Ontario Securities Commission | Commission des valeurs mobilières de l'Ontario | 22nd Floor, 20 Queen Street West, Toronto ON M5H 3S8 | 22e étage, 20, rue Queen Ouest, Toronto ON M5H 3S8

Citation: Paramount Equity Financial Corporation (Re), 2022 ONSEC 7
Date: 2022-04-25
File No. 2019-12

IN THE MATTER OF
PARAMOUNT EQUITY FINANCIAL CORPORATION, SILVERFERN SECURED MORTGAGE FUND, SILVERFERN SECURED MORTGAGE LIMITED PARTNERSHIP, GTA PRIVATE CAPITAL INCOME FUND, GTA PRIVATE CAPITAL INCOME LIMITED PARTNERSHIP, SILVERFERN GP INC., TRILOGY MORTGAGE GROUP INC., MARC RUTTENBERG, RONALD BRADLEY BURDON and MATTHEW LAVERTY

REASONS AND DECISION
(Subsection 127(1) of the *Securities Act*, RSO 1990, c S.5)

Hearing:	March 10, 11, 12, 2020 July 17 and 24, 2020	
Decision:	April 25, 2022	
Panel:	Timothy Moseley Garnet W. Fenn Heather Zordel	Vice-Chair and Chair of the Panel Commissioner Commissioner
Appearances:	Mark Bailey Vivian Lee	For Staff of the Commission
	Matthew Laverty	Appearing on his own behalf
	No one appearing for Paramount Equity Financial Corporation, Silverfern Secured Mortgage Fund, Silverfern Secured Mortgage Limited Partnership, GTA Private Capital Income Fund, GTA Private Capital Income Limited Partnership, Silverfern GP Inc., Trilogy Mortgage Group Inc., Marc Ruttenberg, or Ronald Bradley Burdon	

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REASONS AND DECISION OF THE MAJORITY (VICE-CHAIR MOSELEY AND COMMISSIONER FENN)

I. OVERVIEW

[1] This enforcement proceeding is about raising money from investors to fund mortgages.

[2] Staff of the Commission alleges that beginning in late 2014, the respondents raised almost $80 million from hundreds of investors. Staff alleges that the funds were raised illegally and then used fraudulently.

[3] The central allegation is that investors were told that their funds would be used to invest in residential second mortgages. Instead, the funds were used primarily to invest in what we will call **Multi-Residential Mortgages**. These mortgages were secured by properties that were to bear multi-residential units but that had not yet been developed, or that had been developed for other purposes and were to be redeveloped.

[4] There are ten respondents in this proceeding. For convenience, we will briefly describe here who they are and what their roles were. We expand on these descriptions as necessary later in our reasons.

[5] Staff's allegations center on Paramount Equity Financial Corporation (**Paramount**) and related entities. Paramount was a licensed mortgage broker and administrator. Its activities focused on two funds, through which investors funded mortgages. The two funds, both of which are also respondents, are:

a. Silverfern Secured Mortgage Fund (**Silverfern**) – The Silverfern fund is a trust. Most of the activity that is the subject of this proceeding relates to the Silverfern fund.

b. GTA Private Capital Income Fund (**GTA**) – The GTA fund is also a trust. There is little difference between the nature of the GTA fund and that of the Silverfern fund. The GTA fund was created because a group of investors wanted their funds to be invested only in residential second mortgages in the Greater Toronto Area. They did not want their funds commingled with those of other investors.

[6] Three of the respondents are individuals. Marc Ruttenberg, Ronald Burdon and Matthew Laverty were principals of the business. We refer to them as the **Principals**. Neither Ruttenberg nor Burdon appeared at the hearing to contest Staff's allegations. Laverty participated in the hearing. We will distinguish each individual's involvement from that of the others as appropriate.

[7] Three of the respondents are partnerships related to the two funds. The Silverfern fund's assets were invested in Silverfern Secured Mortgage LP (**Silverfern LP**), a limited partnership. Silverfern GP Inc. (**Silverfern GP**) is the general partner in the limited partnership. The GTA fund's assets were invested in GTA Private Capital Income LP (**GTA LP**), a limited partnership.

[8] In 2017, the Ontario Superior Court of Justice appointed a receiver over Paramount and the Silverfern and GTA entities. At the hearing before us, the receiver did not appear on behalf of any of those entities, although it did provide evidence in support of Staff's allegations.

[9] The last respondent is Trilogy Mortgage Group Inc. (**Trilogy**), which was created in early 2017, as the events leading up to the receivership were unfolding. Like Paramount, Trilogy was a licensed mortgage broker and administrator. Burdon and Laverty intended Trilogy to be what they described as a "soft landing" for investors who had made Paramount-related investments. They did preliminary work to get Trilogy ready, including by preparing marketing materials. However, Trilogy never raised any funds from investors.

[10] Trilogy did not appear at the hearing. As a result, Laverty was the only one of the ten respondents who participated in the hearing.

[11] Staff's allegations of improper conduct fall into five categories. We summarize them here, along with our conclusions.

a. *Engaging in the business of trading without being registered* – The promotion and sale of units of the Silverfern fund and the GTA fund were carried out by individuals and entities who did not have the required registration under Ontario securities law. While Trilogy ceased operations before it could sell any fund units, it did take preparatory steps toward that goal, *i.e.*, acts in furtherance of what it hoped would be eventual sales of fund units. We conclude that all respondents engaged in the business of trading without being registered, thereby contravening s. 25(1) of the *Securities Act* (the **Act**).[1]

b. *Illegal distributions* – Units of the Silverfern and GTA funds were sold without a prospectus, and no exemption from the prospectus requirement was available. We conclude that all respondents other than Trilogy were involved in illegal distributions of units of the two funds, thereby contravening s. 53(1) of the Act. We exclude Trilogy because it did not participate in any completed trades and therefore did not effect any distributions.

c. *Fraud* – Instead of the money raised being used as promised, it was used to invest in riskier mortgages, to benefit the Principals personally, and to pay Paramount's operating costs and other obligations. We conclude that all respondents other than Trilogy perpetrated a fraud in relation to securities through this conduct, thereby contravening s. 126.1(1)(b) of the Act. We exclude Trilogy because it did not participate in the raising of any funds from investors.

d. *Prohibited representations* – Staff alleges that Paramount, the Silverfern entities and the Principals breached s. 44(2) of the Act by making false or misleading statements that a reasonable investor would consider relevant in deciding whether to enter into or maintain a trading or advising relationship. Our findings about Staff's allegations of fraud include all of the elements required to show a contravention of s. 44(2). We decline to make an additional finding about this section.

e. *Misleading statements* – Staff alleges that Trilogy, and by extension the Principals, contravened s. 126.2(1) of the Act by making statements that they knew or ought reasonably to have known were misleading or untrue, and would reasonably be expected to have a significant effect on the

[1] RSO 1990, c S.5

market price or value of a security. Because Trilogy did not begin operations and was never involved in selling any particular security, we dismiss the allegation against Trilogy.

[12] Before turning to our analysis of the five categories of allegations, we begin with some additional background about the parties and the history of this and related proceedings.

II. BACKGROUND

A. Parties

[13] Paramount offered units in pooled mortgage investment funds (including the Silverfern and GTA funds) and direct mortgage investments. Ruttenberg and his wife were Paramount's sole shareholders and directors, although Ruttenberg's wife was not involved in Paramount's operations.

[14] All three Principals were officers of Paramount. Together, they ran the business, although their roles differed:

a. Ruttenberg was its Chief Executive Officer and principal broker. Ruttenberg focused on the sale of fund units to investors.

b. Burdon was Senior Vice President – Real Estate Development. Burdon brought Multi-Residential Mortgage projects to the business. In addition, he was responsible for verifying that project milestones were met before funds were advanced. Burdon was also supposed to review marketing material before it was sent to investors, although that process was not always followed.

c. Laverty was Director of National Sales and then Vice President – Sales and Strategy. While Laverty's title changed, his responsibilities did not. Laverty's focus was on finding opportunities for Paramount and related entities to be a lender. Like Burdon, Laverty was supposed to review marketing material before it was sent to investors. He did review some material, although he does not know the extent to which the process was followed.

[15] Most of the impugned conduct in this proceeding relates to the Silverfern fund, a trust established in September 2014. The three Principals were the trustees of the trust. They were the three signatories on the offering memorandum filed with the Commission and distributed to investors in connection with units of the Silverfern fund. Proceeds from the sale of fund units were used to purchase units of Silverfern LP, the limited partnership.

[16] Silverfern GP was primarily responsible for operating and managing Silverfern LP, although these duties were formally delegated to Paramount. Ruttenberg and Burdon were directors, officers and indirect controlling shareholders of Silverfern GP. We refer to the Silverfern fund, Silverfern LP, and Silverfern GP collectively as the **Silverfern entities**.

[17] Conduct relating to the GTA fund was similar but on a smaller scale. The GTA fund was a trust established in 2015. All three Principals were trustees of the trust. The fund invested in units of GTA LP. As with the Silverfern fund, management responsibilities of the GTA fund were formally delegated to Paramount.

[18] Initially, Burdon and Laverty were content to let Ruttenberg run the business while they focused on their own responsibilities. In the spring of 2016, Burdon and Laverty began to have concerns about how Ruttenberg was running Paramount. They tried to take control, but Ruttenberg was unwilling to relinquish control. Burdon and Laverty took a more active role in the oversight of Paramount's activities.

[19] One result of the difficulties at Paramount was the creation of Trilogy. Its activities were never more than minimal and preliminary. None of the Principals was formally a director or officer of Trilogy. However, Burdon and Laverty were involved in its creation and its short-lived activities.

B. History of this and related proceedings

[20] The respondents' activities have resulted in three inter-related proceedings.

[21] The first is the application brought by the Commission in the Ontario Superior Court of Justice, seeking the appointment of a receiver over Paramount and related entities. The court appointed the receiver in 2017.[2]

[22] The second proceeding relates to Trilogy. In 2018, Staff learned that the Principals had formed Trilogy and that they intended to engage in similar conduct. At Staff's request, the Commission issued a temporary order[3], which required that Trilogy cease trading any securities and provided that any exemptions contained in Ontario securities law would not apply to Trilogy. The Commission extended that temporary order several times, most recently until the conclusion of the merits hearing in this proceeding. In a separate decision[4] issued simultaneously with these reasons, the Commission has further extended that temporary order until the conclusion of this proceeding.

[23] This third proceeding arises from Staff's 2019 filing of a Statement of Allegations against the respondents. The original Statement of Allegations named other related corporations that have since been removed as respondents.

III. ANALYSIS

A. Introduction

[24] We turn now to consider the five categories of allegations described above.

[25] In our analysis that follows, we sometimes use the term "the respondents" when describing activities carried out by some but not all the respondents in this proceeding. We do so for convenience. We are mindful of the different entities involved, and we draw distinctions where necessary.

