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Citation: Strictrade Marketing Inc. et al., 2017 ONSEC 12
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IN THE MATTER OF
EDWARD FURTAK, AXTON 2010 FINANCE CORP., STRICT TRADING LIMITED, RONALD OLSTHOORN, TRAFALGAR ASSOCIATES LIMITED, LORNE ALLEN AND STRICTRADE MARKETING INC.

REASONS AND DECISION ON SANCTIONS AND COSTS
(Sections 127 and 127.1 of the *Securities Act*, RSO 1990, c S.5)

Hearing: January 30, 2017
March 2 and 3, 2017

Decision: May 4, 2017

Panel:	Janet Leiper	- Chair of the Panel
	D. Grant Vingoe	- Vice-Chair
	AnneMarie Ryan	- Commissioner
Appearances:	Catherine Weiler	- For Staff of the Commission
	Yvonne B. Chisholm	
	Christina Galbraith	
	Julia Dublin	- For the Respondents

TABLE OF CONTENTS

REASONS AND DECISION OF THE MAJORITY (Commissioners Leiper and Ryan)

I. INTRODUCTION

A. The Allegations and Merits Findings

[1] The Respondents are the subject of enforcement proceedings brought by Staff of the Ontario Securities Commission. A Statement of Allegations issued on March 30, 2015, alleged that the Respondents breached the *Securities Act*, RSO 1990, c S.5 (the **Act**) by, among other things, marketing and selling licences for trading software (the **Strictrade Offering**). A hearing into the merits of the allegations was held between May and October of 2016 (the **Merits Hearing**).

[2] A merits decision was issued on November 24, 2016 (*Re Furtak* (2016), 38 OSCB 9731) (the **Merits Decision**), in which the Commission gave reasons for finding the following breaches of the Act:

a. engaging in the illegal distribution of securities, contrary to subsection 53(1) of the Act (all Respondents);

b. engaging in or holding themselves out as engaging in trading in securities without registration, contrary to subsection 25(1) of the Act (Lorne Allen, Strictrade Marketing Inc. (**SMI**), Edward Furtak, Axton 2010 Finance Corp. (**Axton**) and Strict Trading Limited (**STL**));

c. violating provisions of National Instrument 31-103 – *Registration Requirements, Exemptions and Ongoing Registrant Obligations* (Trafalgar Associates Limited (**TAL**) and Ronald Olsthoorn); and

d. failing to comply with Ontario securities laws as directors and officers, contrary to section 129.2 of the Act (Furtak, Olsthoorn and Allen).

[3] The breaches of the Act related to the sale of the Strictrade Offering, which the Panel determined to be an investment contract. The Strictrade Offering was created by Furtak and marketed by Olsthoorn and Allen across Canada and in Las Vegas, United States. The evidence revealed a complicated investment scheme among a group of related entities and individuals.

[4] Investors purchased licences for trading software from Furtak's company, Axton. Every investor then signed a promissory note with Axton to finance the purchase amount. Investors paid Axton 10.5% per year in advance in interest and loan maintenance fees. Investors contracted with STL, another entity created by Furtak. STL was the "customer" who operated the software and paid investors for trading reports generated by the software. Investors also paid in advance an annual software hosting fee to STL.

[5] The Strictrade Offering promised to pay annual capped "trading report payments." A "Software Performance Bonus" was offered to those investors who stayed in the scheme for at least five years. In addition, the promoters highlighted the tax deductions and capital cost allowance possibly available to purchasers of the licences. The Respondents' marketing materials referred to a valuation report as evidence of the licence value. The valuation report, which was not provided to investors, was based on a different kind of licence arrangement than that sold to investors. We found that this was a misleading feature of the marketing of the Strictrade Offering.

[6] Due to the complexity of the scheme, a number of the investors who purchased the licences did not understand the nature of their investment. Several testified that they did not know they would be required to make annual payments. In relation to the annual payments required by the contract, one such investor, Daniel G, testified: "This is killing me." However, Daniel G elected to stay in the investment in the hope of maintaining certain tax deductions and the expectation of the payment of trading report payments and an eventual bonus payment in the future.

B. The Issues

[7] On January 30, 2017 and March 2 and 3, 2017, the Commission received evidence and submissions from Staff and the Respondents on the issues of sanctions and costs. At the end of the first day of the hearing, Staff requested an order requiring the Respondents to cease trading in the Strictrade Offering. The Commission made an interim cease trade order pending its decision on sanctions and costs.

[8] Staff submits that a range of sanctions is justified by the findings on the merits and that such sanctions would be consistent with previous decisions of the Commission involving unlawful trading. Staff requests an order with trading, director and officer bans, registration bans, monetary penalties, disgorgement and costs.

[9] In contrast, the Respondents submit that none of the sanctions sought by Staff are justified, arguing that the sanctions are disproportionate to the conduct. At the Sanctions Hearing, the Respondents tendered emails and letters between their lawyer and Commission Staff to suggest that they had been transparently communicating with their regulator while attempting to promote a novel arrangement that they believed was not a security in law.

[10] The Respondents ask that the Panel decline to impose any market participation bans in order to allow them to continue the investment scheme with current investors. They ask to continue to collect fees and interest payments from the remaining three investors. They point to the benefits of the tax deductions that the investors have taken and may continue to take, as well as the Software Performance Bonus, which becomes payable at the end of the fifth year of participation in the scheme. One of the Respondents, Ron Olsthoorn is also a significant investor in the scheme and intends to take tax deductions in relation to his investment.

[11] In essence, the Respondents ask the Commission to allow them to continue to receive funds from the remaining investors, to benefit from a scheme that has been found to be unlawful and to receive no sanctions for their breaches of the Act.

II. EVIDENCE ON SANCTIONS

A. The Net Profits to the Respondents

[12] By way of affidavits sworn on December 22, 2016, January 25, 2017 and February 13, 2017, a Senior Forensic Accountant with Staff provided evidence on the difference between payments made by investors in the scheme and the amounts these investors had received from the trading report payments. As of the final date of the Sanctions Hearing, March 3, 2017, the net amount of funds

obtained by the Respondents totalled $216,538.66. The calculations in this case do not include the investment made by Olsthoorn, as he is a Respondent in the proceedings.

[13] On January 30, 2017, Daniel G sent a bank draft to the Respondents in the amount of $15,000. The interim cease trade order was made by the Commission on that day. By correspondence with Staff prior to the Sanctions Hearing resuming on March 2, 2017, Daniel G confirmed his understanding that the Respondents would not cash the draft pending the outcome of the hearing. He also advised Staff that he had paid into the scheme for five years and expects to receive the promised Software Performance Bonus. If the scheme terminates, the investors would not be entitled to the Software Performance Bonus and would not be able to take advantage of any tax benefits that may have applied over the next couple of years. Daniel G expressed his concern about the impact on his personal income tax situation if the scheme is brought to an end as a result of an Order made by the Commission.

B. The Tax Positions of the Investors

[14] The Senior Forensic Accountant with Staff compiled tax returns for the investors and calculated the tax benefits they received from the Strictrade Offering between 2012 and 2015. One investor who participated in the scheme, but has since terminated her contracts, claimed business losses in 2013 related to the Strictrade Offering. Her claim was reassessed by the Canada Revenue Agency three years later. The business losses arising from the Strictrade Offering were denied. She was charged arrears interest relating to the Strictrade Offering of $856.84. To date, none of the other investors who have claimed deductions and losses under the Strictrade Offering have been reassessed. They have all claimed tax benefits from expenses relating to the Strictrade Offering.

