Ontario

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: *Go-To Developments Holdings Inc (Re)*, 2025 ONCMT 8
Date: 2025-05-06
File No. 2022-8

IN THE MATTER OF
GO-TO DEVELOPMENTS HOLDINGS INC., GO-TO SPADINA ADELAIDE SQUARE INC., FURTADO HOLDINGS INC., and OSCAR FURTADO

REASONS AND DECISION

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

Adjudicators:	M. Cecilia Williams (chair of the panel) Geoffrey D. Creighton Cathy Singer	
Hearing:	July 8, 9, 10, 11, 15, 16, 17, 19, 22, 23, 24, 25, 26, and December 10, 2024; final written submissions received December 13, 2024	
Appearances:	Erin Hoult Trevor Alcove Alvin Qian	For the Ontario Securities Commission
	Ian Aversa Jeremy Nemers Calvin Horsten	For Go-To Developments Holdings Inc., Go-To Spadina Adelaide Square Inc., Furtado Holdings Inc., for the Receiver, KSV Restructuring Inc.
	Melissa MacKewn Dana Carson Alexandra Grishanova Maxim Tchoudnovski Joshua Shneer	For Oscar Furtado

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REASONS AND DECISION

1. OVERVIEW

[1] The Commission alleges that Go-To Developments Holdings Inc. (**GTDH**), Go-To Spadina Adelaide Square Inc. (**Adelaide GP**), Furtado Holdings Inc. (**Furtado Holdings**) (collectively, the **Corporate Respondents**), and their sole director and officer Oscar Furtado, defrauded investors in their capital raising for, and activities related to, limited partnerships for the purchase and development of real estate projects.

[2] The Commission also alleges that, through Furtado's control over the Corporate Respondents and related entities, the respondents traded securities without the necessary registration and made prohibited representations to investors. The Commission further alleges that Furtado made misleading statements to the Commission during its investigation of this misconduct and that Furtado authorized, permitted or acquiesced in the Corporate Respondents' alleged breaches of the *Securities Act* (the ***Act***)[1].

[3] For the reasons that follow, we find that the respondents did perpetrate a securities fraud in breach of the *Act* in five different ways. Three of those ways defrauded investors in the Go-To Spadina Adelaide Square LP (**Adelaide LP**). One defrauded investors in two other GTDH projects. The final one was a fraud on the Adelaide LP itself.

[4] We also find that Furtado made misleading statements to the Commission during its investigation. However, we dismiss the Commission's other allegations.

2. BACKGROUND

2.1 The respondents

[5] The Corporate Respondents are related Ontario corporations. GTDH is a real estate development company which operates through its corporate subsidiaries and project-specific limited partnerships (each, an **LP**). The Adelaide GP is a wholly-owned subsidiary of GTDH incorporated to serve as the general partner of

[1] RSO 1990, c S.5 (the ***Act***)

the Adelaide LP. Furtado Holdings owns GTDH and is Furtado's personal and family holding company.

[6] For each of its nine real estate projects, GTDH set up a limited partnership and incorporated a subsidiary to serve as the general partner (**GP**). The Go-To LPs, Go-To GPs, and GTDH were used by Furtado to carry out GTDH's real-estate development business in southern Ontario.

[7] Furtado is the founder, sole director and officer, and directing mind of the Corporate Respondents. As CEO and president, Furtado was responsible for overseeing all aspects of the GTDH business. Furtado is a chartered accountant with over 30 years of experience, primarily at the Royal Bank of Canada before he left and eventually established his own business.

2.2 The Adelaide Project

[8] One of the projects undertaken by GTDH was the proposed acquisition and development of a land assembly of two properties in the heart of downtown Toronto, 355 Adelaide Street West and 46 Charlotte Street (collectively, the **Adelaide Properties**).

[9] The Adelaide LP was formed to pursue this project (the **Adelaide Project**), and the Adelaide GP was the general partner of this limited partnership. Beginning in the fall of 2018, Furtado and GTDH sought financing, partners and investors for the Adelaide Project. The Adelaide Properties were acquired by the Adelaide LP on April 5, 2019.

[10] Capital raising by the Adelaide LP continued periodically into 2020. However, between April 30, 2019 and December 10, 2020, the Commission obtained investigation orders related to Furtado's and GTDH's conduct and delivered summonses to produce documents.

[11] Furtado attended three compelled examinations by the Commission, the first of which was in September 2020.

[12] On December 6, 2021, the Commission brought an application in the Ontario Superior Court of Justice to have a receiver appointed over GTDH and several other GTDH entities including the other Corporate Respondents and the Adelaide LP. The Court appointed KSV Restructuring Inc. as the receiver over the

Corporate Respondents and related entities on December 10, 2021. This receivership continues.

3. PRELIMINARY ISSUES

3.1 Late disclosure of documents

[13] On the second day of the hearing, the Commission objected to the admissibility of various documents on which the respondents sought to rely in the merits hearing. The basis of the objection was that they were not disclosed by Furtado until shortly before the hearing.

[14] The respondents submitted that the documents in question were only delivered to them by the Receiver on July 4, 2024, and they were promptly provided to the Commission. The Receiver noted that the respondents requested the documents only on July 3, 2024 and the Receiver provided them the next day. The respondents also submitted that the Commission had itself disclosed some documents late.

[15] Each party reserved their right to object to documents delivered late, as those documents were introduced into evidence during the merits hearing. We determined that we would deal with the admissibility and weight of any such documents when deciding any issue to which those documents might relate, based on the closing submissions and in the specific context for which their use was sought.

[16] As the hearing unfolded, neither party made any further objections to specific documents based on late delivery. Only four of the disputed documents became exhibits. Neither party addressed the issue in closing submissions.

[17] Ultimately, none of those four documents were material to any decision the panel made. Accordingly, we did not need to make any findings on their admissibility or weight.

3.2 Reasons for ruling on the admissibility of the Furtado affidavit

[18] When Furtado took the stand, the Commission objected to the admissibility of portions of his affidavit on the basis that those portions attempt to:

a. relitigate issues decided by the Court in the receivership proceedings;

b. introduce irrelevant facts from withdrawn motions; or

c. introduce hearsay opinion evidence from experts, particularly concerning medical matters addressed on adjournment motions.

[19] We allowed the affidavit to be filed as is. These are our reasons for doing so.

[20] Furtado submitted that the challenged portions of his affidavit were not included to relitigate any issue in the receivership proceeding, or prior determinations in this proceeding. Rather, he submitted, they were included to lay out the procedural history, for background and context. Furtado submitted that he makes no request for relief with respect to any of those earlier decisions.

[21] Furtado also submitted that in some respects the evidence was responsive to matters already canvassed in evidence by the Commission's own witnesses.

[22] The Commission replied that Furtado's submissions did not address its concern that Furtado refused to confirm that he would seek no findings based on what the Commission submits is irrelevant or inadmissible evidence.

[23] We had some sympathy for the Commission's concerns. The volume and detail of material provided in Furtado's affidavit in relation to the receivership, the procedural history, and evidence on adjournment motions, was particularly extensive. It contains material which is irrelevant to the issues we need to determine in relation to the Statement of Allegations.

[24] However, it is typical to summarize, both in evidence and in reasons, the procedural background and context for a proceeding.[2] It is also permissible to append exhibits which confirm information in associated paragraphs in the affidavit.

[25] The issues before us are framed and limited by the Statement of Allegations. Anything beyond that is irrelevant. We have kept this guiding principle in mind as we have reviewed the evidence, including Furtado's affidavit, and as we have determined the issues before us. We considered the impugned portions of the affidavit only for background and context, and as documentary confirmation of

[2] *Conrad M Black et al,* 2015 ONSEC 4 at para 5; see also *Juniper Fund Management Corporation et al,* 2013 ONSC 17 at paras 2, 13-17

matters to which Furtado provided direct testimony, susceptible to cross-examination.

