Ontario Securities Commission | Commission des valeurs mobilières de l'Ontario | P.O. Box 55, 19th Floor 20 Queen Street West Toronto ON M5H 3S8 | CP 55, 19e étage 20, rue queen ouest Toronto ON M5H 3S8

IN THE MATTER OF THE *SECURITIES ACT*,
R.S.O. 1990, c. S.5, AS AMENDED

– AND –

IN THE MATTER OF
MAJESTIC SUPPLY CO. INC., SUNCASTLE DEVELOPMENTS CORPORATION, HERBERT ADAMS, STEVE BISHOP, MARY KRICFALUSI, KEVIN LOMAN and CBK ENTERPRISES INC.

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

Hearing:	November 7, 9-11, 14-17, 28-29, 2011 and May 18, 2012	
Decision:	February 21, 2013	
Panel:	Edward P. Kerwin	- Commissioner and Chair of the Panel
	Paulette L. Kennedy	- Commissioner
Appearances:	Derek Ferris	- For Staff of the Ontario Securities Commission
	Kevin Richard	- For Kevin Loman
	Andrew Furguiele	- For Herbert Adams
	Unrepresented	- Steve Bishop, Mary Kricfalusi, Majestic Supply Co. Inc., Suncastle Developments Corporation and CBK Enterprises Inc.

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REASONS AND DECISION

I. BACKGROUND

A. History of the Proceeding

[1] This was a hearing before the Ontario Securities Commission (the "**Commission**"), pursuant to section 127 of the *Securities Act*, R.S.O. 1990, c. S.5, as amended (the "**Act**"), to consider whether Majestic Supply Co. Inc. ("**Majestic**"), Suncastle Developments Corporation ("**Suncastle**"), Herbert Adams ("**Adams**"), Steve Bishop ("**Bishop**"), Mary Kricfalusi ("**Kricfalusi**"), Kevin Loman ("**Loman**") and CBK Enterprises Inc. ("**CBK**") (collectively, the "**Respondents**") breached the Act and acted contrary to the public interest.

[2] The merits proceeding was commenced by a Statement of Allegations and Notice of Hearing dated October 20, 2010. Enforcement Staff of the Commission ("**Staff**") alleges that between November 30, 2005 and January 31, 2008 (the "**Material Time**"), Majestic Adams, Bishop and Loman sold Majestic shares from treasury contrary to the registration and prospectus requirements found in sections 25 and 53 of the Act and the Respondents sold previously issued Majestic shares contrary to subsections 25(1)(a) and 53(1) of the Act and contrary to the public interest.

[3] In addition, Staff alleges that Majestic, Adams, Bishop and Loman gave undertakings relating to the future value or price of Majestic shares with the intention of effecting sales of Majestic shares contrary to subsection 38(2) of the Act and made representations regarding the future listing of Majestic shares on an exchange with the intention of effecting sales of Majestic shares contrary to subsection 38(3) of the Act, both of which are contrary to the public interest.

[4] Staff also alleges that Adams, Kricfalusi and Bishop, as officers and directors of Majestic, authorized, permitted or acquiesced in violations of the Act by Majestic in contrary to section 129.2 of the Act and contrary to the public interest. Similarly, it is alleged that Adams and Kricfalusi, as officers and directors of Suncastle, authorized, permitted or acquiesced in violations of the Act by Suncastle contrary to section 129.2 of the Act and contrary to the public interest. Furthermore, Staff alleges that Majestic failed to file a report of exempt distribution of Majestic shares with the Commission, contrary to section 6.1 of National Instrument 45-106 *Prospectus and Registration Exemptions* ("**NI 45-106**").

[5] The hearing on the merits began on November 7, 2011 (the "**Merits Hearing**"). On that day Staff, Bishop and counsel for Loman made submissions. Over the course of ten hearing days, we heard evidence from 15 investor witnesses, Staff's investigator, Staff's forensic accountant, Loman and three witnesses called by Bishop. Closing submissions were heard on May 18, 2012. We also considered written submissions of Staff, dated December 22, 2011, of CBK Enterprises Inc. dated January 9, 2012, of counsel for Loman dated January 13, 2012 and of Bishop filed May 18, 2012.

[6] On January 19, 2012, Staff filed and served a Notice of Motion and other materials seeking, among other things, orders permitting the filing of fresh evidence. We heard submissions of the parties on this motion on January 24, 2012 and February 22, 2012. This Panel dismissed the motion by order dated March 20, 2012 (*Re Majestic Supply Co. Inc.* (2012), 35 O.S.C.B. 2806).

[7] For the reasons set out below, we conclude that the Respondents breached subsections 25(1)(a) and 53(1) of the Act, and that such conduct is contrary to the public interest. We also conclude that Adams, Bishop and Majestic breached subsection 38(3) of the Act, and that such conduct is contrary to the public interest. We do not find that Loamn breached subsection 38(3) of the Act or that he made representations contrary to the public interest. Lastly, we find that Adams, prior to November 16, 2006, and Bishop, as officers and directors of Majestic, and Adams and Kricfalusi, as officers and directors of Suncastle, authorized, permitted or acquiesced in non-compliance with the Act by Majestic and Suncastle, respectively, and are deemed to have not complied with Ontario securities law pursuant to section 129.2 of the Act and that such conduct is contrary to the public interest. We do not find that Adams, Bishop or Majestic breached subsection 38(2) of the Act. However, we do find that Adams' deceptive representations amount to conduct contrary to the public interest. Finally, we do not find Majestic in breach of section 6.1 of NI 45-106.

B. The Respondents

1. Corporate Respondents

[8] Majestic is an Ontario company created by the amalgamation of two other Ontario corporations, 1562497 Ontario Inc., operating as Majestic Supply Co., and Decorative Impressions Inc., on April 1, 2006. Majestic's registered office is in Burlington, Ontario. Majestic purported to be a provider of environmentally friendly printing products and systems, including Souken water-based ink.

[9] Suncastle was incorporated in Ontario on February 22, 1983 and changed its corporate name to Suncastle Developments Corporation on December 6, 1988. During the Material Time, as defined below, Suncastle's registered office address was the same as Majestic's, located in Burlington, Ontario.

[10] CBK Enterprises Inc. is a company incorporated in the British Virgin Islands on July 20, 2007 by Kenneth Bryan Asselstine ("**Asselstine**"), the sole director, president and secretary. Asselstine is Adams' brother. CBK's registered office is in Tortola, British Virgin Islands.

[11] There is no record of Majestic, Suncastle or CBK (the "**Corporate Respondents**") having been registered under the Act.

2. Individual Respondents

[12] Adams was an original officer of 1562497 Ontario Inc., Majestic's predecessor company, and subsequently a director and officer of Majestic after the amalgamation. Adams purportedly resigned as secretary and director of Majestic on November 16, 2006. Adams also held the position of secretary of Suncastle since June 28, 1995.

[13] Bishop was appointed as Majestic's secretary and vice-president of corporate finance on November 16, 2006. During the Merits Hearing, Bishop was a director and officer of Majestic. Bishop was formerly registered with the Commission as a salesperson under the categories of mutual fund dealer and limited market dealer at various times between March 26, 1982 and March 15, 1999. Bishop is currently a director and officer of Majestic.

[14] Kricfalusi became president and director of Suncastle as of April 1, 2006. She also worked as an administrator for Majestic and was described as Majestic's VP of Operations in Majestic's Business Plan.

[15] Loman was a resident of Alberta and president of Essen Capital Inc. ("**Essen**"), which had an office in Lethbridge, Alberta. Loman was also president of Essen Inc., a company with its office in Christ Church, Barbados. Loman was registered with the Alberta Securities Commission as a mutual fund salesperson from 2003 to 2005.

[16] There is no record of Adams, Kricfalusi or Loman (together with Bishop, the "**Individual Respondents**") having been registered under the Act.

C. The Allegations

[17] Staff alleges that the Respondents distributed Majestic securities to investors raising approximately $5.3 million from approximately 134 investors through: (i) loan agreements, loan conversion agreements and promissory notes; (ii) issuance of Majestic shares from treasury; and (iii) secondary sales of Majestic shares. It is alleged that Bishop and Loman acted as salespersons and received commission on sales of Majestic shares. As a result of the conduct describe above, Staff alleges that during the Material Time, the Respondents traded in securities of Majestic without registration contrary to subsection 25(1) of the Act and engaged in a distribution of Majestic shares without Majestic having filed any prospectus with the Commission, contrary to subsection 53(1) of the Act.

[18] It is also alleged that Majestic, through its agents, Adams, Bishop and Loman, gave undertakings relating to the future value of Majestic shares contrary to subsection 38(2) of the Act and made representations regarding the future listing of Majestic shares with the intention of effecting sales of Majestic shares contrary to subsection 38(3) of the Act.

[19] Staff further alleges that Adams, Kricfalusi and Bishop, as officers and directors of Majestic, and Adams and Kricfalusi, as officers and directors of Suncastle, authorized, permitted or acquiesced in violations of the Act by Majestic and Suncastle, respectively, and pursuant to section 129.2 of the Act, are deemed to have not complied with Ontario securities law.

[20] By virtue of the conduct referred to in paragraphs 17 to 19, it is also alleged that the Respondents engaged in conduct contrary to the public interest.

[21] We note that Staff concede in their closing submissions that the evidence does not establish on a balance of probabilities that Loman provided undertakings as to the future value of Majestic shares, contrary to subsection 38(2) of the Act, nor that Kricfalusi, as an officer and director of Majestic, authorized, permitted or acquiesced in breaches of the Act by Majestic, such that Kricfalusi may be deemed to have not complied with Ontario

securities law pursuant to section 129.2 of the Act. We accept Staff's concession and withdrawal of those specific allegations against Loman and Kricfalusi, and accordingly do not make any further analysis or finding with respect to those allegations.

II. PRELIMINARY ISSUES

A. Failure of Some Respondents to Attend

1. Respondent Participation

[22] Counsel for Kricfalusi and CBK and counsel for Adams and Suncastle were permitted to be removed as counsel of record for this matter on the first day of the Merits Hearing, on the basis of consent provided by these respondents to their counsel. As a result, Kricfalusi, Suncastle and CBK did not attend and were not represented throughout the hearing, other than as indicated in the next two sentences. Kricfalusi appeared in person on the first day of the Merits Hearing and was present on the first day of the motion, but did not otherwise participate in the hearing process. Asselstine did provide brief written closing submissions on behalf of CBK.

[23] Adams attended the hearing in person and was represented in a limited capacity by counsel from time to time during the Merits Hearing. Bishop attended the hearing in person and represented himself and Majestic. Loman was represented by counsel.

2. The Law

[24] Subsection 6(1) of the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22, as amended (the "**SPPA**"), which is set out below, requires that "reasonable notice" be given to the parties to a proceeding:

> **Notice of hearing**
>
> **6.**(1)The parties to a proceeding shall be given reasonable notice of the hearing by the tribunal.

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

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

[26] Further, Rule 7.1 of the OSC Rules provides:

> **7.1 Failure to Participate –** If a Notice of Hearing has been served on any party and the party does not attend the hearing, the Panel may proceed in the party's absence and that party is not entitled to any further notice in the proceeding.

3. Authority to Proceed in Absence of Respondents

[27] Given that all the Respondents were represented or participated at the beginning of the Merits Hearing, we are satisfied that Staff served the Respondents with notice of the hearing. We also note that the Notice of Hearing and the Statement of Allegations were posted on the Commission's website, as was the Commission order which set out the dates on which the Merits Hearing was scheduled to take place. We are therefore authorized to proceed in the absence of some of the Respondents in accordance with subsection 7(1) of the SPPA.

B. The Standard of Proof

[28] The standard of proof in this hearing is the civil standard of proof on a balance of probabilities. Evidence must be sufficiently clear, convincing and cogent to satisfy this standard (*F.H. v. McDougall*, [2008] 3 S.C.R. 41 at paras. 40 and 46).

C. Hearsay Evidence

[29] This Panel has the discretion to admit relevant evidence that might not otherwise be admissible as evidence in a court, including hearsay evidence, under subsection 15(1) of the SPPA, subject to the weight given to such evidence (*Re Sunwide Finance Inc.* (2009), 32 O.S.C.B. 4671 at para. 22).

III. ISSUES

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

(a) Did the Respondents engage in unregistered trading, contrary to subsection 25(1)(a) of the Act and contrary to the public interest?

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

(c) Did Majestic, Adams and/or Bishop give an undertaking relating to the future value or price of Majestic shares with the intention of effecting a trade in Majestic shares, contrary to subsection 38(2) of the Act and contrary to the public interest?

(d) Did Majestic, Adams, Bishop and/or Loman make prohibited representations that Majestic shares would be listed on an exchange with the intention of effecting a trade in Majestic shares, contrary to subsection 38(3) of the Act and contrary to the public interest?

