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**IN THE MATTER OF THE
*SECURITIES ACT, RSO 1990, c S.5***

- AND -

**IN THE MATTER OF
BLACK PANTHER TRADING CORPORATION
and CHARLES ROBERT GODDARD**

**REASONS AND DECISION
(Subsection 127(1) of the *Securities Act*)**

Hearing: October 20, 21 and 24, 2016

Decision: January 30, 2017

Panel: Timothy Moseley - Commissioner and Chair of the Panel
Garnet Fenn - Commissioner
Judith Robertson - Commissioner

Appearances: Keir D. Wilmut - For Staff of the Commission
Charles Robert Goddard - For Black Panther Trading Corporation and himself

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REASONS AND DECISION

I. INTRODUCTION

A. Overview of significant events

- [1] Between July 2012 and April 2015 (the "**Material Time**"), the respondents Charles Goddard and Black Panther Trading Corporation ("**Black Panther**") received more than \$425,000 from 16 individuals (the "**Note Holders**"), and issued to those Note Holders documents entitled Letters of Understanding promising an annual return, typically either 20% or 30%.
- [2] The respondents, neither of whom was registered during the Material Time, failed in most instances to invest the Note Holders' funds as promised or to make the payments called for by the Letters of Understanding. Instead, the respondents often used the funds to pay other Note Holders and family members, or for personal expenses.
- [3] In addition, at Mr. Goddard's suggestion, some Note Holders granted him trading authority over their brokerage accounts so that he could effect trades in those accounts on their behalf. Mr. Goddard was to be compensated by receiving half of any return earned above 20% per year.

B. The respondents

- [4] Mr. Goddard, an Ontario resident, spent most of his working career in the securities industry. He was registered with the Ontario Securities Commission (the "**Commission**") beginning in June 1986, and then for almost 24 years until March 2010, in the categories of Securities Salesperson (for mutual funds only), Salesperson, Branch Manager, Trading Officer and Dealing Representative. For the last six months of that period, Mr. Goddard was also authorized under the rules of the Investment Industry Regulatory Organization of Canada to carry on discretionary management of client assets.
- [5] Black Panther, a federal corporation headquartered in Ottawa, was incorporated by Mr. Goddard in 2009. He has been Black Panther's sole shareholder and director since inception, except between December 2010 and May 21, 2014, during which time Mr. Goddard's son was Black Panther's sole director. Even though Mr. Goddard was not formally a director of Black Panther during that time, he was for practical purposes the sole officer and director. Staff and the respondents agree that Mr. Goddard's son played no role at Black Panther, and that Mr. Goddard has been the sole directing mind of Black Panther since its inception.

C. Allegations, respondents' position, and conclusions

- [6] Staff alleges that the Letters of Understanding issued to Note Holders are securities, and that during the Material Time:
 - a. the respondents, while not registered, engaged in or held themselves out as engaging in the business of trading in securities, contrary to subsection 25(1) of the *Securities Act* ("the "**Act**");¹
 - b. the respondents participated in an illegal distribution of the Letters of Understanding, contrary to subsection 53(1) of the Act;

¹ RSO 1990, c S.5.

- c. the respondents engaged in, or held themselves out as engaging in, the business of advising with respect to securities, contrary to subsection 25(3) of the Act;
- d. the respondents perpetrated fraud, contrary to clause 126.1(1)(b) of the Act, by:
 - i. misrepresenting the returns that Black Panther had earned through trading;
 - ii. using the Note Holders' funds in a manner other than had been promised; and
 - iii. misrepresenting the risk associated with investment in Black Panther;
- e. the respondents made untrue statements that would be relevant to a reasonable investor contemplating entering into a trading or advising relationship with the respondents, and thereby contravened subsection 44(2) of the Act;
- f. in numerous respects, Mr. Goddard misled Staff during his February 2015 compelled examination under oath, which conduct is prohibited by clause 122(1)(a) of the Act; and
- g. by forwarding a copy of his summons to a third party, Mr. Goddard disclosed information regarding the investigation of this matter, contrary to section 16 of the Act.

[7] Staff also alleges that Mr. Goddard, being a director of Black Panther, authorized, permitted or acquiesced in Black Panther's non-compliance with Ontario securities law and is therefore deemed to have failed to comply with Ontario securities law, pursuant to section 129.2 of the Act.

[8] The respondents submit that the Letters of Understanding are not securities and deny that they committed a fraud or that they otherwise breached the Act.

[9] For the reasons that follow, we find that the Letters of Understanding are securities, and that Staff has proven breaches of the Act in all seven categories listed above.

D. Evidentiary matters

[10] Before reviewing the background facts in detail, we discuss factual assertions made in the respondents' written submissions, hearsay evidence adduced at the hearing, and the applicable standard of proof.

1. The respondents' factual assertions

[11] At the merits hearing, Mr. Goddard appeared on his own behalf and as agent for Black Panther. Staff called three investor witnesses and two members of Staff who assisted in the investigation of this matter. Mr. Goddard did not testify and the respondents neither called any witnesses nor adduced any documentary evidence.

[12] Staff and the respondents filed written submissions following the merits hearing. Because the respondents' submissions contain many improper factual assertions, we first review the Commission's cautions to Mr. Goddard during this proceeding.

[13] At an interlocutory hearing on September 19, the respondents confirmed that at the upcoming merits hearing Mr. Goddard would neither testify nor call any witnesses. The Commission panel at that hearing explained to Mr. Goddard that at the merits hearing he would not be able to introduce evidence during opening or closing submissions or by way of his questions during cross-examination. Mr. Goddard

replied that the explanation was “perfectly clear”. The panel also advised that if, when cross-examining a Staff witness, Mr. Goddard put a suggestion to the witness that the witness declined to adopt, he would be “stuck with” the witness’s answer. Mr. Goddard confirmed that he understood.

- [14] At the merits hearing, Mr. Goddard began his opening statement by making a factual assertion as to what his goals were in creating Black Panther. The Chair of the panel interrupted him and repeated the earlier admonition that the respondents could not introduce evidence through opening or closing submissions, and that any facts admitted into evidence would have to come through a witness. Mr. Goddard responded by saying: “Then I won’t waste time doing this.”
- [15] The hearing proceeded. Staff called five witnesses, and Mr. Goddard cross-examined each witness. Before concluding the hearing, the Chair of the panel again cautioned Mr. Goddard that the respondents could refer to evidence properly admitted at the hearing but that the panel would “almost certainly” have to disregard any assertions in the written submissions that were unsupported by evidence.
- [16] The respondents’ written submissions include many factual assertions not supported by evidence admitted at the hearing, and often expressly contradicted by the evidence. For example, the respondents repeat the statement referred to in paragraph [14] above regarding Mr. Goddard’s claimed objectives in setting up Black Panther. The submissions also contain his version of investors’ understanding as to the use that would be made of their funds. There are many other examples.
- [17] Subsection 15(1) of the *Statutory Powers Procedure Act* (the “**SPPA**”)² provides:
- Subject to subsections (2) and (3) [not relevant in this case], a tribunal may admit as evidence at a hearing, whether or not given or proven under oath or affirmation or admissible as evidence in a court,
- (a) any oral testimony; and
- (b) any document or other thing.
- [18] The respondents did not request that we admit as evidence any factual assertions contained in their written submissions. Even if they had, we would have declined the request, especially since Staff had no opportunity to challenge or respond to those factual assertions, either by cross-examination or reply evidence. We therefore do not rely on any factual assertions in the respondents’ written submissions that are unsupported by evidence adduced at the hearing.

2. Hearsay evidence

- [19] During the hearing Staff sought to introduce hearsay evidence in two forms: the transcript of Mr. Goddard’s examination in February 2015, and a September 10, 2015, letter to Staff from counsel to Mr. Goddard’s son.
- (a) Transcript of examination**
- [20] Staff disclosed the transcript of Mr. Goddard’s examination to him months before the hearing and advised him that Staff would rely upon the transcript at the hearing. At Staff’s request, and with Mr. Goddard’s consent, we admitted the entire transcript into evidence, as we are permitted to do by section 15 of the SPPA. We must still consider the weight to be attributed to various parts of that transcript.

² RSO 1990, c S.22.

- [21] When Staff cites an admission made by Mr. Goddard during the examination, it is appropriate for us to rely on that admission. Our placing weight on those admissions is consistent with the long-standing exception to the hearsay rule for admissions against interest, which exception recognizes of the reliability of such admissions.
- [22] The same is not true where the respondents seek to rely on evidence Mr. Goddard gave during the examination. With respect to any contested fact, evidence from Mr. Goddard at the hearing would have been subject to Staff's cross-examination and to any questions that the panel may have had, all of which would have helped us assess the reliability of that evidence.³ We cannot be confident about the accuracy of Mr. Goddard's testimony on his compelled examination, which did not benefit from those measures, and accordingly we cannot give significant weight, if any at all, to portions of the transcript on which the respondents rely and that relate to contested facts.

