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 SIMPLY WEALTH FINANCIAL GROUP INC.,
NAIDA ALLARDE, BERNARDO GIANGROSSO,
K&S GLOBAL WEALTH CREATIVE STRATEGIES INC., KEVIN PERSAUD,
MAXINE LOBBAN and WAYNE LOBBAN

REASONS AND DECISION

Hearing:	January 3, 4 and 13, 2012	
Decision:	June 21, 2012	
Panel:	James D. Carnwath, Q.C.	- Commissioner and Chair of the Panel
Appearances:	Peter W. G. Carey	- For Kevin Persaud
	Unrepresented	- Simply Wealth Financial Group Inc., Naida Allarde, Bernardo Giangrosso, Maxine Lobban, Wayne Lobban and K & S Global Wealth Creative Strategies Inc.
	Christie Johnson	- For Staff of the Commission

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PART ONE – OVERVIEW

A. Nature of the Hearing

[1] This was a hearing on the merits (the "**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 determine whether it is in the public interest to make orders against the respondents Simply Wealth Financial Group Inc. ("**Simply Wealth**"), Naida Allarde ("**Ms. Allarde**"), Bernardo Giangrosso ("**Mr. Giangrosso**"), K&S Global Wealth Creative Strategies Inc. ("**K&S**"), Kevin Persaud ("**Mr. Persaud**"), Maxine Lobban ("**Ms. Lobban**") and Wayne Lobban ("**Mr. Lobban**") (collectively, the "**Respondents**").

[2] The Hearing took place on January 3, 4 and 13, 2012.

B. The Respondents

[3] Simply Wealth is an Ontario company incorporated on January 14, 2003 and has its registered office in North York, Ontario. Simply Wealth has never been registered with the Commission in any capacity.

[4] Ms. Allarde is a director and officer of Simply Wealth. She resides in Ontario. Ms. Allarde was registered with the Commission as a salesperson in the category of Scholarship Plan Dealer from May 1, 2000 to November 27, 2000, from December 22, 2000 to December 31, 2002, and from March 5, 2003 to July 30, 2004.

[5] Mr. Giangrosso is a director and officer of Simply Wealth. He resides in Ontario. He has never been registered with the Commission.

[6] K&S was incorporated in Ontario on September 7, 2005 and has its registered office in Pickering, Ontario. K&S has never been registered with the Commission.

[7] Mr. Persaud is the sole director of K&S and was at all material times the directing mind of K&S. He resides in Ontario. Mr. Persaud has never been registered with the Commission.

[8] Ms. Maxine Lobban resides in Ontario. She was registered with the Commission as a salesperson in the category of Scholarship Plan Dealer from April 5, 2000 to November 14, 2001, from November 28, 2001 to September 4, 2002, from September 27, 2002 to December 31, 2003 and from March 29, 2004 to December 31, 2006.

[9] Mr. Wayne Lobban resides in Ontario. He was registered with the Commission as a salesperson in the category of Scholarship Plan Dealer from February 28, 2003 to December 31, 2003.

C. Staff's Allegations

[10] On March 16, 2011, Staff made the following allegations against the Respondents in its Amended Statement of Allegations:

The conduct of Simply Wealth, and its directors Ms. Allarde, and Mr. Giangrosso, was contrary to the public interest and constituted the following breaches of the *Act*:

(i) trading without registration contrary to section 25 of the *Act*;

(ii) an illegal distribution of securities contrary to section 53 of the *Act*; and

(iii) as directors of Simply Wealth, Ms. Allarde and Mr. Giangrosso authorized, permitted or acquiesced in breaches of section 25 and 53 of the *Act* by Simply Wealth contrary to section 129.2 of the *Act*.

The conduct of K&S, and its director Persaud, was contrary to the public interest and constituted the following breaches of the *Act*:

(i) trading without registration contrary to section 25 of the *Act*;

(ii) an illegal distribution of securities contrary to section 53 of the *Act*; and

(iii) as a director of K&S, Persaud authorized, permitted or acquiesced in breaches of sections 25 and 53 of the *Act* by K&S contrary to section 129.2 of the *Act*.

