Capital Markets Tribunal | Tribunal des marchés financiers | 22nd Floor 20 Queen Street West Toronto ON M5H 3S8 | 22e étage 20, rue Queen ouest Toronto ON M5H 3S8

Citation: *Mughal Asset Management Corporation (Re)*, 2023 ONCMT 39
Date: 2023-11-01
File No. 2022-15

IN THE MATTER OF
MUGHAL ASSET MANAGEMENT CORPORATION,
LENDLE CORPORATION and USMAN ASIF

REASONS AND DECISION

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

Adjudicators:	Andrea Burke (chair of the panel) Geoffrey D. Creighton	
Hearing:	By videoconference, April 24, 26 and July 20, 2023; final written submissions received October 26, 2023	
Appearances:	Sarah McLeod	For Staff of the Ontario Securities Commission
	Usman Asif	For himself and Mughal Asset Management Corporation and Lendle Corporation

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REASONS AND DECISION

1. OVERVIEW

[1] These are our reasons for finding that the respondents, Mughal Asset Management Corporation, Lendle Corporation and Usman Asif, breached the Ontario *Securities Act*[1] (the ***Act***) by perpetrating a fraud on investors and also that Asif made false and misleading statements to Staff of the Ontario Securities Commission, disclosed an investigation order and summons and engaged in conduct contrary to the public interest.

[2] Staff alleges that Mughal was a sham investment corporation operated by Asif. Over a five-year period, Mughal and Asif raised approximately $3 million from investors by representing that Mughal was a legitimate investment firm that traded in securities on behalf of investors. In reality, Asif was using Mughal and Lendle, another corporation controlled by Asif, to operate a scheme in which new investor funds were used to pay "returns" to existing investors, commonly known as a Ponzi scheme. Contrary to the representations made to investors, none of their funds were ever invested. The scheme also funded Asif's lifestyle and personal expenses.

[3] Staff also alleges that during the course of the investigation of his conduct, Asif repeatedly misled and interfered with the work of the Commission's investigation team. Asif lied while testifying under oath and in correspondence, failed to produce documents required to be disclosed by a summons, concealed the existence of certain documents, unlawfully disclosed the nature or content of a summons, coached a witness on how to respond to the Commission's investigation team and encouraged other witnesses to ignore the investigation team.

[4] During the merits hearing in this proceeding, Staff and the respondents jointly filed an agreed statement of facts in which the respondents admitted to all of Staff's allegations in the Statement of Allegations (issued in July 2022 and later amended in December 2022) and admitted to most of the facts pleaded in the

[1] RSO 1990, c S.5

Amended Statement of Allegations and contained in the affidavit of Staff's investigator. Staff presented additional evidence from its investigator witness to address certain facts not agreed to by the respondents. The respondents did not present any additional evidence.

[5] For the reasons that follow, we find that:

a. the respondents perpetrated a fraud on investors, contrary to s. 126.1(1)(b) of the *Act*;

b. Asif made false and misleading statements to Staff, contrary to s. 122(1)(a) of the *Act*;

c. Asif disclosed the nature or content of an investigation order and details regarding a summons, contrary to s. 16 of the *Act*; and

d. Asif engaged the Tribunal's public interest jurisdiction by:

i. disregarding a warning letter sent in 2019;

ii. interfering with the investigation; and

iii. telling at least one investor that he had settled this enforcement proceeding when no settlement had occurred.

[6] Because we found that Asif directly contravened s. 126.1(1)(b) of the *Act* along with each of Mughal and Lendle, we find that we do not need to consider whether Asif also authorized, permitted or acquiesced in the companies' misconduct and we decline to do so.

[7] We also dismiss the allegation that Asif breached s. 13 of the *Act* for failure to comply with a s. 13 summons. In our view, s. 13(1) of the *Act* does not create a positive obligation on individuals or prohibit certain conduct, such that it can be breached.

2. BACKGROUND

[8] From October 2016 until December 2021 (the **Material Time**), Mughal and Asif raised at least $2.757 million[2] and US$264,000 from at least 82 investors by

[2] All dollar amounts not indicated to be in U.S. dollars are in Canadian dollars.

making representations that Mughal was an investment firm and managed various investment funds.

[9] Asif was at all times the sole director, shareholder, chief executive officer, and directing mind of Mughal.

[10] In the course of marketing investments in Mughal to investors and prospective investors, Mughal and Asif told investors that:

a. Mughal was an investment firm operating several investment funds;

b. investor funds were being invested in different investment funds or were being used to purchase securities in initial public offerings;

c. investors would be paid all profits on their investment less a 2 percent management fee; and

d. investors could expect to earn 2 to 5 percent in monthly returns.

[11] Mughal and Asif advertised Mughal as an investment firm through a website, advertisements on a local radio station, business cards and emails, and several social media sites. Mughal provided investors with "client forms" that stated Mughal was using investor money to invest in securities. In addition, investors and prospective investors met with Asif in Mughal's Toronto office and spoke with him on the phone and by text message. Asif primarily targeted Ontario investors from the Pakistani community.