4. EVIDENCE

[26] The evidentiary portion of the merits hearing took place over 13 days and involved testimony from seven individuals. The Commission called six witnesses, including its investigator – a forensic accountant from the Enforcement division of the Commission – and five investor witnesses with various levels of involvement and sophistication. The respondents called Furtado as their only witness.

[27] The documentary record was voluminous. Both the Commission's investigator witness and Furtado provided evidence-in-chief by way of affidavit. With exhibits, the investigator's affidavit extended to 16 volumes. Furtado's affidavit appended over 175 additional exhibits.

[28] There are also several ongoing proceedings in the civil courts arising out of the circumstances surrounding the GTDH business, including the receivership of the Corporate Respondents and the other GTDH projects. Both the Commission and Furtado cautioned us that the other, and their respective witnesses, were attempting to secure findings in this proceeding which would assist them in the civil court cases.

[29] Mindful of the other proceedings, we have restricted our findings to only those necessary to dispose of the issues properly before us in the Statement of Allegations. Despite the volume of evidence, the salient facts related to those allegations, as we find them, can be summarized in relatively brief form. We have done so in respect of our findings for each allegation.

4.1 Credibility of witnesses

[30] In assessing the credibility of witnesses, the Tribunal has accepted the guidance that "the most satisfactory judicial test of truth lies in its harmony or lack of

harmony with the preponderance of probabilities disclosed by the facts and circumstances in the conditions of the particular case."[3]

[31] We may accept some, all or none of a witness' evidence. We may find the evidence of a witness credible in some respects and not in others. Where there are sufficient instances of questionable evidence, we may, with appropriate caution, make an overall assessment of a witness' credibility and reliability.[4]

[32] Considering all the evidence, we concluded that Furtado lacked credibility on matters that related to his potential liability. When faced with contemporaneous documents that challenged the accuracy of his evidence, he often found someone else to blame for the discrepancy, suggested a strained interpretation, or professed a lack of recall.

[33] Given these frailties in Furtado's credibility, we gave more weight to the conclusions we could draw from the consistency of the substantial documentary record.

[34] We found the investor witnesses generally credible. We recognized, however, their self-interest in parallel civil proceedings, and approached their evidence in those areas with particular care.

[35] The Commission's investigator's evidence was credible, documented and dispassionate.

5. ISSUES & ANALYSIS

5.1 Introduction

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

[37] The following questions are before us:

a. Did the respondents defraud investors in the Adelaide and other Go-To LPs contrary to s. 126.1(1)(b) of the *Act*?

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[3] *Feng (Re)*, 2023 ONCMT 12 (***Feng***) at para 22, citing *Springer v Aird & Berlis LLP*, 2009 CanLII 15661 (ON SC) at para 14

[4] *Meharchand (Re)*, 2018 ONSEC 51 (***Meharchand***) at para 52; *Feng* at para 23

b. Did Furtado and GTDH engage in the business of trading securities without registration contrary to s. 25(1) of the *Act*?

c. Did Furtado, GTDH and the Adelaide GP make prohibited representations to investors contrary to s. 44(2) of the *Act*?

d. Did Furtado breach s. 122(1)(a) of the *Act* by making false and misleading statements to the Commission?

e. Did Furtado, as officer and director of the Corporate Respondents, breach s. 129.2 of the *Act* by authorizing, permitting or acquiescing in the Corporate Respondents' breaches of the *Act*?

f. Did the respondents engage in conduct that is contrary to the public interest?

[38] For the reasons below, we find that the respondents did defraud investors in the Adelaide LP and in two other Go-To LPs, Elfrida and Eagle Valley, contrary to s. 126.1 (1)(b) of the *Act*. We also find that Furtado breached s.122(1)(a) by making misleading statements to the Commission.

[39] However, we find that Furtado and GTDH did not engage in the business of trading securities without registration contrary to s. 25(1). Nor, we find, did they and the Adelaide GP make prohibited representations contrary to s. 44(2). We also dismiss the allegations under s. 129.2 with respect to authorizing corporate breaches, and the general "public interest" allegation.

5.2 Did the respondents defraud investors in the Adelaide and other Go-To LPs?

[40] The Commission alleges that Furtado committed fraud in five ways by:

a. failing to tell investors that he stood to benefit (or in respect of later investors, had benefited) from the Adelaide LP's purchase of the Adelaide Properties;

b. redeeming Anthony Marek's units contrary to representations made to other Adelaide LP investors;

c. acting contrary to representations made to investors in the Elfrida and Eagle Valley LPs by misusing their properties as security for obligations of the Adelaide GP and LP;

d. dishonestly soliciting a new $12 million investment from Marek in August-September 2019; and

e. personally benefiting from the Adelaide LP's acquisition of the Adelaide Properties, which amounts to a fraud on the Adelaide LP.

[41] For the reasons that follow, we find that Furtado did commit fraud in each of these five ways.

5.2.1 The test for fraud

[42] We begin our analysis by considering the test for fraud and what the evidence must demonstrate.

[43] The governing provision in the *Act,* s. 126.1(1)(b), 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.

[44] That section brings within its reach two categories of actors:

a. those who perpetrate a securities-related fraud; and

b. others who participate, directly or indirectly, in securities-related conduct that they know or reasonably ought to know perpetrates a fraud.

[45] The first step is to determine whether one or more persons have perpetrated a fraud. The term "fraud" is not defined in the *Act*. Previous Tribunal decisions[5] have applied the framework found in the Supreme Court of Canada's decision in *R v Théroux.*[6] Those Tribunal cases set out these elements to prove a fraud:

a. the *actus reus*, or objective element, which consists of:

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

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[5] *First Global Data Ltd (Re),* 2022 ONCMT 25 at para 346; *Quadrexx et al (Re),* 2017 ONSEC 3 at para 19; *Bridging Finance Inc (Re),* 2024 ONCMT 23 at para 33 (***Bridging Merits***)

[6] [1993] 2 SCR 5 (***Théroux***)

ii. deprivation caused by that act, which may come in the form of an actual loss, or the placing of the victim's pecuniary interests at risk; and

b. the *mens rea*, or subjective element, which consists 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.

[46] The second step is to inquire whether the respondent has, as required in s. 126.1(1)(b), directly or indirectly participated in any act or conduct, related to securities, that they knew or ought reasonably to have known perpetrated a fraud.

[47] This second step is more straightforward where, as in this case, the respondent is the person who perpetrated the fraud under the *Théroux* framework in step one. In this case, we find that Furtado, as the directing mind of the Corporate Respondents, was the actor who perpetrated the fraud directly. Accordingly, in the second step, in this case, we only need to consider if the fraudulent conduct related to securities.

5.2.1.a Attribution to Corporate Respondents

[48] In this case there are four respondents: Furtado, and the three Corporate Respondents. There was no issue that Furtado is the sole directing mind of the Corporate Respondents. The allegations of fraud against the Corporate Respondents are based on attributing Furtado's acts to those entities.