The conduct of Maxine Lobban and Wayne Lobban was contrary to the public interest and constituted the following breaches of the *Act*:

(i) trading without registration contrary to section 25 of the *Act*; and

(ii) an illegal distribution of securities contrary to section 53 of the *Act*.

D. Evidence Tendered at the Hearing

[11] The Hearing proceeded by way of agreed facts, evidence filed on consent and the oral evidence of Mr. Persaud.

[12] On consent, Staff filed exhibits 1 through 32, which included Agreed Statements of Facts with each Respondent, transcripts of the compelled examinations of each Respondent, Staff's brief entitled "Compensation Received by the Respondents" which sets out the compensation received and realized by each Respondent ("**Staff's Financial Analysis**"), and various documents relating to Mr. Persaud's promotional activities relating to Gold-Quest securities, which Staff are relying upon to prove its allegations against Mr. Persaud and K&S.

[13] Mr. Persaud testified and filed exhibits 33 to 35. The other Respondents called no oral evidence and filed no additional evidence.

PART TWO – THE FACTS

A. Background Facts: Gold-Quest International

[14] All of the Respondents admitted facts about Gold-Quest International ("**Gold-Quest**") in their Agreed Statement of Facts, including facts related to the nature of the investment contract, the commission structure, past regulatory proceedings and findings against Gold-Quest, and the current status of Gold-Quest.

B. Unregistered Trading and Illegal Distribution

(a) The Simply Wealth Respondents and the Lobban Respondents

[15] The Agreed Statements of Fact and the admissions made in the course of the compelled examinations of Ms. Allarde, Mr. Giangrosso, Simply Wealth (the "**Simply Wealth Respondents**"), Ms. Lobban and Mr. Lobban (the "**Lobban Respondents**") establishes that:

- None of the Simply Wealth Respondents or Lobban Respondents were appropriately registered to trade in securities from June 2006 to June 2008 (the "**Material Time**"). Further, Gold-Quest was never registered with the Commission.
- No preliminary prospectus or prospectus has ever been filed with the Commission by Gold-Quest to attempt to qualify the trading of Gold-Quest securities.
- During the Material Time, Ontario residents invested with Gold-Quest as a result of the promotional activities of the Simply Wealth Respondents and Lobban Respondents. These activities included recommending investment in Gold-Quest, facilitating the process of investing in Gold-Quest, and, in certain cases, facilitating the transfer of funds to Gold-Quest on behalf of investors.
- The Simply Wealth Respondents and the Lobban Respondents were aware of the nature of the investment contracts with Gold-Quest. Gold-Quest told investors funds would be invested in the forex market and that they would receive returns of 87.5% per year on their investment.
- The Simply Wealth Respondents and Lobban Respondents received payments for referring investors to Gold-Quest pursuant to the Gold-Quest commission structure. The Simply Wealth Respondents and the Lobban Respondents did not tell the referred investors about the commissions being paid to them by Gold-Quest.
- The Simply Wealth Respondents realized a total of $215,790.00 (USD) in commissions from Gold-Quest as a result of their promotional activities. The Lobban Respondents realized a total of $84,381.50 (CDN) and $36,046.00 (USD) in commissions from Gold-Quest as a result of their promotional activities.
- There were no exemptions under the *Act* which allowed the Simply Wealth Respondents and the Lobban Respondents to trade in Gold-Quest securities in Ontario.

- The Simply Wealth Respondents and the Lobban Respondents admitted culpability for the breaches of the *Act* alleged in Staff's Amended Statement of Allegations and further admitted that they engaged in conduct contrary to the public interest.

[16] Staff submit that admissions made by the Simply Wealth Respondents and the Lobban Respondents in their Agreed Statements of Fact and admissions made in the course of their compelled examinations satisfy the essential elements of the allegations made against them. I agree and so find.

(b) The K&S Respondents

(1) The Agreed Statement of Facts

[17] The Agreed Statement of Facts of Mr. Persaud and K&S (the "**K&S Respondents**") establishes that:

- Neither of the K&S Respondents were registered with the Commission to trade in securities during the Material Time. Further, Gold-Quest was not registered with the Commission to trade in securities during the material time (Ex. 4, Agreed Statement of Facts of the K&S Respondents at paras. 1-2 and 12).

