Ontario Securities Commission
Commission des valeurs mobilières de l'Ontario
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IN THE MATTER OF THE *SECURITIES ACT*,
R.S.O. 1990, c. S.5, AS AMENDED

AND

IN THE MATTER OF
SUNWIDE FINANCE INC., SUN WIDE GROUP, SUN WIDE GROUP FINANCIAL INSURERS & UNDERWRITERS, BRYAN BOWLES, ROBERT DRURY, STEVEN JOHNSON, FRANK R. KAPLAN, RAFAEL PANGILINAN, LORENZO MARCOS D. ROMERO and GEORGE SUTTON

REASONS AND DECISION

Hearing:	November 19, 2008	
Decision:	May 28, 2009	
Panel:	James E. A. Turner	- Vice-Chair and Chair of the Panel
	Suresh Thakrar	- Commissioner
	Carol S. Perry	- Commissioner
Counsel:	Cullen Price	- For the Ontario Securities Commission
		No one appeared for any of the Respondents.

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REASONS AND DECISION

1. Overview

[1] This was a hearing before the Ontario Securities Commission (the "**Commission**") pursuant to sections 127 and 127.1 of the *Securities Act*, R.S.O. 1990, c. S.5, as amended (the "**Act**"), to consider whether Sunwide Finance Inc. (a.k.a. Sun Wide Finance Inc., Sunwide Financial Inc., Sun Wide Financial Inc.) ("**Sunwide**"), Sun Wide Group, Sun Wide Group Financial Insurers & Underwriters ("**Sun Wide Insurers**"), Bryan Bowles ("**Bowles**"), Robert Drury ("**Drury**"), Steven Johnson ("**Johnson**"), Frank R. Kaplan ("**Kaplan**"), Rafael Pangilinan ("**Pangilinan**"), Lorenzo Marcos D. Romero ("**Romero**") and George Sutton ("**Sutton**") (collectively referred to as the "**Respondents**") breached the Act and acted contrary to the public interest, and to consider appropriate sanctions and costs.

[2] A temporary cease trade order was issued in this matter on November 19, 2007 and a Notice of Hearing was issued on November 21, 2007. Four Commission orders (dated December 3, 2007, March 4, 2008, July 22, 2008 and September 4, 2008) were issued that extended the temporary cease trade order until the completion of the hearing on the merits. A hearing on the merits was held on November 19, 2008.

[3] A Statement of Allegations and a second Notice of Hearing were filed by Staff of the Commission ("**Staff**") on August 21, 2008. The Statement of Allegations named three respondents not previously named in the temporary cease trade order and the first Notice of Hearing, namely Drury, Romero and Pangilinan, and removed Wi-Fi Framework Corporation as a respondent.

[4] In oral submissions, Staff withdrew allegations with respect to sections 53 and 126.1 of the Act. The remaining allegations of breaches of the Act in this proceeding are as follows:

(a) it is alleged that the Respondents have breached Ontario securities law by:

(i) trading and advising in securities without registration or an appropriate exemption from the registration requirements contrary to section 25 of the Act. Specifically, these breaches include:

(1) causing investors to purchase a "refundable vendors bond" (the "**Vendors Bond**"), a security pursuant to sub-definition (e) of the definition of "security" in subsection 1(1) of the Act, and purporting to guarantee the re-purchase of shares, which was an act in furtherance of the sale of the Vendors Bond;

(2) the solicitation of investors to "exercise" warrants and to direct to Sunwide payments with the promise of re-purchase at a substantial premium; and

(3) advising investors in respect of the sale and purchase of securities without being registered to do so; and

(ii) making prohibited representations to re-purchase securities contrary to section 38 of the Act. The representations of the Respondents as to the re-purchase of securities constituted prohibited representations under section 38 of the Act because of the offer to re-purchase and the undertaking as to the future value of the shares and warrants; and

(b) the Respondents' conduct was contrary to the public interest and harmful to the integrity of the Ontario capital markets.

[5] On November 19, 2008, we heard evidence and submissions on the merits and on sanctions and costs in this matter. None of the Respondents were present or represented by legal counsel. Only Pangilinan, by way of an affidavit sent to Staff by e-mail on November 18, 2008, provided any evidence.

[6] The following are our reasons and decision in this matter.

2. The Respondents

[7] Sunwide purports to be an Ontario financial services company. Sunwide's only address known to Staff is a business service centre located at 20 Bay Street, Toronto, Ontario (the "**Virtual Office**"). Sunwide is not incorporated under the laws of Ontario or Canada.

[8] Sun Wide Group and Sun Wide Insurers purport to be companies that guarantee the obligations of Sunwide to purchase shares from investors pursuant to agreements of purchase and sale entered into by Sunwide with investors. Neither Sun Wide Group nor Sun Wide Insurers is incorporated under the laws of Ontario or Canada.

[9] Bowles, Drury, Johnson and Sutton appear to be sales representatives of Sunwide.

[10] Kaplan purports to be the president of Sun Wide Group.