(b) Mr. Goddard's son's response to an Enforcement Notice

- [23] On July 27, 2015, Staff sent a letter to Mr. Goddard's son setting out Staff's view that Black Panther may have breached Ontario securities law, and that as Black Panther's sole director for several years, the son may have authorized, permitted or acquiesced in Black Panther's alleged breaches. The letter, known as an "Enforcement Notice", offered Mr. Goddard's son an opportunity to respond to Staff's concerns. Mr. Goddard's son's counsel responded on September 10, 2015. Mr. Goddard objected to the introduction of the response letter on the basis that "everyone agreed [his son] had nothing to do with Black Panther in a form that has any effect on this hearing." Staff concedes that the response is hearsay but asked that it be made an exhibit to help explain certain transfers made between Black Panther and Mr. Goddard's children. We admitted the response letter as an exhibit but deferred determination of the weight to be attributed to it.
- [24] We do not rely on the letter in disposing of any issue in this proceeding. The transfers themselves are impugned, and the respondents offered no legitimate explanation for them. We find below that the transfers were an improper use of funds, and we reach that conclusion without reference to the letter.
- [25] We do rely on one attachment to the letter – a Letter of Understanding issued to Mr. Goddard's son, as discussed in paragraph [156] below. The document speaks for itself, is corroborated by Staff's analysis of the source and use of funds, and was not challenged by the respondents.

3. Material Time

- [26] The Material Time defined above and in the Statement of Allegations limits Staff's allegations of misconduct to acts that took place during that period. At the hearing and in written submissions, the respondents objected to the introduction of evidence about events or transactions that preceded July 1, 2012, the beginning of the Material Time.
- [27] We allowed the introduction of evidence outside the Material Time, and we do not accept the submission that we must ignore such evidence. Evidence relating to events before the Material Time serves only to set the stage for the alleged misconduct. In our analysis that follows, we are mindful that any breaches we find must have occurred during the Material Time.

³ *Re Agueci* (2013), 36 OSCB 12133 ("*Agueci*") at para 131, citing *Re Donald* (2012), 35 OSCB 7383 at para 34.

4. Standard of proof

- [28] Staff bears the burden of proof in this proceeding. For any factual finding that we make, whether Staff's evidence is disputed or not, we apply the civil standard of proof of the "balance of probabilities". In other words, is it more likely than not that an alleged event occurred?⁴

II. BACKGROUND FACTS

A. Source and use analysis of Note Holders' funds

- [29] Ms. Sherry Brown, a Senior Forensic Accountant in the Commission's Enforcement Branch, testified about the analysis of the source and use of funds she conducted for this proceeding (the "**Funds Analysis**"). Ms. Brown became a Chartered Accountant in 1995, continues to hold the current equivalent designation of Chartered Professional Accountant, and has been recognized as a specialist in investigative and forensic accounting by the Canadian Institute of Chartered Accountants.
- [30] In preparation for the Funds Analysis, Staff obtained records from five banks and eight registered firms, all of which records were in the name of Mr. Goddard or Black Panther, or were connected to transactions at issue in this proceeding, including some brokerage records relating to Note Holders.
- [31] The Funds Analysis reveals that the 16 Note Holders, some of whom invested more than once, paid the respondents a total of \$425,607 during the Material Time, beginning with the first investment in July 2012. Staff traced all of the Note Holders' investments as they were deposited into one of three bank accounts (two in the name of Black Panther and one in the name of Mr. Goddard).
- [32] The analysis shows that Mr. Goddard used funds to pay other Note Holders, to pay utility and credit card accounts, to make numerous cash withdrawals, and to transfer Note Holders' funds to his personal account and to his son, daughter, and a woman Mr. Goddard described as his life partner. There is no evidence that the respondents used the Note Holders' funds for general business operations of Black Panther. We review the Funds Analysis in more detail in our discussion of the use of the Note Holders' funds beginning at paragraph [128] below.
- [33] In cross-examining Ms. Brown, Mr. Goddard suggested that she had been selective in her analysis, particularly with respect to transactions that pre-dated the Material Time. In their written submissions, the respondents assert without particulars that "Staff's analysis of accounts is flawed". The respondents chose not to provide any "evidence on this front" due to alleged promises "to others regarding confidentiality".
- [34] Ms. Brown explained the methodology she used to prepare the Funds Analysis, including that the analysis focuses on and traces transactions relating to Note Holders' funds. Her testimony was unimpeached on cross-examination and the respondents adduced no evidence to suggest that any of the information or conclusions contained in the Funds Analysis are incomplete, unwarranted or unreliable.
- [35] We have no evidence that there were any promises of confidentiality that dissuade the respondents from explaining why they say the Funds Analysis is flawed. Even if such promises exist, they cannot override the power of the Commission to summons

⁴ *F.H. v. McDougall*, 2008 SCC 53 at paras 44, 49.

witnesses who have relevant evidence to give, or Mr. Goddard's obligation to respond fully to the summons issued to him for his compelled examination.

- [36] The respondents have also suggested that they have other accounts that are not reflected in the Funds Analysis. Nothing in that analysis points to any Note Holder funds transferring to any unidentified account, and again, the respondents chose not to adduce any evidence to support their contention.
- [37] Accordingly, there is no reason for us to suspect that a flaw exists in the Funds Analysis, and we accept it as an accurate analysis of the relevant transactions.

B. Note Holder witnesses

- [38] Staff called three Note Holders as witnesses. We found all three witnesses to be helpful, forthright and credible.

1. Ms. P.

- [39] At the beginning of the hearing, Mr. Goddard objected to Ms. P. testifying, on the ground that she takes medicine that affects her memory. We allowed Ms. P. to testify, and confirmed to Mr. Goddard that he would have the opportunity to challenge her memory and her evidence in cross-examination, and to make closing submissions as to the weight we ought to attribute to her evidence.
- [40] Ms. P. is a federal government employee who lives in Ottawa. Ms. P. met Mr. Goddard in September 2012 through his daughter, Ms. P.'s co-worker, who told Ms. P. that Mr. Goddard invested money for people, and who sent Ms. P. a one-page Black Panther marketing pamphlet entitled *The 20% Solution*. That pamphlet offered "hands-on management" by Mr. Goddard, who was described as having "[a]lmost 30 years as a financial professional with accreditations few have achieved." The pamphlet listed accreditations for Mr. Goddard of CIM (Chartered Investment Manager), DMS (Derivatives Market Specialist) and CMT (Chartered Market Technician).
- [41] The pamphlet also said that for investments between \$1,000 and \$50,000, the investor would "write a cheque to Black Panther Trading Corporation and receive [the] investment plus 20% in one year." For investments of at least \$50,000, the investor was to create an account at Questrade Inc. and name Mr. Goddard as trading authority on the account. The pamphlet specified that "[m]anagement fees are charged only if a 20% return is achieved (annualized). Any return above 20% is divided in half and charged as a management fee...", and that "due to the active management required", that option would be limited to 20 investors.
- [42] Ms. P. testified that at the time of her introduction to Mr. Goddard, her knowledge about investments was "on a scale of 1 to 100, zero." She had investments totaling approximately \$50,000 in two RSP accounts, one of which held a locked-in plan. Ms. P. "wasn't interested in high risk" and wanted "something that was safe but that would make [her] some money."
- [43] In September 2012, after Ms. P. sent a summary of her holdings to Mr. Goddard by email, Mr. Goddard replied:

The problem with those holdings are [*sic*] that they are very middle of the road and will never make what they could with active management.

I suggest we create new investment accounts for you and transfer your accounts. They will then be actively traded. They [*sic*] doesn't mean more risk than you have now...

The accounts you have now charge fees whether they make you money or not. I propose to only charge you fees if I exceed an annualized rate of 20%.

Whatever you earn above 20% we split. For example if you make 30%, you get the first 20% and we split 10%... you receive 25% and I get 5%. [ellipsis in the original]

- [44] Ms. P. followed Mr. Goddard's instructions. In late 2012, she opened a trading account at Questrade Inc., transferred in her locked-in RSP, and gave Mr. Goddard trading authority over the account. Several months later she deregistered her other RSP, paid the applicable income tax of approximately \$7,000, and in February 2013 paid the remaining \$18,157.98 to Black Panther. Ms. P. understood from Mr. Goddard that he would "trade [her funds] and make [her] a good return." Mr. Goddard provided Ms. P. with a Letter of Understanding that reflected the investment of \$18,157.98, that characterized the investment as a "debt obligation" and that promised a payment of \$23,605.37 on or before February 28, 2014, which represented a stated 30% interest rate. Ms. P. testified that Mr. Goddard also promised to reimburse her for the income taxes she paid as a result of deregistering her RSP.
- [45] Between August 2013 and July 2015, the respondents made seven payments to Ms. P., totaling \$6,500. Ms. P. has repeatedly asked the respondents to pay her the balance owing, without success. We reject the respondents' assertion in written submissions that for Ms. P., as with all investors who "melted down" their RSP (to use the respondents' words in promotional materials), the "program was for five years... [and the] notes were markers along the way." That assertion is unsupported by any evidence and is directly contradictory to the documents themselves, to Ms. P.'s testimony, and to Mr. Goddard's own statement to Ms. P. by email of November 17, 2015, in which Mr. Goddard says that her "note matures in may [*sic*] of 2016."
- [46] Ms. P. does not know whether the funds she transferred to Questrade still exist. She describes the loss of even the principal amount paid to Black Panther of \$18,157.98 as "huge" and "devastating", since she "can't make enough money to be able to save that again" before she retires.
- [47] With respect to the memory issues referred to above, Ms. P. testified on direct examination that she "sometimes [has] difficulties with word retrieval due to side effects of medication [she is taking], especially when [she is] stressed." She acknowledged on cross-examination that she has a "terrible memory". In written submissions, the respondents repeated their objection, asserting that Ms. P. "should never have been brought in to testify since she admitted to being on medication that affected her memory."
- [48] We have no reason to discount Ms. P.'s evidence about her investment knowledge and risk tolerance, or about what she understood Mr. Goddard would do with her funds. All of that was corroborated in material respects by documents filed as exhibits, and none of it was contradicted by any other evidence. In fact, Ms. P. recalled with precision, and without relying on documents, details about her financial affairs including regarding her two separate accounts.