- No preliminary prospectus or prospectus has ever been filed with the Commission by Gold-Quest to attempt to qualify the trading of Gold-Quest securities (Ex. 4, Agreed Statement of Facts of the K&S Respondents at para. 12).

- Mr. Persaud was advised by the principals of Gold-Quest that investors would enter into one-year contracts with Gold-Quest, the invested funds would be invested in the forex market, investors would receive an annual return on their investment of 87.5%, in order to receive this annual return, investors were required to leave their funds with Gold-Quest for a period of one year, and that investors who introduced another investor to Gold-Quest would receive the title of "Administrative Manager" for the new investor (Ex. 4, Agreed Statement of Facts of the K&S Respondents at para. 14).

- Mr. Persaud booked a conference room for a Gold-Quest presentation held on November 2, 2006. He sent out invitations to this presentation to various family members and friends (Ex. 4, Agreed Statement of Facts of the K&S Respondents at paras. 16 and 17).

- During the Material Time, nine Ontario residents invested approximately $69,000 (USD) with Gold-Quest. Mr. Persaud acted as an Administrative Manager for these nine investors (Ex. 4, Agreed Statement of Facts of the K&S Respondents at para. 24).

- The K&S Respondents were aware of the terms of the Gold-Quest Commission Structure. Mr. Persaud provided investors with information concerning the commissions (Ex. 4, Agreed Statement of Facts of the K&S Respondents at para. 25).

- One of the individuals to whom Mr. Persaud acted as Administrative Manager was Donald Iain Buchanan **("Buchanan")** who promoted Gold-Quest to Ontario residents, resulting in additional investment of approximately $1,800,000 (USD) with Gold-Quest. The K&S Respondents were the Managing Directors or Supervisory Managing Directors for investors that were brought into Gold-Quest under Buchanan (Ex. 4, Agreed Statement of Facts of the K&S Respondents at paras. 26 and 27).

- The K&S Respondents received $90,000 (USD) in commissions from Gold-Quest, pursuant to the Gold-Quest commission structure (Ex. 4, Agreed Statement of Facts of the K&S Respondents at paras. 27 and 28).

(2) Further Evidence

[18] Other evidence presented or filed in the course of the Hearing, including admissions made in the course of Mr. Persaud's compelled examination, Mr. Persaud's testimony at the Hearing, and the documentary evidence filed, establish the following facts which were not included in, or which elaborate upon, the K&S Respondents' Agreed Statement of Facts:

- Mr. Persaud invited his aunt, Susan Chetram, to a Gold-Quest presentation held on November 2, 2006, and directed her to the Gold-Quest website at www.g-qi.com (Ex. 16).

- Mr. Persaud personally sent invitations to the Gold-Quest presentation to approximately 15 to 20 family members and friends who were told that if they wanted to invest in Gold-Quest they would invest through the individual who invited them (Ex. 34).

- Mr. Persaud knew about the Gold-Quest commission structure prior to the Gold-Quest presentation and knew that he would receive a commission of 58% on the investment of anyone who signed up below him in the Gold-Quest commission structure (Ex. 7, Q181-186).

- Mr. Persaud spoke with Gold-Quest representatives on the phone respecting investors who had not received a subscription agreement or a welcome letter from Gold-Quest (Ex. 7, Q208-210).

- Mr. Persaud provided Gold-Quest membership forms to potential investors for them to fill out, would assign an ID code to the new investors once the forms were completed, and would send the completed forms by fax back to Gold-Quest (Ex. 7, Q341-350 and Q472-480).

- Mr. Persaud filled out the application forms for investors beneath him in the Gold-Quest commission structure who wanted to become Administrative Managers. He would then fax the completed forms to Gold-Quest for processing (Hearing Transcript of January 4, 2012 at pp. 35:3-18, 46:17-47:4).

- Mr. Persaud vetted the first few forms submitted by Administrative Managers beneath him in the Gold-Quest commission structure to ensure that the forms were filled out

correctly. Persaud assigned an ID code to the new agreement and then faxed it to Gold-Quest. The ID code ensured that Gold-Quest knew the new investor was beneath Persaud in the Gold-Quest commission structure and he received commissions of 1.5% per month as "Managing Director" and 1% per month as "Supervisory Managing Director" (Ex. 7, Q444-448).