C. Evidence of Edward Furtak on Sanctions

[15] Furtak gave evidence at the Sanctions Hearing. He described the various schemes that he developed to use trading software, which ultimately culminated in the Strictrade Offering. He had created various ways to monetize trading software, either by joint venture (**MoneyMoves**) or by licences and payment of fees to purchasers for trading reports generated by software (**STRICTrade Contracts**). Through legal counsel, Furtak sent descriptions of these proposed "transactions" to the Commission, seeking regulatory certainty that they would not be considered as sales of "securities" or that they could be exempt from prospectus and registration requirements under the Act. The evidence establishes that Furtak was cautioned, through correspondence with his counsel, about the risks of proceeding with the products described to the Commission.

[16] The letters, memoranda and emails tendered by the Respondents include a 2009 email from Staff of the General Counsel's Office of the Commission concerning the MoneyMoves program developed by Furtak. In that email, Staff wrote to Furtak's counsel, Julia Dublin:

> Our preliminary view is that the structure you have described in your memo of 4 February 2009 would constitute an offering of 'investment contracts' for the purposes of the *Securities Act*. Please note that these are the views of OSC staff only and do not

> constitute any kind of decision with respect to the matters you have raised with us.

Staff asked for confirmation that the program was not being distributed to investors in Ontario or if so, that it should cease being distributed, other than in compliance with the Act.

[17] Ms. Dublin wrote to Commission Staff that her clients disagreed with the analysis and that they preferred not to market the MoneyMoves program as a security. Furtak testified that he believed he stopped any work on the MoneyMoves program after this exchange with the Commission. The following year, he began to develop the Strictrade Offering along with Allen and Olsthoorn.

[18] During the Merits Hearing, Ms. Dublin conceded that the Respondents were aware that there was a risk of a finding that the transactions in issue were securities and that the Respondents had not been relying on a legal opinion:

> MS. DUBLIN: … But they are not going to argue that this was -- that they believed, having read it, that it was necessarily the only opinion you could form on their facts. It was the opinion they preferred, the opinion that they felt was reasonable.
>
> THE CHAIR: So they didn't have a green light by way of a legal opinion. You're really saying they had a yellow light --
>
> MS. DUBLIN: They had a yellow light.

[19] In a memorandum dated May 12, 2013 (the **May 2013 Memorandum**), counsel to the Respondents described a "contemplated transaction" and presented an argument in support of the "most reasonable conclusion" that individuals purchasing that product were not entering into an investment contract but a different commercial arrangement. The product described in the May 2013 Memorandum is not the Strictrade Offering, which by then had been marketed and sold to the investors for over a year. The differences between the product described in the memorandum and the Strictrade Offering are compared in a chart Staff included in its reply submissions. A copy of the chart is attached to these Reasons as Appendix A.

[20] The Respondents argued at the Sanctions Hearing (over the objections of Staff as to the relevance of the document) that the May 2013 Memorandum is evidence of their good faith engagement with the regulator and should be taken into account in assessing sanctions. Commission Staff did not provide any assurances in response to the May 2013 Memorandum. Correspondence filed by the Respondents reveals that investigations by the Compliance and Registrant Regulation and Enforcement branches began around May–June of 2013. This led to the filing of the Statement of Allegations and the Merits Hearing.

[21] In his cross-examination at the Sanctions Hearing, Furtak was asked about a settlement agreement he entered into with the Commission in 2003. In the settlement, he and TAL admitted to unregistered trading in securities and conduct contrary to the public interest. He repaid investors as part of the settlement. A public interest order was made and included a reprimand, a cease trade order for six months and costs. The settlement agreement approved by the Commission describes the conduct that occurred in 1998, which included the sale

of software licencing agreements by Furtak to a client for whom they were not suitable.

[22] Furtak was asked by a Panel member about whether he had considered the potential risk of enforcement proceedings and disruption to the scheme, during the marketing of the Strictrade Offering, as it could lead to investor losses. He said that he did not believe that this was ever raised as a risk with him by his lawyer. He said that he was not told that the licensees' "businesses" would be disrupted. Furtak testified, "[W]e never anticipated that we would be precluded from carrying on the contracts that were benefitting the licensee."

[23] At the end of the Sanctions Hearing, Furtak gave an oral undertaking that he would honour the terms of the Software Performance Bonus provided for in the licencing agreement. There were no submissions or evidence on Furtak's ability to fulfill that undertaking. During the hearing, evidence was tendered showing that some of the trading report payments were not made by STL, the entity with whom investors had contracted for payment, but by other entities controlled by Furtak (*i.e.*, Axton and Aileron Capital Limited).

D. Evidence of Ronald Olsthoorn on Sanctions

[24] Olsthoorn also testified at the Sanctions Hearing. He described his concerns over the potential termination of the Strictrade Offering due to a cease trade order. He prepared a number of scenarios as to the potential tax and recapture implications depending on the timelines of various investments. Olsthoorn testified that the most advantageous scenario, and one that he hoped to employ for himself, involved staying in the investment for seven years and rolling over the investment into a corporation for the latter part of that period to avoid recapture. According to Olsthoorn, under this "best case scenario," for investors Daniel G and Georgina F, their investments might not wrap up until 2020 and 2022, respectively.

[25] Olsthoorn agreed that in the marketing slides in evidence, there is no discussion of a seven-year "best case scenario" for terminating the scheme. He testified that he would have conveyed this information to the investors, or their accountants, orally. Olsthoorn agreed that if Daniel G decided to leave the investment after five years as he intended (in order to qualify for the Software Performance Bonus), he could not take advantage of any corporate rollover to avoid recapture. He also agreed that any disposal of the asset by an individual at the end of the investment period would lead to recapture, where the individual does not defer tax through a corporate rollover.

III. PUBLIC INTEREST ORDERS UNDER THE SECURITIES ACT

[26] The Commission is mandated to provide protection to investors from unfair, improper or fraudulent practices and to foster fair and efficient capital markets as well as confidence in capital markets (section 1.1 of the Act). When making orders under subsection 127(1) of the Act, the Commission has a broad discretion to intervene in the public interest. These orders are "preventive in nature and prospective in orientation" (*Committee for the Equal Treatment of Asbestos Minority Shareholders v Ontario (Securities Commission)*, 2001 SCC 37 at para 45) (***Asbestos***).

[27] In *Asbestos*, the Supreme Court of Canada noted that the powers granted to the Commission under section 127 of the Act require that any order be made with regard to the public interest and that it is "an error to focus only on the fair treatment of investors" (at para 41). As a regulatory provision, section 127 cannot be used merely to remedy misconduct under the Act that is alleged to have caused harm or damages to private individuals (*Asbestos* at paras 41–45).

[28] The range of orders available under the Act includes the removal of those individuals who have behaved in a way that is detrimental to the integrity of the markets. As the Commission stated in *Re Mithras Management Ltd.* (1990), 13 OSCB 1600 at (1610–11):

> We are here to restrain, as best we can, future conduct that is likely to be prejudicial to the public interest in having capital markets that are both fair and efficient. In so doing we must, of necessity, look to past conduct as a guide to what we believe a person's future conduct might reasonably be expected to be.

[29] In making public interest orders, it is also appropriate to consider general deterrence in order to discourage like behaviour from others. The weight given to general deterrence, for example by imposing financial penalties, will vary from case to a case and is within the discretion of the Commission (*Re Cartaway Resources Corp*, 2004 SCC 26 at paras 60, 64).

