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

- AND -

**IN THE MATTER OF EMPIRE CONSULTING INC. and
DESMOND CHAMBERS**

**REASONS AND DECISION
(Sections 127 and 127.1 of the Act)**

Hearing:	January 26 and 27, 2012 March 22, 2012	
Decision:	August 16, 2012	
Panel:	Edward P. Kerwin	- Commissioner
Appearances:	Derek J. Ferris	- For Staff of the Commission
	No one appeared for the Respondents:	- Desmond Chambers - Empire Consulting Inc.

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REASONS AND DECISION

I. BACKGROUND

[1] This proceeding arises out of a Notice of Hearing issued on May 26, 2011 by the Ontario Securities Commission (the "**Commission**") and a Statement of Allegations filed by Staff of the Commission on the same day. An Amended Statement of Allegations was filed by Staff on October 31, 2011. A hearing was conducted before the Commission on January 26 and 27, 2012 and March 22, 2012 pursuant to sections 127 and 127.1 of the *Securities Act*, R.S.O. 1990, c. S.5, as amended (the "**Act**") to consider whether the respondents, Empire Consulting Inc. ("**Empire**") and Desmond Chambers ("**Chambers**") (collectively, the "**Respondents**") breached certain provisions of the Act and/or acted contrary to the public interest (the "**Merits Hearing**").

A. Preliminary Issues

i) Service

[2] Staff presented the Panel with evidence of telephone and e-mail correspondence between Staff and the Respondents regarding service of the Notice of Hearing, the Statement of Allegations, the Amended Statement of Allegations, as well as the matter of the attendance of the Respondents at the Merits Hearing.

[3] Staff provided affidavit evidence that describes Staff's correspondence with Chambers as set out, in part, as follows:

> a) On April 11, 2011, Staff spoke with Chambers by telephone who advised Staff that he now resides in Mandeville, Jamaica. Chambers provided Staff with his e-mail address but refused to provide a mailing address.
>
> b) On June 28, 2011, Staff sent the Notice of Hearing and Statement of Allegations by e-mail to the Respondents at the e-mail address provided by Chambers. Staff further telephoned Chambers that same day to advise him that these materials had been sent to him by e-mail. During that telephone call, Chambers advised that he did not plan on attending any proceedings before the Commission.
>
> c) On July 4, 2011, Staff spoke with Chambers by telephone who continued to refuse to provide a mailing address and reiterated that he would not be attending any hearings before the Commission.
>
> d) Staff worked diligently with the Jamaican Financial Services Commission from April 11, 2011 to July 25, 2011 to effect service of the Notice of Hearing and Statement of Allegations in hard copy with the assistance of the Jamaican police; however, the Jamaican authorities have been unable to locate Chambers.
>
> e) On July 25, 2011, Chambers confirmed in a telephone conversation with Staff that he was in receipt of the Notice of Hearing and Statement of Allegations, but that he did not intend to attend the Merits Hearing.

f) On November 3, 2011, Staff sent a copy of the Amended Statement of Allegations to the Respondents by e-mail.

g) Staff provided Chambers with copies of the hearing brief, including all documents that Staff intended to produce or enter as evidence at the Merits Hearing, a list of witnesses that Staff intended to call to testify at the Merits Hearing and a summary of the evidence that the witness was expected to give at the hearing in advance of the Merits Hearing, by sending these materials to the Respondents by e-mail.

[4] Rule 1.5.1 (1)(f) of the *Rules of Procedure* of the Commission provides as follows:

> **1.5.1 Service of Documents on Parties – (1)** All documents required to be served under the Rules shall be served by one of the following methods:
>
> **…**
>
> (f) electronically to the facsimile number or e-mail address of the party or the representative of the party.

[5] This Panel is satisfied that Staff have met their service obligations under Rule 2.1(3) by serving the Notice of Hearing, Statement of Allegations, and Amended Statement of Allegations on the Respondents by emailing same to the e-mail address that was provided by Chambers, pursuant to pursuant to Rule 1.5.1(1)(f). The Panel notes that Chambers has acknowledged receipt of these initiating documents.

[6] This Panel is satisfied that Staff have met their service obligations under Rules 4.3 and 4.5 by serving the hearing brief, witness lists and witness statements on the Respondents by sending them electronically to the e-mail address that was provided by Chambers pursuant to Rule 1.5.1(1)(f).

ii) Failure of the Respondents to Appear

[7] Subsection 7(1) of the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22, as amended, (the "**SPPA**") provides that:

> 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.

[8] The Panel notes the following passage from *Administrative Law in Canada*:

> Where a party who has been given proper notice fails to respond or attend, the tribunal may proceed in the party's absence and the party is not entitled to further notice. All that the tribunal need establish, before proceeding in the absence of the party, is that the party was given notice of the date and place of the hearing. The tribunal need not investigate the reasons for the party's absence. (Sara Blake, *Administrative Law in Canada*, 5th ed. (Markham: LexisNexis, 2011) at p.32)

[9] The Respondents did not attend the Merits Hearing. As noted above, the Panel accepts Staff's evidence that the Respondents have been in receipt of the Notice of Hearing and Statement of Allegations since no later than July 25, 2011 and that Chambers indicated on July 25, 2011 and again as recently as January 25, 2012, that the Respondents had no intention of attending any hearing before the Commission. The Panel finds that the Respondents were given proper notice of the Merits Hearing, were well aware of the hearing dates in this matter, and were provided with sufficient time to prepare and attend and were also provided with the option of participating in the Merits Hearing by teleconference and have chosen not to do so.

[10] The Panel is satisfied that it is properly able to proceed with the Merits Hearing in the Respondents' absence in accordance with subsection 7(1) of the SPPA.

