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 ENERGY SYNDICATIONS INC., GREEN SYNDICATIONS INC., SYNDICATIONS CANADA INC., DANIEL STRUMOS, MICHAEL BAUM and DOUGLAS WILLIAM CHADDOCK

REASONS AND DECISION

(Section 127 of the *Act*)

Hearing:	May 15, 16, 17, 22, 23 and 29, 2013	
Decision:	June 20, 2013	
Panel:	Alan J. Lenczner, QC Commissioner	
Appearances:	Christie Johnson	For Staff of the Ontario Securities Commission
	Douglas Chaddock	On his own behalf and on behalf of Energy Syndications Inc., Green Syndications Inc. and Syndications Canada Inc.
	Daniel Strumos	On his own behalf
	Michael Baum	Not appearing

REASONS AND DECISION

[1] The hearing on the merits was held before the Commission on May 15, 16, 17, 22, 23 and 29, 2013 (the "**Merits Hearing**"). Douglas Chaddock ("**Chaddock**") and Daniel Strumos ("**Strumos**") attended throughout the Merits Hearing and testified. Michael Baum ("**Baum**") did not appear. On April 3, 2013, the Ontario Securities Commission (the "**Commission**") issued an order waiving service on Baum, pursuant to Rule 1.5.3 of the Commission's *Rules of Procedure* (2012), 35 O.S.C.B. 10071 (the "**Rules**"), based on Staff's evidence of its unsuccessful attempts to serve him since November 13, 2012. Pursuant to Rule 7.1 and subsection 7(1) of the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22, as amended, I am satisfied that the Commission is entitled to proceed with the Merits Hearing in Baum's absence.

[2] Staff of the Commission ("**Staff**") alleges that the Respondents contravened sections 25 (unregistered trading) and 53 of the *Act* (distribution without a prospectus) and subsection 44(2) of the *Act* (prohibited representations), contrary to the public interest, and that Chaddock, who was the directing mind of Energy Syndications Inc. ("**ESI**"), Green Syndications Inc. ("**GSI**") and Syndications Canada Inc. ("**SCI**") (the "**Corporate Respondents**"), authorized, permitted or acquiesced in the Corporate Respondents' non-compliance with Ontario securities law, contrary to section 129.2 of the Act and contrary to the public interest.

[3] The allegations relate to the sale of Land Agreements and Solar Panel Agreements by the Respondents between October 2008 and April 2011 (the "**Material Time**"). Chaddock, who was the directing mind of ESI, GSI and CSI, submits that the Respondents were not selling securities but sold tangible goods (the solar panels) in compliance with Ontario consumer protection law, and sold land in compliance with Ontario real estate law. The Respondents also claim that they relied on legal advice.

PART 1 - THE ISSUES

[4] I must decide the following issues:

(i) Did the Respondents engage in the business of trading in securities, without registration, in circumstances where no registration exemption was available, contrary to subsection 25(1)(a) of the *Act* (before September 28, 2009) and contrary to subsection 25(a) of the *Act* (on and after September 28, 2009), contrary to the public interest?

(ii) Did the Respondents distribute securities without filing a preliminary prospectus and prospectus with the Commission and receiving a receipt for it from the Director, in circumstances where no prospectus exemption was available, contrary to subsection 53(1) of the *Act* and contrary to the public interest?

(iii) Did the Respondents make false or misleading statements about matters that a reasonable investor would consider relevant in deciding whether to enter into or maintain a trading relationship with Energy, contrary to subsection 44(2) of the *Act* and contrary to the public interest?; and

(iv) Did Chaddock, being the director or officer of the Corporate Respondents, authorize, permit or acquiesce in the Corporate Respondents' non-compliance

with Ontario securities law, contrary to section 129.2 of the *Act* and contrary to the public interest?

PART 2 - FACTS

A. SYNDICATIONS CANADA INC.

[5] In October of 2008, Chaddock incorporated SCI. Chaddock was the sole shareholder, director and officer of SCI.

[6] SCI obtained a large number of contiguous 8 metre x 8 metre plots from a Singaporean company, Profitable Plots Proprietary ("**PPP**"). Until 2008, when it withdrew from business in Canada, PPP had solicited Canadian purchasers for these plots all of which were situated in the United Kingdom near London.

[7] Beginning in October 2008, SCI carried on the business formerly conducted by PPP in Canada. It acquired the hundreds of small contiguous plots of land in the United Kingdom. It took over the lease from PPP at 80 Bloor Street East, Toronto, an attractive address and office space, which gave investors an impression of substance and of financial stability. It began selling the small contiguous plots of vacant land.

[8] Chaddock and Strumos had both worked for PPP.

[9] In 2008, SCI employed Strumos as a principal salesman with the title Client Services Manager. SCI also employed Baum as its Sales Manager. Baum did not appear at the hearing, although duly served with the Notice of Hearing and Statement of Allegations. His evidence was tendered by way of a transcript of his compelled evidence and admitted into evidence.

