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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
IRWIN BOOCK, STANTON DEFREITAS, JASON WONG,
SAUDIA ALLIE, ALENA DUBINSKY, ALEX KHODJAIANTS
SELECT AMERICAN TRANSFER CO.,
LEASESMART, INC., ADVANCED GROWING SYSTEMS, INC.,
INTERNATIONAL ENERGY LTD., NUTRIONE CORPORATION,
POCKETOP CORPORATION, ASIA TELECOM LTD.,
PHARM CONTROL LTD., CAMBRIDGE RESOURCES CORPORATION,
COMPUSHARE TRANSFER CORPORATION,
FEDERATED PURCHASER, INC., TCC INDUSTRIES, INC., FIRST NATIONAL ENTERTAINMENT CORPORATION, WGI HOLDINGS, INC.
and ENERBRITE TECHNOLOGIES GROUP

REASONS AND DECISION
(Section 127 of the *Securities Act*)

Hearing:	August 7-10, 13 and December 5, 2012	
Decision:	September 13, 2013	
Panel:	Vern Krishna, Q.C.	- Commissioner and Chair of the Panel
Appearances:	Donna Campbell Swapna Chandra	- For Staff of the Commission
	Alexander Khodjaiants	- For himself
		- No one appeared for the other respondents

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REASONS FOR DECISION

I. BACKGROUND

A. Overview

[1] This was a hearing before the Ontario Securities Commission (the "**Commission**"), pursuant to section 127 of the *Securities Act*, R.S.O. 1990, c. S.5, as amended (the "**Act**"), to consider whether Alexander Khodjaiants ("**Khodjaiants**") and Alena Dubinsky ("**Dubinsky**") (collectively, the "**Individual Respondents**") breached the Act and/or acted contrary to the public interest.

[2] The merits proceeding was commenced by a Statement of Allegations and Notice of Hearing, dated October 16, 2008. Subsequently, on January 4, 2012, an Amended Statement of Allegations was filed by Enforcement Staff of the Commission ("**Staff**") and on January 5, 2012, an Amended Notice of Hearing was issued by the Commission. Shortly thereafter, Staff withdrew allegations against Saudia Allie ("**Allie**"), who had been named as a respondent in this matter.

[3] Staff alleges that between June 2006 and March 2007, the Individual Respondents: (a) were involved in fraudulent and manipulative trading of shares of a number of issuers and (b) participated in an illegal distribution of those shares. Specifically, it is alleged that Dubinsky and Khodjaiants operated trading accounts in Ontario for the purpose of receiving and trading fraudulent or false securities in a number of the issuers named as respondents, and that Khodjaiants, through Dubinsky's account, engaged in manipulative trading in respect of two specific issuers.

[4] There are no allegations with respect to the corporate respondents: Leasemart, Inc., Advanced Growing Systems, Inc., International Energy Ltd., NutriOne Corporation, Pocketop Corporation, Asia Telecom Ltd., Pharm Control Ltd. (collectively, the "**Issuer Respondent(s)**"), Select American Transfer Co. ("**Select American**"), Cambridge Resources Corporation, Compushare Transfer Corporation, Federated Purchaser, Inc., TCC Industries, Inc., First National, Entertainment Corporation, WGI Holdings, Inc. and Enerbrite Technologies Group (collectively and together with the Issuer Respondents, the "**Corporate Respondents**"). In fact, on the first day of the merits hearing Staff expressly stated that it would not be introducing evidence with respect to the latter eight corporate respondents, despite there being a temporary cease trade order against them. Staff did not provide a service affidavit for the Corporate Respondents and Staff does not seek findings against the Corporate Respondents. For these reasons, I will not be making further analysis or findings with respect to the Corporate Respondents.

B. History of the Proceeding

[5] Prior to the commencement of the hearing on the merits, the Commission approved a number of settlements in this matter. Nutrione Corporation ("**NutriOne**"), Stanton DeFreitas ("**DeFreitas**"), Jason Wong ("**Wong**"), and Irwin Boock ("**Boock**"), also named as respondents in this matter, each entered into approved settlement agreements (*Re Irwin Boock et al.* (2009),

32 O.S.C.B. 9028; (2012) 35 O.S.C.B. 888; (2012) 35 O.S.C.B. 1128; and (2012) 35 O.S.C.B. 1718, respectively).

[6] The hearing on the merits began on August 7, 2012, continued over the course of five sitting days and resumed on December 5, 2012 for closing submissions (the "**Merits Hearing**"). On the first day of the Merits Hearing, Staff advised that for the second time Khodjaiants had filed for judicial review. Staff submitted that the application was an attempt to further adjourn the Merits Hearing. Khodjaiants did not appear or make submissions. As discussed below, I was not satisfied that an adjournment was in the public interest or necessary to provide an opportunity for a fair hearing of this matter and provided oral reasons for my decision before proceeding with the Merits Hearing.

[7] Over the course of four hearing days, I heard evidence from four witnesses, three called by Staff and Khodjaiants on his own behalf.

[8] For the reasons set out below, I conclude that the Individual Respondents breached subsections 53(1) and 126.1(b) of the Act, and that their conduct is contrary to the public interest.

C. The Individual Respondents

[9] Khodjaiants is a resident of Ontario, who traded in securities of the Issuer Respondents. Dubinsky, who is Khodjaiants's partner, is also a resident of Ontario. Dubinsky opened trading accounts for the purpose of facilitating Khodjaiants's trading of the Issuer Respondents' shares.

D. The Allegations

[10] Staff alleges the Individual Respondents engaged in fraudulent and manipulative trading of shares of various Issuer Respondents, contrary to subsections 126.1(a) and 126.1(b) of the Act and contrary to the public interest. Staff further alleges that the Individual Respondents participated in an illegal distribution of those shares, contrary to subsection 53(1) of the Act and contrary to the public interest.

II. PRELIMINARY ISSUES

A. Failure of Some Respondents to Attend

1. Respondent Participation

[11] On April 16, 2012, the merits hearing that was scheduled to commence in ten days was adjourned on a peremptory basis to begin on August 7, 2012, on the request of Khodjaiants, for the purpose of retaining and accommodating his counsel's schedule (*Re Irwin Boock et al.* (2012) 35 O.S.C.B. (the "**April 16 Order**")). At the adjournment hearing of April 16, 2012, it was made clear to Khodjaiants that the Merits Hearing would proceed on the ordered August 2012 dates sought by him. On the first day of the Merits Hearing, Staff appeared and advised that Khodjaiants had filed a Notice of Application to the Divisional Court for judicial review four days prior. Khodjaiants did not appear or seek any further adjournment of the Merits Hearing.

[12] Staff tendered into evidence a chronology of documents evidencing communications Staff had had with the Individual Respondents in preparation for the Merits Hearing, including delivery of hearing briefs of evidence and witness list, requests for Khodjaiants to provide contact information for his counsel and requests for Dubinsky to advise if she planned to attend the Merits Hearing. Staff submitted to the Panel that the Notice of Application to the Divisional Court for judicial review was an attempt to stall the merits proceeding once again. Staff further argued that Khodjaiants had no grounds for review, since his application sought to review Staff's decision not to settle with Khodjaiants, which was not a final decision of the Commission. Staff argued that the Merits Hearing should continue as scheduled.