[49] After evidence was complete but before closing submissions, the Tribunal's *Bridging Merits* decision was released, as was the Supreme Court of Canada's decision in *Aquino v Bondfield Construction Co.*[7] These cases discussed situations where the actions of a directing mind might not be attributed to a corporation. *Bridging Merits* cited the "identification doctrine" from the Supreme Court of Canada case, *Canadian Dredge & Dock Co v The Queen.*[8] The Tribunal declined

[7] 2024 SCC 31 (***Aquino***)

[8] 1985 CanLII 32 (***Canadian Dredge***)

to find attribution in *Bridging Merits*, as gaps in the evidence created doubt about several factors: whether the actions of the directing mind were in fraud of the corporation (the "total fraud" exception), whether they were not for its benefit (the "no benefit" exception), and whether attribution would serve the public interest. The *Aquino* decision synthesized the prior law and established guiding principles for attribution. It concluded that attribution should be applied purposively, contextually and pragmatically.

[50] The Commission provided us with additional submissions on this issue. The respondents did not address it.

[51] The Commission submitted that *Aquino* superseded *Canadian Dredge,* and that the "total fraud" and "no benefit" exceptions which troubled the Tribunal in *Bridging Merits* should not be applicable to a s. 126.1 allegation in a s. 127 proceeding driven by public interest considerations. Alternatively, it submitted, those exceptions are not engaged on the facts before us.

[52] The circumstances in *Bridging Merits* were different from those before us. In that case, the corporation was a broader operating corporation rather than a holding company or similar entity. As a factual matter, in any event, neither the "total fraud" nor the "no benefit" exceptions would have any application in this case where the individual respondent is the directing mind of the Corporate Respondents. Furtado is the directing mind of the Corporate Respondents. There is no suggestion he acted in fraud of his own companies or that they received no benefit. To the extent we find Furtado's actions to be fraudulent, we find the Corporate Respondents to have engaged in the same fraud.

[53] We decline to determine whether the *Aquino* line of cases should apply to a s. 126.1 allegation in a s. 127 proceeding. Such a determination is not necessary in this case and has not been the subject of full argument.

5.2.1.b Is reliance required?

[54] Another issue which overlays the allegations of fraud is whether there is any difference between fraud by "deceit or falsehood", on the one hand, and by "other fraudulent means", on the other. The respondents submit there is. For fraud by deceit or falsehood, they submit, the evidence must establish that investors relied upon the misstatement, to their detriment. For this principle, the

respondents cite the Ontario Court of Justice's decision in *Ontario Securities Commission v Katmarian.*[9]

[55] The Commission counters that reliance is not a necessary element of fraud by deceit or falsehood. It urges us not to follow *Katmarian,* as that case is under appeal and is inconsistent with governing Supreme Court of Canada and Ontario Court of Appeal authorities. In any event, the Commission submits that most if not all the alleged frauds can be characterized as "other fraudulent means".

[56] The Commission cites *R v Riesberry*,[10] which concerned an accused who had injected performance enhancing drugs into racehorses. In finding Riesberry liable, the Court rejected the contention that fraud required inducement or reliance. It focused on the causal connection.[11] In finding that there was a direct causal link between Riesberry's conduct and the risk of financial deprivation to the betting public, the Court held that "the absence of inducement or reliance is irrelevant."[12]

[57] *Riesberry* was a case of fraud by "other fraudulent means". Closer to the circumstances of this case, the Commission points to *R v Drabinsky*.[13] That case related to a misrepresentation in a balance sheet used in an initial public offering. Finding the accused liable, the Court approved the trial judge's observation that the inclusion of a balance sheet that is false is an act of deceit, falsehood and dishonesty. Since members of the public were entitled to rely on the statements before risking their funds, the deceit created potential risk to the public.[14] If the balance sheet was false, it was no defence that investors would only look to other statements.

[58] We agree that these cases demonstrate that reliance is not a necessary element of a finding of fraud, whether by deceit, falsehood, or other fraudulent means. This conclusion is consistent with the purposes of the *Act,* which provides protection to investors from unfair, improper or fraudulent practices. Neither s.

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[9] 2024 ONCJ 151 (***Katmarian***)
[10] 2015 SCC 65 (***Riesberry***)
[11] *Riesberry* at para 22
[12] *Riesberry* at para 26
[13] 2015 SCC 65 (***Drabinsky***)
[14] *Drabinsky* at paras 81-82

126.1(1)(b) of the *Act*, nor the framework for determining fraud set out by the Supreme Court in *Théroux,* suggest any distinction between frauds effected by deceit, falsehood or other fraudulent means.

[59] With this framework to determine if a fraud occurred, we now turn to the five acts by Furtado which the Commission alleges constitute fraud.

5.2.2 Fraud analysis

5.2.2.a Non-disclosure of Furtado's expected benefit on the purchase

[60] The first allegation turns on what Furtado knew and intended, and told, or more to the point, did not tell, potential investors when they were considering their investments in the Adelaide LP.

[61] The Commission alleges that Furtado expected, intended and planned to profit from the purchase by the Adelaide LP of the Adelaide Properties. By failing to tell investors of his intent to profit (or by failing to tell later investors that he had benefited already), the Commission submits he perpetrated a fraud.

[62] We consider first the objective element of this allegation: did Furtado engage in deceit, falsehood, or other fraudulent means?

5.2.2.a.i Step one - objective element

[63] In the capitalization and operation of the Adelaide LP, from at least October 2018 onwards, Furtado worked closely with Alfredo Malanca. Malanca had a company called Goldmount Financial Corp. His spouse, Kasia Pikula, was a mortgage broker through her company Goldmount Capital Inc. Together they had a family holding company called AKM Holdings Inc. Malanca was also the representative or agent of a company called Adelaide Square Developments Inc.

[64] Prior to the Adelaide LP, Goldmount had arranged financings for GTDH projects and Furtado considered Malanca his "primary person" for debt financings.

[65] While there was conflicting evidence around timing and details, the preponderance of the documentary and oral evidence makes clear that, by October 2018, Malanca or a company he represented had agreements in hand to acquire the Adelaide Properties at an aggregate purchase price in the mid-$50 million range. Furtado knew this.

[66] The evidence also makes clear that Malanca and Furtado contemplated a purchase of the Adelaide Properties by the Adelaide LP for an aggregate purchase price in the mid-$70 million range. The parties took us through various communications and draft agreements throughout the relevant period, highlighting changes to amounts and parties and respective roles, and disputing who knew or said precisely what and when. What did not change, however, was that the basic structure in all cases involved a significant difference between what would be due to the existing owners of the Adelaide Properties from Malanca or a company he represented, and the price at which the Adelaide LP would acquire them. That difference was referred to by the parties before us, and was referred to at the time, in 2018 and early 2019, by Furtado and Malanca, as a "lift".

[67] In the fall of 2018, Hans Jain became involved in the discussions concerning the Adelaide Properties. Jain testified at the hearing. He is an experienced real estate developer. For a time, he assisted with the development of the Adelaide LP's project and guaranteed its mortgage debt. He also indirectly made a $2 million equity investment in the Adelaide LP. His dealings with the Adelaide LP and Furtado are the subject of separate civil proceedings.

[68] Throughout the period from no later than November 2018 onwards, Furtado and Malanca, and sometimes Jain, engaged in discussion of the "lift" that was built into the proposed acquisition of the Adelaide Properties. For example, on December 28, 2018, Furtado sent to Malanca an email with comments on the draft limited partnership agreement for the Adelaide LP. Among his comments he stated that:

> "Section A — Class A unit holders: $16.8 million comes from the equity investors (this includes the $6.1 million in lift we would allocate to them to re-invest in the LP). The net number of $10.7 million is the real cash they have to invest.
>
> Section A — Class B unit holders: $10.15 million comes from us (assuming all cash is reinvested from the flip).

Section A — designed in such a way that if Hans invests, he knows about the lift. If the Bahrain guys invest, we can ask them to put the full 16.8 million into the deal (possibly)."