[10] SCI sought potential investors to contact it by running advertisements in *The Toronto Star* and in *The Globe and Mail* indicating that they could earn a 25 percent return in one year with the claim, "Make money like a bank, not from a bank". The advertisements, which ran frequently, did not indicate that the investment was a purchase of land in the U.K. They only emphasized the size of the percentage return that could be realized within a year.

[11] Once a potential investor contacted the company at the telephone number in the advertisements, either a promotional brochure was sent to the investor or the investor attended at the company's offices and spoke to Strumos to receive the details of the investment.

[12] If the investor was interested, he was sent a TP-I or TR-I Land Agreement which indicated the cost of acquiring a plot of land, usually £8,000. The Land Agreement contained a Schedule 2 which gave the investor the option to transfer back the plot to SCI in a year's time for the return of the purchase price and a fixed return of £2,000 or 25 percent.

[13] As the program of sales evolved, the fixed return promised on the return of the land was lowered to 18 percent at the conclusion of the one year period and then to the payment of one percent per month.

[14] One typical promotional brochure indicated:

4 EASY STEPS TO MAKING
12% ANNUALLY

1. Complete the Plot Request Form and make the £5,000 payment to our law firm 'Black Sutherland LLP – In Trust'.

2. On the date you sign the request form, your purchase is calculated into Canadian Dollars. 1.0% of the purchase price is calculated for the monthly consideration payment.

3. Sign the TR-1 documents that transfer freehold title for your plot and return the documents to us.

4. On your one year anniversary date, we buy back the property, or you can request (by mutual consent) to extend the OTR agreement for 12 additional months.

B. ENERGY SYNDICATIONS INC. AND GREEN SYNDICATIONS INC.

[15] In August 2010, Chaddock incorporated ESI, a wholly-owned subsidiary of SCI. Chaddock was the sole officer and director of that company.

[16] Contemporaneously, GSI was also incorporated. Its shares were owned as to 25 percent by SCI, as to 25 percent by Strumos, as to 25 percent by Chaddock and as to 25 percent by Chaddock's brother, David Chaddock. ESI had no active bank account and operated from 80 Bloor Street East, the same premises as SCI. GSI also had no bank account and also operated from the same premises.

[17] The purpose for the incorporation of ESI and GSI was to take advantage of the *Green Energy Act* and the Feed In Tariff program of the Government of Ontario whereby the Ontario Power Authority would pay attractive rates for energy produced by solar and by wind power either in small installations, up to 10 kilowatts, or through large installations.

[18] Chaddock, through SCI and ESI ran advertisements in *The Toronto Star* and *The Globe and Mail* promising a nine percent return for a six month investment. No mention was made in the advertisement that there was to be the purchase of solar panels. A telephone number was given to contact SCI or ESI.

[19] When a potential investor contacted the company, he was either sent a brochure, directed to a website and/or invited to the company premises for further details and explanation. The brochure indicated:

> The Ontario Government created a tremendous money making opportunity with Bill 150, the *Green Energy and Green Economy Act* … As a result of this mandate, there will be shortfall of locally manufactured solar panels to meet the demand of projects already permitted, not to mention the growing demand for 2011. … To meet this enormous demand, Green Syndications has developed a simple, clever business model which offers the opportunity to participate in and profit from the manufacture of solar panels …

[20] Upon an expression of interest by the investor, he was sent a panel request form, which he filled in to indicate how many panels he wished to purchase for the sum of $750 per panel. The minimum purchase requirement was four panels for the sum of $3,000.

[21] In due course, the investor was provided with a Solar Panel Agreement, which, in section 2.4, gave him three options exercisable after a six month lapse from the time of payment, the "Election Date",

(a) obtain a refund of the purchase price from SCI or ESI together with his fixed rate of return of nine percent;

(b) take delivery of the solar panels that he had purchased by paying, upon delivery, the HST and a delivery fee; and

(c) assign his solar panels into a leasing program that would be managed by Sunvestments Inc., an affiliate of ESI and SCI and receive a dollar rental figure per annum, being nine percent of the purchase price for a period up to 20 years.

PART 3 - THE RESPONDENTS' DEFENCES

[22] The Respondents claim that the Land Agreements provide for the purchase and sale of a plot of land in fee simple. They say that, upon payment of the purchase price, the investors received title to a parcel of land which they were entitled to retain or to sell. The option to put the lands back to SCI in one year's time is just that, an option to repurchase, not unusual in land transactions.

[23] The Respondents state that the Solar Panel Agreements provide for the purchase of a consumer good, a solar panel. Each Solar Panel Agreement specified a serial number that would accompany the solar panel, and the purchaser had the right, at the expiry of the Election Date, to call for the delivery of the panels purchased, to transfer the panels into a leasing program, or to refuse delivery of the panels and obtain the return of the purchase price plus nine percent. Each Solar Panel Agreement also contained a right of rescission pursuant to the *Consumer Protection Act*.

[24] The Respondents assert that both types of agreements do not constitute the sale of securities.

[25] With respect to the alleged misrepresentations, the Respondents state that the statements made in the solar panel promotional materials were not false or misleading.