[26] As we review each category of allegations, and particularly as we consider the three Principals' involvement, we will refer as necessary to s. 129.2 of the Act. That section provides that where a company or person has not complied with Ontario securities law, a director or officer of that company or person shall be deemed also to have not complied with Ontario securities law if the director or

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[2] *Ontario Securities Commission v Paramount Equity Financial Corporation et al* (June 7, 2017), Toronto CV-17-11818-00CL (Ont Sup Ct Commercial List) and *Ontario Securities Commission v Paramount Equity Financial Corporation et al* (August 2, 2017), Toronto CV-17-11818-00CL (Ont Sup Ct Commercial List)

[3] *Trilogy Mortgage Group Inc (Re),* (2018) 41 OSCB 3437

[4] *Trilogy Mortgage Group Inc (Re),* 2022 ONSEC 8

officer authorized, permitted, or acquiesced in the company or person's non-compliance.

[27] That section of the Act speaks about a "company or person" and a "director or officer". In this case, it is important to note that in s. 1(1) of the Act, the word "person" is defined to include a trust, and the word "director" means "a director of a company… or occupying a similar position for any person." It follows that a trustee of a trust is subject to s. 129.2 of the Act in the same way as is a director of a company.

B. Engaging in the business of trading without being registered

1. Introduction

[28] We begin with Staff's allegation that the respondents engaged in the business of trading without being registered. Section 25 of the Act provides that if a person or company is to engage in the business of trading in securities, that person or company must be registered under Ontario securities law.

[29] None of the respondents was ever registered. The only issue, therefore, is whether the respondents engaged in the business of trading. We conclude that they did.

[30] Staff alleges that the respondents engaged in the business of trading by:

a. raising more than $70 million from more than 500 investors in the Silverfern fund;

b. raising more than $5 million from six investors in the GTA fund;

c. using a network of referral agents to sell units of those two funds to investors; and

d. taking preparatory steps concerning Trilogy.

[31] The meaning of "engaged in the business of trading in securities" is addressed in Companion Policy 31-103CP *Registration Requirements, Exemptions and Ongoing Registrant Obligations*. That Companion Policy suggests criteria that assist in determining whether a person or company is engaged in the business of trading in securities.

[32] The Companion Policy is not part of Ontario securities law and therefore is not directly binding on the respondents. However, the "business purpose" test in s. 1.3 (also referred to as the "business trigger" test), on which Staff relies, has been adopted by the Commission in other proceedings[5] and reflects a test that the Commission had earlier applied with respect to advisers.[6] The test includes the following factors, which are relevant in this matter:

a. trading with repetition, regularity or continuity, whether or not that activity is the sole or even primary endeavour;

b. directly or indirectly soliciting securities transactions;

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[5] *Money Gate Mortgage Investment Corporation (Re),* 2019 ONSEC 40, (2020) 43 OSCB 35 (***Money Gate***) at para 145

[6] See, *e.g.*, *Maguire (Re)*, (1995) 18 OSCB 4623; *Momentas Corporation (Re)*, (2006) 29 OSCB 7414 (***Momentas***) at paras 35-65

c. receiving, or expecting to receive, compensation for trading; and

d. engaging in activities similar to those of a registrant, including by setting up a company to sell securities or by promoting the sale of securities.

[33] We adopt the test and will assess each of these factors in turn.

2. Trading with repetition, regularity and continuity

[34] We begin by determining whether the impugned trading happened repeatedly, regularly or continuously. We agree with Staff that the trading did so in this case.

[35] Paramount sold units of the Silverfern fund continuously from September 2014 to November 2016. It sold units frequently, making 804 distributions of units to approximately 500 investors. These facts easily satisfy this element of the test.

[36] The sale of GTA fund units happened on a smaller scale. There were only 20 distributions of GTA fund units to only six investors following the inception of the GTA fund in May 2015. However, it is appropriate to treat the GTA fund distributions as part of the continuing course of conduct for purposes of the business trigger test.

3. Directly or indirectly soliciting securities transactions

[37] We next consider whether the respondents were directly or indirectly soliciting securities transactions.

[38] There can be no doubt that they were.

[39] The respondents created promotional materials, an offering memorandum, other documents, and websites, all designed to solicit investors. They paid referral agents for recruiting new investors.

4. Receiving, or expecting to receive, compensation from trading

[40] Next, we determine whether those who engaged in the trading activity received, or expected to receive, compensation for doing so.

[41] Again, there is no doubt that this was true. Ruttenberg received commissions for referring investors to the Silverfern fund. Other referral agents who raised funds from investors were also compensated for their efforts.

[42] Paramount records indicate that Laverty received a small sum for commissions, although he denies this. We address this discrepancy below in our analysis of Staff's allegations of illegal distributions. However, even if we were to accept Laverty's testimony, it would not change our conclusion on this point for the purposes of the business trigger test.

5. Engaging in activities similar to those of a registrant

[43] Finally, we consider whether the respondents' activities were similar to those of a registrant. We conclude that they were.

[44] When funds are raised properly in the exempt market, a registered exempt market dealer will carry out many functions. These functions include soliciting members of the public to be investors, explaining the potential investment to some of those prospective investors, and meeting with investors to complete and sign subscription documents.

[45] In this case, the respondents did not engage a registered dealer. Instead, they carried out the tasks themselves. Ruttenberg and referral agents met and communicated with investors, and either completed and witnessed subscription documents themselves or helped investors and others do so. The respondents engaged in the very activities that a registrant ought to have carried out.

[46] As the Commission has previously concluded, the fact that an issuer carries on a core or some other business does not preclude the conclusion that the issuer also engaged in the business of trading in securities.[7] The Superior Court of Justice (Divisional Court) reached a similar conclusion in a case involving a respondent who engaged in the business of advising with respect to securities:

> There is nothing in this legislation to suggest that the business of advising must be the only business in which a person must be involved in order to trigger the requirement of registration.[8]

[47] It is undisputed that even though Ruttenberg was CEO of Paramount, he focused his time and efforts on the sale of fund units to investors, *i.e.*, on trading. As the Commission has previously found, a key consideration in determining whether a respondent entity has engaged in the business of trading is the extent to which management's activities were allocated to the raising of capital.[9]

[48] Other Commission decisions on this topic have involved situations where the entity's emphasis was more on fundraising than on a core business unrelated to trading. However, the circumstances of this case raise the same investor protection concerns. The proportion of management resources devoted to trading, on an ongoing basis, requires the conclusion that the respondent entities were engaged in the business of trading, a proposed conclusion that was not contested by those entities, who failed to appear at the hearing.

6. Distinguishing features of the roles of Laverty and Trilogy

[49] Collectively, the respondents' conduct easily satisfies all four elements of the business trigger test. Before we conclude our analysis about whether this conduct implicates all respondents, we must make specific comments about Laverty and Trilogy.

(a) Laverty

[50] Laverty testified that he was responsible for developing Paramount's mortgage business from the time he began with Paramount in early 2014. Relying in part on his pre-existing relationships in the financial services industry, he found opportunities for Paramount to lend funds.

[51] Laverty was not directly involved in raising funds from investors. In mid-2014, when Ruttenberg told Laverty that Ruttenberg wanted to create a fund to support Paramount's growth, Laverty introduced Burdon to Ruttenberg.

[52] Each of Burdon and Ruttenberg indirectly owned 50% of Silverfern GP. Laverty neither had an ownership interest in Silverfern, nor did he meet with potential or

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[7] *Momentas* at para 56
[8] *Costello (Re)*, 2004 CanLII 2651 (ON SCDC) at para 62, affirming (2003) 26 OSCB 1617
[9] *Momentas* at para 54

existing investors. However, as we have noted above, Laverty was one of the three trustees of the Silverfern fund, and he signed the offering memorandum.

[53] Understandably, Laverty sought at the hearing to distance himself from the respondents' conduct as it related to investor funds. It is true that meetings with potential or existing investors were conducted by Ruttenberg and people reporting to him, and not by Laverty. However, that cannot relieve Laverty of responsibility for the activities of the Silverfern fund. The fund was engaged in the business of trading its securities. As one of the fund's three trustees and as a signatory to the offering memorandum, Laverty was similarly engaged, even though he may not have realized it at the time. He shared responsibility for ensuring that the fund complied with its regulatory obligations, and he permitted or at least acquiesced in the fund's non-compliance.

(b) Trilogy

[54] As for Trilogy, we repeat our finding above that it was essentially a continuation of Paramount, except that Ruttenberg was excluded. Even though it ceased operations before it sold any fund units, it took preparatory steps toward that goal. Those steps were acts in furtherance of hoped-for trades. The definition of "trade" in s. 1(1) of the Act includes acts in furtherance of trades. Trilogy's steps were, therefore, part of a course of conduct that was the business of trading.

7. Conclusion on the business of trading without registration

[55] Ruttenberg, the CEO and leader of a small senior management group, focused his efforts on trading, *i.e.*, selling fund units to investors. He did this not on his own personal behalf but on behalf of Paramount and the funds of which he sold units. He was a directing mind of those entities and caused them to engage in the business of trading without being registered.

[56] We therefore conclude that all seven respondent entities (Paramount, the three Silverfern entities, the two GTA entities, and Trilogy) engaged in the business of trading without being registered to do so. They thereby contravened s. 25(1) of the Act.

[57] We reach the same conclusion about the three Principals in respect of the Silverfern fund. As officers of Paramount and as trustees of the fund, they at least acquiesced in the fund's trading. Therefore, by s. 129.2 of the Act, they are deemed to have contravened s. 25(1) of the Act.

C. Illegal distribution

1. Introduction

[58] We turn next to Staff's allegation of illegal distribution. We agree with Staff's submission that units of the Silverfern fund and GTA fund were distributed without a prospectus and that the respondents have not demonstrated that they were entitled to any exemptions from the prospectus requirement.

[59] However, because Trilogy was not involved in any completed trades, we disagree with Staff's submission that Trilogy also engaged in illegal distribution.

[60] Section 53(1) of the Act prohibits the distribution of securities unless a prospectus has been filed and a receipt for the prospectus has been issued. In

this case, no prospectus was filed. All sales of the fund units were "distributions" because those units had not previously been issued.[10]

[61] Ontario securities law does provide numerous exemptions from this requirement. However, where a respondent seeks to rely on an exemption, the respondent bears the burden of establishing the respondent's entitlement to the exemption.[11]

[62] The burden of compliance does not rest on the investor. When the availability of the exemption claimed depends on the investor's financial circumstances, part of the respondent's obligation is to show that they carried out sufficient due diligence to confirm the accuracy of those financial circumstances. That due diligence must include a "serious factual inquiry in good faith" and a "look behind the boilerplate language of a subscription agreement". The respondent cannot simply rely on the investor's representation that the investor meets the applicable criteria.[12]

[63] Other than Laverty, none of the respondents appeared at the hearing, so no argument was put forward by those respondents that they were entitled to an exemption or that they had conducted sufficient due diligence. As for Laverty, he limited his submissions to his role in the respondents' conduct. He made no submissions about exemptions from s. 53(1) of the Act.