2. Mr. C.

- [49] Mr. C. is a resident of Ottawa who has been unemployed since 2014. In February 2012, he contacted Mr. Goddard, whom he had met many years earlier, but with whom he had lost touch. After some initial discussions, Mr. Goddard gave Mr. C. a two-page marketing document (plus attached charts), on Black Panther Trading

Seminars letterhead, that advertised "Corporate Notes (similar to GICs)" and offered a one-year return of 15% and a two-year return of 20% per year.

[50] The document explained:

The investor issues a cheque to the corporation which is deposited into the corporate bank account and is covered by CDIC.

The monies are then transferred to trading accounts: stocks and options – RBC Direct; Currencies (primarily the Forex market) – Questrade and Commodities and foreign stocks and indices – CMC Markets. These firms are registered investment firms and as such are covered by CIPF. This protects accounts against insolvency to a limit of one million dollars per account.

...

In conclusion: given that CDIC has less than two billion dollars in cash with an ability to borrow twenty billion more to cover deposits exceeding six hundred and twenty billion, I believe this investment structure has no more risk than a GIC.

[51] In August 2012, at Mr. Goddard's suggestion, Mr. C. gave Mr. Goddard trading authority over an existing Questrade account that contained Mr. C.'s Tax Free Savings Account. In an email to Mr. C., Mr. Goddard explained the terms of this arrangement:

As discussed the management set up for accounts that remain in the name of the investor is as follows:

A management fee only kicks in if a return of 20% annualised is achieved. This is calculated quarterly. So, anything over 5% is divided between the two of us. A 10% return on the quarter results in 7.5% for you, 2.5% for me.

[52] These terms were confirmed in a contract prepared by Mr. Goddard and signed by Mr. C., which stated that "Charles Goddard will manage and trade this account" for the management fee specified above, to "be paid to Black Panther Trading Corporation".

[53] The process to authorize Mr. Goddard to effect trades in Mr. C.'s Questrade account was not completed until November 2012. In the meantime, Mr. Goddard instructed Mr. C. to make specific trades, and Mr. C. followed those instructions. When Mr. Goddard received authority to trade in Mr. C.'s account, he did so. Mr. Goddard did not consult with Mr. C. before making a trade. In early January 2013, Mr. Goddard prepared an invoice to Mr. C. in the amount of \$950 for management fees for "the first quarter", for both the specific trades recommended and the trading services provided. Mr. C. paid the \$950.

[54] In the spring of 2013, Mr. Goddard said he was dissatisfied with Questrade's trading platform, and he ceased to manage Mr. C.'s Questrade account. At Mr. Goddard's suggestion, and following Mr. Goddard's representations that an investment with Black Panther directly would yield an annual return of 30%, Mr. C. invested \$3,000. Mr. Goddard gave Mr. C. a Letter of Understanding that confirmed Black Panther's obligation to pay Mr. C. \$3,900 on or before June 17, 2014. Mr. Goddard advised that he would earn the necessary returns by investing the funds.

[55] Mr. C.'s evidence was consistent with the documentary record and was unimpeached on cross-examination. We accept his testimony without reservation.

3. Mr. S.

[56] Mr. S. is a resident of Ottawa who was enrolled in the same part-time MBA program as Mr. Goddard's son. In March 2014, Mr. Goddard contacted Mr. S. through LinkedIn and sent a message that said, in part: "20% returns are possible with active trading. If you are the least bit interested in hearing how, please contact me." Mr. Goddard also sent a broadcast message to his LinkedIn connections, including Mr. S., that stated:

My goal for my company – Black Panther Trading Corporation – is 50 investors with an average investment of \$10,000 (min is \$1,000, max is unlimited) in the form of a corporate note (similar to a GIC) for which they will receive a one year return of 20%! There are 42 places left.

[57] Mr. S. told Mr. Goddard that he was interested in receiving more information. In the ensuing months, Mr. Goddard copied Mr. S. on emails sent to a number of people, which emails included portfolio performance updates, showing monthly returns for May and June 2014 of 13.2% and 36.33% respectively. In a later meeting between them, Mr. Goddard told Mr. S. that any investment Mr. S. might make would be no more risky than a GIC.

[58] In August 2014, Mr. S. decided to invest \$3,000 with Mr. Goddard to "test the waters". Mr. Goddard gave Mr. S. a Letter of Understanding that acknowledged receipt of the \$3,000 and that promised a payment of \$3,600 one year later, for an annual return of 20%. Mr. Goddard told Mr. S. that the funds would be pooled with other investors' money and invested in currencies and commodities. Mr. S. ultimately received the payment contemplated by the Letter of Understanding when it was due.

[59] After Mr. S. invested the \$3,000, he and Mr. Goddard discussed the possibility of Mr. S. moving his RSP from the firm that held the account. Mr. Goddard proposed that Mr. S. open a new account and give trading authority to him, and that Mr. S. remove money from his RSP so that Mr. Goddard could manage those funds more aggressively outside the RSP. Mr. Goddard explained that collapsing an RSP "is a strong option for most people", and illustrated this point by contrasting \$100,000 earning 7% annually inside an RSP and then being cashed out after five years (for a net loss of \$22,860), with cashing out \$100,000, paying the applicable tax, and earning 25% per annum on the remainder for five years (for a net gain of \$42,456).

[60] Mr. S. ultimately decided not to proceed with the transfer of his RSP. Instead, as Mr. Goddard had suggested, Mr. S. withdrew some of the funds in his RSP and on April 15, 2015, made a \$15,000 payment directly to Black Panther, in return for a Letter of Understanding that promised repayment in two years with a 25% return compounded annually.

[61] The respondents have made no payment to Mr. S. in respect of the \$15,000 investment. Mr. S. describes that amount as "a lot of money" for him.

[62] Mr. S. was a reliable witness whose testimony was consistent with the documentary record and was unimpeached on cross-examination. We accept his evidence without reservation.

C. The respondents' marketing activities

1. Introduction

[63] The respondents actively solicited investment in Black Panther using many methods, some of which have been referred to in our review of the three investor witnesses' evidence, and some of which were described in the testimony of an Investigator in the Enforcement Branch, who through her involvement in the investigation of this matter was aware of complaints made by other members of the public. The Investigator's evidence was unimpeached on cross-examination and, as with all of Staff's evidence, was uncontradicted by any evidence adduced by the respondents. In many respects, it was consistent with admissions made by Mr. Goddard on his compelled examination.

2. Staff's evidence

[64] Mr. Goddard sent unsolicited marketing brochures to various people, including to some whom he did not know. He also provided copies to Ms. M., his life partner, who "handed them out". The one-page brochures:

- a. were on letterhead titled "Black Panther Trading Seminars";
- b. bore the headline "It is time to... MELT DOWN YOUR RRSP";
- c. provided Mr. Goddard's email address and telephone number;
- d. suggested that the reader of the brochure contact Mr. Goddard for details of a "strategy" if the reader wanted "a great return (20%)"; and
- e. set out a sample five-year calculation that contemplated "Proceeds invested with Black Panther Trading Corp".

[65] Mr. Goddard also created and distributed a booklet that he called *Roller Coaster*. The document, on letterhead for "Black Panther Trading Seminars", told readers that "with a little effort you could learn enough to make your own investment decisions... Or, as many have decided, I can do it for you" [emphasis in the original]. *Roller Coaster* went on to say: "This entity has been operational for a little more than a year. Investors have made deposits and received their funds back with their return as promised." *Roller Coaster* contained purported testimonials from satisfied investors and represented that:

- a. to generate the advertised return of 20% per year, it would be necessary to invest in stocks, options, commodities and currencies;
- b. Mr. Goddard could generate the advertised return, or "[I]f you so choose I can teach you how to use some basic tools so that you can make your own decisions.";
- c. investors would receive "Notes confirming indebtedness" from Black Panther;
- d. investors' contributions would be deposited to Black Panther's bank account and would therefore be covered by the Canada Deposit Insurance Corporation;
- e. investors' contributions would be transferred to trading accounts at registered investment firms, and would be insured by the Canadian Investor Protection Fund; and
- f. the proposed investment structure "has no more risk than a GIC".