[26] In addition, the Respondents claim that they relied upon lawyers to incorporate the companies and draw up both the Land Agreements and the Solar Panel Agreements. At no time were they advised that their activities were contrary to the *Act* or that they were engaged in trading in securities.

PART 4 - ANALYSIS

A. UNREGISTERED TRADING AND ILLEGAL DISTRIBUTION

[27] In this case, there is little dispute about the facts.

[28] There is no dispute that Chaddock, Strumos and Baum have not been registered with the Commission or that none of SCI, ESI and GSI has been a reporting issuer in Ontario, filed a prospectus with the Commission, delivered an offering memorandum to the Commission, or filed a Report of Exempt Distribution with the Commission.

[29] Nor is there any dispute about the material facts that gave rise to Staff's allegations.

[30] Chaddock admitted, in his testimony, that:

- he was the sole owner, director and officer of SCI, which he incorporated in October 2008, when PPP decided to close its Toronto office;

- he was the sole director of ESI, which was incorporated in August 2010 and was wholly owned by SCI;
- he was a director and 25% shareholder of GSI, which was also incorporated in August 2010;
- Baum and Strumos were employees of SCI, Baum as a Business Development Manager, who dealt mainly with new clients, and Strumos as a Client Services Manager, who dealt mainly with existing clients, but also dealt with new clients if Baum was unavailable, and both were paid commissions on each Land Agreement or Solar Panel Agreement they sold;
- the buy-back option was added to the Land Agreement when SCI took over the business of PPP;
- SCI marketed the Land Agreements by attending trade shows, running newspaper ads and distributing promotional material to interested persons;
- the money to pay the promised returns to existing clients came from the sale of Land Agreements to new clients;
- from the approximately $2.7 million received from sales of the Land Agreements, SCI paid out approximately $233,000 to PPP clients during the Material Time, and approximately $291,000 to SCI clients;
- SCI began selling the Solar Panel Agreements at the end of June 2010, with a six-month Election Date, and ceased doing so in October 2010;
- the Solar Panel Agreement was marketed by running newspaper ads, distributing promotional material to interested persons and directing them to the ESI website, and by contacting existing Land Agreement clients with information about the Solar Panel Agreement;
- SCI had not entered into binding agreements for the purchase or manufacture of solar panels by the time of the first Election Dates in January 2011, and had not created a leasing pool;
- SCI was not able to give refunds to investors who opted for a refund at the Election Date;
- SCI received approximately $1,075,000 from the sale of the Solar Panel Agreements, and paid out approximately $273,000 to investors; and
- ESI's bank account was inactive, and all proceeds from the sale of the Solar Panel Agreements went into the SCI bank account, of which he was the sole signatory.

[31] In his testimony, Strumos admitted that:

- he began working with PPP as a Business Development Executive in July 2006;
- in 2008, Chaddock hired him to work as a Client Services Manager with SCI, when it took over PPP's business;
- he was involved in selling both the Land Agreements and the Solar Panel Agreements;

- his involvement included explaining the land product and solar panel product to existing clients and answering their questions, sending emails to existing clients about new products and attaching promotional material, sending clients documents (including request forms and agreements) to be completed, meeting with clients to complete paperwork, signing documents for Chaddock under a power of attorney, and receiving checks which were sent to his attention;
- when Baum was unavailable, Strumos also took calls from people who had seen the newspaper ads;
- commissions of approximately 8% were paid on each Land Agreement and approximately 4% on each Solar Panel Agreement, but commissions were shared amongst the salespersons involved in the sale; and
- his commissions during the Material Time totalled approximately $140,000.

[32] In his compelled examination by Staff on November 8, 2011, Baum admitted that:

- he began working at PPP in about 2006 selling land products;
- Chaddock hired him as sales manager for SCI, when it took over PPP's business;
- he sold both the land product and the solar panel product;
- his involvement included attending at trade shows, creating newspaper ads and drafting promotional materials with Chaddock and Strumos, taking calls from people who had seen the newspaper ads, explaining the land product and solar panel product; sending promotional material to new clients, sending clients documents (including request forms and agreements), and witnessing Chaddock's or Strumos's signature on Land Agreements or Solar Panel Agreements; and
- commissions of 2% to 10% were paid on sales of the land product and the solar panel product, but commissions were shared amongst the salespersons involved in the sale.

B. "TRADING" AND "DISTRIBUTION"

[33] The critical issue to be determined is whether by promoting and entering into the Land Agreements and Solar Panel Agreements, the Respondents traded in a security.

[34] In order to succeed, Staff has to prove its allegations of fact to the civil standard of the balance of probabilities (*F. (H.) v. McDougall*, 2008 SCC 53, [2008] 3 S.C.R. 41).

[35] "Trade" or "trading" is a defined term under the *Act* and includes "any sale or disposition of a security for valuable consideration, whether the terms of payment be on margin, instalment, or otherwise" and "any act, advertisement, solicitation, conduct or negotiation directly or indirectly in furtherance of any of the foregoing".