[69] These discussions of a "lift", which Furtado understood meant an immediate profit, had occurred and were continuing as investors were sought for the Adelaide LP. By December 28, 2018, the Adelaide LP had signed a purchase agreement with Adelaide Square Developments to purchase the Adelaide Properties for $74.25 million, with the amount then due from Adelaide Square Developments to the existing owners of the properties being approximately $58 million. By December 28, 2018, the anticipated "lift" had been quantified in the amount of approximately $16.25 million. Furtado was aware of this.

[70] When Furtado was questioned on cross-examination by the Commission on the meaning of his December 28 comments, Furtado indicated he could not recall what "the flip" in these comments referred to, nor did he recall who "us" was meant to designate. We find his evidence in this regard not credible, and that the notes in their context speak for themselves. The "flip" was the purchase of the properties by Adelaide Square Developments followed by their immediate transfer to the Adelaide LP at a higher price. Put another way, it was the payment to the original owners followed by the purchase by the Adelaide LP at prices which created an immediate profit, in other words a "lift".

[71] Likewise, in an email from Furtado to Malanca, the meaning of "us" clearly refers to Furtado and Malanca. Furtado was discussing how the profit from the "flip" would be shared.

[72] Furtado submitted that the scenarios in which he or GTDH shared in a "lift" were scenarios that never proceeded and that did not involve outside investors. They were a "back up" plan. We do not agree with this distinction. The purchase of the Adelaide Properties, as it finally occurred with the involvement of outside investors, included an assignment fee of $20.95 million paid to Adelaide Square Developments by Adelaide LP, representing the "lift" between the price paid by Adelaide Square Developments to the original owners and the price paid by the Adelaide LP to Adelaide Square Developments.

[73] To secure the closing, as we will describe below, Furtado and Malanca obtained a short-term investment from Marek, who viewed his investment in units of the Adelaide LP as a "day loan". Because Marek required immediate payout of his investment with a large fee on closing of the purchase, the assignment fee to be paid by Adelaide LP to Adelaide Square Developments was, in the first instance, directed to the payment of Marek. The assignment fee payment owing to Adelaide Square Developments was replaced by a demand loan from the Adelaide LP to Adelaide Square Developments (the **Demand Loan**).

[74] Within less than two weeks of the purchase, Adelaide Square Developments issued new shares to Furtado Holdings and AKM Holdings, and paid each of them approximately $388,000 in the form of dividends. By October 2019, Furtado had secured a further $12 million investment from Marek, as we will describe below, and caused the Adelaide LP to use it to pay out $12 million of the Adelaide Square Developments Demand Loan. Adelaide Square Developments then used that receipt to pay dividends, in the amount of $6 million each, to Furtado Holdings and AKM Holdings.

[75] Furtado's explanation, of why he was given shares of Adelaide Square Developments and why he received the dividends, changed over time. Ultimately it was, in essence, that Adelaide Square Developments had made a lot of money on the deal because of his efforts and it wanted to thank him for his contribution to ensuring the deal closed.

[76] We do not find that to be a credible explanation, considering the voluminous documentary record, and the evident sophistication of the parties involved. The existence of a "lift" on closing was an obvious element of the purchase of the Adelaide Properties. Furtado had been involved in continuous discussions of scenarios, all of which recognized this "lift" and how it would be shared or applied. No later than his notes of December 28, 2018, set out above, those scenarios contemplated that a GTDH or Furtado entity would have some claim on a portion of the "lift".

[77] Based on all the documents and testimony, we conclude that Furtado did expect, intend and plan to profit from the purchase by the Adelaide LP of the Adelaide

Properties. In fact, after closing, he received almost $6.4 million from Adelaide Square Developments.

[78] Furtado at no time told any of the investors in the Adelaide LP (other than Jain) about the "lift", or of any intent that he had of sharing in it. This is so with respect to investors who purchased units both before and after Furtado Holdings had received dividends of almost $6.4 million.

[79] Did this non-disclosure, in the circumstances, perpetrate a fraud on the investors in the Adelaide LP? We find that it did.

[80] The information provided to investors was found in various investor packages, oral discussions with Furtado, and in the limited partnership agreement itself. Generally, the documents and oral representations:

a. touted the Adelaide Project, GDTH's existing projects and experience, and Furtado's experience, integrity and trustworthiness;

b. confirmed that the Adelaide GP, which Furtado controlled, was a fiduciary of the Adelaide LP and would act in its best interests; and

c. indicated that investors "got paid first".

[81] Non-disclosure can constitute "other fraudulent means" where a person, through their silence, hides fundamental and essential elements such as would mislead a reasonable person.[15]

[82] Furtado was a fiduciary of the Adelaide LP, the purchaser of the Adelaide Properties. However, he also expected, intended and planned to profit from the "lift" represented by the assignment fee paid by the Adelaide LP to Adelaide Square Developments on that purchase. Furtado was on both sides of the transaction. As a fiduciary of the LP, his failure to disclose this conflict of interest was objectively dishonest and hid a fundamental and essential element of the purchase transaction.

[83] The second aspect of the objective element of a fraud is that the victim's pecuniary interests have been placed at risk. In this case, Furtado's non-

[15] *Bradon Technologies Ltd (Re),* 2015 ONSEC 26 at para 159; *R v Émond*, 1997 CarswellQue 4688 (English translation) at paras 29-30, 34-37

disclosure of the "lift" and his intent to share in it, and the fact that he was on both sides of the transaction, exposed investors to the risk that the purchase of the Adelaide Properties had not been, and would not be, pursued solely in the best interests of the Adelaide LP. This was a pecuniary risk for which they had not bargained.

5.2.2.a.ii Step one - subjective element

[84] Addressing briefly the subjective element of the fraud, we conclude that Furtado was aware of his failure to disclose the "lift" and his intent to share in it, and that the non-disclosure could place investors' pecuniary interests at risk.

5.2.2.a.iii Step two – remaining elements of s. 126.1(1)(b)

[85] Finally, moving to step two of the analysis laid out above, there is no question that Furtado's fraudulent conduct described above related to securities, in this case the sale of units of the Adelaide LP.

[86] We accordingly find that the Commission has established this first alleged fraud.

5.2.2.b Redemption of units contrary to representations to investors

[87] The Commission's second allegation is that the respondents committed fraud by redeeming the units of one investor, Anthony Marek, in contravention of representations made to investors.

[88] Marek came on the scene shortly before the closing of the purchase of the Adelaide Properties by the Adelaide LP. He is an experienced real estate developer. He made a substantial investment of $16.8 million for a brief period, demanding a fee of $2.7 million.

[89] Although Marek viewed his investment as a "day loan" to permit the closing, he purchased units in the Adelaide LP. He testified that Furtado told him that, "this is the way they have to show it on their books". He accordingly agreed and signed a subscription agreement for units.

[90] Furtado testified that he did not tell Marek this. We prefer Marek's evidence in this regard, as it is consistent with the documents. Specifically, the mortgage financing that had been arranged for the purchase of the Adelaide Properties required a certain amount of equity as a pre-condition to funding.

[91] In any event, there is no dispute that Furtado agreed to the subscription for units, accepted the subscription agreement from Marek, and then, after closing, authorized the redemption of the units by the Adelaide LP. To do so, he entered into the Demand Loan on behalf of the Adelaide LP with Adelaide Square Developments.

[92] The limited partnership agreement for the Adelaide LP, which governed the relationship between the investors and the Adelaide LP, had detailed provisions for the payment of distributions as a return of capital invested. The key element of those provisions, paraphrased by Furtado, was that "the investors got paid first."

