested that they call him, "in 10 minutes".

127. Mr Andy Chan said that work with Chaoda's lawyers, Sidley Austin, on the preparation of documents needed for the placement had begun at about 5:00 p.m. Of the issue of the significance, if any, to be attached to the fact that due diligence and work on legal documents with lawyers was underway in the late afternoon of 15 June 2009 in respect of the contemplated placement, Mr Andy Chan said that he still regarded the two matters as separate. On the one hand the future conference calls and on the other hand, separate, the contemplated placement.

*The plan to contact the participants after the conference calls and to meet Mr Kwok Ho*

128. At 17:58 on 15 June 2009 Mr Rodney Tsang e-mailed Mr Nicholas Lee and others addressing the twin issues of conducting the conference calls and obtaining demand/orders:

> "Nick/Kevin will try to accumulate as much hedgie demand as possible now. We should be getting demand/orders right after every calls to night the Company has so we have live update."

129. Elsewhere in the e-mail Mr Rodney Tsang said that he planned to visit Mr Kwok at midnight that night and asked Mr Nicholas Lee to give him "a live update around midnight." The e-mail concluded with Mr Rodney Tsang indicating that he was aiming to go to Mr Kwok's office :

> "around 8:15/8:30 a.m. tomorrow to give him our proposal."

130. Mr Rodney Tsang described the e-mail as being his "wish list". He said :

> " ... a lot of these investors or shareholders wanted to have the conversation

with management, and therefore, right after that call, I wanted my ECM colleagues to instruct the salesperson to follow up with the accounts, and see how the call went, as well as their potential interest to participate in the offering."

131. In cross-examination by Mr Huggins, Mr Rodney Tsang explained that it was his intention that his colleagues :

"follow-up with every single investors after each investor call."

Of the time at which he expected that to happen, he said that his target was that :

"... our salespersons can get to that fund managers almost immediately after every single call, so to enable to go with a plan that I have here that I can, by the time the eight o'clock the next day ... I can have a discussion with Mr Kwok about launching a transaction."

He agreed that was a matter to be followed up by Merrill Lynch and only after they had complied with the requisite protocols. It was not for Mr Kwok Ho or Mr Andy Chan to take the investors 'over the wall'. However, he said that he took no steps himself to implement the plan, adding that he did not get the answer that he had wanted by the morning. Perspicaciously, he added that he doubted if that had been done in fact.

132. Mr Nicholas Lee testified that he had not put that request into action. He was not permitted to do so. He said that such follow up or feedback from the investors participating in the conference call was limited to whether or not, after those calls they were positive or negative, in respect of the company. In cross-examination, Mr Nicholas Lee said that he had not pushed to get any feedback. If some was forthcoming, that was "great". He did not recall receiving any feedback. He explained that this was his way of "*managing*" Mr

Rodney Tsang's demands, namely by appearing to be constructive but in fact not carrying out the instruction.

133. In an e-mail sent at 22:53, in which the subject was described as '11:00 p.m. update', Mr Nicholas Lee provided Mr Rodney Tsang with information as to the potential demand for Chaoda shares at placement prices of HK$5.00 and HK$4.80. He accepted that the information was not a 'live' update involving recent contact with investors, rather it reflected their earlier indications or was an estimate by salespersons of anticipated demand. In cross-examination by Mr Huggins, he accepted that he was only appearing to help Mr Rodney Tsang in complying with his demand for that information.

134. In the hour or so that followed, Mr Rodney Tsang was in regular contact with his colleagues, including Mr Nicholas Lee. In an e-mail sent at 23:27 to Mr Rodney Tsang, Mr Allan Wong said that it was probably necessary for Merrill Lynch to "get the script from the company on what they have conveyed to investors in terms of uses for the proceeds before we answer investors from our side."

135. In an e-mail sent at 23:30 Mr Rodney Tsang said that he would be joining Mr Kwok Ho in his office shortly and sought 'the latest colour', in particular in respect of the three conference calls that had been completed. In testimony, he confirmed that what he sought was feedback from the investors participating in the conference calls. Mr Nicholas Lee did not address that request in his subsequent e-mails to Mr Rodney Tsang.

*The midnight meeting at Chaoda's offices*

136. In his testimony, Mr Rodney Tsang said that having arrived at Mr Kwok Ho's offices he waited outside the room that he and Mr Andy Chan were using for the conference call. When Mr Kwok Ho emerged he had a conversation with them, but a longer one with Mr Kwok Ho. Following those conversations Mr Rodney Tsang reported to his colleagues in several e-mails. At 23:46 he reported that Mr Kwok Ho felt that the four meetings conducted so far had "gone well". Further, "he feels comfortable some will come in, esp Blackrock." In cross-examination, by Mr Huggins, Mr Rodney Tsang denied that, in light of that information, it must have been obvious to him that the line had been blurred by Mr Kwok Ho and Mr Andy Chan and that in the conference calls they had been talking about a placement and 'sounding out' investors. He was aware that there were protocols, to which Merrill Lynch was required to adhere in their contact with Fidelity, but he was not aware of the details. That was a matter for the Equity and Capital Markets Department and the sales force. He did not discuss with Mr Nicholas Lee whether he was following such protocols. He assumed that he would do so.

137. At 23:50 he advised that, "Argyle Street Mgt, may have some interest." In evidence, he said that he had obtained that information from Mr Andy Chan.

138. In face of suggestions made by Mr Lok SC, on behalf of Mr Andy Chan, that he had not even met Mr Andy Chan that night at Chaoda's offices, Mr Rodney Tsang remained adamant that he had met him and that he had given him the information in respect of Argyle Street Management.

139. In answer to Mr Nicholas Lee's e-mail enquiry as to what had been said in the conference calls about the company's capital needs, at 00:04 on 16 June 2009 Mr Rodney Tsang replied :

> "No one asked them that question point blank but this is what they said. They proposed that they need to raise $200 - 250m predominantly for refinancing the HY. If the fund raising failed, Co can still repay but have to repatriate all the money they have onshore in China which will be damaging politically plus it will limit Co capex for the next two years which will limit Co's growth. They used the same line for all four shareholders."

140. In his testimony, Mr Rodney Tsang confirmed the accuracy of what he had attributed to Mr Kwok Ho in the e-mail, namely when he said that he had informed investors in the conference calls as to the size of the funding needs of Chaoda.

141. In an e-mail sent one minute later, Mr Rodney Tsang said :

> "Also he told some investors he is willing to do the deal at $5."

In his testimony, Mr Rodney Tsang confirmed that was a reference to Mr Kwok Ho. However, notwithstanding the unambiguous terms of what was asserted in the text of the e-mail, Mr Rodney Tsang resiled from the statement attributed to Mr Kwok Ho. He had deduced the figure of $5 from what Mr Kwok Ho told him that he had said to the investors, namely that, "should an equity placement happen ... he wants to achieve a *good price*." [Italics added.] In their discussions about the potential transaction the next morning Mr Kwok Ho had told him that he wanted to transact at $5. As a result, so he said, he suspected and assumed that, " ... he may have told some investors". It was late at night and he was careless in composing the text of the e-mail.

142. When taken to his record of interview, conducted of him by an officer of the SFC on 27 November 2009, Mr Rodney Tsang resiled from some of his answers. Contrary to his answer in that interview, Mr Kwok Ho had told him that he had disclosed to the investors in the conference calls the potential placement by Chaoda and its size. He explained his conflicting accounts on the basis that the interview was conducted a few months after the placement and by the fact that in the course of giving evidence his memory had been refreshed by referring to contemporaneous e-mails.

143. Notwithstanding his evidence that disclosure by Mr Kwok Ho to investors in the conference call of the size and price of a prospective potential placement was price sensitive information, and the fact that there were further such conference calls scheduled to occur, Mr Rodney Tsang said that he did not give any specific advice to Mr Kwok Ho and Mr Andy Chan about how they should speak to investors, other than his earlier general advice that they had to handle such issues "carefully".

144. For his part, Mr Kwok Ho said that when he and Mr Andy Chan emerged from the room in which they had been conducting the conference calls, after the conclusion of the fourth conference call, he had a short conversation with Mr Rodney Tsang. Mr Andy Chan was not present at that conversation. Mr Andy Chan said that although he had seen Mr Rodney Tsang in Mr Kwok Ho's room, as he left the conference room together with Mr Kwok Ho, and had waved his hand in acknowledgement he had gone to his own room and had not had any discussion with him at the midnight meeting.

145. Mr Kwok Ho said that he told Mr Rodney Tsang that the conference calls had been "Quite good. The atmosphere was quite good." By that he said that he meant that the atmosphere between the parties have been quite light-hearted, jokes had been exchanged. The investors had been happy with the development of the company and what had been discussed. He did not say that he had told investors that there would be a placement; that placement shares would be priced at $5.00 per share and the size of the placement would be $200 - $250 million.

146. By contrast, Mr Kwok Ho said that he had the impression that he had told Mr Rodney Tsang that he felt comfortable that some of the investors to whom he had spoken on the conference calls would subscribe to a placement. However, because of his limited English he did not think he identified such an investor as being Blackrock. In the course of discussions, prompted by questions asked by investors and based on the hypothesis that future market sentiment might permit a placement, he had said that if there was such a placement he hoped the investor would support it. That had prompted a reply from one of the investors, to the effect that they would consider participating in the placement, "because they didn't want their share to be diluted." He had told Mr Rodney Tsang of that at the midnight meeting.

*16 June 2009*

147. Mr Rodney Tsang said that in the morning of 16 June 2009 he had contacted Mr Kwok Ho, either by telephone or in person, and informed him that Merrill Lynch was still contacting investors and that the launch of any placement had to wait. In an e-mail sent at 12:44 on 16 June 2009, Mr Rodney

Tsang advised his colleague Mr Allan Wong that, having opened at $5.50, the price of Chaoda's shares had dropped to $5.25. Nevertheless, he wrote of Mr Kwok Ho that he :

> " ...still wants to do this asap so we are watching closely."

The closing price of Chaoda shares on 16 June 2009 was $5.28.

148. In an e-mail sent at 18:37 that day to Mr Nicholas Lee, Mr Rodney Tsang said that he had spoken to Mr Kwok Ho and advised him that they would be in a position to launch the placement after having heard from investors and "as soon as mkt turns a bit more positive". He indicated that the "window" for launching the placement that he was aiming for was the close of trading on the stock market the following day. In his testimony, Mr Rodney Tsang said that he had told Mr Kwok Ho that if the market in the United States of America rebounded overnight he reserved the right to call him in the morning.

149. Mr Kwok Ho said that he could not remember if Mr Rodney Tsang had come to his offices on the morning of 16 June 2009. He did not recall a discussion about the share price, nor was he paying attention to it at that time. He accepted that he did mention to Mr Rodney Tsang in effect that he wanted to do the placement as soon as possible.

*Suspension of trading in Chaoda shares: 17 June 2009*

150. At the request of Chaoda trading in its shares were suspended with effect from 2:30 p.m. on 17 June 2009, "pending the release of an announcement by the company regarding a placing of shares."

*The Placing Agreement: 17 June 2009*

151. At a meeting of the Board of Directors of Chaoda at 5 p.m. on 17 June 2009, at which Mr Kwok Ho and Mr Andy Chan were in attendance, it was resolved that Chaoda enter into a placing agreement with joint placing agents for the placement on a "best efforts basis" of up to 388 million new shares of the company at HK$4.60 per share. Mr Kwok Ho identified his signatures on the placing agreement, dated 17 June 2009.

*Announcement of the placement and resumption of trading: 18 June 2009*

152. In an announcement dated 18 June 2009, Chaoda said that it had entered a placement agreement the previous day on those terms. The placing price was described as representing :

> " (i) a discount of approximately 12.9% to the closing price of HK$5.28 per Share as quoted on the Stock Exchange of 16 June 2009, being the last full trading day immediately preceding the date of the placing agreement;
>
> (ii) a discount of approximately 16.1% to the average closing price of approximately HK$5.48 per Share as quoted on the Stock Exchange or the last five consecutive trading days up to and including 16 June 2009;
>
> (iii) a discount of approximately 16.1% to the average closing price of approximately HK$5.48 per Share as quoted on the Stock Exchange for the last 10 consecutive trading days up to and including 16 June 2009."

153. Of the proposed use of the net proceeds of the placement, on the basis that there was a full placing of placement shares, it was stated that it was intended that there be, first repayment of the guaranteed senior notes which matured on 8 February 2010 and payment of interest due thereon and, second that the proceeds be used for general working capital requirements.

*THE CONFERENCE CALLS*

154. In all, six conference calls were conducted by Mr Kwok Ho and Mr Andy Chan with investors in the United States of America on 15 and 16 June 2009. Five of those conference calls were on the night of 15 June and one call, with the representative of Janus, on the morning of 16 June 2009 (Hong Kong Time).

*Alliance Bernstein - 8 a.m. EDT*

155. Mr Matthew Sigel testified that he had been interviewed by an officer of the SFC on 19 May 2010 and that he had signed the handwritten record of that interview. His statements were accurate as to his knowledge and belief. He had participated in a conference call at 8:00 a.m. on 15 June 2009 with Mr Kwok Ho and Mr Andy Chan of Chaoda. The latter acted as an interpreter to and from English for Mr Kwok Ho who spoke in Putonghua. However, he did not take notes of what was said in the conference call. Of the format of the conference call, he said that he asked questions throughout the call. He did not recall there being an opening statement.

156. Mr Matthew Sigel said that he was aware of the attempt in April 2009 by Chaoda to raise equity and that it had failed. He had spoken to Mr Andy Chan "in the days after" the failed April placement. Subsequent to Mr Sigel's testimony, the Tribunal obtained records of the simultaneous Global teleconference conducted by Mr Kwok Ho and Mr Andy Chan on 29 April 2009. It is to be noted that Mr Matthew Sigel of Alliance Bernstein was described as one of the participants in that teleconference. He said that he had come to understand that Chaoda had 'pulled' the April placement because "market

conditions did not support the deal". He added that he knew the "company's fundamentals" and that "it was clear to anyone who followed the company that there was a need for some kind of capital". He agreed that before the June 15, 2009 teleconference he had the impression that Chaoda wished to do a placement, adding "circumstances permitting". As a result, he said that prior to the telephone conference call he believed its purpose to be, "... to discuss an equity issuance which was going to happen".

157. Mr Matthew Sigel said that he was not aware of any participation by Alliance Bernstein in the February 2009 placement, nor was he aware that the lock-up provision in that agreement was any obstacle to the April 2009 placement.