[36] "Distribution" is defined, in subsection 1(1) of the Act, to mean, amongst other things, "a trade in securities of an issuer that have not been previously issued".

[37] If it is determined that the purchases and sales under the Land Agreements and Solar Panel Agreements were securities, then I am satisfied that the Respondents traded and distributed securities in contravention of sections 25 and 53 of the *Act*.

[38] "Security" is also a defined term in the *Act* and includes 16 definitions. The only definition that applies in these circumstances is that a security includes "any investment contract". "Investment contract" is not further defined and it falls to me to determine what it constitutes. There are, however, many judicial precedents, from the Supreme Court of Canada, from other civil courts and from securities regulators including the Commission, which have addressed the elements that are necessary to find an investment contract.

[39] In approaching the interpretation of a statutory provision, the modern approach requires an interpretation that complies with the legislative text, promotes the legislative purpose, and produces a reasonable and sensible meaning (*Kerr v. Danier Leather Inc.* (2005), 77 O.R. (3d) 321 (Ont. C.A.) at para. 85).

[40] Section 1.1 describes the two main purposes of the *Act*: to protect investors and to foster fair and efficient capital markets.

> 1.1 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.

[41] In order to accomplish its goals, Ontario securities law requires that persons who wish to trade in securities be registered and that the securities be issued pursuant to a prospectus that has been receipted by the Director.

[42] Registration is not perfunctory. Registration ensures that the registrant has the necessary skill, proficiency, solvency, knowledge and integrity to properly deal with investors, to advise on the level of risk associated with a proposed investment, and to recommend investments that are suitable to the investors' financial situation and risk tolerance.

[43] A prospectus, vetted by the Commission before it issues, ensures full, plain and true disclosure of all material facts necessary for the investor to know prior to making an investment. It includes a full history of the company, a robust description of the investment and details of the risks associated with the investments.

[44] Both the registration and prospectus requirements are the implementation tools which serve the purposes of the *Act*, namely protection of the investing public.

[45] It is against this context and with these goals in mind that I must determine the meaning of the words "investment contract".

[46] The Supreme Court of Canada in the leading case of *Pacific Coast Coin Exchange v. Ontario (Securities Commission),* [1978] 2 S.C.R. 112 ("***Pacific Coast Coin***") set out four elements that have to be met in order for an arrangement to be an "investment contract". The four elements are:

> (d) an investment of money;
>
> (e) with an intention or an expectation of profit;

(f) 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

(g) 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.

[47] The Court conflated the third and fourth parts of the test and indicated that the test of common enterprise is met:

> … 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.

[48] The Court also indicated that one had to look at the economic realities of the transaction rather than the *caveat emptor* principle.

[49] The test formulated by the Supreme Court of Canada in *Pacific Coast Coin* has been uniformly adopted in a large number of Commission decisions including: *Re Sabourin,* (2009) 32 OSCB 2707 at paras. 30 to 39; *Re New Found Freedom Financial* (2012), 35 O.S.C.B. 11522 at paras. 171-175; *Re Axcess Automation LLC* (2012), 35 O.S.C.B. 9019 at paras. 139-141; *Re Empire Consulting Inc.* (2012), 35 O.S.C.B. 7775 at paras. 51-53; and *Re McErlean* (2012), 35 O.S.C.B. 6859 at paras. 194-197.

[50] A further helpful statement can be found in *A.G. Alta. v. Great Way Merchandising Ltd.*, [1971] 3 W.W.R. 133 (Alta. Sup. Ct.) ("***Great Way Merchandising***") at para. 10, wherein the Alberta Court of Appeal indicated that:

> … once an agreement contains provisions for investment, the fact these provisions have been intermixed and intermingled with provisions relating to non-investment matters does not exempt the resulting contract from the provisions of The Securities Act. The Act may not be so easily avoided. The Securities Act is remedial legislation and should be interpreted as such.

[51] The Alberta Court of Appeal emphasized that form is to be disregarded in favour of substance and emphasis should be placed upon the true economic reality of the arrangement. If the investment of monies with the expectation of profit, objectively viewed, is a substantial element in the arrangement, then it is an investment contract. (*Great Way Merchandising* at para. 12)

C. THE LAND AGREEMENTS

[52] The investors were drawn to this opportunity, which they saw initially by advertisements in *The Toronto Star* and *The Globe and Mail*. These advertisements promised, successively, a 25 percent return, then an 18 percent and ultimately a 1.5 percent return per month over a one year period for the investment of monies. No indication is given in the advertisement where the monies are to be placed or for what purpose they are being sought. A telephone number of SCI was given.

[53] When the investor contacted SCI, he was invited to attend at the offices on Bloor Street and was informed by Strumos or Baum that he could purchase a plot of land in a vacant field near London, England for a payment of £8,000 and that at the end of one year he could choose to be paid back his purchase price plus an additional £2,000 representing a 25 percent return on his investment. They also told the investor that he could wait until planning permission was granted and then his plot together with the plots of other purchasers of land could be aggregated together and sold to a developer at a handsome profit. No information was provided as to the planning process, the status of any applications for zoning, whether the process has been initiated or when it would be initiated.