[93] More specifically, s. 4.1 of the agreement provided for what the parties called a "waterfall" of payments, in order and priority. After a nominal payment to the general partner, the first distribution was to repay each unitholder, on a pro-rata basis, any capital contribution made by such unitholder. Furtado also told investors (other than Marek) that their investment was illiquid, and they could not get it out until the end of the project. Section 4.1 of the limited partnership agreement reiterates this point.

5.2.2.b.i Step one - objective element

[94] Turning to the objective element of the alleged fraud, we note that the redemption of Marek's units was a clear breach of the terms of s. 4.1 of the limited partnership agreement. It was contrary to the bargain that had been placed before investors, that all investors were in it together until the project came to fruition, at which point investors would be paid out on a pro-rata basis. This was a dishonest act which satisfies the first aspect of the objective element of a fraud.

[95] The capital structure of the Adelaide LP was also materially altered by the Adelaide LP entering into the Demand Loan and using most of the proceeds to pay Marek on redemption of his units, substituting debt for equity. This early, material payment to Marek placed the pecuniary interests of the other investors at risk. This satisfies the second aspect of the objective element of a fraud.

5.2.2.b.ii Step one - subjective element

[96] As to the subjective element of fraud, Furtado knew that the agreement provided for pro-rata distribution, and he knew that he had told investors that they would be paid first. He nevertheless authorized the redemption of Marek's units and their replacement by the Adelaide Square Developments Demand Loan. We find that he understood this would put the pecuniary interests of the investors other than Marek at risk. The subjective element is satisfied.

5.2.2.b.iii Step two – remaining elements of s. 126.1(1)(b)

[97] Turning to the second step in the analysis under s. 126.1(1)(b) of the *Act,* Furtado urges us to determine that this is not conduct which is "relating to securities", but rather is a simple matter of an alleged breach of contract, for which investors have contractual remedies that should be sought in the courts.

[98] We do not agree. Conduct may constitute fraud under s. 126.1 even though it may give rise to other remedies in other forums. The conduct in this case related to representations made and agreements entered with investors in relation to their purchase of securities, the limited partnership units. We find the conduct alleged is in relation to securities, within the meaning of s. 126.1, and accordingly that Furtado committed a fraud by the redemption of Marek's units.

5.2.2.c Misuse of assets of other partnerships by using their properties to secure obligations of the Adelaide GP and LP

[99] The Commission's third allegation of fraud relates to the use of the assets of two other limited partnerships created by GTDH, to secure obligations in respect of the Adelaide GP and LP.

[100] The Elfrida LP and Eagle Valley LP were limited partnerships created by GTDH to develop two other projects. Their structures were similar to the Adelaide LP in that GTDH created a subsidiary to be the general partner of each limited partnership. All the GTDH entities, including these general partners, were affiliates as they were all controlled by Furtado.

[101] The limited partnership agreements for each of the Elfrida LP and the Eagle Valley LP contained a specific covenant by the general partner that it shall not

"cause the Partnership to guarantee the obligations or liability of, or make loans to, the General Partner or any Affiliate of the General Partner".

[102] The investment opportunity documents for each of the Elfrida LP and Eagle Valley LP also state in their "Summary of Key Considerations" section that, "The General Partner holds the property in trust for the Partnership".

[103] Despite these provisions, Furtado caused the Elfrida LP to agree to the registration of a charge for over $7 million on its property and agree to certain restrictions, to support an obligation in respect of the Adelaide Project.

[104] Furtado also caused the Eagle Valley LP to agree to the registration of a charge for over $13 million on its property, as collateral security for one of the Adelaide LP's mortgages.

[105] Furtado obtained no benefit for the Elfrida LP or the Eagle Valley LP in exchange for these provisions of security. Nor did he obtain investor approval from those LPs. They were not disclosed to investors in those LPs until late 2020, after Furtado was questioned about the charges by the Commission.

[106] The Commission submits that in appropriating the assets of the Elfrida LP and the Eagle Valley LP in an unauthorized manner, Furtado acted dishonestly in a manner that is a fraud by "other fraudulent means".

[107] Furtado submits, to the contrary, that what is alleged is no more than an unintentional breach of contract which does not engage the jurisdiction of the Tribunal. In any event, he submits, the charges were removed, with no damage occurring, once the Commission raised the issue. Finally, he submits, there was never any real risk of deprivation to the relevant unitholders in those partnerships, as the value of the Adelaide LP properties was sufficient to support payment of all the debts in question.

5.2.2.c.i Step one – objective element

[108] The investors in the Elfrida LP and the Eagle Valley LP were entitled to rely on the general partner's representations and agreements made in respect of their purchase of securities. Those representations included that the properties would be held in trust and not encumbered for the benefit of the general partner or any of its affiliates. The cross-collateralization caused by Furtado was an

unauthorized use of those partnerships' properties, at odds with the bargain that was presented to investors when they purchased the units. It was a dishonest act that satisfies the first aspect of the objective element of a fraud.

[109] Turning to the second aspect of the objective element, whether investors' pecuniary interests were subjected to risk because of this conduct must be tested at the time of the conduct. Furtado was adamant in his testimony that there was no real risk to investors in the Elfrida LP and the Eagle Valley LP because the value of the Adelaide LP's properties was sufficient to support the payment of all debt.

[110] Furtado's assessment of the risk, however, does not determine the issue. Properties subject to a charge in support of an affiliate of the general partner is precisely what the investors in the Elfrida LP and the Eagle Valley LP had not bargained for. They had bargained to receive property held in trust and unencumbered by the general partner or its affiliates. An encumbered property obviously carries a greater risk than one not encumbered. It involves a greater risk of deprivation if for any reason the chargee determines to enforce against the property.

5.2.2.c.ii Step one – subjective element

[111] As an experienced real estate developer, Furtado must have known the potential pecuniary risk of charges on the other LPs' properties, however he may have quantified (or dismissed) that risk. The second aspect of the objective element is satisfied.

5.2.2.c.iii Step two – remaining elements of s. 126.1(1)(b)

[112] As to the second step in the analysis, we have already noted above that conduct may constitute fraud under s. 126.1 as "relating to securities", even though it may give rise to other remedies in other forums. Here, Furtado's dishonest acts related to the rights and expectations of investors in limited partnership securities, based on the representations and documents provided by the general partner. We find this conduct by Furtado to be "relating to securities".

5.2.2.d Dishonestly soliciting a further $12 million investment from Marek

[113] The Commission alleges that Furtado undertook further dishonest acts in soliciting a new investment from Marek in August-September 2019. He did so, it submits, by making misrepresentations about the Adelaide LP's financial picture and failing to disclose important facts including his indirect personal interest in Adelaide Square Developments, the existence of the Adelaide Square Developments Demand Loan, and his expectation of receiving a $6 million dividend from the proceeds of Marek's investment.

[114] Furtado approached Marek in August 2019, to ask if Marek might be interested in making a further investment in the Adelaide LP. Furtado and Marek met in person for about an hour at Furtado's office on August 27, 2019. Marek invested a further $12 million by a subscription of units on September 26, 2019. Marek and Furtado agreed that those units would carry a target annualized return of 20% plus a further 10% of the profits after other limited partners were paid.

[115] At some point (precisely when was not agreed upon by the parties), Furtado gave Marek an updated information deck about the Adelaide Project (the **Updated Deck**). The Updated Deck was clearly wrong in some key respects. It stated that "Go-To Developments and its partners...have collectively invested $19.8 million of the total $27 million equity required". In that regard, on the same page in a table of "Sources and Uses" of capital, it showed Adelaide Square Developments as having contributed $16.8 million in equity. Both of these statements were incorrect. "Go-To Developments and its partners" had invested no equity. Adelaide Square Developments did not have any equity. Rather, it had the substantial outstanding Demand Loan, which was not disclosed. The Updated Deck materially understated the Adelaide LP's debt and overstated its equity.