(e) Did Adams, Bishop and/or Kricfalusi authorize, permit or acquiesce in non-compliance with Ontario securities law by one or both of the Corporate Respondents, such that they are deemed, pursuant to section 129.2 of the Act, to have not complied with Ontario securities law and to have acted contrary to the public interest?

(f) Did Majestic fail to file a report of exempt distribution of Majestic shares with the Commission contrary to section 6.1 of NI 45-106?

IV. EVIDENCE

A. Overview

[31] Staff called 17 witnesses at the hearing. Fifteen of Staff's witnesses were investors, six of whom were residents of Alberta and nine of whom were from Ontario. The other two witnesses were senior investigator, Jeff Thomson ("**Thomson**") and senior forensic accountant, Paul DeSouza ("**DeSouza**"), both with the Enforcement Branch of the Commission.

[32] To protect the privacy of all investor witnesses, we have referred to them anonymously by initials rather than using their respective names. In addition, we have required that Staff provide a redacted version of the record to serve the same purpose.

[33] Staff adduced 168 exhibits at the hearing through their witnesses. Staff also introduced a number of documents through cross-examination.

[34] Loman testified on his own behalf and his counsel entered five exhibits through him. Bishop called three witnesses, two of whom were former members of Majestic's board of directors and shareholders in the company ("**Director One**" and "**Director Two**", respectively). Bishop's third witness was Majestic's lawyer, Tom Brown ("**Brown**").

[35] None of the other Respondents tendered any evidence at the hearing.

[36] To facilitate comprehension of the issues, we have prepared the following summary of the facts and events in evidence before us.

B. Respondents Were Not Registered Under the Act and Did not File a Prospectus

[37] Thomson obtained certificates of registration under section 139 of the Act, which confirm that none of the Respondents was registered under the Act during the Material Time and that Majestic never filed a prospectus or a preliminary prospectus with the Commission.

C. Identification of the Corporate Respondents

[38] Thomson conducted corporate searches of Suncastle and 1562497 Ontario Inc., Majestic's predecessor, and obtained Articles of Amalgamation for Majestic from an investor, which confirm the positions of various individual respondents within Majestic and Suncastle's corporate structures. He also obtained a resolution of CBK from Asselstine which verifies that Asselstine is CBK's sole director, president and secretary.

D. Trading by the Corporate Respondents

[39] DeSouza compiled and analyzed information pertaining to the distribution of Majestic shares, both from treasury and as secondary market sales. He relied primarily on

Majestic's General Ledger and financial statements, but also reviewed supporting documentation such as share registers and transfer records. DeSouza used the information to create a reconciliation document which depicts Majestic treasury stock movement from inception until Majestic ceased to operate and identifies certain secondary market sales. The document indicates that there are a total of 88 shareholders who acquired shares of Majestic from treasury and 53 transactions that resulted in a transfer of Majestic shares from Suncastle as well as a number of other secondary market trades which, as determined below, were illegal trades as there was never a legitimate distribution of Majestic shares with a prospectus. It is, however, noted that the total number of investors cannot be determined by adding the listed number of shareholders because of a number of share consolidations.

[40] DeSouza also created another document from his analysis of Majestic's General Ledger which details share transactions by date. Each transaction notes the name of the investor, the number of shares of Majestic they acquired and the value attributed to the shares. DeSouza testified that his findings were supported by Majestic share registry records and provided Majestic shareholders lists for the periods before and after Majestic's amalgamation, which DeSouza received from former counsel for Adams. DeSouza had also obtained the Shareholder Register from Majestic's counsel, which corroborated his findings.

1. Majestic Treasury Share Sales

[41] DeSouza's financial analysis indicated that Majestic issued 13,420,619 shares from treasury to 88 shareholders for consideration of approximately $2.1 million.

[42] Investor B.R. testified to having signed a share subscription agreement with Majestic on March 6, 2006 for 30,000 shares at a price of $1.00 per share. Other investors, D.P. and his wife, testified to having invested $100,000 in Majestic under a similar share subscription agreement with Majestic on October 27, 2006 also at a price of $1.00 per share.

[43] In May 2006, Director One was given 200,000 shares of Majestic as compensation for labour provided to 1562497 Ontario Inc., Majestic's predecessor. His services included providing plant maintenance, delivering orders and assisting day-to-day operations.

[44] Investor J.L.1 is a retired police officer who also worked as a fraud investigator for the Workplace Safety and Insurance Board. J.L.1 testified that he was introduced to Majestic by Bishop and that he and his wife were given a tour of the Majestic plant conducted by Adams in the fall of 2006. J.L.1 and his wife decided to invest their life savings of approximately $250,000 in Suncastle and Majestic by way of several separate investments. The first was a loan and conversion agreement with Adams for $100,000, described at paragraph 59 below. On November 12, 2006, J.L.1 and his wife invested for a second time by providing Majestic with a bank draft for $50,000 and later received a share certificate for 50,000 Majestic shares, dated November 17, 2006. The third investment by J.L.1 and his wife was made in February 2007 with a purchase of 80,000 Majestic shares from Suncastle for $1.00 per share. J.L.1 and his wife subsequently sent

one last draft payable to Suncastle for $20,000, dated May 14, 2007, as their last investment in an additional 20,000 Majestic shares.

[45] C.F., an engineer hired by Suncastle to develop an ink cartridge filling station and printer heating device, testified that he signed a share subscription agreement with Majestic in trust for one of his suppliers and the supplier's associates on January 11, 2008. C.F. purchased 100,000 Majestic shares in trust at $1.00 per share.

2. Secondary Sales of Majestic Shares

[46] We were provided with a chart created by DeSouza outlining secondary sales of Majestic shares. According to the chart, shares, which were first issued from treasury by Majestic without a prospectus to Suncastle, were then illegally distributed by Suncastle, which resold 2,558,986 Majestic shares to 53 investors including 16 transactions for services. Adams directly and indirectly resold to 33 investors 1,040,900 Majestic shares which had been issued from treasury by Majestic without a prospectus. Kricfalusi resold to one investor 33,154 Majestic shares which had been issued from treasury by Majestic without a prospectus and CBK resold to 11 investors 300,000 Majestic shares which had been issued from treasury by Majestic without a prospectus. DeSouza noted that the actual cash received for the secondary market sales does not form part of Majestic's outstanding dollar share capital.

[47] DeSouza's financial analysis indicated that secondary sales included transfers and gifts made for nil consideration, and sometimes resulted in no change of beneficial ownership. At times, shares were also provided as compensation. For example, on March 30, 2007, C.F. entered into a service agreement with Suncastle that would compensate his services partly in Majestic shares and partly in cash. It is important to note that a prospectus was never filed in respect of any secondary sale of Majestic shares.

[48] Brown identified two documents which explain the origin of part of Suncastle's holding of Majestic shares. The first is dated May 15, 2006 and refers to a revolving loan agreement dated January 10, 2005, whereby Suncastle agreed to lend up to $250,000 to Majestic and Majestic granted Suncastle an option to convert all or any portion of amounts owing by Majestic to Suncastle into shares of Majestic at any time prior to March 30, 2007. The second document is a letter dated March 1, 2007 from Suncastle to Majestic which purports to convert Majestic's debt of $403,983.19 into 577,119 shares of Majestic at a rate of $0.70 per share. A resolution of Majestic's directors, dated March 1, 2007, approved the issue of 577,119 Majestic shares in consideration for the conversion of the debt of $403,983.19.

[49] Shares of Majestic acquired by Suncastle at $0.70 per share, as described in paragraph 48 above, were later resold at $1.00 per share. For instance, investor R.R., a farmer residing in Alberta, and his wife purchased 100,000 Majestic shares from Suncastle for $100,000 pursuant to an agreement dated April 12, 2007. R.R. provided the Panel a copy of the money order for $100,000 payable to Suncastle dated April 16, 2007 for 100,000 shares of Majestic and a copy of his Majestic share certificate dated April 21, 2007. Similarly, investor L.N., another resident of Alberta, signed a share purchase agreement with Suncastle on August 15, 2007 for 20,000 Majestic shares at a cost of $1.00 per share. L.N. testified that he sent a bank draft payable to Suncastle for $20,000.

Another Alberta-resident investor, R.F, signed a share purchase agreement with Suncastle on August 13, 2007 for 25,000 Majestic shares at a cost of $1.00 per share.

[50] With respect to shares held by CBK, Brown confirmed that he transferred 850,000 Majestic shares which he held in an implied trust, to CBK on September 1, 2007. In a response to the Commission's request for documentation, then counsel for Adams confirmed CBK held 850,000 Majestic shares in trust for Adams and another 850,000 Majestic shares in trust for Kricfalusi. Of the 11 investors that acquired Majestic shares from CBK, six were named in Adams' letter to CBK dated January 16, 2008, authorizing CBK to transfer Adams' shares in Majestic as collateral for loans. In his testimony, Brown identified CBK and confirmed its related activity as follows: "I'm quite certain CBK did transfer shares to individuals and that I prepared the necessary documentation for that" (Tom Brown – Transcript of November 29, 2011 at p. 91). DeSouza's analysis reveals that the 11 investors acquired 300,000 Majestic shares from CBK.

[51] A number of additional secondary sales were made as a result of Majestic shares transferred pursuant to loan and conversion agreements ("**L&C Agreement(s)**"). DeSouza created a chart summarizing 49 L&C Agreements supported by copies of the agreements themselves and/or transfer letters, share certificates and copies of cheques from investors payable to the borrower. Majestic was the borrower in eight of these agreements and its predecessor, 1562497 Ontario Inc., was the borrowing party in three other instances. The borrowers in the other 38 L&C Agreements are discussed in paragraph 63 below.

E. Trading by Adams and Kricfalusi

[52] Thomson was assigned to investigate this matter on September 8, 2008 after the Commission received an email complaint regarding a possible illicit distribution. The email was from Bishop and copied to Lauren Sclisizzi ("**Sclisizzi**") of the Halton Police Service Fraud Squad.

[53] On December 2, 2008, Thomson and Sclisizzi conducted a joint voluntary interview of Adams. In that interview, Adams was asked whether he recruited anyone to invest in Majestic and Adams responded that he had friends, "[s]even or eight of them I brought directly into Majestic, other ones bought shares from myself, but … I directed cash right into Majestic" (Exhibit U13 – Transcript Excerpt of Interview of Herb Adams at p. 31).

[54] Investor L.R. was a mortgage advisor for a Canadian chartered bank who testified as a witness for Staff. She stated that Adams gave her tours of Majestic's facilities in late 2005 and early 2006, explained the business to her and discussed a biodegradable ink, which he called Souken Ink. L.R. testified that she saw the printing machines, very large prints with extraordinary clarity, and ink inside of unique bags that resembled IV bags. It was L.R.'s evidence that in early 2006, at a subsequent meeting in Majestic's office, Adams told her there weren't any Majestic shares left, but since Adams appreciated the mortgage work she had done for his son, Adams could sell her some of his own shares for $1.00 per share. L.R. stated she wanted to invest $5,000, but was told by Adams that the minimum investment was $10,000. L.R. testified that Adams told her it was a once-in-a-lifetime opportunity, the company was on the cutting edge of biodegradable ink, they

were getting contracts with a big German company and the government was reviewing it to give him and his company a million dollar grant for research and development.

[55] On February 10, 2006, at the time of her third meeting with Adams at Majestic's plant and office, L.R. signed a subscription agreement with 1562497 Ontario Inc., operating as Majestic Supply Co., for 10,000 Majestic shares at a price of $1.00 per share and wrote a cheque to Majestic Supply Co. for $10,000 from a line of credit which she arranged in order to provide funds for the purchase of Majestic shares and which remains outstanding. L.R. testified that Adams told her how to fill out the subscription agreement, including a form certifying she was an accredited investor. L.R.'s income tax statement reveals she was not an accredited investor. However, L.R. stated she was told by Adams that the form was just a formality.

[56] In October 2007, Adams asked L.R. to attend his home to hear some interesting news about Majestic including that Majestic going on the stock market soon, within a week or so, to offer her more shares and for L.R. to prepare mortgage documents for Kricfalusi. After hearing the news from Adams, on October 25, 2007, L.R. signed a L&C Agreement with Kricfalusi for $25,000, which granted L.R. a conversion right to obtain 25,000 shares of Majestic that was exercised on the same day. L.R. testified that she acquired the shares from Kricfalusi because Adams told her there were no shares of Majestic left, but that Kricfalusi had many and would be able to sell them through a L&C Agreement.

[57] On May 1, 2006, investor D.B. entered into a L&C Agreement with Adams whereby D.B. lent Adams $5,000 and was granted a conversion right to obtain 100,000 shares of Majestic. D.B. testified that he signed the agreement in the presence of Adams and Kricfalusi. D.B. also testified that he introduced approximately 14 investors to Majestic, four of whom were identified as having signed L&C agreements with Adams from May 2006 to January 2008 and at least one investor who entered into a L&C Agreement with Kricfalusi on May 22, 2007. One of these investors, W.C., gave evidence that he entered into a L&C Agreement with Adams on October 10, 2006 for $10,000, which granted W.C. a conversion right to obtain 10,000 shares of Majestic. D.B. testified that he was not aware of any potential investor that he introduced who was turned down by Adams or Kricfalusi and stated that Adams never gave him criteria of who he could bring forward.