[11] Pangilinan is the holder of a credit card that was used to pay the fees for the Virtual Office. Pangilinan appears to reside in the Philippines.

[12] Romero purports to be a representative of Sunwide and is Sunwide's contact that dealt with the service provider of the Virtual Office in its dealings with Sunwide. Romero appears to reside in the Philippines.

[13] None of the Respondents are registered in any capacity with the Commission.

[14] None of the individual Respondents appear to reside in Canada and, based on the evidence submitted to us, none of them appear to have ever been in Ontario in connection with the conduct that is the subject matter of this proceeding.

3. Preliminary Issues

A. The Failure of the Respondents to Appear at the Hearing

[15] As noted above, none of the Respondents were represented or appeared at the hearing. Subsection 7(1) of the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22, as amended (the "**SPPA**") provides that a tribunal may proceed in the absence of a party when that party has been given adequate notice:

> Where notice of an oral hearing has been given to a party to a proceeding in accordance with this Act and the party does not attend at the hearing; the tribunal may proceed in the absence of the party and the party is not entitled to any further notice in the proceeding.

[16] Staff also referred us to the following passage from *Administrative Law in Canada*:

> Where a party who has been given proper notice fails to respond or attend, the tribunal may proceed in the party's absence and the party is not entitled to further notice. All that the tribunal need establish, before proceeding in the absence of the party, is that the party was given notice of the date and place of the hearing. The tribunal need not investigate the reasons for the party's absence.
>
> (Sara Blake, *Administrative Law in Canada*, 4th ed. (Markham, Ont.: LexisNexis Butterworths, 2006) at p. 35)

[17] Staff submitted evidence in the form of an Affidavit of Service of Louisa Tong, dated November 14, 2008, to establish that Staff took reasonable steps to give the Respondents notice of this proceeding and to serve the Respondents with the order dated September 4, 2008 setting this proceeding down for a hearing on November 19, 2008.

[18] We are satisfied that Staff gave adequate notice of this proceeding to the Respondents and that we are entitled to proceed in their absence in accordance with subsection 7(1) of the SPPA.

B. The Use of Hearsay Evidence

[19] The Staff investigator found a number of documents at the Virtual Office which were tendered into evidence at the hearing. Much of the evidence relied on by Staff in this proceeding was hearsay evidence. Staff sought to introduce various forms of hearsay evidence, including the Staff investigator's testimony as to two telephone conversations he had with certain of the investors, and copies of e-mails, faxes and documents that he testified were forwarded to him by those investors. The reason Staff used and relied upon such hearsay evidence was the fact that all of the investors involved in this matter were residents of countries in Europe. None of those investors testified before us or provided affidavit evidence.

[20] Subsection 15(1) of the SPPA states:

> Subject to subsections (2) and (3), a tribunal may admit as evidence at a hearing, whether or not given or proven under oath or affirmation or admissible as evidence in a court,
>
> (a) any oral testimony; and
>
> (b) any document or other thing,
>
> relevant to the subject-matter of the proceeding and may act on such evidence, but the tribunal may exclude anything unduly repetitious.

[21] In *The Law of Evidence in Canada*, it is stated that:

> In proceedings before most administrative tribunals and labour arbitration boards, hearsay evidence is freely admissible and its weight is a matter for the tribunal or board to decide, unless its receipt would amount to a clear denial of natural justice. So long as such hearsay evidence is relevant it can serve as the basis for the decision, whether or not it is supported by other evidence which would be admissible in a court of law.
>
> (John Sopinka, Sidney N. Lederman & Alan W. Bryant, *The Law of Evidence in Canada*, 2d ed. (Markham, Ont.: LexisNexis Butterworths, 1999) at p. 308)

[22] Although hearsay evidence is admissible under the SPPA, the weight to be accorded to such evidence must be determined by the panel. Care must be taken to avoid placing undue reliance on uncorroborated evidence that lacks sufficient indicia of reliability (*Starson v. Swayze*, [2003] 1 S.C.R. 722 at para. 115). In the circumstances, we admitted the hearsay evidence tendered by Staff, subject to our consideration of the weight to be given to that evidence.

[23] There was documentary evidence introduced by Staff that corroborated or was consistent with the hearsay evidence given by the Staff investigator. This documentary evidence included a copy of notes taken by one investor, copies of e-mails and faxes from certain of the Respondents referring to conversations with investors and copies of legal documents referring to transactions purportedly discussed between certain of the Respondents and investors. All of this documentary evidence was itself hearsay evidence but, taken as a whole, the totality of the evidence is corroborative and consistent.

[24] One of the concerns with respect to the introduction of hearsay evidence is that it may infringe on the rights of a party to cross-examine a witness or to introduce contradictory evidence. This engages the rules of procedural fairness. In the case before us, none of the Respondents appeared before us, were represented or present to object to the use of the hearsay evidence, to cross-examine on it or to introduce contradictory evidence of their own. As a result, the Respondents have waived their rights to do so. As stated in *Violette v. New Brunswick Dental Society*, [2004] 267 N.B.R. (2d) 205 (C.A.) at para. 80:

> In conclusion, I am of the view that the appellant's informed decision not to participate in the hearing before the Discipline Committee constitutes abandonment, leading to waiver of possible breaches of the rules of procedural

> fairness. This conclusion is hardly surprising. He who seeks fairness must act fairly by raising timely objections. This necessarily requires the affected party's participation.