[116] Marek's testimony is that he received the Updated Deck in the August 27 meeting. Furtado contests this, on the basis that he believes Marek left the meeting with no documents and only received the Updated Deck later by email. Furtado's evidence, however, changed over time between his compelled interviews, his affidavit, and his live testimony. We prefer Marek's evidence on this point and find that he did receive the Updated Deck before his $12 million investment.

[117] Marek testified that Furtado said nothing in the meeting about the page in the Updated Deck referred to above, that set out the erroneous equity, debt, and sources and uses of capital. His evidence, consistent with Furtado's in this respect, is that they just flipped through the deck. He was straightforward in saying that Furtado told him nothing about any of the items on that page. After the meeting, he testified that he "quickly reviewed" the document but asked no further questions. He confirmed he asked for no further financial information before making his investment.

[118] We are therefore faced with a situation where a disclosure document provided to an investor, Marek, prior to his decision to invest, contained material misstatements concerning the capital structure of the investment.

[119] It is equally clear from the evidence, however, that Marek did not rely on the misstatements before making his $12 million investment. He was focused on the return he would receive on his investment.

[120] We have explained above that reliance is not a necessary element of a finding of fraud, whether by deceit, falsehood, or other fraudulent means. This alleged fraud demonstrates the importance of this principle.

[121] Furtado attempted to explain away the misstatements, and to blame them on the third party who had been retained to prepare the Updated Deck. However, as President and CEO of GTDH, he had the power of final approval over all information decks provided to investors, and he provided the Updated Deck to Marek. He bears responsibility for its contents.

5.2.2.d.i Step one – objective element

[122] Returning to the framework for determining whether securities fraud occurred, we conclude that the first aspect of the objective element is satisfied by Furtado's dishonest act in providing the Updated Deck containing material misstatements to Marek as a potential investor. The second aspect of the objective element, the risk to the pecuniary interests of the investor, flows from the nature of the misstatements, which overstated equity and understated debt.

5.2.2.d.ii Step one – subjective element

[123] As to the subjective element, Furtado was aware of the true capital structure of the limited partnership, and was therefore aware that what was in the Updated Deck was a misstatement. We find, therefore, that he must have appreciated the pecuniary risk that could flow from that misstatement.

5.2.2.d.iii Step two – remaining elements of s. 126.1(1)(b)

[124] Finally, the second element of s. 126.1(1)(b), that Furtado's fraudulent conduct is in relation to securities, is satisfied by the fact that the conduct was in relation to the sale of units in the Adelaide LP. Accordingly, this allegation is established, and we find that Furtado perpetrated a fraud in the solicitation of Marek's $12 million investment in September 2019.

5.2.2.e Fraud on the Adelaide LP itself

[125] The Commission alleges that Furtado's acts, undertaken to obtain a personal benefit from the Adelaide LP's acquisition of the Adelaide Properties, were a fraud on the Adelaide LP itself.

[126] Of the four frauds we have determined above, only one impacts the Adelaide LP itself. It is the early redemption of Marek's initial units and its replacement with a Demand Loan.

[127] From the perspective of the Adelaide LP, the early redemption of Marek's initial investment, and its replacement with a Demand Loan from Adelaide Square Developments, had the effect of replacing a material amount of its equity with debt. To the extent we have found that this perpetrated a fraud on the investors in the Adelaide LP, we find it also was a fraud on the limited partnership itself.

5.3 Did Furtado and GTDH engage in the business of trading in securities without being registered?

[128] Registration is one of the cornerstones of the regulatory framework of the *Act*. It is a key gate-keeping mechanism that protects investors and the capital markets

by imposing obligations of proficiency, integrity, and solvency on those who seek to be in the business of trading in securities.[16]

[129] The *Act* requires those engaged in the "business" of trading to be registered.[17] The conduct must be determined to be trading in securities, and the trading must rise to the level of someone being in the business of trading in securities. This is generally referred to as "the business trigger".

[130] The Commission alleges that Furtado and GTDH traded in securities of the various GTDH limited partnerships, and that their capital raising conduct activated the business trigger, which required them to be registered to trade. Furtado and GTDH do not take issue with the Commission's allegation that they were trading in securities, but submit that their trading did not cross the line between permissible capital raising, and the registrable business of trading.[18] We have concluded that Furtado and GTDH did not engage in the business of trading, for the following reasons.

[131] Between March 2016 and June 2020 (a period of more than four years), Furtado and GTDH raised over $80 million from about 85 investors. The capital was invested in 10 separate limited partnerships. Each partnership held a different property (with one exception, where two partnerships existed for a single property). The Adelaide LP was the last partnership to start raising money and was by far the largest of the 10 partnerships.

[132] In all cases, the units were sold on a prospectus-exempt basis, relying on the accredited investor or similar exemptions. The Commission has not alleged that any of the sales required a prospectus.

[133] The Commission cites and relies upon Companion Policy 31-103CP *Registration Requirements, Exemptions and Ongoing Registrant Obligations* (**Companion Policy**) as setting out criteria to assist in determining if the business trigger has been met. The criteria include:

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[16] *Hogg* at para 187; *Limelight Entertainment Inc et al*, 2008 ONSEC 4 at paras 135-136; *Meharchand* at para 107

[17] *Act*, s 25(1)

[18] *Money Gate Mortgage Investment Corporation (Re),* 2019 ONSEC 40 (***Money Gate***) at para 143, citing *Blue Gold Holdings Ltd et al,* 2016 ONSEC 24 at para 20

a. engaging in activities similar to a registrant;

b. intermediating trades or acting as a market maker;

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

d. being, or expecting to be, remunerated or compensated for the activity; and

e. directly or indirectly soliciting securities transactions.

[134] The Companion Policy is not law. However, the Tribunal has consistently adopted its criteria as helpful in determining whether a business trigger has been met. Equally, though, the Tribunal has cautioned that "these factors are useful, but ultimately [the Tribunal] must take a holistic view to determine whether [the impugned party] was acting like a [party] in the business of trading securities or was seeking to raise capital for the advancement of an underlying business."[19]

[135] This quote refers to a concept which has influenced the Tribunal's determination on the business trigger in several cases. The presence of an underlying business for which capital is being raised is a factor which weighs against a finding of a "business of trading".[20] However, it is not determinative.[21]

[136] The Companion Policy itself reflects this tension, as it notes that issuers with an active non-securities business (or a bona fide business plan for one), who trade in their own securities, are generally not considered to be in the business of trading if they meet certain criteria. The criteria are the obverse of the ones set out above, which tend to demonstrate that the business trigger is met. Yet those criteria are themselves also noted in the Companion Policy to be subject to exceptions.

[137] The Companion Policy also refers specifically to issuers in the "start-up stage", who will be considered to have an "active non-securities business" if they are raising capital to start a non-securities business.

[138] The Commission submits that we should consider all the GTDH projects together in our analysis of the business trigger, as Furtado was the directing mind of them

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[19] *Threegold Resources Inc (Re),* 2021 ONSEC 30 (***Threegold***) at para 40

[20] *Threegold* at paras 41-58; *Stinson (Re),* 2023 ONCMT 26 (***Stinson***) at para 53

[21] *Paramount Equity Financial Corporation (Re),* 2022 ONSEC 7 (***Paramount***) at para 46; *Money Gate* at para 143

all, and solicited investments for all of them with repetition, regularity and continuity. It encourages us to view all the capital raising for the projects as a single ongoing business, not something in the start-up stage for each project. The Commission submits that the registration requirement should apply to such "serial sponsors and sellers" of securities, when viewed through the investor protection lens of the *Act.*

[139] Furtado and GTDH submit, to the contrary, that each of the limited partnerships represented a separate business, financing a different project, and there was no reason to ignore the separate legal personality of the different partnerships. The fundraising efforts of each limited partnership, they submit, should be viewed on their own. Furtado's activity is explicable as GTDH was the shareholder of each of the general partners of the partnerships, and he was the directing mind of GTDH. When viewed as stand-alone partnerships, they submit, each limited partnership was raising funds primarily in its start-up phase.