- [66] Further, Mr. Goddard created flyers advertising Black Panther, inserted some of those flyers into newspapers at a local coffee shop, and left some flyers on a coffee table at a local car dealership.
- [67] The respondents posted advertisements on the Kijiji website, one of which was titled "30% solution" and stated:
- [Black Panther] also offer[s] corporate notes (similar to GICs) that promise a one year return of 30% for funds received prior to the end of February, 2014. Funds are transferred via PayPal if the investor resides outside of Ottawa. (investment can be as little as \$500).
- [68] A second Kijiji advertisement entitled "Learn how to Trade and Invest PROFITABLY" offered, for \$29.95, an e-book and "one year of consultation" with Goddard, during which purchasers were encouraged to "[a]sk about potential trades you wish to place".
- [69] In March 2014, a Staff member using an assumed name and a covert email account responded to the "30% solution" Kijiji advertisement, asking for more information. Mr. Goddard replied, attached a copy of his *Roller Coaster* booklet and advised that he would "honour the rate advertised" (20%) if the Staff member took "action over the next few days".
- [70] The Staff member replied noting that the Kijiji advertisement offered a rate of 30%. Mr. Goddard responded and indicated that he would honour that rate. In answer to the Staff member's comment about bank rates, Mr. Goddard said: "Please keep in mind that the bank or entities that you know give you a very low interest rate and then turn the money over to trading rooms which do exactly the same thing as I have set out in the material I sent you."
- [71] Mr. Goddard sent further emails to Staff's covert account as a "BCC" addressee. These emails, which begin "Hi Everyone", purport to give updates about the trading portfolio managed by the respondents, including returns of 13.2%, 36.3%, 17.4%, 18.0% and 18.5% in each of May through September 2014 respectively.
- [72] The respondents submit that we should disregard the evidence relating to Staff's response to the advertisement. The respondents argue that this information was obtained through a "sting operation". We reject this submission. There was nothing improper about the steps Staff took. In February 2014, Staff received several complaints about the respondents' activities. In March, when Staff responded to the Kijiji advertisement, Staff was investigating the respondents' conduct in good faith. Staff merely requested further information that was offered in the advertisement and that was provided to others. The evidence obtained through Staff's covert email account is admissible and reliable.
- [73] Mr. Goddard also created a Twitter account that he used to publicize that he was "creating an investment fund, like a mutual fund but with some juice", and that "20% returns are possible". On his LinkedIn profile he claimed to be a "market wizard" in the "financial services industry" and a "Trader" for Black Panther.
- [74] Mr. Goddard posted material on the IndieGoGo crowdfunding platform. This site, which Mr. Goddard advertised in a newspaper, stated that its goal was to "Raise a pool of capital for active trading in the marketplace", and added:
- The concept is for investors to deposit money into my trading corporation and one year later I send them back their money plus a guaranteed 20% return.

...

I earn money by actively trading in various markets, mainly, currencies, stocks and options, and commodities... Each investor will receive a 20% return on their investment one year after investment. Once I receive an investment I send out a "Letter of Understanding" that confirms receipt of the funds and the date and amount to be returned.

[75] Mr. Goddard included on the IndieGoGo site a profile of himself, in which he stated that Black Panther "does only one thing and that is trade in the marketplace."

[76] Finally, Mr. Goddard placed an advertisement in an Ottawa grocery store, referring readers to the IndieGoGo website and to Black Panther's own website.

3. The respondents' position

[77] The respondents do not contest any of the facts set out above, although they do offer a different interpretation.

[78] In written submissions, the respondents assert that the brochures they distributed "were for... workshops and individual tutoring." It is true that some of the brochures included such references. However, not all did, and even where there were such mentions, the above excerpts make clear that those activities were not the only purpose of the solicitations, and in most instances were clearly not the dominant purpose.

[79] The respondents also submit that the "20% solution" reference in the pamphlet given to Ms. P. "was not to do with return on investments, it was to do with improving the return on your portfolio and lowering the risk profile by actively trading 20% of the portfolio." This submission is directly contradicted by the pamphlet itself, which refers three times to an annual rate of return of 20%, with no reference to a portion of the portfolio being traded.

III. ANALYSIS

A. Are the Letters of Understanding "securities"?

1. Introduction

[80] We begin our analysis of the legal issues with Staff's submission that the Letters of Understanding are "securities" as that term is defined in the Act. The respondents submit that the Note Holders loaned money to Black Panther for a fixed period and a fixed return, and that the loans are "notes" or "debentures", not securities.

[81] The definition of "security" in subsection 1(1) of the Act comprises sixteen subdivisions, which as the Supreme Court of Canada held in *Pacific Coast Coin Exchange v Ontario (Securities Commission)* ("**Pacific Coast**"), are not mutually exclusive.⁵ In the Statement of Allegations, Staff alleges that each Letter of Understanding was a security because it met one or both of the following subdivisions:

(e) a bond, debenture, note or other evidence of indebtedness...,

...

⁵ [1978] 2 SCR 112 at 127.

(n) any investment contract,...

[82] In written submissions, Staff pursued only the “investment contract” subdivision of the definition. However, the respondents in their written submissions state numerous times that the Letters of Understanding are loans to Black Panther, and therefore not securities. Because the parties’ submissions, taken together, engage the two subdivisions of the definition of “security” cited above, we will address both.

2. Investment contract

[83] The term “investment contract” is not defined in the Act, but as the Supreme Court of Canada held in *Pacific Coast*, an investment contract will be found where: (i) there is an investment of funds with a view to profit, (ii) in a common enterprise, and (iii) the profits are to be derived solely from the efforts of others.⁶

[84] In describing the second and third prongs of the test to determine the existence of an investment contract, the Supreme Court of Canada held that:

...such an enterprise exists when it is undertaken for the benefit of the supplier of capital (the investor) and of those who solicit the capital (the promoter). In this relationship, the investor’s role is limited to the advancement of money, the managerial control over the success of the enterprise being that of the promoter; therein lies the community. In other words the “commonality” necessary for an investment contract is that between the investor and the promoter. There is no need for the enterprise to be common to the investors between themselves.⁷

[85] It is beyond doubt that the Note Holders advanced funds to Black Panther or Mr. Goddard with a view to a profit. While the Letters of Understanding specified a fixed rate of return, rather than a variable rate based on the investment performance of the Note Holder’s funds, this fact does not diminish the Note Holders’ dependence upon the managerial control exercised by the respondents.

[86] The investors in *Pacific Coast* were:

dependent upon the quality of the expertise brought to the administration of the funds... If Pacific does not properly invest the pooled deposit, the purchaser will obtain no return on his investment regardless of the prevailing value of silver; there is nothing that the customer can do to avoid that result.⁸

[87] That characterization applies equally in this case. The Note Holders were solicited by Mr. Goddard on the strength of his advertised experience and expertise, including his accreditations listed in the various brochures. Other than the advising service provided to Mr. C., Black Panther’s only business was trading, as is reflected in Mr. Goddard’s statement on the IndieGoGo platform, referred to in paragraph [75] above, that Black Panther “does only one thing and that is trade in the marketplace.” While there was some evidence that Black Panther offered “trading seminars”, there is no evidence that the company ever earned any revenue from doing so. Because the company’s only revenues were derived from trading conducted by Mr. Goddard, a Note Holder’s ability to be paid the amount promised was entirely dependent upon

⁶ *Pacific Coast* at 128.

⁷ *Pacific Coast* at 129-30.

⁸ *Pacific Coast* at 130.

Mr. Goddard, and the Note Holder was not involved in the trading that was required for Black Panther to earn the returns necessary to fulfill its obligations under the Letters of Understanding.

- [88] The respondents' efforts to characterize the Letters of Understanding as loan agreements that are not subject to the Act "do not detract from the true nature of the agreement[s] as... investment agreement[s]", to use the words of the Commission when it was considering similar circumstances in *Re Rezwealth Financial Services Inc. ("Rezwealth")*.⁹ While some parts of the advertisements, documents and communications used terminology that suggested loans, many other parts emphasized the makeup and performance of Black Panther's portfolio and sold the Letters of Understanding as a Note Holder's opportunity to participate in the capital markets. As the Supreme Court of Canada held in *Pacific Coast*, "[s]ubstance, not form, is the governing factor",¹⁰ so we must look beyond the form of the Letters of Understanding and instead to their true substance.
- [89] Mr. C. expressly rejected Mr. Goddard's suggestion on cross-examination that his funds were a "business loan". His understanding, and the understanding of the other investor witnesses that they were making "investments", is consistent with the message to that effect in Black Panther's advertisements, promotional materials, websites and updates delivered to existing and potential Note Holders.
- [90] We conclude that the Letters of Understanding are in substance investment contracts, since as in *Pacific Coast* "it is obvious that an investment of money has been made with an intention of profit",¹¹ and that profit was entirely dependent upon the respondents' efforts in the common enterprise between the Note Holder and the respondents.