[25] Accordingly, we have concluded that admitting the hearsay evidence in this matter does not undermine the requirement for procedural fairness to the Respondents.

C. The Appropriate Standard of Proof

[26] Staff also made submissions as to the appropriate standard of proof applicable in Commission proceedings.

[27] In *F.H. v. McDougall*, [2008] 3 S.C.R. 41, a recent Supreme Court of Canada decision, it is stated at paragraph 49 that:

> …in civil cases there is only one standard of proof and that is proof on a balance of probabilities. In all civil cases, the trial judge must scrutinize the relevant evidence with care to determine whether it is more likely than not that an alleged event occurred.

At paragraph 46, it is further stated that:

> …evidence must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test. But again, there is no objective standard to measure sufficiency… If a responsible judge finds for the plaintiff, it must be accepted that the evidence was sufficiently clear, convincing and cogent to that judge that the plaintiff satisfied the balance of probabilities test.

[28] We must decide this matter on the balance of probabilities. In doing so, we must be satisfied that there is sufficient clear, convincing and cogent evidence to support our findings. While the evidence before us is primarily hearsay evidence, it is corroborated by documents submitted to us and we believe that the evidence is clear, convincing and cogent and provides a sufficient basis for our conclusions set out below. We are satisfied that the events described in these reasons are more likely than not to have occurred.

4. Issues

[29] Based on the Statement of Allegations and oral submissions by Staff, the issues in this matter are:

(a) Did the Respondents trade in securities in breach of subsection 25(1)(a) of the Act?

(b) Did the Respondents advise in connection with trading in securities in breach of subsection 25(1)(c) of the Act?

(c) Did the Respondents make prohibited representations in breach of subsection 38(1) of the Act?

(d) Did the Respondents act in a manner that was contrary to the public interest and harmful to the integrity of Ontario capital markets?

5. Evidence

[30] Staff submitted to us an Evidence Brief and a Supplemental Evidence Brief and called as witnesses a Staff investigator and an individual who was employed by the service provider that provided the Virtual Office and its services to Sunwide. Staff stated that they were aware of nine investors solicited with respect to the investment scheme described below, although Staff introduced evidence respecting only four of those investors. To protect the privacy of those investors, we will refer to those four investors as Investors 1, 2, 3 and 4.

A. The Investment Scheme

[31] This proceeding relates to the following investment scheme. Investors who owned shares of apparently defunct companies were contacted by telephone by individuals who said they were representatives of Sunwide and who indicated that a client of Sunwide was in the process of making a take-over bid for the shares of those companies. Most, if not all, of the companies were defunct and the shares, if they were trading at all, were trading at a nominal price. The representatives of Sunwide offered to purchase the investors' shares at a substantial premium to the market price. There was no evidence as to how the investors came to own the shares or how Sunwide learned of their ownership. Purportedly in order to protect the confidentiality of the take-over bid, investors were asked to sign a non-disclosure agreement.

[32] Investors were also told that in order to sell their shares, they were required to first obtain and pay for a "refundable vendors bond" (which we refer to in these reasons as the "Vendors Bond") to be issued by Sun Wide Group, the purported purpose of which appears to have been to guarantee the completion of the transaction by the investor. No copy of the Vendors Bond was submitted to us. There are indications in the evidence that the fee paid for the Vendors Bond was to be held by an unidentified escrow agent whose purported role was to hold the money separate from Sunwide. Representatives of Sunwide represented to the investors that upon the completion of the share purchase transaction, the escrow agent would return the fee for the Vendors Bond to them.

[33] After the investors paid the fee for the Vendors Bond, but before Sunwide completed the purchase of their shares, investors were informed by representatives of Sunwide that the investors also owned warrants issued by the relevant companies, which were exercisable for additional shares (the "**warrant shares**"). The Sunwide representatives indicated that if investors exercised the warrants and paid the exercise price to Sunwide, then Sunwide would purchase all of the warrant shares that were issued at the same substantial premium to the market price as was to be paid for their other shareholdings. The investors were not aware that they owned any such warrants and it appears that no such warrants actually existed.

[34] If investors agreed to either or both of these transactions, a representative of Sunwide would telephone them yet again, stating that Sunwide had encountered problems with the United States tax authorities. In order for an investor's profit on the sale of the shares to be paid to them, they would have to pay up front all U.S. capital gains tax (that also suggests that the relevant

transactions were taking place in the United States and not in Canada). Investors were asked to forward to Sunwide the purported amount of capital gains that would be owing as calculated by Sunwide.