[64] However, we note that when the fund units were distributed to investors, the respondents did file reports under National Instrument 45-106 *Prospectus Exemptions* (**NI 45-106**), by which they purported to rely on four different exemptions:

a. for approximately 71.4% of the 804 Silverfern distributions, the respondents purported to rely on the "accredited investor" exemption in s. 2.3 of NI 45-106;

b. for approximately 12.6% of the Silverfern distributions, the respondents purported to rely on the "family, friends and business associates" exemption in s. 2.5 of NI 45-106;

c. for approximately 12.3% of the Silverfern distributions, the respondents purported to rely on the "offering memorandum" exemption in s. 2.9(2.1) of NI 45-106; and

d. for approximately 1.4% of the 804 Silverfern distributions, the respondents relied on the "minimum amount investment" exemption in s. 2.10 of NI 45-106.

[65] We address in turn each of the first three exemptions that appeared on the respondents' reports of exempt distribution.

2. Accredited investor exemption

[66] The accredited investor exemption, upon which the respondents purported to rely with respect to almost three-quarters of the distributions, according to the reports filed, prescribes certain income and asset tests. The respondents supplied no evidence that the investors in respect of whom this exemption was

[10] Act, s 1.1, "distribution"
[11] *Meharchand (Re),* 2018 ONSEC 51, (2018) 41 OSCB 8434 (***Meharchand***) at para 95
[12] *York Rio Resources Inc (Re),* 2013 ONSEC 10, (2013) 36 OSCB 3499 at para 110

claimed actually met those income and asset tests, despite what was implied by the filed reports. Moreover, testimony from investor witnesses showed that at least some of the supposedly accredited investors were not.

[67] The respondents have not met their burden of showing that they were entitled to the benefit of the accredited investor exemption in any instance.

3. Family, friends and business associates exemption

[68] The family, friends and business associates exemption is available where the person who purchases the security falls under one of the categories listed in s. 2.5(1) of NI 45-106. Those categories include "a close personal friend of a director, executive officer or control person of the issuer".

[69] One investor purportedly fell within this category because she was a close personal friend of Ruttenberg's. In fact, she was not a close friend and had never met him; rather, she was a relative of another investor who had met Ruttenberg only once and was also falsely represented to be Ruttenberg's close personal friend.

[70] Further, s. 2.5(2) of NI 45-106 provides that the family, friends and business associates exemption is unavailable where a commission or finder's fee is paid to a director, officer or control person of the issuer or an affiliate of the issuer.

[71] For eight of the instances where the Silverfern fund purported in its filings to rely on this exemption, Ruttenberg received a commission. Ruttenberg was a trustee of the fund and was thus a control person. The exemption was therefore unavailable in these instances.

[72] For two instances, financial records of the Silverfern fund and related entities suggest that Laverty received commissions totaling almost $3,000. Laverty denies this. He testified that the commissions went directly to his sister and to a friend who was identified in the records as the investor. The records are not primary source documents, such as a cheque or other bank record. We are prepared to give Laverty the benefit of the doubt on this point. We do not conclude that Laverty received the commissions.

[73] In any event, the respondents have failed to demonstrate that they were entitled to the family, friends and business associates exemption for the approximately 100 distributions in respect of which that exemption was claimed.

4. Offering memorandum exemption

[74] The offering memorandum exemption is available where:

a. an offering memorandum is delivered to the purchaser;

b. the purchaser provides a signed risk acknowledgment in prescribed form; and

c. the purchaser's acquisition cost of all securities in the preceding 12 months does not exceed a prescribed limit that depends on the purchaser's individual circumstances, but which limit may be as low as $10,000.

[75] In the reports of exempt distribution that they filed, the respondents purported to rely on the offering memorandum exemption with respect to approximately 100 of the 804 Silverfern distributions. However, the respondents did not meet

their burden of demonstrating that the purchasers qualified according to the applicable financial criteria, or that offering memoranda were in fact delivered and proper risk acknowledgments obtained. We cannot find that the respondents were entitled to the benefit of the offering memorandum exemption.

5. Trilogy

[76] Staff alleges that Trilogy engaged in illegal distribution. We disagree.

[77] The definition of "trade" includes acts in furtherance of a trade. Staff argues that for this reason, Trilogy's promotional activities were trades, and since no prospectus was filed for any sales that Trilogy was hoping to effect, these acts in furtherance of those anticipated sales were illegal distributions.

[78] Staff provided no authority for the proposition that uncompleted sales of securities can constitute the basis for a finding of illegal distribution of those securities. We are not prepared to make that finding here. Such a finding would imply that a final prospectus must be filed, and a receipt obtained, before any promotional activities can be carried out.

[79] Further, where an exemption to the prospectus requirement depends on the identity and circumstances of the purchaser of securities, it is impossible to determine whether that exemption is available in respect of purchasers who do not yet exist. The finding Staff asks us to make would unfairly expose legitimate issuers, who fully intend to rely properly on available exemptions, to a burden that the issuers could not possibly overcome.

[80] Accordingly, we dismiss Staff's allegation that Trilogy engaged in an illegal distribution.

6. Conclusion on illegal distribution

[81] Distributions of units of the Silverfern and GTA funds were made without a prospectus. The respondents did not meet their burden of demonstrating their entitlement to exemptions from that requirement. We therefore conclude that substantially all the distributions of units of those two funds contravened s. 53(1) of the Act, and that each of the respondent entities except Trilogy contravened that provision.

[82] As trustees of the Silverfern fund and as signatories to the fund's offering memorandum, and as trustees of the GTA fund, all three Principals authorized the illegal distributions by the Silverfern and GTA funds and are therefore deemed to have contravened s. 53(1) of the Act with respect to distributions of the fund units, by s. 129.2 of the Act.

D. Fraud

1. Introduction

[83] We turn now to Staff's allegations of fraud. Staff makes these allegations against Paramount, the three Silverfern entities (the fund, the general partner, and the limited partnership) and the Principals.

[84] The alleged misconduct falls into three categories:

a. misrepresentations to investors in the Silverfern fund, *i.e.*, use of the raised funds in a manner not contemplated by the offering memorandum

or various materials provided to investors, including marketing materials and subscription agreements;

b. hidden self-dealing by the Principals; and

c. misuse of an account established for pre-paid funds.

[85] Before we address these three categories, we review the legal framework relating to fraud under the Act.

2. Legal framework regarding fraud

[86] Section 126.1(1)(b) of the Act prohibits securities fraud. In this case, to prove that a respondent contravened that provision, Staff must show that the respondent:

a. directly or indirectly engaged or participated in an act, practice or course of conduct relating to the units of the Silverfern fund; and

b. knew, or ought reasonably to have known, that the act, practice or course of conduct would perpetrate a fraud on any person or company.

[87] There is no question that Paramount, the Silverfern entities and the Principals (to a greater or lesser extent) engaged in a course of conduct relating to units of the Silverfern fund. The question is whether each respondent knew, or ought reasonably to have known, that his or its course of conduct would perpetrate a fraud on any person or company.

[88] A fraud has two elements:

a. the *actus reus*, or primarily objective element, which must consist of:

i. an act of deceit, falsehood, or some other fraudulent means; and

ii. deprivation caused by that act; and

b. the *mens rea*, or subjective element, which must consist of:

i. subjective knowledge of the act referred to above; and

ii. subjective knowledge that the act could have as a consequence the deprivation of another.[13]

[89] We will now apply this framework to the three categories of fraud alleged by Staff. For all three categories, when we analyze the subjective element we focus on the Principals since they are individuals, who can more readily be said to "know" something, unlike an entity such as Paramount or the Silverfern fund. Having said that, in the circumstances of this case, any finding we make about what the Principals knew or ought to have known applies equally to Paramount and the three Silverfern entities. This is so because the Principals were the directing minds of those entities.[14]

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[13] *Quadrexx Hedge Capital Management Ltd (Re)*, 2017 ONSEC 3, (2017) 40 OSCB 1308 (***Quadrexx***) at paras 18-19; affirmed by the Divisional Court in *Quadrexx Hedge Capital Management Ltd. v Ontario Securities Commission,* 2020 ONSC 4392; *R v Théroux*, [1993] 2 SCR 5 (***Théroux***) at para 27, cited in *Richvale Resource Corp (Re)*, 2012 ONSEC 13, (2012) 35 OSCB 4286 at para 102; *Meharchand* at para 119

[14] *Quadrexx* at para 25

3. Misrepresentations to investors in the Silverfern fund

[90] The first category comprises Staff's allegations that the representations made to investors in the Silverfern fund were false.

[91] Term sheets attached to subscription agreements stated explicitly that the Silverfern fund would invest in second mortgages on residential properties. There was no mention of mortgages for other purposes.

[92] Marketing materials used to promote the Silverfern fund described the investment as being safe and dependable, and used terms such as "predictable, steady returns", "low volatility", "high-returning annuity/GIC alternative", "capital preservation" and "stable returns".

[93] The Silverfern fund offering memorandum expressly contemplated that the fund would invest in units of Silverfern LP. The fund's trustees were entitled to retain "a portion of the proceeds" for "operational funds, general trust purposes and for permitted Unit redemptions".

[94] Silverfern LP was to use the proceeds from the sale of its units "to directly or indirectly, invest its funds in second residential mortgages of up to 85% loan to value and in certain instances in higher ratio residential mortgages, provided that such higher ratio mortgages shall not exceed fifty percent (50%) of [Silverfern LP]'s total mortgage portfolio."

[95] Elsewhere, the offering memorandum contemplated investment in "Commercial First, Second Mortgages and Third Mortgages including land being acquired for residential development and construction", but stated that the fund primarily invested in residential second mortgages.

[96] Investors' funds were not used as promised in the term sheets, marketing materials or offering memorandum. Only $20 million of the $70 million raised by the Silverfern fund was used for residential second mortgages. The remaining $50 million funded higher-risk mortgages for undeveloped land or for the redevelopment of land to new uses.

[97] The portfolio of Multi-Residential Mortgages did not resemble what was promised to investors. In some instances, loan-to-value ratios far exceeded 100%, let alone the 85% figure that was disclosed. Not all mortgages were properly registered. Paramount exercised limited, if any, oversight over costs associated with development of the subject properties. The portfolio was highly concentrated in loans to entities controlled by one individual. All these factors contributed to a significantly higher risk than investors had bargained for.

[98] The objective element of the fraud allegations is clearly established. Even if the respondents decided to change course following issuance of the offering memorandum (a possibility that was neither argued by respondents nor supported by any evidence, and about which we cannot speculate), it would have been incumbent on the respondents to modify their disclosure and representations (*e.g.*, by filing an amended offering memorandum and by amending marketing material and subscription forms) so that existing and future investors were properly informed. Laverty, the only respondent who contested Staff's allegations, explicitly admitted that this ought to have been done.

[99] Without any such modifications, the representations persisted and they quickly, if not immediately, became false. The investors suffered a deprivation in that

their funds were used in a way that was not authorized and that exposed them to greater risk.

[100] That brings us to the subjective element. Its first component is satisfied because the Principals knew what the funds were being used for. We must still determine whether the second component is satisfied; *i.e.*, did the Principals know, or ought they reasonably to have known, that those uses could result in a deprivation of the investors? We conclude that they did know.