158. Mr Matthew Sigel said that in the telephone conference call he was told that Chaoda planned to raise equity. He was not told that was definite, nor was he told, as he recalled, the size or price of an equity issue. In his record of interview, he said he had asked why the plan was to raise equity and not debt. He had not been given a satisfactory answer.

159. After the conference call Mr Matthew Sigel sent an e-mail at 9:00 a.m. to Associate Portfolio Managers, who directed orders from Portfolio Managers to traders :

> "We are expecting an equity offering from Chaoda at a price of around $5. Please participate at the market, to keep our current weight in GTG. Please calculate the size of the order using the price of the deal, not the previous close."

He explained that GTG was the acronym for his fund, namely Global Thematic

Growth. He did not recall how it was that he had come to stipulate the price as being "around $5".

160. There then ensued a conversation in an online chat room between Mr Matthew Sigel and Mr Matt Kim, one of the Associate Portfolio Managers :

> "matt kim (10:41:20 7 A.M.) Do you know an idea of a when the offering for Chaoda is going to be?
>
> matthew sigel (11:42: 03A.M.) My guess is tonight but don't know for sure."

He confirmed that he had not been given any specific timing in the telephone conference call of when Chaoda plan to do an equity offering.

161. The conversation in the online chat room continued with Mr Matt Kim pursuing the subject with Ms Lauren Knight, whom Mr Matthew Sigel described as being an equity trader in New York :

> "matt kim (1:58:12 P.M.) hey Lauren-by any chance to you see a equity offering for chaoda modern under your radar? i believe it's supposed to happen tonight?
>
> matthew sigel (1:59:56 P.M.) it's not official yet, but doing calls this morning with shareholders prepping us for possibility."

162. Of when it was that he believed that the equity offering would be made by Chaoda, Mr Matthew Sigel said:

> "I believed that it would happen before the stock started training again. So, I believe that either the deal will be announced in the morning, Hong Kong time, or that the stock would be halted."

163. Of why it was that he had formed that belief, he said :

> "Because the opportunity to speak with Chairman Kwok, during a call in which he did not deny my presumption of an equity offering was imminent was

market moving information. I believed that a very small number of investors were given the opportunity to talk -- to be put in that position that morning, that I was given."

*Fidelity - 9 a.m. EDT*

164. At 09:00 on 15 June 2009 EDT Mr George Stairs and Ms Jessamyn Larrabee had a telephone conference call with Mr Kwok Ho and Mr Andy Chan. The evidence in relation to that telephone conference call will be considered in more detail later.

*Wellington - 10 a.m. EDT*

165. Mr Sabre Mayhugh of Wellington Management was interviewed in the offices of K & L Gates in Boston, Massachusetts in the United States of America on 17 May 2010 by an officer of the SFC. Despite multiple requests, made in August and September 2011, by the Assistant Presenting Officer and an officer of the SFC on behalf of the Tribunal with K &L Gates, acting on behalf of Mr Sabre Mayhugh, the latter declined to assist the Tribunal by giving evidence, including by video link. In an e-mail sent on his behalf by K & L Gates to the Assistant Presenting Officer on 30 September 2009 it was said that Mr Sabre Mayhugh, "found himself unable to accept" that request.

166. At the request of the Tribunal to the SFC, made during the course of the hearing in February 2012, that attempts be made to locate the other four employees of Wellington who had participated in the telephone conference of 15 June 2009 and invitations made to them to testify to the Tribunal by video link, an officer of the SEC was able to establish contact with three of them. However, in an e-mail sent on 3 February 2012 to the SFC, the SEC officer advised that having made contact with Mr Adam Hall, Mr James Mordy and Mr

David Fassnacht, "all declined to voluntarily provide testimony to the SFC." Finally, an SFC officer established contact by telephone with the fourth Wellington employee, Ms Wei Li, on 20 February 2012, but advised the Assistant Presenting Officer by e-mail that she, "did not want to give any oral evidence". Further, that "she could not remember anything about the phone call with Chaoda in June".

167. In his record of interview, Mr Sabre Mayhugh said that in June 2009 he was a Vice President and Global Industry Analyst following the agricultural sector for Wellington. His assistant had received an e-mail from Mr Tim Lynch of Merrill Lynch sent at 10:15 on 12 June 2009 inviting him and Ms Wei Li to join a conference call on the morning of 15 June 2009 with Mr Kwok Ho and Mr Andy Chan of Chaoda. The purpose of the call was described as being, "for management to update key shareholders about their business and financial status." He and Ms Wei Li participated in the conference call from Boston, whereas two of his colleagues participated from Wellington's Pennsylvania office. Mr Kwok Ho spoke in Putonghua and Mr Andy Chen acted as an interpreter to and from English. He provided his handwritten notes of the meeting, which he said, "would indicate a rough flow of the call". Having noted the participation in the conference call of Mr Kwok Ho and Mr Andy Chan, Mr Sabre Mayhugh's note reads :

> "proposed transaction: USD $200-$250 million ~ $5 HK.
>
> proceeds: high yield bond $225 million to pay off 7.45 yield/in Feb 2010 issued in Feb 2005.
>
> working capital."

168. Of his notes, Mr Sabre Mayhugh explained :

> " ...Chaoda was talking about a proposal, or suggested transaction, which is an equity transaction to pay off a debt. I don't think we discussed a proposed vehicle, but my notes, if they choose to do equity transaction, it would be issued new stock and as a result, there would be a 15% dilution."

He added that his notes do not suggest that the aborted April placement had been discussed in the conference call. He did not recall being asked to participate in the proposed equity transaction.

169. Of the issue of the timing of the placement, Mr Sabre Mayhugh said that he did not recall that being mentioned, "It was nothing concrete. It could happen or not."

170. Of the information he had received, namely as to a proposed placement, its size and price, he said that he did not regard it as price sensitive information because it was not specific enough, in particular, "I don't even know if they were going to do a transaction."

*Blackrock - 11 a.m. EDT*

171. Ms Angela Yu testified by video link from the offices of Blackrock in Princeton, New Jersey in the United States of America. She confirmed that she had participated in an interview with an officer of the SFC at the offices of Blackrock in New York City on 18 May 2010. The answers that she had given were true to the best of her knowledge and belief. The Tribunal received the handwritten notes of that interview, which Ms Angela Yu had not signed, together with a typed-up copy.

172. Ms Angela Yu said that she and her colleague, Ms Lindsay Watson, participated in a conference call with Mr Kwok Ho and Mr Andy Chan which began at 11:00 EDT on 15 June 2009. She and Ms Watson were both research analysts employed by Blackrock. Ms Angela Yu graduated with a Finance and Accounting degree from the University of Michigan in 2007 and is also qualified as a Chartered Financial Analyst. Since 2007 she had worked with the Blackrock Global Allocation Fund, covering the Greater China region.

173. Ms Angela Yu said that, as the e-mail sent to her from Ms Carmen Schwender at 2 p.m. on 12 June 2009 EDT stated, she and Ms Carmen Schwender, of Merrill Lynch's New York office, had a conversation on that day in which she accepted an invitation to participate in a conference call with the management of Chaoda at 11 a.m. on 15 June 2009 EDT. She said that she was told the purpose of the call was to give them "update" on the company. Blackrock was an existing investor in the shares of Chaoda. She said that after Chaoda had announced on 29 April 2009 that it was not going to proceed with a proposed placement of shares the management held a conference call with "... all shareholders, explaining why the April offering was cancelled." She did not believe that the topic of the April 2009 placement was discussed in the June 15 2009 conference call.

174. Ms Angela Yu said that during the conference call Mr Kwok Ho spoke in Putonghua, which she herself understood, and that Mr Andy Chan spoke in English and also acted as an interpreter for Mr Kwok Ho. She made

handwritten notes of what was said by the management of Chaoda, which notes were made available to the Tribunal. She noted :

> "- plan to raise $200-250m, HK $5 dollars per share
>
> - repay debt, plus working capital".

Later, in the body of that document she noted:

> "capex 20%-30% increase in 2011 post-placement".

175. Ms Angela Yu said that she understood that the debt was to be repaid in 2010 and was a "straight bond". She had not been told by Ms Carmen Schwender that the topic of a potential placement would be raised during the conference call.

*Compliance Department report*

176. Ms Angela Yu said that she and Ms Watson considered the information to be price sensitive, it being dilutive of the existing shareholders' interest in Chaoda, so that it would be perceived as negative information. As a result, it was determined that the Compliance Department of Blackrock be informed. She understood that Ms Watson did that orally to the Chief Operating Officer Compliance, Ms Lisa O'Donnell. In an e-mail sent at 12:40 p.m. on 15 June 2009 EDT Ms Marie Dwyer, an employee at Blackrock's trading centre, advised Mr David Maryles, a lawyer in Blackrock :

> "Chaoda Modern contacted us today about coming with a secondary share offering (remember they cancel their secondary offering last month). Kent and Lindsay have spoken to the company about the offering. They were brought over the wall to have this conversation. (The prospectus and term sheet should be available within in the next few days.) We have deleted a pending order that was on the blotter in MacGregor. Can you please put Chaoda on the restricted list for the Global Allocation Funds?"

Ms Angela Yu said that Chaoda was then placed on Blackrock's restricted trading List.

177. For her part, Ms Angela Yu said that the reference to Kent was to Mr Kent Hogshire. She said that Ms Dwyer was wrong in her assumption that he had been a party to the conversation. That was evidenced by an e-mail sent at 12:02 p.m. on 15 June 2009 EDT by Ms Watson to Mr Kent Hogshire in which the subject was described as 'Chaoda Share Placement Part Deux'. She informed him of the information provided to them in the conference call. She wrote :

> "Angela and I did a call with the CFO and chairman of Chaoda this morning, they would like to try to do the share placement again. Target is to raise 200 - 250mn USD at a share offering price of 5.00 HKD. Last night's close was 5.60 HKD, so transaction would represent a discount of 10.7%.
>
> Recall they previously cancelled share placement in late April because chairman was not happy with book runners' recommended price of 4.54 - 4.81 80 KG, a 12 - 17% discount off of 5.478 KT market price when transaction announced.
>
> Goal is to use HKD proceeds to cover senior notes totalling 225 mn (1,539mn RMB) due February 8, 2010 (FY 10).
>
> ... CFO said that Merrill is the only bookrunner this time."

178. At 12:12 p.m. 15 June 2009 EDT Ms Watson sent Mr Hogshire another e-mail, in which she wrote :

> "CFO and Chairman said that if the transaction is successful they expected to increase land-acquisition capex by 20% for the year ending June 2010..."

179. In cross-examination by Mr Yuen SC, she said that she believed that at the beginning of the call Mr Kwok Ho had made a presentation in which he

described the company's situation and its future plans. She agreed that she and Ms Watson had asked questions, including some which touched on the future of funding requirements of the company. However, she said she could not remember whether she or Ms Watson raised the question of whether there was any plan to make a further fund-raising exercise, since the placement in April had been abandoned. She observed that in the sequence of her notes that matter was dealt with at the outset, "it's possible that, when Mr Kwok started the presentation, he already mentioned the company to do a placement." However, she agreed that she was not sure that it might have been raised in the question and answer session after the presentation. She did not recall that Mr Kwok Ho had said that the company had "..not yet made any decision". Similarly, she did not recall Mr Kwok Ho saying, "if the market was good, the company would consider doing another fund-raising exercise." She said, "the Chairman ... definitely told us the size of the offering and the price it would be offered ...".

180. Ms Angela Yu's attention was drawn to a letter, dated 23 October 2009, in which Mr Peter Vaughan, managing director of the Legal and Compliance Department of Blackrock, had responded to an enquiry of the SFC identifying Ms Watson and Ms Angela Yu as having participated in the conference call. It was stated in the letter that they:

> "... recall being informed that the potential offering will be made at $5.00 per share. The BlackRock employees do not recall a *specific discussion of the size* of the potential placement. They do, however, recall that during the Investor Conference the Company indicated that placement would be at approximately the same size as an earlier offering considered (but ultimately not consummated) by the company in April 2009. The earlier offering sought to raise $200 - $250 million." [Italics added.]

181. When it was suggested to Ms Angela Yu that her answer at counter 16 of her record of interview, namely that she had been told in the conference call "they would do an equity placement to raise $200 - 250m" was subject to the caveat contained in the letter from Mr Peter Vaughan, namely that there was no "specific discussion of the size of the potential placement", Ms Angela Yu said that what she meant was there was a 'range of price' between $200 and $250 million, not any specific dollar amount. She went on to say that the Chairman, "... might have said that they plan to do another offering; the size of which will be similar to the abandoned placement, and the size will be 200, 250 million."

*The Boston Company - 1 p.m. EDT*

182. Ms Carolyn Kedersha's note is dated 16 June 2009 and states at the outset:

> "Chaoda announced another capital raising exercise for $200 million USD. This is on top of the HKD 409 million (HKD 391 net of fees) raised in February."

Having analysed what she estimated to be the cash available to the company after the placement, Ms Kedersha noted:

> "My conversation with Andy Ho and Chairman revealed that they spent RMB 1.2 billion in cap ex year to date."

Later, details of the placement were described:

> "This present issue will be priced at 14% discount to last night close of HK$5.35 (or 17.85% discount price before announcement). Companies stating its reason to come back yet again was the Chinese government asking corporate to not put any money abroad and to try and attract foreign money into the country."

183. It is to be noted that HK$5.35 was the closing price at the time of suspension of trading in Chaoda shares at lunch time in Hong Kong, prior to the opening of the afternoon session on 17 June 2009. However, the placement and related details were not announced publicly until the morning of 18 June 2009 before the stock market opened. Prior to that, as evidenced from information received by e-mail by Mr George Stairs whilst he was in London, Merrill Lynch were engaged in book-building for the placement.

*Janus - 7 a.m. 16 June 2009 (Hong Kong Time)*

184. By a letter to the SFC, dated October 2009, the compliance officer of Janus Capital Asia Limited, in Hong Kong, responded to enquiries made by the SFC in respect of the participation of representatives of Janus in a conference call with Mr Kwok Ho and Mr Andy Chan at 07:00 on 16 June 2009. Mr Hochstetler was identified as having participated in the conference call. Of the discussions in the conference call, it was asserted :

> "...the Company did mention the possibility of a placement of shares of approximately USD $250 million of approximately HK $5.00/share. Immediately following the call, according to Janus' insider trading policy and procedures, Mr Hochstetler requested that the Company be placed on Janus' restricted list. The Company was on Janus' Restricted List until the information regarding the placement of shares became public on 17 June 2009."

Later in the letter it was asserted:

> "The Company did disclose the possibility of a placement of shares and sought indication of interest from Janus. Janus explored the idea of participating but ultimately did not participate in the placement of shares."