- Mr. Persaud communicated with investors beneath him in the Gold-Quest commission structure on a regular basis and acted as a link between Gold-Quest and his investors. Persaud answered inquiries investors had concerning Gold-Quest and their on-going investment in Gold-Quest (Exs. 24-29, 31 and 32).

[19] Additional admissions made by Mr. Persaud in the course of his compelled examination, which corroborate the Agreed Statement of Facts and statements made by Mr. Persaud during his testimony at the Hearing, can be found in Schedule "2" to Staff's closing submissions.

C. Compensation Received and Realized by the Respondents

[20] Staff completed an analysis of the investor funds received and compensation realized by the Respondents as a result of their promotional activities regarding Gold-Quest securities. A summary of the results of such analysis follows:

RESPONDENT	TOTAL RECEIVED	TOTAL REALIZED
Naida Allarde Bernardo Giangrosso Simply Wealth Financial Group Inc.	$958,738.73 (USD)	$215,790.00 (USD)
Kevin Persaud K&S Global Creative Wealth Strategies Inc.	$254,007.04 (USD)	$90,000 (USD)
Maxine Lobban Wayne Lobban	$187,997.88 (USD)	$84,381.50 (CDN) $36,046.00 (USD)

(Ex. 15, Staff's Financial Analysis, index and supporting documentation)

[21] Further, all Respondents agreed that they realized the amounts above in their Agreed Statements of Fact.

PART THREE – THE LAW & ANALYSIS

A. The Commission's Public Interest Jurisdiction

[22] The Commission mandate in upholding the purposes of the *Act* is set out in section 1.1 of the *Act* as follows:

> **1.1 Purposes –** The purposes of this Act are,

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

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

[23] The Commission is guided by certain fundamental principles in upholding and achieving the purposes of the *Act*. These principles include:

> **2.1 Principles to Consider –** In pursuing the purposes of this Act, the Commission shall have regard to the following fundamental principles:
>
> […]
>
> 2. The primary means for achieving the purposes of this Act are,
>   i. requirements for timely, accurate and efficient disclosure of information;
>   ii. restrictions on fraudulent and unfair market practices and procedures; and
>   iii. requirements for the maintenance of high standards of fitness and business conduct to ensure honest and responsible conduct by market participants.
>
> (s. 2.1.2 of the *Act*)

[24] Administrative proceedings under the public interest provisions of the *Act* are one way in which the Commission carries out its statutory purposes (s. 127 of the *Act*).

[25] The purpose of the Commission's public interest jurisdiction is neither remedial nor punitive; it is protective and preventative, intended to be exercised to prevent likely future harm to Ontario's capital markets (*Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission),* [2001] 2 S.C.R. 132 at paras. 42).

[26] The public interest provisions in the *Act* "reveal the breadth of the Commission's public interest mandate" and make clear the intention of the Legislature to "give the Commission a very broad discretion to determine what is in the public interest" (*Pezim v. British Columbia (Superintendent of Brokers),* [1994] 2 S.C.R. 557 at paras. 70-71).

[27] The scope of the Commission's discretion in defining the public interest is limited only by the general purposes of the *Act* (*Gordon Capital Corp. v. Ontario (Securities Commission),* [1991] O.J. No. 934 (Ont. Ct. J.) at p. 9 (Q.L.)).

B. Standard of Proof

[28] It is well established that the standard of proof that must be met in administrative proceedings is the civil standard of the "balance of probabilities". The civil standard of proof and the nature of the evidence which is required to meet that standard are integral to the duty of administrative tribunals to provide a fair hearing (*Re ATI Technologies* (2005), 28 O.S.C.B. 8558 at paras. 13-14).

[29] The Supreme Court of Canada stated that the "evidence must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test." However, this requirement of clear, convincing and cogent evidence does not elevate the standard of proof beyond the balance of probabilities (*F. H. v. McDougall,* [2008] 3 S.C.R. 41 at para. 46).

[30] Keeping in mind the standard of proof of a balance of probabilities and the requirements of clear, convincing and cogent evidence, in considering the evidence it is appropriate to attribute to corporate respondents the knowledge of, and information known by, directors of the company during the Material Time (*Re Biovail Corporation* (2010), 33 O.S.C.B. 8914 at para. 84).

