Ontario Securities Commission | Commission des valeurs mobilières de l'Ontario | P.O. Box 55, 19th Floor 20 Queen Street West Toronto ON M5H 3S8 | CP 55, 19e étage 20, rue queen ouest Toronto ON M5H 3S8

IN THE MATTER OF THE *SECURITIES ACT*,
R.S.O. 1990, c. S.5, AS AMENDED

– AND –

IN THE MATTER OF
RICHVALE RESOURCE CORPORATION, MARVIN WINICK,
HOWARD BLUMENFELD, JOHN COLONNA, PASQUALE SCHIAVONE,
and SHAFI KHAN

REASONS AND DECISION
(Section 127 of the Act)

Hearing:	October 26, 2011 January 12, 2012	
Decision:	April 25, 2012	
Panel:	Edward P. Kerwin	- Commissioner and Chair of the Panel
Appearances:	Jonathan Feasby Christie Johnson	- For the Ontario Securities Commission
		- No one appeared on behalf of Richvale Resource Corporation or Pasquale Schiavone

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REASONS AND DECISION

I. BACKGROUND

A. History of the Proceeding

[1] This was a hearing before the Ontario Securities Commission (the "**Commission**"), pursuant to section 127 of the *Securities Act*, R.S.O. 1990, c. S.5, as amended (the "**Act**"), to consider whether Richvale Resource Corporation ("**Richvale**") and Pasquale Schiavone ("**Schiavone**") (collectively, the "**Respondents**") breached the Act and acted contrary to the public interest.

[2] On March 19, 2010, the Commission issued a temporary cease trade order against Richvale, Marvin Winick ("**Winick**"), Howard Blumenfeld ("**Blumenfeld**"), Schiavone and Shafi Khan ("**Khan**") (the "**Temporary Order**"). The Commission extended the Temporary Order from time to time and eventually extended it, by order dated December 2, 2010, to the conclusion of the hearing on the merits.

[3] The merits proceeding in this matter was commenced against Richvale, Winick, Blumenfeld, John Colonna ("**Colonna**"), Schiavone and Khan by a Statement of Allegations and Notice of Hearing dated November 10, 2010. On September 13, 2011, Staff of the Commission ("**Staff**") filed an Amended Statement of Allegations.

[4] On October 14, 2011, prior to the hearing on the merits, Winick, Blumenfeld, Khan and Colonna settled with the Commission.[1]

[5] The proceeding arose from allegations by Staff that between August 8, 2008 and December 31, 2009 (the "**Material Time**"), the Respondents engaged in unregistered trading and trades in securities of Richvale not previously issued and for which no prospectus has been filed in violation of subsection 25(1), formerly subsection 25(1)(a), and subsection 53(1) of the Act and contrary to the public interest.

[6] In addition, Staff alleges that the Respondents engaged in conduct related to securities of Richvale that they knew or reasonably ought to have known perpetrated a fraud contrary to subsection 126.1(b) of the Act and that Richvale made prohibited representations contrary to subsection 38(3) of the Act and contrary to the public interest. Staff also alleges that Schiavone, as officer and director of Richvale, authorized, permitted or acquiesced in violations of the Act in breach of section 129.2 of the Act and contrary to the public interest.

[7] The hearing on the merits commenced on October 26, 2011. On that day, Staff requested that the matter continue as a written hearing under Rule 11 of the *Ontario Securities Commission Rules of Procedure* (2010), 33 O.S.C.B. 8017 (the "**OSC Rules**"). The Respondents did not appear. However, Schiavone's counsel provided consent by

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[1] See *Re Richvale Resource Corporation et al.* (2011), 34 O.S.C.B. 10805; *Re Richvale Resource Corporation et al.* (2011), 34 O.S.C.B. 10813; *Re Richvale Resource Corporation et al.* (2011), 34 O.S.C.B. 10821; and *Re Richvale Resource Corporation et al.* (2011), 34 O.S.C.B. 10829 respectively.

email to the continuation of the matter as a written hearing, subject to Schiavone's right to attend and be heard by the Commission in the future.

[8] This Panel ordered on October 26, 2011 that pursuant to Rule 11.5 of the OSC Rules, the oral hearing continue as a written hearing until it returned before the Commission on January 12, 2012, then to continue as an oral hearing to allow any necessary *viva voce* evidence and to provide an opportunity for the panel and the parties to ask questions. This Panel further ordered that on or before November 25, 2011, the Respondents serve upon Staff and file with the Commission any affidavits or other documents they wish the Panel to consider as evidence, and the witness list and witness summaries, as defined in Rule 4.5 of the OSC Rules, for each witness they intend to call when the oral hearing in this matter continued (the "**Merits Hearing**").

[9] I heard submissions in this matter on October 26, 2011 and oral evidence from the Staff investigator, Wayne Vanderlaan, on January 12, 2012. I also received Staff's written submissions dated October 25, 2011 accompanied by the Affidavit of Wayne Vanderlaan, sworn October 26, 2011. None of the Respondents appeared in person or by counsel, or provided written submissions on the merits.

[10] For the reasons set out below, I conclude that the Respondents breached subsections 25(1), formerly 25(1)(a), 53(1) and 126.1(b) of the Act, which is contrary to the public interest. I also conclude that Richvale breached subsection 38(3) of the Act and that Schiavone is liable for breaches pursuant to section 129.2 of the Act, which is contrary to the public interest.

B. The Respondents

1. Richvale Resource Corporation

[11] Richvale was incorporated on July 22, 2002 as Tess Security Services (2002) Inc. pursuant to the laws of Ontario. On August 8, 2008, the corporate name was changed to Richvale Resource Corporation, with its head office in Thornhill, Ontario. Winick was Richvale's director as of the date of incorporation. Blumenfeld became director, secretary and treasurer of Richvale on June 23, 2008.

[12] On its website, Richvale purported to be a Canadian exploration and development company with a diversified portfolio of metals and mining business.

[13] There is no record of Richvale having been registered under the Act. **2. Pasquale Schiavone**

[14] Schiavone is a resident of the province of Quebec. Schiavone acknowledged that he and Blumenfeld created Richvale in August, 2008. At the Material Time he was listed in Richvale's Business Summary (as defined below) as Richvale's president and director. Schiavone also admitted to being president of Richvale and stated that he was engaged to fill the position and signed an agreement to that effect.

[15] Schiavone was not registered under the Act during the Material Time.

C. The Allegations

[16] Staff alleges that Richvale and Schiavone distributed Richvale securities to investors from August, 2008 to December, 2009, and that residents of several Canadian provinces received unsolicited phone calls from salespersons, including Khan, to purchase securities of Richvale. It is alleged that these unsolicited calls resulted in approximately $753,000 in Investor Funds (as defined below) being received from approximately 27 individuals and companies that purchased shares of Richvale (the "**Investors**").