II. OVERVIEW OF THE HEARING

[11] Empire was a financial consulting firm that provided tax consulting, investment planning, and debt restructuring services to investors from approximately April 2007 to October 2009 (the "**relevant time**"). Chambers was the principal director and officer and sole signing authority for Empire. The Respondents launched the "D.E.S. program" or the "debt elimination strategy" program ("**DES**") whereby they advised clients to use funds borrowed against their homes to pay down other existing debts and to invest in a foreign exchange portfolio exclusively managed and controlled by the Respondents. The Respondents represented that the DES program would return 2% to 6% on investments per month and would enable investors to pay off their mortgages within 5 to 7 years.

[12] This proceeding relates to Empire and Chambers, the principal director and officer of Empire and sole signing authority of Empire's bank accounts, who together received at least $1,493,108 from 26 identifiable investors in Ontario.

[13] Staff allege that, during the relevant time, the Respondents acted as advisers and traded in investment contracts without being registered to do so under the Act. Staff further allege that, during the relevant time, the Respondents did not comply with prospectus requirements pursuant to the Act nor did they qualify for any exemptions from doing so. Staff allege that the Respondents fraudulently enticed investors with misleading profit projection tables, false information about the state of their investments and the profitability of Empire, by using investor funds for personal purposes, and by causing Empire to use new investor funds to repay amounts to previous investors. Staff also allege that, as a director and officer of Empire, Chambers authorized, permitted and acquiesced in the commission of breaches of the Act by Empire contrary to the public interest.

III. THE PARTIES

A. The Respondents

[14] Empire was incorporated in Ontario pursuant to the *Business Corporations Act*, R.S.O. 1990, c. B.16 (the "**OBCA**") on September 1, 2005. There is no record of Empire having been registered under the Act at any time.

[15] Chambers is a self-described investment consultant and was a director, officer and the sole signing authority of Empire at all times. Chambers lived in Ontario during the relevant

time. He was registered under the Act as a mutual fund salesperson from 1989 to 2003. There is no record of Chambers having been registered under the Act during the relevant time.

B. Other Relevant Players

[16] Hummingbird Financial Corporation ("**Hummingbird**") is a company that provides bookkeeping and taxation services and was incorporated in Ontario pursuant to the OBCA on April 19, 2006. Hummingbird shared office space with Empire at a shared-facility location called Canadian Executive Centre at 10 Kingsbridge Garden Circle in Mississauga, Ontario.

[17] Norman Nelson ("**Nelson**") is the president and director of Hummingbird. Nelson is a former mutual funds dealer and salesperson and currently is licensed through the Financial Services Commission of Ontario to sell life insurance, which he does from time to time. Nelson was a director of Empire during part of the relevant time from November 2007 to February 2008, at which point he resigned from Empire's board.

IV. THE ALLEGATIONS

A. Trading without Registration

[18] In the Amended Statement of Allegations, Staff allege that, during the relevant time, the Respondents received approximately $1.6 million from 33 clients for the purpose of investing in a foreign exchange ("**Forex**") trading program and that, in doing so, the Respondents engaged in trading in investment contracts and as such were required to be registered under the Act. Staff allege that the Respondents' trading activities were contrary to subsection 25(1)(a) of the Act pre-September 28, 2009 and contrary to subsection 25(1) of the Act post-September 28, 2009.

B. Acting as an Advisor without Registration

[19] Staff allege that the Respondents received instructions from investor-clients to act on their behalf in matters associated with the management and direction of their Forex investment portfolios and "to actively manage all aspects of the portfolios" and, in doing so, acted as advisers to approximately 33 clients without being registered with the Commission.

[20] Staff allege that in light of the failure of the Respondents to be registered, the Respondents' advisory activities were contrary to subsection 25(1)(c) of the Act pre-September 28, 2009 and contrary to formerly subsection 25(3) post-September 28, 2009.

C. Illegal Distribution

[21] Staff allege that, during the relevant time, the Respondents distributed investment contracts without filing a prospectus or obtaining a receipt from the Director nor were they exempted from doing so. As such, Staff allege that the Respondents' activities were contrary to subsection 53(1) of the Act.

D. Fraudulent Conduct

[22] Staff allege in the Amended Statement of Allegations that the Respondents engaged in acts, practices or courses of conduct relating to securities that they knew or reasonably ought to have known perpetrated a fraud on investors that were contrary to the public interest in breach of subsection 126.1(b) of the Act by:

a) Representing that principal payments were guaranteed and locked in for one year in order to attract investors;

b) Creating misleading tables indicating investments would compound at interest rates of 2% to 6% per month in order to induce clients to invest with the Respondents;

c) Using $692,307 of new investor funds to pay for investor repayments and returns to other investors;

d) Using approximately $300,000 of investor funds for the Respondents' personal expenses including rent for his condominium and office, vehicle lease payments, food, liquor, and clothing; and

e) Making misrepresentations to clients including but not limited to:

   (i) That their portfolios had achieved specific rates of return on their investments as specified in various investor-clients' statements;

   (ii) The value of their portfolios were increasing;

   (iii) That all principal investments were in a Forex trading program;

   (iv) That profits from the Forex program were being used to pay down clients' outstanding debts;

   (v) That the DES program would eliminate the investor-clients' debts in five to seven years while simultaneously building their retirement portfolios; and

   (vi) That Forex trading provides above average returns with less risk.

E. Conduct Contrary to the Public Interest

[23] Staff allege that Chambers, in his capacity as director and officer of Empire, authorized, permitted or acquiesced in Empire's breaches of sections 25, 53 and 126.1 of the Act, contrary to section 129.2 of the Act.

[24] Staff allege that, in light of all of the allegations listed above and Chambers' alleged breach of section 129.2 of the Act, the Respondents have acted contrary to the public interest.