[35] It appears that these misrepresentations were made by Sunwide and its representatives for the sole purpose of obtaining and appropriating monies from the investors through the fee for the Vendors Bond, the exercise price of the alleged warrants and the amount purported to be payable by investors as U.S. capital gains on the transactions.

[36] The investors who agreed to participate in these transactions sent funds as follows:

(a) Investor 1, who resides in Austria, wired US $6,075 to HSBC Bank in New York and that amount was then forwarded by wire to Credit Corp Bank in Panama for the account of Century Management Division Inc. ("Century Management");

(b) Investor 2, who resides in the U.K., wired US $11,369 to HSBC in Hong Kong for the account of Sunwide Finance Inc. Investor 2 also wired a payment of US $16,443 to Credit Corp Bank in Panama for the account of Century Management;

(c) Investor 3, who also resides in the U.K., wired US $2,205 to HSBC Bank in New York and that amount was then forwarded by wire to Credit Corp Bank in Panama for the account of Century Management; and

(d) Investor 4, who also resides in the U.K., wired US $2,676.32 to HSBC Bank in New York and that amount was then forwarded by wire to Credit Corp Bank in Panama for the account of Century Management.

There is no evidence that funds were wired by any investor to any bank or bank account in Canada.

[37] Based on the evidence submitted to us, no shares were ever purchased by Sunwide from the investors and none of the amounts paid by investors were ever returned to them.

B. The Virtual Office

[38] The investors understood that Sunwide, Sun Wide Group and Sun Wide Insurers were carrying on business in Toronto and they thought they were dealing with individuals and companies located in Canada. The Virtual Office appears to have been established for the sole purpose of misleading investors into believing that this was the case.

[39] As noted above, Sunwide, Sun Wide Group and Sun Wide Insurers are not incorporated in Ontario or Canada. Staff's best information is that the individuals representing Sunwide are residents of the Philippines. In any event, they are not residents of Canada. Romero arranged for the establishment of the Virtual Office but there is no evidence that in doing so he came to Canada.

[40] The Virtual Office provided Sunwide a telephone answering service, a mailing address and, if requested, conference facilities for meetings. A person calling a representative of Sunwide

would call the telephone number of the Virtual Office, which would be answered using Sunwide's name, and a message could be left for any of the Sunwide representatives identified on a list provided by Romero to the Virtual Office service provider. The message would then be passed on to the relevant Sunwide representative. Similarly, investors would send documents and correspondence to Sunwide at the Toronto address of the Virtual Office. Those documents would then be forwarded to Sunwide. The various documents prepared by Sunwide and sent to investors identified Sunwide using the Virtual Office address or referred to Sunwide in Toronto. It was not apparent to investors that they were dealing with a Virtual Office. Investors believed they were dealing with individuals or companies located in Toronto and carrying on business at the address of the Virtual Office. This gave some comfort to investors and some credibility to the representatives of Sunwide.

[41] The Virtual Office was set up by Romero who paid the service fees for the Virtual Office using a credit card issued to Pangilinan. There was no other evidence before us as to Pangilinan's direct involvement in the investment scheme. Pangilinan filed an affidavit saying that he had no knowledge whatsoever of the investment scheme and that he did not know any of the other Respondents or have any business connections whatsoever with them. He did not explain the use of his credit card except to say that in the past he had allowed another individual to use his credit card when he was short of cash occasionally. The credit card appears to have been used for a period of 11 months in paying the monthly fee for the Virtual Office.

[42] Accordingly, we are dealing with circumstances in which the only Ontario connection to the purported securities transactions was the Virtual Office. All of the individuals involved, whether investors or representatives of Sunwide or the other corporate Respondents, all appear to be located outside Canada, all of the purported securities transactions were to occur outside Canada, no payments by investors were made to anyone in Ontario or to any bank in Ontario and none of the representatives of Sunwide or the other corporate Respondents appear to have ever been in Ontario. Any representations made to investors were made by representatives of Sunwide who were located outside Canada to investors who were also outside Canada.

6. Analysis

A. Was there a Breach of Subsection 25(1)(a) of the Act?

i. The Applicable Law

[43] Subsection 25(1)(a) of the Act states that:

> No person or company shall,
>
> (a) trade in a security or act as an underwriter unless the person or company is registered as a dealer, or is registered as a salesperson or as a partner or as an officer of a registered dealer and is acting on behalf of the dealer…
>
> and the registration has been made in accordance with Ontario securities law and the person or company has received written notice of the registration from the Director and, where the registration is subject to terms and conditions, the person or company complies with such terms and conditions.

[44] Subsection 1(1) of the Act defines a "trade" as including:

> (a) any sale or disposition of a security for valuable consideration, whether the terms of payment be on margin, instalment or otherwise, but does not include a purchase of a security or, except as provided in clause (d), a transfer, pledge or encumbrance of securities for the purpose of giving collateral for a debt made in good faith,
>
> …
>
> (e) any act, advertisement, solicitation, conduct or negotiation directly or indirectly in furtherance of any of the foregoing.