[54] The investor was told that if he provided his £8,000 or its Canadian equivalent to the Davis LLP law firm, it would be held in escrow until such time as he received the Land Agreement, a plot plan and title documents. Only after title documents had been provided to the investor, would the monies be released to the vendor of the property, SCI. At all relevant times, SCI had plots in its inventory which it was selling.

[55] The Land Agreements all had a Schedule 2 with provisions as follows:

12 MONTH STAR BUY-BACK OPTION AGREEMENT

...

Anniversary Date – at the first Anniversary of the date of this agreement.

One Year Option Period – the period of 12 months from the date of this agreement.

Option – means the buy back option granted by the Transferor to the Transferee by this Agreement.

Purchase Price – the sum of £10,000.00.

…

2. **OPTION**

… The Transferor (SCI) grants to the Transferee (investor) the option on the Anniversary date of the One Year Option Period to call for the Transferor to buy back the Property at the Purchase Price plus interest at the rate of eighteen percent (18%) per annum, calculated annually.

…

4. TITLE GUARANTEE

If the Option is exercised in accordance with the terms of this agreement the Transferor will buy the Property from the Transferee at the Purchase Price, plus any applicable accrued interest in accordance with the terms and conditions of this agreement. The Transferee will sell the Property with full title guarantee.

[56] As previously indicated, the buy-back option varied between a 25 percent return in one year to an 18 percent return to one percent per month. Otherwise, the essential elements of the

Land Agreements did not change. Attached to the Land Agreement was a plot number and a plot map showing hundreds of individual plots with a scale of either 1:2500 or 1:1250. It is impossible for the ordinary person to determine the size of each individual plot, although Chaddock testified that each plot size was 8 metres x 8 metres. Even at that size, each plot is not viable on its own.

[57] From an objective determination of the events and conduct leading up to the purchase of plots, the advertisements and the terms of the Land Agreements, it can be concluded that the predominant purpose of these Land Agreements was, from a reasonable investors' view point, the investment of the money with the expectation of a healthy profit to be realized within one year.

[58] It is illusory to believe that the investors purchased the plots to hold them until planning permission was given for a development so that the plots could be sold in aggregation with other plots to a developer and that an even greater return would be achieved. There was no information regarding the status of any planning permission or even any application for planning permission. No information was given to the investors of what planning process was being undertaken or by whom. No timelines for the achievement of planning permission were set out in any of the documents.

[59] I am satisfied from the objective evidence as well as from the evidence of an investor, who gave evidence that the first two elements of the test have been satisfied, namely that there was an investment of money by the investors with an intention or expectation of profit being received from SCI one year later. I am also satisfied that the third and fourth elements of the *Pacific Coast Coin* test have been proven. The Land Agreements represent a common enterprise in which the expectations of the investor in receiving back his money together with his profit are entirely dependent upon SCI which owned the plots and was selling the plots. In a brochure that SCI produced and provided to investors before they made their investment, there are a series of Frequently Asked Questions. One of those questions was whether the repurchase option and the profit associated with it was dependent upon planning permission. The answer given by SCI was that it was not dependent upon planning permission, but rather was a contractual obligation of SCI.

> **IS MY RETURN BASED ON PLANNING PERMISSION BEING OBTAINED?**
>
> No, it's not. It's based on the stated contractual buy-back amount of the Colchester OTR plot, up to 12 months of OTR payments.

Thus, since SCI had nothing further to do with the land, including obtaining planning permission or securing a developer of multiple plots, the investors' predominant purpose in making the investment with the expectation of a profit within one year lay entirely within the resources available to SCI.

[60] Until the summer of 2010, SCI did not engage in any other revenue producing business. Its ability to refund the purchaser the purchase price and provide him with a return depended upon it selling more plots to generate monies to pay back early purchasers. Looked at frankly, SCI was off loading small plots of contiguous land at a profit to itself, representing to investors, that it would buy them back a year later and provide investors with a healthy profit, when it knew or must have known that it had no ability to honour its promises.

[61] In the Material Time, SCI received $2,702,820 from 69 investors who bought 220 individual land plots. It bought back plots for a sum of $290,410.72 and made periodic monthly payments of $177,616.80. The difference of $2,234,792.50 is unaccounted for. The bank account of SCI at the end of the Material Time in April 2011 had a credit balance of $29,973.29.

[62] The Respondents contend that the investors were buying freehold real estate. They further contend that the investors had title to the land and could and can dispose of the plots that they own. They also contend that *caveat emptor* applies. What they overlook is that the substance of the agreements trump the form and that the principle of *caveat emptor* is displaced by the economic realities of the transactions. It is completely unrealistic and not in accordance with common sense to believe that 69 investors bought small vacant plots near London, England with the expectation that some unspecified, unknown developer would come along, obtain planning permission, aggregate lots together and then pay them a lot of money individually to obtain their lots. There is no air of reality with respect to such a contention.