[101] The Principals, all three of whom were trustees of the Silverfern fund, signed the offering memorandum. All three knew or ought reasonably to have known that investors' funds were not being invested as promised in the offering memorandum.

[102] Laverty submits that he did not have timely or complete access to Paramount's financial records or status. Even if that is true, it does not change the fact that the offering memorandum, which Laverty signed, promised that investor funds would be used in a manner that differed from how the funds were actually used; nor does it change the fact that Laverty knew that some of the funds were being used for Multi-Residential Mortgage projects.

[103] Laverty concedes that the mortgage portfolio was materially different from what was represented to investors. However, he submits that Ruttenberg and others, but not Laverty himself, were responsible for disclosing this difference to investors.

[104] We cannot accept his submission. It is at odds with his admission on cross-examination that his responsibility as trustee was to oversee the funds, whether or not he had difficulties carrying out that responsibility.

[105] Laverty's submission on this issue also poignantly highlights the pitfalls of becoming a director, officer or trustee of an entity that engages in the public solicitation of investor funds. Laverty was a trustee of the Silverfern fund, and he signed the offering memorandum. Those roles are not mere formalities. They carry with them important obligations. We believe that Laverty was sincere in his efforts and honest in his intentions. But he took on a responsibility that he did not fully understand.

[106] As a trustee of the fund and as a signatory to the offering memorandum, Laverty assumed the burden of the representations in that document. Those representations proved to be false. As the Supreme Court of Canada has held, where someone tells a lie, knowing that some other person would act on that lie, and thereby puts that other person's property at risk, "the inference of subjective knowledge that the property of another would be put at risk is clear."[15]

[107] We acknowledge Laverty's testimony and submissions about the limited degree of his control over the respondent entities' affairs. Even if that is true, it was open to Laverty to take definitive steps (up to and including resignation) to ensure that he was not part of an enterprise that was breaching its regulatory obligations on an ongoing basis. He did not, and by continuing his involvement as an officer and trustee, he acquiesced in the entities' activities.

[15] *Théroux* at para 29

[108] We therefore find that Paramount, the Silverfern entities and all the Principals contravened s. 126.1(1)(b) of the Act through the misrepresentations in the offering memorandum.

4. Hidden self-dealing by the Principals

[109] The second category of fraud allegations relates to benefits that flowed to the Principals through a group of companies, the parent of which was Paramount Alternative Capital Corporation (**Paramount Alternative**). That parent company was owned as to 40% by each of Ruttenberg (jointly with his wife) and Burdon, and as to 20% by Laverty, all through holding companies.

[110] The benefits that flowed to the Principals included ownership interests in Multi-Residential Mortgage projects, as well as substantial fees paid to Paramount Alternative or to special purpose corporations owned by it. We begin by reviewing the ownership interests in Multi-Residential Mortgage projects.

(a) Ownership interests in Multi-Residential Mortgage projects

[111] Paramount Alternative owned a number of special purpose corporations, each of which was set up in respect of a particular Multi-Residential Mortgage project. Each special purpose corporation, in turn, owned an interest (usually either 50% or 100%) in that project's borrower.

[112] Because of this structure, each of the Principals had an indirect ownership interest in these Multi-Residential Mortgage projects.

[113] The marketing materials given to investors did not disclose that the Principals owned or would come to own interests in the Multi-Residential Mortgage projects.

[114] The offering memorandum provided some disclosure about possible conflicts of interest arising from ownership interests. However:

a. the disclosure applied only to situations where the mortgage loan was to a Paramount-related corporation, as opposed to an unrelated third party, and there were only two such instances among the many loans provided to third parties; and

b. the disclosure applied only to corporations owned by Ruttenberg and Burdon.

[115] The objective element of the fraud is clearly established. Investor funds were used in a way that was not disclosed, and to the personal benefit of the Principals instead of to the benefit of investors. This unauthorized diversion of funds constitutes "other fraudulent means".[16]

[116] We also conclude that the subjective element is satisfied for all three Principals. The entire Paramount Alternative structure was premised on the three Principals having ownership interests in the twenty special purpose corporations. None of the Principals, including Laverty, offered any evidence or argument to rebut Staff's allegations about the ownership interests.

[16] *Théroux* at para 18; *Meharchand* at para 120

(b) Fees paid to Paramount Alternative or to special purpose corporations owned by it

[117] The Principals, through their holding companies, issued invoices for upfront fees regarding the Multi-Residential Mortgages. The invoices contained no detail to substantiate the fees. However, François Collat, Paramount's former Chief Financial Officer, testified that he understood that the Principals regarded the fees as payable for work performed in arranging the mortgages.

[118] The fees were substantial. For 2015 and 2016 together, the Principals submitted invoices totaling $3,871,427. Of that amount, at least $1.72 million is traceable through bank and other records to the Principals' corporations. Approximately $1.32 million came from the Silverfern fund. Some portion of the fees was held back to cover expenses charged to the special purpose corporations. The percentage held back changed over time, ranging from zero to 20%.

[119] Fees were split among the three Principals in proportion to their ownership interest in Paramount Alternative (40% for each of Ruttenberg and 20% for Laverty). Laverty confirmed that he received 20% of the fees, less the amount held back. However, he characterized the payments as legitimate brokerage fees.

[120] We found the evidence about the fees to be inconclusive. The Silverfern fund offering memorandum disclosed that Paramount Alternative originated mortgages for the fund on behalf of Paramount pursuant to a referral agreement. The offering memorandum refers to a "Referral Agreement" in a way that suggests that it is a defined term. However, the offering memorandum contains no definition of "Referral Agreement".

[121] While we accept Staff's submission that the marketing materials did not disclose these referral fees, the offering memorandum does contain language that might authorize them. Based on the evidence and submissions before us, we cannot conclude on a balance of probabilities that the fees were unauthorized.

(c) Conclusion about hidden self-dealing

[122] We find that the Principals contravened s. 126.1(1)(b) of the Act by obtaining undisclosed ownership interests in Multi-Residential Mortgage projects. We dismiss Staff's allegation of a contravention related to the referral fees.

5. Misuse of an account for pre-paid funds

[123] The final category of fraud alleged by Staff relates to an account established to receive and disburse pre-paid funds. Two types of payments were paid into this account (the **Pre-Paid Account**), as reflected on term sheets for individual mortgage loans:

a. interest contingency, or pre-paid interest payments; and

b. interest rate buy-down payments.

[124] The interest contingency component was necessary because many Multi-Residential Mortgage projects would not produce sufficient income to cover periodic interest obligations, at least in the early stages. When the Silverfern fund made a mortgage advance to the borrower, an amount was withheld to represent interest payments for a specified period. As each periodic interest

payment was earned, the appropriate amount was to be withdrawn from the Pre-Paid Account and paid to the Silverfern fund.

[125] Interest rate buy-down payments occurred when a borrower wished to obtain a lower interest rate than was otherwise available and was willing to make an up-front payment to "purchase" that lower rate. That up-front payment was effected as a reduction in the amount advanced.

[126] Paramount did not always use the Pre-Paid Account funds as intended. Instead, Paramount used some of the funds to cover its operating costs. It also used some funds to repay certain loans that: (i) were related to Paramount and Ruttenberg but were unrelated to the Silverfern fund; (ii) put Paramount into a negative cash flow position; and (iii) pre-date the material time in this proceeding.

[127] When Collat, who was Paramount's CFO at the time, became aware of this practice, he told Burdon and Laverty about it. Laverty testified that this discussion occurred in April 2016. Collat initially testified that it happened in early 2015, although when confronted with Laverty's recollection, Collat conceded that it might have been 2016. Laverty attributed his confidence in the timing to a connection between the discussion and certain personal events in his and Burdon's lives that month. It is more likely than not that the discussion occurred in 2016.

[128] Burdon and Laverty spoke to Ruttenberg about the practice. Following that discussion, the Principals worked to find a substitute source of funds to cover Paramount's cash flow deficit.

[129] In late May 2016, an agreement was entered into that acknowledged the approximately $8 million owed by Paramount, Ruttenberg and his wife to Paramount Alternative, the Silverfern fund and the Silverfern general partner. The parties to the agreement were Paramount, Ruttenberg, his wife, Paramount Alternative, several special purpose corporations related to Paramount Alternative, the Silverfern general partner, and Aleria Capital Inc. (**Aleria**), which was a holding company owned by Burdon. The agreement was signed by Ruttenberg (personally and for Paramount) and by his wife, and by Burdon on behalf of all the other corporate parties to the agreement.

[130] Under the agreement, Aleria (Burdon's holding company) committed to lend working capital to Paramount and the Ruttenbergs in order to restructure Paramount's business. The loans were to be by way of a $1.75 million "1st mortgage facility" and a $1m "revolving line of credit".

[131] A few days after the date of the agreement, $1.75 million was deposited into the Pre-Paid Account. However, the funds did not come from Aleria, as contemplated by the agreement. Instead, they originated from the Silverfern fund. They were then passed through a corporation controlled by an individual who controlled most of the Multi-Residential Mortgage borrowers, before ending up in the Pre-Paid Account.

[132] In addition to that $1.75 million, the Silverfern fund continued to be the source of payments out of the Pre-Paid Account to cover Paramount's operating expenses and loan obligations. From May 2016 to June 2017, those payments totaled more than $3.2 million.

[133] Each time the Pre-Paid Account was used this way, Collat sought approval by sending an email to Burdon, with a copy to Laverty. Burdon routinely gave his approval. There is no evidence that Laverty ever responded, but neither did he object or attempt to stop the practice.

[134] Again, the objective element of fraud is established. Money from the Silverfern fund was diverted for purposes that improperly benefited Paramount and Ruttenberg, and that were not disclosed to investors.

6. Conclusion regarding Staff's fraud allegations

[135] We conclude that the respondents contravened s. 126.1(1)(b) of the Act in the following ways:

a. Paramount, the Silverfern entities and the Principals misrepresented the use to which investors' funds would be put. Because the Principals themselves made these misrepresentations, including by way of the Silverfern offering memorandum, we need not address s. 129.2 of the Act; *i.e.*, the question of whether they authorized, permitted or acquiesced in the entities' misrepresentations.

b. The Principals improperly acquired ownership interests in Multi-Residential Mortgage projects. Again, because the Principals engaged in this conduct directly, we need not address s. 129.2 of the Act.

c. Paramount and the Silverfern entities misused the Pre-Paid Account. Ruttenberg and Burdon authorized this misuse. Laverty acquiesced in it. All three Principals are deemed to have contravened s. 126.1(1)(b) of the Act, as contemplated by s. 129.2.

E. Prohibited representations

[136] The fourth category of Staff's allegations refers to s. 44(2) of the Act, which prohibits the making of false or misleading statements that a reasonable investor would consider relevant in deciding whether to enter into or maintain a trading or advising relationship.

[137] We have already found that the respondents made false or misleading statements to investors, and that the respondents' conduct was fraudulent when examined against those statements. Even if the investors could be said to be in a trading relationship with one or more of the respondents, which is not clear, a finding under s. 44(2) would share a common factual background with that underlying the fraud allegations. We therefore decline to make a finding regarding the s. 44(2) allegation.