[13] Dubinsky did not appear at the Merits Hearing. Khodjaiants later appeared on the fifth day of the Merits Hearing for the purpose of tendering evidence on his own behalf. Khodjaiants appeared again on the date scheduled for closing submissions and confirmed that his written submissions were on his own behalf and on behalf of Dubinsky.

2. The Law

[14] Subsection 6(1) of the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22, as amended (the "**SPPA**") requires that the tribunal provide "reasonable notice of the hearing" to the parties to a proceeding.

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

> **Effect of non-attendance at hearing after due notice**
>
> **7**.(1)Where notice of an oral hearing has been given to a party to a proceeding in accordance with this Act and the party does not attend at the hearing, the tribunal may proceed in the absence of the party and the party is not entitled to any further notice in the proceeding.

[16] Further, Rule 7.1 of the Commission's Rules of Procedure (2012), 35 O.S.C.B. 10071 ("*Rules of Procedure*") echoes the language of subsection 7(1) of the SPPA.

3. Authority to Proceed in Absence of Respondents

[17] On the first day of the Merits Hearing, I determined that I was satisfied that proper notice of the hearing had been given and I fully accepted that, in accordance with subsection 7(1) of the SPPA and the Commission's *Rules of Procedure*, Khodjaiants was not entitled to any further notice and that the hearing may proceed in his absence. Nevertheless, I decided to resume the Merits Hearing the next morning and asked Staff to communicate to the Individual Respondents that the Merits Hearing would proceed at that time.

[18] I am also satisfied that Dubinsky had notice of the Merits Hearing, as evidenced by email communications to her and by the fact that written submissions were made on her behalf by Khodjaiants. I also note that the Notice of Hearing, the Statement of Allegations, the Amended Notice of Hearing and the Amended Statement of Allegations were posted on the Commission's website, as was the April 16 Order which set out the dates on which the Merits Hearing was

scheduled to take place. The Notice of Hearing included the caution that if any party failed to attend the hearing, the hearing would proceed in their absence and they would not be entitled to any further notice of the proceeding. Accordingly, pursuant to section 7 of the SPPA and Rule 7.1 of the Commission's *Rules of Procedure*, I was authorized to proceed with the Merits Hearing without further notice to Khodjaiants or Dubinsky.

B. The Standard of Proof

[19] The standard of proof in this hearing is the civil standard of proof on a balance of probabilities and evidence must be sufficiently clear, convincing and cogent (*F.H. v. McDougall*, [2008] 3 S.C.R. 41 at paras. 46 and 49). The Panel must scrutinize the evidence with care and be satisfied whether it is more likely than not that the conduct underlying the allegations occurred.

C. Hearsay Evidence

[20] This Panel has the discretion to admit relevant evidence that might not otherwise be admissible as evidence in a court, including hearsay evidence, under subsection 15(1) of the SPPA, subject to the weight given to such evidence.

III. ISSUES

[21] The following issues were raised in the hearing:

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

(b) Did the Individual Respondents engage in conduct that resulted in or contributed to a misleading appearance of trading activity in, or artificial price for, a security, contrary to subsection 126.1(a) of the Act and contrary to the public interest?; and

(c) Did the Individual Respondents engage or participate in acts, practices or courses of conduct relating to securities that they knew or reasonably ought to have known perpetrated a fraud on persons or companies contrary to subsection 126.1(b) of the Act and contrary to the public interest?

IV. EVIDENCE

A. Overview

[22] Over the course of four hearing days, I heard evidence from four witnesses, three called by Staff and Khodjaiants on his own behalf. Staff called DeFreitas, Allie and Commission investigator Craig Gallacher ("**Gallacher**").

[23] Staff tendered 14 exhibits at the hearing through their own witnesses. Khodjaiants testified on his own behalf and tendered one exhibit. None of the other respondents tendered any evidence at the hearing.

B. Credibility

[24] Khodjaiants's testimony in chief contradicted documentary evidence with respect to dates upon which shares were issued and much of his recollection was not supported by documentary evidence of any kind.

[25] Further, in his examination-in-chief, Khodjaiants challenged the credibility of DeFreitas. He appeared to blame DeFreitas for the use of his name on corporate records of certain Issuer Respondents. However, Khodjaiants did not appear at the Merits Hearing to cross-examine DeFreitas. Further, DeFreitas's testimony did not bear on Khodjaiants's alleged conduct directly, but explained the overall scheme and how shares were issued by Select American.

[26] When weighing the conflicting evidence in this case, I have considered whether the evidence is in harmony with the preponderance of probabilities disclosed by the facts and circumstances in this case.

D. The Corporate Hijacking Scheme

[27] The corporate hijacking scheme involved a reincorporated entity with a new corporate name, new CUSIP number, as defined below, and new trading symbol, which issued shares through Select American. The new shares were issued to new shareholders, following a consolidation of shares and an increase in authorized share capital. The Issuer Respondents were closely held by Boock and his associates, which resulted in discretionary issuance of shares to parties related to him for the purpose of trading in those shares.

[28] Gallagher testified with respect to the mechanics of the corporate hijacking scheme. The first step in the scheme was to find a dormant or defunct issuer that had previously traded on the Pink Sheets. Gallacher explained that Pink Sheets are one of three over-the-counter markets that operate in the United States ("**U.S.**"), meaning their securities are not listed on the New York Stock Exchange or the NASDAQ stock market. The Pink Sheets, Gallacher testified, is privately operated and companies do not apply to list, rather brokers/dealers apply to trade on the Pink Sheets. As a result, there are no stringent filing or ongoing disclosure requirements of the Pink Sheets as there are with companies whose securities are listed on a formal stock exchange.

[29] The next step in the scheme, Gallacher testified, is to perform a reverse due diligence of the dormant or defunct entity to analyse corporate filings and make sure there are no persons associated with the dormant or defunct company that could be readily located. Once that is established, the person hijacking the company files new articles of incorporation with the same name as the old defunct corporation. Gallacher explained that while it varies by jurisdiction, it was his understanding that typically in the U.S. when a corporation is inactive or had not paid its filing fees for four to five years a person may reincorporate a company by the same name.

[30] To place distance between the original company and the hijacked company, the person would then conduct a corporate name change and a reverse stock split. The idea of the reverse stock split, Gallacher explained, is to consolidate the old base of shareholders by reducing their holdings in the company. The share consolidation in this scheme was commonly done on a one-thousand-to-one share basis. The following step in the corporate hijacking would be an

amendment to authorize the share flow to increase. The effect of the latter two steps are to eliminate the influence of the old shareholder base and allow the new hijacked entity to issue shares to whomever it chooses.

[31] Once the name change, reverse stock split and amendment to increase share capital were complete, the individuals conducting the corporate hijacking would communicate with the NASDAQ Corporate Action Department requesting a name and symbol change. While the NASDAQ is a stock exchange, it has a department commonly referred to as NASDAQ Reorg which is responsible for issuing trading symbols for every issuer. Therefore, whenever a name change or corporate action is taken, NASDAQ Reorg is contacted and a new trading symbol is applied.