C. Unregistered Trading in Securities

(a) Registration Requirements

[31] Subsection 25(1)(a) of the *Act*, prior to September 28, 2009, stated:

> **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 registration from the Director and, where the registration is subject to terms and conditions, the person or company complies with such terms and conditions.

[32] The requirement that individuals and companies be registered with the Commission to trade in securities is one of the cornerstones of the regulatory framework of the *Act*. Through the registration process, the Commission attempts to ensure that those who engage in trading activities meet the necessary proficiency requirements, are of good character and satisfy the appropriate ethical standards (*Gregory & Co. v. Quebec (Securities Commission)*, [1961] S.C.R. 584 ("***Gregory***") at p. 4 (Q.L.)*; Re First Global Ventures S.A.* (2007), 30 O.S.C.B. 10473 at para. 122).

[33] The registration requirement was discussed by the Supreme Court of Canada in *Gregory* as follows:

> The paramount object of the Act is to ensure that persons who, in the province, carry on the business of trading in securities or acting as investment counsel, shall be honest and of good repute and, in this way, to protect the public, in the province or elsewhere, from being defrauded as a result of certain activities initiated in the province by persons therein carrying on such a business. For the attainment of this object, trading in securities is defined in

> s. 14 [s. 1(1) of the Act]; registration is provided in s. 16 [s. 25 of the Act] as a requisite to trade in securities.
>
> *(Gregory,* above, at p. 4 (Q.L.))

[34] With respect to the phrase "trade in a security" used in subsection 25(1)(a) of the *Act*, the definition of "security" under subsection 1(1)(n) of the *Act* includes "any investment contract". "Investment contract" is not a term defined in the *Act* but its interpretation has been the subject of a long line of established jurisprudence.

(b) An Investment Contract is a Security

[35] In the leading case, *Pacific Coast Coin*, the Supreme Court of Canada considered what constitutes an "investment contract" within the meaning of the *Act* and reviewed the test established by the United States Supreme Court in *Howey* "Does the scheme involve an investment of money in a common enterprise, with profits to come solely from the efforts of others?" *(Pacific Coast Coin Exchange of Canada v. Ontario (Securities Commission),* [1978] 2 S.C.R. 112 *("**Pacific Coast Coin**")* at pp. 10-11 (Q.L.)*; Securities and Exchange Commission v. W.J. Howey Co.,* 328 U.S. 293 (1946) (*"**Howey**"*) at pp. 298-299 (p. 4, LexisNexis)).

[36] In *State of Hawaii, Commissioner of Securities v. Hawaii Market Center, Inc.*, cited with approval in *Pacific Coast Coin*, the Supreme Court of Hawaii crafted a risk capital approach to defining an investment contract. The Court based its approach on a recognition that:

> [T]he salient feature of securities sales is the public solicitation of venture capital to be used in a business enterprise […] This subjection of the investor's money to the risks of an enterprise over which he exercises no managerial control is the basic economic reality of a security transaction.
>
> (*State of Hawaii, Commissioner of Securities v. Hawaii Market Center, Inc.,* 485 P. 2d 105 (1971) at 109 (p. 3, LexisNexis)

[37] In *Pacific Coast Coin*, the Supreme Court of Canada refined the branch of the *Howey* test respecting whether "profits come solely from the efforts of others":

> The word 'solely' in [the *Howey*] test has been criticized and toned down by many jurisdictions in the United States. As mentioned in the *Turner* case, to give a strict interpretation to the "solely" […] "would not serve the purpose of the legislation. Rather we adopt a more realistic test, whether the efforts made by those other than the investor are the undeniably significant ones, those essential managerial efforts which affect the failure or success of the enterprise". In the same case of Turner, the expression "common enterprise" has been defined to mean […] "one in which the fortunes of the investor are [i]nterwoven with and dependent upon the efforts and success of those seeking the investment or of third parties". These refinements of the test, I accept.

(*Pacific Coast Coin,* above, at p.11 (Q.L.))