F. Misleading statements by Trilogy

[138] The fifth and final category of allegations relates to Trilogy. Staff alleges that Trilogy, and by extension the Principals, contravened s. 126.2(1) of the Act, which prohibits a person or company from making a statement that the person or company knows, or ought reasonably to know, is misleading and would reasonably be expected to have a significant effect on the market price of a security.

[139] All efforts related to Trilogy were preliminary. Trilogy prepared marketing materials and set up a website, but did little else. Undoubtedly, Burdon and

Laverty intended to establish an issuer of securities. They did not get that far. There was no market price of a security to be affected by any misstatements.

[140] We dismiss these allegations against Trilogy.

G. Conduct contrary to the public interest

[141] In addition to specifically alleged contraventions of the Act, Staff alleges in numerous instances in the Statement of Allegations that the impugned conduct is "contrary to the public interest".

[142] As the Commission has previously noted,[17] the words "contrary to the public interest" do not appear in the Act. In this proceeding, Staff has identified no conduct, other than the alleged contraventions of the Act, that would warrant an order under s. 127 of the Act. We dismiss these allegations.

IV. CONCLUSION

[143] We have found that:

a. all seven respondent entities engaged in the business of trading without being registered to do so, contrary to s. 25(1) of the Act, and all three Principals are deemed to have similarly contravened that section, pursuant to s. 129.2 of the Act;

b. all respondent entities except Trilogy distributed securities without a prospectus, contrary to s. 53(1) of the Act, and all three Principals are deemed to have similarly contravened that section, pursuant to s. 129.2 of the Act;

c. Paramount, the Silverfern entities and the Principals contravened s. 126.1(1)(b) of the Act by perpetrating a fraud, in that:

i. they all misrepresented the use to which investors' funds would be put, or in the case of the Principals acquiesced in the entities' use of funds in a manner inconsistent with what had been represented;

ii. the Principals contravened s. 126.1(1)(b) of the Act by improperly acquiring ownership interests in Multi-Residential Mortgage projects; and

iii. Paramount and the Silverfern entities contravened s. 126.1(1)(b) of the Act by misusing the Pre-Paid Account, and the Principals are deemed to have similarly contravened that section, pursuant to s. 129.2 of the Act.

[144] We therefore require that the parties contact the Registrar by 4:30pm on May 20, 2022, to arrange an attendance, the purpose of which is to schedule a hearing regarding sanctions and costs, and the delivery of materials in advance of that hearing. The attendance is to take place on a mutually convenient date that is fixed by the Secretary, and that is no later than June 10, 2022.

[17] *Solar Income Fund Inc (Re)*, 2021 ONSEC 2, (2021) 44 OSCB 557 at paras 70-76

[145] If the parties are unable to present a mutually convenient date to the Registrar, each party may submit to the Registrar, for consideration by a panel of the Commission, a one-page written submission regarding a date for the attendance. Any such submission shall be submitted by 4:30pm on May 20, 2022.

Dated at Toronto this 25th day of April, 2022.

"Timothy Moseley"	*"Garnet W. Fenn"*
Timothy Moseley	Garnet W. Fenn

COMMISSIONER ZORDEL (DISSENTING IN PART):

I. INTRODUCTION

[146] At its core, this case is about capital raising by individuals and entities other than banks using business structures, including limited partnerships and unincorporated open-ended investment trusts, to raise money through the sale of securities of Mortgage Investment Entities (MIEs). Funds from the sale of these securities were used for and to fund single and multi-residential and non-residential property mortgages and project financing. In some later cases, funds were used to buy real estate property.

[147] The story began in 2014 with work putting together the ideas and structuring the entities, and the initial selling of securities. The allegations are multiple, covering various activities over the September 2014 to December 1, 2016 timeframe. During this time period, the Paramount Group raised approximately $78 million from over 500 investors through pooled MIEs. For convenience, I adopt all the defined terms as set out in the majority reasons.

[148] The allegations in this case involve fraud, misleading investors, unregistered trading, and the illegal distribution of securities of MIEs. In my view, considering the evidence presented at the hearing, Enforcement Staff has not proven all their allegations on a balance of probabilities. As a result, my findings are that:

a. Only Ruttenberg engaged in, and held himself out to be engaged in, the business of trading in securities to the public while unregistered contrary to subsection 25(1) *Registration – Dealers* of the Act;

b. I agree with the majority that Trilogy did not engage in an illegal distribution and did not breach s. 53(1) *Prospectus Required* of the Act;

c. Only Ruttenberg failed to file a prospectus or preliminary prospectus with respect to trades of units of the Silverfern fund contrary to subsection 53(1) *Prospectus Required* of the Act, in circumstances where no prospectus exemptions were available pursuant to Part XVII *Exemptions from the Prospectus Requirement* of the Act;

d. Only Ruttenberg engaged in fraud contrary to s. 126.1(1)(b) *Fraud and Market Manipulation* of the Act with respect to the following:

i. his actions, which over time were not always in accordance with the representations in the Silverfern fund offering memorandum and marketing materials;

ii. hidden self-dealing by Ruttenberg; and

iii. misuse of an account established for pre-paid funds;

e. I decline to make findings on the s. 44(2) *Representation Prohibited* allegation, for the same reasons as set out by the majority at paragraphs 136 and 137;

f. I decline to find that Trilogy breached s. 126.2(1) *Misleading or Untrue Statements* of the Act for the same reasons as set out by the majority at paragraphs 138 to 140; and

g. I decline to make a finding that the respondents acted contrary to the public interest for the same reasons as the majority set out at paragraphs 141 and 142.

[149] My reasons are set out below.

A. Unregistered trading

1. Application of the business trigger test

[150] I acknowledge that none of the respondents was ever registered under securities law. The issue is whether the respondents engaged in the business of trading and were required to be registered.

[151] This case involves the continuing and developing interpretation of the "business trigger test" from s. 1.3 *Fundamental Concepts* of the Companion Policy 31-103CP *Registration Requirements, Exemptions and Ongoing Registrant Obligations*. For background, National Instrument 31-103 *Registrant Requirements, Exemptions and Ongoing Registrant Obligations* and the Companion Policy, introduced in September 2009 and subsequently amended multiple times, purported to change how regulators should decide if a market participant needed to be registered with the OSC as an exempt market dealer or full dealer representative in order to communicate with potential funders, to accept investments or to sell securities. In 2009, the policy approach moved from a "trading trigger" to a "business trigger" for registration requirements. Cases since that time have raised a continuing discussion on how the "business trigger test" should be interpreted and applied.

[152] The "business trigger test" is set out at Companion Policy, s. 1.3 *Fundamental Concepts*. The test includes the following factors, which are listed as headings in the Companion Policy, s. 1.3 *Fundamental Concepts*:

a. Engaging in activities similar to a registrant (this includes trading or advising for a business purpose);

b. Intermediating trades or acting as a market maker (this typically takes the form of the business commonly referred to as a broker, and making a market in securities and is also generally considered to be trading for a business purpose);

c. Directly or indirectly carrying on the activity with repetition, regularity or continuity;

d. Being, or expecting to be, remunerated or compensated (compensation and having the capacity or the ability to carry on the activity to produce profit is also a relevant factor); and

e. Directly or indirectly soliciting (i.e. contacting anyone to solicit securities transactions or to offer advice may reflect a business purpose).

[153] When I apply these factors to the evidence, I come to a different conclusion than the majority. I also note that a Companion Policy is not binding law, which was also acknowledged by the majority in the statements at paragraph 32. While previous Commission decisions have applied the business trigger test from the Companion Policy, in my view these decisions have over time broadened the scope of the type of activities that are captured by the business trigger test to the point where they may negatively impact capital formation in Ontario and create extra burden for individuals and entities operating legitimate businesses for compensation.

[154] In my view, the only respondent whose conduct met the business trigger test and therefore had to be registered was Ruttenberg. Ruttenberg engaged in acts in furtherance of trades and traded on a regular and continual basis. He brought in investors, he helped investors fill out complicated subscription forms, and encouraged investors to check off boxes in subscription agreements where there was no proof that the investors were qualified for those exemptions and where they may not have had separate, independent or otherwise appropriate financial advice. Through these actions, he was directly involved in soliciting securities transactions. Ruttenberg received commissions for referring investors to the Silverfern fund. Overall, Ruttenberg was engaging in activities similar to those of a registrant through his actions of soliciting and selling units to investors.

[155] This was not the case for the other individuals, Laverty and Burdon. Based on the evidence presented, Laverty and Burdon do not meet the factors in the business trigger test.

[156] Laverty did not have the same involvement in dealing with investors as Ruttenberg did. I accept Laverty's testimony at the hearing that Laverty did not personally attend any of the sales meetings with investors or potential investors. Sales meetings were strictly done by Ruttenberg and his team of account managers. This is evident from looking at the evidence regarding interactions with investors and payment of commissions, which may have been something other than commissions. Staff's evidence indicated that Laverty solicited two investors and received $2,970 in commissions, whereas Ruttenberg received $218,490 in commissions from more than 70 investors. However, Laverty testified that he never received referral fees in connection with those two investors as they were (i) his sister and (ii) a friend of 20 years, and the two investors were paid the commission directly from Paramount and no compensation was paid to Laverty. I believe that Laverty was telling the truth and he also provided a letter from his friend supporting his position and explaining that his friend received the commission instead of Laverty. Regardless, dealing with two investors and receiving a small payment/commission does not in my view meet the threshold for trading with repetition, regularity or continuity. Laverty's actions fall short of meeting the business trigger test and he was not engaging in activities similar to a registrant or a market maker.

[157] Burdon did not meet with any investors and did not receive any commission. He was not trading with repetition, regularity or continuity. He was not engaging in activities similar to those of a registrant or a market maker. The business trigger test is not met for Burdon.

[158] With respect to the seven respondent entities (Paramount, the three Silverfern entities, the two GTA entities, and Trilogy), I find that none of these entities meet the business trigger test.

[159] When I review the precedents that Enforcement Staff relies on to establish that the business trigger test was met, I can distinguish them from the present case.

[160] For example, in *Momentas*, the actual business of the entity was trading and the principal business activities were described in the offering memorandum as using an automated equities trading system for equities trading and the trading of foreign currencies through foreign exchange traders.[18] In *Momentas,* the core business involved the selling of securities as evidenced by the overall composition of the workforce, overall expenses incurred and sources of revenue.[19] It had a team that was exclusively cold calling and selling convertible debentures. This is not the situation in the present case. In the present case, the notes to the Paramount audited financial statements for the year ended May 31, 2016 set out that "The company's principal business activity is to provide alternative lending solutions for clients who require short term interim financing." Further, the Silverfern offering memorandum sets out that the underlying business is:

> …to generate income from its Mortgage loan and other investments. To achieve these objectives, the Partnership will benefit from [Paramount]'s experience in originating, underwriting, syndicating and servicing Mortgage investments. …
>
> The Partnership intends to continue to pursue a strategy of growth through additional investments in Residential Mortgages and Commercial Mortgages that are currently underserviced by banks and other lending institutions. The Partnership is well positioned to add to its portfolio by focusing on underserviced market niches within the real estate lending market and intends to grow the Partnership's Mortgage assets by accessing capital through further capital contributions from the Fund. The Fund will finance such capital contributions by the issuance of additional Units. See Investment Strategy and Investment and Operating Policies of the Partnership. The Partnership may also invest directly or indirectly in real estate in Canada and the United States.