[45] The Commission has held that an act in furtherance of a trade is itself a trade for purposes of the Act (*Re Lett* (2004), 27 O.S.C.B. 3215 at para. 64). Accordingly, if an act in furtherance of a trade in a security occurs in Ontario, even though the actual trade occurs outside of Ontario, that act constitutes trading in securities in Ontario for purposes of the Act. It is not necessary for there to be a completed trade in order for someone to be trading in a security (*Re First Federal Capital (Canada) Corp.* (2004), 27 O.S.C.B. 1603 (*"Re First Federal"*) at paras. 46, 51). For a particular act to be an act in furtherance of a trade, there must be sufficient proximity between the act and an actual or potential trade (*Re Costello* (2003), 26 O.S.C.B. 1617 at para. 47 and *Re First Federal*, *supra* at para. 51).

ii. Analysis

[46] In this case, Sunwide was purporting to solicit and enter into transactions that if they had occurred in Ontario would have constituted trading in securities. In analysing the investment scheme from a securities law perspective we recognize the likelihood that the scheme was a complete sham and fabrication and that Sunwide never intended to complete a purchase of a security as represented to investors.

[47] The acts with respect to the investment scheme that occurred in Ontario were the establishment of the Virtual Office and the use of that office to pass on to the Respondents telephone messages received by the Virtual Office and documents mailed, couriered or faxed to Sunwide at the address of the Virtual Office. In our view, the establishment and use of the Virtual Office in this manner was an integral part of the investment scheme intended to mislead investors into believing they were dealing with persons or companies in Ontario. In our view, the establishment and use of the Virtual Office in this manner had sufficient proximity to purported trades in securities with investors so as to constitute acts in furtherance of trades in securities that occurred in Ontario. Accordingly, any Respondent that used the Virtual Office for that purpose committed an act in furtherance of a trade in Ontario and was therefore trading in a security in Ontario within the meaning of the Act.

[48] We note that a purchase of a security is expressly excluded from the definition of "trade" in the Act. The transactions solicited by Sunwide ultimately purported to involve a purchase by Sunwide or its client of outstanding shares, including the warrant shares that were to be issued pursuant to the exercise of the warrants. In our view, the actions of Sunwide and its representatives involved a solicitation of the sale of the relevant shares and the making of various

misrepresentations to induce those sales. Those actions constitute acts in furtherance of a trade and not the mere purchase of a security.

[49] Staff characterized the issue of the Vendors Bond and the payment of the fee for that bond as a transaction involving the issue of and payment for a security. The exact terms of the Vendors Bond and the nature of that instrument were not, however, clear based on the evidence before us. The only certainty is that investors paid a fee for the Vendors Bond. In reality, the Vendors Bond was simply an artifice to mislead investors into paying that fee.

iii. Conclusions

Sun Wide

[50] Based on the evidence before us, Sunwide initiated and carried out the investment scheme. Sunwide established and arranged payment for the Virtual Office and used that office and its address in communications with Investors 1, 2, 3 and 4. All of the agreements of purchase and sale were entered into by Sunwide with investors using the address of the Virtual Office and the individual Respondents, other than Pangilinan, held themselves out as representatives of Sunwide.

[51] Accordingly, we have concluded that Sunwide engaged in acts in furtherance of trades in securities in Ontario within the meaning of the Act. Sunwide was not registered in any capacity with the Commission and no registration exemption was available. Sunwide therefore violated subsection 25(1)(a) of the Act.

Sun Wide Group and Sun Wide Insurers

[52] Based on the evidence before us, Sun Wide Group entered into a Share Purchase Guarantee with Investors 1 and 3 and Sun Wide Insurers appears to have guaranteed the purchase of shares by Sunwide pursuant to the Share Purchase Guarantees sent to Investors 1, 3 and 4. Each of Sun Wide Group and Sun Wide Insurers used or referred to the Virtual Office in communications with investors. These actions were carried out in furtherance of the investment scheme. Accordingly, we have concluded that Sun Wide Group and Sun Wide Insurers engaged in acts in furtherance of trades in securities in Ontario within the meaning of the Act. Neither company is registered in any capacity with the Commission and no registration exemption was available. Accordingly, they have each violated subsection 25(1)(a) of the Act.

Bowles

[53] Based on the evidence before us, we have concluded that Bowles participated in the carrying out of the investment scheme and engaged in acts in furtherance of trades in securities in Ontario within the meaning of the Act. There is evidence before us that Bowles acted as follows:

(a) Bowles discussed with Investor 1, on the telephone, the purchase of warrant shares by Sunwide from Investor 1.

(b) Bowles discussed with Investor 2, on the telephone, the purchase of warrant shares by Sunwide from Investor 2. Bowles then sent Investor 2 a letter relating to

the capital gains that Investor 2 would have to pay on the purchase. Investor 2 later sent Bowles, as a representative of Sunwide, a letter regarding her capital gains tax invoice.