[17] It is alleged that the Respondents traded in securities of Richvale from the Toronto area without having been registered with the Commission in accordance with subsection 25(1), formerly 25(1)(a), of the Act and without Richvale having filed a prospectus or a preliminary prospectus with the Commission, contrary to subsection 53(1) of the Act.

[18] It is also alleged that salespersons, agents and representatives of Richvale made representations to the Investors that were false, inaccurate or misleading including that the company would be going public and that the securities of Richvale would be listed on a stock exchange, with the intention of effecting trades in Richvale securities, contrary to subsection 38(3) of the Act.

[19] Staff alleges that the Respondents engaged in conduct which they knew or reasonably ought to have known perpetrated a fraud, in breach of subsection 126.1(b) of the Act including, but not limited to, salespersons using aliases, posting on the Richvale website false or misleading statements about the compensation and business experience of directors and officers of Richvale, and falsely stating that the net proceeds of the sale of Richvale securities would be used primarily for costs associated with the exploration of properties owned by Richvale, while the majority of Investor Funds were paid to enrich Richvale directors, officers and employees or removed in the form of cash and only six percent of Investor Funds were used to renew land claims of Richvale on certain properties in Quebec.

[20] Staff further alleges that Schiavone was a directing mind of Richvale along with Winick and Blumenfeld. As a result, Staff alleges Schiavone authorized, permitted or acquiesced in the commission of violations of securities laws by Richvale and is liable under section 129.2 of the Act.

[21] By virtue of the conduct referred to in paragraphs 16 to 20, it is also alleged that Respondents engaged in conduct contrary to the public interest.

II. PRELIMINARY ISSUES

A. The Commission's Jurisdiction in this Matter

[22] The Commission's mandate under the Act is to (i) provide protection to investors from unfair, improper or fraudulent practices, and (ii) foster fair and efficient capital markets and confidence in capital markets (Act, *supra*, s. 1.1).

[23] The Richvale securities were purchased by investors resident in several Canadian provinces and Schiavone is a resident of the province of Quebec. Nevertheless, investors

were sold securities in Richvale, an Ontario corporation with its registered head office in Thornhill, Ontario. Investors were solicited by telephone calls originating in Toronto, Ontario. Investor Funds were sent to Richvale bank accounts located in Ontario and held by Ontario residents. Therefore, there is a sufficient nexus to Ontario for the Commission to have jurisdiction over the Respondents.

B. Failure of the Respondents to Appear

1. Service by Staff

[24] Neither of the two Respondents appeared at the Merits Hearing in person or by counsel. Staff submits that it has provided notice of the proceeding to Richvale and Schiavone. In support of its submission, Staff filed the Affidavits of Charlene Rochman ("**Rochman**") sworn October 25, 2011 and January 11, 2012 which detail the steps taken by Staff to serve the Respondents with notice of hearing dates and Staff's written materials including submissions, evidence, authorities cited in submissions and orders of the Commission in this matter. In addition, Staff relies on the correspondence of counsel to Schiavone dated October 25, 2011, which confirms Schiavone's intention not to attend the Merits Hearing on October 26, 2011.

2. The Law

[25] Subsection 6(1) of the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22, as amended (the "**SPPA**"), which is set out below, requires that "reasonable notice" be given to the parties to a proceeding:

> **Notice of hearing**
>
> **6.**(1)The parties to a proceeding shall be given reasonable notice of the hearing by the tribunal.

[26] Subsection 7(1) of the SPPA, authorizes a tribunal to proceed in the absence of a party when that party has been given notice of the hearing. The provision states:

> **Effect of non-attendance at hearing after due notice**
>
> **7**.(1)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.

[27] Further, Rule 7.1 of the OSC Rules provides:

> **7.1 Failure to Participate –** If a Notice of Hearing has been served on any party and the party does not attend the hearing, the Panel may proceed in the party's absence and that party is not entitled to any further notice in the proceeding.

3. Authority to Proceed in Absence of Respondents

[28] I am satisfied that Staff served the Respondents with notice of the Merits Hearing. I also note that the Notice of Hearing, the Statement of Allegations and the Amended Statement of Allegations were posted on the Commission's website, as were the Commission orders which set out the dates on which the Merits Hearing was scheduled to take place. I am therefore authorized to proceed in the absence of the Respondents in accordance with subsection 7(1) of the SPPA.

C. The Standard of Proof

[29] The standard of proof in this hearing is the civil standard of proof on a balance of probabilities. Evidence must be sufficiently clear, convincing and cogent to satisfy this standard (*F.H. v. McDougall*, [2008] 3 S.C.R. 41 at paras. 40, 46).

D. Hearsay Evidence

[30] This Panel has the discretion to admit relevant evidence that might not otherwise be admissible as evidence in a court, including hearsay evidence, under subsection 15(1) of the SPPA, subject to the weight given to such evidence (*Re Sunwide Finance Inc*. (2009), 32 O.S.C.B. 4671 at para. 22).

III. ISSUES

[31] Staff's evidence raises the following issues:

(a) Did the Respondents engage in unregistered trading, contrary to present subsection 25(1), former subsection 25(1)(a), of the Act and contrary to the public interest?

(b) Did the Respondents distribute securities of Richvale without having filed a preliminary prospectus or a prospectus, contrary to subsection 53(1) of the Act and contrary to the public interest?

(c) Did the Respondents engage in fraud, contrary to subsection 126.1(b) of the Act and contrary to the public interest?

(d) Did Richvale make prohibited representations, contrary to subsection 38(3) of the Act and contrary to the public interest?

(e) Did Schiavone authorize, permit or acquiesce in commission of violations of securities law by Richvale, contrary to section 129.2 of the Act and contrary to the public interest?

IV. EVIDENCE

A. Overview

[32] Staff submitted the affidavit of senior investigator, Wayne Vanderlaan, ("**Vanderlaan**"), sworn October 26, 2011, and made him available for examination on January 12, 2012. Through the affidavit of Vanderlaan, Staff tendered excerpts from transcripts of interviews with two investors, ("**Investor One**" and "**Investor Two**" respectively, and collectively, the "**Two Investors**") and two geologists, ("**Geologist One**" and "**Geologist Two**" respectively and collectively, the "**Two Geologists**"), as well as excerpts from the examination of Schiavone.

[33] Staff also introduced a number of documents through the affidavit of Vanderlaan, including a financial analysis of the Richvale bank accounts, the Richvale Resource Corp. Business Summary (the "**Business Summary**"), printed statements from the Richvale website, certificates of registration under section 139 of the Act, and copies of letters directing the transfer agent to issue Richvale shares.

[34] Neither of the Respondents attended the hearing, gave any evidence or provided written submissions.

B. Staff Investigator

[35] Vanderlaan is an investigator in the Enforcement Branch of the Commission. He was assigned the file throughout the investigation and reviewed all of the documents appended to his affidavit, which are contained in six volumes. Much of his evidence is derived from examinations of respondents and witnesses interviewed by Staff. Vanderlaan also obtained certificates of registration under section 139 of the Act, which confirm that neither of the Respondents was registered under the Act during the Material Time and testified that Richvale never filed a prospectus with the Commission.