[32] Securities in the U.S. also have a Committee on Uniform Security Identification Procedures ("**CUSIP**") number. The CUSIP number, Gallacher testified, is a unique security identifier which acts much like a person's social insurance number. Gallacher stated that the CUSIP number is assigned by a division of Standard & Poor's, known as the CUSIP Service Bureau. The CUSIP Service Bureau would require proof of corporate filings from the Secretary of State to accompany an application for a new CUSIP number. Gallacher testified that a CUSIP number must be applied whenever there's a name change, a stock consolidation or corporate action is taken and that it was his understanding that CUSIP numbers are not. Post-reincorporation, the person conducting the hijacking would represent in dealings with the Pink Sheets, NASDAQ and CUSIP Service Bureau that they are the old company. They could do this because the old CUSIP number was readily available on the internet.

[33] Gallacher also testified that a transfer agent, like Select American, has a gatekeeper role to verify, as an independent third party, the corporate actions of the issuer. When the transfer agent sends a letter requesting a new CUSIP number, the CUSIP Service Bureau relies entirely on the independence of the transfer agent to issue a new CUSIP number. Similarly, when a "transfer agent verification form" is sent to NASDAQ, it is meant to independently verify corporate actions.

[34] Select American was incorporated in Delaware on April 14, 2005 by DeFreitas, Boock and Wong. DeFreitas testified that it was Boock's idea to set up Select American as a transfer agent because the U.S. Securities and Exchange Commission (the "**SEC**") had changed its regulations to require that Pink Sheet companies have an independent transfer agent. DeFreitas stated that Boock was never a director or officer, but was involved in Select American's operations. By August 2005 Wong ceased to be president of Select American.

[35] DeFreitas testified that Boock would find dormant and/or bankrupt companies that were listed on the NASDAQ stock market years prior, usually ten years or more. Boock would then reincorporate the name, in the same state or in another state altogether. Once the company was reincorporated, the relevant party would be contacted for a new CUSIP number. Once that was done the principals would affect corporate name changes and revise terms of share capital by way of corporate resolution or minutes to the minute book. These changes triggered a new CUSIP number and would trigger a new trading symbol to be provided by NASDAQ.

[36] Gallacher testified that once the corporate hijacking was complete one of two things was done with the hijacked companies. Some reincorporated entities were sold to third parties as shell companies. Others, including the Issuer Respondents, were held closely by Boock, Wong and DeFreitas, who appear to have controlled this operation. Gallacher testified that "Select American was effectively used as a printing press to print share certificates and these share certificates were put on deposit by[…] the respondents and parties related to them and liquidated from brokerage accounts for profit" (Gallacher – Hearing Transcript of August 9, 2012 at p. 85). Allie, an employee of Select American, testified about the procedure she followed to create and print share certificates for the Issuer Respondents on the direction of DeFreitas and Boock. Allie identified an email from Boock which provided her with a number of addresses she could use to fill in the shareholder list wherever an address was needed; it did not matter what name the address was matched to. Gallacher testified that many of the addresses on that list did not exist, but the street names were the same or close to the real addresses of some of the traders.

C. Actors Involved in the Corporate Hijacking Scheme and Trading

1. Principals of the Corporate Hijacking Scheme

[37] DeFreitas testified that he met Boock in late 2003 or early 2004 through Alex Kaplun ("**Kaplun**"), whom DeFreitas was doing some consulting for at the time. Kaplun had had prior business dealings with Boock. DeFreitas was told that Boock was an individual who could assist in raising money for investments abroad.

2. Traders

[38] DeFreitas testified that he met Roufat Iskenderov, whom he also knew as Alik, ("**Iskenderov**") through Boock. DeFreitas stated that Iskenderov was a close friend and associate of Boock's who referred to them two or three entities that wanted to go public: El Apparel, which later became NutriOne, Asia Telecom and Magellan Energy. DeFreitas referred to a group of "Roufat's people" who were supposed to help in the promotion of the companies and were paid for those services by way of shares. Gallacher testified that Iskenderov was a trader of many of the securities in question. Allie confirmed that Iskenderov would come to the Select American office to pick up share certificates.

[39] Elena Lazareva is Iskenderov's spouse and the president and chief executive officer of El Apparel, later NutriOne. Natalya Lazareva is Elena's sister. Gallacher testified that Elena and Natalya Lazareva were traders of the securities in question.

[40] According to DeFreitas, Vicky Zaltsman ("**Zaltsman**") was a friend of Iskenderov's and Tale Aliev ("**Aliev**") was a real estate agent referred to DeFreitas by Iskenderov. Gallacher testified that Zaltsman and Aliev were traders of the securities in question.

[41] Boock told DeFreitas that Khodjaiants was a friend of Iskenderov. DeFreitas stated that he knew Khodjaiants as a person supposedly helping with public relations or investor relations with a couple of the issuers for whom Select American was a transfer agent. DeFreitas testified that he linked the name Alex Khodja, listed on corporate documents for International Energy, to Khodjaiants for two reasons. First, the play on names and use of aliases in the scheme make it

too coincidental. Second, DeFreitas testified that he had seen Khodjaiants's full name appear on another issuer that was not listed in this matter.

[42] In her compelled examination, Dubinsky admitted that she was Khodjaiants's girlfriend and Khodjaiants testified that Dubinsky was his fiancée. Gallacher testified that a facebook search of Dubinsky revealed she attended high school with an individual named Ruufy Iskenderov. Gallacher's interview of Iskenderov confirmed that he had a son named Roufat who was commonly referred to as Ruufy and that Ruufy did indeed attend the same high school as Dubinsky.

[43] Gallacher testified that Rashad Ahmadov ("**Ahmadov**") and Maksud Guluzade ("**Guluzade**") were also traders of the securities in question.

[44] The documentary evidence, tendered through Gallacher, records dates and volume of share deposits and trading activity for accounts held by Dubinsky (for trading by Khodjaiants), Elena Lazareva, Natalya Lazareva, Ahmadov, Aliev, Iskenderov, Zaltsman and Guluzade (collectively, the "**Eight Traders**").

D. Conduct of Khodjaiants and Dubinsky

1. Dubinsky's Compelled Examination

[45] Dubinsky admitted in her compelled testimony of October 25, 2007 that she opened a Royal Bank of Canada ("**RBC**") Direct Investing Account on June 17, 2006 (the "**RBC Account**") and a HSBC Bank Canada trading account on February 5, 2007 (the "**HSBC Account**") (together, the "**Trading Accounts**"). Dubinsky stated the Trading Accounts were opened at the request of Khodjaiants so that he could trade in securities and that she knew nothing about the shares deposited into the Trading Accounts.

[46] Dubinsky admitted that she verbally authorized Khodjaiants to trade in the HSBC Account and that it was always her intention that Khodjaiants trade in the Trading Accounts. Dubinsky stated that she received statements from the Trading Accounts, which she passed on to Khodjaiants and that she never discussed with Khodjaiants what he was doing in the Trading Accounts. Dubinsky acknowledged that she went with Khodjaiants to deposit the shares in the Trading Accounts, she identified the shares of certain Issuer Respondents and she confirmed that she had signed the shares for deposit.