(c) Bowles sent Investor 4 a fax relating to the purchase of warrant shares by Sunwide from Investor 4. In an e-mail sent to Investor 4 from Sunwide, Investor 4 was instructed to "Return For the attention of Mr. Bowles" the warrant acceptance form signed by Investor 4.

[54] In communicating with investors, Bowles made use of the Virtual Office.

[55] Accordingly, we have concluded that Bowles engaged in acts in furtherance of trades in securities in Ontario within the meaning of the Act. Bowles was not registered in any capacity with the Commission and no registration exemption was available. He has therefore violated subsection 25(1)(a) of the Act.

Drury

[56] Based on the evidence before us, we have concluded that Drury participated in carrying out the investment scheme and engaged in acts in furtherance of a trade in securities in Ontario within the meaning of the Act. There is evidence before us that Drury discussed the purchase of shares with Investor 3 by telephone. Drury also made use of the Virtual Office in communicating with Investor 3.

[57] Accordingly, we have concluded that Drury engaged in acts in furtherance of a trade in securities in Ontario within the meaning of the Act. Drury was not registered in any capacity with the Commission and no registration exemption was available. He has therefore violated subsection 25(1)(a) of the Act.

Sutton

[58] Based on the evidence before us, we have concluded that Sutton participated in carrying out the investment scheme and engaged in acts in furtherance of trades in securities in Ontario within the meaning of the Act. There is evidence before us that Sutton acted as follows:

(a) Sutton discussed both the purchase of shares and the purchase of warrant shares with Investor 1 by telephone and e-mail.

(b) Sutton sent Investor 4 a fax relating to the purchase of warrant shares on behalf of Sunwide. In an e-mail sent to Investor 4 from Sunwide, Investor 4 is reminded of his "telephone conversation with Mr. George Sutton".

[59] In communicating with investors, Sutton made use of the Virtual Office.

[60] Accordingly, we have concluded that Sutton engaged in acts in furtherance of trades in securities in Ontario within the meaning of the Act. Sutton was not registered in any capacity with the Commission and no registration exemption was available. He has therefore violated subsection 25(1)(a) of the Act.

Romero

[61] Based on the evidence before us, Romero facilitated the carrying out of the investment scheme. He established the Virtual Office, signed the license agreement as the "Principal" of Sunwide, gave instructions to the Virtual Office service provider as to the names of individuals for whom messages should be accepted, acted as the contact person for the Virtual Office and was invoiced for the services. Accordingly, we have concluded that, in doing so, Romero engaged in acts in furtherance of trades in securities in Ontario within the meaning of the Act. Romero was not registered in any capacity with the Commission and no registration exemption was available. He has therefore violated subsection 25(1)(a) of the Act.

Pangilinan

[62] Pangilinan's credit card was used to pay the fees for the Virtual Office. He states in an affidavit that he did not know any of the other Respondents, that he had no business connections with them and that he was not involved in and had no knowledge of the investment scheme. We reject that evidence on the basis that, for a period of 11 months, the monthly fee for the Virtual Office was paid by him through the use of his credit card. Accordingly, we have concluded that, by paying the fees for the Virtual Office, Pangilinan engaged in acts in furtherance of trades in securities in Ontario within the meaning of the Act. Pangilinan was not registered in any capacity with the Commission and no registration exemption was available. He has therefore violated subsection 25(1)(a) of the Act.

Johnson and Kaplan

[63] There was some evidence before us that Johnson and Kaplan were involved in carrying out the investment scheme. However, the documents before us upon which the names of Johnson and Kaplan appear (which consist primarily of copies of faxes and e-mails) are not confirmed by any evidence or testimony of the parties to those documents or by conversations by the Staff investigator with investors. We have concluded that there is insufficient evidence to make a finding against them. Accordingly, we dismiss the allegations against them.

B. Was there a Breach of Subsection 25(1)(c) of the Act?

i. The Applicable Law

[64] Subsection 25(1)(c) of the Act states that:

> No person or company shall,
>
> (c) act as an adviser unless the person or company is registered as an adviser, or is registered as a representative or as a partner or as an officer of a registered adviser and is acting on behalf of the adviser,
>
> and the registration has been made in accordance with Ontario securities law and the person or company has received written notice of the registration from the Director and, where the registration is subject to terms and conditions, the person or company complies with such terms and conditions.

ii. Analysis

[65] Staff alleged that the investment scheme involved Sunwide advising investors as to the purchase or sale of a security in breach of section 25 of the Act. An "adviser" is defined in subsection 1(1) of the Act as "a person or company engaging in or holding himself, herself or itself out as engaging in the business of advising others as to the investing in or the buying or selling of securities."

[66] If any investment advice within the meaning of subsection 25(1)(c) of the Act was given, it is reasonably clear that such advice was given by persons located outside Canada to investors also located outside Canada. Similarly, if any holding out occurred, that holding out was by a person located outside Canada to a person also located outside Canada. Accordingly, it appears that no advice was given, or holding out occurred, directly or indirectly, by or to a person in Ontario. There is no concept in the Act of a person engaging in acts in furtherance of advising under subsection 25(1)(c) of the Act. As a result, in our view, the provisions of the Act relating to advising do not apply to the activities that occurred in this case.