[36] Through his affidavit, Vanderlaan testified about the relationship between Schiavone and Richvale, the solicitation of investors and the application of Investor Funds. His evidence is that Schiavone was at all times President and Chief Executive Officer of Richvale and that Schiavone and Blumenfeld discussed and created the company. It was Vanderlaan's testimony that Schiavone brought in individuals who owned mining properties in Quebec and Blumenfeld contributed the shell company, with the intent of forming Richvale and taking it public.

[37] Vanderlaan also testified, through his affidavit, that Richvale investors were solicited by telephone calls originating in Toronto. His evidence was that the salesperson, Khan, used an alias, told investors that Richvale would be going public in a matter of weeks, sent prospective investors a Business Summary and a Subscription Agreement and directed them to Richvale's website. Shares of Richvale were purportedly sold from treasury at $0.50 per share. Vanderlaan further testified that once investors sent funds to Richvale, Schiavone and/or Blumenfeld directed the transfer agent to issue shares and that Schiavone's signature appeared on the cover letters and share certificates sent to Investors.

[38] As part of the investigation, Vanderlaan also reviewed and analyzed bank account records and cheques obtained from financial institutions and from representatives of Richvale. Bank records related to Richvale's Royal Bank of Canada Account (the "**RBC Account**") and Bank of Nova Scotia Account (the "**BNS Account**") (together, the "**Richvale Accounts**"). Vanderlaan relied on those records to ascertain the flow of funds and trading activity and to create a Financial Analysis.

[39] Vanderlaan's evidence is that during the Material Time Richvale shares were sold to 27 Investors, raising a total of approximately $753,000 which were deposited into the Richvale Accounts. In particular, Vanderlaan identifies transactions involving Investor Funds as follows:

(a) From August, 2008 to August, 2009, approximately $380,000 of Investor Funds were deposited in the RBC Account, which was opened by Schiavone and Blumenfeld and to which they were the only signatories;

(b) After August, 2009, approximately $372,000 of Investor Funds were deposited in the BNS Account, which was opened by Winick and Blumenfeld and to which they were the only signatories;

(c) Investor Funds amounted to 99% of total funds in the Richvale Accounts;

(d) Khan received $239,687.50 or 32% of the total funds in the Richvale Accounts;

(e) $205,583 or 27% of the total funds in the Richvale Accounts was removed in the form of cash;

(f) $41,915 or 6% of the total funds in the Richvale Accounts were spent on mining claims;

(g) Schiavone received $38,300 or 5% of the total funds in the Richvale Accounts; and

(h) None of the total funds in the Richvale Accounts was spent on exploration of mining claims.

[40] Relying on the banking records, Vanderlaan testified through his affidavit that Schiavone personally received five cheques totalling $18,300 and that Schiavone wrote a cheque for $20,000 to a company he personally owned, from the RBC account. It is Vanderlaan's evidence that Schiavone admitted in his examination that he believed Khan was receiving a fifty percent commission and that he didn't think investors had the right to know that half of their money was spent on sales commissions.

[41] Vanderlaan also testified, through his affidavit, that Schiavone received $2,000 worth of pre-paid Mastercards from Blumenfeld "for promotion", which Schiavone knew were purchased with Investor Funds. Further, Vanderlaan testified that Schiavone received a computer and a digital camera worth approximately $3,000 and purchased with Investor Funds.

[42] Vanderlaan obtained copies of Richvale's Business Summary and excerpts from the company's website. It is Vanderlaan's affidavit evidence that the Business Summary contained false and misleading statements concerning the composition and expertise of Richvale's board of directors, the credentials of the actual Richvale directors, the overall disposition of Investor Funds and the compensation of directors. In his affidavit testimony, Vanderlaan also stated Richvale's website contained numerous falsehoods and misleading statements concerning an ethics policy, the credentials of Richvale's directors, claims to an office which was in fact a UPS box and assertions that Richvale had mining claims which had in fact expired.

C. The Two Investors

[43] The Two Investors were interviewed by the Alberta Securities Commission in September, 2010. In their interviews, the Two Investors discussed their interaction with the Respondents in relation to the sale of securities. They stated that they dealt almost exclusively with a Richvale salesperson, and were instructed by him to send funds to Richvale.

1. Investor One

[44] Investor One is a resident of Alberta who owns his own company and is employed as a sheet metal worker. He described himself as not really having much knowledge of investments.

[45] Investor One stated that he owned 558,000 shares of Richvale. He purchased shares during the Material Time at a rate of $0.50 per share.

[46] Investor One was solicited by telephone from an individual who identified himself as Dave, a representative of Richvale. He was also sent information on Richvale through email and eventually made cheques out to Howard Blumenfeld.

[47] After the initial introduction, Investor One recalled investing four times and sending funds totalling $275,000 to Richvale. In the Financial Analysis it appears that Investor One invested five times for a total of $300,000. His investments included:

(a) $10,000, deposited in the RBC Account on May 6, 2009 and for which 20,000 shares were issued;

(b) $15,000, deposited in the RBC Account on June 3, 2009 and for which 30,000 shares were issued;

(c) $25,000 deposited in the RBC Account on August 6, 2009 for 50,000 shares;

(d) $100,000, deposited in the BNS Account on November 9, 2009 and for which 200,000 shares were issued; and

(e) $150,000, deposited in the BNS Account on December 1, 2009 and for which 300,000 shares were issued.

[48] With respect to his interactions with the Richvale representative, Investor One stated he was told that Richvale would be a public company and that they were hopeful it would be soon. Also, while Investor One had not received any returns from his investment, it was implied by Richvale that he would be getting a quick return by selling at five to six dollars per share.

2. Investor Two

[49] Investor Two is a contractor with a high school education. He invests through a broker and does not do his own trading.

[50] During the Material Time, Investor Two acquired 150,000 shares of Richvale at $0.50 per share.

[51] In October, 2008, Investor Two was telephoned at work by an individual who identified himself as Dave, a Richvale representative. As part of the investment pitch, Dave told Investor Two that Richvale had a mining operation in Quebec which had shown positive testing results. Shortly after, Investor Two was sent a subscription agreement by email, filled it out and sent a cheque to Richvale. Investor Two explained that in some cases Richvale would type in the investor's personal information on the subscription agreement including the investor's name, the number of shares and the price per share. Richvale would email the prepared agreement and then send a courier to pick up the cheques. In return, Investor Two would receive share certificates within one to two weeks after payment.

[52] Investor Two represented that he was an accredited investor by virtue of the fact that his income exceeded $200,000 before taxes in the last two calendar years.