[30] In deciding the nature of sanctions that are appropriate, the Commission has taken into account relevant factors, including:

a. the seriousness of the allegations;

b. the respondents' experience in the marketplace;

c. the level of the respondents' activity in the marketplace;

d. whether there has been recognition by the respondents of the seriousness of the conduct;

e. whether or not the sanctions may serve to deter any like-minded people from similarly abusing the capital markets;

f. any mitigating factors;

g. whether the violations were recurrent or isolated;

h. the size of profits made or losses avoided from the conduct;

i. the size of voluntary payments or financial sanctions;

j. the effect of sanctions on the livelihood of the respondent;

k. the restraint sanctions may have on the ability of the respondent to participate without check in the capital markets;

l. the reputation and prestige of the respondent;

m. the shame or financial pain to the respondent; and

n. the remorse of the respondent.

(*Re Belteco Holdings Inc.* (1998), 21 OSCB 7743 at 7746; *Erikson v Ontario (Securities Commission)* (2003), 26 OSCB 1622 (Div Ct) (***Erikson***) at para 58; *Re MCJC Holdings Inc*. (2002), 25 OSCB 1133 at 1136)

IV. ANALYSIS

A. Approach to Sanctions

[31] We accept the approach to sanctions as submitted by Staff as being a proportionate response and grounded in the public interest. Sanctions are required to respond to the features of the Strictrade Offering, the harm to investors and the future risks posed by the Respondents to the markets. We reject the Respondents' submission that this was an appropriately conducted exercise in testing the jurisdiction of the Commission with a novel business product by people who are amenable to regulation. The evidence does not support that narrative.

B. Factors Relevant to Sanctions

1. Seriousness of the Allegations/Level of the Respondents' Activity in the Marketplace

[32] Unlike the MoneyMoves offering, which was viewed unfavourably by Commission Staff, and unlike the product described in the May 2013 Memorandum from the Respondents' counsel to the Commission, the Strictrade Offering, which is the subject of these proceedings, was not described to the Commission in advance of its promotion or sales. Prospective investors were not advised of any regulatory risk to its continuation, in spite of the efforts of the promoters to persuade the regulator that similar products involving a variety of contracts for selling trading software were not securities. The creator of the scheme, Furtak, was the subject of a Commission Order in 2003 in which he was removed from the capital markets for six months after he unlawfully sold investments, including unsuitable software licences. We conclude on this basis that the Respondents knew the risks and ignored them. They created and sold a complex product of dubious value to investors without making them aware of the nature of the product, the regulatory risks and the potential for disruption and loss.

[33] The evidence at the Merits hearing described months of presentations to potential distributors and purchasers across Canada at investment seminars. Ultimately, only seven investors purchased licences.

[34] Unlike his redemption of the problematic investments involved in the Commission Order against him in 2003, Furtak has not taken any steps to refund any investors for their participation in the Strictrade Offering. The Respondents now point to the losses to investors as a reason to continue their unlawful scheme. This represents a lack of understanding and insight into the findings of the Commission and the impact on the investors. An appropriate order will protect the public in the future and deter others. This means that the scheme must come to an end.

[35] The factors that are relevant in this case in determining the appropriate sanctions include the Respondents' extensive marketing activities and their deliberate decision to omit any discussion of the investment contract at issue while describing similar vehicles to Staff, as well as the misleading nature of the scheme without commercial justification for its complex structure. The additional

evidence filed at the Sanctions Hearing reveals both the rationale of the Respondents in their attempts to secure a regulatory "pass" for their various schemes to monetize trading software and, significantly, the omission of any description of the actual scheme sold. This was the same approach taken as when the Respondents used the results of an earlier software licence valuation in the Strictrade Offering marketing materials; although it was based on a different kind of licence, it was positioned as evidence of value to the licensees as a way to give the scheme legitimacy.

[36] In their submissions, the Respondents invite us to reconsider some of the negative findings made on the merits. We decline to do so and confirm our finding that this was a deliberately complex scheme with misleading elements. It was not well understood by the investors. Further, the Respondents lacked candour with the regulator during the Material Time. The Respondents argue that their communications with the Commission in the lead-up to and during the Material Time was transparent—we do not agree. The Respondents prefer their own interpretation of the Act to that of Commission Staff in respect of a product they ultimately did not sell; they argue that this is consistent with good faith. To the Panel, this suggests awareness by the Respondents that the product ultimately marketed would not pass regulatory scrutiny.

2. The Respondents' Experience in the Marketplace

[37] Furtak and Olsthoorn are experienced participants in the marketplace. Olsthoorn and TAL were registered with the Commission during the misconduct. Furtak was registered with the Commission from 1992–1994, has been an approved shareholder of TAL since August 19, 2011 and is an officer and director of multiple international companies. He was the beneficial owner, officer and director of two respondent companies in this matter, Axton and STL. Olsthoorn was a dealing representative as well as TAL's Chief Compliance Officer (**CCO**) and Ultimate Designated Person (**UDP**). These are aggravating factors as related to Furtak and Olsthoorn: Registrants are held to a higher standard and are expected to have a higher level of understanding of the regulatory framework and awareness of their responsibilities (*Re North American Financial Group Inc.* (2014), 37 OSCB 8522 at para 38).

[38] Allen, Axton, STL and SMI have never been registered with the Commission. This factor is neutral as far as they are concerned.

3. Profits Made from the Conduct

[39] The net amount received from investors (their interest and loan maintenance fees less their trading report payments) was $216,538.66. SMI, which is owned by Allen, received commissions on sales of the Strictrade Offering, some of which was in turn paid to Olsthoorn as well as to an accountant and a firm in respect of the sale of the Strictrade Offering to David D.

4. Recognition of the Seriousness of the Misconduct/Mitigating Factors

[40] Staff submits that there are no mitigating factors. We agree. In fact, the evidence points to the contrary: the Respondents do not appreciate the impact of their conduct and essentially insist that they are right in the face of the evidence and logic. Furtak, an experienced market participant, failed to even consider the possibility that the scheme could be stopped. The Respondents submitted at the close of the Sanctions Hearing that this was a legitimate and "benign"

commercial arrangement involving "sophisticated investors." They took no steps to remedy the unfair position in which they placed the investors, particularly Daniel G, who is financially vulnerable and withdrew money from his registered retirement saving plan (**RRSP**) to make payments to the Strictrade Offering. Instead, the Respondents argue for the right to continue to take the investors' money under the impugned contracts.

C. Sanctions Requested

1. Disgorgement

[41] Paragraph 10 of subsection 127(1) of the Act permits the Commission to make an order for disgorgement to ensure that respondents do not benefit from their breaches. Disgorgement also functions as a form of deterrence. All money obtained from investors is subject to disgorgement where it is obtained as a result of non-compliance with the Act. The Commission may also look to the seriousness of the misconduct, the harm to investors, whether the amount is ascertainable and whether individuals are likely to be able to obtain redress (*Re Phillips* (2015), 38 OSCB 9311, aff'd *Phillips* v *Ontario (Securities Commission*), 2016 ONSC 7901).

[42] Staff submits that an order for disgorgement against the Respondents should be the net amount received from all investors, being the total paid by investors less the total received by investors as trading report payments. This amount was calculated as $216,538.66.

[43] The Respondents submit that the tax benefits obtained by investors should be deducted from the disgorgement amounts. Staff submits that these tax benefits are unrelated to the funds obtained by the Respondents as a result of their unlawful activities and that a plain reading of paragraph 10 of subsection 127(1) of the Act does not anticipate reduction of disgorgement by reason of amounts paid to investors by third parties. Further, given the possibility that investors in addition to Geraldine O may be reassessed, any such tax benefits are uncertain.