[67] This conclusion is consistent with the legal authorities. For instance, in *Regina v. W. McKenzie Securities Limited, West and Dubros,* [1966] 56 D.L.R. (2d) 56 (Man. C.A.) at para. 19, the Court stated:

> It seems clear that the true nature of the provincial statutes above considered, no less than *The Securities Act* of our own province, is to provide protection to the public through a system of regulating and supervising the conduct of persons who engage in trading activities in securities within the province. The *Securities Act* of Manitoba is not designed to reach out beyond provincial borders and to restrain conduct carried on in other parts of Canada or elsewhere. Its operation is effective within Manitoba, and nowhere else. For a person to become subject to its restraint he must trade in securities in Manitoba. This is not to say that a non-resident of Manitoba can never become subject to the controls of the statute. If the activities of such a non-resident can fairly and properly be construed as constituting trading within the province, then they fall within the purview of the Act.

(See also *Gregory & Co. v. Quebec (Securities Commission),* [1961] S.C.R. 584.)

iii. Conclusion

[68] For the reason discussed above, we are not satisfied that any of the Respondents breached subsection 25(1)(c) of the Act.

C. Was there a Breach of Subsection 38(1) of the Act?

i. The Applicable Law

[69] Subsection 38(1) of the Act states that:

> No person or company, with the intention of effecting a trade in a security, other than a security that carries an obligation of the issuer to redeem or purchase, or a

right of the owner to require redemption or purchase, shall make any representation, written or oral, that he, she or it or any person or company,

(a) will resell or repurchase; or

(b) will refund all or any of the purchase price of,

such security.

ii. Analysis

[70] Staff alleged that certain of the Respondents made representations that the purchase price of the Vendors Bond would be returned to investors. Those representations were alleged to breach subsection 38(1) of the Act.

[71] Whatever representations were made, it is reasonably clear that such representations were made by persons located outside Canada to investors who were also located outside Canada. Accordingly, it appears that no representations were made, directly or indirectly, by or to a person in Ontario. There is no concept in the Act of a person engaging in acts in furtherance of an illegal representation under subsection 38(1) of the Act. As a result, in our view, section 38 does not apply to any representations that may have been made in this case.

iii. Conclusion

[72] For the reason discussed above, we are not satisfied that any of the Respondents breached subsection 38(1) of the Act.

D. Was there Conduct Contrary to the Public Interest and Harmful to the Integrity of the Ontario Capital Markets?

i. The Applicable Law

[73] Under section 1.1 of the Act, the Commission's mandate is to:

(a) provide protection to investors from unfair, improper or fraudulent practices; and

(b) foster fair and efficient capital markets and confidence in those capital markets.

[74] Subsection 127(1) of the Act permits the Commission to make a wide range of orders if it finds that doing so is in the public interest. That broad public interest jurisdiction permits the Commission to take action to prevent harm to Ontario investors and Ontario capital markets.

ii. Analysis

[75] It appears that the sole reason for establishing the Virtual Office was to mislead investors located outside Canada. Those investors believed that they were dealing with reputable persons and companies resident and carrying on business in Ontario. In fact, this was not the case. We have a public interest in ensuring that Ontario capital markets are not used in this way to perpetrate sham transactions and to misappropriate investor funds, wherever those investors may

be located. That behaviour undermines the integrity of Ontario capital markets and their reputation in the rest of the world for fairness and integrity.

iii. Conclusion

[76] Accordingly, in our view, Sunwide, Sun Wide Group, Sun Wide Insurers, Bowles, Drury, Sutton, Romero and Pangilinan in using or facilitating the use of the Virtual Office in connection with the investment scheme have acted contrary to the public interest within the meaning of the Act.

7. Sanctions

A. Sanctions Requested by Staff

[77] Staff requested that we issue an order imposing the following sanctions on the Respondents:

(a) a permanent cease trade order;

(b) a permanent prohibition on the acquisition of securities by the Respondents;

(c) an order providing that exemptions contained in Ontario securities law do not apply to the Respondents permanently;

(d) the Respondents be permanently prohibited from becoming or acting as directors or officers of any issuer, registrant, investment fund manager or promoter in the province of Ontario; and

(e) the Respondents pay an administrative penalty in the amount of $50,000.00.

B. Staff's Submissions on Appropriate Sanctions

[78] Staff submitted that the conduct of the Respondents in carrying out the investment scheme and misleading investors into believing they were dealing with persons in Ontario is egregious behaviour that should not be tolerated. Staff submitted that the behaviour of the Respondents is such that strong action should be taken to prevent further harm to Ontario capital markets by the Respondents.

C. The Law on Sanctions and Relevant Considerations in Imposing Sanctions

[79] The Commission must impose sanctions that protect the integrity of Ontario capital markets, that protect investors in Ontario and that deter similar conduct by these Respondents and others from occurring in the future.