[58] Investor B.R. testified he entered into a L&C Agreement with Adams on June 10, 2006 for $5,000, which granted B.R. a conversion right to obtain 5,000 shares of Majestic. On September 29, 2006, investor T.M. entered into a L&C Agreement with Adams for $5,000 which granted T.M. a conversion right to obtain 5,000 shares of Majestic. T.M. testified that Adams filled out the agreement, and T.M. signed it and gave Adams a bank draft from funds he had borrowed in order to invest.

[59] As stated at paragraph 44 above, investor J.L.1, a retired police officer, testified that he and his wife toured the Majestic plant with Adams and Bishop. J.L.1 stated that during the tour Adams told him shares were selling at $1.00 per share for Majestic and $100 per share for Suncastle, but that J.L.1 would have to invest $100,000 in Suncastle first, which would then be converted into Majestic shares before the company went public. J.L.1 and

his wife entered into a L&C Agreement with Adams on November 10, 2006, whereby J.L.1 and his wife lent Adams $100,000 and in turn were granted a conversion right to 1,000 shares of Suncastle. On November 12, 2006, they gave Adams a bank draft for $100,000. The conversion right under the L&C Agreement was amended on January 28, 2007 to provide J.L.1 and his wife with the option to convert the loan into 100,000 shares of Majestic rather than 1,000 shares of Suncastle.

[60] In spring 2007, investor R.R., a resident of Alberta, and others visited the Majestic facilities in Burlington, Ontario. R.R. testified that Adams and Bishop gave the group a tour and made a presentation on the operations and income of Majestic. R.R. also stated that Adams confirmed the minimum investment was $50,000 and maximum would be $100,000.

[61] C.F., the engineer referred to in paragraph 45 above, testified that he was approached by Adams and Bishop in late 2007 or early 2008 to invest in Majestic and Suncastle, but declined because he already held shares of Majestic received as partial compensation for his services and did not want to put further money into the companies until he saw more developments towards going public.

[62] In response to Staff's request for documents, Thomson received a letter dated January 16, 2008 from Adams to CBK requesting Asselstine to transfer Adams' shares of Majestic to certain individuals as collateral for loans.

[63] DeSouza's share distribution and financial analysis revealed that 17 shareholders acquired Majestic shares as a result of Adams' secondary distribution and one shareholder acquired Majestic shares through Kricfalusi. Of the 49 L&C Agreements which resulted in Majestic share transfers, Adams was the borrower in 33 instances and Kricfalusi was the borrower in five.

[64] The Suncastle Financial Statements, for the year ended March 31, 2008, record that Adams owed Suncastle $522,000.00 in relation to: (i) sales of Majestic shares deposited into Adams' personal account; (ii) the conversion of loans; and (iii) reclassification of payment from Essen Inc.

F. Trading by Bishop

[65] Thomson and Sclisizzi jointly conducted a joint interview of Bishop on October 1, 2008. Thomson read excerpts of the interview into the record. In the interview, Bishop admitted to having a commission-based relationship with Herb Adams, Suncastle and Majestic, through which he was offered shares of Majestic and a vice president position at Majestic. Bishop further admitted to personally bringing in "probably" 60 investors who invested approximately $2.5 million.

[66] Bishop agreed that he promoted Majestic's shares indirectly through his presentation at Essen's annual general meeting in Lethbridge. Bishop also indicated that he continued to sell Majestic shares even after Majestic had reached 50 shareholders because there was a "relatively limited number of shares that were being sold … by Majestic, everything else was a resale" (Exhibit U13 – Transcript Excerpt of Interview of Steven Bishop at pp.134-135).

[67] Thomson obtained two commission agreements between Bishop and Majestic. The first was dated September 12, 2006 and allowed Bishop to sell up to a maximum of 5 million Majestic shares at $1.00 CDN per share in exchange for commissions composed of shares of Majestic and 5% compensation on any amount for the first $2 million raised. The second was dated December 29, 2006 and it extended the first commission agreement for six months on the same terms. A copy of each agreement was admitted into evidence.

[68] Investor J.S. testified that he was introduced to Majestic by Bishop and decided to invest through his holding company. On September 15, 2006, J.S.'s holding company entered into a loan agreement with Majestic whereby Majestic borrowed $25,000 and J.S.'s holding company was granted the option to convert the debt into 25,000 Majestic shares. J.S. gave Bishop a cheque for that amount on the same day. After a visit by Bishop two to three months later, J.S.' s holding company entered into a second loan agreement with Majestic on December 21, 2006, whereby Majestic borrowed another $25,000 and J.S.'s holding company was again granted the option to convert the debt into 25,000 Majestic shares.

[69] Investor D.P. is an engineer who testified for Staff. D.P. stated he and his wife were introduced to Majestic in October 2006 through Bishop, who had previously acted as the financial and insurance advisor for D.P.'s consulting company. D.P. testified that Bishop attended his home and brought D.P. a Majestic business plan and power point presentation. D.P. understood that Majestic was in the large-format printing supply business which was introducing a revolutionary water-based ink, Souken Ink, that had the same properties as a solvent ink without the hazardous components. D.P. testified that Bishop told him Suncastle would have a better return, but to invest in Suncastle there was a minimum requirement of investing $100,000 in Majestic. D.P. stated the share price was $1.00 per share for Majestic and $100 per share for Suncastle. After visiting Majestic, D.P. and his wife invested $100,000 in Majestic under a share subscription agreement and another $100,000 in Suncastle through a L&C Agreement with Adams on October 27, 2006.

[70] As stated above at paragraph 44, investor J.L.1, a retired police officer, was introduced to Majestic by Bishop, toured the Majestic plant with his wife and Adams and decided to invest their life savings. J.L.1 testified that they did all the paperwork through Bishop, giving Bishop cheques and signed documents to be delivered to or executed by Adams. J.L.1 also stated that Bishop delivered share certificates to him.

[71] Investor H.E., a resident of Alberta, testified that in the fall of 2006 Bishop went out west to speak at meetings arranged by Essen in Lethbridge, Alberta. It is H.E.'s evidence that Bishop told him Majestic shares were valued at $1.00 per share, but Bishop could manage to get some Majestic shares for H.E. at $0.66 since another investor, an older individual, was looking to get rid of his shares for health reasons.

[72] As stated above at paragraph 60, R.R., a resident of Alberta, testified that Bishop and Adams gave him and others a tour of Majestic's facilities in Ontario and made a presentation on the operations and income of the company in the spring of 2007. R.R. also stated that Bishop bought the group a nice dinner and paid for their hotel room in Ontario that evening before they returned to Alberta the next day. Shortly after, R.R. and

his wife purchased 100,000 Majestic shares from Suncastle for $100,000 pursuant to an agreement dated April 12, 2007. R.R. provided the panel a copy of the money order payable to Suncastle dated April 16, 2007 and confirmed that Bishop gave him the details of where to deposit the funds.

[73] Investor R.F., a resident of Alberta, testified that Bishop gave him investment details for Majestic in the spring or summer of 2007, advised him that the minimum investment was $25,000 and subsequently sent him a share purchase agreement by mail. R.F. also stated that Bishop arranged for him to visit the Majestic facilities on August 8, 2007. R.F. subsequently signed a share purchase agreement with Suncastle on August 13, 2007 for 25,000 Majestic shares at a cost of $1.00 per share. R.F. testified that he signed the agreement in Loman's office and sent a bank draft payable to Suncastle for $25,000 on August 14, 2007.

[74] As stated above at paragraph 61, C.F., an engineer hired by Suncastle, testified that he was approached by Adams and Bishop in late 2007 or early 2008 to invest in Majestic and Suncastle, but declined. C.F. stated that after telling one of his supplier's about Majestic and Suncastle, C.F. was asked to invest on behalf of the supplier and the supplier's friends. The supplier subsequently made a cheque out to C.F. and C.F. in turn made a cheque for the same amount to Majestic. On January 11, 2008, C.F. signed a subscription agreement with Majestic, in trust for the supplier and his associates, for 100,000 Majestic shares at $1.00 per share and gave the cheque to Bishop.

[75] Thomson testified that on January 10, 2010, in a meeting held at the Halton Regional Police Service, Bishop stated "I am the one that sold that stuff" referring to western investors. Thomson later conducted a voluntary interview of Bishop on April 27, 2010 to clarify and review information obtained. At the later interview, Bishop indicated that he had another contract with Suncastle which allowed him to sell Suncastle shares and Majestic shares which were owned by Suncastle. A copy of a commission agreement dated September 12, 2006 between Adams and Bishop was tendered into evidence through Thomson (the "**Suncastle Commission Agreement**"). In the Suncastle Commission Agreement, Adams authorized Bishop to sell up to a maximum of 15,000 Suncastle shares at $100.00 CDN per share. The Suncastle Commission Agreement identified that sales of shares would be structured as loan and conversion agreements and that buyers would concurrently provide a conversion letter addressed to Adams, dated in January 2007. The Suncastle Commission Agreement provided that Bishop would receive 10 percent commission as compensation for sales of Suncastle shares, half payable by cheque and the other half in Suncastle shares.

[76] Bishop further admitted in the voluntary interview on April 27, 2010 that he sold Alberta investors shares in Majestic and that accredited investors bought only from Majestic while non-accredited investors would buy from Suncastle. In response to the Commission's enforcement notice, Bishop stated: "I sold shares and raised capital for these firms [Majestic and Suncastle] through the subscription agreements and loan/conversion agreements…" (Letter of Bishop to the Commission dated June 24, 2010; Exhibit U17).

G. Trading by Loman

[77] Staff takes the position that Loman acted as a salesperson for Majestic by promoting Majestic shares to investors in Alberta. Loman testified on his own behalf and denied having sold Majestic shares. Loman stated he was introduced to Majestic through Bishop and personally visited the Majestic plant in Ontario in early 2007.

[78] Loman acknowledged that he and Essen settled with the Alberta Securities Commission in an unrelated matter. Under that settlement, Loman undertook to cease trading in securities for a period of 3 years commencing as of October 22, 2009, subject to certain exceptions for his registered retirement savings plans (*Re Essen Capital Inc.*, 2009 ABASC 530).

1. Evidence of Payments Received by Loman

[79] Staff argued that Loman was paid commissions on sales of Majestic shares. During Thomson's testimony, Staff tendered into evidence a document entitled "Kevin Loman Transactions" which, Staff alleged, purported to record amounts of commissions received by Loman for sales of Majestic shares to Alberta investors (the "**Alberta Investors**"). The document lists transactions by date and includes names of the Alberta Investors, and beside each name the number of shares and the amount of commission payable to Loman for each transaction. The document further indicates that Loman was paid a 25% commission rate by Suncastle and a 10% commission rate by Majestic on each sale of shares. Thomson testified to having received multiple copies of the document from investors as part of their disclosure to Staff and stated that investors told him that it had been handed out at a Majestic shareholders meeting.

[80] Counsel for Loman objected to admission of the document as evidence on the basis that the source of the document was unknown. In response, Staff referred the Panel to Bishop's voluntary interview of April 27, 2010, at which Bishop stated that the "Kevin Loman Transactions" document was created by Mary Kricfalusi as a method of quantifying Loman's consulting fees. We admitted the document and the excerpt of Bishop's voluntary interview, subject to a high degree of caution, on the basis that the evidence was relevant with respect to the Alberta Investors and possible commissions, while being mindful that a lack of verifiable source goes to the weight that may be attributed to the document as evidence.

[81] The "Kevin Loman Transactions" document divides transactions by three payment totals. The first two groups detail payments apparently owing from Suncastle to Loman for $145,250 and $58,750 respectively. The third group identifies an amount of $24,000 apparently owing from Majestic to Loman. The document also appears to confirm payment of $145,250 and $60,000 by Suncastle and notes the overpayment in the latter instance should be deducted from the amount owing by Majestic.

[82] DeSouza provided the Panel with an invoice dated May 10, 2007, from Essen Inc. to Suncastle, c/o Herb Adams, for the amount of $145,250 (the "**Essen Invoice**"). The Essen Invoice described the services rendered as follows:

> In regard to all consulting services in support of your companies financing and in regard to corporate developments fostered and provided by us. As well as for the professional guidance rendered thus far in regard to structuring and facilitating the necessary framework that allowed for your company to access public markets and for those ancillary and related services provided.

[83] DeSouza drew the Panel's attention to the Suncastle financial records for the year ending March 31, 2008 which recorded a payment of $145,250 for fees to Essen Inc. dated May 10, 2007. The same financial records reflected a $60,000 payment to Loman as an expense of $55,000 for fees and dues and a balance of $5,000 being a receivable from Majestic. Loman did not dispute receipt of these funds by Essen Inc., or himself, but his counsel did demonstrate there were inconsistencies in Suncastle's financial records with respect to recording of dates and flow of funds amongst the parties.