[44] Paragraph 10 of subsection 127(1) of the Act reads:

> The Commission may make one or more of the following orders if in its opinion it is in the public interest to make the order or orders:
>
> > 10. If a person or company has not complied with Ontario securities law, an order requiring the person or company to disgorge to the Commission any amounts obtained as a result of the non-compliance.

We agree with Staff's submissions that a plain reading of this section, informed by prior Commission practice, is to apply it to amounts actually obtained by Respondents less amounts repaid to investors.

[45] Staff submits that Furtak, Axton and STL should be responsible to pay disgorgement of the amount received from investors, $216,538.66, less commissions of $51,000 paid out to Olsthoorn, Allen and others. Staff calculated this amount to be $165,298. Staff requests disgorgement of $21,285 from Allen and SMI and $14,415 from Olsthoorn and TAL, representing the commissions they received. We note that $15,000 was paid to third parties who were not respondents in this matter and that Staff did not make submissions on who should be responsible for this amount.

[46] We find that Allen and SMI and Olsthoorn and TAL should disgorge the amounts paid to them in commissions as requested by Staff. We find that it is appropriate that Furtak be responsible for the balance of the amount obtained from investors, including the amount paid in commissions to third parties. Furtak was the directing mind behind that Strictrade Offering scheme and companies over which he had control received the monies from investors. We find further support for this approach from the Commission's decision in (*Re Limelight Entertainment Inc.* (2008), 31 OSCB 12030 (***Limelight***):

> …paragraph 10 of subsection 127(1) of the Act provides that disgorgement can be ordered with respect to "any amounts obtained" as a result of non-compliance with the Act. Thus, the legal question is not whether a respondent "profited" from the illegal activity but whether the respondent "obtained amounts" as a result of that activity. In our view, this distinction is made in the Act to make clear that all money illegally obtained from investors can be ordered to be disgorged, not just the "profit" made as a result of the activity. This approach also avoids the Commission having to determine how "profit" should be calculated in any particular circumstance. Establishing how much a respondent obtained as a result of his or her misconduct is a much more straightforward test.
>
> (para 49)

[47] Therefore, we order disgorgement by Furtak, Axton and STL, jointly and severally, of $180,298.66; by Allen and SMI, jointly and severally, of $21,825; and Olsthoorn and TAL, jointly and severally, of $14,415.

2. Administrative Penalties

[48] Monetary penalties are imposed to discourage repeat conduct by respondents and to demonstrate to other market participants that there will be consequences for similar behaviour. These are principles of specific and general deterrence (*Limelight*). Staff submits that the Commission should apportion the administrative penalties taking into account that there were few investors involved and the amounts obtained as compared to other cases involving investment contracts, such as *Re Energy Syndications Inc.* (2013), 36 OSCB 11613 (***Energy Syndications***). Staff proposes penalties of $75,000, jointly and severally, against Furtak Axton and STL; $35,000, jointly and severally, against Olsthoorn and TAL; and $25,000, jointly and severally, against Allen and SMI. The differences among the Respondents are justified by virtue of the varying levels of control and involvement in the scheme. This is a principle that has been followed in other decisions of the Commission (*Re 2241153 Ontario Inc.* (2016), 39 OSCB 2733; *Re Morgan Dragon Development Corp.* (2014), 37 OSCB 8511 (***Morgan Dragon***); *Energy Syndications*).

[49] We conclude that deterrence requires some additional form of administrative penalty beyond disgorgement. The sanctions need to be meaningful and not merely the cost of doing business. The penalties proposed by Staff are proportionate to the misconduct.

3. Market Participation and Director and Officer Bans

[50] In considering the length of any market participation and director and officer bans, Staff submits that there should be a distinction made between Furtak, as the principal architect of the scheme, and Olsthoorn and Allen, who were salespersons for the Strictrade Offering. The following features further distinguish Furtak's culpability from that of Olsthoorn and Allen: (i) his creation and control of the contracts, entities and materials; (ii) his past securities misconduct; (iii) his experience as a former registrant; (iv) his expressed ongoing interest in finding ways to sell the Strictrade Offering; (v) his insistence that the scheme does not hold any potential risk or harm to investors; (vi) his control of the flow of funds among the entities; and (vii) his use of the misleading valuation in the marketing materials, in spite of his control of the finances of the corporate entities and ownership of the software.

[51] Staff also distinguishes between Olsthoorn and Allen in that Olsthoorn has had substantially greater experience in the market as a former registrant in Ontario and in British Columbia.

[52] Staff seeks market participation bans of ten years against Furtak, Axton and STL, of eight years against TAL and Olsthoorn and of six years against Allen and SMI. Staff also seeks director and officer bans of ten years against Furtak, of eight years against Olsthoorn and of six years against Allen.

[53] In Commission cases that have considered the primary promoter of unlawful distribution schemes, there is a precedent for imposing significant bans. Staff cites bans of 10 years in *Energy Syndications* and 15 years in *Re Axcess Automation LLC* (2013), 36 OSCB 2919 (***Axcess Automation***). In *Morgan Dragon*, a multimillion dollar solicitation of an investment contract scheme led to five-year bans for the directing minds and co-owners of the corporate respondent.

[54] The Respondents distinguish their case from those where bans were imposed in the context of findings of fraud or where larger sums of money were involved from a greater number of investors. We accept that prior decisions provide some guidance, but they are neither determinative nor formulaic. Instead, we look to the principles of public protection in deciding whether to make the orders requested. The question we must consider is what amount of trust the Commission could have in the Respondents if they are to be allowed to continue to participate in the capital markets.

[55] In this case, the impact was experienced by a smaller number of investors than in *Energy Syndication*, *Morgan Dragon* or *Axcess Automation*; however, the potential future impact on prospective investors remains a risk factor. The Respondents have not changed their attitudes nor do they appear to be willing to alter their behaviour towards investors, even after the finding that they were unlawfully selling securities. The misleading nature of the marketing materials and the Respondents' selective disclosure to the Commission while the scheme was up and running are aggravating features. We have minimal trust in the Respondents as market participants. The length and nature of the market participation and director and officer bans sought by Staff are appropriate.

4. Trading Bans

(a) The Jurisdictional Argument: Do Future Payments under the Strictrade Offering Constitute Acts in Furtherance of a Trade?

[56] Staff seeks trading bans of ten years against Furtak, Axton and STL, of eight years against TAL and Olsthoorn and of six years against Allen and SMI.

[57] The Respondents submit that no bans should be imposed and that the Strictrade Offering should continue with regard to the three remaining investors. In addition, counsel for the Respondents argued at the hearing that the receipt of fees and interest from the investors under the terms of their contracts should not be considered as acts in furtherance of a trade. Before considering the nature of any market or participation bans as part of the sanctions requested by Staff, the Panel must consider the threshold question of whether any future payments made by investors would be caught by the Act.

[58] The Respondents' submissions begin with the principle rearticulated in *Re Sabourin* (2009), 29 OSCB 2707 (***Sabourin***) that the question of whether an act is in furtherance of a trade is fact-specific and that the inquiry can usefully begin with the question of whether the activity has a "sufficiently proximate connection to an actual trade" (at para 57, citing *Re Costello* (2003), 26 OSCB 1617 at para 47).