3. Evidence of indebtedness

- [91] Even if we were to accept the respondents' submission that the Letters of Understanding reflected loans and not investments, it would not necessarily follow that those agreements are outside the Act's jurisdiction, given that the definition of "security" includes a "note" or "other evidence of indebtedness". The Act is remedial legislation and must be interpreted broadly in a manner consistent with its purposes, including investor protection.
- [92] Whether a promissory note is a security depends on its substance and on the surrounding circumstances. We have no difficulty reaching the conclusion that the Letters of Understanding are, in substance, evidence of indebtedness within the meaning of paragraph (e) of the definition of "security" in subsection 1(1) of the Act. We base that conclusion on the following factors:
- a. throughout the Material Time, using numerous methods and on numerous occasions, the respondents advertised to the general public and solicited funds from those who expressed interest;
 - b. the respondents' marketing materials were consistent with a contribution of funds being an investment opportunity;
 - c. the respondents sought the investments exclusively to fund trading in the capital markets;

⁹ (2013), 36 OSCB 7446 at para 222.

¹⁰ *Pacific Coast* at 127.

¹¹ *Pacific Coast* at 128.

- d. the respondents made representations regarding historic performance and regarding Mr. Goddard's personal experience and expertise in the capital markets, to induce the Note Holders to contribute funds; and
- e. the investors' only recourse is an unsecured claim against the respondents, and no other regulatory protection is available, all of which buttresses the conclusion that the investor protection purpose of the Act is promoted by extending the Act's provisions to the Letters of Understanding.

4. Conclusion as to "securities"

[93] For these reasons, we find that each Letter of Understanding is a security because it was an investment contract as well as evidence of indebtedness subject to the Act.

B. Unregistered trading in securities

[94] Subsection 25(1) of the Act prohibits a person or company from "engaging in the business of trading in securities", or from holding themselves out as doing so, unless the person or company is properly registered or is exempt under Ontario securities law. As noted above, neither respondent was registered during the material time.

[95] If Staff demonstrates that the respondents engaged in an activity that would be a breach of Ontario securities law but for the existence of an exemption which the respondents say is available to them, the respondents would then bear the burden of identifying the exemption and of demonstrating that they are entitled to rely on it.¹² In this case, the respondents did not suggest that either of them was entitled to an exemption from the prohibition in subsection 25(1) of the Act, and there is no evidence that at any time they purported to rely on an exemption. We therefore need only consider whether the respondents engaged in the business of trading in securities or held themselves out as doing so.

[96] "Trade" is defined in subsection 1(1) of the Act to include "any sale or disposition of a security for valuable consideration". It is undisputed that the respondents issued the Letters of Understanding in return for funds invested by the Note Holders. Because we have found that each Letter of Understanding is a security, it follows that each issuance of a Letter of Understanding was a trade in that security.

[97] We must still determine whether the respondents were required to be registered. Registration is a cornerstone of Ontario securities law. The requirement protects investors and promotes confidence in Ontario's capital markets by seeking to ensure that anyone who is in the business of selling or promoting securities meets the necessary standards of proficiency, solvency and integrity, among others.¹³ The requirement also affords the Commission and self-regulatory organizations the necessary opportunity to monitor registrants' conduct and to act where appropriate in order to achieve the purposes of the Act.¹⁴

[98] The Commission has adopted Companion Policy 31-103CP *Registration Requirements, Exemptions and Ongoing Registrant Obligations* ("**31-103CP**"), which among other things sets out "criteria to be considered in determining whether a person or company is engaged in a business when trading or advising in

¹² *Re Limelight Entertainment Inc.* (2008), 31 OSCB 1727 ("**Limelight**") at para 142; *Re First Global Ventures, S.A.* (2007), 30 OSCB 10473 ("**First Global**") at para 141.

¹³ Clause 27(2)(a) of the Act.

¹⁴ *Limelight* at para 135; *Re Momentas Corporation* (2006), 29 OSCB 7408 at para 46.

securities".¹⁵ This "business purpose" test in section 1.3 of 31-103CP includes the following factors:

- a. directly or indirectly carrying on the activity with repetition, regularity or continuity, especially trading in any way that produces, or is intended to produce, profits; and
- b. directly or indirectly soliciting, including contacting anyone by any means to solicit securities transactions.

[99] Both criteria are satisfied in this case. Using many means of communication over several years, the respondents repeatedly solicited members of the public to invest in Letters of Understanding, with the ostensible goal of realizing returns in excess of the rates promised to the Note Holders and thereby generating profits for the respondents.

[100] The respondents consistently and repeatedly held themselves out as being engaged in the business of trading. The above circumstances by themselves lead us to that finding, but also permit no other conclusion when combined with the fact that Black Panther carried on no material business other than issuing Letters of Understanding in return for investor funds. The respondents thereby breached subsection 25(1) of the Act.

C. Illegal distribution of securities

[101] Subsection 53(1) of the Act prohibits a person or company from trading in a security if the trade would be "a distribution of the security", unless a prospectus has been filed or an exemption is available. Like the registration requirement, the requirement to file a prospectus is a cornerstone of Ontario securities law.¹⁶

[102] The respondents' trades of the Letters of Understanding were a "distribution" as defined in subsection 1(1) of the Act, since the Letters of Understanding had "not been previously issued". Black Panther filed no prospectus with the Commission. Each trade was therefore a breach of subsection 53(1) of the Act unless the respondents identify an exemption and show that they may rely on it.¹⁷

[103] The respondents submit that they were entitled to the benefit of the friends, family and business associates exemption ("**FFBA Exemption**") provided for in subsection 2.5(1) of NI 45-106. A trade that is a distribution is not exempt under that provision unless the purchaser of the security purchases as principal and, if an individual, has a relationship with the issuer that is listed in paragraphs (a) through (g) of subsection 2.5(1) of NI 45-106 (*e.g.*, specified family members, close personal friends, and close business associates).

[104] That exemption did not apply in Ontario until Subsection 2.6.1(1) of NI 45-106 made it available on February 19, 2015. The coming into force of an exemption does not have retroactive effect unless expressly provided for, which it was not with respect to the FFBA Exemption. The exemption was therefore unavailable to the respondents before February 19, 2015. All but one of the Letters of Understanding were issued before that date, and as a result the respondents distributed each of those securities in breach of subsection 53(1) of the Act.

¹⁵ *Re Moncasa Capital Corp.* (2013), 36 OSCB 5320 at para 40; *Rezwealth* at para 211.

¹⁶ *Jones v FH Deacon Hodgson Inc* (1986), 9 OSCB 5579 (Ont HC) at para 10.

¹⁷ *Limelight* at para 142; *First Global* at para 141.

[105] The only Letter of Understanding issued after February 19, 2015, was to Mr. S., who was neither a family member, nor a close personal friend, nor a close business associate of Mr. Goddard's. Rather, Mr. S. was an acquaintance of Mr. Goddard's son, and was solicited by Mr. Goddard through LinkedIn. The respondents were not entitled to rely on the FFBA exemption with respect to Mr. S., and therefore the distribution to Mr. S. was also in breach of subsection 53(1) of the Act.

D. Business of advising

[106] Subsection 25(3) of the Act provides that unless an exemption is available, or the person or company is properly registered, no person or company shall "engage in the business of, or hold himself, herself or itself out as engaging in the business of, advising anyone with respect to investing in, buying or selling securities".

[107] The business purpose test discussed above with respect to trading applies equally to advising.¹⁸ In considering Staff's allegation that the respondents engaged in the business of advising in securities, or that they held themselves out as being in that business, we take into account additional factors listed in section 1.3 of 31-103CP, beyond those mentioned in paragraph [98] above, and we consider them in the context of this allegation. The factors include:

- a. engaging in activities similar to those of a registrant;
- b. directly or indirectly carrying on the activity with repetition, regularity or continuity, especially advising in any way that produces, or is intended to produce, profits;
- c. being, or expecting to be, remunerated or compensated for advising; and
- d. offering advice for the purpose of directly or indirectly soliciting securities.

[108] In January 2013, Mr. C. paid \$950 to Black Panther. On his compelled examination, Mr. Goddard testified that the fee was for coaching as opposed to trading, acknowledging that his "doing the investments" would be prohibited. This answer conflicts with Mr. C.'s evidence that in return for the fee Mr. Goddard instructed him to make specific trades. The answer also conflicts with the terms of the agreement prepared by Mr. Goddard and referred to in paragraph [52] above, which expressly called for "management fees" to be paid to Mr. Goddard in return for his "manag[ing] and trad[ing] this account".

[109] We accept Mr. C.'s evidence, and the written agreement speaks for itself. In cross-examining Mr. C., Mr. Goddard did not put to Mr. C. the suggestion that the \$950 was for coaching about general trading techniques as opposed to instructing Mr. C. to make specific trades, for at least part of the period represented by the \$950 fee. We therefore have no basis upon which to find that the \$950 was for anything other than what Staff alleges.