*Fidelity: Conference Call*

Ms Jessamyn Larrabee Norton

*SFC request for an interview*

185. By letter dated 10 March 2010 addressed to Messrs Skadden, Arps, the Attorneys of Fidelity, the SFC stated that, in the enquiries that they were making into the circumstances in which Mr George Stairs had placed an order on 15 June 2009 EDT to sell 374,000 shares, they wished to interview Mr George Stairs as "a person under investigation" and Ms Jessamyn Larrabee as a witness and were prepared to come to Boston to do so. Messrs Robertsons replied on behalf of Ms Jessamyn Larrabee, in a letter dated 1 April 2010, advising that Ms Jessamyn Larrabee "... has very little actual recall of that matters about which the SFC would seek to interview her". Further, having noted that Robertsons and Ms Jessamyn Larrabee assumed that the SFC had received "all relevant material documentation and accumulated its own evidence" in respect of that trading the SFC were informed, " ... Ms Jessamyn Larrabee feels that there would be no point in participating in the voluntary interview process sought of her by the SFC" and advised that she declined that invitation.

*The Tribunal's request for testimony*

186. By a letter, dated 9 February 2012, from Nutter McClennen & Fish, Attorneys-at-Law in Boston, Massachusetts in the United States of America written on behalf of Ms Jessamyn Larrabee, now described as Ms Jessamyn Larrabee Norton, the Tribunal was informed that she declined its request, by way of a Notice dated 31 January 2012, that she give testimony to the Tribunal by way of video link. She said that she did so, "upon advice of counsel, and for personal and professional reasons. Further, she said that, as she had previously

stated, "I have little recollection of the details of the matters that are the subject of investigation". Finally, she said "I will not be available to give evidence by video-link due to scheduling obligations for my new employment and other personal and professional reasons." Although it was unsolicited by the Tribunal, she provided a signed but undated statement.

*The first statement*

187. Ms Jessamyn Larrabee said in her statement that she held the degrees of Bachelor of Arts awarded by Wheaton College, Massachusetts in 1999 and that of Masters of Business Administration and Finance, Accountancy and Strategy awarded by the University of Chicago's Booth School of Business in 2006. She is a Chartered Financial Analyst and joined Fidelity in 2007, where she worked as an equity research analyst. That employment ceased in early 2011. Now, she is the Chief Investment Officer of a small investment firm in the United States of America.

188. As a research analyst at Fidelity one of the companies that she followed was Chaoda. At the invitation of Mr Tim Lynch of Merrill Lynch she and Mr George Stairs participated in a conference call with representatives of Chaoda. It was held on a Monday in June 2009. Of the conference call she said in the statement:

> "(it) consisted of a general business update about the company and a reiteration of a securities placement that had been made public several weeks earlier. I viewed the call as a routine update from a company, not unlike thousands of other calls I participated in with representatives from many different companies."

189. She said that after the call, "consistent with my standard practice" she had drafted a "Quick Note summarising the call, which I distributed through the internal Fidelity distribution system."

190. Of the information imparted by the representatives of the company during the conference call, she said :

> "I did not believe there was any non-public information discussed on the call. Nobody on the call said that any information discussed was non-public, and there was nothing about the call that suggested any non-public information was discussed.
>
> I would not have distributed a Quick Note if I had any suspicion or belief that the information received from Chaoda was non-public information."

*Second statement*

*(i) contemporaneous notes*

191. In an undated supplemental statement, provided through the same Attorneys by a letter dated 21 February 2012, by way of their response to the Tribunal's enquiry for further assistance, Ms Jessamyn Larrabee identified an undated typed note headed, "CHAODA MODERN at HK $5.60 offering at 5.", as what appeared to her to be contemporaneous notes that she had taken during the conference call held with Mr Kwok Ho and Mr Andy Chan on 15 June 2009.

192. In a letter, dated 22 February 2012, Messrs Herbert Smith, acting on behalf of Fidelity, stated that the text of the notes was on a Microsoft Word file by an author bearing Ms Jessamyn Larrabee's corporate identification number at FMR. The file was created at 09:04 and last modified at 09:35 on 15 June 2009.

193. At the outset, the text states :

"Proposing a placing $200 - 250mn. Price at HK 5.00. Use the proceeds = working capital. #2) use for next year's repayment of the HY Bond. They hope we can support.

Chairman Kwok: cooperation is the same as they expected. If they don't have it-they are still able to use their internal cash flow to meet their HY bond obligations."

Later in the text, the following is stated:

"Capital spending with our (or?) without offering. YE is due in June. If this is successful-there is not much to increase capex for this year. For FY 10, capex plan will be ~ 2.5bn rmb – 15 - 20% growth. IF do the exercise, the growth rate in 2011 will go from 15 - 20% to 20 - 25%. Time lag between getting money and generating-one year to 1.5 years.

12% discount to today's price. Can reinvest in capex to land acquisition in 2010 will increase growth for 2011. Capex: 2.5 - 2.8 bn rmb. For 2010, capex 2.5-2.8 bn (with the issuance 2.5-3 without the capital increase). WITH capital increase= 3.5 – 4 bn rmb. In year 2011, reach around 4 - 4.5 bn."

Finally, under the heading 'One topic', it was noted:

"Proposing the transaction-business environment is favourable."

*(ii) Quick Note*

194. Ms Jessamyn Larrabee said she was the author of the Quick Note, which was sent out at 11:43 a.m. on 15 June 2009, the subject title of which was "CHAODA MODERN AGRIC (HLDGS)LTD, Quick Note; Upcoming equity offering of $200 - $250 mn. Mgmt has changed its tune." She said that she drafted the Quick Note based on the call and her contemporaneous notes.

195. In the text, the price of the share was described as being "5.65" . Under a bold heading, it reads :

**" Upcoming equity offering of $200 - $250 mn. Mgmt has changed its tune.**

> George Stairs and I spoke with the CFO and Chairman of Chaoda Modern Agriculture this morning. They requested a call to notify us that they will soon be doing an equity placement to the tune of $200 – 250 mn at HK 5.00 (discount of 12% to today's price at HK $5.20). The use of the proceeds will be to replay next year's RMB 1.7 bn high-yield bond when it comes due.
>
> Andy (the CFO) argues that, by raising the capital to pay off the bond, Chaoda will be able to put more money towards capex and growth for fiscal years 2010 and 2011..."

The final paragraph states :

> "Bottom line: we knew that Chaoda would be coming back to the market right around now after their botched placement at the end of April. Surprisingly, the stock is outperformed to the tune of ~ 6% since that happened. Management is naive at best and fraudulent at worst, but most would argue that this is captured in the valuation..... The stock will fall as the placement happens in the stock gets locked up. However, management is finally saying the right thing about using the money to invest in capex instead of arguing with investors about the necessity of a "cash buffer". Stay tuned."

## THE SPECIFIED PERSONS

### *Mr Kwok Ho*

196. Mr Kwok Ho said that Mr Andy Chan explained to him who the various participants were in the conference calls. Of Fidelity, Mr Kwok Ho said that he was not clear as to whether it was a large shareholder of Chaoda. However, in advance of the conference calls Mr Rodney Tsang had told him that the six institutional investors with whom the conference calls had been arranged were "quite sizeable". He had heard of the name Fidelity. Mr Kwok Ho said that he could not recall whether he knew prior to the conference calls that he was to have a conference call with a representative of Janus. In the conference call itself he was aware that the other party was a representative of Janus.

197. Mr Kwok Ho said that Mr Andy Chan had not warned him against disclosing material price sensitive non-public information to investors in the course of the telephone conference call. There was no need to him to do so. He was not going to disclose such information, nor did he do so. Although Chaoda's company secretary had played a role at an earlier stage, a long time ago, in advising him about the disclosure of material, non-public, price sensitive information she gave no specific advice in respect of the telephone conference calls 15 and 16 June 2009 :

> "In addition, we knew what to say and what not to say."

He could not recall if Chaoda had its own protocols for the disclosure of material non-public information. He was aware that 'Funds', not just Fidelity had protocols in place about the receipt of such information.

198. Mr Kwok Ho explained repeatedly how he had communicated with the investors in the conference calls. If he was asked directly if Chaoda planned to launch a placement, he would respond with what he described as the "standard answer", namely "Up to today, the company has made no decision to do a placement." If the investor had pressed with further questions, he would respond that if market sentiment was good, and permitted the launch of a placement, the company would consider doing so. If there were no further questions, he would stop there. However, some of the investors had pressed for more detail, in which circumstances he had responded by saying that if market sentiment allowed the financing to be done, "the amount to be raised and the price would be similar to April. Also included was what those monies would be used for if there was such financing is going to happen." By that, he

meant $200 - $250 million at about $5 per share. He had given Mr Rodney Tsang a summary of that in their midnight meeting on 15 June 2009.

*The conference call with Fidelity*

199. Of the conference call with Fidelity, Mr Kwok Ho denied that he had disclosed that Chaoda intended to do a placement of its shares; that it was intended thereby to raise approximately $200 - $250 million at an expected price of $5 per share. He did not ask the investors to support the placement. Of the issue of a placement, he said that if it had been raised he would have informed them, "At the moment, the company has not made such decision. If the market allows, we may." If no further questions had been asked, he would have stopped there. He would have proceeded in the face of further questions in the manner described earlier. He did not recall if he mentioned the price and size of a placement to Fidelity. If he had done so, it would have been in the circumstances he had outlined earlier, namely on the basis of a series of hypotheses.

200. In his written statement, produced to the Tribunal as his evidence in chief, Mr Kwok Ho said that even if the representatives of some of the investors had drawn the inference from what was said in the conference calls that Chaoda would soon launch a placement of its shares :

> "I firmly believed at the time that they would abide strictly by the relevant rules and regulations and professional conduct, and would not make use of any price sensitive information to deal in Chaoda shares. The persons who participated in the six telephone conferences were all professional representatives from renowned and very large institutional investors in the industry. I had no reason at the time to cast any doubt on their professional integrity."

201. In the face of the suggestion of the Presenting Officer, that he had informed Mr George Stairs that Chaoda intended to make an offering of common stock to raise US$200 - US$250 million at an expected price of $5.00 per share, Mr Kwok Ho said that it was "impossible" for him to have done so :

> "Because at that time, Merrill Lynch, being a professional organisation, even they hadn't told me about the placement, for the size of 200 to 250 million at a price."

202. Of the suggestion that he had reasonable cause to believe that Mr George Stairs would use that information to deal in Chaoda shares, he said :

> "In raising this question, he's insulting my wisdom, my intelligence and also my conduct, my conscience as a person. Because if I decided to do this immediately, and if I knew that he was going to sell the shares of the company, I am not dull; I am not an idiot. If I did do that, this will be hurting others, and it's a lose-lose situation, and it's not beneficial to myself, not beneficial to the company, and there's no benefit at all in doing that."

203. Mr Kwok Ho disagreed with the suggestion of the Presenting Officer that the purpose that he had disclosed non-public, price sensitive information to Mr George Stairs, was so that Mr George Stairs could use the information to secure a profit or avoid a loss. He said :

> "As an entrepreneur, when I perform my role to communicate with my investors, I have been doing my best to communicate and tell them the truth. I would not have enabled the investor to avoid loss. I didn't have that in my mind."

*Mr Andy Chan*

204. Although Mr Andy Chan accepted that he and Mr Kwok Ho had conducted a total of six telephone conference calls with investors of Chaoda on

the evening of 15 June and the morning of 16 June 2009, he said in his statement, tendered as is evidence in chief, that he could not recall "the details or particulars of these calls". Such notes as he took were only for the purposes of interpreting for Mr Kwok Ho and, he believed, had been disposed of afterwards. He no longer had any clear recollection of the conference calls. Nevertheless, he was certain that the topic of Chaoda's, "... funding requirements must have been discussed". It was possible that information was supplied as a result of an investor question or it was possible that Mr Kwok Ho raised the topic.

205. Mr Andy Chan said in his witness statement that before studying the material available in the Tribunal he believed that the conference calls had been conducted in line with his usual practice. In particular, he said that if the question had been raised as to whether Chaoda had "any plan to issue shares" he and Mr Kwok Ho would have retorted with the stock answer, "None for today, but we are keeping all options open." If the question had been raised of how much the company would want to raise if new shares were issued, he believed that his answer was they could refer to what the company had tried to do in April 2009, namely "an attempt to issue shares at HK$5.00 to raise US $200 million to 250 million." Finally, he believed that he would not have said that Chaoda "would be launching a share placement very soon" with those terms as to size and price.

206. However, having had the opportunity to read the accounts of the fund managers, in records of interview and contemporaneous records, although he still could not, "recall what was said in those tele-conferences" he had no reason to think that those records were false or inaccurate. As a result, he stated :

"Thus, I now accept that the contemplated share placement for a size of US $200 to 250 million at around HK $5 a share *might* have been mentioned in the course of the conference calls. As I was the only one from Chaoda speaking English that evening, I have to admit that these words *might* have been uttered through my mouth. I have to say that I am most surprised that I could have my guard down that evening or the following morning.

I now believe I may have mistakenly allowed myself to think that these fund managers has somehow been informed that the purpose of these calls was for Chaoda's management to explain the rest you now are they contemplated placement." [Italics added.]

207. In the context of his concession, that those events *might* have occurred, Mr Andy Chan then addressed in his statement his belief as to the use of the information:

"I now strongly believe that the participants in those calls were all highly professional fund managers from the top tier houses. I now certainly believe that they would understand that if any non-public price sensitive information was obtained by them, they certainly should not have used such information to trade in the securities market. I am certain at the time (15 June 2009) I did not have any doubt that we mentioned a placement of shares for the size of US $200 to 250 million at a price of around HK $5 a share, these professional fund managers would have immediately realise that they had received non-public price sensitive information, and that they would not be allowed to deal upon hearing this."

208. In cross-examination by Mr Huggins, Mr Andy Chan said of the telephone conference with Fidelity, including Mr George Stairs, that he had, "no recollection of what was said in the meeting". He had no recollection of whether or not Mr George Stairs had arrived late or left early at the conference call.

209. In cross-examination by the Presenting Officer, Mr Andy Chan was asked if it was his evidence that in the conference calls on 15 and 16 June 2009 " ... you *may* have discussed ... Chaoda's plan of a contemplated placement." He replied, "there is a possibility, but I don't remember clearly". When the question was posed on the basis that it "*might*" have been discussed, Mr Andy Chan said that he really could not remember.