[59] The Respondents argue that the Commission has found an act to be in furtherance of a trade when a respondent "received consideration or other benefit from an eventual sale" (*Sabourin* at para 61, citing *Re Momentas Corp.* (2006), 29 OSCB 7408 at paras 87–88 (***Momentas***)). The Respondents characterize the activities in the case at hand as those that are necessary to promote or close the original trade. They argue that the annual contractual payments by the investors do not promote a trade but instead are a business feature of a contract. Further, the Respondents submit that the payments fall outside of the Material Time as defined in the Statement of Allegations, and thus the Commission has no jurisdiction to make orders purporting to prevent the continuing payments.

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

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

[61] The ongoing payments that are a part of the Strictrade Offering, which we found to be a security, and are part of the consideration for the investment. The payments meet the definition of "trade" under a plain reading of the definition in the Act. Payments were previously found by the Commission to be acts in furtherance of a trade (*Momentas*). Finally, the payment of the ongoing consideration for the investment through the life of the contracts is inextricably

linked to the security, which establishes a "proximate connection." We conclude that ongoing acceptance of payments would amount to trading in a security. Therefore, any order banning the Respondents from trading will apply to the Strictrade Offering and will preclude the acceptance of any future funds from investors, including the $15,000 bank draft from Daniel G, which is currently being held pending this decision.

(b) Analysis: Are Trading Bans in the Public Interest?

[62] The Respondents submit that if the jurisdictional question is not decided in their favour, in any event, no bans should be issued. In particular, they argue that the Strictrade Offering be permitted to continue until the investors choose to terminate the investments. They point to the potential negative tax consequences as well as the loss of the Software Performance Bonus, which is part of the contractual arrangement.

[63] It is a privilege to participate in Ontario's capital markets (*Erikson* at paras 55–56). In this case, the Respondents were aware of the regulatory sphere in which they operated. Furtak and TAL have prior Commissions orders made against them. Furtak is a former registrant and Olsthoorn was the CCO and UDP of an exempt market dealer. In spite of the views expressed by Commission Staff that earlier versions of monetized trading software investments were securities, the Respondents proceeded with a new version but did not disclose this prior to taking the Strictrade Offering to the market. The Respondents continued to accept payments from investors throughout the proceeding, after the finding on the merits and until the end of the first day of the Sanctions Hearing. They asked to continue the scheme, pointing to the potential prejudice to investors that they created in order to profit from the scheme. Given these circumstances, it is appropriate to consider whether the Respondents should be banned from participating in Ontario's capital markets for a period of time.

[64] In having regard to sanctions, the Commission takes into account the harm to investors as part of its consideration of the seriousness of the conduct. However, the overarching public interest mandate of the Commission means that it would be an error to focus only on the harm to individual investors in any one case. There are other avenues for redress, including by way of civil remedies or allocating disgorged funds for the benefit of third parties pursuant to the Act. The Commission acting as a tribunal must concern itself with protecting and preventing future abuses of the market by individual respondents and by those who might breach the Act. It must also consider public confidence in capital markets in carrying out its mandate.

[65] The Panel concludes that having found that the Respondents breached the Act in carrying out the Strictrade Offering, it would send a confusing message to the markets and registrants if the Respondents were allowed to continue trading unabated or if the scheme was allowed to continue. It would also be an unprecedented exercise of discretion by the Commission to permit an unlawfully promoted scheme to continue for years past the dates of the merits and sanctions hearings. The Respondents would potentially profit from their unlawful actions and expose the remaining investors to further losses, both of funds that might be available for more advantageous investments and of tax deductions that may be reassessed. Such an order may also put the Commission in the

position of advancing the alleged interests of the individual investors ahead of the public at large.

[66] Counsel for the Respondents cites *Re Universal Settlements International Inc.* (2006), 29 OSCB 7880, a decision of the Commission, in support of the Respondents' request to continue receiving investor funds. In *Universal Settlements*, the Commission found that the products sold amounted to investment contracts. Staff sought a cease trade order without other sanctions. Some of the investors' funds had already been used to purchase insurance products, and the investors were allowed to retain those interests. However, to the extent that funds had been transferred to the promoters and not yet used for purchase, those funds were to be returned to the investors. Accordingly, although the Respondents request a *Universal Settlements*-type order, Staff submits, and the Panel agrees, that this is not a precedent that permits receipt of future ongoing payments from investors as consideration for unlawfully distributed securities.

[67] As stated above, we have minimal trust in the Respondents as market participants. The length and nature of the trading bans sought by Staff are appropriate. An exception is granted for personal trading in an RRSP account once the financial sanctions and costs have been paid.

D. Costs

[68] Section 127.1 of the Act provides the Commission with the discretion to order a respondent to pay costs of an investigation and hearing if the Commission is satisfied that the respondent has failed to comply with Ontario securities law.

[69] Staff submitted a bill of costs, which details the total costs sought by Staff. The total fees in relation to Staff time is comprised of the time of Senior Litigation Counsel, Catherine Weiler, as well as the time of two investigative counsel who worked consecutively, but not concurrently, on the file. The total fees do not include the work of Senior Litigation Counsel, Yvonne B Chisholm, or of Litigation Counsel, Christina Galbraith. Although the Sanctions Hearing occupied three hearing days and included *viva voce* evidence as well as submissions, no time has been claimed for preparing for or attending on these hearing dates. In addition to fees, the disbursements for process serving, court reporting and witness fees are included in the bill of costs.

[70] The total costs sought by Staff are $465,034.44, with the apportionment between the Respondents as 40% payable by Furtak, Axton and STL, 30% payable by Olsthoorn and TAL and 30% payable by Allen and SMI, with each amount being on a joint and several basis.

[71] Rule 18.2 of the Commission's *Rules of Procedure* (2014), 37 OSCB 4168 sets out factors that the Commission may consider when exercising its discretion to award costs against a person or company:

a. whether the respondent failed to comply with a procedural order or direction of the Panel;

b. the complexity of the proceeding;

c. the importance of the issues;

d. the conduct of Staff during the investigation and during the proceeding, and how Staff's conduct contributed to the costs of the investigation and the proceeding;

e. whether the respondent contributed to a shorter, more efficient, and more effective hearing, or whether the conduct of the respondent unnecessarily lengthened the duration of the proceeding;

f. whether any step in the proceeding was taken in an improper, vexatious, unreasonable, or negligent fashion or in error;

g. whether the respondent participated in the proceeding in a way that helped the Commission understand the issues before it;

h. whether the respondent participated in a responsible, informed and well-prepared manner;

i. whether the respondent co-operated with Staff and disclosed all relevant information;

j. whether the respondent denied or refused to admit anything that should have been admitted; or

k. any other factors the Panel considers relevant.

[72] The Commission has also identified criteria that it considered in awarding costs in past decisions:

a. failure by Staff to provide early notice of an intention to seek costs may result in a reduced costs award;

b. the seriousness of the charges and the conduct of the parties;

c. abuse of process by a respondent may be a factor in increasing the amount of costs;

d. the greater investigative/hearing costs that the specific conduct of a respondent tends to require in the case; and

e. the reasonableness of the costs requested by Staff.

(*Re Ochnik* (2006), 29 OSCB 5917 at para 29).

[73] The Strictrade Offering was a complex product made up of multiple entities located in Ontario and offshore, as well as multiple individual persons. The Respondents should reasonably expect the costs related to the investigation and hearing of such a matter to be higher.

[74] All but one of the allegations against the Respondents was made out by Staff at the hearing. All of the witnesses called by Staff were necessary to prove Staff's case.