[12] Investor funds raised by Mughal were primarily used to pay other investors, either as simulated return payments or to satisfy withdrawal requests. Of the $2.757 million and US$264,000 raised by Mughal from investors, the records available to Staff's investigator reflect that approximately $1.83 million was transferred back to existing investors by Mughal. Investor funds were also used for Asif's personal spending, transferred into his personal accounts and funneled into Lendle, another corporation controlled by Asif.

[13] Mughal investors never received any real return on their investment. Any Mughal investors who were not repaid with other investors' funds, or funds from Asif or Lendle, lost all of their invested funds.

[14] In or around November 2019, Asif incorporated Lendle, a purported credit and loan corporation, which up until January 2022 shared an office location with Mughal. Asif is the chief executive officer and directing mind of Lendle. Asif and his brother are the sole directors of Lendle and had sole signing authority on the Lendle bank accounts.

[15] Beginning in or around mid-2021, Asif began to solicit certain investors in Mughal to provide funds directly to Lendle. The respondents admitted that at least some of these funds were used to repay Mughal investors and for Asif's personal expenses.

[16] Some Mughal investor funds were transferred by Mughal to Lendle and were used to fund Lendle operations and were also used by Lendle to repay Mughal investors.

[17] Before this proceeding was commenced, Mughal and Asif had been the subject of previous Commission investigations. During the previous investigations, Asif described Mughal's business as teaching investment courses. Asif advised Staff that Mughal was not raising investment funds from the public. Asif is alleged to have made false and/or misleading statements to the investigation team in response to this and other investigations, and also to have made several attempts to disrupt Staff's investigations.

3. EVIDENCE CONSIDERED

[18] The evidentiary portion of the merits hearing took place over two days. On the second day of the hearing, before any oral evidence had commenced, the parties jointly filed an agreed statement of facts in which the respondents admitted to all of Staff's alleged breaches in the Amended Statement of Allegations as well as most facts contained in the Amended Statement of Allegations, in the affidavit of Staff's investigator witness and in various summaries of evidence given by investors.

[19] Staff's investigator witness provided additional oral testimony at the hearing pertaining to specific facts not admitted by the respondents.

[20] The respondents did not tender any evidence outside of the agreed statement of facts.

[21] In coming to our decision, we rely on the facts contained in the agreed statement of facts, the investigator affidavit, and oral testimony. We note that while the agreed statement of facts contains admissions to breaches of the *Act*, this does not displace the Tribunal's obligation to determine whether the facts satisfy the required elements for each of those breaches.

[22] After the filing of the agreed statement of facts and Staff closing its case, the respondents requested additional time to permit Asif to obtain and review records and produce additional evidence relating to the total amount of funds that were repaid to Mughal investors.

[23] This request was dismissed with reasons to follow. Because the decision to dismiss this request was made before Adjudicator Furlong recused himself from the merits panel (as explained below in part 4), the reasons for dismissing this request are set out in separate Reasons for Decision.[3]

4. PRELIMINARY ISSUE - RECUSAL OF ADJUDICATOR FROM MERITS HEARING PANEL

[24] Before oral closing submissions, the panel alerted the parties that a member of the panel, Adjudicator Furlong, had, subsequent to the closing of the evidentiary portion of the merits hearing, inadvertently reviewed the transcript of a confidential conference held between the parties and a different adjudicator of the Tribunal. Neither of the remaining panel members reviewed the transcript nor discussed its contents with Adjudicator Furlong.

[25] The confidential conference occurred in the middle of the evidence portion of the merits hearing, at the request of the merits panel, so the parties could discuss the possibility of producing the agreed statement of facts without the merits panel present for discussions.

[26] Rule 20(1) of the Capital Markets Tribunal *Rules of Procedure and Forms* states that at any stage of a proceeding, a party may request or a panel may direct that the parties participate in a confidential conference to consider:

a. the settlement of any or all of the issues;

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b. the simplification of the issues;

c. facts that may be agreed upon; and

d. any other matter that may further a just, expeditious and cost-effective disposition of the proceeding.

[27] Rule 20(2) states that an adjudicator who presides at a confidential conference at which the parties attempt to settle issues shall not preside at a subsequent hearing in the proceeding unless the parties consent.

[28] The purpose of rule 20(2) is to allow parties to have frank and confidential discussions about the issues in a proceeding without the decision-maker present.

[29] While Adjudicator Furlong was not physically present at the confidential conference, his review of the transcript could reasonably be seen as violating the expectations of the parties. The panel therefore asked the parties to be prepared to discuss and provide their positions at the outset of oral closing submissions on the issue of Adjudicator Furlong's continued participation in the merits hearing given his review of the transcript.

[30] Asif, who represented himself and the corporate respondents at the merits hearing, did not attend oral closings or file any written closing submissions and did not provide his position to the panel on the issue of Adjudicator Furlong's continued participation at any time – either orally or in writing.

[31] Staff took the position that Adjudicator Furlong should recuse himself for the following reasons:

a. the respondents were not present to consent to Adjudicator Furlong's continued participation in the hearing; and

b. given that the respondents are unrepresented, it is important to err on the side of caution to ensure the respondents receive procedural fairness.

[32] After considering Staff's submissions, Adjudicator Furlong recused himself from the merits hearing panel. The findings contained in these reasons, with the exception of the findings summarized above in part 3 (that are the subject of separate Reasons for Decision issued as a companion to these Reasons and Decision), are of Adjudicators Burke and Creighton only.