[53] Investor Two sent Richvale funds on five separate occasions totalling $75,000. His investments included:

(a) $5,000, deposited in the RBC Account on October 23, 2008 and for which 10,000 shares were issued;

(b) $20,000, deposited in the RBC Account on May 5, 2009 and for which 40,000 shares were issued;

(c) $10,000, deposited in the BNS Account on August 19, 2009 and for which 20,000 shares were issued;

(d) $15,000, deposited in the BNS Account on August 28, 2009 and for which 30,000 shares were issued; and

(e) $25,000, deposited in the BNS Account on November 16, 2009 and for which 50,000 shares were issued.

[54] In his interactions with the Richvale representative, Investor Two stated he was told that Richvale had a successful track record and then directed to the Richvale website. In addition, Investor Two was informed that Richvale would be listed on a stock exchange soon and that the listed shares would trade at a substantially higher price than 50 cents.

D. The Two Geologists

[55] The Two Geologists were interviewed by Vanderlaan in July, 2010. In their interviews, the Two Geologists confirmed they were in contact with Richvale in the early stages of forming the company. Both witnesses were approached to provide services with respect to review of certain properties in Quebec.

1. Geologist One

[56] Geologist One is an engineer who has worked in mining exploration as a consultant and professional for a number of years. He stated he is a qualified person for purposes of writing certain reports under National Instrument 43-101 ("**43-101 reports**").

[57] In October, 2008, Geologist One was approached to write 43-101 reports for Richvale on properties described as Bell River and Lac des Moufettes. Geologist One wrote two geological reports, for Bell River in December, 2008 and for Lac des Moufettes in early 2009, and stated he was only compensated for half of his fees, which amounted to $12,000 paid by personal cheques. He was told that Schiavone, Blumenfeld and one other individual were meant to provide financing for Richvale.

[58] Geologist One stated that Richvale did nothing to further exploration on either Bell River or Lac des Moufettes. It was Geologist One's understanding that Richvale's claims had lapsed by March or April, 2009 and he knew this because he had included the claims listing with the lapse dates in his 43-101 reports and by that time no work had been done and Richvale did not pay to keep the claims. Geologist One stated that Schiavone, among others, told him Richvale had no money to do anything on the properties.

[59] Geologist One also stated that Richvale had no claims to the Le Tac property, which was presented on Richvale's website as a mining property of Richvale. He confirmed this by visiting the Minister of Natural Resources website and reviewing claims, of which none were listed in the name of Richvale. Geologist One agreed that the Richvale website was misleading and states that he told Richvale, specifically Schiavone and at least one other representative, that the Richvale website should be corrected to reflect proper ownership.

2. Geologist Two

[60] Geologist Two is a geologist with 40 years of experience in mining exploration and economic exploration. He too stated he is a qualified person for purposes of writing 43-101 reports.

[61] In August, 2008, Geologist Two was approached by three individuals from Quebec City, whom he refers to as "hobby prospectors". Geologist Two became involved in Richvale when he was requested by the "hobby prospectors" to act as a consultant for a company incorporated in Ontario which intended to take control of their mining properties in Quebec. As a result, Geologist Two prepared a summary describing the Quebec properties which were apparently sold to Richvale at the time he was preparing the document. The Bell River and Le Tac properties were included in his summary.

[62] Geologist Two stated he was also asked to act as a consultant on the Richvale Advisory Board, indicated he was willing, but was never called back. He authorised the use of his name as consultant geologist on the Advisory Board in the development stage, but was not aware that Richvale was preparing a website with his name on it and was never asked for advice. In fact, Geologist Two was informed that Richvale had not done any exploration work on the properties.

[63] In his interview, Geologist Two stated he did not receive any Richvale shares and was never paid for work he did perform. Geologist Two confirmed he was unaware that he had been given 3 million shares in Richvale, was never told he was a shareholder, did not receive documentation to that effect and stated that he wouldn't have accepted the shares in any event. He agreed that the Richvale Business Summary was inaccurate.

E. Schiavone Interview

[64] Schiavone also made a number of admissions in his interview of July, 2010, which were relied upon by Staff. Schiavone confirmed his employment relationship and position as president of Richvale. He acknowledged that he and Blumenfeld created Richvale and that he was aware Khan was soliciting investors and selling Richvale shares at a price of $0.50 per share.

[65] In his interview, Schiavone also acknowledged that he and Blumenfeld were signatories on the RBC Account but denied any knowledge of funds deposited into the BNS account and denied any knowledge of share sales after August, 2009. Schiavone further stated that he did not think investors had a right to know how their money was being spent and admitted to receiving a number of payments and other benefits from the Investor Funds.

V. ANALYSIS

A. Did the Respondents engage in unregistered trading, contrary to present subsection 25(1), former subsection 25(1)(a), of the Act and contrary to the public interest?

1. The Law

[66] During the Material Time, prior to September 28, 2009, subsection 25(1)(a) of the Act set out the registration requirement as follows:

> **25. (1) Registration for trading** – 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.

[67] During the Material Time, on and after September 28, 2009, subsection 25(1) of the Act set out the registration requirement as follows:

> **25. Registration – (1) Dealers** – Unless a person or company is exempt under Ontario securities law from the requirement to comply with this subsection, the person or company shall not engage in or hold himself, herself or itself out as engaging in the business of trading in securities unless the person or company,
>
> (a) is registered in accordance with Ontario securities law as a dealer; or
>
> (b) is a representative registered in accordance with Ontario securities law as a dealing representative of a registered dealer and is acting on behalf of the registered dealer.

[68] Both of the applicable provisions refer to a trade or trading in a security. The terms "trade" or "trading" are defined in subsection 1(1) of the Act as:

> **"trade"** or **"trading"** includes,
>
> (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;

[69] The Commission has established that trading is a broad concept which includes any sale or disposition of a security for valuable consideration, including any act, advertisement, solicitation, conduct or negotiation directly or indirectly in furtherance of such a sale or disposition. This interpretation has been confirmed by the Ontario courts in their acknowledgement that "[r]egarding "trade", the legislature has chosen to define the term and they have chosen to define it broadly in order to encompass almost every conceivable transaction in securities" (*R v. Allan Sussman*, [1993] O.J. No. 4359 (Ont. Ct. J.) at para. 46).

[70] The Commission has found that a variety of activities constitute acts in furtherance of trades. For example, the Commission has found that accepting and depositing investor cheques in a bank account for the purchase of shares constitute acts in furtherance of trades (*Re Limelight Entertainment Inc.* (2008), 31 O.S.C.B. 1727 ("***Limelight***") at para. 133). Likewise, offering securities to investors on the internet is an act in furtherance of a trade (*Re First Federal Capital (Canada) Corp.*, (2004) 27 O.S.C.B 1603 at para. 45). Other examples of activities that have been considered acts in furtherance of trades by the Commission include, but are not limited to:

a. providing potential investors with subscription agreements to execute;
b. distributing promotional materials concerning potential investments;
c. issuing and signing share certificates;
d. preparing and disseminating materials describing investment programs;
e. preparing and disseminating forms of agreements for signature by investors;
f. conducting information sessions with groups of investors; and
g. meeting with individual investors.