[140] It is common ground that in each case, the purpose of soliciting investments was to provide the relevant partnership with funds to purchase a developable property and then fund pre-construction 'soft costs' (such as planning and zoning). Each investor received a separate subscription agreement and the relevant limited partnership agreement, and almost all received an informational document about the particular partnership seeking funds.

[141] Ultimately, in our view, whether one views the GTDH family of projects as a single business, or as separate businesses, does not materially change the analysis. Either way, each capital raising was for a defined underlying business in respect of a particular property development.

[142] The Commission notes that, among Furtado's responsibilities under his employment agreement with GTDH, he was expected to meet and communicate with potential investors in relation to the purchase of LP units. Furtado did meet with virtually all investors before they invested, to walk through the relevant project and documents. The Commission also notes that GTDH received administration fees from the limited partnerships, including for managing tasks related to unitholders. Further, GTDH also had a VP of Investor Relations and

Special Projects whose responsibilities included achieving annual targets for new funding from accredited investors.

[143] While all this is true, in respect of Furtado there was no evidence to suggest that his activity related to soliciting investments consumed more than a modest fraction of his time, nor that he was compensated based on the quantum raised. Furtado testified, and we accept, that he wore many hats for GTDH, including identifying development opportunities, formulating acquisition and development strategies, securing mortgage financing, managing zoning and planning processes with municipalities, retaining architects, engineers and planners, and sometimes additional responsibilities if a project entered the construction phase.

[144] While GTDH did receive administration fees from the partnerships, there was no evidence to support an assertion that it was any more, or less, than one would expect for the administration of property development projects. Nor was there any evidence as to whether any component of any fee attributable to investor relations was typical or not.

[145] With respect to the VP of Investor Relations and Special Projects, we had in evidence only the employment contract for that person and no witnesses spoke to the responsibilities or scope of the role. We note that the contract sets out numerous responsibilities including leading all communications and information technology functions.

[146] While the Commission's factual assertions are correct, in context and considered together they are consistent with GTDH and Furtado acting primarily as a real estate developer, rather than being in the business of trading securities. None of the investor witnesses suggested that they viewed Furtado or GTDH as being in the business of trading securities. All of them said, in one way or another, that GTDH was a real estate development business.

[147] It is useful to contrast two recent decisions of the Tribunal, *Paramount* and *Stinson.* In *Paramount,* the respondents offered units in pooled mortgage investment funds and direct mortgage investments on a continuous basis. The Tribunal cautioned that, just because an issuer carries on a core or other business, it does not preclude a conclusion that the issuer is engaged in the

business of trading in securities.[22] The Tribunal focused on other factors such as the amount of management time spent on soliciting investors, the regularity and continuity of sales of securities, and the expectation of those engaged in the trading activity to be compensated for it. The Tribunal concluded that the business trigger test had been met.

[148] In *Stinson,* on the other hand, the respondents were pursuing a strategy to acquire, renovate, convert and operate a hotel and condominium project. Despite an agreed statement of facts that purported to admit to a breach of the registration section, the Tribunal determined that the Commission had not established that the respondents had met the business trigger test. It found that the respondents did not cross the line from capital raising for a specific underlying business, to engaging in the business of trading in securities.[23]

[149] In our view, the position of Furtado and GTDH is more analogous to that of the respondents in *Stinson* than those in *Paramount.* Though GTDH had nine separate projects, each was the subject of a separate capital raising. The focus of Furtado and GTDH was to raise capital for those businesses. We find the respondents were not in the business of trading in securities.

5.4 Did the respondents make false or misleading statements to investors about the use of invested funds?

[150] Subsection 44(2) of the *Act* supports the registration requirement by prohibiting false or misleading statements that a reasonable investor would consider relevant to deciding whether to enter or maintain a trading relationship.

[151] The Commission conceded, consistent with the Tribunal's decision in *Solar Income Fund,* that if there were no requirement for the respondents to be registered under s. 25(1), then they could not be liable under s. 44(2).[24] We have concluded that the respondents were not required to be registered. Accordingly, we need not consider this allegation.

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[22] *Paramount* at para 46

[23] *Stinson* at para 52

[24] *Solar Income Fund Inc (Re),* 2022 ONSEC 2 at para 66

5.5 Did Furtado mislead the Commission during the investigation?

[152] The Commission alleges that Furtado made misleading statements to the Commission during its investigation into the respondents' conduct.

[153] Subsection 122(1)(a) of the *Act* makes it an offence to make a statement to a person appointed to make an investigation under the *Act* that, in a material respect, is misleading or untrue, including by omission.

[154] The statements relied upon by the Commission were made by Furtado in his three compelled interviews, pursuant to a summons under the *Act.* The Commission must therefore prove the remaining element, that one or more of these statements were misleading or untrue.

[155] In deciding whether a misstatement rises to the level in s. 122(1)(a), we must give meaning to the term "in a material respect". As the Tribunal has found in the past, we should give those words meaning consistent with the remedial nature of the section, but we should also distinguish between, on the one hand, misstatements that are evasive or designed to obfuscate, and on the other hand, inadvertent errors that are the product of confusion or poor recollection.[25]

[156] The Commission in its Statement of Allegations alleges that Furtado misled the Commission about:

a. the payments and benefits received by Furtado Holdings, specifically Furtado's testimony across his three examinations about the $388,087.33 received from Adelaide Square Developments in April 2019 and the $6 million dividend paid by Adelaide Square Developments in October 2019, and

b. his relationship with Adelaide Square Developments and Malanca, specifically that Furtado initially claimed his discussions with Adelaide Square Developments were with its sole registered director, Angelo Pucci, but later saying he dealt with Malanca as his primary contact.

[157] In the hearing and in its closing submissions, the Commission expanded its allegations to include arguably misleading or incomplete written answers given

[25] *Rosborough (Re),* 2022 ONCMT 11 at para 91

by Furtado to a summons for documents delivered between his second and third examinations, concerning correspondence with Malanca.

[158] Furtado objected to this expansion of the allegation, noting that nothing in the Statement of Allegations alleges misleading in respect of responses to summonses for documentary disclosure. This allegation was not referred to in the Commission's opening statement and was raised for the first time in the cross-examination of Furtado during the hearing.

[159] The Commission submitted this allegation was captured by the phrase "regarding his relationships and dealings with [Adelaide Square Developments] and [Malanca]". Yet the only particularized allegation on that matter in the Statement of Allegations is related to the question of whom Furtado said he had discussions with, Pucci or Malanca.

[160] We allowed the Commission to pursue questioning and introduce documents in relation to what later became this allegation. However, we have determined that in light of the limited assertions in the Statement of Allegations and the absence of any notice of this particular allegation, we will consider only those allegations of misleading statements made in Furtado's examinations.