210. Mr Andy Chan's attention was drawn by the Presenting Officer to a statement in an e-mail, that had been sent at 12:02 on 15 June 2009 within Blackrock from Ms Lindsay Watson to Mr Kent Hogshire, in which a description was given of the recently completed conference call between Ms Angela Yu and Ms Lindsay Watson with Mr Kwok Ho and Mr Andy Chan. At the conclusion of the e-mail it was asserted: "CFO said that Merrill is the only book runner this time". Mr Andy Chan accepted that Ms Angela Yu had said in her testimony that she believed that the information in the e-mail had been provided to them in the course of the conference call. However, of the specific assertion that he was a provenance of that information, Mr Andy Chan said :

> "I didn't say such things, because I don't know who was going to do it, and I don't know why she wrote this."

*Material non-public price sensitive information*

211. When it was suggested to Mr Andy Chan, that he had interpreted Mr Kwok Ho's statement to Mr George Stairs and Ms Jessamyn Larrabee from Putonghua into English that, "Chaoda intended to raise, approximately, 200 to US $250 million in an offering of common stock at an expected price of HK $5

per share", he said that he didn't remember. He accepted that if those figures had been mentioned the information was, "non-public and price sensitive".

212. Of the suggestion, that he had reasonable cause to believe that Mr George Stairs would use the information to deal in Chaoda shares, he said :

> "I don't believe anyone, if they get any non-public information, would do any dealing with this information."

*Mr George Stairs*

213. Mr George Stairs said of the conference call arranged for 09:00 on 15 June 2009 EDT with Mr Kwok Ho and Mr Andy Chan, that not only was it described as being an "update" by the company's management but also the manner in which it had been arranged by Merrill Lynch, namely without the invocation of any of Fidelity's protocols, indicated to him that no material non-public information would be discussed during the conference call. Further, in all his 23 years of experience as a portfolio manager he had, "never received unexpected and 'unflagged' non-public information." He had never informed the Compliance Department of any of his employers requesting that dealing in the shares of the company be restricted, in consequence of what he had been told by an investment banker or in a conference call with the management of a company.

214. In his oral testimony, he confirmed his statement to the Tribunal that he believed that he had arrived late for the conference call and left early, whilst it was still going on. In support of that assertion, he pointed out the disparity between the ambit of topics encompassed in Ms Jessamyn Larrabee's

contemporaneous note and his own handwritten note. Ms Jessamyn Larrebee's notes contained three paragraphs of text about various topics after his own note had come to an end. He said that, as was noted in his diary schedule, he had to attend another telephone conference at 09:30 that morning, with Anglo-American. He did attend that meeting and made fuller notes of the meeting, which he said indicated that he had been at the meeting from its commencement.

215. Mr George Stairs said that he did not recall the format of the conference call, in particular whether it had begun with a presentation by Mr Kwok Ho which was then followed by a question and answer session. His recollection was that it was primarily in question and answer form. Since Ms Jessamyn Larrabee was hosting the conference call, she led the questioning for Fidelity.

216. Mr George Stairs accepted that whilst both their contemporaneous notes of the conference call with the management of Chaoda began with reference to the size of the offering as being $200 - $250 million, his own note contained no mention of the price of the placement shares, whereas Ms Jessamyn Larrabee's note made reference to the price of $5. In his statement to the Tribunal, he said that he did not recall whether the price of $5 was mentioned in the conference call. However, in his oral testimony he said that during the course of 15 January 2008,

> "he came to the understanding that the price they had mentioned was $5."

He had a vague recollection that during the course of the day, when he encountered and talked to Ms Jessamyn Larrabee in passing whilst in the office, he had come to learn that the placement price was $5 per share, "so I think that

she mentioned then about the $5, and she mentioned that she written a Quick Note on the subject."

217. Of the Quick Note, Mr George Stairs confirmed in his oral testimony his assertion in his statement to the Tribunal that he did not think that he had read the Quick Note at the time. It would have been circulated to him in his e-mail system. Similarly, it would have been circulated to Analysts and Portfolio Managers that had 'signed up' for receipt of such material. There could have been dozens of such persons, or even hundreds as Skadden Arps, Attorneys acting for Fidelity, had asserted in their letter dated 26 August 2009 to the SEC. He did not really know the size of the circulation list.

218. Although the last sentence of the first paragraph of Ms Jessamyn Larrabee's contemporaneous notes of the conference call of 15 June 2009 stated, "They hope we can support", Mr George Stairs said that he had made no such note himself and did not recall that having been said.

219. Mr George Stairs accepted that both he and Ms Jessamyn Larrabee had made similar notes in respect of what they had been told by Mr Kwok Ho and Mr Andy Chan of the capital expenditure of Chaoda, save that he made no note of the 12% discount at which the placement shares were to be offered to the then market price of Chaoda shares, namely $5.65, to which both of them made reference. He did not recall why he had not made a note.

220. Mr George Stairs agreed that there was no mention in either his contemporaneous notes or those of Ms Jessamyn Larrabee of any mention of the placement proposed by Chaoda in late April 2009.

221. In cross-examination by the Presenting Officer, Mr George Stairs was asked if he was surprised to receive information about a placement, its size and and price in the telephone conference. He said that he was not, "it was a statement of intent of something we had anticipated since April." In his statement to the Tribunal, Mr George Stairs said (paragraph 74) :

> "The predominant feeling I had was that there was nothing new in this update and we and the market had known for some time that this placement was going ahead ... it was obvious that Chaoda had made its mind up and the placement was going ahead."

*Timing of the placement*

222. Mr George Stairs went on to deny that following the conference call, and having regard to his expectation that Chaoda would seek to revive the failed April placement when conditions permitted, he believed the placement was imminent. Mr Kwok Ho and Mr Andy Chan had given "no indication of timing at all". What they were told in the conference call, "confirmed that there was a placement; they continued to intend to do the placement. But there was no indication of timing on the call." As to the timing of the placement, he said, "I think we thought it was in the coming weeks". Later, he added, "Certainly not in the next day or two." Furthermore, he said that he thought "that they would have said that they were doing a ... that they were going to do one in a day or two, if that's what they were planning to do."

223. Of the significance or otherwise of the fact that the Chairman of Chaoda has participated in the conference call, of which there would be a total of six such calls, Mr George Stairs said, "We were very pleased that he was on the call, but again, it's not unusual for the Chief Executive of a company to participate in a call with us." On the other hand, he conceded that this was the second time only that Mr Kwok Ho had participated in a conference call with Fidelity, the first being on 28 April 2009.

*3 July 2009 e-mail to Mr Eric Wetlaufer: Facts/ Extenuating circumstances*

224. In a two-page note, entitled 'Facts' and 'Extenuating circumstances', that Mr George Stairs had attached to an e-mail dated 3 July 2009, he had sent to his manager Mr Eric Wetlaufer, he addressed the circumstances of the conference call on 15 June 2009, his order to sell 375,000 Chaoda that night and his subsequent order to buy 630,000 Chaoda shares on 17 June 2009 whilst he was in London. He said that he had prepared the two-page notes two or three days prior to 3 July 2009. In the note entitled 'Facts', Mr George Stairs asserted :

> "They opened the discussion saying they were doing a Capital Raising of US $200-250M. Jessamyn thinks they mentioned a price of around $ HK 5.00, although I do not have that in my notes. The purpose of the Offering was to repay the debt coming due early in 2010, and to retain the financial flexibility to maintain growth. *I remarked to her that it was surprising that stock was not down in HK trading on June 15.*" [Italics added.]

225. In his oral testimony Mr George Stairs confirmed his assertion in his statement to the Tribunal, that he could not recall what had prompted him to

make the observation in respect of the Chaoda share price in trading on 15 June 2009. He said :

> "...the market had been expecting this placement ever since the April placement was withdrawn. So, while often a stock price will drop, when, you know, (a) deal is, kind of, confirmed, in this case, the stock had gone down a lot when the prior deal was withdrawn ... in any case ... the indicated size and price for the market had, kind of, expected, so no surprise."

226. In his oral testimony, Mr George Stairs said that he had made that remark to Ms Jessamyn Larrabee *sotto voce* during the conference call. He accepted that in order to do so, data as to Chaoda must have been available during the conference call. They were in Ms Jessamyn Larrabee's office and she had access to Bloomberg on a computer screen. One or both of them had taken a look at the screen. Earlier in his evidence, Mr George Stairs said that he had not looked up any information as to Chaoda on "wire services or anywhere else", prior to the conference call.

227. Of the information that had been given to him in the conference call by Mr Kwok Ho and Mr Andy Chan, Mr George Stairs said in his oral testimony :

> "It did not even occur to us at the time that this was non-public information ... We did not discuss that, we did not even think about it at the time."

228. In his statement to the Tribunal, Mr George Stairs set out at some length the various reasons why nothing alerted him to the possibility that the information was non-public. Some or all of those reasons were enumerated by him in the note that he had sent to Mr Eric Wetlaufer on 3 July 2009 and/or had

been referred to in the submissions made on his behalf by Skadden Arps to the SEC. Those factors included :

(i) that Merrill Lynch was involved in arranging the conference calls with the Mr Kwok Ho and Mr Andy Chan on both 28 April 2009 and 15 June 2009. In the former, they had gone through the appropriate Fidelity protocols, relevant to the disclosure of material non-public information to him as a Fidelity Portfolio Manager. In the latter, they had simply informed Ms Jessamyn Larrabee and him directly that management wished to give them a business "update";

(ii) that he had received no "Walls and restrictions" from Fidelity's ethics office;

(iii) that neither Mr Kwok Ho nor Mr Andy Chan warned or cautioned them in any way that they were going to impart material, non-public, price sensitive information to them in the conference call;

(iv) that as the Analyst most familiar with Chaoda, Ms Jessamyn Larrabee had not alerted him in anyway whatsoever that the information imparted to them was material, non-public, price sensitive information;

(v) that, in publishing a Quick Note after the telephone conference in the morning of 15 June 2009, it was to be inferred that Ms Jessamyn Larrabee did not consider that the information imparted was material, non-public, price sensitive information; analysts do not publish notes when they are "over the wall";

(vi) that he had been informed that Mr Kwok Ho and Mr Andy Chan

had a schedule for conducting a total of six conference calls on 15 June 2009 EDT with investors in the United States of America and it was to be inferred that the same information would be imparted to each of the investors; and

(vii) that he believed that the market knew the placement of approximately the size stipulated in the conference call was inevitable after the proposed April placement had not been proceeded with, given that the earlier proposed placement evinced a desire by Chaoda to obtain further capital and that the real reason that it had not been proceeded was because of a 'lock-up' provision of 90 days in the 19 February 2009 placement, in which new shares could not be issued.

229. Mr George Stairs acknowledged that there was readily available to him a number of methods by which he could check that the information that had been imparted to him was material, non-public, price sensitive information: he could have directed a question to that effect to the management, either in the conference call or afterwards in an e-mail; or, the same question could have been directed towards Merrill Lynch; research could be made of Bloomberg or of Google on his computer. He acknowledged :

> "if we had checked ... we would have seen there was no announcement ... I blame myself for not checking further. You know, I've had the training, I've been in this industry a long time, and I should have checked more, rather than just saying "Well, you know, we have these tough protocols, we have brokers we deal with who know those protocols, we have companies who, with the brokers, came through those protocols in April."

*The order to sell some Chaoda shares: the night of 15 June 2009 EDT*

230. Mr George Stairs said that at about 10:30 p.m. on 15 June 2009 EDT, while he was at his desk at home, he noticed that the price of Chaoda shares "was drifting down a bit". As he had done on 22 May 2009, he decided to "trim" his holding of Chaoda shares by one third. This decision was, "pursuant to my view of the company as established in May and a pre-existing strategy to reduce my fund's holding in that stock." In particular, he said that he was still concerned about Chaoda's financing strategy, and that Chaoda intended to undertake a placing, with which he disagreed; his emerging market colleagues had liquidated their entire Chaoda positions and Chaoda's share price was up 10% of the price at which he had sold Chaoda shares on 22 May 2009.

231. Mr George Stairs said that he entered a 'Sell' order on his laptop computer, which order he sent to the Hong Kong trading desks used by Fidelity, FIL. He did so because that was the trading desk that was open and trading at that time.

*Trading in Chaoda shares in the morning of 16 June (Hong Kong Time)*

232. Chaoda shares had closed on Friday, 12 June 2009 at $5.65. On Monday, 15 June 2009 the first sale was executed 09:50 at $5.50. Thereafter, the price at which sales were executed did indeed drift down, albeit that as it did so there were upward spikes in the prices at which shares were sold : at 10:01 at $5.46; at 10:06 at $5.42; at 10:08 at $5.39; at 10:18 at $5.32; at 10:30 at $5.37; and 10:35 at $5.36 - $5.33; and 10:38 at $5.33. About 2.3 million of the approximately 7.3 million Chaoda shares sold on 16 June 2009 had been sold by

10:38 that day. To put the fall of Chaoda shares into context, it is to be noted that the Hang Seng Index fell 5.71%, or 333 points on 16 June 2009.

233. In the note that he attached to the e-mail that he sent on 3 July 2009 to Mr Eric Wetlaufer, Mr George Stairs stipulated 10:38 as the time at which he had entered the 'Sell' order for some Chaoda shares held in the International Value Fund, which he managed. In his oral testimony Mr George Stairs explained that he thought he got that exact time from the printer from the 'PATS' trading system. No printout was presented to the Tribunal. He said that the order was to sell '25 basis points' of the Portfolio's funds at a price limit of HK$5.30. Later, he explained that a basis point was 0.01% of the portfolio's funds.

234. The order was stipulated to be 375,000 shares. Then, the order, now stipulated to be for the sale of 374,000 at a limit of $5.30, was noted as "Taken" and "Accepted/Rejected" at 11:06 p.m. and at 11:08 p.m., respectively, on 15 June 2009 EDT in the 'TEAU' system. That order was executed in full in Hong Kong during 16 June 2009 (Hong Kong time).

235. Mr George Stairs explained that the sale was a "continuation of his trim program". By early May 2009, he had come to the view that the funds that he managed had too large an exposure to Chaoda. He determined that it was time to reduce those holdings. He was concerned that the company had changed its financing strategy by pursuing the aborted April placement. The market's negative perception of that strategy reduced the valuation according to the stock. Chaoda's earnings and cash flow were diluted by the February placement and

would be furthered diluted by any subsequent placement, thereby reducing the return to investors.