[47] Dubinsky also identified her voice and that of Khodjaiants on a series of voice recordings, dated March 13 through 19, 2007, in which the Individual Respondents asked various HSBC employees to transfer $400,000 out of the HSBC Account. She further admitted to having made calls on the direction of Khodjaiants to HSBC, and she identified a fax, dated March 12, 2007, signed by her which requested the immediate transfer of $400,000 from the HSBC Account. Dubinsky admitted that a U.S. dollar HSBC account was specifically set up to receive the funds from the trading and that she had sole signing authority on the account, but she stated that the funds belonged to Khodjaiants.

2. Khodjaiants's Testimony at the Merits Hearing

[48] Khodjaiants testified that in 1996, before he moved from Moscow, Russia to Canada, he gave Oleg Oskov ("**Oskov**") $30,000 in cash to invest in real estate. Oskov, Khodjaiants testified, was a friend of his from university whom he had known for many years. Under cross-examination, Khodjaiants admitted he never saw the real estate, never got a deed for the property and did not otherwise have a description for the address. Khodjaiants confirmed nothing except that he understood the property was in Moscow.

[49] In his compelled examination, Khodjaiants stated that Oskov called him in 2006 to let him know he had sold the property. Khodjaiants recalled at the Merits Hearing that Oskov had called him for that purpose, but did not recall when the call was made. Khodjaiants testified that Oskov gave him shares as payment for the sale of the property they had purchased together and that Oskov had the shares delivered to Khodjaiants by someone travelling to Canada as Oskov did not trust mail, Fedex or UPS. Under cross-examination, Khodjaiants stated that he did not ask to be paid in cash instead of share certificates because he considered share certificates to be good too. Khodjaiants confirmed that he could not personally trade, so he recalled giving Oskov Dubinsky's name to put on the shares.

[50] Khodjaiants testified under cross-examination that he received the share certificates from an unidentified man at Pearson Airport. He stated that Oskov described the man Khodjaiants was to meet at the airport, but Khodjaiants did not know who the man was or his name. Khodjaiants stated that he never thought of meeting the man at his home and couldn't recall exactly where they met at Pearson Airport. Khodjaiants testified that the encounter in the airport was the only time that he was given share certificates. Khodjaiants claimed that he received all the shares deposited into Dubinsky's accounts on that occasion and stated that he did not check the dates on the share certificates. He did not explain the misalignment of dates between receipt of shares in June 2006 and the recorded issuance dates of post- June 2006 shown on the face of the shares.

[51] Khodjaiants further testified at the Merits Hearing that he had recently been contacted by Oskov several months prior. It was Khodjaiants testimony that Oskov was looking for DeFreitas because DeFreitas owed him money. In that conversation, Khodjaiants testified, Oskov confirmed that the buyer of their real estate had been a St. Vincent company owned by Merma DeFreitas, who is DeFreitas' mother, and that DeFreitas had sent Oskov the shares.

[52] It was Khodjaiants's evidence that he asked Dubinsky to open accounts in order for him to sell the shares he received from Oskov. Under cross-examination, Khodjaiants acknowledged that the HSBC Account was opened when RBC stopped accepting the share certificates.

[53] Khodjaiants admitted that he did the trading in the Trading Accounts and stated that Dubinsky did none. Khodjaiants stated that he deposited the shares on several separate occasions, but did not recall why. Khodjaiants also testified that he decided when to sell the shares certificates based on internet research and whether it was a good price to sell, but stated that he did not consult with anyone prior to selling them. When Staff presented Khodjaiants with summaries of Issuer Respondent share deposits made by certain of the Eight Traders, which showed that Dubinsky's deposits coincided with the same or similar dates and the same share volume per issuer as those traders, Khodjaiants testified that it could be a coincidence. He had a

similar response when faced with documentation recording sales within the same time period by himself and the Eight Traders whose deposits matched Dubinsky's. Staff showed Khodjaiants's similar patterns for BigHub, later known as Advanced Growing Systems Inc., and Leasemart, Inc. Khodjaiants repeatedly stated he did not know who the other traders were, what they doing or why there were coinciding Issuer Respondent share deposits and sale patterns.

[54] Khodjaiants's evidence with respect to the use of his name, or a similar name, on the corporate records of Select American's clients was that he attended the office of Select American, the transfer agent listed on the shares he received, to transfer the shares for deposit and paid by way of credit card. Khodjaiants stated that this may have been how his information was used without his knowledge and could explain how a name similar to his was used on documentation filed in California. Khodjaiants testified that prior to the Commission's investigation neither he nor Dubinsky knew or had any relationship with DeFreitas, Wong or Boock.

[55] The remainder of Khodjaiants testimony did not assist me in determining this matter.

3. Gallacher's Investigation

[56] Gallacher is a senior investigator and has been with the Commission since 2004. His involvement in the investigation of this matter commenced in May 2007. Staff tendered, through Gallacher, relevant documentation pertaining to the Issuer Respondents. Specifically, Gallacher identified:

- Corporate filings for each of the Issuer Respondents and subsequent amendments to the articles of incorporation from the Secretary of State in the jurisdiction where the issuer is domiciled;

- The last SEC filing for the original company that predates the corporate hijacking;

- Documents obtained from the SEC, Pink Sheets LLC and NASDAQ with respect to each Issuer Respondent;

- Press releases for the respective Issuer Respondents; and

- Screen shots of websites he observed for certain relevant entities;

[57] Gallacher testified that by the time he became involved in the investigation Select American had been sold to a third party in Montreal and was operating under the name Fair Ross Stock Transfer. In the course of his investigation, Gallacher discovered that Select American was the transfer agent of record for approximately 50 companies in which he saw similar patterns consistent with the corporate hijacking scheme.

[58] Gallacher obtained account opening documents and bank account statements from RBC and HSBC with respect to the Trading Accounts. The documents confirm Dubinsky's real address, despite the insertion of a fake address in the shareholder list. As stated above, the documentary evidence also records dates and volume of share deposits and trading activity for

accounts held by the Eight Traders. Staff, through Gallacher, tendered into evidence the share certificates placed on deposit and the deposit slips for the Eight Traders.

(a) The RBC Account

[59] The RBC Account was opened on June 17, 2007. Dubinsky and Khodjaiants made the following deposits into the RBC Account:

Date	**Security (Formerly known as)**	**Number of Shares Deposited**
July 1, 2006	Leasemart	12,000,000
July 6, 2006	Bighub (Advanced Growing)	12,000,000
July 6, 2006	International Energy	250,000
July 6, 2006	El Apparel (NutriOne)	12,000,000
August 1, 2006	Bighub (Advanced Growing)	12,500,000
August 31, 2006	Bighub (Advanced Growing)	18,000,000
August 31, 2006	Leasemart	18,000,000
August 31, 2006	Universal Seismic (Pocketop)	1,800,000
December 11, 2006	International Energy	750,000

(Exhibit 6, Tab 1)

[60] From July 17, 2007 to March 6, 2007, Khodjaiants sold shares from the RBC Account in all five of the Issuer Respondents listed above for proceeds of US$12,267.66. Gallacher explained that the total amount withdrawn from the RBC Account was actually US$14,763.94 because of a nominal sum made from trading in other issuers which were beyond the scope of this matter.