[38] The Supreme Court of Canada's formulation of the test in *Pacific Coast Coin* thus requires the tribunal to consider:

(1) an investment of money;

(2) with an intention or expectation of profit;

(3) in a common enterprise, in which the fortunes of the investor are interwoven with and dependent upon the efforts and success of those seeking the investment or of third parties; and

(4) whether the efforts made by those other than the investor are undeniably significant ones, those essential managerial efforts which affect the failure or success of the enterprise.

(*Pacific Coast Coin,* above, at p. 11(Q.L.))

[39] The Court considered the third and fourth parts together and accepted that a common enterprise "exists when it is undertaken for the benefit of the supplier of capital (the investor) and of those who solicit the capital (the promoter)." The relationship was one in which the investor's role was limited to the advancement of money, and the managerial control over the success of the enterprise was that of the promoter. The Court held that the "community" or "commonality" necessary for an investment contract is between the investor and the promoter (*Pacific Coast Coin,* above, at p. 12 (Q.L.)).

[40] The Supreme Court of Canada also observed that the intention of the Legislature is evident in the broad terms employed in defining "security" in the *Act*. The Court described the *Act* as "remedial legislation which must be construed broadly, and … read in the context of the economic realties to which it is addressed. Substance, not form, is the governing factor" (*Pacific Coast Coin,* above, at p. 10 (Q.L.)).

[41] The application of the investment contract test formulated by the Supreme Court of Canada in *Pacific Coast Coin* must be consonant with the important public policy goals and mandate of the Commission. To achieve the purposes of the *Act*, the definition of "investment contract" must embody a flexible rather than a static principle, one that adapts to the countless investment schemes devised by those who seek to use others' money on the promise of profits (*Pacific Coast Coin,* above, at p. 10 (Q.L.)).

[42] I find that the Gold-Quest membership agreements are "investment contracts" for the following reasons: (1) individuals would provide Gold-Quest with monies; (2) individuals would expect to receive a 87.5% rate of return per annum on their monies; and (3) would expect that their monies would be invested by Gold-Quest in the forex market with investors taking a passive role in the success or failure of the enterprise. In the Gold-Quest scheme, the investor's role was limited to the advancement of money, while the managerial control over the success of the enterprise rested with Gold-Quest.

(c) Trading and Acts in Furtherance of a Trade

[43] The definition of "trade" or "trading" as defined in subsection 1(1) of the *Act* includes:

> (a) any sale or disposition of a security for valuable consideration whether the terms of payment be on margin, instalment or otherwise,
>
> […]
>
> (e) any act, advertisement, solicitation, conduct or negotiation directly or indirectly in furtherance of the foregoing.

[44] The inclusion of the word "indirectly" in the definition of "acts in furtherance" 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 (*Re Goldbridge Financial Inc. et al.* (2011), 34 O.S.C.B. 1064 at para. 27).

[45] An act constitutes an act in furtherance of a trade if there is a sufficient proximate connection between the act and the trade in securities:

> There is no bright line separating acts, solicitations and conduct indirectly in furtherance of a trade from acts, solicitations and conduct not in furtherance of a trade. Whether a particular act is in furtherance of an actual trade is a question of fact that must be answered in the circumstances of each case. A useful guide is whether the activity in question had a sufficiently proximate connection to an actual trade.
>
> (*Re Costello* (2003), 26 O.S.C.B. 1617 at para. 47)

[46] The Commission has found that a variety of activities constitute acts in furtherance of trades including, but 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 Corp.* (2006), 29 O.S.C.B. 7408 ("***Momentas***") at para. 80)

[47] In *Re Guard Inc.*, the Commission found that the preparation and dissemination of materials describing the business of the company and which advised recipients of the opportunity to invest in an offering constituted acts in furtherance of a trade. The Commission found that the respondent's activities, taken as a whole, amounted to the preparation of the market by creating an interest in the respondent's activities and a solicitation of potential investors (*Re Guard* (1996), 19 O.S.C.B. 3737 at p. 18 (Q.L.)).

[48] Solicitation or direct contact with investors is not required for an act to constitute an act in furtherance of a trade (*Re Lett* (2004), 27 OSCB 3215 at paras. 48-51 and 64; *Re Allen* (2005), 28 O.S.C.B. 8541 at para 85)

[49] An act in furtherance of a trade does not require that an investment contract be completed or that an actual trade otherwise occur. Any claim that an actual trade must occur for there to be an act in furtherance of a trade would necessarily limit the effectiveness of and negate the purpose of the *Act,* which is to regulate those who trade, or purport to trade, in securities (*Re First Federal Capital (Canada) Corp.* (2004), 27 O.S.C.B. 1603 at paras. 46-47 and 50-51).