5. ANALYSIS OF THE ISSUES AND ALLEGATIONS

5.1 Elements of fraud

[33] We now turn to our analysis of the substantive issues raised in this hearing.

[34] Staff alleges that the respondents committed securities fraud by making false representations to investors which caused them a deprivation, in contravention of s. 126.1(1)(b) of the *Act*. That section of the *Act* provides:

> A person or company shall not, directly or indirectly, engage or participate in any act, practice or course of conduct relating to securities, derivatives or the underlying interest of a derivative that the person or company knows or reasonably ought to know, …
>
> (b) perpetrates a fraud on any person or company.[4]

[35] Staff is required to prove the following elements of fraud:

a. the *actus reus*, or 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.[5]

5.1.1 Fraud on Mughal investors

5.1.1.a The investments in Mughal were securities

[36] We must first determine whether the Mughal investments are "securities" as defined by the *Act*. The term "security" is defined in s. 1(1) of the *Act* and includes "any investment contract".

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[4] *Act*, s 126.1(1)(b)

[5] *Meharchand (Re)*, 2018 ONSEC 51 (***Meharchand***) at para 119, citing *R v Théroux*, 1993 CanLII 134 (SCC) (***Théroux***) at p 20

[37] An "investment contract" will be found where:

a. there is an investment of money;

b. with an intention or expectation of profit;

c. in a common enterprise in which the fortunes of the investor are interwoven with and dependent on the efforts and success of third parties; and

d. where the efforts made by those other than the investor are significant and managerial, thereby affecting the failure or success of the enterprise.[6]

[38] The Tribunal has previously found that in situations involving fraudulent investment firms, the investments were securities according to the definition of an investment contract.[7]

[39] The respondents admitted that the Mughal investments are securities.

[40] We find that the Mughal investments meet the above definition of a security. Mughal's client forms and advertisements represented that Mughal operated an investment fund and was pooling investor funds to invest in securities. The investors advanced funds in a common enterprise with an expectation of profit solely dependent on the efforts of Mughal and Asif.

5.1.1.b *Actus Reus*

5.1.1.b.i Acts of deceit, falsehood or other fraudulent means

[41] We find that Asif and Mughal engaged in acts of deceit, falsehood, or some other fraudulent means on Mughal investors.

[42] Previous Tribunal decisions have found that using investor funds in a manner other than what is represented to investors constitutes the *actus reus* of fraud under s. 126.1(1)(b) of the *Act*.[8] Respondents have previously been found to have engaged in acts of fraud by diverting new investor funds to pay existing

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[6] *Pacific Coast Coin Exchange v Ontario Securities Commission*, 1977 CanLII 37 (SCC) at p 128

[7] *Reeve (Re),* 2018 ONSEC 55 at paras 18-23

[8] *Quadrexx Hedge Capital Management Ltd (Re)*, 2017 ONSEC 3 (***Quadrexx***) at paras 245-246 and 300

investors or for personal spending.[9] The "other fraudulent means" category has been found to include acts that a reasonable person would consider to be dishonest, such as "the use of corporate funds for personal purposes, non-disclosure of important facts… [and] unauthorized diversion of funds."[10]

[43] Asif and Mughal have admitted to making false representations to Mughal investors that their funds were being pooled in an investment fund and being used to purchase securities. There was no investment fund and no securities were purchased on behalf of Mughal investors. The respondents admitted that Mughal was a sham investment corporation operated by Asif.

[44] Asif and Mughal also admitted to engaging in the following "other fraudulent means":

a. using investor funds for Asif's personal and lifestyle spending;

b. not disclosing important facts to Mughal investors (such as the fact that Mughal was operating a Ponzi scheme in which new Mughal investor funds were used to pay simulated returns to existing Mughal investors or to satisfy withdrawal requests of existing Mughal investors); and

c. unauthorized diversion of invested funds (including to Lendle, Asif and other Mughal investors).

[45] We find that the respondents used Mughal investor funds in a way that was inconsistent with what was promised to Mughal investors and without any notice to them. No Mughal investor funds were used for the purpose that was promised (which was for Mughal to invest in securities on behalf of its clients) and all Mughal investor funds were diverted to unauthorized personal spending, transfers to Lendle, or repayment of existing Mughal investors.

5.1.1.b.ii Deprivation caused by the fraudulent acts

[46] We find that the above fraudulent acts caused both a deprivation and the risk of deprivation to Mughal investors.

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[9] *Quadrexx* at para 246; *Black Panther (Re),* 2017 ONSEC 1 at paras 128-135; *Solar Income Fund Inc (Re),* 2022 ONSEC 2 (***Solar Income***) at paras 74-75, 87-88 and 94

[10] *Meharchand* at para 120, citing *Théroux* at p 19

[47] The deprivation component of the *actus reus* is established by proof of:

a. actual loss to one or more investors;

b. actual prejudice to investors' economic interests; or

c. risk of prejudice to investors' economic interests.[11]

[48] Mughal investors suffered an actual loss as the Mughal bank accounts are now closed and the investors who were not repaid have lost their funds. While the respondents did not agree with the specific amounts that Staff alleged were repaid to Mughal investors, they did admit to facts showing that certain Mughal investors have not been repaid.