[61] On March 5, 2007, RBC sent a letter to Dubinsky which stated that the bank wished to discontinue their relationship and that no further deposits or trading would be accepted on the RBC Account. Gallacher testified that the closure of the RBC Account was the impetus for opening the HSBC Account so that Khodjaiants and Dubinsky could continue to deposit Issuer Respondent securities.

(b) Dubinsky's HSBC Account

[62] The HSBC Account was opened on on February 5, 2007. Gallacher testified that the HSBC Account had a Canadian cash portion and a U.S. dollar portion.

[63] Dubinsky and Khodjaiants made the following deposits into the HSBC Account:

Date	**Security (Formerly known as)**	**Number of Shares Deposited (Account)**
February 27, 2007	Asia Telecom	5,000,000 (Cdn Account)
February 27, 2007	Pharm Control	250,000 (Cdn Account)
February 27, 2007	International Energy	5,000,000 (Cdn Account)

March 6, 2007	International Energy	50,000,000
March 6, 2007	Pharm Control	30,000,000
March 6, 2007	Asia Telecom	40,000,000
March 12, 2007	Asia Telecom	17,400,000
March 12, 2007	Bighub (Advanced Growing)	10,000,000
March 12,2007	International Energy	1,800,000
March 12, 2007	International Energy	1,800,000
March 12, 2007	International Energy	5,000,000
March 12, 2007	International Energy	12,000,000
March 12, 2007	International Energy	21,800,000
March 12, 2007	Pharm Control	8,750,000
March 12, 2007	Leasemart	10,000,000
March 13, 2007	Universal Seismic (Pocketop)	1,500,000

(Exhibit 6, Tab 2)

[64] Gallacher identified a handwritten letter of direction from Dubinsky, dated March 12, 2007, which he understood accompanied the share certificates placed on deposit that day in the U.S. portion of the HSBC Account. This letter of direction corroborates the bank records.

[65] From March 1, 2007 to March 14, 2007, Khodjaiants sold shares from the HSBC Account in five of the Issuer Respondents listed above for proceeds of CDN$53,138.71 and US$984,625.63. Gallacher identified a faxed letter from Dubinsky, also dated March 12, 2007, which was marked "RUSH" and requested the transfer of $400,000 instantly from the HSBC Account to Dubinsky's personal bank account. Further, Gallacher also provided transcripts of telephone calls between Dubinsky and Khodjaiants and representatives of HSBC in an effort to transfer the $400,000 from the HSBC Account.

[66] Gallacher testified that none of the funds were ultimately removed from the HSBC Account because HSBC alerted the Commission to matters relating to Select American and specifically this account in mid-March 2007, and by May 18, 2007 the Commission effected a freeze order on the HSBC Account (the "**Freeze Order**"). The Freeze Order remains in effect at the time of writing this decision.

[67] It should be noted that on May 13, 2008 the Superior Court ordered $7,878.08 to be paid from the HSBC Account to Revenue Canada for the credit of Dubinsky. Updated bank records reflect that the HSBC Account as of June 30, 2012 held balances of CDN$46,218.91 and US$1,016,518.79. This can be explained by the fact that HSBC paid interest on the HSBC Account until the fall of 2008, when the bank ceased to pay interest on these types of accounts due to the economic downturn.

(c) Misleading Appearance of Trading Activity

[68] Gallacher testified that between March 7 and 14, 2007, 60 million shares of Asia Telecom were liquidated through the HSBC Account, which represented 25 percent of the total trading in that security during that time period. Further, Gallacher testified, between March 7 and 13, 2007,

40 million shares of Pharm Control were sold, which amounted to 40 percent of the total volume of trading activity in that time period for that security. Gallacher testified that he was able to calculate the trading volume based on publicly available information on BigCharts.com and taking a fraction of the total volumes of the respective security traded for the relevant period. Gallacher noted that only securities of Select American's clients were sold by Khodjaiants in the Trading Accounts.

[69] The Eight Traders each held a personal RBC Action Direct trading account. Gallacher acquired opening account documents, account statements and correspondence between RBC and each of the Eight Traders. Gallacher testified that he analyzed the trading data of the Issuer Respondents and noticed certain commonalities amongst the Eight Traders. First, shareholder records showed that they lived at the same addresses which Allie had been given by Boock to "fill in the blanks" on shareholder lists.

[70] Account records for the Eight Traders revealed further commonalities with respect to trading activity, including quantities and dates for deposits and subsequent liquidation of securities of the Issuer Respondents. Gallacher testified that it seemed like wholesale liquidation of the securities in question commenced at around the same time by the Eight Traders.

[71] Gallacher guided the Panel through the contemporaneous patterns of share deposits and trading by the Eight Traders for securities of the Issuer Respondents. For example, with respect to securities of International Energy ("**IE shares**"), Gallacher testified that between July 6 and 11, 2006, Aliev, Dubinsky and Elena Lazareva each deposited a certificate of 250,000 IE shares into their own RBC Direct accounts. Prior to that, between May 1 and 5, 2006, Elena Lazarevna, Iskenderov, Aliev, Zaltsman, Ahmadov and Natalya Lazareva deposited 400,000 IE shares each into their respective accounts.

[72] It was Gallacher's evidence that over a three day period between November 28, 2006 and November 30, 2006, seven of the Eight Traders, Iskenderov, Aliev, Dubinsky, Elena Lazareva, Natalya Lazareva, Ahmadov and Zaltsman, engaged in trading, with all of them liquidating their IE shares in that time frame. Gallacher testified that the summary information concerning trades was taken from the brokerage records of the Eight Traders.

[73] On March 5, 2007, RBC sent a letter to each of the Eight Traders which, similar to that of Dubinsky, stated that the bank wished to discontinue their relationship and that no further deposits or trading would be accepted on their accounts.

V. EVIDENCE MOTION

[74] When Khodjaiants filed written closing submissions he argued that his explanation for receipt of the shares was legitimate and he sought leave to submit to the Panel a document evidencing his real estate purchase and sale agreement (the "**Agreement**"), which he allegedly obtained a few weeks prior to making his written submissions. The documentation was not provided in English, the language of the proceeding. Instead, Khodjaiants appeared to presume that Staff would translate and somehow authenticate the document.

[75] Staff argued that Rule 4.3(1) of the Commission's *Rules of Procedure* requires each party to deliver to every other party copies of the documents to be relied upon at least 20 days before the commencement of the hearing or as determined by the Panel. Staff took the position that Khodjaiants had testified at the Merits Hearing that Oskov had contacted him several months prior in relation to the real estate investment, yet when Khodjaiants testified he still had no direct knowledge of the sale details and did not seek to call evidence from witnesses to substantiate the details.

[76] Staff relied upon the test to adduce fresh evidence in *R. v. Palmer*, [1980] 1 S.C.R. 759, cited in *Ontario Federation of Anglers & Hunters v. Ontario (Ministry of Natural Resources)*, [2002] O.J. 1445 (C.A.). Staff argued that there was no evidence to explain why Khodjaiants did not take steps to obtain and disclose the Agreement in advance of the Merits Hearing or at least at the time of his testimony or why he was silent about the existence of the Agreement. Staff further submitted that the evidence is not credible in the sense that it is not reasonably capable of belief because of the timing of production, the failure to translate the Agreement into English, the fact that the few English words in the Agreement implicate DeFreitas and his mother and the lack of transparency concerning its origin. Staff argue that this suggests the document did not exist until August 13, 2012.