236. Mr George Stairs said that he had reduced his 'target price', namely the price at which he would liquidate his holding in Chaoda, to $6.00 - 6.50. The decision to raise cash by the proposed late April placement, where there was no need to do so, concerned him. There was an 'overhang' to the shares, created by the prospect of another placement, which would limit the shares upside. Both Ms Jessamyn Larrabee and Mr Rekowski had liquidated their positions in Chaoda in early May 2009. He had even sought Ms Jessamyn Larrabee's advice in an e-mail sent on 30 April 2009 as to whether he ought to "dump" his Chaoda shares. Although she had not answered his enquiries directly she had said, "I cannot see upside of the stock until at least the end of the lock-up and most likely, until the HY bond in February 2010. At least I cannot see relative outperformance."

237. Mr George Stairs took issue with the assertion made in the Skadden Arps letter of 7 January 2010 to the SEC, in which it was asserted that he had "trimmed his funds' position in Chaoda shares on June 15 because he was primarily a value-style portfolio manager and he believed that Chaoda's shares were "overvalued at HK $5.30". He said that at that point in time his price range for Chaoda was $6.00 - $6.50. He went on to explain :

> "Overvalued to me was $6.00 or above. But we were clearly closer, at $5.30, than we had been when I sold his stock-my first trim sale at $4.80-sometime in May of 2009."

238. Mr George Stairs explained that he had held several meetings with Skadden Arps and provided them with documentation, including that which had been received as 'GS1-29' by the Tribunal. However, he had not reviewed their letters to the SEC of 26 August 2009 and 7 January 2010 before they were sent out.

*Trading in Chaoda shares in the days prior to 15 June*

239. Mr George Stairs accepted that he had not sold any of the Chaoda shares in his funds on the trading days prior to 16 June 2009. On 15 June 2009, the high price had been $5.80 and the low $5.46. On 12 June 2009 the high had been $5.80 and the low $5.50. In the context of the high being $5.74 and $5.83 on 4 and 5 June 2009, Mr George Stairs explained that he was in Frankfurt on those days with "back-to-back meetings at a financial services conference, and basically out of touch." Nevertheless, he accepted that these were opportunities to sell :

> "I wish I had sold. But I didn't. But I did sell, still, 10% above what I sold in my first trim back in May."

He accepted that in the week 8 to 12 June 2009 he was in the office in Boston. He wished that he had sold at some of the intraday highs that were reached in that week.

240. At 6:45 p.m. on 16 June 2009 EDT Mr George Stairs flew from Boston, Massachusetts to London, where he arrived at about 05:00 on 17 June 2009. He reached Fidelity's office in London very early that morning. He found out, either from Bloomberg or from some kind of message from Fidelity or FIL Trading in Hong Kong, that trading in the shares of Chaoda had been suspended.

In his statement to the Tribunal he said that Chaoda had publicly announced the placement price of HK$4.60. However, the public announcement was not made of the placing of the shares and the resumption of trading until 09:14 on 18 June 2009 (Hong Kong Time).

241. In his oral testimony Mr George Stairs said that his order had been placed as part of the placement order gathering and relayed to the placing agent. An e-mail from Mr Alan Leung sent to asiapacificdeals&ipo@fil.com at 1:34 AM on 17 June 2009 EDT provided particulars of the placement, which was yet to be announced publicly. A total of 337 million shares were to be placed for about US $200mm at a "fixed price: $4.60 per share", which was stated to be a 14% discount to the closing price on 17 June 2009 of $5.35.

*The order to buy Chaoda shares*

242. Mr George Stairs said that the placement price of $4.60 was "a bit of a surprise". It was a " ...surprisingly low price". At that price his target range for Chaoda's share price of $6.00 - $6.50, "was over 30% upside". Also, by doing the placement the 'overhang' on Chaoda shares have been removed. Further, repayment of the high yield bond in February 2010 was no longer in doubt. Although he did not like the fact of the placing, the price was "attractive again". As a result, he placed an order to buy 20 basis points, or 2%, of his fund's value or 630,000 shares. The order was recorded in the TEAU system at 05:02 on 17 June 2009 EDT. In due course, it was executed in full.

*Material received at the request of Mr George Stairs*

243. At the request of Mr Huggins, on behalf of Mr George Stairs, the Tribunal received evidence, both by written statements and orally by video-link, from Mr Andrew Boyd and Mr Bruce Herring, respectively a Vice President of the Special Situations Group and a Group Chief Investment Officer at Fidelity.

*Mr Andrew Boyd*

244. Mr Andrew Boyd, an Attorney admitted to the Bars of the Province of Ontario in Canada and the State of Massachusetts in United States of America, began his employment with Fidelity in 2004. The Special Situation Group is responsible for, "establishing protocols for and coordinating the receipt, the internal distribution and use of non-public information about securities or their issuers in connection with securities transactions, including equity private placements".

245. Meetings of Portfolio Managers of Fidelity with the management of companies for the purposes of disseminating a general business update are arranged either through Fidelity's Investor Relations Department or through a brokerage firm acting on behalf of the company. The first point of contact is normally directly with the analyst, who might then invite the portfolio manager to participate.

*Fidelity's Protocols: material non-public information*

246. By contrast, Fidelity has policies and procedures designed to prevent the misuse of material non-public information by its associates. In particular, Fidelity has a protocol that governs the communication of non-public

information to its investment professional by a publicly traded company which wishes to communicate that information prior to making a public announcement. The company, or its agent, is required to contact Mr Andrew Boyd's office or, in the Asian market, the Equity Capital Markets of FIL at its offices in Singapore, which in turn relays information to Mr Andrew Boyd's office. In its turn, Mr Andrew Boyd's office contacts the Portfolio Managers whom it is considered would be interested in receiving the information and makes enquiry of them, without providing information that would identify the company concerned, as to whether they would be interested in receiving the material non-public information. In the face of an affirmative response by the Portfolio Manager Mr Andrew Boyd's office notifies Fidelity's Ethics Office and its Compliance Group of that fact. The Ethics Office establishes a 'wall', which prohibits the Portfolio Manager from disclosing information to others or trading in the securities of that company, until such time as the Portfolio Manager is informed that the 'wall' has been removed and that he is free to resume trading in those shares. An e-mail, to which the Portfolio Manager is required to respond, is sent advising the establishment of a 'wall'. For its part, the Compliance Group establishes a systemic restriction on trading securities of that company by funds or accounts managed by that Portfolio Manager.

247. Mr Andrew Boyd said that in circumstances where a share placement is imminent, in order to avoid the risk of intentional or unintentional communication of material non-public information to Fidelity, the latter expects a broker or placement agent not to contact Fidelity's investment professionals directly to arrange a meeting with the management of the company but rather to do so through the Special Situations Group. Nevertheless, Fidelity recognised

that in circumstances where material non-public information was disclosed to Fidelity's investment professionals, other than in accordance with Fidelity's protocols, intentionally or inadvertently, those persons had a duty not to disclose or deal on that information.

248. Mr Andrew Boyd said that on a continuing basis Fidelity disseminated information to brokers and placement agents in respect of its protocols regarding Fidelity's receipt of material non-public information and conducted related meetings. He understood that there had been two such meetings, in April 2007 and April 2008, with representatives of Merrill Lynch in Hong Kong.

*The April placement: use of the Fidelity protocols by Merrill Lynch*

249. Mr Andrew Boyd said that on 26 April 2009 Merrill Lynch in Hong Kong had invoked the Fidelity procedures for the disclosure of material non-public information and had informed FIL in Singapore of the planned Chaoda placement, its size and price. By an e-mail from Ms Kirsty Mactaggart, FIL had advised Mr Andrew Boyd's office of the information, which in turn had enquired of Mr George Stairs whether or not he wished to receive material non-public information. In consequence of his affirmative response, Mr George Stairs was provided with that information, after which he was advised by e-mail that he was now 'restricted', which status was confirmed subsequently in an e-mail to Mr George Stairs from Fidelity's Ethics office sent at 4:27 p.m. EDT on 29 April 2009 advising him that he was now subject to the 'Walls and Restrictions' provisions.

250. At 09:49 on 27 April 2009 (Hong Kong) trading in shares of Chaoda on the Stock Exchange of Hong Kong was suspended at the request of the company, which announced that that was pending the release of an announcement regarding the placement of its shares. In those circumstances, Mr Andrew Boyd acceded to a request by Mr George Stairs that Ms Jessamyn Larrabee be brought 'over the wall'. However, having come to learn that representatives of Merrill Lynch in Hong Kong had contacted Ms Jessamyn Larrabee directly, in connection with the arrangements for a conference call between Mr Kwok Ho and Mr Andy Chan, on the one hand, and Mr George Stairs and Ms Jeesamyn Larrabee, on the other hand, Mr Andrew Boyd said that he contacted Mr Nicholas Lee of Merrill Lynch in Hong Kong. He voiced his concerns to him that direct contact had been made with Ms Jessamyn Larrabee when a material non-public equity placement was under contemplation, asserting that such contact should have been through Mr Andrew Boyd and not directly with Ms Jessamyn Larrabee.

251. For his part, Mr Nicholas Lee had testified that he was aware of protocols within Fidelity which governed their receipt of material non-public information in respect of the company or its shares. He agreed that from time to time Merrill Lynch received letters from Fidelity, of which the letter from Mr Brian Hogan dated 24 August 2009 was but an example, reminding Merrill Lynch of those protocols. The letter stated, *inter alia* :

> "Generally, Fidelity's policy is not to accept material, non-public information regarding an issuer of publicly traded securities, whether such information is disclosed in written, oral or electronic form. Exceptions to this policy may only be made by Fidelity's Special Situations Group or members of our senior management, not by analysts, portfolio managers or other investment personnel."

It is to be noted that the penultimate paragraph of the letter asserts :

> "Please note that, with respect to any disclosure of information to Fidelity investment personnel in breach of the above policy, Fidelity expressly disclaims any duty of confidentiality and *will use such information as it sees fit, including, without limitation, publicly disclosing such information* in a press release or otherwise." [Italics added.]

252. Mr Nicholas Lee said that he had regular dialogue with the ECM team at Fidelity, whom he regarded as "permanently over the wall" for purposes of discussing such material non-public information. His contact for that purpose was by telephone with Ms Kirsty Mactaggart, initially in Hong Kong but latterly in Singapore. Whether or not the ECM team then went on to perform a 'wall crossing' within Fidelity was up to them. Also, he had contacted Mr Andrew Boyd of the Special Situations Group for the same purpose.

253. In cross-examination by Mr Huggins, on behalf of Mr George Stairs, Mr Nicholas Lee agreed that, although he could not recall the date of such meetings, he had attended several meetings with representatives of Fidelity in which Fidelity's protocols for the receipt from Merrill Lynch of material non-public information had been discussed.

254. Having been taken to an e-mail exchange on 29 April 2009 between Ms Kirsty Mactaggart and himself, in respect of Chaoda, in which confirmation was sought and given to Ms Kirsty Mactaggart that she and Fidelity were no longer over 'the wall', Mr Nicholas Lee agreed that was an illustration of Fidelity's protocols and operation. Further, he agreed that a few days before that date Merrill Lynch had contacted FIL informing them about the contemplated

securities offering by Chaoda and in particular the fact of the proposed placement, its size and price and the timing of the offer.

255. By contrast, Mr Nicholas Lee said that he had no recollection of a conversation with Mr Andrew Boyd, in which Merrill Lynch had been admonished for making contact with Ms Jessamyn Larrabee directly in order to arrange the telephone conference call of 28 April 2009 in which she and Mr George Stairs participated with Mr Kwok Ho and Mr Andy Chan.

*Mr Bruce Herring: Mr George Stairs's character*

256. Mr Bruce Herring testified that he had known Mr George Stairs for six years and said that he enjoyed a general reputation as being a pleasant, upstanding man and a "straight shooter".

*Expert evidence?*

257. The Presenting Officer provided the Tribunal with a statement dated 16 June 2011 from Mr Eric Cheng Kai Sum, containing both factual evidence and expressions of opinion, which he invited the Tribunal to receive. In the preliminary Chairman's Conferences, the Chairman raised the issue of whether the Tribunal as a whole would be assisted by much of that material, in particular expressions of opinion. That was the position taken by the Tribunal itself during the receipt of material at the request of the Presenting Officer.

258. Subsequently, the Tribunal was provided by Mr Huggins, on behalf Mr George Stairs, with two statements by Mr Richard Witts, dated 10 and 21 February 2012 respectively. On 13 February 2012, in face of its recent receipt

of Mr Witts's first statement, the Tribunal indicated to the parties the preliminary position it took, namely that it was minded to receive the statements of both Mr Cheng and Mr Witts as to facts, but not as to their opinions, and that it would not receive their oral testimony. Having received submissions on behalf of Mr George Stairs as to the potential relevance and importance of three matters to which Mr Witts averted in his first statement, the Tribunal reserved its determination in respect of the receipt of material from Mr Cheng and Mr Witts until the receipt of all factual evidence.

259. At the conclusion of the receipt of factual evidence, Mr Huggins renewed his invitation to the Tribunal to receive the material from Mr Witts. He pointed to specific opinions expressed by Mr Witts :

(i) that the price at which placement took place, namely $4.60, was not within market expectations and that an "adverse impact on the share price (was) almost inevitable". The price mentioned in the telephone conference call was around "$5".

(ii) "that the market was entitled to expect that the placement would be likely to happen soon after the lock-up period expired towards the end of May". Also, "A share placement in itself will not necessarily result in an immediate drop in the company's share price ... the share price could appreciate, depreciate, move to approximately the placing price, move below the placing price or fail to react at all."

(iii) of the increase in the size of the proposed April placement in relation to that of June 2009, namely from $150 - $200 million to $200 - 250 million: "From the point of view of investors I do not

consider this difference to be material. Chaoda had at that time a market value of approximately US $2 billion. Whether the new capital being raised ranges from 7.5% to 10% of the market value of the company or 10% to 12.5% of that value is insignificant in the eyes of shareholders."

*Ruling*

260. In the event, the Tribunal as a whole determined that it would receive the statements of Mr Cheng and Mr Witts as to factual matters only and that it would not receive statements in respect of their "opinions, views or beliefs". Further, it determined not to receive any oral testimony from them.

261. As the Chairman stated at the time of the ruling, the Tribunal thanks both Mr Cheng and Mr Witts for the material received by the Tribunal from them which is relevant to factual matters. Mr Cheng provided not only Stock Historical Data but also some of the material relevant directly and indirectly to announcements made by Chaoda. However, during the course of the hearing, at the request of the parties and in consequence of notices of the Tribunal the ambit of that material received by the Tribunal has increased many times. Mr Witts provided a considerable volume of press coverage, relevant to the issue of whether the effect of a placement by Chaoda was non-public. However, in consequence of its notice to Chaoda the Tribunal received the audio recording and partial transcription of Chaoda's global simultaneous telephone conference call of 29 April 2009, following which it ordered and received a full transcription and translation of what was said.