[50] The Commission has found that it must adopt a contextual approach and assess "the totality of [a respondent's] conduct and the setting in which the acts have occurred" to determine whether non-registrants have acted in furtherance of a trade; the primary focus of this assessment is the effect these acts had on the persons at whom the acts were directed (*Momentas,* above*,* at para. 77).

(d) Did the Simply Wealth Respondents and the Lobban Respondents Trade in Securities?

[51] The admissions, described at paragraph 15 above, confirm that the conduct of the Simply Wealth Respondents and the Lobban Respondents, with respect to securities, was in breach of the *Act*. These respondents traded in securities without being registered to do so, contrary to s. 25 of the *Act*.

(e) Did the K&S Respondents Trade in Securities?

[52] I reject the submissions that Kevin Persaud's actions were merely of an administrative function as opposed to acts in furtherance of a trade. I do so for the following reasons:

- He invited approximately 15 to 20 persons to attend the presentation on Gold-Quest in Toronto;
- Nine of the persons he invited to the presentation invested in Gold-Quest;
- He recommended to his Aunt that she consider investing in Gold-Quest and directed her to its website;
- When he issued his invitations to the presentation, he knew the compensation scheme offered by Gold-Quest and, as an original inviter he would reap 58% of investments made by his invitees, with possible future benefits to follow;

- He was the Administrative Manager to those investors who were required to go through him in any dealings with Gold-Quest;

- He helped investors complete their forms and forwarded those forms to Gold-Quest; and

- He was paid $90,000.00 for his services, an unlikely sum for a purely administrative function.

[53] I find these acts of the K&S Respondents, taken in there totality, to be acts in furtherance of trading contrary to s. 25 of the *Act.*

(f) Do the K&S Respondents have a defense of due diligence?

[54] Counsel for the K&S Respondents made closing submissions claiming that lack of motive, intention or knowledge on Mr. Persaud's part were relevant considerations when determining breach.

[55] Following the closing oral submissions, I directed the Secretary to invite written submissions on the decision in *Re Sabourin* (2009), 32 O.S.C.B. 2707 ("***Sabourin***") which was not cited to me in argument.

[56] In particular, I drew counsel's attention to paras. 64 to 71 of *Sabourin.* Paragarphs 64 to 66 of *Sabourin* provide:

> [64] An issue raised in this proceeding is whether what the Respondents knew, or believed, or intended has any relevance in this proceeding. Staff submits that it need not establish motive, intention, knowledge or belief on the part of Respondents in order to prove its allegations. Staff relies on the following passage from *Standard Trustco Ltd. (Re)* (1992), 15 O.S.C.B. 4322 at 4359-60:
>
> > While the Commission should consider the state of mind of the Respondents in deciding whether to exercise its public interest jurisdiction, it is not determinative. It is not necessary for us to find that the Respondents acted wilfully or deceitfully in order to exercise our public interest jurisdiction. In the case of *Gordon Capital Corporation and Ontario Securities Commission* (1990), 13 OSCB 2035, affirmed (1991) 14 OSCB 2713 (Ont. Div. Ct.) at p. 14, Craig J. stated:
> >
> > > The fact that Gordon may have acted without malevolent motive and inadvertently is not determinative of the right of the OSC to exercise its regulatory and discretionary powers to impose a sanction upon Gordon.
> >
> > Although that case involved a hearing into whether it was in the public interest to suspend, cancel, restrict or impose conditions on the registration