(*Re Momentas Corporation* (2006), 29 O.S.C.B. 7408 ("***Momentas***") at para. 80)

[71] The inclusion of the word "indirectly" in the definition of "acts in furtherance" (cited above in paragraph (e) of subsection 1(1) of the Act) reflects an express intention on the part of the Legislature to capture conduct which seeks to avoid the registration requirement by doing indirectly that which is prohibited directly.

[72] Once Staff has established that a respondent has engaged in an activity for which registration or a prospectus is required, the onus is on the respondent to prove facts establishing the availability of an exemption (*Re Lydia Diamond Exploration of Canada Ltd.* (2003), 26 O.S.C.B. 2511 ("***Re Lydia Diamond***") at paras. 83-84).

[73] In this case, there is some indication that the respondents may have relied upon the "accredited investor" exemption at subsection 2.3(1) of National Instrument 45-106 ("**NI 45-106**") (subsection 3.3(1) of NI 45-106, in effect on and after September 28, 2009) from registration requirements found in section 25 of the Act. The definition of "accredited investor" is found at section 1.1 of NI 45-106 and includes:

> "accredited investor" means
> …
> (j) an individual who, either alone or with a spouse, beneficially owns, directly or indirectly, financial assets having an aggregate realizable value that before taxes, but net of any related liabilities, exceeds $1 000 000,
>
> (k) an individual whose net income before taxes exceeded $200 000 in each of the 2 most recent calendar years or whose net income before taxes combined with that of a souse exceeded $300 000 in each of the 2 most recent calendar years and who, in either case, reasonably expects to exceed that net income level in the current calendar year,
>
> (l) an individual who, either alone or with a spouse, has net assets of at least $5 000 000,
> …

[74] Evidence must be sufficiently clear, convincing and cogent proof, on a balance of probabilities, that the "accredited investor" exemption applies.

[75] However, the "accredited investor" exemption from dealer registration is not available to market intermediaries. Subsection 2.43(1)(b) of NI 45-106 (subsection 3.0(1)(b) of NI 45-106, in effect on and after September 28, 2009) states:

> **Removal of exemptions— market intermediaries**
> 2.43 (1) Subject to subsection (2), in Ontario and Newfoundland and Labrador, the exemptions from the dealer registration requirement under the following sections are not available for a market intermediary except for a trade in a security with a registered dealer that is an affiliate of the market intermediary:
> …
> (b) section 2.3 [*Accredited investor*];

[76] During the material time, a "market intermediary" was defined at Ontario Securities Commission Rule 14-501 as a person or company that engages or holds himself, herself or itself out as engaging in Ontario in the business of trading in securities as a principal or agent. According to then *Companion Policy* 45-106 (45-106CP) the Commission took the position that:

> if an issuer retains an employee whose primary job function is to actively solicit members of the public for the purposes of selling the issuer's securities; the issuer and its employee are in the business of selling securities. Further, if an issuer and its employees are deemed to be in the business of selling securities the Ontario Securities Commission considers both the issuer and its employees to be market intermediaries. […] Accordingly, in order to be in compliance with securities legislation, these issuers and their employees should be registered under the appropriate category of registration in Ontario

[77] Therefore, at the Material Time, if a issuing corporation hired an employee to solicit investments from the public that corporation and its employees are deemed to be market intermediaries to which the "accredited investor" exemption from dealer registration did not apply.

2. Analysis

[78] I find that Richvale traded in Richvale securities and that Schiavone engaged in acts in furtherance of trading Richvale securities for the reasons that follow.

(a) Richvale

[79] I received consistent and credible evidence from the Two Investors, supported by documentary evidence which includes the Subscription Agreements and share certificates, that Richvale solicited investors to buy Richvale shares. The acts of trade or acts in furtherance of trades by Richvale included the following:

(a) Richvale hired a salesperson to act its representative and telephone potential investors to buy Richvale shares;

(b) Richvale's salesperson gave prospective investors a copy of the Business Summary which describes the company, its directors and the offering including the $0.50 price per share;

(c) Richvale's salesperson directed potential investors through the Richvale website in furtherance of selling Richvale shares;

(d) Richvale's salesperson sent packages of documents by e-mail to the Two Investors including Richvale subscription agreements;

(e) Richvale sent a courier to pick up Investor Two's cheque for the purchase of Richvale shares;

(f) Richvale sold shares to 27 investors, raising $380,650 in the RBC Account and $372,500 in the BNS account for a total of approximately $753,000 (the "**Investor Funds**");

(g) Richvale's directors directed the transfer agent to issue share certificates to investors; and

(h) Richvale sent the Two Investors their Richvale share certificates.

[80] It is clear from the evidence that Richvale and its representatives actively solicited and induced the sales of Richvale shares. Richvale's salesperson made representations to induce those sales and sent documents and materials relating to those sales. I find that the actions of Richvale constituted trades.

[81] During the Material Time, Richvale was not registered under the Act in any capacity.

[82] I find that Richvale hired a salesperson whose sole function was to solicit the public for the purpose of selling Richvale shares. As a result, the "accredited investor" exemption would not be available to Richvale pursuant to then section 2.43 of NI 45-106, later subsection 3.0(1)(b) of NI 45-106.

[83] Even if the exemption were available, as stated above at paragraph 72, the onus is on the Respondent to prove facts establishing the availability of an exemption. It appears that some of the subscription agreements did not have accredited investor forms or the form was unsigned. I also have no evidence on the investors' financial positions which would prove that they qualify. I did not receive sufficient evidence on the availability of an exemption which would allow Richvale to trade in securities in Ontario.

[84] I find that Richvale traded securities without registration and without a registration exemption being available contrary to subsection 25(1), former subsection 25(1)(a), of the Act and contrary to the public interest.

(b) Schiavone

[85] Schiavone had little direct contact with investors. However, as noted in paragraphs 70 and 71 above, there are a number of activities which constitute acts in furtherance of trades that do not require direct contact with investors. Accepting Investor Funds, directing the issuance of shares, and signing share certificates for the purpose of an investment can constitute "trading" within the meaning of the Act.

[86] The Financial Analysis introduced by Staff through Vanderlaan establishes that the Two Investors sent a total of $75,000 to the RBC Account. The RBC Account was opened by Schiavone and Blumenfeld. During the Material Time, Schiavone and Blumenfeld were the sole authorized signatories on the RBC Account. Accordingly, I find that Schiavone opened and maintained a bank account that accepted Investor Funds and thereby engaged in acts in furtherance of trading Richvale shares.

[87] Documentary evidence provided by the Two Investors proves that Schiavone's signature appeared on cover letters enclosing share certificates and on the certificates themselves. This was corroborated by letters sent to the transfer agent with Schiavone's signature on them and the admission from Schiavone himself that he directed the share certificates to be issued to Investors.

[88] Schiavone was not registered with the Commission during the Material Time in any capacity.