[77] Finally, Staff also submitted that even if the Agreement was found to be credible, when taken with the other evidence adduced at trial it does not counterbalance the preponderance of credible evidence led by Staff which establishes that Khodjaiants and Dubinsky obtained, deposited and sold the shares as part of a group, in furtherance of a scheme designed to defraud investors.

[78] Khodjaiants argued that he only got the Agreement after obtaining legal advice after he had testified, and stated that he had not provided a translation because he didn't have time. His explanation was that he received the Agreement from Oskov by email within a month of the date scheduled for closing submissions. The Agreement purportedly evidenced the sale of Oskov's property, because title was held under Oskov's name.

[79] Staff noted there was not even peripheral reference to the existence of the document prior to the proceedings and Staff had not had the opportunity to cross-examine on the evidence. Staff added that when Gallacher attempted to obtain contact information for Oskov from Khodjaiants during his compelled interview of December 3, 2007, Khodjaiants advised that contact information was not available.

[80] On December 5, 2013, I ruled that I was not persuaded that the Agreement should be admitted. I determined it was inappropriate timing and in a foreign language, lacking authentication. Further, it would deny, in effect, the opportunity to have it properly cross-examined. I also had no firm evidence as to its connection to the matter, its reliability or its credibility. In addition to being introduced at an entirely inappropriate period of the proceeding, the Agreement also contradicted evidence Khodjaiants gave as part of his interview earlier on. My ruling was that the Agreement in Russian attached as appendix A in Khodjaiants's submissions would be excluded from the evidence. I acknowledge that pursuant to subsection 15(1) of the SPPA a panel has the discretion to admit relevant evidence that might not otherwise be admissible as evidence in a court, including hearsay evidence. Under the circumstances, I

chose not to exercise that discretion. In closing, my determination was based on a lack of diligence by Khodjaiants and the unreliable nature of the document itself.

VI. SUBMISSIONS

A. Staff's Submissions

[81] Staff submits that each of the Issuer Respondents was a hijacked Pink Sheets company for which no prospectus or final prospectus was circulated or filed with the Director. Staff argues that the evidence clearly demonstrates that Dubinsky and Khodjaiants traded and carried out acts in furtherance of trading the securities of Pharm Control Ltd. ("**Pharm Control**") and Asia Telecom Ltd. ("**Asia Telecom**") and in so doing participated in an illegal distribution of those securities contrary to section 53 of the Act.

[82] Staff also argues that Dubinsky and Khodjaiants directly or indirectly engaged in acts, practices or a course of conduct that they knew or reasonably ought to have known resulted in or contributed to a misleading appearance of trading activity in or an artificial price for the securities contrary to subsection 126.1(a) of the Act. Staff made no specific submissions on the application of the evidence to this allegation.

[83] Further, Staff submits that there is compelling evidence that the Individual Respondents engaged in an ongoing course of conduct that is characterized by deceit, falsehoods or other fraudulent means, including opening trading accounts for the express purpose of selling significant quantities of Issuer Respondent shares, which they knew or ought to have known were part of a scheme to defraud investors. Staff also submitted that deceitful conduct is evidenced by making statements on the RBC Account and HSBC Account applications which were untrue or inaccurate to enhance the likelihood that the application would be granted, so that a fraud could be perpetrated. Lastly, Staff argued that depositing and selling the Issuer Respondent shares in concert with others to optimize the proceeds realized from sales and selling shares in increasingly significant quantities to create a misleading appearance of trading activity in Pharm Control and Asia Telecom securities to the detriment of investors amounts to deceit, falsehood or other fraudulent means. These actions, Staff submits are conducted by the Individual Respondents in breach of subsection 126.1(b) of the Act.

[84] Staff also submits that Dubinsky was wilfully blind to the actions of Khodjaiants and facilitated the fraud through her acquiescence with Khodjaiants's requests and by deliberately choosing not to ask questions which could have confirmed the fraudulent nature of his conduct.

[85] Staff also argues that the Individual Respondents had subjective awareness that they were undertaking the dishonest act which could put investors' financial interest at risk. Specifically, Staff submitted that Khodjaiants knew he was perpetrating a fraud because he directed Dubinsky to open the Trading Accounts, controlled the accounts, told Dubinsky to make untrue and inaccurate statements on the RBC and HSBC application forms, repeatedly deposited into the RBC account shares in the same denomination as the Eight Traders and repeatedly sold shares in the same time frame as the Eight Traders. Staff also submitted that Khodjaiants knew his conduct was fraudulent because when the Eight Traders were no longer able to use their RBC trading accounts, he deposited hundreds of millions of shares of Asia Telecom and Pharm Control into

the HSBC Account and engaged in a wholesale liquidation of them within days of depositing them. Further, Staff argues that Khodjaiants knew he was perpetrating a fraud because he directed Dubinsky to tell HSBC that the shares deposited in the account were obtained through a private transaction with Select American.

[86] It is Staff's position that all of the Individual Respondents' conduct described above is also contrary to the public interest.

B. Khodjaiants's Submissions

[87] Khodjaiants filed written closing submissions. He argued that there was a lack of evidence with respect to documentation proving that Select American was directed to issue shares to various parties. Given that there was email correspondence before the Panel on point, I presume his submissions related to issuance of shares to Dubinsky and Khodjaiants specifically.

[88] With respect to the contemporaneous trading activity, Khodjaiants reiterated that he and Dubinsky did not know the Eight Traders and questioned Staff's choice not to examine any of the Eight Traders.

[89] Khodjaiants submitted that his explanation for receipt of the shares was legitimate and argued that culturally it was not unusual for individuals who were raised in the Soviet Union to be distrustful of the mail.

[90] Khodjaiants also relied on the Ontario Superior Court's decision with respect to a separate, but related freeze order against Mr. Papa. In that decision, the Superior Court acknowledged that Staff raised legitimate suspicions regarding Mr. Papa's credibility, but noted that Staff was unable to support suspicions with documentary evidence or otherwise. The Superior Court went on to decide that the evidence considered before it did not constitute a *prima facie* case that Mr. Papa knew or ought to have known that his sale of NutriOne shares was part of a scheme of market manipulation (*Ontario Securities Commission v. 1367682 Ontario Ltd. (c.o..b as De Freitas & Associates), Jason Wong, JWV Consulting Inc., 1606884 Ontario Inc., Alena Dubinsky and Ralph Papa* (22 May 2008), Toronto 07-CL-7045 (Ont. Sup. Ct.)).

[91] Khodjaiants submitted that neither he nor Dubinsky was aware, nor did they turn a blind eye, to any activity that constituted perpetration of a fraud or market manipulation. In summation, Khodjaiants took the position that Staff had not offered credible or reliable evidence that Dubinsky and he were involved in the alleged fraudulent scheme and that rather than calling any of the Eight Traders to testify, Staff relied on the admitted fraudster, DeFreitas, to prove its case.