V. ISSUES

[25] This matter raises the following issues for consideration:

a) Did the Respondents trade in securities without being registered contrary to subsection 25(1)(a) of the Act pre-September 28, 2009 and subsection 25(1) of the Act post-September 28, 2009?

b) Did the Respondents engage in activity such that they acted as advisors without being registered contrary to subsection 25(1)(c) of the Act pre-September 28, 2009 and subsection 25(3) of the Act post-September 28, 2009?

c) Did the Respondents distribute securities without meeting the proper requirements or exemptions contrary to subsection 53(1) of the Act?

d) Did the Respondents engage or participate in acts, practices or courses of conduct relating to securities in respect of Empire that the Respondents knew or reasonably ought to have known perpetrated a fraud on persons contrary to subsection 126.1(b) of the Act?

e) Did Chambers, in his capacity as director and officer of Empire, authorize, permit or acquiesce in the commission of violations by Empire of sections 25, 53, and 126.1 of the Act contrary to section 129.2 of the Act?

VI. EVIDENCE AND FINDINGS

A. Evidence Submitted at the Hearing

[26] This was an electronic hearing. In total, Staff filed 106 exhibits. The first four exhibits consisted of four volumes of documents that were provided in electronic form. The fifth exhibit was a compilation of affidavits and exhibits sworn by Raymond Daubney ("**Daubney**"), the lead investigator with the Enforcement branch of the Commission with respect to the investigation into Chambers and Empire (the "**Daubney Affidavits**"). The Daubney Affidavits provide details of Staff's communications with Chambers over the last year. Further, more recent communications between Daubney and Chambers were entered as exhibits 6 and 7. Exhibit 8 was the Affidavit of Michelle Hammer, an investigator with the Case Assessment Unit of the Enforcement branch of the Commission sworn January 23, 2012 (the "**Hammer Affidavit**"). The remaining 98 exhibits consisted of documents that can be found in the first four binders of documents (the first four exhibits) and included, in part:

a) Investor documents;

b) Transcripts of Staff's interviews with Chambers;

c) E-mail correspondence between Staff and Chambers;

d) Corporate documents and registration certificates for all relevant individuals and entities;

e) Tables prepared by Staff summarizing Empire's receipt and application of investor funds;

f) Trading records of Empire's nine different trading accounts with three different foreign exchange trade companies in the United States: HotSpot FXR L.L.C. ("**HotSpot**"), Global Forex Trading, and Forex Capital Markets LLC ("**FXCM**"); and

g) Copies of the Respondents' bank records with The Toronto-Dominion Bank (the "**TD Bank records**").

[27] In addition to filing these exhibits, Staff called six witnesses which included four investor witnesses, Daubney, and Nelson. Staff also submitted evidence of its seventh witness, Michelle Hammer, by way of the Hammer Affidavit, as referred to above.

[28] The evidence given by the investor witnesses was consistent as between each of them. Each investor testified that Chambers induced them into investing with Empire under the promise of receiving 3% to 4% monthly returns on their investments. Each investor testified that Chambers told them they would be debt-free in 5 to 7 years of investing with the DES program. Each investor testified that they signed an authorization for Empire to manage all aspects of their investment portfolio (the "**Empire Authorizations**") but that after signing the Empire Authorizations, the investors were given little or no updates on their investments other than verbal representations by Chambers that their portfolio was increasing in value. Each investor further testified that as of December 2009 Chambers was unreachable and, by January 2010, they each received a copy of an e-mail from Chambers indicating that their money is gone (the "**Chambers E-mail")**. The Chambers E-mail, dated January 24, 2010, has in its "re" line: "I will make good to you, please pe [*sic*] patient with me" and reads in part as follows:

> On behalf of Empire Consulting Inc., I regret to inform the closure of business effective immediately and the need to hand over all corporate activities & client related files to a Receiver & Trustee in Bankruptcy.
>
> …
>
> In attempts to satisfy total liabilities of approximately $1,250,000, I am currently out of the country seeking financial solutions that would allow for the means & methods for repayment of monies owing to all of you. However, this process will take time.

[29] None of the investor witnesses has heard from Chambers or Empire since the date of the Chambers E-mail.

[30] Nelson testified that he met Chambers through their shared office facilities and that he ultimately was engaged by Chambers to provide bookkeeping services for Empire, which included reconciling bank accounts, producing financial statements, and filing tax returns. He testified that he assisted Chambers in creating an excel-based software to help determine the necessary calculations for the DES program planned by Empire. Notwithstanding that Nelson stated that he was not involved in the investment side of the DES program, he gave evidence that he accompanied Chambers on a trip to Orlando, Florida to meet with a foreign exchange trader named Tom Flora to discuss Flora's trading record and a management fee structure. Nelson testified that his role was to act as a third party witness to the discussions with Tom Flora and that the result of that meeting was that Mr. Flora was retained to be a trade manager for Empire on the FXCM and, ultimately, the HotSpot accounts.

[31] Nelson testified that Empire's books and records were very poorly kept and that it was difficult to distinguish between business and personal expenses. He noted that Chambers' personal expenses for his clothing, apartment, and food were all run through Empire. Nelson indicated that he was uncomfortable with Empire's poor administration and the way Chambers evasively dealt with his clients. It is for these reasons that Nelson says he resigned from his position as a director of Empire very shortly after his appointment. Nelson also gave evidence that he only learned of Chambers' grandiose promises of investment returns after such investments were made.

[32] Daubney testified that from reviewing the documents he received through Nelson's cooperation in the investigation, he was able to determine that Chambers and Empire held three bank accounts with The Toronto-Dominion Bank. Accordingly, Daubney summonsed the TD Bank records during the course of his investigation, which included a USD account and a CAD account held by Empire (the "**Empire bank records**"), as well as a personal bank account for Chambers (the "**Chambers bank records**"). The Empire bank records showed that Chambers was Empire's sole signatory on its bank accounts and that Chambers described himself on the account opening documents as an "investment consultant". The Empire bank records included photocopies of cheques deposited into and withdrawn from its accounts as well as records of all wire transfers. Daubney testified that from the Empire bank records he was able to decipher the total amount of investor funds deposited into Empire's account and to whom Empire made payments, as well as the transfer of funds to various foreign exchange trading accounts located in the United States.