[89] As stated above at paragraph 82, I find that Richvale hired a salesperson whose sole function was to solicit the public for the purpose of selling Richvale shares. As a result, pursuant to then section 2.43 of NI 45-106, later subsection 3.0(1)(b) of NI 45-106, the "accredited investor" exemption would not be available to Schiavone as an employee of Richvale.

[90] Again, even if the exemption were available, as stated in paragraph 83, I did not receive sufficient evidence on the availability of an exemption which would allow Schiavone to trade Richvale securities in Ontario.

[91] I find that Schiavone traded securities without registration and without a registration exemption being available contrary to subsection 25(1), former subsection 25(1)(a), of the Act and contrary to the public interest.

B. Did the Respondents distribute securities of Richvale without a prospectus, contrary to subsection 53(1) of the Act and contrary to the public interest?

1. The Law

[92] Subsection 53(1) sets out the prospectus requirement under the Act:

> **53. (1) Prospectus required** – No person or company shall trade in a security on his, her or its own account or on behalf of any other person or company if the trade would be a distribution of the security, unless a preliminary prospectus and a prospectus have been filed and receipts have been issued for them by the Director.

[93] A "distribution", is defined in subsection 1(1) of the Act and includes a trade in securities of an issuer that have not been previously issued.

[94] The Commission has acknowledged that the prospectus requirement is fundamental to the protection of the investing public because it ensures investors have full, true and plain disclosure to properly assess investment risk and make an informed decision. The panel in *Limelight* articulated:

> The requirement to comply with section 53 of the Act is important because a prospectus ensures that prospective investors have full, true and plain disclosure of information to properly assess the risks of an investment and make an informed investment decision. The prospectus requirements of the Act play a significant role in the overall scheme of investor protection. As stated by the court in *Jones v. F.H. Deacon Hodgson Inc.* (1986), 9 O.S.C.B. 5579 (H.C.) (at p. 5590), "there can be no question but that the filing of a prospectus and its acceptance by the Commission is fundamental to the protection of the investing public who are contemplating purchase of the shares."
>
> (*Limelight*, *supra* at para. 80)

[95] There is some indication that the respondents may have relied upon the "accredited investor" exemption at subsection 2.3(2) of NI 45-106 (subsection 2.3(1) of NI 45-106, in effect on and after September 28, 2009) from prospectus requirements found in section 53 of the Act. The definition of "accredited investor" is found at section 1.1 of NI 45-106 and is substantially the same as the language articulated at paragraph 73 above.

[96] As stated in paragraph 72 above, the onus is on the respondent to prove facts establishing the availability of an exemption from the prospectus requirements of subsection 53(1) of the Act (*Re Lydia Diamond, supra* at paras. 83-84). Evidence must be sufficiently clear, convincing and cogent proof, on a balance of probabilities, that the "accredited investor" exemption applies, as discussed above at paragraphs 73 to 74.

2. Analysis

[97] Based on the evidence, I find that previously unissued Richvale shares were sold to investors and that such trades were distributions within the meaning of the Act.

[98] No prospectus was filed by Richvale during the Material Time.

[99] The Richvale securities were issued from treasury. Some subscription agreements were accompanied by signed accredited investor forms, while others had no attached accredited investor form or contained a blank accredited investor form. Investor Two represented that he was an accredited investor by virtue of the fact that his income exceeded $200,000 before taxes in the last two calendar years. Although Investor One signed certain accredited investor forms, I received no confirmation from him as to his qualification as an accredited investor. I would also note that there were a number of settlement agreements with the Commission on the part of the four individual respondents in this matter other than Schiavone, which state there were no exemptions available under the Act in respect of the distribution of securities.

[100] I find the evidence does not clearly establish on a balance of probabilities that the Respondents may rely on the "accredited investor" exemption to relieve them from the prospectus requirement in the Act in respect of every investor. Therefore, I find that the trades in Richvale securities were distributions made without a prospectus and without a prospectus exemption, and that the Respondents therefore breached subsection 53(1) of the Act and contrary to the public interest.

C. Did the Respondents engage in fraud, contrary to subsection 126.1(b) of the Act and contrary to the public interest?

1. The Law

[101] Subsection 126.1(b) of the Act sets out the fraud provision as follows:

> **126.1 Fraud and market manipulation** – A person or company shall not, directly or indirectly, engage or participate in any act, practice or course of conduct relating to securities or derivatives of securities that the person or company knows or reasonably ought to know,
>
> …
>
> (b) perpetrates a fraud on any person or company.

[102] It is well established, by previous Commission decisions, that the elements of fraud under subsection 126.1(b) of the Act are:

> …the *actus reus* of the offence of fraud will be established by proof of:
>
> 1. the prohibited act, be it an act of deceit, a falsehood or some other fraudulent means; and
>
> 2. deprivation caused by the prohibited act, which may consist in actual loss or the placing of the victim's pecuniary interests at risk.
>
> Correspondingly, the *mens rea* of fraud is established by proof of:
>
> 1. subjective knowledge of the prohibited act; and
>
> 2. subjective knowledge that the prohibited act could have as a consequence the deprivation of another (which deprivation may consist in knowledge that the victim's pecuniary interests are put at risk).
>
> (*R. v. Théroux*, [1993] 2 S.C.R. 5 ("***Théroux***") at para. 27; *Re Al-Tar Energy Corp.* (2010), 33 O.S.C.B. 5535 ("***Al-Tar Energy***") at paras. 216-221)

[103] In *Anderson v. British Columbia (Securities Commission)* (2004), 192 B.C.A.C. 119 (leave to appeal to the Supreme Court of Canada denied) ("***Anderson***"), the British Columbia Court of Appeal discussed the mental element of the fraud provision in the British Columbia *Securities Act*, R.S.B.C. 1996, c. 418, as amended (the "**BC Act**") and stated:

> …[the fraud provision of the BC Act] does not dispense with the requirement that there must be a fraud involved in the transaction, which requires a guilty state of mind.…[the fraud provision of the BC Act] simply widens the prohibition against participation in transactions to include participants who know or ought to know that a fraud is being perpetrated by others, as well as those who participate in perpetrating the fraud. It does not eliminate proof of

> fraud, including proof of subjective knowledge of the facts constituting the dishonest act, by someone involved in the transactions.
>
> (*Anderson*, *supra* at paras. 24 and 26)

As the fraud provision of the BC Act has identical operative language to section 126.1 of the [Ontario] Act, the Commission has adopted the analysis in *Anderson* in cases involving subsection 126.1(b) of the Act (*Al-Tar Energy, supra* at para. 218).

[104] The Commission has also recognized that, for a corporation, it is sufficient to show that its directing minds knew that the acts of the corporation perpetrated a fraud to prove breach of subsection 126.1(b) of the Act (*Al-Tar Energy, supra* at para. 221; *Re Global Partners* (2010), 33 O.S.C.B. 7783 at para. 245).