[49] In addition to actual losses, Asif and Mughal exposed Mughal investors to real and substantial risk of loss by concealing the fact that Mughal was not operating an investment firm and relying on enticing new investors in Mughal in order to pay simulated returns to, and satisfy withdrawal requests of, existing investors.

[50] We therefore find that both of the *actus reus* elements for fraud on the Mughal investors have been established.

5.1.1.c *Mens Rea*

5.1.1.c.i Subjective knowledge of the fraudulent acts

[51] We find that the respondents had subjective knowledge of the fraud on Mughal investors.

[52] The mental element of fraud under s. 126.1(1)(b) of the *Act* is established where a respondent is subjectively aware that: (a) they are undertaking a prohibited act, and (b) the prohibited act could cause deprivation.[12] In situations where a respondent "tells a lie knowing others will act on it and thereby puts their property at risk, the inference of subjective knowledge that the property of another would be put at risk is clear."[13] In proving that a respondent was aware they were undertaking a prohibited act, it is not necessary to show that they

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[11] *Meharchand* at para 121, citing *Théroux* at pp 15-16

[12] *First Global Data Ltd (Re),* 2022 ONCMT 25 (***First Global***) at para 386; *Solar Income* at para 177

[13] *Meharchand* at para 123, citing *Théroux* at p 21

regarded the act as dishonest. It is enough to show that a respondent knowingly undertook the act.[14]

[53] Asif directly made, or was at least aware of, all of the admitted false representations that were made to Mughal investors. Asif was at all times the sole director, shareholder, officer and directing mind of Mughal. Asif had sole access to Mughal's bank accounts and was therefore aware of all of the unauthorized uses of investor funds.

[54] Mughal also had knowledge through Asif, who is Mughal's directing mind. A corporation will have the requisite knowledge if the directing minds of the corporation knew or ought reasonably to have known that the corporation perpetrated a fraud.[15]

5.1.1.c.ii Subjective knowledge of deprivation

[55] We find that Asif and Mughal also had subjective knowledge of the deprivation and risk of deprivation to Mughal investors.

[56] To satisfy this element of the test for fraud, it is not necessary to prove what is in a respondent's mind. The Tribunal may infer a subjective awareness of the consequences from the dishonest act itself.[16]

[57] It is clear in this case, based on Asif's and Mughal's own admissions, that they knew that Mughal investor funds were being used for purposes other than those they had represented to investors. They were aware that Mughal did not actually operate an investment fund. They were aware that the entire operation was a Ponzi scheme whereby new investor funds were being used to pay existing investors, for Asif's personal spending or diverted into Lendle.

[58] We therefore find that Asif and Mughal have committed a fraud on Mughal investors in contravention of s. 126.1(1)(b) of the *Act*.

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[14] *First Global* at para 390, citing *Théroux* at pp 19-20

[15] *First Global* at para 347; *Solar Income* at para 82

[16] *First Global at* para 420, citing *Théroux* at p 18

5.1.1.d The extent of the fraud on Mughal investors

[59] Staff's investigator Jody Sikora prepared a detailed "source and application" analysis in connection with Mughal's, Lendle's and Asif's various bank accounts and Asif's investment account with a view to quantifying:

a. the amount of funds received by Mughal from Mughal investors;

b. the uses of those funds (including the amounts diverted to Asif's personal expenses, used to pay Mughal investors and forwarded to Lendle); and

c. the amounts repaid to Mughal investors.

[60] The "source and application" analysis was included in Sikora's affidavit. In oral testimony Sikora explained his methodology in undertaking the analysis as well as the various assumptions and limitations underlying the analysis.

[61] The respondents did not admit to the contents of Sikora's "source and application" analysis. The respondents also did not cross-examine Sikora, nor did the respondents introduce any evidence to contradict Sikora's analysis, findings or conclusions.

[62] Amongst other things, Sikora explained that he made certain assumptions and judgment calls when identifying the 82 Mughal investors, calculating the total amount of funds invested in Mughal and repaid to Mughal investors, and identifying Mughal investor monies used for Asif's personal expenses. We find that Sikora's methodology, assumptions and judgment calls with respect to the analysis related to Mughal investor funds were reasonable and that he took a conservative approach.

[63] Sikora's evidence was that:

a. Mughal received at least $2.757 million and US$264,000 of investment funds from Mughal investors;

b. Mughal transferred back to Mughal investors approximately $1.811 million and US$19,000;

c. Asif paid Mughal investors $83,350 from his personal accounts;

d. Lendle paid Mughal investors $201,573**;**

e. Asif received (or received the benefit of) $650,698 of Mughal investor funds directly from Mughal accounts, by way of payment of his personal expenses, payment of deposits for two residential real estate properties and transfers to him, to his personal Questrade account, to a joint bank account he shared with his brother and to his personal credit card; and

f. Lendle received $290,385 of transferred Mughal investor funds.

[64] The respondents admitted to the figures in a, d and f, but did not admit the figures in b, c, and e above.