[84] Investor R.R. from Alberta testified that he questioned Bishop about commissions several times when he visited the Majestic facilities in the spring of 2007. R.R. states that when he initially asked, Bishop denied the payment or existence of commissions; however, R.R. stated that later in the evening Bishop admitted both Bishop and Loman were being paid commissions on investments. It is noted that R.R. is currently involved in separate litigation in which R.R. is suing Loman with respect to certain investments.

2. Loman's Evidence on Payments Received

[85] Loman testified that on January 18, 2007 he purchased 300 Suncastle shares from Adams for $30,000. Loman stated that he later invested in Majestic together with investor H.E. On March 14, 2007, Loman wired $100,000 to Adams and on April 4, 2007 H.E. obtained a bank draft payable to Adams in the amount of $96,000 for the purchase of Majestic shares. Loman testified that he and H.E. obtained 300,000 Majestic shares for their $196,000 investment. He stated that they were acquiring the shares at a discount and were in a rush to pay for them because of the sick health status of the person they were buying from who required the money for medical attention according to information he received from Adams and Bishop.

[86] Loman's evidence was that his contribution of $100,000 towards the investment in Majestic was made on the understanding that $60,000 of that amount would be repaid to him by Essen Inc. as its portion of the share purchase. Therefore, Loman was to personally invest $40,000, Essen Inc. was to contribute $60,000 and H.E. the remaining $96,000. Loman testified that he received a payment from Suncastle for $60,000 for work being done by Essen Inc. Loman stated that he requested the amount be paid to him personally rather than having it sent to Essen Inc. in Barbados only to have it sent back to him as repayment of the $60,000 owed for the Majestic shares.

[87] Loman's evidence was that he and J.L.2, another employee of Essen Inc., discussed Asset Protection Insurance ("**API**") for Majestic and Suncastle. He described the service as follows:

> Asset protection insurance is a product that protects against litigious or predatory attacks on personal or corporate assets. And then in the event

> that those assets are successfully attacked, there is actually insurance insuring the value of the assets inside the policy.
>
> In the case of Majestic and Suncastle, there was a need for asset protection insurance to protect the intellectual property against the likes of HP and other competitors and really to thwart lawsuits that those competitors would put in place that were meant to reduce the company's ability to gain market share because of the launch of that technology.
>
> (Kevin Loman – Transcript of November 17, 2011 at pp. 155-156)

[88] Loman stated he had conversations with a number of individuals at Majestic and Suncastle, including Adams, Bishop and Brown with respect to API. Loman described his work as predominantly consisting of dialogue with the parties about "the feasibility process…[and] determining how you would utilize asset protection insurance in a corporate…field" and how to utilize API in specific circumstances (Kevin Loman – Transcript of Nov. 17, 2011 at p. 157). Loman also testified that the primary threat was HP, which he testified had apparently put in two offers to buy the company. Loman stated that they did not know at the time that HP was putting in the offers, but through some investigative work they believed it was an HP representative. His testimony was that he flew to Toronto eight or nine times and that his work continued on an ongoing basis, each time for different work such as going through technologies or information on patents.

[89] Loman testified that he was responsible for all the work during the establishment period, but admitted he did not have a contract with Suncastle or anyone else personally for API. Loman stated that J.L.2 was "also involved in assisting with the process", but didn't know exactly what other work would have been done, other than "consultant type work" in relation to the company's international exposure and utilizing tax treaties.

[90] With respect to the Essen Invoice, Loman testified he could not comment on the content because he did not create it, but stated that J.L.2 prepared it. When asked if he had any knowledge of the services rendered that are referred to in the invoice, Loman responded that "the invoice refers to a number of different areas which would have included asset protection work that I was doing, and then the additional work that…[J.L.2] was doing" (Kevin Loman – Transcript of November 17, 2011 at pp. 163).

[91] In cross-examination, Loman was asked to identify the portion of the invoice that made reference to API. He identified "professional guidance rendered thus far in regard to structuring and facilitating the necessary framework that allowed for your company to access public markets" as the appropriate section because API was important to protect assets against litigation and to permit the company to move forward. Staff suggested this section related to bringing in members of the public as investors in Majestic. Loman repeated that he had not created the document and could not comment on it, but would say that API would certainly fall within "ancillary and related services provided". Loman agreed with Staff that "there is no written contract for services pursuant to which this invoice is rendered" (Kevin Loman – Transcript of November 17, 2011 at p. 210).

[92] Loman testified that the relationship between Suncastle and Majestic was not clear with regard to the assets they held; particularly in terms of ownership of technology, who held the license and what rights were granted. Staff suggested to Loman that neither Majestic nor Suncastle owned any patent that would require protection. Loman refrained from commenting on what the companies ended up owning, but noted that at the time they believed there was significant value to Souken Ink, the cartridge and the filling station. Later, under cross-examination by Bishop, Loman testified that as far as he recalled Souken Ink had a valuation of around 160 million, the filling and cartridge technologies around 25 to 30 million and that there were additional technologies coming from Suncastle.

[93] Loman's evidence was that the API policy would be placed with Allied Sovereign and Equitable Assurance and then reinsured to "some majors overseas". He stated that they were not paid a commission from the insurance company. Rather, they would charge the insured a fee for the establishment based on the overall insurance value. Loman confirmed that his company did not do the valuation. Rather, it relied on the valuations provided to it by the parties involved in the companies. Loman testified that in this case they never got to a due diligence stage because the companies fell apart before then. He confirmed that the $145,250 charge and then some was just for the initial review and discussions for API.

[94] In cross-examination, Adams suggested that only investor J.D. and J.L.2 worked on API. Loman responded that Adams was incorrect. After a series of questions, Adams and Loman had the following exchange:

> [Adams] Q: I would suggest to you that no work was put in it…The project was abandoned when we had no product that we could put within the asset protection simply because the people who were being paid to develop the products refused to deliver the products. So, we had nothing to put into asset protection and to say $145,000 you're billing for a service that was never performed, I think is a little outlandish; am I right in assuming that?
>
> [Loman] A: I couldn't comment on whether you're right or wrong with the service, but what I can say is the services were performed.
>
> (Transcript of November 17, 2011 at p. 220)

[95] Loman testified that he did not receive commissions of $228,000 as alleged by Staff in the Statement of Allegations.

[96] Brown later testified that Souken Ink was a trademark, but no patents were associated with the ink and that he, as counsel for Suncastle and Majestic, worked with Ridout & Maybee, the outside intellectual property counsel, in respect of some trademark registration but never dealt with any patents that were owned by either of the companies.

3. Loman's Acts in Furtherance of Trades

[97] Loman admitted to having casual conversations with friends and acquaintances about Majestic and Suncastle, including his uncles, and L.N., H.E., and R.F., but denied

being retained as a salesperson for Majestic. He elaborated on his relationships with several investor witnesses and stated he did not believe he sold Majestic shares.

[98] During cross-examination, Staff presented Loman with the document entitled "Kevin Loman Transactions" and several share purchase agreements for investors that were listed. Loman admitted to having signed and witnessed six share purchase agreements. He further acknowledged that he had email correspondence with investor J.B., an Alberta resident, had provided her with a subscription agreement and also bank account details to which her money could be wired.

[99] Investor H.E., a dentist residing in Alberta and friend of Loman's, testified that he was introduced to Majestic through Loman in the fall of 2006 when Loman brought Bishop to Alberta to speak about investments at Essen and where Bishop had discussed Majestic. H.E. testified that he and Loman discussed investing in Majestic together, Loman gave H.E. Majestic's business plan and instructions to make the investment payable to Adams. H.E. stated that Loman told him the two of them would put their shares into a holding company in Barbados that Loman operated. H.E. subsequently signed transfer of capital documentation transferring his Majestic shares to Loman. H.E. testified that he spoke about Majestic to some friends who also subsequently invested, including investors R.D., R.R.2, B.M., G.B. and J.B. The Panel heard that H.E. sent Tom Brown a cheque for $309.70 as payment for an Essen Invoice so that Majestic's counsel would send him copies of his share certificates when the companies started to fall apart.

[100] Brown testified that he recalled individuals from Alberta coming to visit the Majestic facilities in February or March 2007 and that they were Loman's contacts "that he [Loman] brought to the table" (Tom Brown – Transcript of November 29, 2011 at p. 140). With respect to Loman's role in Majestic or dealings with the Alberta investors, Brown stated:

> It was my understanding that these were individuals that were known to him [Loman], may have already participated in investments that he had been involved in in raising capital for in Alberta, and he presented this opportunity to them, which was Majestic, and that they agreed to -- well, a certain number of them agreed to acquire shares in Majestic.
>
> (Tom Brown – Transcript of November 29, 2011 at p. 147)

[101] Investor R.R., referred to at paragraph 84 above, is a farmer and steam engineer residing in Alberta, who testified that he received a call from Loman in the spring of 2007 with respect to Majestic. R.R. stated that Loman told him about Majestic's business, and informed him that if R.R. was interested in investing a presentation was coming up shortly and R.R. should fly to Ontario and have a look for himself. R.R. testified that Loman called him a second time to confirm whether R.R. would be flying out to visit Majestic and that on that second call Loman informed him the minimum investment was $50,000 and maximum was $100,000 to acquire shares in Majestic at a price of $1.00 per share. R.R. subsequently invested $100,000 in Majestic.

[102] Investor J.B., an Alberta resident, provided us with emails from Loman to J.B. and G.B., J.B.'s fiancé at the time and H.E.'s friend. The first email was dated April 16,

2007. In it Loman provided J.B. and G.B. with Majestic's address to forward the signed subscription agreement once it was executed and stated "I will make sure that Mr. Bishop registers the shares in both of your names" (Exhibit L2). Loman also copied Bishop on the email and noted the agreement would be signed in two parts, stating to Bishop "If this is not sufficient please let me know and I will assist in getting one copy duly signed" (Exhibit L2). The second email from Loman to J.B. and G.B. was dated April 17, 2007 and attached a document entitled "Suncastle Generic Sale. Apr.2007", identified by J.B. as the subscription agreement received by Loman from Bishop and then forwarded to J.B. via email. On April 16, 2007, J.B. signed a share purchase agreement and subscription with Suncastle for 40,000 Majestic shares at a price of $1.00 per share and forwarded $40,000 for that purpose. J.B. admitted in cross-examination that she never had discussions with Loman before investing and that at the time of the Merits Hearing she had still never spoken to Loman.

[103] It is L.N.'s evidence that he was introduced to Majestic through Loman in late July or early August 2007. L.N., also an Alberta resident, testified that Loman stopped him in the hallway of the building in which Essen had its office, told L.N. about Majestic's business, gave L.N. information on Majestic and directed L.N. to call Bishop. L.N. stated that Loman told him L.N. could tell others about Majestic and that the minimum investment was $10,000. L.N. subsequently signed a share purchase agreement with Suncastle on August 15, 2007 for 20,000 Majestic shares at a cost of $1.00 per share. L.N. testified that he received the agreement from Loman and sent a bank draft payable to Suncastle for $20,000.

[104] R.F., Essen's landlord, testified that he first heard of Majestic in late 2006, but was re-introduced by Loman in early 2007. Investor R.F. stated that he and Loman had numerous discussions about Majestic and that Loman gave R.F. Bishop's contact information where he later obtained investment details. R.F. subsequently signed a share purchase agreement with Suncastle on August 13, 2007 for 25,000 Majestic shares at a cost of $1.00 per share. R.F. testified that he signed the agreement in Loman's office.

H. Representations of Future Value and Listing of Majestic Shares

[105] L.R. testified that when she made her first purchase of Majestic shares in February 2006, Adams told her that Majestic shares were going to go on the stock market and "when they [shares] go on the stock market, that they would open at $5 and could go upwards to $10, $20, $30" (L.R. – Transcript of November 7, 2011 at p. 89). In late October 2007, before L.R. made her second purchase of Majestic shares, she testified Adams offered to sell her more shares and told her "it was going on the stock market like really soon, within a week or so" (L.R. – Transcript of November 7, 2011 at p. 93). L.R. stated that Adams told her the company would be "going on the NASDAQ within a week or so" and "would open at $5" (L.R. – Transcript of November 7, 2011 at p. 94).

[106] It was L.R.'s evidence that she was told her decision to invest for the second time had to be made quickly because of the indicated timing of the shares being traded on the NASDAQ and was assured by Adams that he would personally guarantee the investment. In cross-examination, L.R. could not recall whether Adam specifically stated that he would reimburse her if the loan failed, but did recollect that Adams said he would "make sure" L.R. got her money back and she trusted him in that respect. L.R. testified to having

asked Adams about the listing several weeks after signing the L&C Agreement and was told they had run into a snag with paperwork.