[105] Courts and tribunals have concluded that non-disclosure of important facts, unauthorized diversion of funds, use of corporate funds for personal purposes, and unauthorized arrogation of funds or property are examples of fraud (*Théroux, supra* at para. 18; *Anderson, supra* at para. 30; *Re Lehman Cohort Global Group Inc.* (2010), 33 O.S.C.B. 7041 at para. 90).

2. Analysis

[106] Richvale and Schiavone deceived investors. I find that the Respondents participated in acts which they knew or reasonably ought to have known perpetrated a fraud within the meaning of the Act.

(a) Richvale

[107] It is clear from the evidence that Richvale operated a fraudulent scheme akin to a one-man boiler room and made material misrepresentations to induce Richvale investors into purchasing shares .

[108] The evidence before me establishes that Richvale's salesperson used aliases to solicit Richvale investors by telephone. In the solicitation and the materials that he sent to investors by e-mail, he identified himself as acting on behalf of Richvale and misled investors by claiming that Richvale would be going public and listed on a stock exchange in the near future.

[109] Richvale's salesperson also led investors to believe that Richvale was in the business of mining and that the company had achieved positive testing results. In reality, Richvale had spent no money on exploration of Richvale's mining claims and allowed at least one of the claims to lapse.

[110] Promotional materials, including Richvale's Business Summary and website, contained a number of falsehoods. Misleading and deceitful representations were made as follows:

> (a) The Business Summary stated under "Use of Proceeds" that the net proceeds from the sale of Richvale shares would be "used primarily for costs associated with the exploration of the Company's resource property,

for ongoing operations, and to acquire new properties", when in reality most of the funds were being withdrawn to enrich the directors, officers and employees of Richvale, including at least 30% paid as commission to the salesperson;

(b) The Business Summary and Richvale's website exaggerated and falsified the experience of directors and officers;

(c) The Business Summary claimed the directors had not accrued any expense or compensation, but Schiavone's employment contract provides for remuneration and begins prior to the date of the Business Summary;

(d) The Richvale website, used to solicit investors, claimed that individuals with extensive experience in Mining and exploration were on the Advisory Board and Board of Directors when they were not;

(e) The Richvale website advertised existence of a Greater Toronto Satellite Office which was merely a UPS mailbox; and

(f) The Richvale website listed Le Tac as one of the properties held by Richvale. Geologist One confirmed Richvale had no claims over Le Tac.

[111] The Richvale salesperson instructed investors on how to complete payment of shares. The Investor Funds were then deposited into the Richvale Accounts and disbursed in a manner that was not disclosed to investors and which was inconsistent with the Business Summary. Investor Funds were used in the following manner:

(a) Loans were made to friends of Richvale employees with no documentation, deadline for repayment or interest rate;

(b) Approximately 27% of funds in the Richvale Accounts were withdrawn in cash;

(c) At least 30% of Investor Funds were paid by way of commission to the salesperson;

(d) Approximately 78% of Investor Funds were paid to directors, officers or employees of Richvale or removed in the form of cash; and

(e) Only 6% of Investor Funds were used to renew mining claims.

[112] There is no evidence that Richvale intended to use the Investor Funds for the purpose of exploration. Rather, the funds went directly to benefit its employees. The Financial Analysis of the banking records in evidence further show that approximately a quarter of the funds in the Richvale Accounts were withdrawn in cash. There is no evidence before us that explains the use of these Investor Funds. Accordingly, I conclude that Richvale had no underlying legitimate business.

[113] I find that Richvale engaged in acts of deceit or falsehood. It made false and misleading statements to Investors which deceived the Investors about the investment,

including misrepresentations about its salesperson's identity, the nature of the business, and the allocation of Investor Funds.

[114] These false and misleading statements induced the Investors to pay a total of approximately $753,000 into the Richvale Accounts. More specifically, Investor One invested five times and sent funds totalling $300,000 to Richvale and Investor Two sent Richvale funds on five separate occasions totalling $75,000. I conclude that at least these Two Investors were deprived of their funds as a result of false and misleading statements.

[115] Accordingly, I find that Richvale perpetrated a fraudulent scheme, contrary to subsection 126.1(b) of the Act and contrary to the public interest.

(b) Schiavone

[116] There is compelling evidence that Schiavone knew about the dishonest acts and the deprivation suffered by the investors that would result therefrom.

[117] Schiavone confirmed his employment relationship and position as president of Richvale. He acknowledged that he and Blumenfeld created Richvale and that he was aware Khan was soliciting investors and selling Richvale shares at a price of $0.50 per share.

[118] As we found in paragraph 79, of the approximately $753,000 paid by Richvale investors, $380,650 was deposited to the RBC account. As noted in paragraph 65 above, Schiavone and Blumenfeld were the signatories on the RBC Account and were authorized to withdraw money from those accounts.

[119] Schiavone further stated that he did not think Investors had a right to know how their money was being spent and admitted to receiving a number of payments and other benefits from Investor Funds. Benefits derived from the Investor Funds which accrued to Schiavone include:

(a) Schiavone received five cheques totalling $18,300 from the RBC Account;

(b) Schiavone wrote a cheque for $20,000 to a company he personally owned from the RBC account;

(c) Schiavone received $2,000 worth of pre-paid Mastercards from Blumenfeld "for promotion", which he knew were purchased with the Investor Funds; and

(d) Schiavone received a computer and a digital camera worth approximately $3,000 which were purchased with the Investor Funds.

[120] I find that Schiavone furthered the fraudulent acts in the scheme by diverting Investor Funds from the intended use that was represented to the Investors. Having received Investor Funds and disposed of them in the manner described in paragraph 119 above, Schiavone knew or reasonably ought to have known that such actions would result in deprivation on the part of the Richvale Investors.

[121] I find that Schiavone participated in fraudulent misconduct, contrary to subsection 126.1(b) of the Act and contrary to the public interest.

D. Did Richvale make prohibited representations, contrary to subsection 38(3) of the Act and contrary to the public interest?

1. The Law

[122] Subsection 38(3) of the Act states:

> **38(3) Listing**—Subject to the regulations, no person or company, with the intention of effecting a trade in a security, shall, except with the written permission of the Director, make any representation, written or oral, that such security will be listed on any stock exchange or quoted on any quotation and trade reporting system, or that application has been or will be made to list such security upon any stock exchange or quote such security on any quotation and trade reporting system, unless,
>
> (a) application has been made to list or quote the securities being traded, and securities of the same issuer are currently listed on any stock exchange or quoted on any quotation and trade reporting system; or
>
> (b) the stock exchange or quotation and trade reporting system has granted approval to the listing or quoting of the securities, conditional or otherwise, or has consented to, or indicated that it does not object to the representation.

[123] Unlike subsection 38(2) of the Act, subsection 38(3) does not require an undertaking with respect to the future listing, only a representation**.** A representation about listing shares on a stock exchange is sufficient to constitute a violation of subsection 38(3) of the Act. For example, in the *Limelight* case, the Commission found that evidence of salespersons stating that Limelight shares would be listed on an exchange, with the timeframe given ranging from 10 to 12 days to a year, constituted a breach of subsection 38(3) of the Act (*Limelight*, *supra* at para. 181).