[110] As a result, we conclude that with respect to Mr. C. the respondents meet at least two of the factors enumerated in 31-103CP. First, they engaged in activities similar to a registrant, in that they provided the precise service that many registrants provide, and for which those registrants require their registration. Second, the respondents were in fact compensated for advising. As the Commission has

¹⁸ *Re International Strategic Investments* (2015), 38 OSCB 2354 ("**International Strategic**") at para 50.

previously held, the presence of compensation for the service is a strong, if not conclusive, indicator of a business purpose.¹⁹

[111] The respondents offered the same service more broadly to the public. In the Kijiji advertisement referred to in paragraph [68] above, the respondents offered, for a fee, to give advice with respect to specific trades.

[112] We therefore conclude that the respondents jointly engaged in the business of advising Mr. C. with respect to investing in securities and thereby breached subsection 25(3) of the Act, and that the respondents further breached that subsection by holding themselves out as being engaged in the business of advising with respect to specific securities transactions.²⁰

E. Fraud

1. Introduction

[113] Staff alleges that the respondents perpetrated fraud by committing the following acts:

- a. misrepresenting to existing and potential Note Holders the returns earned by the respondents through the trading of Note Holders' funds;
- b. failing to honour representations to the Note Holders that the funds invested by them would be pooled with funds of other Note Holders, and that these funds would be traded in the capital markets; and
- c. representing to existing and potential Note Holders that their investment funds were guaranteed by the Canadian Deposit Insurance Corporation ("**CDIC**"), that the funds were then transferred to trading accounts that were covered by the Canadian Investor Protection Fund ("**CIPF**"), that a number of steps had been taken to minimize trading risk, and that Black Panther's investment structure carried no more risk than a Guaranteed Investment Certificate ("**GIC**").

[114] Staff alleges that each of these actions contravened clause 126.1(1)(b) of the Act,²¹ which provides, in part:

A person or company shall not, directly or indirectly, engage or participate in any act, practice or course of conduct relating to securities... that the person or company knows or reasonably ought to know... perpetrates a fraud on any person or company.

2. Analysis

(a) Law

[115] In order to prove that a respondent has committed a fraud, Staff must establish both an act of the necessary fraudulent quality (often called the "*actus reus*") and that the respondent had the necessary guilty mind or wrongful intention (often called the "*mens rea*").²²

¹⁹ *International Strategic* at para 51.

²⁰ *Costello v. Ontario (Securities Commission)*, 2004 CanLII 2651 (ON SCDC) at paras 40-64; *International Strategic* at para 54.

²¹ Formerly paragraph 126.1(b) of the Act, and renumbered in 2013 without any change to the text of the provision.

²² *Rezwealth* at para 253.

- [116] The Supreme Court of Canada held in *R v Théroux* ("**Théroux**") that the *actus reus* has two components, each of which must be proven:
- a. an act of deceit, a falsehood or some other fraudulent means; and
 - b. a resulting deprivation, which may be real (an actual loss) or potential (*e.g.*, placing the victim's pecuniary interests at risk).²³
- [117] An act is of deceit or is a falsehood if the person who committed it "as a matter of fact, represented that a situation was of a certain character, when, in reality it was not." The third category, "other fraudulent means", includes "the use of corporate funds for personal purposes, non-disclosure of important facts... [and] unauthorized diversion of funds."²⁴
- [118] The *mens rea* of fraud examines the mental state of the person alleged to have committed the fraud, and typically focuses on that person's degree of appreciation for the potential consequences of the alleged fraudulent act. Staff may prove this element either by direct evidence or by relying on an inference that can be drawn from the act itself.²⁵ Where an individual "tells a lie knowing others will act on it and thereby puts their property at risk, the inference of subjective knowledge that the property of another would be put at risk is clear."²⁶ Alternatively, "[r]ecklessness presupposes knowledge of the likelihood of the prohibited consequences".²⁷
- [119] A corporation may be found to have breached clause 126.1(1)(b) of the Act if the corporation's directing mind knew or ought reasonably to have known that the corporation perpetrated a fraud.²⁸
- [120] We now examine each of the three categories of alleged fraud referred to in paragraph [113] above.

(b) Returns earned

- [121] The respondents made many representations about the performance of Black Panther's investment portfolio. In emails sent to existing and potential investors, including Mr. S., the respondents asserted that the portfolio had earned returns ranging from 13.2% to 36.3% per month from May to October 2014. On January 8, 2015, Mr. Goddard told the principal of the firm he was seeking to join that his "return in 2014 for the accounts [he] manage[d]" was 63.48%.
- [122] The records available to Staff that were admitted into evidence reflect neither the extraordinary returns claimed by the respondents and used by them to entice investment in Black Panther, nor any positive return at all over the Material Time.
- [123] It was, of course, open to the respondents to tender evidence to the contrary. The summons issued to Mr. Goddard required him to produce a list of all bank and brokerage accounts held by him and/or Black Panther, and on his examination Staff asked Mr. Goddard to identify all institutions at which accounts were held. In his response to undertakings given on the examination, Mr. Goddard asserted with respect to accounts that might demonstrate the advertised returns that he did "not have access to these records any longer" and that he was "in the process of

²³ *Rezwealth* at paras 253-58, citing *R v Théroux*, [1993] 2 SCR 5.

²⁴ *Théroux* at 16-17.

²⁵ *Théroux* at 17-21.

²⁶ *Théroux* at 21.

²⁷ *Théroux* at 20.

²⁸ *Re Al-Tar Energy Corp.* (2010), 33 OSCB 5535 at para 221.

gathering all this information for my accountant, but due to my time and other constraints, it is not available at this time.”

- [124] When the principal of the firm Mr. Goddard was seeking to join asked repeatedly for proof to support the returns claimed, Mr. Goddard initially advised that he had “no problem disclosing the accounts [he was] involved with.” However, he stated that even though “[o]ver the past eight months [he had] recorded every trade [he] made”, he could not provide the proof requested, since he had “no way of providing the statement(s)” that the principal was seeking.
- [125] In their written submissions the respondents repeat these assertions, referring to trades “across many accounts” and returns from “several accounts” in respect of which Mr. Goddard doesn’t “have access... anymore”, and stating that “Staff do not have all accounts”. In response to Staff’s written submission, with which we concur, that client records ought to be readily available, the respondents reply that Mr. Goddard “also said [he] would not be revealing details of any accounts that involved other people.” This answer is either a deceitful attempt to avoid the truth that no such accounts exist, or it is a clear refusal to comply with his legal obligation under the summons issued to him. Either way, it is of no benefit to the respondents.
- [126] The evidence leaves us with no difficulty concluding on a balance of probabilities that the Funds Analysis comprises information from all of Black Panther’s and Mr. Goddard’s bank and brokerage accounts through which any of the Note Holders’ funds might have passed. In particular, we note as Staff has that all of the Note Holders’ initial investments are accounted for, and there is no indication that any of those funds flowed into an account that is not included in the Funds Analysis. The only reasonable conclusion is that there is no other account in which funds remain or in which the advertised returns were realized.
- [127] We therefore conclude that Mr. Goddard knowingly made false representations as to the performance of Black Panther’s trading portfolio. These false and deceitful acts caused at least a potential risk of deprivation, if not actual loss, to those who were induced to invest in Black Panther on the strength of these representations. The representations were fraudulent.

(c) Use of funds

- [128] All three investor witnesses testified that they expected their funds to be traded in the market, and that they did not authorize Mr. Goddard to use their funds to pay his personal expenses, to make repayments to other investors, or to use as Mr. Goddard wished in a business venture. Their testimony is uncontradicted by other evidence, was unimpeached on cross-examination, and is corroborated by the respondents’ promotional documents (*e.g.*, the pamphlet sent to Mr. C., referred to in paragraph [50] above).
- [129] In contrast to these expectations, Staff’s Funds Analysis demonstrates the following:
- a. less than 24% of the total funds advanced by the Note Holders to the respondents was ever transferred to a brokerage account;
 - b. when Note Holders’ funds were transferred to a brokerage account, often most or all of these funds were soon returned to a Black Panther bank account;
 - c. of the approximately \$101,201 that was transferred to brokerage accounts, a total of approximately \$98,000 was ultimately returned, resulting in a net loss in those accounts of \$3,000 during the Material Time;