[107] J.S. testified that in 2006 Bishop came to J.S.'s office to discuss investing in Majestic. In his examination in chief, J.S. was asked if any statements were made about whether or not Majestic would go public and J.S. stated that Bishop indicated it would go public. J.S. testified that he would have a loan to start with and convert that into shares once the company went public.

[108] T.M. testified that when he took a tour of Majestic's plant in September 2006, Adams told T.M. that he hoped Majestic would go public in 2007.

[109] It is H.E.'s evidence that in the fall of 2006 Bishop told him shares of Majestic were available and it was a good time to buy because "in 2007 they would probably go public" (H.E. - Transcript of November 14, 2011 at p. 23).

[110] C.F. testified that Adams and another individual told him "Majestic was going to go public" (C.F. – Transcript of November 10, 2011 at p. 32), which led him to accept a service agreement to build a filling line for Majestic that would compensate his services partly in shares and partly in cash. C.F. stated that Adams told him once the company went public the share value "could easily reached[sic] $30 a share, but most likely would hover around $5 to $15 a share" (C.F. – Transcript of November 10, 2011 at pp. 52-53).

[111] R.R. testified that Loman told him Majestic "would go public at some point in the near future" (R.R. – Transcript of November 10, 2011 at p. 136). R.R. also testified that when he visited the Majestic facilities in the spring of 2007 Bishop and Adams told him "it was going to go public" and "the share price would probably be around $5" (R.R. – Transcript of November 10, 2011 at p. 146). It was R.R.'s evidence that Loman called him sometime after the visit and told R.R. that there was a lot of interest in Majestic and the shares would be going public at $5, which confirmed the number given by Adams and Bishop (R.R. – Transcript of November 10, 2011 at p. 148).

[112] D.P.'s evidence is that both Bishop and Adams stated Majestic "would go public" D.P. – Transcript of November 7, 2011 at pp. 191 and 193).

[113] R.F. testified that both Bishop and Loman mentioned that Majestic had plans to "go public in the short future" (R.F. – Transcript of November 16, 2011 at p. 28).

V. FRESH EVIDENCE MOTION

[114] Staff and the Respondents completed the evidence phase of the Merits Hearing on November 29, 2011 and closing oral submissions were scheduled for January 24, 2012. Final written submissions on the merits were scheduled to be filed by December 22, 2011 for Staff and January 13, 2012 for the Respondents. With respect to the Merits Hearing**,** Staff, counsel for Loman, Adams, Bishop and CBK filed written submissions.

[115] During the Merits Hearing, Kricfalusi was notified by Staff that on November 17, 2011 Staff expected to call its last witness and the respondents would be called upon to present their cases. Following receipt of that notification, Kricfalusi advised Staff by email dated November 21, 2011 that she had email communications with respect to

"Kevin Loman commissions". Thomson responded to her by email on the same day, requesting that she forward any e-mails or other documents which relate to the issue of Loman receiving commissions or engaging in acts in furtherance of sales of Majestic shares to Alberta investors. Thomson had not previously interviewed Kricfalusi during his investigation of the matter. Subsequently, Kricfalusi communicated to Staff by fax on January 13, 2012 that she had documents pertaining to Loman's involvement and commissions paid to him in this matter and attached four emails that were potentially prejudicial to Loman ("**Kricfalusi's Communication**").

[116] On January 19, 2012, Staff filed and served its Notice of Motion and other materials seeking, among other things, orders permitting the filing of a copy of Kricfalusi's Communication and fresh evidence, being the affidavit of Kricfalusi with e-mails and attachments, and if necessary, an order permitting the matter be reopened for the purpose of introducing the aforementioned fresh evidence (the "**Motion**").

[117] Staff submitted that the Kricfalusi Communication should be admitted because it is credible evidence, not previously in Staff's possession, which ensures a complete evidentiary record and is potentially determinative of the question of whether Loman received commissions. Counsel for Loman submitted that Staff should not be permitted to adduce further evidence after the close of presentation of evidence by the parties and after the filing of written closing submissions on the basis that disruption of the adversarial process amounts to "case-splitting". Case-splitting is a term used to describe situations in which the party presenting the matter seeks to adduce evidence after the respondent has presented a reply. Counsel for Loman argues that case-splitting creates unfair surprise, prejudice and confusion. Further, he submitted that the evidence was available or discoverable upon exercise of reasonable diligence.

[118] The Panel heard submissions on the Motion on January 24 and February 22, 2012 and dismissed the Motion on March 20, 2012 with reasons to follow (*Re Majestic Supply Co., Inc. et al.* (2012) 35 O.S.C.B. 2806). These are those reasons.

[119] The Panel's discretion to admit fresh evidence after written closing submissions was not in dispute. The SPPA grants discretion to a tribunal to control its own process under section 25.0.1. The Commission's *Rules of Procedure* (2010), 33 O.S.C.B. 8017 (the "*Commission Rules"*), are similarly flexible and accommodating. Subrule 1.4(2) of the *Commission Rules* permits a Panel to issue procedural directions or orders in any proceeding and subrule 1.6(2) allows the Panel to "extend or abridge any time period prescribed under the Rules, before or after the time period expires and on any conditions that the Panel considers advisable." The *Commission Rules* also provide the tribunal with the ability to waive or vary any of its own rules in respect of any proceeding. Rule 1.4 (3) states:

> A Panel may waive or vary any of the Rules in respect of any proceeding before it, if it is of the opinion that to do so would be in the public interest or that it would otherwise be advisable to secure the just and expeditious determination of the matters in issue.

[120] With respect to evidence, the Panel also has a broad discretion to admit evidence under the SPPA pursuant to subsection 15(1) which states:

> **15.**(1) Subject to subsections (2) and (3), 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,
>
> relevant to the subject-matter of the proceeding and may act on such evidence, but the tribunal may exclude anything unduly repetitious.

[121] Therefore, it is within the powers of the Commission to grant the relief sought or dismiss the motion to adduce new evidence, despite the fact that the parties had already concluded adducing evidence and filed closing submissions on the merits.

[122] While none of the precedent provided was directly on point, we found it helpful to consider both court and administrative tribunal cases in which a party sought to present fresh evidence. We agree with the observation of a labour arbitrator who, upon reviewing the authorities cited by counsel, noted the rules guiding arbitrators are not significantly different than those guiding courts in an application to reopen a hearing (*Re Stelco Inc. and U.S.W.A., Local 1005,* [1994] O.L.A.A. No. 1110 at para. 31). We also note that the right of a trial judge to reopen a case to consider fresh evidence is less stringent than the principles governing an application to adduce new evidence before an appellate court (*Scott v. Cook,* [1970] 2 O.R. 769 (H.C.) ("***Scott v. Cook***") at p. 775). Staff submits that there are three possible tests for adducing fresh evidence. The following three cases discuss those options.

[123] The Supreme Court of Canada (the "**SCC**") in *Sagaz* confirmed the applicability of a two-part test from *Scott v. Cook,* on the determination of whether to exercise the court's discretion to re-open a trial after reasons were delivered, but before formal judgment was entered (*671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, [2001] 2 S.C.R. 983 ("***Sagaz")*** at paras. 20-21 and 59-65; *Scott v. Cook, supra* at p.774). With respect to new evidence, the test states:

> (a) Would the evidence, if presented at trial, probably have changed the result?; and
> (b) Could the evidence have been obtained before trial by the exercise of reasonable diligence? [emphasis added]

[124] In *Sagaz,* the SCC considered a civil case in which the appellants sought to admit the affidavit of a witness who had previously had the opportunity to give evidence on discovery and at trial. The trial judge had found that he could not say that the new evidence would probably have changed the result, only that it may have changed the result. This was due to concerns of credibility. Second, the trial judge had found that the evidence could have been obtained before trial, since the witness could have been compelled to testify. The SCC upheld the decision of the trial judge and noted that the applicant had to meet both branches of the *Scott v. Cook* test to reopen a trial to admit

fresh evidence (*Sagaz, supra* at para. 65). The SCC also acknowledged that deference should be granted to the trial judge who is in the best position to determine whether "at the expense of finality, fairness dictates that the trial be reopened." (*Sagaz*, supra at para. 60, citing *Clayton v. British American Securities Ltd.*, [1934] 3 WWR 257 (BCCA) ("***Clayton***") at p. 295). The court cited *Clayton* and *Scott v. Cook* for the proposition that the trial judge must exercise discretion to reopen a trial "sparingly and with the greatest care" so that "fraud and abuse of the Court's processes" do not result (*Sagaz, supra* at para. 60, citing *Clayton, supra* at p. 295 and *Scott v. Cook, supra* at p. 774).

[125] The second test proposed by Staff was elaborated by the SCC in *Palmer.* In that case, the SCC noted the following principles derived from legal authorities with respect to admission of new evidence on appeal:

> (a) The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases;
> (b) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial;
> (c) The evidence must be credible in the sense that it is reasonably capable of belief; and
> (d) The evidence must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result. [emphasis added]
>
> (*R. v. Palmer,* [1980] 1 S.C.R. 759 ("***Palmer***"))

[126] In *Palmer,* the SCC was considering the ability of the Court of Appeal to apply its discretion in admitting new evidence from a witness, which contradicted that witness' testimony given at trial. In that case, the evidence was not in existence at trial, but was relevant. The Court subsequently considered the credibility branch of the test. Since the evidence was unworthy of belief, the court refused the motion to adduce new evidence. In applying the test, the SCC found that the appellate court had made no error in law which would warrant interference.

[127] The third test presented by Staff was Ontario Court of Appeal's decision in *Sengmueller* which concluded that the court will exercise its discretion in favour of admitting new evidence when:

> (a) the tendered evidence is credible;
> (b) the evidence could not have been obtained, by exercise of reasonable diligence, prior to trial; and
> (e) the evidence, if admitted, will likely be conclusive of an issue in the appeal. [emphasis added]
>
> (*Sengmueller v. Sengmueller* (1994), 17 O.R. (3d) 208 (C.A.) at para 9, citing *Cook v. Mounce* (1979), 26 O.R. (2d) 129 ("***Sengmueller***") at para. 5)

[128] In *Sengmueller,* the Court of Appeal admitted evidence that did not exist at the time of the trial because to deny admission of the evidence would lead to a substantial injustice. The Court of Appeal in *Chiang (Trustee of) v. Chiang* reviewed both tests for

admitting fresh evidence on appeal and stated that, while they are similar, the last branch of the *Sengmueller* test may be more stringent that the last branch of the *Palmer* test ([2009] 93 O.R. (3d) 483 at para. 77).

[129] Considerable thought must also be given to fairness and ability of the parties to respond if the case is reopened. Administrative tribunals "owe a duty of fairness to the regulated parties whose interest they must determine" (*Newfoundland Telephone v. Board of Commissioners of Public Utilities*, [1992] 1 S.C.R. 623, at para. 21). The Court of Appeal in *Griffin v. Corcoran* noted the importance of balancing procedural and substantial justice when exercising discretion to reopen a case ([2001] N.S.J. No. 158 (N.S.C.A.) ("***Griffin v. Corcoran***") at para. 65). In that case, the court noted that reopening a case may be offensive to important principles of orderly conduct of litigation in which parties advance the issues, disclose relevant documentation to each other and then proceed by each side having the opportunity to present its case (*Griffin v. Corcoran*, *supra* at para. 66). A decision to reopen could be procedurally unfair to the opposite party and, if allowed routinely or too readily, will provide an incentive to ignore these principles to gain a tactical advantage (*Griffin v. Corcoran*, *supra* at para. 67).

[130] In *Re Foresight Capital Corporation*, 2006 BCSECCOM 529, the British Columbia Securities Commission noted that an application to reopen would have to specify full particulars of the new evidence and explain why the fresh evidence is relevant and why it was not reasonably possible to provide it during the hearing. In that matter, upon receiving the application, the Commissioner decided that the proposed evidence was not relevant.

[131] We have taken into consideration the need to balance procedural fairness, including the requirement to provide notice to a respondent of the case to respond to and the right to be heard, with the risk of substantial injustice in this matter. While the evidence sought to be adduced was relevant and reasonably capable of belief, there was only a possibility that it could have changed the result in this case and it appears on the facts that it could have been obtained by exercise of reasonable diligence. Furthermore, admitting the fresh evidence after the close of presentation of evidence by the parties and after the filing of written closing submissions would cause prejudice to Loman in particular, given the nature of the evidence. In the circumstances of this case, and considering that Loman responded to allegations by testifying on his own behalf, we do not agree with Staff that allowing him to respond to the fresh evidence would be a sufficient remedy. For these reasons, we dismiss the Motion to adduce fresh evidence.

VI. MERITS ANALYSIS

A. Did the Respondents engage in unregistered trading, contrary to former subsection 25(1)(a) of the Act and contrary to the public interest?