262. The Chairman of the Tribunal has the considerable benefit of the fact that he sits with two solicitors of great commercial experience, one having been a senior legal adviser to a global bank and the other in commercial practice in Hong Kong today. Furthermore, the Tribunal has received a wealth of material and oral testimony from multiple witnesses, who were actually involved in the events leading up to the actual placement itself. They include representatives of investors and placing agents, together with directors of Chaoda.

263. In the circumstances of this case, the Tribunal was satisfied, with great respect to them, that it would not be assisted by receipt of the opinions expressed by Mr Cheng and Mr Witts in their statements or by receipt of their oral testimony.

# CHAPTER 4

# A CONSIDERATION OF THE MATERIAL RECEIVED BY THE TRIBUNAL

*A person 'connected' with Chaoda*

*Mr Kwok Ho*

264. It was conceded in closing submissions on behalf of Mr Kwok Ho that he was a person 'connected' with Chaoda for the purposes of section 247(1) of the Ordinance. It was appropriate to make that concession, since Mr Kwok Ho was not only a director of Chaoda but also a substantial shareholder and in a position as a director which may reasonably be expected to give him access to relevant information in relation to Chaoda. Accordingly, we find that he was so 'connected' with Chaoda.

*Mr Andy Chan*

265. Similarly, it was conceded in closing submissions on behalf of Mr Andy Chan that he was a person connected with Chaoda. Again, it was appropriate to make that concession, since Mr Andy Chan was an executive director and Chief Financial Officer of Chaoda and in a position as a director which may reasonably be expected to give him access to relevant information in relation to Chaoda. Accordingly, we find that Mr Andy Chan was a 'connected' person for the purposes of section 247(1) of the Ordinance.

*Mr George Stairs*

266. Finally, it was accepted in closing submissions on behalf of Mr George Stairs that at the time of his telephone conference with Mr Kwok Ho and Mr

Andy Chan on the morning of 15 June EDT, in which he received information from them, he knew or had reasonable cause to believe that each of them held that information as a result of being connected with Chaoda. Again, it was appropriate to make that concession. Mr George Stairs not only knew that his conversation was with the Chairman and the Chief Financial Officer of Chaoda, with both of whom he had a telephone conference on 28 April 2009, but also he had been advised that the purpose of the telephone conference call was to provide an update on the business of Chaoda. Accordingly, we find that Mr George Stairs knew or had reasonable cause to believe that the information he received from Mr Kwok Ho and Mr Andy Chan was held by them as the result of being connected with Chaoda.

*Did Mr Kwok Ho/Mr Andy Chan disclose 'relevant information' to Mr George Stairs in the telephone conference call?*

267. It is to be noted at the outset that throughout the telephone conference call with Mr George Stairs and Ms Jessamyn Larrabee on 15 June 2009 EDT that Mr Kwok Ho spoke in Putonghua only. Mr Andy Chan acted as his interpreter from Putonghua to English and vice versa. Mr George Stairs and Ms Jessamyn Larrabee understood the English translation only and replied in English. Accordingly, as Mr Andy Chan accepted in his testimony if 'relevant information' was disclosed to Mr George Stairs in the course of the telephone conference call, that information was uttered in English through the mouth of Mr Andy Chan.

*The six telephone conference calls*

268. Although the Tribunal has received material, in one form or another, in respect of all six telephone conference calls conducted by Mr Kwok Ho and Mr Andy Chan there is no doubt that the critical telephone conference call is that which was held with Mr George Stairs and Ms Jessamyn Larrabee. In respect of that telephone conference call the Tribunal has received the oral testimony, subject to cross-examination, of Mr Kwok Ho, Mr Andy Chan and Mr George Stairs. Also, it has received the record of interview, conducted by officers of the SFC under the powers of compulsion under the Ordinance, of Mr Kwok Ho or Mr Andy Chan. Mr George Stairs declined to be interviewed by an officer of the SFC. Since he was not subject to the compulsory powers of the Ordinance, not being in Hong Kong, he was entitled to decline to participate in an interview. No adverse inference whatsoever is drawn against him in consequence of his exercise of his legal right. Also, the Tribunal has received the contemporaneous notes made by Mr George Stairs of the telephone conference call, together with various written descriptions of the events in question made subsequently by Mr George Stairs and on his behalf.

269. Ms Jessamyn Larrabee not only declined to be interviewed by an officer of the SFC but also declined the request of this Tribunal that she give evidence by a video link. Since she was not subject to the compulsory powers of the Ordinance she was entitled to do so. Through her Attorneys she has provided the Tribunal with two statements, the first of which was unsolicited by the Tribunal and the second in response to the Tribunal's enquiries. Also, she identified, as apparently her contemporaneous note of the telephone conference call, the computer generated document provided earlier to the Tribunal by

Fidelity and the Quick Note which she wrote and published within Fidelity on the morning of 15 June 2009 EDT, after the telephone conference call had ended. Significantly, it follows that such assertions that she has made, in contemporaneous documentation or statements provided to the Tribunal, have not been tested at all in cross-examination.

270. Although Ms Jessamyn Larrabee informed the Tribunal that she would not be available to give evidence by video link, all she said in that regard was that was "due to scheduling obligations for my new employment and other personal and professional reasons." She did not condescend to any particular whatsoever as to what were those "personal and professional reasons". Similarly, she provided no particulars as to difficulties with "scheduling obligations". Given that the Tribunal was inviting her to give evidence between 7 p.m. and 10 p.m. EDT and that the evidence could have been taken on a suitable day over a period of time the Tribunal is sceptical that such difficulties stood in the way of her testifying if, in truth, she had been prepared to do so and expose herself to cross-examination. We are satisfied that she has not advanced any reasons of substance for declining to assist the Tribunal by giving evidence by the way of video link. The Tribunal and has had regard to all those matters in determining what weight to give to such material that it has received from Ms Jessamyn Larrabee.

271. Such relevance as the other five telephone conference calls have lies only in a consideration of what information was disclosed by Mr Kwok Ho and Mr Andy Chan in those telephone conference calls. Was the fact of a placement by Chaoda, its size and price disclosed? The relevance arises from

the context in which the telephone conference calls were conducted, namely as a series of calls arranged at one hourly intervals, at least from 8 a.m. to 11 a.m. EDT on 15 June 2009. The telephone conference calls had been represented by Merrill Lynch, on behalf of Chaoda, to the participants on the same basis, namely as being an 'update' on the business of the company. The telephone conference call with Mr George Stairs and Ms Jessamyn Larrabee at 9 a.m. EDT 15 June 2009 took place after the telephone conference call which began at 8 a.m. with Mr Matthew Sigel, then of Alliance Bernstein, and before the telephone conference call with Ms Angela Yu of Blackrock which began at 11a.m. Both Mr Matthew Sigel and Ms Angela Yu gave oral evidence by video link, having both provided records of interview to the SFC in May 2010. Also, the Tribunal received Ms Angela Yu's contemporaneous handwritten notes of her telephone conference call. Finally, shortly after the respective telephone conference calls e-mails were sent internally within the respective corporations by participants in the telephone conference calls.

272. In all those circumstances, in addressing the issue of what information was provided in the conference calls other than in the conference call with Mr George Stairs and Ms Jessamyn Larrabee the Tribunal has also had regard to the material received in respect of the telephone conference calls with Alliance Bernstein and Blackrock. By contrast, it has given little weight to the material received in respect of the remaining telephone conference calls.

*Did Mr Kwok Ho and Mr Andy Chan disclose to Mr George Stairs that Chaoda was making a placement of its shares at about $5 per share to raise $200 - $250 million?*

*Mr Kwok Ho*

273. Although, broadly stated, the position taken by Mr Kwok Ho in his record of interview with the SFC was that he had not disclosed the fact of a placement, its size or price in any of the telephone conference calls, in his testimony before the Tribunal he acknowledged that those matters might have been mentioned, but sought to explain the circumstances in which it could be that they had been mentioned. His testimony was to the effect that if pressed by investors he would have provided a series of hypothetical answers relating to a possible future placement: if market conditions permitted, Chaoda would consider a placement of its shares. He said that, if pressed further, as to price and size he would have said that he would look for a similar price and size as the April 2009 placement. We reject that testimony.

*The contemporaneous records*

274. We are satisfied that it is no coincidence that the contemporaneous note of Ms Jessamyn Larrabee of the 15 June 2009 conference call begins :

> "Proposing a placing $200-250 mn. Price at HK 5.00".

and that Mr George Stairs's note is to the same effect as to the size of the proposed offering. Although Mr Stairs made no specific note as to the price of $5.00 per share, he did note that it was to be at a 12% discount of the then market price of $5.65. Clearly, that statement was to the same effect ($4.97) as to the price of the shares as in Ms Jessamyn Larrabee's note.

275. It is to be noted that Ms Angela Yu's note of the telephone conference call in which she took part on behalf of Blackrock, she being able to understand both Putonghua and English, was to similar effect as to that information, namely :

"plan to raise $200 - 250m, HK$5 per share".

Also, Ms Angela Yu remained adamant in her oral testimony that Mr Kwok Ho had informed them of the size and price of the placement.

276. Similarly, although Mr Matthew Sigel did not take any notes in the telephone conference call, in an e-mail to Associate Portfolio Managers sent shortly after the call came to an end he wrote: "We are expecting an equity offering from Chaoda at a price of around $5."

277. We are sure that Mr Kwok Ho and Mr Andy Chan informed Mr George Stairs and Ms Jessamyn Larrabee during their conference call that the forthcoming Chaoda placement was to be of a size in the range of US $200 - 250 million and that the price per share was to be around HK $5 per share.

*Reference to the price and size of a placement on an hypothetical basis?*

278. Of the testimony of Mr Kwok Ho that, if he had mentioned the size and price of a placement, albeit on a hypothetical basis, he would have done so by reference to the April placement, it is to be noted that the contemporaneous notes made in their respective conference calls by Ms Jessamyn Larrabee and Mr George Stairs on the one hand, and Ms Angela Yu on the other contained no reference whatsoever to such an observation by Mr Kwok Ho or Mr Andy Chan. We reject Mr Kwok Ho's testimony in that respect.

279. We are sure that the reference to a placement, its size and price per share was not on a hypothetical basis but on an actual basis.

*Information as to the time of the placement*

280. In her contemporaneous note of the conference call, Ms Jessamyn Larrabee noted that she had been informed that Chaoda, was "Proposing a placement". Elsewhere in the note she recorded, "Proposing the transaction - business environment is favourable". In the Quick Note, which she published on 15 June 2009 EDT, within Fidelity within a couple of hours of the conference call, she noted in the bold heading :

> "Upcoming equity offering $200 - $250 mn. Mgmt has changed its tune."

In the text, she described the purpose of the conference call as being :

> " ... to notify us that they will *soon be doing* an equity placement." [Italics added.]

The language is unambiguous: the decision had been taken by Chaoda, and was to be effected "soon".

281. In his two-paged note of 3 July 2009 to Mr Eric Wetlaufer, Mr George Stairs noted under the title, 'Facts', what Mr Kwok Ho and Mr Andy Chan said in the conference call:

> "They opened the discussion saying they were doing a Capital raising of US $200 - 250 M".

Again, the language is unambiguous: the decision had been taken by Chaoda. However, in his oral testimony Mr George Stairs said that no indication had been given of when it was that the placement would take place. As noted earlier, he said :

"I think we thought it was in the coming weeks".

He added later :

"Certainly not in the next day or two."

282. Mr George Stairs's testimony in that regard came in the context of his having been asked by the Chairman of the Tribunal as to the issue of what he understood to be the timing of the prospective placement, in the context of the description ascribed to it by Ms Jessamyn Larrabee, namely that it was to happen "soon". Ms Jessamyn Larrabee had also described the placement as "upcoming".

283. Furthermore, the information had been provided by the Chairman and the Chief Financial Officer of Chaoda themselves, in what Mr George Stairs said he knew was only one of a series of six conference calls with investors in the United States of America that evening (Hong Kong Time). In an e-mail sent by Mr Tim Lynch to Ms Jessamyn Larrabee and Mr George Stairs at 10:19 on 12 June 2009 they had been advised :

"Slots are available 8 AM, 9, 10, 11, 12, 1 on 15 June. But there are a bunch of us working on this, - so first come, first served."

Clearly, those conference calls were between the Chairman and the Chief Financial Officer, with one investor at a time. It is to be noted that, albeit in the different context of judging the eagerness of Mr Kwok Ho to go through with the placement, Mr Rodney Tsang attributed significance to the fact that the Chairman was participating in multiple conference calls and was doing so long into the night.

284. Although Mr George Stairs accepted, in cross-examination by the Presenting Officer, that he had contact with a representative of Chaoda prior to the conference call of 28 April 2009, namely on three occasions with Mr Jerry Lu, he accepted that Mr Kwok Ho's participation on the latter date was unusual. In fact, it was the first time that Mr George Stairs had spoken to Mr Kwok Ho. In context, it is to be remembered that the conference call of 28 April was itself against the background of an important event for Chaoda, namely what, in the event, became the failure of an attempt at a placement. Of the fact of the participation of Mr Kwok Ho in the conference call on 15 June 2009, Mr George Stairs said that he did not remember "thinking anything in particular".

285. By contrast, Mr Matthew Sigel said that, although he had not been told anything definite about the placement, very soon after the conference call with Mr Kwok Ho and Mr Andy Chan concluded he had sent an e-mail advising his Associate Portfolio Managers, "We are expecting an equity offering from Chaoda at a price of around $5." In responding to an enquiry as to when that was to be, although he had said that he was not sure, he responded "my guess is tonight". He said that he believed that it would happen before the stock started trading again, either the deal being announced in the morning in Hong Kong or trading in the shares being suspended. Of why it was that he formed this belief, he said :

> "Because the opportunity to speak with Chairman Kwok, during a call in which he did not deny my presumption of an equity offering was imminent was market moving information. I believed that a very small number of investors were given the opportunity to talk-to be put in that position that morning, as I was given."

286. The Tribunal accepts Mr Matthew Sigel's evidence in that regard. We are sure that it was the only reasonable inference to be drawn by him from the available information. We note that Ms Angela Yu and Ms Lindsay Watson immediately reported the fact of their receipt of similar information to their compliance department, with the result that, as they had anticipated, Blackrock was precluded from trading in Chaoda shares.