> of a registrant and not a section 128 hearing, we believe the same principle applies in the case at hand.
>
> [65] In *Re Gordon Capital Corporation* (1990), 13 O.S.C.B. 2035, affirmed (1991), 14 O.S.C.B. 2713 (Ont. Div. Ct.) [*Gordon Capital*], the respondents conceded that breaches of the Act occurred, but argued that they should be excused on the basis that the breaches were inadvertent and not reasonably foreseeable. The Commission rejected that position.
>
> [66] In affirming the Commission's decision, the Ontario Divisional Court indicated that the classification of offences into categories of "absolute liability", "strict liability" and full "*mens rea*" is only relevant to criminal and quasi-criminal proceedings and that the due diligence defence is not applicable to proceedings that are regulatory, protective or corrective in nature. The court emphasized the distinction between charging a respondent with a criminal or quasicriminal offence and alleging that a respondent breached a regulatory statute: while the former may result in punitive consequences, regulatory proceedings are protective of the public in regulating certain activities. The primary purpose of proceedings under the Act is "to maintain standards of behaviour and regulate the conduct of those who are licensed to carry on business in the securities industry." The court, therefore, concluded that the Commission did not commit any error in law by rejecting the due diligence defence (*Gordon Capital, supra* at 2723-26 (Ont. Div.Ct.).

[57] Counsel for the K&S Respondents submits that para. 59 of *Sabourin,* which is a direct cite of *Momentas* (at para. 77) noted above at paragraph 50 of this decision, would seem to indicate that the state of mind of the individual charged would be relevant. With respect, I disagree. Paragraph 59 of *Sabourin* found that "[s]uch approach requires an examination of the totality of the conduct and the setting in which the acts have occurred, the primary consideration of which is the effects the acts had on those to whom they were directed"[emphasis added].

D. Distributing Securities Without a Prospectus

[58] During the Material time, s. 53(1) of the *Act* stated:

> **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 distributed of security, unless a preliminary prospectus or a prospectus have been filed and receipts have been issued for them by the Director.

[59] As found earlier at paragraph 16, the Simply Wealth Respondents and the Lobban Respondents admitted to culpability of breaches of the *Act* alleged against them. They traded in securities without a prospectus or preliminary prospectus being filed with the Commission and without a receipt being issued by the Director.

[60] I find that the K&S Respondents engaged in acts in furtherance of trade, as described at paragraph 52 above, which were also trades of securities without a prospectus or preliminary

prospectus being filed with the Commission and without a receipt being issued by the Director. Therefore, the K&S Respondents are in breach of s. 53(1) of the *Act*.

E. Director and Officer Liability

[61] During the Material time, s. 129.2 of the *Act* stated:

> **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.

[62] Ms. Allarde and Mr. Giangrosso were directors of Simply Wealth. They were aware of the nature of the investment contracts, acknowledged the involvement of Simply Wealth and admitted to culpability for breaches of the *Act*. As a result, I find that Ms. Allarde and Mr. Giangrosso authorized, permitted or acquiesced in breaches of sections 25 and 53 of the *Act* by Simply Wealth, contrary to s. 129.2 of the *Act*. I similarly find that Mr. Persaud, as the sole director of K&S, authorized, permitted or acquiesced in breaches of sections 25 and 53 of the *Act* by K&S contrary to s. 129.2 of the *Act*.

PART FOUR - CONCLUSION

[63] I find the conduct of Simply Wealth and its directors Ms. Allarde and Mr. Giangrosso, was contrary to the public interest and constituted the following breaches of the *Act*:

i. trading without registration contrary to section 25 of the *Act*;

ii. an illegal distribution of securities contrary to section 53 of the *Act*; and

iii. as directors of Simply Wealth, Ms. Allarde and Mr. Giangrosso authorized, permitted or acquiesced in breaches of sections 25 and 53 of the *Act* by Simply Wealth, contrary to section 129.2 of the *Act*.

[64] I find the conduct of K&S, and its director Kevin Persaud, was contrary to the public interest and constituted the following breaches of the *Act*:

i. trading without registration contrary to section 25 of the *Act*;

ii. an illegal distribution of securities contrary to section 53 of the *Act*; and

iii. as a director of K&S, Kevin Persaud authorized, permitted or acquiesced in breaches of sections 25 and 53 of the *Act* by K&S, contrary to section 129.2 of the *Act*.

[65] I find the conduct of Maxine Lobban and Wayne Lobban was contrary to the public interest and constituted the following breaches of the *Act*:

i. trading without registration contrary to section 25 of the *Act*; and

ii. an illegal distribution of securities contrary to section 53 of the *Act*.

[66] 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 this 21st day of June, 2012.

"James D. Carnwath"

James D. Carnwath, Q.C.