[33] As part of his investigation, Daubney cross-referenced various sources of information including the TD Bank records, the investment contracts between Empire and its investors, investor interviews, and surveys taken of known investors, in order to prepare a list of Empire's investors and the amount of funds that was both invested in and redeemed from Empire. Daubney maintained that because Empire did not have a complete set of records he had to piece together information and cross-reference various sources.

[34] Based on his review of all of the sources mentioned above, Daubney was able to clearly identify that the Respondents received at least CAD $1,493,108 from investors, of which approximately $680,602 was returned to investors. He looked at the various foreign exchange trading accounts (the "**Forex Accounts**") and determined that Empire's trades resulted in the following losses:

Forex Account	Total Overall Loss
Hotspot FXR L.L.C.	($70,188.48)
Global Forex Trading	($130,461.46)
Forex Capital Markets LLC	($295,887.53)

[35] On January 25, 2012, one day before the commencement of the Merits Hearing in this matter, Daubney spoke with Chambers by telephone, after which Chambers sent Daubney an e-mail (the "**Chambers 2012 E-mail**"), which states, in part, as follows:

> When I became aware of the delema [*sic*] I was in I started to try to cover up the problem by lying to you all which compounded the problem exponentially because each lie I told had to be covered by another and so on and so on.
>
> …
>
> I am profoundly sorry for those events and as I have said many times I WILL repay every cent that all of you lost.

[36] The Panel finds that the evidence presented at the Merits Hearing was convincing and uncontroverted. Most persuasive was the investors' evidence describing their individual experience with Chambers and Empire, which was consistent with one another and with the books and records that Staff were able to obtain and examine. We further note that the investors' evidence, the books and records of Empire, and the TD Bank records were consistent with Nelson's account of the business of Empire and the way in which Chambers conducted himself as principal of Empire.

[37] The Panel notes that although Staff indicated that they had been able to trace a figure of approximately $1.6 million received from 33 investors, as stated in the Amended Statement of Allegations, that had been deposited into the Empire bank accounts, the evidence at the Merits Hearing identified for the Panel only $1,493,108 that can specifically be traced to 26 investors.

VII. THE LAW AND ANALYSIS

Standard of Proof

[38] There is only one civil standard of proof and that is proof on a balance of probabilities. The balance of probabilities standard requires the trier of fact to decide whether it is more likely than not that an alleged event occurred. The Supreme Court of Canada has held that the evidence must be sufficiently clear, convincing and cogent to satisfy this standard of proof: *F.H. v. McDougall*, [2008] 3 S.C.R. 41 at paras. 40 and 46.

[39] The standard of proof in administrative proceedings in the civil standard of a balance of probabilities. The Supreme Court of Canada's findings regarding standard of proof has been adopted by the Commission in many of its decisions: *Re Sunwide Finance Inc*. (2009), 32 O.S.C.B. 4671 at paras. 26-28; *Re Al-Tar Energy Corp*. (2010), 33 O.S.C.B. 5535 at paras. 32-34 ("***Al-Tar***").

A. Trading without Registration

Did the Respondents engage in unregistered trading of securities contrary to subsection 25(1)(a) of the Act pre-September 28, 2009 and subsection 25(1) of the Act post-September 28, 2009?

[40] Staff allege that the Respondents breached subsections 25(1)(a) and 25(1) of the Act during the relevant time. On September 28, 2009, the Act was amended, which falls within the relevant time, and so it is important to consider the wording of the Act both before and after the amendment came into effect.

[41] Prior to September 28, 2009, subsection 25(1)(a) of the Act read as follows:

> 25. (1) 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.

[42] As of September 28, 2009, subsection 25(1) came into force and provides as follows:

> 25. (1) 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.

[43] The language of subsection 25 has become more broad as a result of the 2009 amendments; accordingly, if the Panel determines that the evidence indicates that the Respondents' actions prior to September 28, 2009 were contrary to the predecessor provision then the same behaviour post-September 28, 2009 must also be in violation of the broader wording of the Act. The same does not hold true in reverse; namely, acts that are found to be in contravention of the amended subsection 25(1) of the Act post-September 28, 2009 are not necessarily in contravention of subsection 25(1)(a) pre-September 28, 2009. In this case, Staff have alleged that the Respondents' behaviour and activities were the same throughout the relevant time.

[44] The phrase "engaging in the business of trading" indicates that the Commission must find a business purpose in determining whether a person or company is trading in securities pursuant to section 25 of the Act, as amended. In making this determination, the Commission must consider Companion Policy 31-103 at section 1.3, which provides as follows:

> **Business trigger for trading and advising**
>
> We refer to trading or advising in securities for a business purpose as the "business trigger" for registration.
>
> We look at the type of activity and whether it is carried out for a business purpose to determine if an individual or firm must register. We consider the factors set out below, among others, to determine if the activity is for a business purpose. For the most part, these factors are from case law and regulatory decisions that have interpreted the business purpose test for securities matters.

[45] The policy goes on to enumerate the following factors:

> a) Engaging in activities similar to a registrant;

b) Intermediating trades or acting as a market maker;

c) Directly or indirectly carrying on the activity with repetition, regularity or continuity;

d) Being, or expecting to be, remunerated or compensated; and

e) Directly or indirectly soliciting.

[46] The policy notes that the enumerated factors are not exhaustive and that no one factor on its own will determine whether an individual or firm is in the business of trading or advising in securities.