287. We are satisfied that Mr George Stairs downplayed the significance, if any, to be attached to the fact that the Chairman was involved in the conference call. We do not accept Mr George Stairs's evidence that he understood that effect would be given to the decision to make a placement in a matter of weeks and "Certainly not in a day or two". We are satisfied that he understood the placement to be imminent.

*Was the information provided to Mr George Stairs by Mr Kwok Ho and Mr Andy Chan specific information?*

288. Mindful of the Chairman's direction in respect of the nature of 'specific information', in particular that it is not necessary that "all the particulars or details of the transaction, event or matter be precisely known" but that there is a "substantial commercial reality" to the event occurring, we are satisfied that the information that Chaoda was to make a placement of its shares at $5 per share with an overall size of US $200 - 250 million was specific information.

*Was that information not generally known to the persons who are accustomed or would be likely to deal in Chaoda shares?*

*29 April 2009 conference call*

289. As noted earlier, in the simultaneous global telephone conference call of 29 April 2009, conducted by Mr Kwok Ho and Mr Andy Chan, information was disseminated not only in respect of Chaoda's financing needs but also as to the relevance, in that context, of the proposed placement. Having indicated the size and price that he sought for the placement Mr Kwok Ho indicated that it was because of the price proposed by the bankers that the decision not to proceed with the placement had been taken. Two of the participants in the six conference calls of 15 June 2009, namely Ms Lindsay Watson and Mr Matthew Sigel were named as participants in the call of 29 April 2009.

290. At the outset of the conference call, Mr Kwok Ho identified two issues which he proposed addressing, namely firstly, why the fund raising was attempted and secondly, why it was cancelled. He said that his concerns as to the level of Chaoda's share price has been met with advice from bankers that the market was concerned about the need to repay the convertible bond in May 2009 and the high yield bond in 2009. Also, there were concerns about the effect of those pressures on Chaoda's liquidity.

*The April placement: size and price*

291. Mr Kwok Ho said that in his meetings with bankers in respect of the proposed placement he had stipulated the size to be achieved in the range US $150 to US $200 million and the price of not less than $5 per share. However, those bankers had told him that they wished to set a range of discount to the

current share price of around 12% - 17%. He had said that was unacceptable. On 28 April 2009 they had repeated their indication of the discount they wish to set. Again, he indicated that was unacceptable. At noon on 29 April 2009 he had informed the bankers that Chaoda would cancel the financing plan. However, he reminded his audience that on both 27 and 28 April 2009 the Hang Seng Index had fallen. Mr Kwok Ho went on to reassure his investors that notwithstanding the cancellation of the placement Chaoda had sufficient funds to make repayment of the convertible bond on 8 May 2009.

292. In their report on Chaoda dated 4 May 2009, Daiwa reported what Mr Kwok Ho had said in the telephone conference call as to the size and price of the planned placement, namely that "the company planned to raise US $150 - $200m through the placement (at not less than HK $5 per share)."

*Future placement?*

293. In a question posed by an investor, Mr Kwok Ho was asked :

> "... whenever the market sort of improves a little bit and you're able to get a new issue done at $5 Hong Kong how likely is it that you'll be back in the market at $5 Hong Kong, say in the next little while."

Mr Kwok Ho responded:

> "Today, we halted this financing exercise...there is no opportunity to reopen the discussion of financing."

In response to the question of whether or not Chaoda was planning refinancing following the repayment of the convertible bonds, in order to repay the high yield bond Mr Kwok Ho said, "Up to this point there is none."

*Lock-up*

294. When asked how Chaoda addressed the issue of getting around the 'lock-up' provision in the February 2009 placement, Mr Kwok Ho said that there had been communication with UBS in that respect and they had provided a conditional consent, which they had cancelled when Chaoda withdrew the placement proposal. It is clear from the e-mails provided to the Tribunal by UBS that Mr Kwok Ho was accurate in asserting not only that UBS had been forthcoming with a conditional consent to waive the lock-up provision but also that, when Chaoda decided not to proceed with the placement, UBS had withdrawn that conditional waiver. In his testimony, Mr Kwok Ho said that he had been prepared to agree to the conditions, notwithstanding the fact that he had not made some of the representations attributed to him. In those circumstances, we are satisfied that the lock-up provision was a surmountable barrier for Chaoda. In any event, the lock-up provision expired 90 days after 23 February 2009.

*Market expectations*

295. Although on 29 April 2009 Mr Kwok Ho had denied that Chaoda had any plan to make another attempt at a placement in the future, it is clear that there was a sentiment amongst some in the market that, if market conditions became more favourable, a future placement was one of the options available to Chaoda. In a report on Chaoda dated 30 April 2009, Mr Jake Lynch of Macquarie Research adverted to the telephone conference call of 29 April 2009, noting that Chaoda's original intention "was to lay to rest all concerns regarding next year's high yield bond repayment and raise enough cash so that it would be a 'non-issue'." However, the writer concluded :

"Now that the company has signalled that it is less than 100% sure on meeting its high yield bond due in 2010, the market will expect another share placement at some point and the issue will remain a major overhang on the stock-likely until either the high yield bond is bought back *or there is a share placement.*" [Italics added.]

296. By contrast, in the Daiwa report of 4 May 2009 the writer asserted the view, in respect of repayment of the convertible bond, that "Chaoda does not need another share placement". Moreover, the other expressed a similar view in respect of repayment of the high yield bond :

"Chaoda should have Rmb 1,496m cash on hand by February 2010, falling slightly short of the 1,539m required for redemption of the guaranteed senior notes. We believe Chaoda's capex is flexible enough to cater for a slightly higher cash requirement *without another share placement.*" [Italics added.]

297. On 12 June 2009, The Sun newspaper noted that, although Chaoda's share price had fallen from $5.83, its price was above its ten-day average and expressed the view, "the rebound is anticipated to continue in the short term". Also, it suggested :

"However, as the market has turned bullish these few days, it's possible that the group will ramp up the share price for a share placement plan to raise funds. This point should be noted."

298. It is to be noted that in his testimony Mr Matthew Sigel said that after the failed April 2009 placement by Chaoda, "it would not have surprised me to see an equity offering". Later, he added, "I knew the company's fundamentals, and it was clear to anyone who followed the company that there was a need to raise some kind of capital." Ms Jessamyn Larrabee was even more assertive that her anticipation of a placement had materialised, noting in her Quick Note,

"We knew that Chaoda would be coming back to the market right around now after the botched placement at the end of April."

299. Whilst the possibility of a share placement was anticipated by some in the market, its timing was less easy to calculate. Repayment of the high yield bond lay many months away in 2010. Whilst Chaoda might be expected to wish to make provision for repayment of that debt, together with sustaining its level of capex, at an earlier rather than later stage, the opportunity for it to do so clearly extended over a period of months. Having failed to get the price it wished to secure in the April placement, no doubt it was to be expected that a future placement would be launched only when market sentiment was solidly favourable. We are sure that the timing of the placement of shares by Chaoda was not public information.

300. The information supplied to Mr George Stairs of the size of the placement, namely US $200 - $250 million, was to the effect that it was aimed now to raise between 1/4 to 1/3 more funds than it had been intended to raise in the April placement. Whilst that was a significantly greater fund-raising, it is also to be viewed in relation to the capital of Chaoda, in which comparison it is a small difference only.

301. In the result, we are satisfied that the information supplied to Mr George Stairs in the telephone conference call of 15 June 2009 of the fact of Chaoda's decision to make a placement, it's size and price was non-public information.

*Was the information supplied by Mr Kwok Ho and Mr Andy Chan, if known to those who were accustomed or would be likely to deal in Chaoda shares, likely to materially affect the price of Chaoda shares?*

302. We are sure that, if those who were accustomed or would be likely to deal in Chaoda had known of the proposed placement of shares at the stipulated discount to its last traded price and to its average traded price over the last 10 trading days, it was likely to materially affect the price of Chaoda in a negative manner. The placement was necessarily dilutive of the interests of existing shareholders. That the placement price, namely $4.60, was lower than the indicative price given to Mr George Stairs of around $5, does not alter the fact that the information with which he was supplied was price sensitive information, that would materially affect the price of Chaoda shares.

*Did Mr Kwok Ho and Mr Andy Chan know or have reasonable cause to believe that Mr George Stairs would make use of the information disclosed to him to deal in Chaoda shares?*

303. There is no dispute that in June 2009 both Mr Kwok Ho and Mr Andy Chan, as the Chairman and the Chief Financial Officer of Chaoda respectively, were experienced and seasoned businessman, knowledgeable in corporate governance. We are sure that they both knew that the information of the placement by Chaoda that they provided to Mr George Stairs was material non-public price sensitive information. Equally, we are sure that they knew of the proper protocols through which this information ought to have been offered to Mr George Stairs, in particular that proceeding in accordance with the proper protocols would have afforded Mr George Stairs the opportunity to agree or disagree to the receipt of the information. Further, they knew that proceeding

in accordance with the protocols, if agreement had been received from Mr George Stairs to receive information, would have resulted in that fact being properly documented by the Compliance Department of Fidelity. We are sure that they knew that the obvious point of the existence of such protocols is, amongst other reasons, to create an audit trail and to act as a barrier to the misuse of such information by way of insider dealing. To blatantly ignore such protocols and 'dump' the information on Mr George Stairs was to ignore the safe and proper way of imparting information and to take the risk that Mr George Stairs would misuse the information by way of insider dealing.

304. Notwithstanding our finding that Mr Kwok Ho and Mr Andy Chan had deliberately and knowingly ignored the proper protocols for providing information to Mr George Stairs and deliberately taken the risk that he might misuse that information it remains necessary to consider whether or not their knowledge of the reputation for integrity and probity of Fidelity and its employees was such that they did not have reasonable cause to believe that he would misuse the information by way of insider dealing. Of course, in large part that reputation, which we accept Fidelity do enjoy, has been earned by the fact that it has a very rigourous and proactive compliance department. We are satisfied that in deliberately providing information to Mr George Stairs outside the proper protocol Mr Kwok Ho and Andy Chan knew that in so doing they were avoiding the checks and balances implicit in the protocols and that they had reasonable cause to believe that Mr George Stairs would make use of that information to deal in the shares of Chaoda.

*Have Mr Kwok Ho and Mr Andy Chan established that the purpose that they disclosed the information to Mr George Stairs was not or did not include the purpose of securing or increasing a profit or avoiding or reducing a loss for Mr George Stairs by using the information?*

305. We have no hesitation at all in finding that Mr Kwok Ho and Mr Andy Chan have established, for the purposes of section 271(3) of the Ordinance, that the purpose for which they disclosed information to Mr George Stairs was not or did not include the purpose of securing or increasing a profit or avoiding or reducing a loss for Mr George Stairs by his use of the information.

306. We accept that, other than as a participant in the earlier conference call of 28 April 2009, Mr George Stairs was not known to either Mr Kwok Ho or Mr Andy Chan. He was merely a portfolio manager representing Fidelity in one of the six telephone conference calls they held on the evening of 15 June and the early morning of 16 June 2009. Whatever were their purposes for disclosing the information to Mr George Stairs, we are sure that it did not include the purpose that he use the information to deal in Chaoda shares, in particular to sell Chaoda shares to avoid a loss that would flow from the negative market reaction to the announcement of a placement of its shares by Chaoda.

307. We are sure that Mr Kwok Ho, notwithstanding some surprising assertions to the contrary, and Mr Andy Chan were alive to the fact that the market price of Chaoda shares, to which a discount would be applied in the placement, was a matter of fundamental importance. Obviously, the selling of Chaoda shares by those to whom non-public information of the placement was given was likely to drive the price of Chaoda shares downwards. The more the

price was driven down, the lower was the likely price to be obtained for placement shares. The lower the price of the placement shares the less funding would be raised for Chaoda.

308. Mr Kwok Ho captured eloquently the illogicality of the suggestion made to him that he had disclosed the information for the purpose that Mr George Stairs deal on the information, in the short emotional response quoted earlier:

> "... if I decided to do this immediately, and if I knew that he was going to sell the shares of the company, I'm not dull; I'm not an idiot. If I didn't do that, this will be hurting others and it's a lose- lose situation, and is not beneficial to myself, not beneficial to the company, and there's no benefit at all in doing that."

**CONCLUSION**

309. Accordingly, for the reasons set out above, we are not satisfied that either Mr Kwok Ho or Mr Andy Chan are culpable of insider dealing, contrary to section 270(1)(c) of the Ordinance.

*Did Mr George Stairs know that the information received by him from Mr Kwok Ho and Mr Andy Chan was relevant information?*

310. Having determined that the information that Mr Kwok Ho and Mr Andy Chan disclosed to and received by Mr George Stairs was relevant information, next it is necessary to consider whether Mr George Stairs knew that to be so when he sold a parcel of Chaoda shares in the late evening of 15 June 2009 EDT.

*The role of Merrill Lynch*

311. We are satisfied that there is force in the criticism made by Mr Huggins of the role played by the representatives of Merrill Lynch in Hong Kong, which resulted in Mr George Stairs being made vulnerable to the receipt, without prior warning let alone agreement, of non-public price sensitive information from Mr Kwok Ho and Mr Andy Chan in the telephone conference call of 15 June 2009.

312. Clearly, having been advised in the e-mail from Mr Tim Lynch of Merrill Lynch in Boston of 10:10 on 12 June 2009 EDT that the telephone conference, in which they were invited to participate with Chaoda management, was simply for the purpose of management giving an update, "about their business and financial status" to key shareholders, Mr George Stairs was not alerted in any way that in fact he would be the recipient of non-public price sensitive information about Chaoda. We accept that Mr George Stairs had recent experience, in late April 2009 with Merrill Lynch and Chaoda, of the former correctly invoking Fidelity's protocols, by which Fidelity could choose whether or not to receive non-public price sensitive information. Given that no such protocols had been invoked in respect of the telephone conference call of 15 June 2009, in advance of that conference call there was no reason for Mr George Stairs to expect, or even suspect, that he would be made the recipient of non-public price sensitive information.

*Mr Rodney Tsang's 'game plan'*

313. By the time of the various telephone conference calls, including the one with Fidelity, it is clear that Mr Rodney Tsang was in the process of implementing a 'game plan', which called for the conference calls to be

followed within a few hours by an approach to Mr Kwok Ho with proposals for the placement. In his e-mail to Mr Nicholas Lee at 17:58 on 15 June 2009, Mr Rodney Tsang said in terms that he was proposing to go to Mr Kwok's office, "around 8:15/8:30 a.m. tomorrow to give him our proposal." If it was ever intended that the management telephone conference update calls be kept separate and distinct from a subsequent 'sounding out', and disclosure of price sensitive information, followed by a proposal, no separation of purpose was maintained.