[65] In addition to not admitting certain of the figures set out above, the respondents specifically noted that they disputed Sikora's conclusion regarding the amounts Mughal repaid to Mughal investors and Asif submitted that the figures could potentially be "slightly" higher. As noted above, the respondents did not provide any evidence to substantiate this assertion, did not cross-examine Sikora on his evidence nor did they introduce any evidence regarding the figures.

[66] We took from Sikora's evidence that the amount he identified for total investment funds Mughal received from Mughal investors (in paragraph [63]a) likely significantly understated the actual total that was received by Mughal from investors, for a number of reasons, including that:

a. Sikora did not include in his analysis receipt of funds by Mughal that were individually below a certain materiality threshold or that he was not able to link directly to someone identified as a Mughal investor because the investment was made in cash or the banks could not identify the deposit; and

b. as a result of (a) above, $895,074 and US$15,010 of funds received by Mughal during the relevant timeframe were not counted by Sikora as investment funds received by Mughal; and

c. there was no evidence of Mughal carrying on any "business activity" other than soliciting investment funds from investors that might account for the receipt of these additional funds by Mughal.

[67] Sikora did acknowledge that because his "source and application" analysis did not take into account withdrawals, payments and transfers out of Mughal

accounts that were under a certain individual materiality threshold or where the application of the withdrawal, payment or transfer could not be identified from available bank and other records, there existed the possibility that the amounts he identified for Mughal repayments to Mughal investors (in paragraph [63]b) were understated. As this was a possibility only and there was no evidence before us regarding the application of these additional withdrawals, payments and transfers, we accepted Sikora's evidence in paragraph [63]b.

[68] Having considered the evidence, we accept and make findings corresponding to Sikora's evidence set out above in paragraph [63].

5.1.1.e Lendle's participation in the fraud on Mughal investors

[69] We also find that Lendle knowingly participated in the fraud on Mughal investors.

[70] The Tribunal has previously found that individuals and companies can breach s. 126.1(1)(b) of the *Act* by aiding and abetting a fraud.[17]

[71] Lendle admitted that it was the recipient of Mughal investor funds (which were fraudulently obtained) and also that Lendle was used to repay Mughal investors. Asif was the directing mind of Lendle and transferred funds between Mughal, Lendle and his personal accounts.

5.1.2 Fraud on Lendle investors

[72] Staff alleges that Lendle and Asif also committed a separate fraud on Lendle investors as a result of false representations made to Lendle investors about the use of their invested funds, and the misuse of Lendle investors' funds.

[73] As detailed below, we find that Staff established this allegation only with respect to two Lendle investors. Staff failed to establish that four other persons identified by Staff as "Lendle investors" provided funds to Lendle in respect of securities issued by Lendle.

[74] Staff alleges that Asif solicited certain Mughal investors to provide investment funds to Lendle (thus becoming "Lendle investors" as well as Mughal investors)

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[17] *Maple Leaf Investment Fund Corp (Re),* 2011 ONSEC 31 at paras 351-352

and stated that these funds would be used for the Lendle business. According to Staff these investments took three different forms:

a. two Lendle investors (M.A. and A.A.(1)) provided funds pursuant to promissory notes;

b. two other Lendle investors (Z.A. and A.A.(2)) provided funds with a promised 45% return and return of principal evidenced by a Lendle post-dated cheque; and

c. another two individuals (N.A. and B.P.) appear to have transferred funds to Lendle's bank accounts.

[75] Staff alleges that the funds invested by these Lendle investors were used to pay back Mughal investors and for Asif's personal expenses. Lendle investors were therefore deceived about the intended use of the funds as Asif used the funds for personal spending and to further the fraud on Mughal investors.

[76] Asif and Lendle admitted the facts in paragraph [74] with respect to M.A., A.A.(1), Z.A., A.A.(2) and B.P, but did not admit that M.A., A.A.(1) and B.P. were investors in Lendle. Asif did not admit the facts in paragraph [74] regarding N.A.

5.1.2.a Were the alleged Lendle investments securities?

[77] We must first determine whether the Lendle investments identified by Staff are "securities" as defined by the *Act*. The term "security" includes a "bond, debenture, note or other evidence of indebtedness" in addition to "any investment contract".[18]

[78] We find that the funds advanced to Lendle by two investors (Z.A. and A.A.(2)) who received Lendle post-dated cheques reflecting repayment of principal and a 45% return were investments and that the post-dated cheques meet the following definition of a security: "bond, debenture, note or other evidence of indebtedness."[19] In total, these two Lendle investors advanced $70,000 to Lendle under the post-dated cheques. We do not find the remaining four advances

[18] *Act*, s 1(1)

[19] *Act*, s 1(1); *Ontario Securities Commission v Tiffin*, 2020 ONCA 217 (***Tiffin***) at para 50

identified by Staff to have been made in connection with Lendle securities, for the reasons explained below.

[79] Although we accept that a promissory note can satisfy the definition of a security,[20] in this case the promissory notes relied on by Staff in connection with funds advanced made by M.A. and A.A.(1) were, on their face, promissory notes of Asif in his personal capacity, and not of Lendle. No evidence was called to address or explain this. In the circumstances we are not satisfied that these promissory notes are Lendle securities as alleged by Staff and, in any event, these promissory notes stated that the advanced funds could be used by Asif for "personal/business use", so we are not satisfied that even if they were Lendle securities Staff has established that the funds advanced under these promissory notes were misused.