[47] It is also important in this case to consider the definition of the words "security", "trade" and "trading" as these terms appear in section 25 of the Act. Subsection 1(1) of the Act sets out the following definitions for these terms:

> "security" includes,
>
> …
>
> (n) any investment contract;
>
> …
>
> whether any of the foregoing relate to an issuer or proposed issuer.
>
> "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…
>
> …
>
> (e) any act, advertisement, solicitation, conduct or negotiation directly or indirectly in furtherance of any of the foregoing;

[48] This Commission has held that the inclusion of the word "indirectly" in the definition of "trade" or "trading" reflects the intention by the Legislature to capture conduct which seeks to avoid registration requirements by doing indirectly that which is prohibited directly (*Re Momentas Corp.* (2006), 29 O.S.C.B. 7408 at para. 79 ("***Momentas***")). It has also held that a respondent who accepts investors' funds for the purpose of an investment carries out an act in furtherance of a trade (*Re Lett* (2004), 27 O.S.C.B. 3215 at paras. 48-51 and 64 ("***Lett***")).

[49] An act is also 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 sufficient proximate connection to an actual trade. (*Re Costello* (2003), 26 O.S.C.B. 1617 at para. 47)

[50] Examples of activities that have fallen within the scope of "acts in furtherance of a trade" are set out in *Momentas* at paragraph 80 and include but are not limited to: a) Preparing and disseminating materials describing investment programs; b) Preparing and disseminating forms of agreements for signature of the investors; c) Conducting information sessions with groups of investors; and d) Meeting with individual investors (the "**Momentas Factors**").

[51] A key issue in this hearing is whether the signed letters by Empire's investors authorizing Empire "to actively manage all aspects" of each investor's portfolio, referred to above as the Empire Authorizations, constitute "investment contracts" under the definition of securities in subsection 1(1) of the Act. If they are investment contracts, the registration requirements of the Act apply.

[52] The term "investment contract" is not defined in the Act. The three-pronged test for determining an investment contract is enunciated in *Re Universal Settlements International Inc.* (2006), 29 O.S.C.B. 7880 ("***Universal***") at paragraph 9 and can be set out as follows:

(i) An investment of funds with a view to profit;

(ii) In a common enterprise; and

(iii) Where the profits are derived from the undeniably significant efforts of persons other than the investors.

[53] The three-pronged test for an investment contract, which was cited by the Commission in Universal was adopted by the Supreme Court of Canada in *Pacific Coast Coin Exchange of Canada v. Ontario (Securities Commission)*, [1978] 2 S.C.R. 112 at paras. 39 and 46 ("***Pacific Coast***").

Investment of Funds

[54] It is clear from the investor documents entered into evidence, the investors' testimony, and from Chambers' own e-mail to the Commission sent during the course of the investigation dated December 22, 2009 (the "**Chambers 2009 E-mail**") in which he explains the business of Empire, that in this case the first prong of the test is met. An investment of money has been made by Empire's investors with an intention to profit. Throughout the Chambers 2009 E-mail, Chambers repeatedly refers to his clients as "investors", describes the DES program, and explains the movement of investor funds to the Forex accounts. It is difficult to conclude anything other than that the Empire Authorizations involved the investment of funds with a view to profit – namely – to eliminate the investors' debts and facilitate their retirement.

Common Enterprise and Profits Derived from the Efforts of Others

[55] The Supreme Court of Canada has determined that the second and third prongs of the test are so interwoven that they can be addressed together. In describing the test of common enterprise, the Court held as follows:

> …such an 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). In this

> relationship, the investor's role is limited to the advancement of money, the managerial control over the success of the enterprise being that of the promoter; therein lies the community. In other words, the "commonality" necessary for an investment contract is that between the investor and the promoter. There is no need for the enterprise to be common to the investors between themselves. (*Pacific Coast*, *supra* at para. 50)

[56] It is clear from the investor documents and the oral testimony given by the investors at the Merits Hearing that the role of the investor in Empire's DES program was limited to the advancement of money. Once the money was transferred to Empire, Chambers maintained full control over the success of the investment, as permitted by the Empire Authorizations. The managerial control over the success of Empire sat with Empire and Chambers exclusively. The success of the Forex investments was dependent upon the efforts of Empire and Chambers alone but for a benefit to accrue to both Empire and the investors. It is this Commission's view that for the foregoing reasons the test of common enterprise is clearly met in this case.

[57] With respect to the third prong and the dependence of the Empire investors upon Empire for the making of profits, this prong is met on the face of the Empire Authorizations whereby the investors relinquish all control over their funds to Empire. Upon transfer of funds, the investors are left with nothing more than a claim as against Empire. Investors are not able withdraw their funds or move them around between Forex accounts. Many investors gave evidence at the Merits Hearing that even upon requesting the return of their investment funds, they were not able to regain control over their own assets. It is clear that the end result of the investment made by each customer is dependent upon the quality of the expertise and efforts brought by Empire. If Empire does not properly invest the funds, the investors would likely be left with nothing.

[58] In OSC Staff Notice 91-702 – *Offerings of Contracts for Difference and Foreign Exchange Contracts to Investors in Ontario* ("**SN 91-702**") – Staff provides guidance to the public on, among other things, the securities law and other regulatory requirements applicable when offering foreign exchange contracts to investors in Ontario "whether through the internet or otherwise." Staff of the Commission communicated the view that such vehicles, when offered to investors in Ontario, engage the purposes of the Act and constitute "investment contracts" and "securities" for the purposes of Ontario securities law. This view is consistent with our finding in this case that the Respondents' relationship with its investors as reflected in the Empire Authorizations constitute "investment contracts" and therefore constitute "securities" and are subject to the applicable registration requirements in the Act.

Breach of Subsections 25(1)(a)/ 25(1)

[59] Having determined that the Empire Authorizations constitute investment contracts and, therefore, securities, pursuant to the Act, the Commission also finds that the Respondents have breached subsection 25(1)(a) of the Act pre-September 28, 2009 and subsection 25(1) of the Act post-September 28, 2009.