[161] In the present case the underlying business was mortgage-financing, being businesses that pool together money from investors to lend as mortgages. Each mortgage is meant to be secured by real property. The mortgage is registered in the name of the MIE or an entity created by the MIE for the benefit of the MIE investors. This did not deal with trading like *Momentas*. Not everyone is eligible

[18] *Momentas* at para 50
[19] *Momentas* at para 55

for bank-offered mortgages, and even if an applicant does get a bank mortgage, they may need additional money in the form of a second mortgage or a third mortgage and those may not be available through a bank. In order to meet demand for non-bank mortgages, the respondent entities were set up in Ontario for the purpose of (i) providing mortgages directly, or indirectly through corporate entities; to lend first or second mortgages to individual home or property owners; and then later (ii) to collectively, through business entities including limited partnerships, lend to developers of what have been called Multi-Residential Mortgages, for what could be business developments, or for real estate developments, and what was later found out to have included real property that was not yet being developed.

[162] Further, I note that the *Momentas* case predates the current business trigger test and is thus of limited value as a precedent.

[163] Another case referred to by Staff was *Meharchand*. In that case, the panel found that whatever legitimate cybersecurity business might have existed at some earlier period did not meaningfully persist and that investors were the only real source of funds.[20] Again this is not the situation in the present case. There was a legitimate business that existed during the Material Time. The Paramount audited financial statements for the year ended May 31, 2016 were in evidence. With respect to revenue, $6,011,064 was collected from mortgages under administration. There was a legitimate operating business that was generating revenue.

[164] Staff also relied on *Money Gate* as a precedent. I note that it was acknowledged in that case that not all mortgage investment corporations are necessarily engaged in the business of trading in securities simply because of the nature of a mortgage investment company.[21] Whether or not a mortgage investment company is engaged in the business of trading in securities remains an issue that must be resolved in light of all the relevant facts.[22] While the panel in *Money Gate* did find that the respondents in that case were in the business of trading, there are some facts that can be distinguished from the present case. Specifically, in *Money Gate* multiple individual respondents promoted the sale of securities and met with investors and the solicitation of investors took place through various means including promotional events, training sessions, the website, trade shows and certain individuals had a core responsibility to deal with investor relations.[23] Overall many respondents in *Money Gate* were involved with the soliciting of trades and this was a large part of *Money Gate's* overall operations. The same cannot be said in the present case. I find that only one principal Ruttenberg, was primarily involved with soliciting investments and in the business of trading. The actions of this one individual cannot condemn the legitimate activities of the seven respondent entities.

[165] Trading is done by people, either individually or as representatives of a trading firm that is a registered dealer. Ruttenberg was the only principal trading with repetition, regularity or continuity and who met the threshold of that factor in the business trigger test. Looking at the activities of the respondent entities

[20] *Meharchand* at paras 116 and 117
[21] *Money Gate* at para 165
[22] *Money Gate* at para 166
[23] *Money Gate* at paras 150 and 151

holistically, capital raising was but one element of what they were doing and in my view not the main element. The respondent entities were not trading with repetition, regularity or continuity – only Ruttenberg was. The respondent entities were engaged in active businesses whose growth was funded by the capital raised from investors.

[166] The seven respondent entities were operating legitimately in the mortgage sector. I take a cautious approach with the case law that focuses on "whether or not that activity is the sole or even primary endeavour". Through this wording, the business trigger test scope has been expanded over time and overreaches to capture conduct of legitimate business entities, which is of concern considering that the Companion Policy is not law.

[167] The Companion Policy language focuses on whether the activities engaged in are similar to a registrant or acting as a market maker. The wording in the Companion Policy states "Examples include promoting securities or stating in any way that the individual or firm will buy or sell securities. If an individual or firm sets up a business to carry out any of these activities, we **may** consider them to be trading or advising for a business purpose" [emphasis added]. The word "may" is used in the Companion Policy and in my view this reflects that there are some nuances based on the circumstances and context to determine whether the business trigger test is met as to different respondents. A CEO, or other officers, directors or staff may engage in activities to raise funds and this would not automatically mean that registration is required. A full examination of the unique circumstances is needed to determine whether or not registration is required as discussed below.

[168] Another important consideration is that subsection 25(1) *Registration – Dealers* uses the heading "Dealer". In my view an individual person being a dealer, while possible in some circumstances, can be a stretch and caution should be exercised to ensure that individuals who raise capital legitimately are not automatically found to meet the business trigger test and require registration. For example, a CEO should not feel constrained to raise capital and such raising of capital does not automatically mean that trading is being done for a business purpose similar to a registrant.

[169] While I acknowledge that Ruttenberg did engage in acts in furtherance of trades, and he did raise funds during the time that the respondent entities were operating, the fact that funds were raised and the focus of trading with repetition, regularity or continuity, whether or not that activity is the sole or even primary endeavour are not determinative of whether an entity meets the business trigger test. Looked at holistically, the factors for the business trigger test are not met by the respondent entities. Specifically, there was evidence of Ruttenberg receiving commission compensation for trading but there was insufficient evidence to demonstrate the respondent entities were expecting to receive compensation for trading.

[170] I also acknowledge that there was uncertainty regarding the application of registration exemptions to MIEs. At the hearing, Staff referred to *CSA Staff Notice 31-323 Guidance relating to the registration obligations of mortgage investment entities* which was published on February 25, 2011 and an *OSC News Release of February 19, 2016: OSC Reminds Mortgage Investment Entities of Registration Requirements*. In Staff's view, this information signalled to those

acting in the MIE space that registration was required. In my view, the CSA Staff Notice and OSC News Release signal that there was some confusion about whether MIEs needed to be registered. This is because the registration requirement is dependent upon the business trigger test being met. This test is not a bright-line test and is specific to the unique circumstances and, as set out in the Companion Policy, it **may** indicate registration is necessary but this determination is not automatic. Regardless of any confusion that may have existed for such entities, in the specific circumstances of this case, when I apply the business trigger test to the respondent entities and Laverty and Burdon, I find that they were not in the business of trading.

[171] For the reasons I have set out above, I find that only Ruttenberg breached s. 25(1) *Registration – Dealers* of the Act.

2. Section 129.2 of the Act – Directors and Officers

[172] As I have found that none of the respondent entities met the business trigger test and were required to be registered, the question of whether the principals are liable under s. 129.2 *Directors and Officers* of the Act is moot.

B. Illegal distributions

1. Trilogy

[173] I agree with the majority decision that Trilogy did not breach s. 53(1) *Prospectus Required* of the Act as it was not involved in any completed trades and therefore was not involved in an illegal distribution.

2. The Paramount entities, Laverty and Burdon

[174] I acknowledge that distributions took place. Fund units are securities and the sale of fund units were distributions because those units had not previously been issued. However, I find that there was insufficient evidence provided by Staff to make a finding that exemptions were not available to the Paramount entities (which include Paramount, the three Silverfern entities, the two GTA entities), Laverty and Burdon.

[175] There was no prospectus and no market for these securities and they could only be issued under a prospectus exemption and resold through further prospectus exemptions. There are numerous exemptions to the prospectus requirement set out in NI 45-106 *Prospectus Exemptions*. Staff submits that it was up to the respondents to lead evidence to establish that exemptions from the prospectus requirement were properly claimed in respect of each issuance of the units of the Funds and Staff also submits that such evidence was not led by the respondents for all investors. I note that resales of securities issued under prospectus exemptions would have required further prospectus and registration exemptions under securities laws, which issues were not addressed or a concern in this case.

[176] The subscription agreement allowed for various exemptions and subscribers checked the applicable boxes, as is standard for exempt distributions. I do not know if appropriate evidence of the availability of such checked exemptions was obtained.

[177] Unfortunately it is not clear that the prospectus exemptions purported to be relied on for distributions were actually available for every investor who purported to avail themself of such prospectus exemption. It is also in evidence

that some investors made incorrect statements in subscription agreements to the effect that they were eligible to participate in a private placement when in fact they were not eligible.

[178] In my view, the onus should not be on the respondents to demonstrate that an exemption is available for every security issued, but they should demonstrate that processes were followed at the time so management could sign off on there being an exemption available and so regulatory filings could be made with securities regulators regarding use of such exemptions. Staff has made allegations and Staff must prove those allegations on a balance of probabilities. In this case, Staff is alleging that exemptions are not available and there is insufficient evidence before me to make such a finding.

[179] In their evidence and submissions, of the over 500 investors, Staff focused on 75 investors of which Staff said 41 investors did not meet any of the criteria that would establish them as an accredited investor or have another exemption available. This conclusion by Staff regarding the 41 investors was made on the basis of an after-the-fact survey, which I do not find to be determinative. However, I accept that some investors did not have prospectus exemptions available. Three of these investors, SB, MC and JW testified at the hearing. MC testified at the hearing that the friends, family and business associates exemption that MC used was not available to MC. However, the accredited investor and friends, family and business associates prospectus and offering memorandum exemptions in NI 45-106 *Prospectus Exemptions* and other prospectus exemptions may have been available. Staff did not address this possibility and as such I am left with uncertainty and cannot make a finding that no prospectus exemptions were available.

[180] An example of another exemption that may have been available is the offering memorandum exemption. In this case there was in evidence before the Panel a Form 45-106F2 *Offering Memorandum for Non-Qualifying Issuers* regarding the issuer Silverfern Secured Mortgage Fund. Page 6 of this offering memorandum states that the offering memorandum exemption is one of the exemptions being relied upon (along with the accredited investor exemption and minimum amount exemption). Further, in evidence there were Form 46-106F1 *Reports of Exempt Distributions* filed for the Silverfern Fund and there was a Schedule 1 to this form filed in evidence that indicated that some investors did rely on the offering memorandum exemption. Staff did not address whether the s. 2.9 *Offering Memorandum* exemption in s. 2.9 of NI 45-106 *Prospectus Exemptions* was available and I am left with an incomplete picture as to the application of exemptions. Instead, Staff took a narrow focus and only looked at two exemptions, the accredited investor exemption and friends, family and business associates exemption. This narrow focus ignores that while investors may not have qualified for the accredited investor exemption and friends, family and business associates exemption, there could have been other exemptions available at the same time such as the offering memorandum exemption or others.

[181] I cannot ignore the offering memorandum in evidence before me. The offering memorandum prospectus exemption (NI 45-106, s. 2.9) has specific requirements for disclosures to investors and does require audited financial statements, whereas other prospectus exemptions like the accredited investor

exemption do not. I have reviewed the Silverfern Subscription Agreement and the Offering Memorandum of April 2016 and note that they were prepared by external legal counsel. I find the documents to be standard for the time and not misleading based on the included information at the time and they appear to comply with the requirements for the offering memorandum exemption as set out in NI 45-106, s. 2.9.