[80] The sanctions imposed by us must be proportional to the circumstances before us. In determining the appropriate sanctions, we have considered a number of the factors identified in the case law that bear on the sanctions that may be imposed (see: *Re M.C.J.C. Holdings and*

Michael Cowpland (2002), 25 O.S.C.B. 1133 and *Re Belteco Holdings Inc et al.*. (1998), 21 O.S.C.B. 7743). In this case, we considered:

(a) the seriousness of the conduct; the carrying out of an investment scheme the object of which appears to have been misappropriating money from innocent investors located outside Canada;

(b) the harm to such investors;

(c) the misrepresentations made to investors;

(d) the Respondents' activities in Ontario and the effect of those activities on the integrity and reputation for integrity of Ontario capital markets;

(e) whether or not the sanctions imposed may deter others from engaging in similar conduct; and

(f) the effect that the sanctions imposed may have on the ability of a Respondent to participate in the future, without check, in Ontario capital markets.

D. Appropriate Sanctions in this Case

[81] Our primary objectives in this case are to (i) prevent the future use of Ontario capital markets to perpetrate sham investment schemes occurring primarily outside Canada that harm investors, wherever they may be located, and (ii) prevent future harm to Ontario investors from the activities in Ontario of the Respondents who we have concluded breached the Act and acted contrary to the public interest. If the Respondents and/or the investors in this matter had been located in Ontario, we would have imposed substantial financial sanctions. That is not, however, the case. All of the investors and the Respondents are located outside Canada, all of the misrepresentations made to investors were made outside Canada and the purported securities transactions were all to occur outside Canada. The only connection to Ontario was the location and use of the Virtual Office to assist in perpetrating the investment scheme.

[82] In the circumstances, we consider the appropriate sanctions to be to permanently bar, from future participation in Ontario capital markets, the Respondents who we have concluded breached the Act and acted contrary to the public interest. In our view, such sanctions will deter the Respondents and other like minded individuals from engaging in similar conduct in Ontario and will protect Ontario investors from the future conduct of these Respondents. As stated by the Commission in *Re Momentas* (2007), 30 O.S.C.B. 6475 at para. 52:

> In order to promote both general and specific deterrence we found it necessary to impose severe sanctions including permanent cease trade orders, permanent exclusions from exemptions, and a permanent prohibition from acting as an officer or director of a reporting issuer.

[83] The Supreme Court has recognized the importance of protecting the public and removing from the capital markets those that breach securities law and engage in conduct contrary to the

public interest. In *Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, [2001] 2 S.C.R. 132 at para. 43, the Supreme Court stated:

> […] the purpose of an order under s. 127 is to restrain future conduct that is likely to be prejudicial to the public interest in fair and efficient capital markets. The role of the OSC under s. 127 is to protect the public interest by *removing from the capital markets those whose past conduct is so abusive as to warrant apprehension of future conduct detrimental to the integrity of the capital markets* […]. [Emphasis added]

In this case, we consider it appropriate to permanently bar from future participation in Ontario capital markets those Respondents who we have concluded breached the Act and acted contrary to the public interest. In our view, such sanctions are appropriate and proportional to the conduct that occurred here.

[84] Accordingly, we order that:

(i) pursuant to paragraph 2 of subsection 127(1) of the Act, each of Sunwide, Sun Wide Group, Sun Wide Insurers, Bowles, Drury, Sutton, Romero and Pangilinan permanently cease trading in securities;

(ii) pursuant to paragraph 2.1 of subsection 127(1) of the Act, each of the Respondents referred to in clause (i) above be permanently prohibited from acquiring any security;

(iii) pursuant to paragraph 3 of subsection 127(1) of the Act, the exemptions contained in Ontario securities law not apply permanently to the Respondents referred to in clause (i) above; and

(iv) pursuant to paragraphs 8, 8.2, 8.4 and 8.5 of subsection 127(1) of the Act, each of Bowles, Drury, Sutton, Romero and Pangilinan be permanently prohibited from becoming or acting as a director or officer of any issuer, registrant, investment fund manager or promoter in the province of Ontario.

8. Costs

[85] Staff requested that the Respondents pay the amount of $5,000 towards the costs of or related to the investigation of this matter and the hearing incurred by or on behalf of the Commission. It is clear based on the evidence submitted to us that the Commission incurred costs well in excess of that amount. Accordingly, we order that the Respondents against whom we have made the orders in paragraph 84 of these reasons, jointly and severally pay costs of $5,000 to the Commission.

[86] In the circumstances, we would encourage Staff to bring this decision and the circumstances before us to the attention of securities regulators in those jurisdictions in which the Respondents against whom we have made orders may be resident or carrying on business.

[87] We will issue a separate order giving effect to our decision on sanctions and costs.

Dated at Toronto this 28th day of May, 2009.

"*James E. A. Turner*"
James E. A. Turner

"*Suresh Thakrar*"
Suresh Thakrar

"*Carol S. Perry*"
Carol S. Perry