[60] The section 139 certificates tendered into evidence show that neither Chambers nor Empire was registered with the Commission and that there were no registration exemptions available to either of them. Further, the evidence presented at the Merits Hearing satisfies the factors set out

in Companion Policy 31-103 as referred to above, as well as the Momentas Factors, establishing that the Respondents engaged in acts in the business of trading in securities without being registered to do so under the Act. Examples of this include, but are not limited to:

(i) Chambers facilitated the transfer of funds from at least 26 investors and accepted such funds by depositing them into Empire's bank account on the premise of creating investment portfolios for each investor;

(ii) Chambers gave presentations to potential investors about the DES program;

(iii) Chambers met with individual investors;

(iv) The Respondents prepared and disseminated materials describing the DES program;

(v) The Respondents prepared and disseminated the Empire Authorizations for signature of the investors;

(vi) Empire took a fee from each investor's portfolio upfront and compensated Chambers on a regular basis;

(vii) The Respondents opened Forex accounts and transferred investor monies to these accounts in the United States and maintained full control over the application and distribution of these monies; and

(viii) The Respondents regularly represented to its investors that their monies were increasing in value with a view to inducing further investments or maintaining investor confidence.

[61] In light of all of the forgoing, the Panel finds that the Respondents have engaged in the business of trading in securities by way of investment contracts without being registered to do so in contravention of subsection 25(1)(a) of the Act pre-September 28, 2009 and subsection 25(1) of the Act post-September 28, 2009.

B. Acting as an Advisor without Registration

Did the Respondents Act as an Advisor without being registered contrary to subsection 25(1)(c) of the Act pre-September 28, 2009 and subsection 25(3) of the Act post-September 28, 2009?

[62] Subsection 1(1) of the Act defines "adviser" as "a person or company engaging in or holding himself, herself or itself out as engaging in the business of advising others as to the investing in or the buying or selling of securities."

[63] The amendments to subsection 25(3) effective as of September 28, 2009 added the availability of an exemption as well as the same "business trigger" language as found in subsection 25(1) above and addressed in Companion Policy 31-103. The provision otherwise remained essentially the same in that it prohibits a person from engaging in the business of advisory activities without proper registration or exemption, as follows:

> 25 (3) 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 the business of, or hold himself, herself or itself out as engaging in the business of, advising anyone with respect to investing in, buying or selling securities unless the person or company,
>
> (a) is registered in accordance with Ontario securities law as an adviser;
>
> (b) is a representative registered in accordance with Ontario securities law as an advising representative of a registered adviser and is acting on behalf of the registered adviser; or
>
> (c) is a representative registered in accordance with Ontario securities law as an associate advising representative of a registered adviser and is acting on behalf of the registered adviser under the supervision of a registered advising representative of the registered adviser.

[64] In order to find that the Respondents have acted in breach of subsection 25(1)(c) prior to September 28, 2009 and subsection 25(3) post-September 28, 2009 after the amendment came into force, this Commission must conclude that the Respondents both acted as an advisor and, after September 28, 2009, engaged in the business of advising with respect to investing, buying or selling securities, as noted in the Act.

[65] In *Re Maguire* (1995), 18 O.S.C.B. 4623 at pages 3 and 4, this Commission adopted the reasons of the British Columbia Securities Commission in *Re Donas*, BCSC Weekly Summary, April 7, 1995, 39 at p.44, where it explained when a person's actions will result in the requirement for registration under the Act:

> The nature of the information given or offered by a person is the key factor in determining whether that person is advising with respect to investment in or the purchase or sale of securities. A person who does nothing more than provide factual information about an issuer and its business activities is not advising in securities. A person who recommends an investment in an issuer or the purchase or sale of an issuer's securities, or who distributes or offers an opinion on the investment merits of an issuer or an issuer's securities, is advising in securities. If a person advising in securities is distributing or offering the advice in a manner that reflects a business purpose, the person is required to be registered under the Act.

In *Re Costello* (2004), 242 D.L.R. 4th 301 at para. 59, the Divisional Court cites a decision of the British Columbia Securities Commission which explains the low threshold to be met in determining whether a business purpose exists:

> In *Hrappstead, Re*, the business purpose element was satisfied even though there was no evidence that any investors had acted on Hrappstead's advice or that he had received a payment of any kind in return for his advice. Hrappstead, under a business name, held information sessions with members of the public and

> distributed material about "High Yield Investment Programs" which were represented as possibly earning very high returns from 4% per month to 100% per month. He recommended a particular investment to the investigating under cover police officer, but could not accept her proffered investment because he had no actual program available at the time. The Commission held he went well beyond merely giving information; he gave his opinion on the merits and recommended the investment. As to his business purpose, "one need look no further than what he stood to receive if the Investment Programs were successful: a commission equal to one half of the astronomical returns that he stated the Investment Programs would generate."

[66] Empire was in the business of giving of advice with respect to debt elimination and the creation, management and direction of investment portfolios. The investor witnesses gave evidence that Chambers personally met with them to recommended the DES program and promoted Empire as a safe investment vehicle.

[67] As noted above, in SN 91-702, Staff of the OSC provides guidance on, among other things, the securities law and other regulatory requirements applicable when offering products such as Forex contracts. In particular, Part V of SN 91-702, provides as follows:

> Staff's view is that CFD's [and Forex contracts], when offered to investors in Ontario, engage the purposes of the Act and constitute "investment contracts" and "securities" for the purposes of Ontario securities law.

[68] The SN 91-702 further states at Part VI as follows:

> 1. *Registration Requirement*
>
> *General.* Any person or company that acts as a dealer or adviser with respect to securities must register under the Act as either a dealer or adviser, respectively. As such, engaging in or holding oneself out as engaging in the business of trading or advising with respect to CFDs [and Forex contracts] triggers the dealer and adviser registration requirements in the Act.