[80] Staff's investigator never spoke to B.P or N.A. The evidence about B.P.'s and N.A.'s advances of funds to Lendle was limited to bank records showing B.P. and N.A. to be the source of the funds. No evidence was introduced concerning the purposes for these advances of funds and Sikora acknowledged that Lendle did carry on another business that was a source of funds. In the circumstances, we find that Staff has not established that these advances were investments or that there were any related Lendle securities.

[81] Below we consider whether Asif and Lendle committed a fraud in connection with the Lendle securities issued to Z.A. and A.A.2. We approach the issue within the framework of the test to establish fraud under s. 126.1(1)(b) of the *Act* as set out above in section 5.1.

5.1.2.b Separate fraud by Asif and Lendle established

[82] The respondents admitted that in soliciting Mughal investors to invest in Lendle, Asif represented that the invested funds were to be used for the Lendle business. Sikora provided evidence with respect to Z.A.'s and A.A.(2)'s understanding that was consistent with this. We therefore conclude that Asif told Z.A. and A.A.(2) that the funds they advanced to Lendle would be used for the Lendle business.

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[20] *Act, s* 1(1); *Tiffin* at para 50

[83] Staff introduced evidence through Sikora that established that some Lendle funds were used for Asif's personal expenses and also to repay Mughal investors. We find that this did occur. Sikora also provided specific evidence that confirmed, and we are satisfied, that a large part of the $70,000 advanced by Z.A. and A.A.(2) to Lendle was used to pay personal expenses of Asif, including a deposit on Asif's home and for Asif's legal counsel. Sikora did not undertake a tracing exercise to establish the precise dollar amount of the $70,000 that was used for Asif's personal expenses, although he did give evidence as to deposits into and and payments out of the Lendle account that received the $70,000. Based on our review of this evidence, we are satisfied that at least $57,540 of the $70,000 was used for these purposes.

[84] The respondents admitted that Z.A.'s investment (in the principal amount of $50,000) has never been repaid and the related post-dated cheque bounced. Staff did not introduce any evidence about the status of repayment of A.A.(2)'s investment in Lendle.

[85] We find that the above acts constitute deceit, falsehood and other fraudulent means which caused a deprivation, or risk of deprivation, to Lendle investors. We also find that Asif and Lendle, with Asif acting as Lendle's directing mind, had subjective knowledge of the fraudulent acts and deprivation to Lendle investors.

[86] Accordingly, we find that Asif and Lendle committed a separate fraud against two Lendle investors pursuant to s. 126.1(1)(b) of the *Act*.

5.2 Asif's misleading statements made to investigators

[87] Staff alleges that Asif made misleading statements to Staff investigators during the course of multiple investigations.

[88] Subsection 122(1)(a) of the *Act* prohibits a person or company from making materially false or misleading statements, or failing to state a fact that is necessary to make the statement not misleading, in the course of an investigation or examination under the *Act*. This section establishes liability even

without proof of a specific mental element, such as intention, wilful blindness or recklessness.[21]

[89] Both this Tribunal and the courts have stressed the importance of providing truthful information during an investigation by the Commission.[22] The Court of Appeal has expressed this importance as follows: "[i]t is difficult to imagine anything that could be more important to protecting the integrity of capital markets than ensuring that those involved in those markets, whether as direct participants or as advisors, provide full and accurate information to the OSC."[23] In particular, providing misleading or false information under oath demonstrates a serious disregard for the investigation process.[24]

[90] We find that Asif breached s. 122(1)(a) of the *Act* by making multiple misleading statements during the course of Staff's investigations.

[91] Asif made repeated false statements in written communications and under oath in two interviews relating to (among other things):

a. the nature of the Mughal business;

b. Mughal's advertisements and banking activity;

c. the status of Mughal's business operations;

d. the existence of Lendle investors;

e. the nature and extent of communications with investors; and

f. the use of investor funds.

[92] In addition, Asif failed to provide material facts by refusing to answer questions in his compelled interview by saying he "did not know" or "did not recall" to obvious questions where we are satisfied that Asif did, in fact, know the answers, such as whether the Mughal bank account was used for personal spending.

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[21] *Black Panther* at para 154

[22] *Kitmitto (Re),* 2022 ONCMT 12 at para 210, citing *Wilder v Ontario (Securities Commission),* 2001 CanLII 24072 (ON CA) (***Wilder***) at para 22; *Agueci (Re),* 2015 ONSEC 2 at paras 634-636

[23] *Wilder* at para 22

[24] *Miner Edge Inc (Re),* 2021 ONSEC 31 (***Miner Edge***) at paras 51-53

[93] Asif has admitted to making false and misleading statements to investigators. Asif's misleading statements in this case were serious, repeated over years and obviously false given the admissions he made at the merits hearing. Many of the statements were made under oath. Asif also mislead investigators by concealing the existence of documents and information (including in response to a summons) that were material to Mughal's fraudulent scheme.

5.3 Allegation that Asif failed to comply with a s. 13 summons

[94] Staff alleges that Asif's admissions that he failed to produce the information or documents requested in a s. 13 summons constitutes a breach of s. 13 of the *Act*.