1. The Law

[132] During the Material Time, and prior to September 28, 2009, subsection 25(1)(a) of the Act set out the registration requirement as follows:

> **25. (1) Registration for trading** – No person or company shall,

(a) trade in a security or act as an underwriter unless the person or company is registered as a dealer, or is registered as a salesperson or as a partner or as an officer of a registered dealer and is acting on behalf of the dealer;
[…]
and the registration has been made in accordance with Ontario securities law and the person or company has received written notice of the registration from the Director and, where the registration is subject to terms and conditions, the person or company complies with such terms and conditions.

[133] The applicable provision refers to a trade or trading in a security. The terms "trade" or "trading" are defined in subsection 1(1) of the Act as:

"trade" or **"trading"** includes,

(a) any sale or disposition of a security for valuable consideration, whether the terms of payment be on margin, instalment or otherwise, but does not include a purchase of a security or, except as provided in clause (d), a transfer, pledge or encumbrance of securities for the purpose of giving collateral for a debt made in good faith,
[…]
(e) any act, advertisement, solicitation, conduct or negotiation directly or indirectly in furtherance of any of the foregoing;

[134] The inclusion of the word "indirectly" in the definition of "acts in furtherance", cited above in paragraph (e) of subsection 1(1) of the Act, reflects an express legislative intention to capture conduct which seeks to avoid the registration requirement by doing indirectly that which is prohibited directly.

[135] The definition of "security " is also found at subsection 1(1) of the Act and states:

"security" includes,

(a) any document, instrument or writing commonly known as a security,

(b) any document constituting evidence of title to or interest in the capital, assets, property, profits, earnings or royalties of any person or company,[…]

(d) any document constituting evidence of an option, subscription or other interest in or to a security,

(e) a bond, debenture, note or other evidence of indebtedness or a share, […]

(g) any agreement providing that money received will be repaid or treated as a subscription to shares, stock, units or interests at the option of the recipient or of any person or company […]

[136] The Commission has established that trading is a broad concept which includes any sale or disposition of a security for valuable consideration, including any act, advertisement, solicitation, conduct or negotiation directly or indirectly in furtherance of such a sale or disposition. This interpretation has been confirmed by the Ontario courts in their acknowledgement that "[r]egarding "trade", the legislature has chosen to define the term and they have chosen to define it broadly in order to encompass almost every

conceivable transaction in securities" (*R. v. Allan Sussman*, [1993] O.J. No. 4359 (Ont. Ct. J.) at para. 46).

[137] The Commission has found that a variety of activities constitute acts in furtherance of trades. For example, the Commission has found that accepting and depositing investor cheques in a bank account for the purchase of shares constitute acts in furtherance of trades (*Re Limelight Entertainment Inc.* (2008), 31 O.S.C.B. 1727 ("***Limelight***") at para. 133). Other examples of activities that have been considered acts in furtherance of trades by the Commission include, but are not limited to:

a. providing potential investors with subscription agreements to execute;
b. distributing promotional materials concerning potential investments;
c. issuing and signing share certificates;
d. preparing and disseminating materials describing investment programs;
e. preparing and disseminating forms of agreements for signature by investors;
f. conducting information sessions with groups of investors; and
g. meeting with individual investors.

(*Re Momentas Corporation* (2006), 29 O.S.C.B. 7408 ("***Momentas***") at para. 80)

[138] Solicitation or direct contact with investors is not required for an act to constitute an act in furtherance of trade (*Re Lett* (2004), 27 O.S.C.B. 3215 at paras. 51 and 64).

[139] In this case, there is some indication that the respondents may have sought to rely on the "accredited investor" exemption at subsection 2.3(1) of NI 45-106 from registration requirements found in section 25 of the Act. The definition of "accredited investor" is found at section 1.1 of NI 45-106 and includes:

> "accredited investor" means
> […]
> (j) an individual who, either alone or with a spouse, beneficially owns, directly or indirectly, financial assets having an aggregate realizable value that before taxes, but net of any related liabilities, exceeds $1 000 000,
>
> (k) an individual whose net income before taxes exceeded $200 000 in each of the 2 most recent calendar years or whose net income before taxes combined with that of a spouse exceeded $300 000 in each of the 2 most recent calendar years and who, in either case, reasonably expects to exceed that net income level in the current calendar year,
>
> (l) an individual who, either alone or with a spouse, has net assets of at least $5 000 000,
> […]

[140] Evidence must be sufficiently clear, convincing and cogent proof, on a balance of probabilities, that the "accredited investor" exemption applies.

[141] In 2006, section 1.10 of the Companion Policy to NI 45-106CP stated:

> **1.10 Responsibility for compliance**
> A person trading securities is responsible for determining when an exemption is available. In determining whether an exemption is available, a person may rely on factual representations by a purchaser, provided that the person has no reasonable grounds to believe that those representations are false. However, the person trading securities is responsible for determining whether, given the facts available, the exemption is available. Generally, a person trading securities under an exemption should retain all necessary documents that show the person properly relied upon the exemption.
>
> […]The **issuer should not rely merely on a representation**: "I am a close personal friend of a director". Likewise, under the accredited investor exemption, the **seller must have a reasonable belief that the purchaser understands the meaning of the definition of "accredited investor"**. Prior to discussing the particulars of the investment with the purchaser, the seller should discuss with the purchaser the various criteria for qualifying as an accredited investor and whether the purchaser meets any of the criteria.
>
> It is not appropriate for a person to assume an exemption is available. For instance an seller should not accept a form of subscription agreement that only states that the purchaser is an accredited investor. Rather the **seller should request that the purchaser provide the details on how they fit within the accredited investor definition**. [emphasis added]

[142] The Saskatchewan Court of Appeal reviewed similar companion policy to Multi-lateral Instrument 45-103 and decided that issuers are required to take reasonable steps in advance of a sale of shares to ensure purchasers are accredited investors and must have a reasonable basis for believing purchasers are in fact accredited (*Euston Capital Corp. v. Saskatchewan Financial Services Commission* (2008) Sask. R. 100 (Sask. C.A.) at para. 33).

2. Analysis

[143] We find that Majestic, Suncastle, Adams, Bishop, Kricfalusi, CBK and Loman traded in securities and/or engaged in acts in furtherance of trading securities without being registered to do so under the Act and without an exemption from registration being available to them, contrary to subsection 25(1)(a) of the Act, for the reasons that follow.

(a) Majestic, Suncastle, Adams, Bishop and Kricfalusi

[144] We find that the shares of Majestic, the L&C Agreements and the rights of conversion of debt to shares arising from the L&C Agreements constitute securities as defined under subsection 1(1) of the Act.

[145] We received consistent and credible evidence from investors, supported by documentary evidence, including subscription agreements, L&C Agreements and share certificates, that Majestic, Suncastle, Adams, Bishop and Kricfalusi solicited investors to

buy Majestic shares and/or sold Majestic shares to investors. The acts of trade or acts in furtherance of trades by these Respondents included the following:

(a) Majestic sold shares from treasury to 88 shareholders for consideration of approximately $2.1 million;

(b) Suncastle resold Majestic shares through at least 53 transactions with shareholders in the secondary market;

(c) Majestic and Suncastle, through Adams, hired Bishop as a salesperson to act as their representative and solicit potential investors to buy Majestic shares;

(d) Bishop admitted to having a commission-based relationship with Adams, Suncastle and Majestic and to having personally brought in "probably" 60 investors who invested approximately $2.5 million;

(e) Bishop introduced to Majestic and/or Suncastle: J.S., whose company invested $50,000 in Majestic; D.P., who invested $100,000 in Majestic and another $100,000 in Suncastle; and J.L.1 who invested $250,000 in Majestic;

(f) Bishop discussed Majestic's operations, gave presentations on its financials and arranged for tours of Majestic's facilities in furtherance of selling Majestic shares;

(g) R.R. testified that Bishop and Adams gave potential investors a tour of Majestic's facilities and made a presentation on the company's operations and finances;

(h) Bishop gave prospective investors a copy of the Majestic business summary and forwarded to prospective investors the subscription agreement which included the $1.00 price per share;

(i) Investors L.R., B.R., D.P. and C.F. in trust signed subscription agreements for Majestic shares and Director One received 200,000 shares as compensation from Majestic;

(j) Investor J.L.1 acquired Majestic shares at $1.00 per share on four occasions through: (i) a L&C Agreement with Adams for $100,000; (ii) a direct purchase from Majestic for $50,000; (iii) purchasing Majestic shares from Suncastle for $80,000; and (iv) another purchase of Majestic shares from Suncastle for $20,000;

(k) Investors R.R., L.N. and R.F. purchased Majestic shares from Suncastle for $100,000, $25,000 and $20,000, respectively;

(l) Forty-nine L&C Agreements with investors were executed in furtherance of selling holdings of Majestic shares, which included the following borrowers: Majestic on eight occasions, 1562497 Ontario Inc. on three occasions, Adams in 33 instances and Kricfalusi in the remaining five cases;

(m) Adams admitted to having recruited seven or eight Majestic investors and having sold his personal Majestic shares to others;

(n) L.R. acquired Majestic shares on two occasions for $10,000 and $25,000 respectively after solicitations by Adams; and

(o) D.B. signed a L&C Agreement with Adams for $5,000 and testified to having introduced at least 14 investors to Majestic, including four who subsequently signed L&C Agreements with Adams;

[146] It is clear from the evidence that Majestic and Suncastle and their representatives actively solicited and induced the sales of Majestic shares. They made representations to induce those sales and sent documents and materials relating to those sales. We find that the actions of Majestic, Suncastle, Adams, Bishop and Kricfalusi constituted trades.

[147] During the Material Time, none of the aforementioned respondents was registered under the Act in any capacity. As stated below at paragraphs 163 to 167, the "accredited investor" exemption is not available to any of these respondents in the circumstances of this case.

[148] We find that Majestic, Suncastle, Adams, Bishop and Kricfalusi traded securities without being registered to do so under the Act and without a registration exemption being available to them, contrary to former subsection 25(1)(a) of the Act and contrary to the public interest.

(b) CBK

[149] CBK transferred 300,000 Majestic shares to 11 investors. CBK submits that it never owned or participated in sales of Majestic shares, nor did it benefit from those sales. CBK also submits that it merely acted as a trustee, holding shares in trust for Adams and Kricfalusi, and transferring the 300,000 shares as requested by beneficiaries.

[150] As stated at paragraph 138, solicitation or direct contact with investors is not required for an act to constitute an act in furtherance of trade (*Re Lett, supra* at para 51). Furthermore, the definition of "acts in furtherance" at subsection 1(1) of the Act includes "any act […] directly or indirectly in furtherance of any [disposition of a security for valuable consideration]". The L&C Agreements and the rights of conversion of the debt to shares pursuant to the L&C Agreements constitute securities, as decided in paragraph 144 above, and were sold by Adams for valuable consideration. As a result, the transfer of securities by CBK to the investor-lenders, pursuant to the exercise of the rights of conversion of debt to shares, amounts to conduct in furtherance of trades and therefore constitutes a trade under the Act.

[151] While CBK may not have directed the trading, CBK exercised control over the Majestic securities themselves and facilitated the transfer of Majestic shares to the investor-lenders. Brown described CBK's involvement as follows: "I'm quite certain CBK did transfer shares to individuals and that I prepared the necessary documentation for that" (Tom Brown – Transcript of November 29, 2011 at p. 91). CBK's responsibility to abide by Ontario securities law cannot be obviated by the existence of a trust. There is no prerequisite of ownership of the securities for a respondent to be found in breach.

Therefore, regardless of whether CBK was acting as a trustee, and regardless of whether Adams gave the directions to effect the transfer, the fact is that CBK transferred the shares and, thereby, traded securities without registration. The spirit of the Act would be defeated if a respondent were entitled to do indirectly, that which cannot be done directly.

[152] If a respondent engages in trading, such as transferring shares, while not being registered to do so that would constitute a breach of former subsection 25(1) of the Act. During the Material Time, CBK was not registered under the Act in any capacity. We find that CBK traded in Majestic shares without being registered to do so under the Act, contrary to former subsection 25(1)(a) of the Act and contrary to the public interest.

[153] We find that CBK traded in securities without being registered to do so under the Act and without a registration exemption being available, as determined at paragraphs 163 to 167 below, contrary to former subsection 25(1)(a) of the Act and contrary to the public interest.

(c) Loman

[154] As noted in paragraph 137 above, there are a number of activities which constitute acts in furtherance of a trade. Providing subscription agreements for investors to execute, distributing promotional materials, and meeting with individual investors for the purpose of soliciting or enabling investment can constitute "trading" within the meaning of the Act.

[155] Investors H.E., R.R., L.N. and R.F. testified that they were introduced to Majestic through Loman. Loman gave Majestic's business plan to H.E. and provided him with instructions to make his investment payable to Adams. R.R. received a call from Loman and L.N. was stopped by Loman in the hallway of Essen's office building; each was told about Majestic's business. R.F. testified to having numerous discussions with Loman about Majestic and stated that Loman gave him Bishop's contact information where he later obtained more investment information. Subsequently, H.E. invested $96,000, R.R. invested $100,000, L.N. invested $20,000 and R.F. invested $25,000 in Majestic.