[161] We deal first with the second allegation, that Furtado misled the Commission about who Furtado said was his primary contact for Adelaide Square Developments. On the second examination, he said it was Pucci. On the third examination, he said it was Malanca. Furtado attempted to explain this in his affidavit as his understanding that Pucci was the principal of Adelaide Square Developments, but that Malanca was an agent and acted with authority for Adelaide Square Developments. We do not find his explanation persuasive, but in our view this inconsistency is not "misleading in a material respect" in the circumstances, given the documentary record the Commission had in hand. The Commission has not established this second allegation, and we decline to find a breach of s.122(1)(a) by Furtado in this regard.

[162] We now consider the first allegation that Furtado misled the Commission about the payments and benefits he received from Adelaide Square Developments.

[163] In his first examination, Furtado was asked about both the approximately $388,000 and the $6 million payments from Adelaide Square Developments. In each case, he was presented with a funds transfer into the Furtado Holdings bank account and asked what it was for. In both cases, he answered that he did not recall offhand.

[164] In his second and third examinations, these payments were revisited and Furtado gave more expansive answers. In the second examination, he explained that the reason for receiving the $388,000 payment was in compensation for his having assumed the risk of an $800,000 non-refundable deposit on the 355 Adelaide property, pursuant to an oral agreement with Pucci. In his third examination, however, he revised this evidence to say there was a written agreement, signed by Pucci, which by that time had been provided to the Commission. He said the payment was treated as a dividend at his request.

[165] With respect to the $6 million dividend in October 2019, in his second examination he said the payment was provided as a "thank you" from Adelaide Square Developments in recognition of all his efforts on the Adelaide LP property purchase, in presenting solutions each time the transaction was in jeopardy. In his third examination, he said that the conversation about the dividend happened in the summer of 2019 during a lunch he had in Woodbridge with Malanca and Pucci.

[166] It is clearly the case that his testimony evolved through the three examinations. It further evolved when he testified in the hearing. In his affidavit for the hearing, Furtado testified that it was Malanca who suggested that Furtado receive shares of Adelaide Square Developments, so the $388,000 payment could be received as a dividend. He also testified at the hearing that it was Malanca who told him that he was going to receive the $6 million dividend, at a luncheon in Toronto in late September 2019, where Pucci was not present. This testimony differs from what he said in the examinations.

[167] Although there were differences in details, the basic assertions about why Furtado was receiving the dividend payments were the same in the second and third examinations: that the $388,000 was to compensate Furtado for having borne the risk of a non-refundable deposit, and that the $6 million dividend was

an unexpected "thank you" for Furtado based on his efforts to close the deal when it was in jeopardy.

[168] In the Statement of Allegations, the Commission asserts that this testimony in his examinations was false and misleading. It asserts this is because in fact, Furtado expected, intended and planned to receive a personal benefit as a result of the acquisition by the Adelaide LP of the Adelaide Properties. The Commission submits that he expected to receive the $388,000 and the $6 million, which ultimately took the form of dividends from Adelaide Square Developments on shares issued to Furtado shortly after the closing of the purchase of the Adelaide Properties.

[169] As noted, we must determine if the inconsistencies were "misleading or untrue" "in a material respect", and, if so, whether they were evasive or designed to obfuscate, or rather inadvertent errors that were the product of confusion or poor recollection.

[170] We note that on the key elements of this testimony we have rejected Furtado's evidence that the payments were unexpected, in our determination that he did expect, intend and plan to receive personal benefits as a result of the purchase of the Adelaide Properties.

[171] This is precisely the testimony alleged in the Statement of Allegations to have been false and misleading, for precisely the reason alleged. It is not an attempt, after the fact, to find a breach of s.122(1)(a) based on a simple rejection by the Tribunal of a respondent's testimony at the hearing.

[172] The reasons that Furtado received shares, and then substantial dividends, from Adelaide Square Developments, were material issues in this proceeding from the outset. We find that his testimony on this subject in his examinations was misleading or untrue, and was so in a material respect in relation to the issues joined in this proceeding. Were they, however, evasive or designed to obfuscate, or were they inadvertent errors that were the product of confusion or poor recollection?

[173] As an explanation for these inconsistencies, Furtado gave testimony, both in his affidavit and in his oral evidence, as to his health and mental state at the time of his examinations. In particular:

a. he had anxiety associated with testifying unmasked with his counsel beside him during the COVID-19 pandemic as he is immuno-compromised;

b. at that time he was seeing doctors for undiagnosed constant pain in his head; and

c. he has mental health challenges with memory, anxiety, sleep problems, and concentration issues which caused him to need to review documents multiple times to retain information.

[174] We note that this evidence was direct evidence in his affidavit and oral testimony, and we had the benefit of observing him in person throughout the hearing. In light of our ruling above concerning the admissibility of Furtado's affidavit, we note that we have disregarded expert testimony about his health that was proffered on adjournment motions.

[175] As we have found above, Furtado's examination testimony on these topics was misleading or untrue in a material respect. While there is no doubt Furtado suffered health challenges throughout the examinations and the merits hearing, those challenges cannot excuse the specific and repeated explanations he gave for the receipt of the payments, which we have found are not sustainable. We find they were evasive or designed to obfuscate.

[176] We accordingly find that the Commission has established its allegation that Furtado breached s.122(1)(a) by making statements to the Commission as to the reasons he received dividends from Adelaide Square Developments, that were misleading or untrue in a material respect.

5.6 Did Furtado authorize, permit or acquiesce in the Corporate Respondents' non-compliance with Ontario securities law?

[177] The Commission alleges that Furtado, as the directing mind of the Corporate Respondents, is liable for their non-compliance with the *Act*. Pursuant to s. 129.2 of the *Act*, 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*.

[178] Recent Tribunal decisions have concluded that where an individual has been found directly liable for a breach of the *Act*, it is not necessary to consider

whether the individual should also be deemed liable under s. 129.2. The *Hogg* case contains a recent summary of the reasons for this conclusion.[26]

[179] Furtado controls all the Corporate Respondents and is their sole directing mind. We have found him directly liable for breaches of the *Act.* As a result, we decline to deem him to be also liable under s. 129.2 for the same breaches by the Corporate Respondents.

5.7 Did the respondents engage in conduct contrary to the public interest?

[180] The Commission alleges that the respondents engaged in activity contrary to the public interest by engaging in the misconduct outlined above.

[181] The Commission did not provide any particulars in its written or oral submissions to support this allegation, and it was not advanced in the Statement of Allegations. The Tribunal has previously determined that where it has found a respondent's conduct to have breached Ontario securities law, it will not also conclude that the conduct was contrary to the public interest without there being additional facts and submissions to support that allegation.[27] We therefore decline to make a finding that the respondents engaged in conduct contrary to the public interest.

6. CONCLUSION

[182] For the reasons above, we find that the Commission has established that the respondents perpetrated fraud in the five ways we have described above. We also find that the Commission has established that Furtado breached s.122(1)(a) by giving misleading statements. However, we find that the remaining allegations have not been established and we dismiss them.

[183] We therefore require that the parties contact the Registrar by 4:30 p.m. on May 26, 2025, to arrange an attendance, 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 Governance & Tribunal Secretariat, and that is no later than June 16, 2025.

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[26] *Hogg (Re),* 2024 ONCMT 15 at paras 215-230

[27] *Valentine (Re),* 2024 ONCMT 11 at paras 119-121; *Kraft (Re),* 2023 ONCMT 36 at para 336; *Kitmitto (Re),* 2022 ONCMT 12 at paras 174-179

[184] 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 Tribunal, a one-page written submission regarding a date for the attendance. Any such submission shall be submitted by 4:30 p.m. on May 26, 2025.

Dated at Toronto this 6th day of May, 2025

"*M. Cecilia Williams*"

M. Cecilia Williams

"*Geoffrey D. Creighton*"

Geoffrey D. Creighton

"*Cathy Singer*"

Cathy Singer