[75] The principle at the heart of the costs provision is that those who have breached Ontario securities laws should contribute to the costs of investigations and hearings that arise as a result of their conduct. The request for a portion of the actual costs incurred, at hourly rates approved by the Commission, is reasonable and will form part of the order.

V. CONCLUSION AND ORDER

[76] For the reasons given above, we make the following order:

a. with respect to Furtak, Axton and STL:

i. pursuant to paragraphs 2 and 2.1 of subsection 127(1) of the Act, each of Furtak, Axton and STL shall cease trading in and acquiring securities for 10 years, with the exception that Furtak may trade and acquire securities for his RRSP accounts after the administrative penalty at subparagraph 76(a)(v) and disgorgements at subparagraphs 76(a)(vi), 76(c)(vi) and 76(e)(vi) ordered against him below are paid in full;

ii. pursuant to paragraph 3 of subsection 127(1) of the Act, any exemptions contained in Ontario securities law do not apply to each of Furtak, Axton and STL for 10 years;

iii. pursuant to paragraph 6 of subsection 127(1) of the Act, each of Furtak, Axton and STL is reprimanded;

iv. pursuant to paragraph 8.5 of subsection 127(1) of the Act, each of Furtak, Axton and STL is prohibited from becoming or acting as a registrant, as an investment fund manager or as a promoter for 10 years;

v. pursuant to paragraph 9 of subsection 127(1) of the Act, Furtak, Axton and STL shall jointly and severally pay to the Commission an administrative penalty of $75,000, which amount shall be designated for allocation or use by the Commission in accordance with subsection 3.4(2) of the Act;

vi. pursuant to paragraph 10 of subsection 127(1) of the Act, Furtak, Axton and STL shall jointly and severally disgorge to the Commission $180,298.66, which amount shall be designated for allocation or use by the Commission in accordance with subsection 3.4(2)(b) of the Act; and

vii. pursuant to section 127.1 of the Act, Furtak, Axton and STL shall jointly and severally pay $186,013.77 in respect of part of the costs of the Commission's investigation and hearings;

b. with respect to Furtak:

i. pursuant to paragraphs 7, 8.1 and 8.3 of subsection 127(1) of the Act, Furtak shall resign any position he holds as a director or officer of an issuer, registrant or investment fund manager; and

ii. pursuant to paragraphs 8, 8.2 and 8.4 of subsection 127(1) of the Act, Furtak is prohibited from becoming or acting as a director or officer of an issuer, registrant or investment fund manager for 10 years;

c. with respect to Olsthoorn and TAL:

i. pursuant to paragraphs 2 and 2.1 of subsection 127(1) of the Act, each of Olsthoorn and TAL shall cease trading in and acquiring securities for 8 years, with the exception that Olsthoorn may

trade and acquire securities for his RRSP accounts after the administrative penalty at subparagraph 76(c)(v) and disgorgement at subparagraph 76(c)(vi) ordered against him below are paid in full;

ii. pursuant to paragraph 3 of subsection 127(1) of the Act, any exemptions contained in Ontario securities law do not apply to each of Olsthoorn and TAL for 8 years;

iii. pursuant to paragraph 6 of subsection 127(1) of the Act, each of Olsthoorn and TAL is reprimanded;

iv. pursuant to paragraph 8.5 of subsection 127(1) of the Act, each of Olsthoorn and TAL is prohibited from becoming or acting as a registrant, as an investment fund manager or as a promoter for 8 years;

v. pursuant to paragraph 9 of subsection 127(1) of the Act, Olsthoorn and TAL shall jointly and severally pay to the Commission an administrative penalty of $35,000, which amount shall be designated for allocation or use by the Commission in accordance with subsection 3.4(2) of the Act;

vi. pursuant to paragraph 10 of subsection 127(1) of the Act, Olsthoorn and TAL shall, on a joint and several basis with Furtak, Axton and STL, disgorge to the Commission $14,415, which amount shall be designated for allocation or use by the Commission in accordance with subsection 3.4(2)(b) of the Act; and

vii. pursuant to section 127.1 of the Act, Olsthoorn and TAL shall jointly and severally pay $139,510.33 in respect of part of the costs of the Commission's investigation and hearings;

d. with respect to Olsthoorn:

i. pursuant to paragraphs 7, 8.1 and 8.3 of subsection 127(1) of the Act, Olsthoorn shall resign any position he holds as a director or officer of an issuer, registrant or investment fund manager; and

ii. pursuant to paragraphs 8, 8.2 and 8.4 of subsection 127(1) of the Act, Olsthoorn is prohibited from becoming or acting as a director or officer of an issuer, registrant or investment fund manager for 8 years;

e. with respect to Allen and SMI:

i. pursuant to paragraphs 2 and 2.1 of subsection 127(1) of the Act, each of Allen and SMI shall cease trading in and acquiring securities for 6 years, with the exception that Allen may trade and acquire securities for his RRSP accounts after the administrative penalty at subparagraph 76(e)(v) and disgorgement at subparagraph 76(e)(vi) ordered against him below are paid in full;

ii. pursuant to paragraph 3 of subsection 127(1) of the Act, any exemptions contained in Ontario securities law do not apply to each of Allen and SMI for 6 years;

iii. pursuant to paragraph 6 of subsection 127(1) of the Act, each of Allen and SMI is reprimanded;

iv. pursuant to paragraph 8.5 of subsection 127(1) of the Act, each of Allen and SMI is prohibited from becoming or acting as a registrant, as an investment fund manager or as a promoter for 6 years;

v. pursuant to paragraph 9 of subsection 127(1) of the Act, Allen and SMI shall jointly and severally pay to the Commission an administrative penalty of $25,000, which amount shall be designated for allocation or use by the Commission in accordance with subsection 3.4(2) of the Act;

vi. pursuant to paragraph 10 of subsection 127(1) of the Act, Allen and SMI shall, on a joint and several basis with Furtak, Axton and STL, disgorge to the Commission $21,825, which amount shall be designated for allocation or use by the Commission in accordance with subsection 3.4(2)(b) of the Act; and

vii. pursuant to section 127.1 of the Act, Allen and SMI shall jointly and severally pay $139,510.33 in respect of part of the costs of the Commission's investigation and hearings;

f. with respect to Allen:

i. pursuant to paragraphs 7, 8.1 and 8.3 of subsection 127(1) of the Act, Allen shall resign any position he holds as a director or officer of an issuer, registrant or investment fund manager; and

ii. pursuant to paragraphs 8, 8.2 and 8.4 of subsection 127(1) of the Act, Allen is prohibited from becoming or acting as a director or officer of an issuer, registrant or investment fund manager for 6 years.

Dated at Toronto this 4th day of May, 2017.

"Janet Leiper"
_____
Janet Leiper

"AnneMarie Ryan"
_____
AnneMarie Ryan

REASONS AND DECISION OF VICE-CHAIR VINGOE

[77] There are three remaining investors in the Strictrade Offering, all of whom were witnesses at the Merits Hearing. They are directly affected by the scope of the trading bans in this decision. One of the Respondents, Ronald Olsthoorn, is also a licensee in the offering.

[78] I agree with the majority on all sanctions against the Respondents for the reasons we have given, except as to the scope of the trading bans.

[79] The majority states that the unlawful offering must come to a complete end in all of its aspects, including the continuing obligations of the Respondents and the investors under the contracts constituting the Strictrade Offering. I agree that no new investors should be solicited for this investment, and none of the existing investors should be required to commit additional funds to the offering. At the Merits Hearing, violations of the prospectus and registration requirements were established. The scheme was difficult to understand and appeared designed to artificially seek to avoid these legal requirements.