[182] I note that the offering memorandum exemption in NI 45-106, s. 2.9 came into force on January 13, 2016. The conduct in the case before me spans from September 2014 to November 2016. So for at least a portion of the relevant time period, the offering memorandum exemption was available and in force in Ontario. I also note that other jurisdictions in Canada had the offering memorandum prior to January 2016. Because Staff did not cover the offering memorandum exemption at the hearing, I have an incomplete picture of which investors could have benefited from this exemption. Where there is the possibility or it is likely that other exemptions applied, the benefit of the doubt should be given to the respondents.

[183] I find that some investors misrepresented their prospectus exemption qualifications in order to participate in the investments and to avoid missing out on what was expected to be a high rate of interest, and there was incorrect information on the subscription forms and/or 45-106F1 *Report of Exempt Distribution* forms filed with the OSC. While I agree with the law that it is the obligation of the issuers to show that subscriptions were completed properly for subscribers, I disagree with the application of the procedural principal to the extent that if there are a few subscriptions that were not completed correctly and allowed a non-eligible subscriber to participate, then the result is that the entire business is offside, and all the directors and officers are offside the law, regardless of their level of involvement, with the potential result that the entities may be shut down in a way that results in unanticipated losses for investors. This is a disproportionate consequence for an otherwise legitimate business. The Paramount entities, Burdon and Laverty should not be held responsible where investors misled them about qualifying for exemptions. It is unrealistic for entities and individuals such as the Paramount entities, Burdon and Laverty to uncover misrepresentations or lies from investors when investors are purposefully deceiving them and completing forms inappropriately, possibly at the suggestion of Ruttenberg as we had evidence that he was telling investors how to fill out forms. Exemptions should be available to issuers, entities and persons when they are used in good faith.

[184] In my view, investors do need to take some responsibility for completing subscription forms properly. To qualify under the accredited investor exemption, an individual purchasing a security must meet certain income or asset tests prescribed under NI 45-106 *Prospectus Exemptions*. The Commission's decisions confirm that the respondents must carry out a factual inquiry to confirm that the individual actually meets **one of** those income or asset or other exemption tests. Not completing a subscription agreement responsibly as to being eligible as an accredited investor (which has a lot of subcategories) is problematic. Subscribers/investors also have a "common sense" obligation to read the material they are given and to seek the assistance of a financial and/or legal advisor before they commit to the investment and as time passes and the investment and the markets change.

[185] As a result, I find that prospectus exemptions were available for many of the subscribers, and that the Paramount entities, Burdon and Laverty, did not engage in an illegal distribution without an exemption and did not breach s. 53(1) *Prospectus Required* of the Act. I do find that Ruttenberg breached s. 53(1) *Prospectus Required* for the reasons set out in the section below.

3. Ruttenberg engaged in an illegal distribution without any available exemptions

[186] Further to the above paragraph, I have come to a different conclusion with respect to Ruttenberg. I find that Ruttenberg cannot benefit from any prospectus exemptions, because it was he who told certain investors to misrepresent whether they qualified for exemptions, either directly or through his staff; or Ruttenberg himself falsely completed the subscription agreements and indicated exemptions which he knew did not apply. Ruttenberg, directly or through his staff, told investors to fill out the forms in a certain way.

[187] In this case, it was the actions done by Ruttenberg in obtaining completed exempt distribution documentation and doing filings with the applicable securities regulators that were offside securities law. The testimony given by two investors revealed that they were told by Ruttenberg to provide answers to subscription questions that would indicate they were qualified to invest, which representations were false, but would thus allow them to participate. It became clear in their testimony that those two investors did not have prospectus exemptions available to them for the requested investments. It appears that Ruttenberg told them they could not invest if they didn't fit in one of these categories. While I recognize subscription forms are difficult to navigate, and the decision to misrepresent was made by the investors, I also find that it was more likely than not that the Ruttenberg knew the two subscribers were lying and did nothing about that.

[188] The evidence demonstrated that it was Ruttenberg meeting with the majority of investors and dealing with the associated paperwork directly or through his staff; and Burdon never met with investors and Laverty only met with two investors, being his sister and a friend of 20 years, as stated above.

[189] In my view, Ruttenberg's misconduct should not impact the Paramount entities, or Burdon and Laverty, because they were unaware of what Ruttenberg was doing. They could not control Ruttenberg and how he was handling the filling out and reviewing of the paperwork associated with investor subscriptions. In my view, if anyone else should have been reviewing and ascertaining that Ruttenberg was acting appropriately, it should have been the Chief Financial Officer, who was not named as a respondent in this proceeding, but in the end it was Ruttenberg's responsibility.

[190] As a result, I find that Ruttenberg did not qualify for prospectus exemptions and breached s. 53(1) *Prospectus Required* of the Act.

4. Section 129.2 of the Act – Directors and Officers

[191] As I have found that none of the respondent entities breached s. 53(1) *Prospectus Required* of the Act, the question of whether the principals are liable under s. 129.2 *Directors and Officers* of the Act is moot.

C. Fraud

[192] To make out its securities fraud allegations, Staff must establish:

a. a respondent directly or indirectly engaged or participated in any act, practice or course of conduct relating to securities;

b. the act, practice or course of conduct perpetrated a fraud on any person or company; and

c. a respondent knew or reasonably ought to have known that the act, practice or course of conduct perpetrated a fraud.

[193] To satisfy the second element above, Staff must establish the following elements of fraud:

a. the *actus reus*, or objective element, which must consist of: an act of deceit, falsehood, or some other fraudulent means; and deprivation caused by that act; and

b. the *mens rea*, or subjective element, which must consist of subjective knowledge of the act referred to above, and subjective knowledge that the act could have as a consequence the deprivation of another.[24]

[194] The majority finds that the above elements are satisfied with respect to the following three categories of fraud alleged by Staff:

a. misrepresentations to investors in the Silverfern fund;

b. hidden self-dealing by the Principals; and

c. misuse of an account established for pre-paid funds.

[195] I disagree with the majority that Staff has proven the above elements for all of the respondents, particularly Laverty, Burdon and the Paramount entities. I agree with certain of the majority's findings, as I explain herein, including that Ruttenberg engaged in fraud. These are my reasons for these findings.

1. Misrepresentations to investors in the Silverfern fund

[196] Staff alleges that the representations made to investors in the Silverfern fund were false, and were thereby fraudulent. Staff submit that the Principals and Paramount entities defrauded investors by making misrepresentations in the promotional materials, subscription agreements and offering memorandum as to the true nature and risks associated with investments in the Silverfern fund. Investors were told that their funds would be invested in a portfolio of Second Residential Mortgages. Instead, some of their funds were invested in some Multi-Residential Mortgages, an investment that was fundamentally different and riskier in nature. The majority sets out the representations at paragraphs 91 to 97 of the majority reasons.

[197] The majority finds that the first element of fraud, the objective element, is satisfied as the representations in the offering memorandum and marketing materials were false.

[198] With respect to the second element of the test, the subjective element, the majority finds that the first component is satisfied because the Principals knew

[24] *Quadrexx* at paras 18-19; *Théroux* at para 27

what the funds were being used for and the majority focused its analysis on the second component of the test: did the Principals know, or ought reasonably to have known, that those uses could result in a deprivation to the investors? The majority finds that they did know.

[199] I disagree with the majority, with respect to both elements of the test, for the following reasons.

[200] First, I do not find that there was a misrepresentation as to the use of funds in the materials, including the Silverfern offering memorandum. The offering memorandum is not in itself fraudulent. The offering memorandum included plans for what the entities were going to do. Problems arose later when investment in mortgages and property were not made in accordance with some of the parameters set out in the offering memorandum.

[201] The offering memorandum is a business plan and roadmap. It explains what a corporation intends to do with funds. Sometimes plans change and things do not happen as expected. In my view, that does not mean the offering memorandum and related materials are inherently fraudulent.

[202] Having reviewed the offering memorandum through the lens of securities law requirements for disclosure, and having considered the document's contents in the context of what has been provided in evidence and testimony in this hearing, I have not found anything that could stand out as being misleading. Any category of disclosure that was required to be included was included. There is insufficient evidence for me to determine that some other information should have been included.

[203] The 74-page disclosure document was comprehensive and well-written. The Silverfern fund's structure was set out along with the business of the Paramount entities and risk factors. The process for investment and redemptions once a year was clear. The disclosure of investment risks was extensive. The conflicts of interest were addressed. The payments to various entities for services were set out. The offering memorandum was very clear that there was a lot of flexibility as to what could be invested in.

[204] As I did not find misrepresentations in the offering memorandum and other promotional materials as of the date of the offering memorandum (April 30, 2016), there was thus no deprivation caused by any offering memorandum misrepresentations, and I find that the objective element of fraud is not established, let alone the subjective element.

[205] Even if the objective element is somehow established, the subjective element of fraud (i.e., did the Principals know, or ought reasonably to have known, that there was a consequence of deprivation to investors), is not satisfied as it relates to Laverty and Burdon. This is because Laverty and Burdon had no control over Ruttenberg's actions and were unaware of Ruttenberg's actions until it was too late.

[206] It is important to note that the Silverfern financial statements were audited and there was no evidence provided to me of anything being out of order. Laverty and Burdon were not involved in keeping the books. They did not authorize, permit or acquiesce to types of investment percentages being offside, and they actively tried to take control of the business when they discovered problems. They would have no way of knowing if investors' funds were not being used as

promised in the offering memorandum. Neither Ruttenberg nor the CFO provided appropriate financial information to Laverty and Burdon. Ruttenberg was the individual in control. He was the one communicating directly with investors and making the "sale" and "closing the deal". It is unfair to place blame on all three Principals in the circumstances. In this situation, while the offering memorandum did not contain fraudulent misrepresentations, it was Ruttenberg's actions which were offside the offering memorandum and fraudulent.

[207] Staff submits that the Principals were aware of the representations regarding the Silverfern fund investments and therefore had subjective knowledge that the representations were untrue. I do not agree that Laverty or Burdon knew deprivation would result from the investments when the business started, because they did not have knowledge of what specific investments would be made; what the terms of the contracts would be; and what the actual profitability or losses of individual investments would be. They did not realize they would be unable to get adequate information, or influence or control how the business was operated, and they did not expect fraud to result. Despite efforts by Laverty and Burdon to effect change, Ruttenberg refused to relinquish control of the bank accounts or otherwise relinquish or share control of the business.

[208] To summarize, Ruttenberg controlled everything with respect to the business and should be held solely liable for any and all fraudulent conduct. Ruttenberg was the main source for the verbal representations to investors, not Laverty or Burdon. Ruttenberg ran the business and, with the assistance of the CFO who controlled the books and financial disclosure, managed the organization, misrepresenting a lot of information to Laverty and Burdon, as well as to investors.