[156] Loman admitted, and documentary evidence supported, the fact that Loman emailed investor J.B. a subscription agreement to execute, an address to which the signed subscription agreement could be sent and an account to which her money for a subscription for securities could be wired. Bishop was copied on the correspondence and advised by Loman that the agreement would be signed in two parts, but if that was not sufficient Loman would "assist in getting one copy duly signed". J.B. subsequently invested $40,000 in Majestic shares.

[157] Brown testified that the Alberta Investors were Loman's contacts, whom Brown understood had participated in investments for which Loman had raised capital in Alberta and to whom Loman presented the opportunity of investing in Majestic.

[158] Documentary evidence provided by Staff support Loman's admission that he signed and witnessed six share subscription agreements. This was corroborated by testimony of R.F. and J.B., with respect to execution of the agreement by her fiancé.

[159] Despite being an investor himself, Loman had direct contact with the Alberta Investors. Many of the Alberta Investors who testified acknowledged a friendly or "acquaintance" relationship with Loman and agreed that he was "sharing information". This does not excuse or explain his actions in breach of the Act.

[160] With respect to whether or not Loman received commissions from the sales of securities to the Alberta Investors, we do not find his explanation for receipt of $145,250 credible. There is no evidence that Majestic or Suncastle held any patents that required asset protection insurance. Further, Loman's claim that the payment was for API services was unsupported by any service agreement. While it is not necessary to find that Loman was paid commission to find him in breach of the Act in this case, on a balance of probabilities the evidence weighs in favour of a finding that Loman was paid commissions in respect of sales of Majestic shares to the Alberta Investors. Also, we do not accept his professed ignorance of an invoice in respect of his own work for a relatively large fee. The finding that commissions were paid supports the allegation that Loman acted as a salesperson selling Majestic securities. He was required to be registered to be engaged in this activity.

[161] We find that Loman's actions constitute acts in furtherance of trading Majestic shares. Loman was not registered with the Commission during the Material Time in any capacity and the "accredited investor" exemption is not available to him, as determined at paragraphs 163 to 167 below.

[162] We find that Loman traded securities without being registered to do so under the Act and without a registration exemption being available to him as determined at paragraphs 163 to 167 below, contrary to former subsection 25(1)(a) of the Act and contrary to the public interest.

(d) Accredited Investor Exemption

[163] Once Staff has proven that the Respondents traded without registration and/or distributed shares without qualifying the shares under a prospectus, the onus shifts to the respondents to prove an exemption from registration and prospectus requirements is available in the circumstances (*Limelight, supra* at para. 142, citing *Re Euston Capital Corp.* 2007 ABASC 75, *Re Lydia Diamond Exploration of Canada Ltd.* (2003), 26 O.S.C.B. 2511, and *Re Ochnik* (2006), 29 O.S.C.B. 3929).

[164] NI 45-106CP states that the Respondents are responsible for compliance and are required to have a reasonable basis for believing purchasers are accredited. Without such a basis, sales constitute illegal trades and the spirit and intent of the exempt market regime are violated. This Companion Policy provides guidance as to how to apply and interpret the proper use of the exemptions set out in NI 45-106.

[165] Despite the fact that many investors signed certificates reporting they were accredited investors, we note that no evidence was provided that any of the investors who testified actually qualified as accredited investors and no evidence was provided to indicate that the Respondents took the requisite effort to ensure investors were in fact accredited.

[166] L.R. testified that Adams told her that signing a form stating that you are an accredited investor is just a formality. Investor D.B. admitted to introducing at least 14 investors and testified that he was not aware of anyone he introduced being turned down by Adams or Kricfalusi, nor was he given criteria as to whom he could bring forward.

[167] We did not receive evidence on the investors' financial positions which would prove that they qualify as accredited investors and we did not receive sufficient evidence on the availability of an exemption which would allow the Respondents to rely upon the "accredited investor" exemption at subsection 2.3(1) of NI 45-106 in order to trade in securities in Ontario during the Material Time.

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

1. The Law

[168] Subsection 53(1) sets out the prospectus requirement under the Act:

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

[169] The prospectus is the primary disclosure document of an issuer for the benefit and protection of investors. In accordance with section 56 of the Act, a prospectus must provide "full, true and plain disclosure of all material facts relating to the securities issued or proposed to be distributed".

[170] The Commission has acknowledged that the prospectus requirement is fundamental to the protection of the investing public because it ensures investors have full, true and plain disclosure to properly assess investment risk and make an informed decision. The panel in *Limelight* articulated:

> The requirement to comply with section 53 of the Act is important because a prospectus ensures that prospective investors have full, true and plain disclosure of information to properly assess the risks of an investment and make an informed investment decision. The prospectus requirements of the Act play a significant role in the overall scheme of investor protection. As stated by the court in *Jones v. F.H. Deacon Hodgson Inc.* (1986), 9 O.S.C.B. 5579 (H.C.) (at p. 5590), "there can be no question but that the filing of a prospectus and its acceptance by the Commission is fundamental to the protection of the investing public who are contemplating purchase of the shares."
>
> (*Limelight*, *supra* at para. 80)

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

[172] Exemptions from the prospectus requirement are provided in NI 45-106 and include, among others, exemptions for a trade in a security of a private issuer to certain persons and a trade in a security if the purchaser is an accredited investor.

[173] Under National Instrument 45-102 *Resale of Securities* ("**NI 45-102**"), if a security was distributed under an exemption from the prospectus requirements in NI 45-106, unless the applicable conditions in Part 2 of NI 45-102 are satisfied, then the first trade of that security is a distribution, which is subject to the prospectus requirement found in subsection 53(1) of the Act.

[174] There is some indication that the Respondents may have sought to rely upon the "accredited investor" exemption from prospectus requirements that existed during the Material Time, as provided in subsection 2.3(2) of NI 45-106. The definition of "accredited investor" is found at section 1.1 of NI 45-106 and is substantially the same as the language articulated at paragraph 139 above.

2. Analysis

[175] Documentary evidence confirms that Majestic has never been a reporting issuer and a prospectus in respect of Majestic securities has never been filed with the Commission. Shares of Majestic were distributed from treasury to investors. For the same reasons set forth in paragraphs 163 to 167, the accredited investor exemption from the prospectus requirement of subsection 53(1) of the Act is not available to the Respondents in respect of the distribution of previously unissued shares of Majestic.

[176] Brown, counsel for Majestic and Suncastle, testified that in addition to the accredited investor exemption, Majestic was also relying on the "seed capital" exemption which would allow solicitation of fifty individuals and sale to twenty-five, pursuant to subsection 72(1)(p) of the Act. However, this exemption was not available during the Material Time for distributions. During the Material Time, pursuant to subsection 5.1(3) of OSC Rule 45-501, the exemptions from the prospectus requirement set forth in subsection 72(1) of the Act were not available for a distribution of a security. In the absence of sufficient evidence and any submissions, we are not able to find that there was any exemption from the prospectus requirement available to the Respondents for the distribution and sale of Majestic shares to the public.

[177] Therefore, Majestic securities were illegally distributed from treasury to 88 shareholders contrary to subsection 53(1) of the Act and contrary to the public interest. Majestic, Adams, Bishop and Loman engaged in the trading of, or engaged in acts in furtherance of the trading of, these Majestic shares without a prospectus having been filed as required by subsection 53(1) of the Act and such conduct was contrary to the public interest.

[178] Adams, Bishop, CBK and Kricfalusi also traded in, or engaged in acts in furtherance of the trading of, the L&C Agreements and indirectly shares of Majestic that were issuable pursuant to the terms of the L&C Agreements. We found at paragraph 144 above that L&C Agreements constitute securities as defined under subsection 1(1) of the Act. These were securities for which no prospectus was issued and for which there was no exemption from the prospectus requirement. Accordingly, they were securities that

were illegally distributed contrary to subsection 53(1) of the Act and contrary to the public interest.

[179] Suncastle and Loman also engaged in the trading of, or engaged in acts in furtherance of the trading of, Majestic securities that were not sold from treasury, but were resales of illegally distributed securities.

[180] The Respondents cannot rely on a resale exemption under NI 45-102 to validate the trading of illegally distributed securities for which there was never a prospectus nor an exemption from the prospectus requirement. NI 45-102 was not drafted to confer legitimacy on secondary trades of illegally distributed securities and it should not be interpreted and used as such. The resale of Majestic shares by Suncastle and Loman and the resale, in effect, of Majestic shares by Adams, Bishop, CBK and Kricfalusi pursuant to the L&C Agreements formed part of the overall trading scheme by the Respondents in this matter and therefore contributed to and continued the illegal distribution of Majestic securities.

[181] Securities, which have been illegally distributed, are not legally freely tradable securities because they were never first acquired under a prospectus or an available prospectus exemption. As a result, Suncastle, CBK, Adams, Bishop, Kricfalusi and Loman, who engaged in secondary trading of Majestic securities, were doing so illegally, because the securities they traded had not been previously issued under a prospectus or an available prospectus exemption. As a result, they too are participating in a distribution illegally.

[182] We find that the trades in Majestic securities by the Respondents were distributions made without a prospectus as required by the Act and without an exemption from the prospectus requirement, and that the Respondents therefore breached subsection 53(1) of the Act and acted contrary to the public interest.

C. Did Majestic, Adams and/or Bishop give an undertaking relating to future value of Majestic shares with the intention of effecting a trade, contrary to subsection 38(2) of the Act and contrary to the public interest?

1. The Law

[183] During the Material Time, subsection 38(2) of the Act provided as follows:

> **Future value**
> [38](2) No person or company, with the intention of effecting a trade in a security, shall give any undertaking, written or oral, relating to the future value or price of such security.

[184] In *Limelight*, the Commission considered the threshold required for a representation to amount to an "undertaking". The panel was guided by the Alberta Securities Commission decision in *National Gaming Corp.* (2000), 9 A.S.C.S. 3570, at p. 16, which stated that "an undertaking is a promise, assurance or guarantee of future value of securities that can be reasonably interpreted as providing the purchaser with a contractual right". Nevertheless, the *Limelight* Panel found that "something less than a

legally enforceable obligation can be an "undertaking" within the meaning of subsection 38(2), depending on the circumstances" (*Limelight*, supra at para. 164).

[185] In *Aatra*, a salesperson told an investor that the investor would "probably" be well over the $4.00 mark over the next 90 days and stated "I would assure you, I will practically guarantee you that within the week you will see the stock…twenty cents ($0.20) to fifty cents ($0.50) higher." (*Re Aatra Resources Ltd. et al.* (1990), 13 O.S.C.B. 5109 ("***Aatra***") at para. 34). The panel in *Aatra Resources Ltd.* found these representations to be in breach of section 38(2) of the Act.

[186] Counsel for Adams placed emphasis on the Commission's decision in *Al-tar*, where the panel stated that "[a] simple representation is not enough to trigger [subsection 38(2) of the Act]" (*Re Al-tar Energy Corp.* (2010), 33 O.S.C.B. 5535 ("***Al-tar***") at para. 160). In *Al-Tar* the salesperson told an investor that the company was going on the market" and "hoped" it would be trading at $6 per share, which the panel understood to be an approximate target and not a firm undertaking (*Al-Tar, supra* at para. 184).

[187] Counsel for Adams also relied on the *Goldpoint* decision, in which it was decided that certain representations lacked the firmness and specificity the panel would expect of a promise or assurance (*Re Goldpoint Resources Corp.* (2011), 34 O.S.C.B. 5478 ("***Goldpoint***") at para. 121). In that matter, the representative had told one investor that Goldpoint would be bought by another company and shares "would" reach a value of $20. While not finding a breach of subsection 38(2) of the Act, the panel in *Goldpoint* did consider the representations together with high pressure sales tactics to be improper and contrary to the public interest (*Goldpoint, supra* at para. 123).

[188] We were also directed to the decision in *Merax*, in which the panel was not satisfied that representations that a public offering would occur at $3 or that a takeover offer of $3.25 had been made constituted undertakings as to the future value of securities (*Re Merax Resource Management* (2011), 34 O.S.C.B. 12476 at para. 140).

2. Analysis

[189] While we find that Adams deceived investor L.R., we are not persuaded that Adams provided an undertaking relating to future value of Majestic shares with the intention of effecting a trade. We do, however, find that Adams' deceptive representations amount to conduct contrary to the public interest. We also find that neither Majestic nor Bishop breached subsection 38(2) of the Act.