[80] I would also implement the full trading bans. However, I would provide an exception, and related exemptions from subsections 25(1) and 53(1) of the Act, to allow any of the three remaining investors to affirmatively consent to Staff in writing to the continuation of their investments notwithstanding these measures within 30 days after the publication of these Reasons to enable them to consider terminating the arrangements at a time they consider beneficial in each of their circumstances.

[81] At the Merits Hearing, we reviewed the package of contracts constituting the Strictrade Offering in considerable detail. These contracts permit the investors to terminate the arrangements at any time by providing written notice and, more particularly for purposes of this analysis, to terminate the arrangements at a time of their choosing. Evidence was presented concerning several investors who had exercised this choice. Based on the representations and warranties of Axton, the specified events of default and the termination provisions in the contracts, additional rights of termination may also arise from the unlawful nature of the Strictrade Offering, which has been established by this Panel.

[82] The three remaining investors now have the benefit of the analysis in our Merits Decision and will have an opportunity to review these Reasons. In deciding whether to terminate these arrangements, the investors could reasonably be expected to consider our reasons in the Merits Decision, as well as these Reasons. They may also choose to consult with legal advisers regarding the legal risks of continuing performance under the agreements and the civil redress that may be available to them and with their accountants regarding the tax treatment that may arise from the termination of these arrangements and the timing of any such termination on their tax positions. The majority would take these decisions away from these investors and substitute January 30, 2017, being the date that this Panel ordered the Strictrade Offering cease pursuant to an interim cease trade order as the

latest date these arrangements were terminated.[1] This date was not selected with the particular interests of the investors in mind, but was based on Staff's discovery during cross-examination of Mr. Furtak on the first day of the Sanctions Hearing that payments from these three investors were still being received under these arrangements notwithstanding the Merits Decision.[2] At no time prior to the Sanctions Hearing had Staff sought an interim cease trade order in this matter. Investors have increased their commitments to the Strictrade Offering during the investigation of this matter and the duration of the Merits Hearing. The remaining investors apparently hoped that they would receive the intended tax benefits, the trading report and bonus payments and that they would avoid recapture of prior claims for capital cost allowance that they had claimed. The opportunity for these outcomes has been brought to an end both by the Respondent's unlawful conduct and by the majority's decision not to enable these investors to preserve the contractual choices open to them.

[83] As a result of this Panel's concern that the temporary cease trade order issued on January 30, 2017 would affect the three investors, we ordered that Staff give notice to these interested parties so that they would have the opportunity to make submissions concerning the Order. Staff tendered a letter from one of the investors expressing concern that the premature termination of the arrangements would have drastic, negative effects on that investor personally.

[84] We do not know if the intended tax treatment or the payments will pan out for the investors. We know with certainty, however, that if the trading bans and cease trade order have no exceptions for continuing performance if the investors so desire, the tax treatment sought by them will terminate and the prospective trading report and bonus payments will come to an end. The scope of the trading bans and cease trade order approved by the majority denies these three individual investors the ability to take actions to protect their own interests as they see fit. It orders a sanction with the effect of

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[1] As an unlawful distribution, this scheme should have come to an end as of the date of the Merits Decision, November 24, 2016, unless we had granted specific exceptions at that time or an earlier date since we have determined that the Strictrade Offering was unlawful from its commencement. This illustrates the difficulty that investors confront if an unlawful offering is not halted at the earliest opportunity since investors' potential losses may mount in any offering as it continues. This is especially true in a case such as this where we have found that the only opportunity for any material gain arises from the potential tax attributes of the investment expected to unfold over a period of years.

[2] The Material Time in the Statement of Allegations was January 2012 to July 2014. During the Merits hearing there was considerable evidence concerning the payments made by the investors and on behalf of Axton after that time. Staff's focus during the Merits hearing was, at least in major part, on whether the required payments were being made on a timely basis, and not on whether these payments should come to an end. Staff did not seek to amend its allegations to challenge these continuing payments. This delay and reframing of the alleged misconduct during the Sanctions Hearing are additional reasons for the exception I would order.

terminating these investors' participation in these continuing aspects of the offering that they could implement themselves at any time if they so choose.

[85] We should be cautious in implementing sanctions under subsection 127(1) of the Act, especially where terms may negatively affect the investors who were the subject of unlawful activity. The Strictrade Offering had both securities aspects on which we have rendered our decision, as well as continuing contractual aspects governed by commercial law and tax aspects, in respect of which we have limited insight. Where, as here, these investors have means available to them to terminate the arrangements in a manner similar to what would be accomplished by a complete trading ban and cease trade order, we should be very careful in imposing a sanction in a form that may interfere with these other aspects of the offering and which may deny these remaining investors choices that arise from these other regimes.

[86] The Supreme Court in *Asbestos* noted that in exercising our authority under section 127, it is "an error to focus only on the fair treatment of investors" (at para 41). I do not interpret that stricture as requiring that we disregard the effects of a sanctions order on individual investors in the scheme if the other public interest objectives for sanctions are otherwise clearly met. This language only requires that all of the elements of the Commission's mandate, including the fair treatment of investors, be considered. To read this quote instead to require us to disregard the interests of the remaining harmed investors in the Strictrade Offering is to take this quote out of the context in which it arose.

[87] The sanctions that are otherwise imposed on the Respondents in this matter are protective of Ontario capital markets by removing the Respondents from involvement in the capital markets for appropriate periods of time, among other sanctions, which, collectively, will both deter the Respondents and act as a general deterrent for those who may implement similar schemes. The investing public is protected since no one will be permitted to make a new investment in this scheme. I do not agree that enabling these three investors to decide when their investments will terminate compromises these principles. To the contrary, this exception promotes our mandate of investor protection by providing the opportunity for these investors to limit their losses or realize them at a time of their choosing. Allowing for the exception outlined above does not create a compensation scheme in the guise of a sanctions order but instead avoids an obstacle to the ability of the investors to protect their interests as they see fit. This exception provides the potential to avoid having the investors essentially harmed twice, first by the conduct of the Respondents and then by the timing of the sanctions order.

[88] The majority's view that these exceptions should not be allowed would be more appropriate if any of the Respondents had been found to have committed fraud. If Staff had alleged fraud, they would have been more likely to take measures to end all aspects of the Strictrade Offering at an earlier date. The one claim for misrepresentation alleged by Staff was rejected by us in our Merits Decision.

[89] In *Universal Settlements International Inc.* ((2006) 29 OSCB 7871), the Commission issued its Order pursuant to subsection 127(1) in circumstances where viatical settlements were found to be investment contracts under the Act and an unlawful distribution was found to have taken place. The respondent had effected a public offering of these securities notwithstanding warnings by Staff in an earlier public notice that these types of securities may be considered investment contracts, and inviting discussions with Staff. No fraud was alleged.

[90] Rather than bringing the offering to a complete end, the Commission's order in *Universal Settlements* provided an exemption from the prospectus and registration requirements to complete tasks relating to the existing investments that had already been committed to the life insurance policies of specific viators. This proviso served to protect the existing investors by allowing those investments to run their course as the life insurance policies were realized upon with the death of those whose lives were insured. To that degree, the Panel permitted continuing reliance by the investors on the performance of contractual obligations by the respondent notwithstanding its contraventions of the prospectus and registration requirements. This was protective of the existing investors, whose investments might otherwise have failed as a result of an overly broad order.