C. Staff's Reply

[92] Staff submitted that Khodjaiants had the opportunity to cross-examine DeFreitas, but chose not to. Staff further argued that with respect to further witnesses, there is no property in a witness and Khodjaiants could have elicited the evidence from the Eight Traders as witnesses if he sought to rely upon their testimony in his defense. Having chosen not to do so, Staff states that no reference can be made to evidence which is not part of the evidentiary record.

VII. ANALYSIS

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

1. The Law

[93] Subsection 53(1) of the Act sets out the statutory prospectus requirement:

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

[94] The prospectus is the primary disclosure document of an issuer for the benefit and protection of investors. In accordance with section 56 of the Act, a prospectus must provide "full, true and plain disclosure of all material facts relating to the securities issued or proposed to be distributed". The prospectus ensures that investors have sufficient information to ascertain risks involved with their investment and make informed decisions (*Re Al-Tar Energy Corp.* (2010), 33 O.S.C.B. 5535 ("***Al-Tar Energy***") at paras. 136-137, citing *Re First Global Ventures, S.A.* (2007), 20 O.S.C.B. 10473 at para. 145).

[95] The terms "trade" or "trading" are defined in subsection 1(1) of the Act as:

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

[96] The inclusion of the word "indirectly" in the definition of "acts in furtherance", cited above in subsection 1(1)(e) of the Act, reflects an express legislative intention to capture conduct which seeks to avoid the registration requirement by doing indirectly that which is prohibited directly. The Commission has established that trading is a broad concept that includes any sale or disposition of a security for valuable consideration, including any act, solicitation, conduct or negotiation directly or indirectly in furtherance of such a sale or disposition. The Commission has found that a variety of activities constitute acts in furtherance of trades.

[97] Subsection 53(1) of the Act specifically contemplates inclusion of a trade by a person on his or her own behalf or on behalf of any other person or company.

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

2. Analysis and Findings

[99] Khodjaiants traded and Dubinsky acted in furtherance of trades in the securities of Asia Telecom and Pharm Control. It was admitted by Khodjaiants that he traded in the Trading Accounts. Documentary evidence supports the finding that those trades included trades of Asia Telecom and Pharm Control shares. Further, Dubinsky admitted that it was always her intention that Khodjaiants use her personal Trading Accounts for the purpose of effecting trades and that she signed and deposited the securities in furtherance of Khodjaiants's trading. In allowing her Trading Accounts to be a vehicle for trading and by assisting in the signature and deposit of the securities, Dubinsky acted in furtherance of trading Asia Telecom and Pharm Control securities.

[100] The trades by Khodjaiants were made on his own account and for his own benefit. Acts in furtherance of trades by Dubinsky were made on behalf of Khodjaiants. As Dubinsky admitted, the funds in the HSBC Account, acquired through trading of Issuer Respondent shares, belong to Khodjaiants.

[101] For the trades to constitute distributions of those securities they must not have been previously issued. The evidence adduced demonstrates that there was one cohesive distribution, which was implemented in various steps. The evidence supports a finding that Asia Telecom and Pharm Control were hijacked corporations through a fraudulent scheme. Part of the fraudulent scheme caused the hijacked corporations to issue new shares. The shares were issued in the name of Dubinsky, for the purpose of distribution to the public through their deposit into the Trading Accounts, which Khodjaiants controlled. There is no evidence that a prospectus or preliminary prospectus was filed, nor a receipt issued by the Director in respect of the Asia Telecom or Pharm Control securities. I accept Gallacher's evidence that the Individual Respondents were participating in a liquidation of shares that had been issued by the Issuer Respondents, through Select American, for sale to the public.

[102] The evidence proves on a balance of probabilities that the Individual Respondents traded in or acted in furtherance of trades in Asia Telecom or Pharm Control securities, which constitute distributions of those securities, contrary to subsection 53(1) of the Act.

[103] I find that the Individual Respondents have contravened subsection 53(1) of the Act that their conduct in this regard was contrary to the public interest.

B. Did the Individual Respondents engage in conduct that resulted in or contributed to a misleading appearance of trading activity in, or artificial price for, a security, contrary to subsection 126.1(a) of the Act and contrary to the public interest?

1. The Law

[104] Subsection 126.1(a) of the Act sets out the market manipulation provision as follows:

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

> (a) results in or contributes to a misleading appearance of trading activity in, or an artificial price for, a security, derivative or underlying interest of a derivative […]

[105] Notably, both direct and indirect acts, practices or courses of conduct relating to securities, which "results in or contributes to" a misleading appearance of trading activity may constitute a contravention of subsection 126.1(a) of the Act. The conduct need not cause the misleading appearance of trading in its entirety. Instead, acts which "contribute to" a misleading appearance of trading may satisfy a finding that the respondent breached the provision, provided that it is also established that the respondent knew or reasonably ought to have known that his or her actions would lead to the misleading appearance.

2. Analysis and Findings

[106] I do not find that the Individual Respondents engaged in market manipulation for two reasons. First, I am not satisfied that Staff has discharged its burden to prove on a balance of probabilities that the Individual Respondents engaged in the conduct alleged in breach of subsection 126.1(a) of the Act. Second, the conduct that was proven by Staff supports findings of fraud in contravention of subsection 126.1(b) of the Act.

[107] Staff did not provide the Panel with legal authorities or factual analysis of the elements of market manipulation. I have no evidence of who bought the shares sold by the Individual Respondents or whether they were sold at a price that was artificially high. I have no evidence of uptick trades or matched trades, which could confirm that the Individual Respondents participated in market manipulation.

[108] Furthermore, in *R. v. Kienapple*, [1975] 1 S.C.R.729, the Supreme Court of Canada adopted the principle that there should not be multiple convictions for the same delict or conduct and that "If there is a verdict of guilty on the first count and the same or substantially the same elements make up the offence charged in a second count, the situation invites application of a rule against multiple convictions"(pp. 10 and 14). I will not make a finding that the Individual Respondents breached subsection 126.1(a) of the Act for market manipulation because the conduct that Staff relies upon is the same conduct which supports a finding that the Individual Respondents engaged in fraud, in breach of subsection 126.1(b) of the Act.

[109] For the reasons elaborated above, I make no findings with respect to allegations that Khodjaiants and Dubinsky participated in a course of conduct that they knew or reasonably ought to have known resulted in or contributed to a misleading appearance of trading activity in securities of the Issuer Respondents, contrary to subsection 126.1(a) of the Act.

C. Did the Individual Respondents engage in conduct relating to securities that they knew or reasonably ought to have known perpetrated a fraud on persons or companies, contrary to subsection 126.1(b) of the Act and contrary to the public interest?