*Risk of disclosure*

314. Mr Rodney Tsang identified to Mr Andy Chan, in his e-mail of 13 June 2009, his expectation that in the course of the telephone conference calls the subject of Chaoda's, "*sources and uses of funds*" in the following 18 months would be raised. Given that one of the sources of funds was under very active consideration by Merrill Lynch and the management of Chaoda at that very moment, namely the proposed placement of its shares, there was a clear risk that disclosure of that proposal might be made to the participants in the telephone conference calls. We accept Mr Tim Lynch's evidence that none of these matters was known to him. He was the uninformed messenger who delivered the invitation to Fidelity to participate in the telephone conference call. We accept his agreement with the suggestion made to him by Mr Huggins in cross-examination, that it was not acceptable practice to arrange such telephone conference calls in which a risk was foreseen that the company's management may say something specific and price sensitive about the proposed placement, without the recipients of the information being given the opportunity to be wall-crossed. That was not done.

315. Although in his e-mail to Mr Nicholas Lee of 12 June 2009 Mr Rodney Tsang referred to Mr Kwok Ho and Mr Andy Chan as working to finalise a "script with investors on source and use of funds", nowhere in any of the e-mails is there any reference to Mr Rodney Tsang having warned Mr Kwok Ho and Mr Andy Chan about disclosing non-public price sensitive information in the telephone conference calls. We accept the evidence of Mr Kwok Ho and Mr Andy Chan that no such warning was given by Mr Rodney Tsang.

316. We accept the criticism of Mr Rodney Tsang made by Mr Huggins, namely that he was pursuing an inherently risky 'game plan' in pursuit of the very substantial fees which Merrill Lynch stood to earn if the placement went ahead. We do not accept the evidence of Mr Nicholas Lee that he was not expecting the management to discuss the proposed placement in the telephone conference call. At the very least, there was a very substantial risk of that happening.

317. As we have noted earlier, there was nothing in the material provided to Mr George Stairs in advance of the telephone conference call with the management of Chaoda alerting him to the possibility of the disclosure of material price sensitive information. Similarly, we accept Mr George Stairs's testimony that neither Mr Kwok Ho nor Mr Andy Chan told him that the information that they imparted to him was material price sensitive information. However, as we have found, we are satisfied that such information was provided to him and Ms Jesamyn Larrabee by Mr Kwok Ho and Mr Andy Chan in the

course of that telephone conference call. We accept that the information was in effect 'dumped' on him. It was a *fait accompli*.

318. Notwithstanding the circumstances in which the relevant information came in to his possession from Mr Kwok Ho and Mr Andy Chan, if he knew it to be 'relevant information', Mr George Stairs was constrained in dealing in Chaoda shares. It was recognition of that fact that had led Ms Angela Yu and Ms Lindsay Watson of Blackrock to make a report immediately to their compliance department, leading to a prohibition in dealing in Chaoda shares. They had not been forewarned, nor had they anticipated in any way, that relevant information would be imparted to them in their conference call.

*Mr George Stairs knowledge that the information was relevant information*

319. It is clear from his oral testimony, prompted by reference to the two-page note that he had sent to Mr Eric Wetlaufer dated 3 July 2009, that Mr George Stairs accessed market trading data in respect of Chaoda during the course of the telephone conference call with Mr Kwok Ho and Mr Andy Chan. In the two-page note, Mr George Stairs had stated of Ms Jessamyn Larrabee :

> "I remarked to her that it was surprising that the stock was not down in Hong Kong trading on June 15."

Although the matter was drawn to his attention in his testimony Mr George Stairs said that he could not recall what had prompted him to make that observation. He offered no explanation.

320. In context, clearly the market data was accessed in respect of the information supplied in the course of the telephone conference call. A closing

price was available, to which Mr George Stairs made reference in his contemporaneous note of the telephone conference call, but obviously the market data contained no statement that trading in the shares had been suspended, as might be expected in anticipation of an announcement of a placement. Further, if an announcement had already been made of a placement at a discount to the market price it would be expected that the market price would have dropped, reflecting the dilutive effect of such a placement. That was not the case. In the result, we are satisfied that Mr George Stairs realised that the market did not know of the material price sensitive information that he had just received from Mr Kwok Ho and Mr Andy Chan. He knew that he was in possession of relevant information in respect of Chaoda.

321. We accept Mr George Stairs's testimony that he had left the telephone conference call with Mr Kwok Ho and Mr Andy Chan before it came to a conclusion. He did so in order to attend another telephone conference call. One consequence of Mr George Stairs leaving the Chaoda conference call early, was that he and Ms Jessamyn Larrabee did not have an opportunity there and then to discuss the information that had been received.

322. Although Ms Jessamyn Larrabee published the Quick Note later in the morning or 15 June 2009 EDT, which was distributed internally within Fidelity, Mr George Stairs said in his written witness statement that he did not think that he had read the Quick Note "at the time", explaining that he had participated in the telephone conference call and was preparing for his trip to London. In his oral testimony, he said for the first time that he had a "vague recollection" of encountering Ms Jessamyn Larrabee in passing and learning that she had

published a Quick Note. It seems clear that the effect of Mr George Stairs's evidence is that on 15 June 2009 EDT he did not know the detail of the contents of the Quick Note.

323. Although Ms Jessamyn Larrabee has asserted in her witness statement that she did not know that the information that she was given in the course of the telephone conference call was non-public price sensitive information we are highly conscious of the fact that her evidence has not been tested in cross-examination. Moreover, as noted earlier, in its protocols Fidelity reserved to itself the right to publish non-public price sensitive information that was provided to it outside Fidelity's protocols. Clearly, that was the situation that obtained for Mr George Stairs and Ms Jessamyn Larrabee: the information provided by Mr Kwok Ho and Mr Andy Chan was provided outside Fidelity's protocols. Accordingly, the mere fact of publication of information by Ms Jessamyn Larrabee was not inconsistent with it being non-public price sensitive information. Again, Ms Jessamyn Larrabee has not been subjected to cross-examination.

324. We accept that Mr George Stairs's order to sell a parcel of Chaoda shares on the evening of 15 June 2009 EDT was not given at the earliest opportunity of trading on what was then the morning of 16 June 2009 in Hong Kong. However, according to the account that Mr George Stairs gave to Mr Eric Wetlaufer the order was placed at 10:38 p.m., in the first hour of trading. Mr George Stairs said in his testimony that he had noticed that Chaoda shares had opened lower than the closing price of the previous trading day and the price was "drifting lower" during the trading which took place before he made his

order to sell. Obviously, that update on the market data of Chaoda would have confirmed the information that he had learned in the morning, namely that the shares were not suspended and had not fallen sharply, thereby reflecting the announcement of a placement of its shares at a discount.

325. We do not accept Mr George Stairs's testimony that his order to sell a parcel of Chaoda shares on the evening of 15 June 2009 EDT was simply a decision to trim his holding in those shares motivated by considerations of valuation. Mr George Stairs had opportunities to trim his holding, if he was so minded, at a better price on a number of days in the previous week or so. In placing an order to sell Chaoda shares from his home in the late evening of 15 June 2009 EDT and placing an order to buy Chaoda from the offices of Fidelity in London in the early morning of 17 June 2009 he illustrated, what one would expect from a professional investor, namely the ability to trade in shares notwithstanding difficulties of travel or time zones. We do not consider the fact that he was in Frankfurt on 4 and 5 June 2009 would have presented a barrier of any moment that would have prevented him from trimming his holding of Chaoda shares, if he had so wished. On 5 June 2009, the intraday high of Chaoda shares was $5.83; the low was $5.61 and the shares closed at $5.65.

326. We are satisfied that it was not a coincidence that, on the very day on which he had received material price sensitive information from Mr Kwok Ho and Mr Andy Chan in respect of Chaoda, Mr George Stairs placed an order to sell a parcel of those shares. We are satisfied that he did so to avoid a loss which would flow from a drop in the market price, following the announcement of the

placement of Chaoda shares at a substantial discount. In so finding, we note that Mr George Stairs did not sell all of the holding of Chaoda shares in his fund and we acknowledge that Mr George Stairs had no personal interest in the fund holding the shares. He did not stand to gain personally. Nevertheless, we are satisfied that he sold the shares to avoid a loss.

*Section 271(3) of the Ordinance*

327. Accordingly, for purposes of section 271(3) of the Ordinance, the Tribunal is satisfied that not only has Mr George Stairs failed to establish, on the balance of probabilities, that one of the purposes of his selling Chaoda shares on 15 June 2009 EDT did not include the purpose that the fund of which he was a manager would avoid a loss but also we are satisfied that was indeed his purpose.

CONCLUSION

328. Pursuant to section 252(3) of the Ordinance the Tribunal determines that Mr George Stairs is culpable of market misconduct, contrary to section 270(1)(e) of the Ordinance.

The Hon Mr Justice Lunn

(Chairman)

Mr Malcolm A Barnett

(Member)

Mrs Christine M K Koo

(Member)

Dated 26 April 2012

# Appendix I

# THE MATERIAL RECEIVED BY THE TRIBUNAL

(I) Correspondence and documentary records received in reply/response to SFC demands made prior to the proceedings.

1.

| **Parties of whom a request was made for the provision of information and/or documents** | **Date of Reply from the relevant parties** |
|---|---|
| Sidley Austin (on behalf of Chaoda) | 12 August 2009 |
| Merrill Lynch | 24 July, 7 & 20 August 2009 and 15 September 2009 |
| Fidelity Investment Management (Hong Kong) Limited | 13 July,20 August 2009 and 8 February 2010 |
| Janus Capital Management LLC | 12 October 2009 |
| Blackrock | 23 October 2009 |

(II) Correspondence and documentary records received by the Tribunal pursuant to Notices issued by the Tribunal pursuant to section 254(2) of the Ordinance.

2.

| **Parties of whom a request was made for the provision of information and/or documents** | **Date of Notice** | **Date of Response from the relevant parties** |
|---|---|---|
| Merrill Lynch (Asia-Pacific) Limited | 12 January and 8 & 16 February2012 | 16, 18 & 20 January and 9 & 23 February 2012 |
| Alliance Bernstein Limited | 12 January 2012 | 27 January 2012 |
| Wellington Management Company LLP | 31 January 2012 and 16 February 2012 | 17 February 2012 |
| Chaoda Modern Agriculture (Holdings) Limited | 14 February 2012 | 15 February 2012 |

| Parties of whom a request was made for the provision of information and/or documents | Date of Notice | Date of Response from the relevant parties |
|---|---|---|
| UBS AG | 17 February 2012 | 21 February 2012 |
| FIL Investment Management (H.K.) Ltd. | 23 February 2012 | 24 February 2012 |

(III) Witness statements and/or records of interview from persons who also gave oral testimony.

3.

| Name | General Relevance to the Proceedings | Date of Record of Interview/Statement/ Oral Testimony |
|---|---|---|
| Mr Tsang Ling Kay, Rodney | Managing Director, Merrill Lynch (Asia-Pacific) Limited | 27 November 2009 (Record of Interview)<br>6, 7 & 8 February 2012 (Oral Testimony) |
| Ms Yu Yi Ming, Angela | Research Associate, Blackrock Financial Incorporated | 18 May 2010 (Record of Interview)<br>7 February 2012 (Oral Testimony) |
| Mr Lee Nicholas Rensselaer | Vice President, Head of Execution, Asia Equity Capital Market, Merrill Lynch (Asia-Pacific) Limited | 9 December 2009 (Record of Interview)<br>9 & 10 February 2012 (Oral Testimony) |
| Mr Matthew Sigel | Vice President Research Analyst, Alliance Bernstein | 19 May 2010 (Record of Interview)<br>9 February 2012 (Oral Testimony) |
| Mr Ip Chi Ming | Executive Director, Chaoda Modern Agriculture (Holdings) Limited | 9 February 2010 (Record of Interview)<br>10 February 2012 (Oral Testimony) |

| Name | General Relevance to the Proceedings | Date of Record of Interview/Statement/ Oral Testimony |
|---|---|---|
| Mr Andrew John Boyd | Investment Adviser, Fidelity Management & Research Company in Boston | 10 February 2012 (Statement)<br>17 February 2012 (Oral Testimony) |
| Mr Bruce Herring | Group Chief Investment Officer, Fidelity Management & Research Company in Boston | 10 February 2012 (Statement)<br>17 February 2012 (Oral Testimony) |
| Mr Kwok Ho | Specified Person | 21 January 2010 (Record of Interview)<br>13 February 2012 (Statement)<br>13, 14, 15, 16, 17, 20, 23 & 24 February 2012 (Oral Testimony) |
| Mr Chan Chi Po, Andy | Specified Person | 21 January 2010 (Record of Interview)<br>13 February 2012 (Statement)<br>20 & 21 February 2012 (Oral Testimony) |
| Mr George William Stairs | Specified Person | 14 February 2012 (Statement)<br>21, 22 & 23 February 2012 (Oral Testimony) |

(IV) Witness statements and/or records of interview from persons who did not give oral testimony.

4.

| Name | General Relevance to the Proceedings | Date of Record of Interview / Statement |
|---|---|---|
| Mr Sabre S Mayhugh | Vice President Global Industry Analyst, Wellington Management Company LLP | 17 May 2010 (Record of Interview) |
| Mr Cheng Kai Sum | Senior Director of the Surveillance Department of the enforcement Division of the SFC, as to facts relevant to the placement by Chaoda in June 2009 but not as to "opinions, views or beliefs"related thereto. | 16 June 2011 (Statement) |
| Ms Jessamyn Larrabee Norton | Equity research Analyst, Fidelity Management & Research Company | 9 & 21 February 2012 (Statements) |
| Mr Richard Arthur Witts | Witness, as to facts relevant to the placement by Chaoda in June 2009 but not as to "opinions, views or beliefs" related thereto, received at the request of Mr. George Stairs. | 10 & 21 February 2012 (Statements) |

(V) Persons who gave oral testimony only.

5.

| Name | General Relevance to the Proceedings | Date of Oral Testimony to Tribunal |
|---|---|---|
| Mr Timothy Francis Lynch | Managing Director of Equity Sales, Merrill Lynch in Boston | 10 February 2012 (Oral Testimony) |

(VI) The Hearings conducted by the Tribunal.

6. The Tribunal conducted hearings on the following dates -

Preliminary Chairman's Conferences : 6 and 28 September 2011.

Preliminary Hearing : 6 January 2012.

Chairman's Conference : 30 January 2012.

Substantive Hearings : 6 to 10, 13 to 17, 20 to 24 February and 2 March 2012.