[95] Subsection 13(1) of the *Act* provides as follows:

> **Power of investigator or examiner**
>
> 13 (1) A person making an investigation or examination under section 11 or 12 has the same power to summon and enforce the attendance of any person and to compel him or her to testify on oath or otherwise, and to summon and compel any person or company to produce documents and other things, as is vested in the Superior Court of Justice for the trial of civil actions, and the refusal of a person to attend or to answer questions or of a person or company to produce such documents or other things as are in his, her or its custody or possession makes the person or company liable to be committed for contempt by the Superior Court of Justice as if in breach of an order of that court.

[96] While Staff concedes that no previous Tribunal decisions have considered a distinct s. 13 breach, it submits that there is no principled reason why the failure to comply with a s. 13 summons should not be considered a separate breach of the *Act*. Staff relies on the Tribunal's decision in *Daley (Re)*[25] as support for its position. In that decision, the panel found that a breach of a summons does not exclusively have to be dealt with by way of contempt proceedings in court.[26]

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[25] 2021 ONSEC 27 (***Daley***)

[26] *Daley* at paras 32-37

However, rather than finding a breach of s. 13 of the *Act*, the panel in that case found that the breach of the summons constituted conduct that engaged the Tribunal's broad public interest jurisdiction and warranted a consideration of sanctions under s. 127 of the *Act*.[27]

[97] In our view, s. 13(1) of the *Act* does not create a positive obligation on individuals or prohibit certain conduct, such that it can be breached. Rather, the section grants powers to investigators to summon a person and to enforce a summons by seeking a contempt order.

[98] Accordingly, we dismiss the allegation that Asif breached s. 13 of the *Act*.

[99] During oral submissions, Staff made an alternative submission that if the conduct does not amount to a breach of s. 13, it should nevertheless be captured by our public interest jurisdiction. We address this submission below in section 5.6.

5.4 Asif's disclosure of the nature or content of a s. 11 order and/or details regarding a s. 13 summons

[100] Staff alleges that Asif breached s. 16 of the *Act* by disclosing to certain Mughal investors that he was being investigated and sending a picture of his s. 13 summons to a Mughal investor.

[101] Subsection 16(1) of the *Act* protects the confidentiality of information related to, and obtained through, a s. 11 investigation. It provides that no person or company shall disclose the nature or content of the s. 11 investigation order, or other specified information regarding the production of documents or testimony given under s. 13. Subsection 16(1.1) provides exceptions to this prohibition against disclosure where it is being provided to counsel or an insurer, neither of which are applicable in this proceeding.

[102] Previous Tribunal decisions have found a breach of s. 16 where a respondent told an investor he was under investigation and scheduled for an interview[28] and where a respondent provided a copy of a s. 13 summons to an individual.[29]

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[27] *Daley* at paras 70-72

[28] *Miner Edge* at para 55

[29] *Black Panther* at paras 162-163

[103] We find that Asif's admitted conduct of disclosing the fact he was being investigated and providing a copy of a s. 13 summons establishes a breach of s. 16(1) of the *Act*.

5.5 Asif permitting, authorizing or acquiescing in Mughal and Lendle's breaches

[104] Staff seeks a finding that Asif be deemed liable for Mughal and Lendle's non-compliance with the *Act* pursuant to s. 129.2 of the *Act*.

[105] Section 129.2 of the *Act* provides that a director or officer is deemed to be liable for a breach of securities law by a company where the director or officer authorized, permitted or acquiesced in the company's non-compliance with the *Act*.

[106] We questioned Staff whether such a finding can or should be made where the individual has already been found to have personally committed the same breaches as the corporation. Staff relied on the Tribunal's decision in *Natural Bee Works Apiaries Inc (Re)*[30] as authority for the proposition that an individual can breach the fraud provision of the *Act* and also authorize or permit the same breach on behalf of the corporation. In that decision, the corporation was found to have breached ss. 53 and 126.1 of the *Act* and one of the individual respondents was found to have only personally breached s. 126.1. The panel went on to find that the individual was deemed liable for all of the breaches of the corporation pursuant to s. 129.2 of the *Act*.[31]

[107] Staff submits that the elements of the breach under s. 129.2 of the *Act* are different than the elements of the breach under s. 126.1(1)(b) of the *Act* and that this argues in favour of a finding under s. 129.2, even where we first conclude that Asif personally committed the same s. 126.1(1)(b) breaches along with the corporations.

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[30] 2019 ONSEC 23 (***Natural Bee Works***)

[31] *Natural Bee Works* at para 149

[108] We prefer the approach to this issue adopted in the recent Tribunal decisions in *Stinson (Re)*[32] and *Feng (Re)*[33]. Having found that Asif directly contravened s. 126.1(1)(b) of the *Act* along with each of Mughal and Lendle we do not need to consider whether he authorized, permitted or acquiesced in the companies' misconduct and we decline to do so.

5.6 Asif's conduct engaging the Tribunal's public interest jurisdiction

[109] Staff alleges that Asif engaged in "conduct contrary to the public interest" as a result of the following conduct:

a. disregarding a warning letter sent from the Staff investigation team in 2019 regarding potential unregistered trading;

b. concealing the existence of documents and information from the Staff investigation team during the investigation;

c. interfering with the investigation, including by coaching a witness on their written response to a request for information, encouraging witnesses not to speak to the investigation team, attempting to conceal banking activity from the investigation team, and shifting to soliciting new investments in Lendle after becoming aware that Mughal was under investigation; and

d. telling at least one investor that he had settled this enforcement proceeding when no settlement had occurred.