1. The Law

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

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

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

> …the *actus reus* of the offence of fraud will be established by proof of:
>
> 1. the prohibited act, be it an act of deceit, a falsehood or some other fraudulent means; and
> 2. deprivation caused by the prohibited act, which may consist in actual loss or the placing of the victim's pecuniary interests at risk.
>
> Correspondingly, the *mens rea* of fraud is established by proof of:
>
> 1. subjective knowledge of the prohibited act; and
> 2. subjective knowledge that the prohibited act could have as a consequence the deprivation of another (which deprivation may consist in knowledge that the victim's pecuniary interests are put at risk).
>
> (*R. v. Théroux*, [1993] 2 S.C.R. 5 ("***Théroux***") at 21; *Al-Tar Energy Corp.* at paras. 216-221)

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

> … [the fraud provision of the BC Act] does not dispense with the requirement that there must be a fraud involved in the transaction, which requires a guilty state of mind.…[the fraud provision of the BC Act] simply widens the prohibition against participation in transactions to include participants who know or ought to know that a fraud is being perpetrated by others, as well as those who participate in perpetrating the fraud. It does not eliminate proof of fraud, including proof of subjective knowledge of the facts constituting the dishonest act, by someone involved in the transactions.
>
> (*Anderson*, *supra* at paras. 24 and 26)

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

[113] The first element of the *actus reus* of fraud is the prohibited act, including an act of deceit, a falsehood or some other fraudulent means. The second element of the actus reus of

fraud is deprivation. The element of deprivation may be satisfied by actual loss to the investor, prejudice to an investor's economic interest or the risk of prejudice to the economic interest of the investor (*Théroux, supra* at 15-16). Therefore, no actual economic loss is necessary for conduct to be found fraudulent.

[114] In respect of the mental element of fraud, the Commission is conscious that the legislature statutorily widened the scope of the prohibition against fraud by imposing liability where a respondent "reasonably ought to have known" that their conduct perpetrates a fraud. Subjective knowledge that a prohibited act could have as a consequence the deprivation of another is established when it is determined that the respondent "knowingly undertook the acts in question, aware that deprivation, or the risk of deprivation, could follow as a likely consequence" or was reckless as to the consequences (*Théroux, supra* at 20-21).

2. Analysis and Findings

[115] I find that there is cogent evidence that establishes on a balance of probabilities that the Individual Respondents engaged in conduct which they knew or ought to have known perpetrated a fraud. It is apparent from the brokerage records in evidence that share certificates of the Issuer Respondents were deposited by Dubinsky and traded by Khodjaiants in concert with the Eight Traders. I do not accept that the trading in concert was a coincidence, as proposed by Khodjaiants. Nor do I find Khodjaiants's testimony of how he and Dubinsky acquired the Issuer Respondents' shares to be credible. I found his explanation implausible and do not accept that an unidentified man at Pearson Airport provided him with, what the documentary evidence proves to be, over $1 million in shares for a $30,000 real estate investment that he made 10 years prior. Khodjaiants had no evidence to support his claim that he had entered into a contract with Oskov, did not know where the property was located and had no contact information for Oskov. Furthermore, Khodjaiants could not explain the discrepancy between the date he obtained the shares and the fact that the shares on their face were issued at later dates. I do not accept that the Issuer Respondent shares were acquired in the manner purported by Khodjaiants.

[116] I accept Staff's submissions that the following acts were deceitful, falsehoods or constitute other fraudulent means:

- opening trading accounts for the express purpose of selling significant quantities of Issuer Respondent shares;

- making statements on the Trading Account applications which were untrue or inaccurate, specifically with respect to Dubinsky's income, to enhance the likelihood that the application would be granted;

- depositing and selling the Issuer Respondent shares in concert with the Eight Traders to optimize the proceeds realized from sales; and

- selling shares in increasingly significant quantities to effectively liquidate the shares of certain hijacked companies, specifically Pharm Control and Asia Telecom securities.

[117] The uncontested evidence also shows that Khodjaiants participated in the trading of large volumes of Asia Telecom and Pharm Control shares, which resulted in the liquidation of those shares, including 25 percent of the total trading in securities of Asia Telecom from March 7 to 14, 2007 and 40 percent of the total trading in securities of Pharm Control from March 7 to 13, 2007. Khodjaiants admitted in his compelled testimony that he had experience trading in the past. As the trader, Khodjaiants knew he was embarking on this large scale liquidation of shares. As the signatory to the shares and person depositing share certificates totaling 62.4 million shares of Asia Telecom and 39 million shares of Pharm Control, Dubinsky contributed to the fraudulent trading activity. Dubinsky received the account statements which showed the trading activity and should have informed herself of the trading activity in her HSBC Account.

[118] The actions described above contributed to a scheme to defraud investors. The Individual Respondents' acceptance of the Issuer Respondents' share certificates, deposit of those shares and subsequent liquidation of them for no plausible reason can only be described as fraudulent conduct, which resulted in deprivation to investors.

[119] I accept Staff's arguments that the following is proof of the subjective awareness of the Individual Respondents:

- Khodjaiants directed Dubinsky to open the Trading Accounts in her own name, encouraged Dubinsky to make untrue and inaccurate statements on the RBC and HSBC application forms and controlled trading of Issuer Respondent shares in the Trading Accounts;

- Dubinsky knowingly opened the Trading Accounts in her name and made untrue and inaccurate statements on the applications to RBC and HSBC for the purpose of relinquishing control of the Trading Accounts to Khodjaiants;

- Dubinsky repeatedly endorsed and deposited share certificates with her name on them even though she had not purchased the shares and had no knowledge of them until Khodjaiants presented them to her;

- Khodjaiants repeatedly sold shares, which had been deposited around the same time and in the same denomination, in the same time frame as the Eight Traders;

- Khodjaiants admitted that the HSBC Account was opened when they were no longer able to use their RBC Account for trading; and

- Dubinsky and Khodjaiants deposited over one hundred million shares of Asia Telecom and Pharm Control into the HSBC Account and Khodjaiants subsequently engaged in a wholesale liquidation of them within days of the deposits.

[120] I find that Khodjaiants had subjective awareness that he and Dubinsky were undertaking dishonest acts which could and did put investors' financial interests at risk. Dubinsky ought to have known that her conduct in facilitation and acquiescence of Khodjaiants' trading could have as a consequence the placing of investors' financial interests at risk.

[121] Taken in the aggregate, the evidence shows that Dubinsky was reckless, wilfully blind and ought to have known that her deceitful actions could put investors' financial interests at risk. Khodjaiants deliberately coordinated his conduct with others and continued to engage in fraudulent liquidation of Issuer Respondent shares after RBC ceased to provide service to the Eight Traders. His explanation that he did research on share price does not assist the Panel as the evidence supports that the hijacked companies issued shares, which had no inherent value, and that Khodjaiants sold those shares as part of a scheme to defraud investors.

[122] I conclude that the Individual Respondents participated in acts which they knew or reasonably ought to have known perpetrated a fraud within the meaning of subsection 126.1(b) of the Act. Their conduct in this respect was contrary to the public interest.

VIII. CONCLUSION

[123] For the reasons given above, I conclude that:

(a) the Individual Respondents engaged in an illegal distribution of securities contrary to subsection 53(1) of the Act and contrary to the public interest; and

(b) the Individual Respondents engaged or participated in acts, practices or courses of conduct relating to securities that they knew or reasonably ought to have known perpetrated a fraud on persons or companies, contrary to subsection 126.1(b) of the Act and contrary to the public interest.

[124] For the reasons outlined above, I will also issue an order dated September 13, 2013 which sets down the date for the hearing with respect to sanctions and costs in this matter.

Dated at Toronto this 13th day of September, 2013.

"Vern Krishna"

_____

Vern Krishna, Q.C.