D. THE SOLAR PANEL AGREEMENTS

[63] Solar panel investments were also initiated by advertisements in *The Toronto Star* and *The Globe and Mail* indicating that ESI was offering a nine percent return for a six month investment. A telephone number for contact was provided. There is no mention in the advertisements of a purchase of solar panels.

[64] If an investor contacted the ESI office, he was provided with a brochure indicating that, as a result of the *Green Energy Act*, an excellent opportunity existed to invest in the program by the purchase of solar panels. Upon contacting Baum or Strumos, it was further explained to the investor that he had to purchase a minimum of four 300 watt solar panels for $750 for each panel. The investor was then told that six months after he paid his money to ESI (the Election Date), he would have three options:

(a) refuse delivery of the solar panels purchased and receive back the purchase price together with a nine percent return as profit;

(b) take delivery of the solar panels upon payment of the HST and a delivery charge; and

(c) enter into an agreement with Sunvestments Inc., an affiliate of SCI and of ESI, whereby he would lease the solar panels to Sunvestments for a period of 20 years and earn nine percent interest on the purchase price per annum.

[65] Investors sent in their monies in the months of August, September and early October, but did not receive the Solar Panel Agreement until after the monies had been sent in, at some time in October 2010. Section 2.4 of the Solar Panel PV Purchase Agreement provides as follows:

> **2.4 Customer Election.** Within (6) months of the Effective Date, Company will deliver a written notice (the "**Election Notice**") to the Customer requesting that the Customer elect to do one of the following:
>
> (a) refuse delivery of the Equipment, disclaim any title to the Equipment, and be entitled to a refund equal to the Purchase Price plus interest at a rate of 18% per annum, calculated monthly not in advance for the period beginning on the Effective Date and ending on the date of the Election Notice, which Company shall pay to the

Customer within 30 days of receiving the Election Response required below;

(b) accept delivery of all of the Equipment in accordance with this Agreement;

(c) enter into a lease of all of the Equipment to Sunvestments Canada Inc., an affiliate of the Company, by entering into the form of lease attached as Schedule 'A' hereto (a "**Lease**"), and direct the Company to deliver all of the Equipment in accordance with the terms of that Lease.

[66] From the advertisements and from the evidence of three investors, I am satisfied that the investors' primary goal in entering into the Solar Panel Agreement was to obtain a nine percent return in six months' time. I am further satisfied that that is what they told Strumos and Baum. None of the investors would have had any interest in the second option, which was to accept delivery of the solar panels. I was told by Barry Murphy, an officer of GSI, that in order to qualify for the Feed In Tariff program, one needed 10,000 watts of solar energy and would thus require somewhere between 30 and 40 300 watt solar panels if an investor wanted to go it alone. No investor bought that quantity of solar panels.

[67] Nor was there any interest expressed by any investor in putting their panels into a common leasing program through Sunvestments Inc. None of the investors, upon Election Date, did so.

[68] Although the Solar Panel Agreement provided for the three options, I am satisfied that the predominant purpose for the investment was to obtain the nine percent return by refusing delivery of the solar panels. That was the common intention and it was known to ESI and GSI. Indeed, GSI conducted its business on that understanding. At no time between July and November 2010, or indeed at no time at all, did it acquire, make arrangements for, obtain a commitment with, or enter into a contract for the purchase of a significant number of solar panels. Nor did it ever intend to manufacture solar panels itself. If it honestly believed that the investors were going to take possession of the panels or put them into a leasing program, such arrangements would necessarily have been made. Nor was there any evidence that any property owner, who was going to allow solar panels to be put on his property or on his roof was secured as a necessary person to the leasing program.

[69] I am satisfied that the investors paid money to ESI with the expectation of a return of that money in six months' time together with profit. Since ESI did not have an operating bank account, all the monies were directed to the bank account of SCI. The first two elements of the *Pacific Coast Coin* test have been met.

[70] It is also clear, and without doubt, that this was a common enterprise wherein both the return of the purchase price together with the promised profit, was entirely within the management and control of the promoter. The only ways by which the promoter, ESI or GSI could hope to pay back the investors was by selling more Solar Panel Agreements. Those companies had no other source of monies. The only other way that ESI and GSI could have earned revenue was through a leasing program, but no adequate, concrete steps had been taken to demonstrate that they were pursuing that course of action.

[71] I am satisfied that all the relevant tests have been made out and that the Solar Panel Agreement was an investment contract, not a contract for the purchase of solar panels. The inclusion of provisions from the *Consumer Protection Act* permitting rescission of the contract within ten days does not alter the substance of the agreement and turn it into a contract for the purchase of solar panels.

[72] Further support for this determination is the fact that when the repurchase option was exercised by the investors under both the Land Agreement and the Solar Panel Agreement, SCI and ESI attempted to persuade the land investor to convert the acquisition value of his plot(s) into solar panels and vice versa. The attempted conversion belies any belief that the Corporate Respondents and Chaddock, Baum or Strumos had that the agreements were, in substance, for the purchase of plots or of solar panels.