[110] Asif admits to having engaged in all of this conduct.

[111] The words "conduct contrary to the public interest" do not appear in the *Act*. Rather, the opening words of s. 127 of the *Act* give the Tribunal broad authority to make "orders if in its opinion it is in the public interest to make the…orders".

[112] The Tribunal may exercise its jurisdiction to find that conduct, which does not constitute a direct breach of Ontario securities law, nevertheless attracts the Tribunal's public interest jurisdiction.[34]

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[32] 2023 ONCMT 26 at para 78

[33] 2023 ONCMT 12 at paras 72-73

[34] *Committee for Equal Treatment of Asbestos Minority Shareholders v Ontario (Securities Commission)* 2001 SCC 37 at para 42

[113] The fundamental animating principles of securities regulation, set out in s. 2.1 of the *Act*, include:

a. requirements for timely, accurate and efficient disclosure of information;

b. restrictions on fraudulent and unfair market practices and procedures; and

c. requirements for the maintenance of high standards of fitness and business conduct to ensure honest and responsible conduct by market participants.

[114] We find that the conduct by Asif set out in paragraph [109] a, c and d, while not being a direct breach of the *Act*, offends the animating principles of the *Act* and the conduct engages the Tribunal's public interest jurisdiction. With respect to the conduct set out in paragraph [109] b (namely, concealing the existence of documents and information from Staff), because this same conduct is part of our finding that Asif breached s. 122(1)(a) of the *Act* which was based in part on representations that certain documents and information did not exist, we decline to find that it is conduct that also separately engages the Tribunal's public interest jurisdiction.

[115] We now return to Staff's submission that if Asif's failure to comply with the summons does not amount to a breach of s. 13 of the *Act*, we should address it under our public interest jurisdiction instead.

[116] We questioned Staff whether that would be permissible from a procedural fairness perspective given that the allegation was not framed as such in its Amended Statement of Allegations. Staff submitted that it was relying on the wording in paragraph 31(b) of its Amended Statement of Allegations that states that Asif's concealment of the existence of documents, which includes the documents listed in the summons, constitutes "conduct contrary to the public interest".

[117] We find that the Amended Statement of Allegations treated the allegation that Asif failed to comply with the summons as an allegation distinct from the allegation that Asif concealed the existence of documents and information from the investigation team during the investigation. The Amended Statement of

Allegations pleads that distinct consequences arise from these allegations, namely that Asif's failure to comply with the summons is a breach of the *Act,* whereas the concealment allegation constitutes conduct contrary to the public interest.

[118] Notwithstanding this, paragraph 31(b) of the Amended Statement of Allegations cross-references other paragraphs in the Amended Statement of Allegations, including paragraph 24, that identifies false and misleading statements provided by Asif in response to the summons, including false and misleading statements concerning the availability of documents and information.

[119] We accept that in appropriate circumstances the failure to comply with a summons can constitute conduct contrary to the public interest.[35] However, here the failure to comply with a summons is based on the very same allegations and facts underlying our conclusion above that Asif concealed the existence of documents and information and made related misleading statements concerning the availability of documents and information to investigators including in response to the summons, contrary to s. 122(1)(a) of the Act. In the circumstances we decline to find that the failure to comply with the summons is an additional example of conduct contrary to the public interest.

6. CONCLUSION

[120] For the reasons set out above we find that:

a. the respondents perpetrated a fraud on investors, contrary to s. 126.1(1)(b) of the *Act*;

b. Asif made false and misleading statements to Staff, contrary to s. 122(1)(a) of the *Act*;

c. Asif disclosed the nature or content of an investigation order and details regarding a summons, contrary to s. 16 of the *Act*; and

d. Asif engaged the Tribunal's public interest jurisdiction by:

i. disregarding a warning letter sent in 2019;

[35] *Daley* at paras 68-73

ii. interfering with the investigation; and

iii. telling at least one investor that he had settled this enforcement proceeding when no settlement had occurred.

[121] Also for the reasons set out above:

a. we dismiss the allegation that Asif breached s. 13 of the *Act*; and

b. we decline to make a finding regarding the allegation that Asif breached s. 129.2 of the *Act.*

[122] The parties shall contact the Registrar by 4:30 p.m. on November 15, 2023, to arrange an attendance in respect of a hearing regarding sanctions and costs. The attendance is to take place on a date that is mutually convenient, that is fixed by the Governance & Tribunal Secretariat, and that is no later than December 8, 2023.

[123] If the parties are unable to present a mutually convenient date to the Registrar, then each party may submit to the Registrar, for consideration by a panel of the Tribunal, one-page written submissions regarding a date for the attendance. Any such submissions shall be submitted by 4:30 p.m. on November 15, 2023.

Dated at Toronto this 1st day of November, 2023

"Andrea Burke"	*"Geoffrey D. Creighton"*
Andrea Burke	Geoffrey D. Creighton