[69] This Panel accepts Staff's submission that Chambers' dealings with investors, and the terms of the Empire Authorizations to manage all aspects of their investment portfolios, is akin to the provision of services by an advising representative of a portfolio manager with full trading discretion in client accounts. Empire and Chambers stood to gain, and did in fact gain, upon the transfer of investor funds into their control. The Respondents engaged in the business of trading and advising with respect to the Empire Authorizations and as such triggered the dealer and adviser registration requirements in the Act. At no time, however, was Empire or Chambers registered as an advisor pursuant to the Act. Accordingly, the Commission finds that the Respondents have acted contrary to subsection 25(3) post-September 28, 2009 and its predecessor subsection 25(1)(c) pre-September 28, 2009.

C. Illegal Distribution

Did the Respondents distribute securities without meeting the proper requirements or exemptions to do so contrary to subsection 53(1) of the Act?

[70] Subsection 53(1) of the Act provides as follows:

> 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.

[71] As noted above, the term "trade" includes any sale or disposition of a security for valuable consideration and any act, advertisement, solicitation, conduct or negotiation directly or indirectly in furtherance thereof. This Panel has already found that the Respondents were trading in investment contracts, which constitute securities pursuant to the Act. The next question for the Panel to consider then is whether the Respondents' trading was a "distribution" without a prospectus.

[72] The section 139 certificates submitted into evidence clearly establish that no prospectus was filed with the Commission and no receipts were issued by the Commission in respect of this matter. The only issue to determine is whether a "distribution" took place.

[73] The term "distribution" is defined in subsection 1(1) of the Act as follows:

> "distribution", where used in relation to trading in securities, means,
>
> (a) a trade in securities of an issuer that have not been previously issued…

[74] It is clear on the face of the Empire Authorizations and the Chambers E-mail that each investment contract entered into with a new investor constituted a trade that had not been previously issued. Accordingly, this Panel finds that the activities of the Respondents constituted a distribution of securities for which no prospectus was filed or receipt obtained, contrary to subsection 53(1) of the Act.

D. Fraudulent Conduct

Did the Respondents engage or participate in acts, practices or courses of conduct relating to securities in respect of Empire that the Respondents knew or reasonably ought to have known perpetrated a fraud on persons contrary to subsection 126.1(b) of the Act?

[75] Subsection 126.1(b) of the Act provides as follows:

> 126.1 A person or company shall not, directly or indirectly, engage or participate in any act, practice or course of conduct relating to securities, derivatives or the underlying interest of a derivative that the person or company knows or reasonably ought to know,
>
> …

(b) perpetrates a fraud on any person or company.

[76] In *Al-Tar, supra*, the Commission adopted, for the purposes of the interpretation of fraud in subsection 126.1(b) of the Act, the British Columbia Court of Appeal's interpretation of fraud as set forth in *Anderson v. British Columbia (Securities Commission)* (2004) BCCA 7 at para. 27 ("*Anderson*"), wherein Justice Mackenzie held that such a fraud provision includes a prohibition against participation in transactions where participants know or ought to know that fraud is being perpetrated by others as well as against those who participate in perpetrating the fraud itself.

[77] The test adopted by this Commission to determine whether an act of fraud pursuant to subsection 126.1(b) has taken place is taken from *R. v. Théroux*, [1993] 2 S.C.R. 5 at 24 ("*Théroux*"), where Madam Justice McLachlin summarizes the elements as follows:

Actus Reus

> …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.

[78] The *actus reus* part of the offence requires proof of two elements: a dishonest act and a deprivation. With respect to the first element, the dishonest act, the term "other fraudulent means" has been held to include the use of corporate funds for personal purposes, non-disclosure of important facts, exploiting the weakness of another, unauthorized diversion of funds, and unauthorized arrogation of funds or property: *Théroux, supra* at para. 15.

[79] The second element, deprivation, is established by proof that the dishonest act caused detriment, prejudice, or risk of prejudice to the economic interests of the victim: *Théroux, supra* at paras. 13 and 24. Actual economic loss is not required; rather, proof of prejudice or the risk of prejudice to or the imperiling of an economic interest is sufficient to establish this element of fraud: *Théroux, supra* at para. 14. "Risk of prejudice" includes the act of inducing an alleged victim through dishonesty and taking some form of economic action, even if that action did not cause economic loss: *Maple Leaf* at paras. 314 and 315. It is not necessary to prove that a respondent received an economic benefit or gain from the conduct: *Théroux, supra* at para. 16.

[80] In this case, the evidence submitted at the Merits Hearing establishes the *actus reus* part of the offence of fraud. All of the investor witnesses gave evidence that Chambers had persuaded them to increase their existing debt by increasing their mortgages and handing their excess funds obtained from such mortgages to Empire for investment purposes. At all times, Chambers led the Empire investors to believe that their principal investments were guaranteed and that their portfolios were increasing in value notwithstanding that the Forex Accounts were almost entirely unprofitable. The Empire bank records and the Chambers bank records, which were all under the exclusive control of Chambers, clearly show the transfer of investor funds into the Empire bank accounts and ultimately to Chambers' account, to cash, to the Forex Accounts, or to payback other investors, and that the funds quickly disappeared. Some investors gave evidence

that Chambers pressured them to invest more funds than they had originally agreed to and to increase their risk exposure on their investments. In doing so, this Panel finds that the Respondents exploited the weaknesses of the investors. The Empire investors appeared to this Panel to be modest, hard-working individuals who naively trusted and relied upon the Respondents' false representations to their detriment.

Mens Rea

[81] In addition to establishing the act of fraud, there must be enough evidence to demonstrate that the mental element, the *mens rea*, of fraud exists. McLachlin J. notes in *Théroux*, *supra* at paragraph 24 that 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).