2. Analysis

[124] Based on the evidence, I find that Richvale made prohibited representations, contrary to subsection 38(3) of the Act and contrary to the public interest.

[125] Richvale's salesperson told Investor One and Investor Two when they made their investments that Richvale would go public. Investor One stated that he was not given an exact date but was told that Richvale was hoping to go public "really soon". Investor Two was repeatedly told by Richvale's salesperson that Richvale was "really close, that it was going to be trading soon, like within couple months" on an exchange. The Richvale representative continuously lowered the time frame given to Investor Two, saying Richvale was closer and closer to listing on an exchange until finally the salesperson said that Richvale could be listed within a few weeks.

[126] Investor Two was also told by Richvale's salesperson that Richvale shares would be listed on the Toronto Stock Exchange. Later he was told that the Richvale shares

would be listed on a European stock exchange to "make it easier to transfer [Richvale] to the Toronto market".

[127] Despite Schiavone's assertion that he and Blumenfeld intended to take Richvale public, the evidence does not support a claim that there was ever any actual intention that Richvale would go public nor that any filing had been made and approved for a listing on an exchange.

[128] I find that the evidence clearly establishes that representations were made by Richvale's salesperson as to Richvale shares being listed on a stock exchange with the intention of effecting a trade in a security. This is part of the fraudulent scheme within which Richvale and Schiavone played an active role and from which they directly or indirectly received the bulk of the proceeds of the sale of securities.

[129] I am satisfied on the evidence that Richvale, through its salesperson, made representations as to the future listing of Richvale shares on a stock exchange for the purpose of effecting trades in Richvale shares contrary to subsection 38(2) of the Act and contrary to the public interest.

E. Did Schiavone authorize, permit or acquiesce in commission of violations of securities law by Richvale, contrary to section 129.2 of the Act and contrary to the public interest?

1. The Law

[130] Under the Act, a director or officer or an individual who performs similar functions can be liable for breaches of securities law by a corporation. Section 129.2 of the Act states:

> **129.2 Directors and officers**—For the purposes of this Act, if a company or a person other than an individual has not complied with Ontario securities law, a director or officer of the company or person who authorized, permitted or acquiesced in the non-compliance shall be deemed to also have not complied with Ontario securities law, whether or not any proceeding has been commenced against the company or person under Ontario securities law or any order has been made against the company or person under section 127.

[131] In subsection 1(1) of the Act, a "director" is defined as "a director of a company or an individual performing a similar function or occupying a similar position for any person" and an "officer" is defined as:

> (a) a chair or vice-chair of the board of directors, a chief executive officer, a chief operating officer, a chief financial officer, a president, a vice-president, a secretary, an assistant secretary, a treasurer, an assistant treasurer and a general manager,
>
> (b) every individual who is designated as an officer under a by-law or similar authority of the registrant or issuer, and

(c) every individual who performs functions similar to those normally performed by an individual referred to in clause (a) or (b).

[132] The Commission determined in *Momentas* that the threshold for a finding of liability against a director or officer under section 129.2 of the Act is low. Indeed, merely acquiescing in the conduct or activity in question will satisfy the requirement of liability. The *Momentas* panel discussed the threshold and defined the terms "authorize", "permit" and "acquiesce" as follows:

> Although these terms have been interpreted to include some form of knowledge or intention, the threshold for liability under section 122 and 129.2 is a low one, as merely acquiescing the conduct or activity in question will satisfy the requirement of liability. The degree of knowledge of intention found in each of the terms "authorize", "permit" and "acquiesce" varies significantly. "Acquiesce" means to agree or consent quietly without protest. "Permit" means to allow, consent, tolerate, give permission, particularly in writing. "Authorize" means to give official approval or permission, to give power or authority or to give justification.
>
> (*Momentas*, *supra* at para. 118)

[133] Section 129.2 of the Act attaches liability to directors and officers or individuals who perform similar functions (ie. a "***de facto***" director or officer) who authorize, permit or acquiesce in the non-compliance of a company, whether or not any proceedings have been commenced against the company itself.

2. Analysis

[134] Based on the evidence, I find that Schiavone did authorize, permit or acquiesce in breaches of Ontario securities law by Richvale.

[135] Schiavone stated that he and Blumenfeld created Richvale in August, 2008.

[136] As discussed above at paragraph 64, Schiavone admitted he was president of Richvale and acknowledged that he was engaged to fill the position and signed an agreement to that effect.

[137] The Business Summary and Richvale's website further corroborate that Schiavone was represented to the public as Richvale's president. Further documentation which supports the same include letters to the Richvale transfer agent and share certificates signed by Schiavone as president of Richvale.

[138] Schiavone's authority and seniority in Richvale's hierarchy is evidenced by the fact that he and Blumenfeld opened and were signatories to the first bank account opened by or for Richvale, the RBC Account, which held approximately half of the Investor Funds raised by the scheme Schiavone also acknowledged that he and Blumenfeld were responsible for directing funds to exploration, but never did so.

[139] In his interview, Schiavone stated he was aware Khan was hired by Blumenfeld to sell Richvale securities. He believed Khan was being paid a 50% commission, but did not think Investors had a right to know exactly what their money was spent on.

[140] Finally, Schiavone admitted he was aware that the website material was inaccurate and that he was responsible for website content, but claimed to rely on Blumenfeld's expertise for the "literature".

[141] In light of the evidence and admissions referred to above, I find that Schiavone, being a *de facto* director and officer of Richvale, authorized, permitted or acquiesced in the commission of the violations of sections 25, 38, 53 and 126.1 of the Act by Richvale, contrary to section 129.2 of the Act and contrary to the public interest.

VI. CONCLUSION

[142] For the reasons given above, I find that:

(a) Richvale and Schiavone traded in Richvale securities without registration, contrary to present subsection 25(1), former subsection 25(1)(a) of the Act and contrary to the public interest;

(b) Richvale and Schiavone engaged in an illegal distribution of securities contrary to subsection 53(1) of the Act and contrary to the public interest;

(c) Richvale and Schiavone engaged or participated in acts, practices or a course of conduct relating to Richvale shares that they knew or reasonably ought to have known perpetrated a fraud, contrary to subsection 126.1(b) of the Act and contrary to the public interest;

(d) Richvale made prohibited representations contrary to subsection 38(3) of the Act and contrary to the public interest; and

(e) Schiavone authorized, permitted or acquiesced in commission of violations of securities law by Richvale, contrary to section 129.2 of the Act and contrary to the public interest.

[143] The parties are directed to contact the Office of the Secretary to the Commission within ten days to schedule a sanctions and costs hearing, failing which a date will be set by the Office of the Secretary.

Dated at Toronto this 25th day of April, 2012.

"Edward P. Kerwin"

Edward P. Kerwin