[209] Upon reviewing the evidence before me, I question what actual ability Laverty and Burdon had to effect decisions. Neither Laverty nor Burdon controlled Paramount or the other entities. Laverty testified that attempts by him and Burdon to remove Ruttenberg were unsuccessful and that Ruttenberg was not interested in handing control over. In addition, Laverty testified that Ruttenberg's whole family worked in the business and everyone that worked there was handpicked by Ruttenberg, loyal and dedicated to him. The staff had no interest in taking direction from anyone but Ruttenberg. Ruttenberg, directly or indirectly was making all the decisions.

[210] Ruttenberg and his wife were the sole shareholders and directors of Paramount. Ruttenberg was controlling Paramount and was clearly unwilling to take direction from Laverty or Burdon. Laverty did not have adequate or timely access to financial information from Ruttenberg or the CFO and testified at the merits hearing that he was misled about the financial situation of Paramount: "If I had known the financial position of Paramount and what had been going on, I never would have gotten involved in the company at all. Neither would have Burdon. All transfers and controls of cash and accounting were handled solely by Ruttenberg."[25]

[211] The majority states at paragraph 89 of these reasons that any finding made about what the Principals knew or ought to have known applies equally to the

[25] Paramount Transcript July 24, 2020, page 12, lines 9-16

corporate entities because the Principals were the directing minds of those entities, citing the Commission's *Quadrexx* decision for this proposition.

[212] I considered concluding that some entities controlled by Ruttenberg committed fraud, because they acted on Ruttenberg's knowledge in making investments in Multi-Residential Mortgage projects that were not well addressed in what they had originally marketed, though the offering memorandum in evidence does indicate considerable investment latitude, as noted above. Also, Ruttenberg did not advise or seek consent from prior investors as the portfolio make-up changed, but such consent was not necessarily required in the pooled funds. Further, there is no evidence before me that new investors were advised of the change in allocation structure.

[213] I do not think it is necessary or appropriate to find, every time an entity varies from statements in an offering memorandum due to the activities of a director or officer, that the corporation also committed fraud. I find that coming to such a conclusion here takes the law too far.

[214] While I find Ruttenberg committed fraud, I do not find that Staff has shown that Laverty or Burdon engaged in fraud in the first category alleged by Staff. I also find that not only did the Paramount entities not perpetrate a fraud, they were potentially the victims of fraud as a result of Ruttenberg's actions and being controlled by Ruttenberg.

[215] I find that the offering memorandum contained no misrepresentations when it was prepared. It set out a plan for the use of funds and provided adequate disclosure about this and did not over represent the business plan. The language in the offering memorandum also provided some leeway for implementation of the business plan.

[216] Ruttenberg knew what was stated in the offering memorandum and, on his own, he knowingly diverged from the plan set out in the offering memorandum and engaged in actions that were not in accordance with the disclosure in the offering memorandum, thereby harming and depriving investors, which I find to be fraudulent misconduct. The Silverfern offering memorandum set out that funds would be invested in a portfolio of First or Subordinate Mortgages, including Second and Third Residential Mortgages and land being acquired for residential development and construction; and could be invested directly or indirectly through a joint venture or co-ownership in real estate. As a result of Ruttenberg's actions, some investor funds were invested in Multi-Residential Mortgages, an investment with a fundamentally different and riskier nature than individual home mortgages. Ruttenberg also lied to investors through his use of marketing materials to entice them to invest. Ruttenberg was the main source for verbal representations to investors which included conveying that the investment was low risk, using words like "predictable, steady returns", "low volatility", "high-returning annuity/GIC alternative", "safety", "capital preservation", and "stable returns". It was Ruttenberg who met with investors and made these representations and put their funds at higher risk than they had expected. Laverty and Burdon did not interact with investors. Further, as I found above at paragraphs 208 to 210, Laverty and Burdon could not control Ruttenberg and they were unaware that funds were not being used as promised in the offering memorandum. I find that it was Ruttenberg on his own that engaged in fraud.

2. Hidden self-dealing by the Principals

[217] Turning to the second fraud allegation, that the Principals leveraged investor funds in the Silverfern fund to procure undisclosed benefits for themselves, the majority finds that both elements of fraud were satisfied with respect to ownership interests in Multi-Residential Mortgage projects. I agree with the majority's conclusions in paragraphs 117 to 121 with respect to referral fees. My reasons below relate exclusively to the allegations as they relate to Multi-Residential Mortgage projects, where, other than with respect to Ruttenberg, I disagree with the majority's findings.

[218] The majority finds that the first component of fraud is satisfied, because the Principals knew what the funds were being used for (i.e., for the personal benefit of the Principals instead of for the benefit of investors). The majority also finds that the second element is established for all three Principals.

[219] Staff submits that the Principals leveraged investor funds in the Silverfern fund to procure undisclosed benefits for themselves. Marketing materials given to investors did not disclose that the Principals owned or would come to own interests in the Multi-Residential Mortgage projects.

[220] Staff submits that the omission of material facts from marketing materials and other investor disclosure including the offering memorandum is itself a fraudulent act. The use of investor assets to procure a personal benefit is, in fact, a form of diversion of investor assets, and also constitutes "other fraudulent means" when considering the *actus reus* (the objective element) of fraud.

[221] The fraud occurred in the acceptance of the investments by the Paramount and Silverfern fund, where the acceptances, at some point, were not in accordance with the terms on which investors had been told these funds would be structured, including what percentage of the funds could be Multi-Residential Mortgages.

[222] I do not find the objective or subjective elements of fraud to be established with respect to Laverty or Burdon. It was reasonable for Laverty and Burdon to expect fund investment money would be used for what the Declarations of Trust, offering memorandum and presentation material said they would be used for, at the beginning. They did not control the entities and Laverty's testimony at the merits hearing was that he did not have timely (or complete) access to financial information. They may have been naïve and failed to ensure there were adequate controls in the organization, but that is not evidence of *actus reus* on their part. The situation evolved, and when Laverty and Burdon learned of the changed situation they tried to correct it.

[223] There is no restriction on the Principals owning Limited Partnership units. To the extent that someone (just Ruttenberg) had an interest in a Multi-Residential Mortgage project that was being financed through a Paramount entity, that would be a conflict of interest. I find that only Ruttenberg's actions constitute "other fraudulent means" and he used investor assets for personal benefit.

[224] Accordingly, I find that there was no hidden self-dealing by Laverty or Burdon, or the Paramount entities (for the reasons I've set out in paragraphs 212 to 214 above). I find that Ruttenberg did engage in hidden self-dealing and did not disclose a conflict of interest, and Staff has established that Ruttenberg engaged in fraud.

3. Misuse of an account for pre-paid funds

[225] Staff submits that the pre-paid account diversions are the last and, arguably, most blatant layer of fraud engaged in by the Principals and the Paramount entities. The majority finds that Staff has established this third fraud allegation. I disagree, except as the findings relate to Ruttenberg, for the following reasons.

[226] I note that Laverty's role was to extend the flow of the mortgage business, so he was generally out of the office, meeting with businesses and other partners so they would refer clients needing second mortgages, and he would summarize term sheets and complete a capital breakdown and send all documentation to Paramount or Silverfern for review and possible funding.[26] There is no evidence of deceit, falsehood or deprivation in these activities.

[227] Burdon's role was being responsible for sourcing the development deals for the Multi-Residential Mortgage projects.[27] There is no evidence of deceit, falsehood or deprivation in these activities either.

[228] Ruttenberg appeared, later during the Material Time, to be misusing prepaid interest amounts for other purposes, due to financial difficulties and possibly for his own family's use, without advance approval and without appropriate explanations being provided to Laverty and Burdon, as to what was developing. This caused further declines in the business that may not have been discoverable by Burdon and Laverty on a timely basis. Ruttenberg's wife would also have benefited from misuse of the prepaid funds (however, I note Ruttenberg's wife is not a named respondent in this matter and I make no findings against her).

[229] Ruttenberg initiated the pre-paid account withdrawals and was the beneficiary of the withdrawals. Laverty and Burdon were informed of the pre-paid account withdrawals at the outset and were informed of each withdrawal thereafter. The withdrawals were either expressly approved, in the case of Burdon, or were not objected to by Laverty who also took no steps to stop the payments.

[230] Even if the withdrawals were approved or not objected to, I believe this fraud allegation is another instance in which Laverty and Burdon lacked the knowledge and control of the business to be expected to have the same level of culpability as Ruttenberg.

[231] For these reasons, I do not find that Laverty or Burdon engaged in fraud in the third category alleged by Staff. Staff has also not shown that the Paramount entities engaged in fraud for the reasons I set out in paragraphs 212 to 214 above. I find that only Ruttenberg engaged in fraud.

4. Conclusion

[232] For all of the above reasons, I find that Staff has not proven on a balance of probabilities that all of the respondents perpetrated a fraud on investors. In my view, the only respondent that has perpetrated a fraud is Ruttenberg and I find that he alone contravened s. 126.1(1)(b) *Fraud and Market Manipulation* of the Act.

[26] Paramount Transcript July 24, 2020, page 10 lines 8-11
[27] Paramount Transcript July 24, 2020, page 32 lines 18-21

5. Section 129.2 of the Act – Directors and Officers

[233] As I have found that none of the Paramount entities breached s. 126.1(1)(b) *Fraud and Market Manipulation* of the Act, the question of whether the principals are liable under s. 129.2 *Directors and Officers* of the Act is moot.

D. Prohibited representations

[234] I decline to make findings on the s. 44(2) *Representations Prohibited* allegation, for the same reasons as set out by the majority at paragraphs 136 and 137.

E. Trilogy did not make misleading statements

[235] I decline to find that Trilogy breached s. 126.2(1) *Misleading or Untrue Statements* of the Act for the same reasons as set out by the majority at paragraphs 138 to 140.

F. Public interest allegations

[236] I decline to make a finding that the respondents acted contrary to the public interest for the same reasons as the majority set out at paragraphs 141 and 142.

V. CONCLUSION

[237] I therefore find that:

a. Only Ruttenberg engaged in, and held himself out to be engaged in, the business of trading in securities to the public while unregistered contrary to subsection 25(1) *Registration – Dealers* of the Act;

b. I agree with the majority that Trilogy did not engage in an illegal distribution and did not breach s. 53(1) *Prospectus Required* of the Act;

c. Only Ruttenberg failed to file a prospectus or preliminary prospectus with respect to trades of units of the Silverfern fund contrary to subsection 53(1) *Prospectus Required* of the Act, in circumstances where no prospectus exemptions were available pursuant to Part XVII *Exemptions from the Prospectus Requirement* the Act;

d. Only Ruttenberg engaged in fraud contrary to s. 126.1(1)(b) *Fraud and Market Manipulation* of the Act with respect to the following:

   i. his actions, which over time were not always in accordance with the representations in the Silverfern fund offering memorandum and marketing materials;

   ii. hidden self-dealing by Ruttenberg; and

   iii. misuse of an account established for pre-paid funds;

e. I decline to make findings on the s. 44(2) *Representation Prohibited* allegation;

f. I decline to find that Trilogy breached s. 126.2(1) *Misleading or Untrue Statements*;

g. I decline to make a finding that the respondents acted contrary to the public interest.

Dated at Toronto this 25th day of April, 2022.

"Heather Zordel"
Heather Zordel