[73] The role of the investor was to provide monies pure and simple. In the plot transactions, the monies were to pay SCI for the purchase of plots it had in inventory.

[74] If SCI, ESI and GSI truly believed they could make a business from the FIT program, it only had to sign up roof owners, apply on their behalf for a FIT contract, lease the roofs and place solar panels on them. With a 20 year FIT contract, there would have been little trouble financing the purchase of solar panels from a traditional lender.

[75] But with no track record, no business plan, no contracts or commitments, the only source of funds came from the investors. But for the promise of the repurchase option, the monies would not have been advanced.

[76] SCI and ESI took in a net amount of $801,233 from the sale of solar panels. Yvonne Lo, a forensic accountant with Staff traced the use of these funds through the corporate records maintained by SCI and ESI. The entire sum was consumed in the period between June 24, 2010 and April 30, 2011 for corporate purposes including for the payment of salaries and commissions, rent, legal and accounting, various visa payments, etc. I am satisfied that this sum of money maintained the ongoing operations for the ten months in question.

E. LEGAL ADVICE

[77] The Respondents raise as a complete defence reliance on legal advice. The Land Agreements were drawn up by Lisa Davies, a well experienced real estate lawyer who, at the Material Time, was an associate at Davis LLP. Davies gave evidence and indicated that the content of the Land Agreements were similar to the forms of agreement used in Ontario and approved by the Real Estate Council of Ontario. In answer to a question by Chaddock, she stated that purchase and leasing options were also common in Ontario. Quite often, a purchaser will buy a building and then lease it back to the vendor for a period of years. I note, however, that Davies did not give evidence regarding the purchase of a vacant piece of land and an option, contained as part of that purchase agreement, that the vendor be obliged to purchase back the same parcel of land within one year at a profit to the initial purchaser.

[78] Davies was not a securities lawyer and had never practised in that area. She was not asked to give an opinion whether the agreement that she drafted constituted the sale of a security. Nor was she asked whether she had seen any of the advertisements or brochures which promoted the opportunity.

[79] Andrew Lord of Davis LLP was, at the Material Time, a junior commercial lawyer who drafted the Solar Panel Agreement. He knew nothing of the advertisements, brochures or

mechanisms that were employed to sell the opportunity to investors. He said that he was not a securities lawyer and was never asked to give an opinion whether the sale of solar panels, pursuant to the Solar Panel Agreement constituted a security. He said that he was told at the relevant time that there was an opinion from Goodman and Carr that the sale of solar panels in this manner did not constitute a security. He never saw that opinion and it has not been produced. In February 2011, after the OSC had begun its investigation, Davis LLP did provide an opinion to Chaddock and his companies. This opinion, which has been produced by the Respondents, clearly indicates that the outright sale of solar panels to investors would not be a security. However, if there were conditions such as the obligation to buy back the panels or to put them into a leasing program, then Davis LLP was not providing an unqualified opinion.

[80] As a matter of law, reliance on legal advice does not constitute a defence to allegations of non-compliance with sections 25 and 53 of the *Act*. With regard to those sections, liability is absolute and if the Commission determines that there has been a contravention then the principal bears responsibility regardless of the advice given to the principal by his agent (*Re Sabourin* (2009), 32 OSCB 2707; *Re Gordon Capital Corporation* (1991), 14 OSCB 2713 (Ont. Div. Ct.), *Re Simply Wealth Financial Group Inc.* (2012), 35 OSCB 6007).

[81] Where the legislature wishes to provide a due diligence defence, it specifically provides for such a defence and examples are found in the *Act* under sections 130(c) and (d) and 138(6).

[82] In any event, for legal advice to be of probative value, high standards have to be met. The requirements include:

(a) what is being sought is an opinion that the detailed facts to be provided do not result in a contravention of the *Act*;

(b) the opinion of a lawyer practising securities law;

(c) a detailed disclosure to the lawyer of all the facts and circumstances giving rise to the transaction;

(d) the notes and records of the lawyer indicating the facts and circumstances he took into account and the legal research he did in coming to his conclusion;

(e) a written opinion.

Absent these criteria, the legal advice has no or little probative value.

[83] The good faith reliance on well established, well formulated legal advice may be of significant assistance to a Respondent in the consideration of the sanctions that should apply upon a finding of contravention of the Act.

[84] For these reasons, I find that the Respondents traded in securities without registration, and distributed securities without filing a preliminary prospectus and prospectus with the Commission and receiving a receipt for them from the Director. As the Respondents have not established the availability of any registration or prospectus exemption or any defence of due diligence or reliance on legal advice, I find that the Respondents contravened subsection 25(1)(a) (before September 28, 2009) and section 25(a) (on and after September 28, 2009, contrary to the public interest, and contravened subsection 53(1) of the Act, contrary to the public interest.

F. PROHIBITED REPRESENTATIONS

[85] Section 44(2) of the *Act* provides:

> No person or company shall make a statement about any matter that a reasonable investor would consider relevant in deciding whether to enter into or maintain a trading or advising relationship with the person or company if the statement is untrue or omits information necessary to prevent the statement from being false or misleading in the circumstances in which it is made.