- d. the respondents often used Note Holders' funds to make payments to other Note Holders; and
 - e. the respondents also used Note Holders' funds for Mr. Goddard's personal benefit, including credit card payments in the name of Mr. Goddard and his life partner, cash withdrawals, as well as for transfers to related parties, including his son, daughter and life partner.
- [130] Of the \$425,607 raised from Note Holders, payments totaling \$112,710 representing both principal and interest were made to some Note Holders. As at the time of Mr. Goddard's compelled examination, approximately \$36,000 remained in the respondents' bank and brokerage accounts, resulting in a deficiency of approximately \$277,000 that was spent or lost in trading. At least \$328,000 of principal and interest continues to be owed to Note Holders by the respondents.
- [131] The respondents' consistent misuse of Note Holders' investments is well illustrated by the activity in Black Panther's primary bank account immediately following the issuance of the first Letter of Understanding. On July 25, 2012, at which time the balance in the bank account was \$2.74, the first Note Holder's investment of \$5,000 was deposited into the account. Over the next week, the only other deposit to the account was \$300 from an unknown source. During that week:
- a. only \$700 was transferred to a brokerage account;
 - b. \$1,000 was withdrawn as cash;
 - c. \$1,750 in payments were made to personal credit card and wireless service accounts, and for bank charges; and
 - d. \$1,500 was paid to Mr. Goddard's daughter;
 - e. leaving a balance of \$350.
- [132] Ms. P.'s investment suffered a similar fate. Of her \$18,157.98 deposited to Black Panther's bank account on March 25, 2013, no funds were transferred to a brokerage account. Her entire investment was depleted within six weeks, through transfers to Mr. Goddard's life partner of \$6,500, credit card and utility payments of \$3,000, payments totaling \$2,300 to Mr. Goddard's daughter for "rent", \$1,600 in cash withdrawals, \$1,300 to Mr. Goddard's personal bank account, and other miscellaneous items.
- [133] The respondents' use of one Note Holder's investment to pay another Note Holder is illustrated by the March 27, 2014, investment of \$100,000 by a Note Holder, Mr. G. (unrelated to Mr. Goddard). That sum was deposited to a Black Panther bank account that was overdrawn at the time of the deposit. Within less than two months, the sums of \$16,514 and \$6,500 were paid from that account to two other Note Holders. A net sum of \$22,000 was transferred to a brokerage account, and the remaining approximately \$55,000 was paid to Mr. Goddard's life partner and to his son (\$35,600 between them) and to credit card, retail store, and auto financing accounts, as well as to cash withdrawals and bank fees.
- [134] A further example is the \$16,000 investment by a Mr. K. and Ms. M on December 3, 2014. Two days later the respondents issued a cheque for \$12,500 to Note Holder Mr. M., who had made an initial investment of \$5,000 in September 2012, followed by investments of \$2,500 in December 2012, \$5,000 in May 2013, and \$10,000 in October 2013.
- [135] We did not hear evidence from these Note Holders, and therefore we do not know whether they or any other Note Holders were in fact induced to invest because

promised payments had been made by the respondents to them or to others they knew. However, we do not need that kind of evidence to notice that the respondents' scheme shares one of the chief attributes of a Ponzi scheme, where new investor funds are used to pay earlier investors, with the inevitable result that eventually some investors will experience a loss, often of their entire investment.

- [136] The evidence is overwhelming that the respondents' actions following receipt of the investor funds were dishonest, were inconsistent with their promises, were executed to the full knowledge of and at the direction of Mr. Goddard, and constituted "other fraudulent means" as referred to in paragraph [117] above. These acts caused all Note Holders to suffer a potential deprivation by having their pecuniary interests put at risk, since their funds were not where they expected them to be, nor were they being used as expected. In addition, most Note Holders suffered a real deprivation in that they have not been paid the funds owing to them. The respondents' assertion in written submissions that "[t]here is no one at this point owed any money" is not only unsupported by any evidence, it is expressly contradicted by the investor witnesses' evidence and by the Funds Analysis.
- [137] As to Mr. Goddard's mental state with respect to the potential consequences of these transactions, we find that he was at least reckless as to whether the investors would suffer the potential and actual deprivation, given that the Note Holders entrusted their funds to Black Panther and relied on his promises that the funds would be invested. As called for in *Théroux*, we also infer from the very nature of Mr. Goddard's acts that he knew of the potential deprivation, if not the certainty of an actual loss. Absent any evidence or explanation to the contrary, we conclude on a balance of probabilities that Mr. Goddard's mental state meets the necessary test for fraud.

(d) Investment risk

- [138] The respondents made various representations regarding risk in order to induce investment in Black Panther.
- [139] In encouraging Ms. P. to move her existing investments, Mr. Goddard said in an email to her that doing so "doesn't mean more risk than you have now...". This statement was untrue with respect to the \$18,157.98 that Ms. P. invested directly with Black Panther. By moving her funds to Black Panther, Ms. P. lost the benefit of a diversified portfolio, as well as any real protection against an insolvency of the firm at which the funds were held, or against a fraud, in this case by Mr. Goddard.
- [140] Mr. Goddard also gave the *Roller Coaster* booklet to Mr. C. and sent it to potential investors, including to Staff's covert email address. The booklet repeated the respondents' representation made on numerous occasions and by numerous modes, reviewed above, that an investment in Black Panther was no riskier than an investment in a GIC. That representation was also untrue, in that it implied an equivalence between the soundness of a guarantee at a regulated financial institution and that of Black Panther, an unregulated company with no net assets or revenues.
- [141] The respondents compounded this misrepresentation of risk by stating that any investment funds would be "covered by" CDIC. The missing details, however, are equally important: that CDIC pays only in the event of a loss due to insolvency of the financial institution, up to a limited amount (\$100,000 per eligible account) and only to the benefit of the account holder, in this case Black Panther. Any suggestion that CDIC insurance would cause the risk of an investment in Black Panther to be "no more" than that of a GIC is blatantly false.

- [142] The respondents made similar representations regarding funds that would be held in brokerage accounts. The respondents stated that “[t]he monies are then transferred” from Black Panther’s bank account to trading accounts at firms that “are registered investment firms and as such are covered by CIPF. This protects accounts against insolvency to a limit of one million dollars per account.”
- [143] Staff submits that this representation was misleading in two respects, in that Mr. Goddard would not in fact be transferring all of the invested funds to trading accounts, and in that it misrepresented the extent of CIPF’s coverage. In particular, Staff submits that the statement implies insurance against trading losses or against the funds being transferred out of the account and spent.
- [144] By very early in the Material Time the respondents had established the consistent pattern of transferring little if any of a Note Holder’s funds to a brokerage account, and, even when they did, often transferring funds back to Black Panther’s bank account shortly afterwards. Therefore, the suggestion that CIPF’s coverage would extend to Note Holders’ funds was materially misleading, since the majority of the funds were not even in an account covered by CIPF. Even with respect to funds in a covered account, if CIPF did pay insurance as a result of the insolvency of a firm, such payment would be limited, and would go to Black Panther and not to the Note Holders.
- [145] We therefore conclude that the representations to Ms. P. and the representations to investors generally regarding risk were dishonestly made, were acts of deceit and of falsehood, and caused at least a potential risk of deprivation to anyone who was induced to invest funds while under a misapprehension as to the actual risk associated with the investment. Mr. Goddard was fully aware of the deceitful nature of the representations, which were therefore fraudulent.

(e) Conclusion as to fraud

- [146] The respondents perpetrated fraud, contrary to clause 126.1(1)(b) of the Act, by doing each of the following:
- a. making false representations about returns generated in Black Panther’s portfolio;
 - b. using investor funds in a manner not consistent with promises made to Note Holders; and
 - c. making false representations about the risk associated with investment in Black Panther.

F. False or misleading statements

- [147] Staff alleges that the respondents breached subsection 44(2) of the Act, which 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.

- [148] Staff’s allegation includes only the second and third categories of statements mentioned in paragraph [113] above. We suspect that Staff intended to include all three categories. However, the relevant portion of the Statement of Allegations

(paragraph 29) appears to contain a typographical error that was not adverted to during the hearing by anyone, including this panel. We are not prepared at this stage and on our own initiative to remedy the error, because doing so would be unfair to the respondents. Accordingly, for the purpose of this allegation we ignore statements regarding returns earned by Black Panther. We consider only the statements that are the subject of the allegation; namely those with respect to the use of funds and the risk associated with the investment.

[149] We have already found that those statements were false and misleading. The statements went to the heart of the proposed investment in Black Panther and would unquestionably be relevant to any reasonable investor who was deciding whether to enter into a trading or advising relationship with the respondents. Indeed, the statements were made for exactly that purpose. The respondents therefore contravened subsection 44(2) of the Act by making those statements.

G. Misleading Staff

1. Introduction

[150] Clause 122(1)(a) of the Act provides that a person or company is guilty of an offence if that person or company:

makes a statement in any... evidence... submitted to... any person acting under the authority of the Commission... that, in a material respect and at the time and in the light of the circumstances under which it is made, is misleading or untrue or does not state a fact that is required to be stated or that is necessary to make the statement not misleading[.]

[151] Staff who conducted the examination of Mr. Goddard in February 2015 were acting under the authority of the Commission pursuant to an order issued by the Commission under section 11 of the Act. Staff alleges that during his examination, Mr. Goddard made a number of misleading or untrue statements, or omitted necessary facts.