[91] In the case of the Strictrade Offering, such an exemption from the trading bans, at the election of any of the remaining investors, would also be protective of investors by preserving their ability to continue or terminate the arrangements in accordance with the contracts governing the investment at a time of their own choosing rather than an arbitrary date arising from the way in which these proceedings have unfolded.

[92] The majority notes that, unlike *Universal Settlements,* this narrow subcategory of exceptions I would approve in this case involve continuing payments by the investors that may enrich the Respondents. A risk of loss through non-performance by the respondent in *Universal Settlements* also posed a substantial financial risk that cannot be definitively stated to be lesser than those risks faced by the three investors if we immediately terminate their investments. For the three investors in the Strictrade Offering, collectively, 70 licenses, computed in $10,000 increments, appear to remain outstanding. The net payment in each year for a $100,000 license, excluding the performance fee, is approximately $5,000 per $100,000 licence or an aggregate of $35,000 for all remaining licenses per year, bearing in mind that the investor is always prepaying amounts one year in advance. Each year, the investor could assess whether to continue or terminate the arrangement based on, among other factors, whether the trading report payments are made and whether the tax treatment is maintained. At the end of a five-year term, a performance fee is payable in an amount of approximately $30,000 per $100,000 licence. This payment, if made, more than offsets the net payments made by these investors over the remainder of this five period. These calculations are without regard to the tax benefits that may or may not be realized or the effect of different scenarios for terminating these arrangements. However, the impact of an immediate

termination of these arrangements may well be a tax liability due to recapture of very large amounts for each investor, potentially involving losses of hundreds of thousands of dollars to them. I cannot agree that the consequences of an immediate termination of these existing investments by our order further the goal of investor protection.

[93] The majority argues that the Respondents are enriched by the continued payments to them by investors. I point out that, over the remaining period of the five-year term relevant to the performance fee, if all payments are made, the Respondents would be out of pocket and not enriched. If they were enriched, a disgorgement order could be considered to prevent this outcome. The majority has rejected that possibility.

[94] There are three additional considerations to be noted.

[95] First, the small number of remaining investors were intimately involved in these proceedings and acted as witnesses for Staff. They are now acutely aware of the violations of Ontario securities law in which the Respondents engaged and can be expected to take this into account in considering whether and when to terminate these arrangements. Staff need not be involved in supervising the activities arising from this very limited exception.

[96] Second, at the last minute in the Sanctions Hearing, Mr. Furtak agreed to be personally responsible for the contractual obligations of STL with regard to these three investors. Although still an unsecured obligation of Mr. Furtak, such a commitment may be advantageous to these investors. The majority's decision on this point removes this potential advantage to these investors.

[97] Finally, there was considerable discussion at the Sanctions Hearing about how Mr. Olsthoorn should be treated for purposes of the interim and any final cease trade order. It would be an unfortunate irony if he could continue to participate in the Strictrade Offering and potentially preserve his tax status and his ability to terminate in the future when the three investors could not. These restrictions should apply to him as well. However, I would go further and provide that if a cease trade order with the exception that I propose were issued, Mr. Olsthoorn's trading ban would also include an exception to enable him to continue his limited participation in the offering as described above but only after all his financial obligations under the Sanctions Order have been fully satisfied. This would provide him with an appropriate additional incentive to meet his financial obligations under the Sanctions Order.

[98] For these reasons, I concur and dissent in part from the majority on the scope of the trading bans.

Dated at Toronto this 4th day of May, 2017.

"D. Grant Vingoe"
D. Grant Vingoe

APPENDIX A

COMPARISON OF FACTS IN THE MAY 2013 MEMORANDUM AND THE MERITS DECISION

Fact Assumed in May 2013 Memo	**Commission Finding in the Merits Decision**
"The Software has been in use by STL to trade for its own account with a leading cash and derivatives broker dealer ED &F Man London". (Page 1)	No account was opened until November 2013, six months after the May 2013 Memorandum was prepared. STL did not have the ability to trade until then. (Paras 61-62)
The Strictrade Offering was "to be offered to individuals through independent intermediaries". (Page 1)	Allen and Olsthoorn were the only individuals who marketed and sold the Strictrade Offering. (Paras 19-20, 24, 35, 101) They devised the structure of the Strictrade Offering and the marketing plan together with Furtak. (Para 15) Neither was independent, particularly Olsthoorn who worked for TAL, an entity co-owned by Furtak. (Para 13)
"The optional contracts allow the Licensee to observe the Software in action for a period of their choosing". (Page 1)	The contracts were not optional; the Strictrade Offering was a package, and was marketed as such to investors. (Paras 4, 25, 37) No investors ever saw or operated the Software. (Para 37) Moreover, they could not since it could not be used in Canada under the Terms of the License Agreement. (Para 5)
"ST[L] offers assistance with installation of the software and technical support as well as training courses in the Software's use." (Page 1)	None of the investors saw the Software, operated the Software, or was put forward as being capable of operating the Software. (Para 37) The Strictrade Offering contemplated that STL would operate the Software at their premises. (Para 5) Also, the License Agreement required that the Software be operated outside of Canada (para 5).
"The Licensing Agreement permits the Licensee to install and use the Software to trade directly." (Page 2)	The License Agreement required that the Software be operated outside of Canada. (Para 5)
The Credit Agreement and the Service Agreement with STL are referred to as	The Strictrade Offering was, and was marketed as, a package of three

Fact Assumed in May 2013 Memo	**Commission Finding in the Merits Decision**
"optional". (Page 2)	agreements. (Paras 4, 25, 37) All of the investors entered into all three agreements. (Para 37)
"The use of the License is controlled by the Licensee." (Page 5)	The investors never took delivery of the software, and therefore, never controlled its use. The Strictrade Offering was premised on the understanding that STL would operate the Software at their premises. (Para 5)
"Other than the interest on the Trading Software Financing (if any) in respect of the Software purchase price, the Licensee contributes no cash….The Licensee is paid a fixed fee for each trading instruction generated by his or her trading software as well as a contingent fee determined at the end of the contract. However, this potential upside is not the primary commercial thrust of the Strictrade Program and the Licensee contributes no additional cash to acquire it." (Page 6)	The investors' payments included: interest and a loan maintenance fee payable to Axton; and a service/hosting fee payable to STL. (Para 6) The Trading Report payments were either the primary or the only return that several investors received from the Strictrade Offering (Geraldine O and Moira O, para 41; Edna K and Warren K). (Paras 58-59) They were the main return for Daniel G, as any tax benefits were not generally worthwhile for those who were not in a 40% tax bracket. (Para 34)
The section "No common enterprise" assumes that STL has a trading account with ED & F Man and that STL is trading using Trading Reports generated by the Licensee's trading software. (Pages 7-8)	The brokerage account was not opened until November of 2013. (Paras 61-62) No such trading was occurring at the time the May 2013 Memorandum was drafted.
"Licensees will have full disclosure of tax and business risks and risks and the fundamental motivation for a buyer entering into a Strictrade License is the use of the Software and certain tax advantages." (Page 9)	The marketing for the Strictrade Offering represented that investors would be insulated from market volatility and risk. (Paras 8, 24) Geraldine O and Daniel G testified that they were attracted by the representations that it would have little or no risk. (Paras 39, 47) None of the investors was put forward as being capable of operating the Software. (Para 37)
"The trading instructions are generated exclusively by the software used by the licensees, not by the efforts of STL." (Page 9)	None of the investors used the software. (Para 37)