[86] Section 44(2) has some equivalency with the common law tort of negligent misrepresentation with one important distinction that being the onus on the Respondent to show he used due care before making the false or misleading statement. The elements of that tort, that should also be applied to interpreting section 44(2) of the *Act*, require Staff to establish, upon a balance of probabilities, that:

(a) a false statement or statements were made;

(b) that the investor relied on the false statement as the substantial reason for entering into or maintaining the trading relationship;

(c) the onus then shifts to the Respondent to establish that he made the statement without negligence, i.e. that he exercised care and adequate due diligence.

[87] I am not satisfied that Staff has proven the first two elements to a balance of probabilities. While, without doubt, much material information which would normally be in a prospectus was not provided to the investors, that is a different thing than establishing that false information was given to the investors. The investors had no financial statements regarding SCI, ESI or GSI. They had no historical information about the activities of the company. They were not presented with any business plans or forecasts. Indeed they were told very little about either the Respondent companies or about the investment opportunities, other than they could expect a handsome profit within a short period of time. But the lack of information is a far cry from establishing that the information given to the investors was false or misleading.

[88] I am not satisfied that the claims in the brochures that ESI developed "a simple, clever business model" or that ESI was "well funded" and had "the capacity to plan, build and implement small, medium and large scale solar PV forms" represents more than touting or puffery. These statements, in their full context, do not rise to the necessary level of a false statement upon which an investor would reasonably rely. In the end, what motivated the investors was the return of the purchase price together with a handsome profit, not anything else that was told to them.

[89] For these reasons, I dismiss this allegation.

G. DIRECTORS AND OFFICERS

[90] Chaddock was the directing mind and controlling officer of the Corporate Respondents. The evidence, including Chaddock's admissions, described at paragraph 30 above, establishes that Chaddock created the Land Agreement and Solar Panel Agreement products, and authorized, permitted or acquiesced in the sale of the Land Agreements and the Solar Panel Agreements by the Corporate Respondents in contravention of Ontario securities law. Pursuant to section 129.2 of the *Act*, he is deemed to have contravened the *Act*.

PART 5 - CONCLUSION

[91] For the reasons expressed above, I find that the Respondents have breached sections 25 and 53 of the *Act*.

[92] Chaddock was the shareholder, directing mind and controlling officer of the Corporate Respondents. He initiated the Land Agreements and the Solar Panel Agreements. On occasion, he also discussed and negotiated purchases with investors.

[93] Baum and Strumos were the principal sales people in this small operation and conducted negotiations with the investors leading to the sale of securities to them. As a result, they traded in securities. Strumos and Baum often signed the Land Agreements or Solar Panel Agreements on behalf of the Corporate Respondents, particularly when Chaddock was out of town.

[94] In the Material Time, SCI paid $151,181.50 as sales commissions to Baum and $141,255.16 to Strumos. Chaddock received $205,333.28.

[95] Accordingly, for the reasons given, I find that:

(i) each of the Respondents, between October 2008 and September 28, 2009, traded in securities without registration, in circumstances where no registration exemption was available, contrary to subsection 25(1)(a) of the *Act* (in force prior to September 28, 2009) and contrary to the public interest, and, from September 28, 2009 to April 2011, engaged in the business of trading in securities without registration, in circumstances where no registration exemption was available, contrary to subsection 25(1) of the *Act* (in force on and after September 28, 2009) and contrary to the public interest;

(ii) each of the Respondents, between October 2008 and April 2011, distributed securities without filing a preliminary prospectus and prospectus with the Commission and receiving a receipt for them from the Director, in circumstances where no prospectus exemption was available, contrary to subsection 53(1) of the *Act* and contrary to the public interest; and

(iii) Chaddock, being the directing mind of the Corporate Respondents, authorized, permitted or acquiesced in the Corporate Respondents' non-compliance with Ontario securities law, contrary to section 129.2 of the *Act* and contrary to the public interest.

[96] I am not satisfied that the Respondents made prohibited representations contrary to subsection 44(2) of the *Act*.

[97] An Order will issue as follows:

(i) Staff shall file and serve written submissions on sanctions and costs by July 10, 2013;

(ii) the Respondents shall file and serve written submissions on sanctions and costs by July 31, 2013;

(iii) Staff shall file and serve written reply submissions on sanctions and costs by August 14, 2013;

(iv) a hearing to determine sanctions and costs will be held at the offices of the Commission at 20 Queen Street West, 17th floor, Toronto, on September 4, 2013, at 10:00 a.m., or such further or other dates as agreed by the parties and set by the Office of the Secretary; and

(v) upon failure of any party to attend at the time and place aforesaid, the hearing may proceed in the absence of that party, and such party is not entitled to any further notice of the proceeding.

DATED at Toronto this 20th day of June, 2013.

"Alan J. Lenczner"

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Alan J. Lenczner, QC