[152] In *Wilder v. Ontario (Securities Commission)* ("**Wilder**"),²⁹ the Court of Appeal for Ontario reviewed the importance of section 122 of the Act and its interrelationship with the public interest jurisdiction of the Commission. The Court referred to the Commission's "obligation to do its best to ensure that those involved in the securities industry provide fair and accurate information" and stated that:

[i]t is difficult to imagine anything that could be more important to protecting the integrity of capital markets than ensuring that those involved in those markets, whether as direct participants or as advisers, provide full and accurate information to the OSC.³⁰

[153] The Court rejected the submission made by the appellant in that case, who had been a respondent before the Commission, that alleged misconduct under clause 122(1)(a) of the Act was within the exclusive jurisdiction of the Ontario Court of Justice. The Court referred to the range of options available to the Commission, including prosecution in the Ontario Court of Justice pursuant to section 122 and a proceeding before the Commission pursuant to section 127, and noted with approval

²⁹ [2001] OJ No 1017 (CA).

³⁰ *Wilder* at para 22.

that the Commission “may prefer the more flexible and less drastic administrative sanctions available pursuant to s. 127 as the best way to achieve the objectives of the legislation.”³¹

[154] The language of clause 122(1)(a) makes clear that misleading by omission is equally problematic.³² The section also establishes liability even without proof of a specific mental element, *e.g.*, intention, wilful blindness or recklessness. In our view, therefore, for the purposes of a proceeding before the Commission, in appropriate circumstances it is in the public interest to make an order under section 127 of the Act where a respondent makes a misleading or untrue statement or omission within the meaning of clause 122(1)(a) of the Act.

2. Funds

[155] Mr. Goddard misled Staff in a material respect in three ways regarding Note Holders’ funds, when he claimed that as of the date of his examination:

- a. 12 investors had become Note Holders, when in fact there were 16;
- b. Note Holders had invested only \$279,000, when in fact the respondents had received \$410,607 of the \$425,607 referred to in paragraph [31] above, including an investment of \$70,000 made less than three weeks before the examination, with the remaining \$15,000 coming from Mr. S. after the examination; and
- c. Black Panther held approximately \$275,000 in three trading accounts and approximately \$35,000 in one bank account, when in fact Mr. Goddard held approximately \$7,400 in one bank account, and Black Panther held a total of approximately \$28,300 in one bank account and three trading accounts.

[156] Mr. Goddard also misled Staff regarding funds flowing to and from his son and daughter. He testified that:

- a. his son had neither invested any money in nor received any money from Black Panther, when in fact:
 - i. his son’s counsel provided a Letter of Understanding acknowledging Black Panther’s receipt of \$15,000 from Mr. Goddard’s son in November 2013;
 - ii. the Funds Analysis shows additional loans or investments by his son totaling approximately \$10,000; and
 - iii. the Funds Analysis shows various payments flowing from Black Panther to his son, the total of which represents approximately 10% more than his son invested; and
- b. his daughter received no funds from Black Panther, when the Funds Analysis shows payments totalling approximately \$8,000 flowing directly from Black Panther’s account to his daughter.

3. Other misstatements

[157] Mr. Goddard made the following additional false or misleading statements to Staff, when he testified that:

³¹ *Wilder* at para 23.

³² *Xanthoudakis v Ontario Securities Commission*, 2011 ONSC 4685 (Div.Ct.) at paras 93-94.

- a. the \$950 payment from Mr. C., referred to in paragraph [53] above, was “for coaching, because I’m not allowed to get paid for doing the investments”, when as we have previously found, the payment was a fee for advising and trading;
- b. no one had responded to the Kijiji advertisement referred to in paragraph [67] above when in fact Staff had responded using its covert email account, and Mr. Goddard had replied, including with specific reference to a promise made in that advertisement; and
- c. he was not an officer or director of, nor did he hold an ownership interest in, any company other than Black Panther, when in fact he had incorporated Charles Goddard Investments Ltd. in the United Kingdom as its sole director and officer in September 2014, several months before his examination.

4. Conclusion as to the allegation of misleading Staff

[158] Staff’s evidence demonstrates that Mr. Goddard made the above statements to Staff, and that each of the statements was misleading or untrue in a material respect. The respondents offered no evidence to contradict Staff’s allegation. We conclude that each of the statements was contrary to clause 122(1)(a) of the Act.

H. Disclosing information regarding Staff’s investigation

[159] Subsection 16(1) of the Act contains important prohibitions against the disclosure of a broad range of information relating to an investigation conducted pursuant to an order issued under section 11 of the Act. These prohibitions protect the integrity of Staff’s investigation by, among other things, restricting the communication of information among persons connected to the matters under investigation.³³ Subsection 16(1) provides:

Except in accordance with section 17, no person or company shall disclose at any time, except to his, her or its counsel,

(a) the nature or content of an order under section 11...; or

(b) the name of any person examined or sought to be examined under section 13, any testimony given under section 13, any information obtained under section 13, the nature or content of any questions asked under section 13, the nature or content of any demands for the production of any document or other thing under section 13, or the fact that any document or other thing was produced under section 13.

[160] On January 26, 2015, Staff issued a summons to Mr. Goddard pursuant to section 13 of the Act. The summons specified documents that Mr. Goddard was to produce on his examination. Mr. Goddard attended for his examination four weeks later.

[161] The letter that accompanied the summons explicitly stated that there was “a high degree of confidentiality associated with this matter”, and quoted subsection 16(1) of the Act in full. In addition, at the beginning of Mr. Goddard’s examination Staff had an extensive discussion with Mr. Goddard about the confidential nature of the examination, and about the prohibitions referred to in the covering letter. Mr. Goddard raised some concerns about the wisdom of those restrictions, and it is clear from his comments that he fully understood them.

³³ *Agueci* at para 104.

[162] One week following his examination Mr. Goddard sent a copy of the summons to the principal of the firm that Mr. Goddard was hoping to join. Mr. Goddard asserts in written submissions that he was considering retaining the same lawyer as the individual to whom he sent the summons, and he expected that individual to forward the summons to the lawyer.

[163] Regardless of Mr. Goddard's explanation, he breached section 16 of the Act by sending a copy of the summons to the individual, since the summons itself disclosed the nature and content of the investigation, the fact that Mr. Goddard had been examined pursuant to section 13 of the Act, and the nature and content of the demand for production of documents.

I. Mr. Goddard's liability as director of Black Panther

[164] Staff alleges that Mr. Goddard, as a director of Black Panther, should be deemed not to have complied with Ontario securities law, by virtue of section 129.2 of the Act, which provides:

For the purposes of this Act, if a company... has not complied with Ontario securities law, a director... of the company... who authorized, permitted or acquiesced in the non-compliance shall be deemed to also have not complied with Ontario securities law...

[165] Mr. Goddard did not attempt to rely on his formal absence from the board of Black Panther from December 2010 to May 2014, to dispute Staff's allegation that he would be liable under section 129.2 for any breaches committed by Black Panther that he authorized or permitted or in which he acquiesced. Even if he had taken that position, however, it would have been of no assistance to him. The definition of "director" in subsection 1(1) of the Act includes an individual "performing a similar function" to that of a director.

[166] Because Mr. Goddard was the sole directing mind of Black Panther at all relevant times, it follows that he authorized all of Black Panther's breaches of Ontario securities law. That conclusion is therefore inconsequential for this proceeding, since Mr. Goddard's direct personal participation in each of those breaches makes him liable on his own, without the need to resort to section 129.2 of the Act.

IV. CONCLUSION

[167] For the reasons set out above, we find that:

- a. while not registered, the respondents engaged in the business of trading in the Letters of Understanding, which are securities, and held themselves out as being in that business, contrary to subsection 25(1) of the Act;
- b. the respondents traded in the Letters of Understanding where such trades were distributions, without filing a prospectus, contrary to subsection 53(1) of the Act;
- c. the respondents engaged in the business of advising Mr. C. in securities, and held themselves out as engaging in that business generally, contrary to subsection 25(3) of the Act;
- d. the respondents perpetrated a fraud contrary to clause 126.1(1)(b) of the Act, by each of:
 - i. making false representations about returns generated in Black Panther's portfolio;

- ii. using Note Holders' funds in a manner not consistent with promises made to them; and
- iii. making false representations about the risk associated with investment in Black Panther;
- e. contrary to subsection 44(2) of the Act, the respondents made untrue statements that reasonable investors would consider relevant in deciding whether to enter into or maintain a trading or advising relationship, with respect to:
 - i. the use of Note Holders' funds; and
 - ii. the risk associated with investment in Black Panther;
- f. contrary to clause 122(1)(a) of the Act, Mr. Goddard misled Staff in its investigation, with respect to:
 - i. the amount of money raised from Note Holders;
 - ii. funds held by the respondents;
 - iii. the nature of his business relationship with Mr. C.;
 - iv. whether his son and daughter had invested in or received money from Black Panther;
 - v. whether anyone had responded to Black Panther's Kijiji advertisement; and
 - vi. whether he held any other positions as director or officer; and
- g. Mr. Goddard breached subsection 16(1) of the Act by disclosing information regarding the investigation being conducted by Staff.

[168] Staff shall contact the Commission's Office of the Secretary, copying the respondents, within 15 days of these Reasons and Decision to arrange dates for a hearing regarding sanctions.

Dated at Toronto this 30th day of January, 2017.

"Timothy Moseley"

Timothy Moseley

"Garnet Fenn"

Garnet Fenn

"Judith Robertson"

Judith Robertson