[82] McLachlin J. also cites at paragraph 31 a salient passage from the British Columbia Court of Appeal's decision in *R. v. Long* (1990), 61 C.C.C. (3d) 156 at p. 174:

> …the mental element of the offence of fraud must not be based on what the accused thought about the honesty or otherwise of his conduct and its consequences. Rather, it must be based on what the accused knew were the facts of the transaction, the circumstances in which it was undertaken and what the consequences might be of carrying it to a conclusion. [underlining in original]

[83] The first element of *mens rea* required to establish fraud, subjective knowledge, can be inferred from the totality of the evidence. It does not require direct evidence of the respondent's knowledge at the time of the alleged fraud. The second element, subjective knowledge that the act could cause deprivation, requires proof that the respondent was reckless or willfully blind to the consequence of his or her conduct. A sincere belief that no risk or deprivation would materialize does not vitiate fraud: *Maple Leaf, supra* at paragraphs 318-321.

[84] Further, this Commission has accepted that it is sufficient to show that a corporation's directing mind knew or reasonably ought to have known that the acts of the corporation perpetrated a fraud in order to prove a breach of subsection 126.1(b) of the Act: *Al-Tar, supra* at paragraph 221.

[85] The *mens rea* element is met in this case. The totality of the evidence establishes that the Respondents' actions indicate that they must have had subjective knowledge of their actions. The Respondents engaged in activities that can only be characterized as deceit. The uncontroverted investors' testimony was clear. The Respondents represented to investors that their principal investments were guaranteed and that their portfolios were increasing in value at a time when Empire did not turn any profit and investor funds were not being applied as represented.

[86] The portfolio values were carelessly misrepresented. For example, one investor couple was advised that their investment of $85,000 grew to $121,005.44 between February 2009 and July 2009, representing a 42.35% rate of return in five months at a time when Empire was only achieving negative performance on its Forex Accounts. This is the kind of egregious misrepresentation made to investors that was heard throughout the Merits Hearing. The Respondents continuously misrepresented to investors that their investments were growing at incredible rates at a time when the only returns achieved by Empire were negative returns.

[87] Notwithstanding that Empire was unprofitable, Chambers was using investor funds for personal expenses when Empire was consistently losing on its investments in the Forex Accounts.

[88] The Respondents knew that their investors were risking their personal savings and, in most cases, their only asset, their principal residence, in the hopes of being debt free and making an easier life for themselves. The Respondents knew, by the design of the DES program, that this risk was in place and that any mismanagement of investor funds could result in significant deprivation to them. The Respondents' actions can only be described as reckless or, at best, willfully blind to the consequences of their actions. In either case, the two prongs for the *mens rea* element of fraud are clearly met, namely subjective knowledge of the prohibited act and knowledge that such act could cause deprivation to Empire's investors.

[89] Applying the principles set out above, this Panel concludes that the Respondents are guilty of committing fraud as set out in subsection 126.1(b) of the Act.

E. Conduct Contrary to the Public Interest

Did Chambers, in his capacity as director and officer of Empire, authorize, permit or acquiesce in the commission of violations of sections 25, 53, and 126.1 of the Act contrary to section 129.2 of the Act?

[90] Staff alleges that Chambers, being a director and officer of Empire, should be held accountable pursuant to section 129.2 of the Act which provides as follows:

> 129.2 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.

[91] This Commission has determined that the threshold for finding a director or officer liable pursuant to section 129.2 of the Act is low:

> 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* at paragraph 118)

[92] Chambers essentially *was* Empire. He was the mastermind behind the DES program – "DES" being an abbreviation of his name, "Desmond," as well as the acronym for the "Debt Elimination Strategy" program. Chambers was in charge of marketing the DES program offered by Empire, met with potential investors personally, facilitated the movement of their funds from the equity in their homes to Empire's bank account, and he was the sole signatory of the Empire bank accounts. Chambers used some of the Empire investor funds to pay for personal expenses and to pay other investors' returns on their investments. For the foregoing reasons, it is apparent that Chambers authorized, permitted, and acquiesced in all aspects of Empire's business.

[93] The Panel has found that Empire has not complied with Ontario securities law by virtue of the violations of sections 25, 52, and 126.1(b) of the Act by Empire. In light of the evidence referred to herein, this Panel finds that Chambers, as director, officer and directing mind of Empire, authorized, permitted and acquiesced in the non-compliance with Ontario securities law by Empire by virtue of Empire's commission of the violations of sections 25, 53, and 126.1(b) of the Act and accordingly, Chambers is deemed to also have not complied with Ontario securities law, contrary to section 129.2 of the Act.

VIII. CONCLUSION

[94] Accordingly, this Panel finds that the Respondents acted contrary to the public interest and contravened Ontario securities law through the following breaches of the Act:

a) The Respondents traded in securities without being registered to trade in securities in circumstances where no exemptions were available to them in accordance with Ontario securities law, contrary to subsection 25(1)(a) (pre-September 28, 2009) and subsection 25(1) (post-September 28, 2009) of the Act;

b) The Respondents acted as advisors with respect to investing in, buying or selling securities without being registered to do so and where no exemptions were available to them, contrary to subsection 25(1)(c) (pre-September 28, 2009) and subsection 25(3) (post-September 28, 2009) of the Act;

c) The Respondents distributed securities without filing a preliminary prospectus and prospectus and without receiving receipts issued by the Director, contrary to subsection 53(1) of the Act;

d) The Respondents engaged in acts relating to securities that they knew or reasonably ought to have known perpetrated a fraud on investors, contrary to subsection 126.1(b) of the Act; and

e) Chambers, in his capacity as director and officer of Empire, authorized, permitted and acquiesced in Empire's non-compliance with Ontario securities law, contrary to section 129.2 of the Act.

[95] The Respondents are directed to appear before the Commission on October 10, 2012 at 10:00 a.m. for a sanctions and costs hearing.

Dated at Toronto this 16th day of August, 2012.

"Edward P. Kerwin"
Edward P. Kerwin