(a) Adams

[190] Staff provided several examples of representations made by Adams to investors. These statements included language such as, the share price "would probably be around $5" (R. R. – Transcript of November 10, 2011 at p. 146), the price "could easily reach $30" (C. F. – Transcript of November 10, 2011 at pp. 52-53), the shares "in all likelihood would be worth 10 to 15 times" more than the purchase price (J.L.1 – Transcript of November 15, 2011 at p. 20). We do not consider these representations to have met the necessary threshold to amount to an undertaking under subsection 38(2) of the Act.

[191] We find that Adams made deceptive representations to induce L.R. into purchasing shares for the second time. We accept L.R.'s evidence that she was told by Adams that shares would be on the NASDAQ within a week or so and would open at $5.00. L.R. testified that Adams stated he would personally guarantee the investment, which led her to sign a L&C Agreement with Kricfalusi for $25,000. We note that under cross-examination L.R. could not recall whether Adam specifically stated that he would reimburse her if the loan failed, but she did recollect that Adams said he would "make sure" L.R. got her money and she trusted him in that respect.

[192] We agree with the panel in *Limelight* that "something less than a legally enforceable obligation can be an "undertaking" within the meaning of subsection 38(2), depending on the circumstances" (*Limelight*, supra at para. 164). In this case, Adams gave the investor a price for which the shares would trade on an exchange within a week. Adams then went further by assuring the investor she would get her money back to induce her into purchasing Majestic shares. Subsection 38(2) of the Act requires an undertaking, written or oral, relating to the future value or price of the security. While Adams' statement guaranteed the principal invested, it did not make a promise with respect to future value or price of the securities.

[193] We find Adams did not provide an undertaking in breach of subsection 38(2) of the Act. Nevertheless, we do find that Adams' deceptive representations amount to conduct contrary to the public interest.

(b) Majestic and Bishop

[194] We are not satisfied that the evidence supports a breach of subsection 38(2) of the Act by Majestic or Bishop.

[195] Staff submitted that Adams and Bishop advised investor D.P. that the Majestic share value could increase by 10 or 20 times once Majestic went public. They made no further submissions with respect to this allegation against Majestic.

[196] D.P. testified that he was told a "10 to 1, 20 to 1 return on investment was not at all unlikely and kind of the minimum to be expected" (D.P. – Transcript of November 7, 2011 at p. 184). There is no evidence of any promise or assurance given to repurchase shares or refund the principal if a certain value was not achieved. We do not consider this statement to be sufficiently clear or certain to amount to an undertaking within the meaning of the subsection 38(2) of the Act.

[197] We find that neither Majestic nor Bishop gave an undertaking relating to future value of Majestic shares with the intention of effecting a trade, contrary to subsection 38(2) of the Act and contrary to the public interest.

D. Did Majestic, Adams, Bishop and/or Loman make prohibited representations regarding future listing of Majestic shares on an exchange, contrary to subsection 38(3) of the Act and contrary to the public interest?

1. The Law

[198] Subsection 38(3) of the Act states:

> **38(3) Listing**—Subject to the regulations, no person or company, with the intention of effecting a trade in a security, shall, except with the written permission of the Director, make any representation, written or oral, that such security will be listed on any stock exchange or quoted on any quotation and trade reporting system, or that application has been or will be made to list such security upon any stock exchange or quote such security on any quotation and trade reporting system, unless,
>
> (a) application has been made to list or quote the securities being traded, and securities of the same issuer are currently listed on any stock exchange or quoted on any quotation and trade reporting system; or
>
> (b) the stock exchange or quotation and trade reporting system has granted approval to the listing or quoting of the securities, conditional or otherwise, or has consented to, or indicated that it does not object to, the representation.

[199] Unlike subsection 38(2) of the Act, subsection 38(3) does not require an undertaking with respect to the future listing, only a representation. A representation about listing shares on a stock exchange is sufficient to constitute a violation of subsection 38(3) of the Act. For example, in the *Limelight* case, the Commission found that evidence of salespersons stating that Limelight shares would be listed on an exchange, with the timeframe given ranging from 10 to 12 days to a year, constituted a breach of subsection 38(3) of the Act (*Limelight*, *supra* at para. 181).

2. Analysis

[200] Based on the evidence, we find that Majestic, through Bishop, and Adams and Bishop, in their individual capacity, made prohibited representations with respect to future listing of Majestic securities on a stock exchange, contrary to subsection 38(3) of the Act and contrary to the public interest. We find Loman did not breach this provision.

(a) Majestic, Adams and Bishop

[201] It is clear from the evidence that Majestic, through Bishop, and Adams and Bishop, in their individual capacity, made material misrepresentations to induce Majestic investors into purchasing shares including that Majestic would go public.

[202] Investor R.R. testified that Adams and Bishop told him "it[Majestic] was going to go public" and "the share price would probably be around $5" (R.R. – Transcript of November 10, 2011 at p. 146). D.P. similarly testified that both Bishop and Adams stated Majestic "would go public".

[203] Investor L.R. stated that Adams told her the company would be "going on the NASDAQ within a week or so" and "would open at $5" (L.R. – Transcript of November 7, 2011 at p. 94). J.S., who invested through his holding company, testified that Bishop indicated Majestic would public. J.S. gave evidence that the idea was for him to have a loan to start with and convert that into shares once the company went public. When asked what he meant by "going public", J.S. replied that he meant "[g]oing on the market, so outside investors could buy shares in the company." (J.S. – Transcript of November 11, 2011 at p. 142).

[204] We find that these statements qualify as prohibited representations regarding the future listing of Majestic shares. On at least one occasion a specific stock exchange was noted with listing within a short timeframe to induce the investor to purchase more shares in Majestic. In another, the investor understood that the shares would be sold to others on the public market and structured his investment with the intent of triggering acquisition of equity upon the occurrence of the listing.

[205] Despite assertions that Majestic intended to go public, the evidence does not support a claim that there was any effort made to go public until it became apparent that investors and agents began questioning the legitimacy of Majestic's operations.

[206] We are satisfied on the evidence that Majestic through Bishop, and Adams and Bishop, in their individual capacity, made representations as to the future listing of Majestic shares on a stock exchange for the purpose of effecting trades in Majestic shares, contrary to subsection 38(3) of the Act and contrary to the public interest.

(b) Loman

[207] The evidence does not support a finding that Loman made prohibited representations, contrary to subsection 38(3) of the Act and contrary to the public interest.

[208] Staff submitted that Loman made representations to L.N. and R.F. with respect to the future listing of Majestic shares on a stock exchange for the purpose of effecting trades in Majestic securities. Investor L.N. testified that Loman told him Majestic and Suncastle intended to take products onto the public market, and that "[t]hrough Majestic/Suncastle or a company to be formed on the stock exchange they were going to take it to the public market as a unit, as a cartridge and ink." (L.N. – Transcript of November 14, 2011at pp. 83-84). Investor R.F. testified that both Bishop and Loman mentioned that Majestic had "plans to go public in the short future" (R.F. – Transcript of November 16, 2011 at p. 28).

[209] We find these comments lack clarity with respect to whether Majestic was to be listed on an exchange. Investor L.N.'s testimony seems to suggest that the companies sought to introduce certain products to public consumers. In the latter instance, the investor was told that the companies had "plans" to go public, but not that Majestic "will" or "would" be listed as specified in the language of the relevant provision. Accordingly, we do not find Loman in breach of subsection 38(3) of the Act or that his actions in this respect were contrary to the public interest.

E. Did Adams, Bishop and/or Kricfalusi authorize, permit or acquiesce in non-compliance with Ontario securities law by one or both of the Corporate Respondents, such that they are deemed, pursuant to section 129.2 of the Act, to have not complied with Ontario securities law and to have acted contrary to the public interest?

1. The Law

[210] Under the Act, a director or officer or an individual who performs similar functions can be liable for breaches of securities law by a corporation. Section 129.2 of the Act states:

> **129.2 Directors and officers**—For the purposes of this Act, if a company or a person other than an individual has not complied with Ontario securities law, a director or officer of the company or person who authorized, permitted or acquiesced in the non-compliance shall be deemed to also have not complied with Ontario securities law, whether or not any proceeding has been commenced against the company or person under Ontario securities law or any order has been made against the company or person under section 127.

[211] In subsection 1(1) of the Act, a "director" is defined as "a director of a company or an individual performing a similar function or occupying a similar position for any person" and an "officer" is defined as:

> (a) a chair or vice-chair of the board of directors, a chief executive officer, a chief operating officer, a chief financial officer, a president, a vice-president, a secretary, an assistant secretary, a treasurer, an assistant treasurer and a general manager,
>
> (b) every individual who is designated as an officer under a by-law or similar authority of the registrant or issuer, and
>
> (c) every individual who performs functions similar to those normally performed by an individual referred to in clause (a) or (b).

[212] The Commission determined in *Momentas* that the threshold for a finding of liability against a director or officer under section 129.2 of the Act is low. Indeed, merely acquiescing in the conduct or activity in question will satisfy the requirement of liability. The *Momentas* panel discussed the threshold and defined the terms "authorize", "permit" and "acquiesce" as follows:

> The degree of knowledge of intention found in each of the terms "authorize", "permit" and "acquiesce" varies significantly. "Acquiesce" means to agree or consent quietly without protest. "Permit" means to allow, consent, tolerate, give permission, particularly in writing. "Authorize" means to give official approval or permission, to give power or authority or to give justification.
>
> (*Momentas*, *supra* at para. 118)

[213] Section 129.2 of the Act attaches liability to directors and officers or individuals who perform similar functions (ie. a "***de facto***" director or officer) who authorize, permit or acquiesce in the non-compliance of a company, whether or not any proceedings have been commenced against the company itself.

2. Analysis

[214] Based on the evidence, we find that Adams and Bishop authorized, permitted or acquiesced in non-compliance with Ontario securities law by Majestic. We also find that Adams and Kricfalusi authorized, permitted or acquiesced in non-compliance with Ontario securities law by Suncastle.

[215] Corporate records reveal that Adams was an original officer of 1562497 Ontario Inc., Majestic's predecessor, and subsequently a director of Majestic after its amalgamation on April 1, 2006. Adams apparently resigned as secretary and director of Majestic on November 16, 2006. Adams also held the position of secretary of Suncastle as of and from June 28, 1995. He hired Bishop to sell Majestic securities on behalf of Majestic and Suncastle and agreed to commission-based compensation packages for each.

[216] Bishop was appointed as Majestic's secretary and vice-president of corporate finance on November 16, 2006. As discussed above at paragraphs 13 and 65, Bishop is a director of Majestic and has acknowledged that he was engaged to fill the position of vice president and signed an agreement which supported that fact.

[217] Kricfalusi became president and director of Suncastle as of April 1, 2006.

[218] In light of the evidence and admissions referred to above, we find that Adams, being a director of Majestic until November 16, 2006, and an officer of a predecessor to Majestic prior to April 1, 2006, and Bishop as a director and/or officer of Majestic as of and from November 16, 2006, authorized, permitted or acquiesced in the commission of the violations of sections 25, 38 and 53 of the Act by Majestic, and are deemed, pursuant to section 129.2 of the Act, to also have not complied with the Ontario securities law and to have acted contrary to the public interest.

[219] Furthermore, we find that Adams and Kricfalusi, being directors and/or officers of Suncastle, authorized, permitted or acquiesced in the commission of the violations of sections 25 and 53 of the Act by Suncastle, and are deemed, pursuant to section 129.2 of the Act, to also have not complied with the Ontario securities law and to have acted contrary to the public interest.

F. Did Majestic fail to file a report of exempt distribution of Majestic shares with the Commission contrary to section 6.1 NI 45-106?

1. The Law

[220] Section 6.1 of NI 45-106 states:

> **Report of exempt distribution**
>
> **6.1** Subject to section 6.2 [*When report not required]*, if an issuer distributes a security of its own issue, the issuer must file a report in the local jurisdiction in which the distribution takes place on or before the 10th day after the distribution under the following exemptions:
>
> (a) section 2.3(2) [*Accredited investor*]; […]

2. Analysis

[221] If we had accepted that this was a legitimate exempt distribution of Majestic securities pursuant to the accredited investor exemption found at subsection 2.3(2) of NI 45-106, or if it had been established that another exemption under 45-106 had been available and applicable to the treasury distribution of Majestic securities, Majestic would have been required to file a report of exempt distribution under section 6.1 of NI 45-106. Having found that this was not a legitimate exempt distribution pursuant to the accredited investor exemption or another exemption under 45-106 and that Majestic breached subsection 53(1) of the Act, as a result, no filing of a report of exempt distribution is required of Majestic under NI 45-106.

[222] In the circumstances, we do not find Majestic in breach of section 6.1 of NI 45-106.

VII. CONCLUSION

[223] For the reasons given above, we find that:

(a) Majestic, Suncastle, Adams, Bishop, Kricfalusi, Loman and CBK traded in Majestic securities and/or engaged in acts in furtherance of trades in Majestic securities without having been registered under the Act to do so, contrary to former subsection 25(1)(a) of the Act and contrary to the public interest;

(b) Majestic, Suncastle, Adams, Bishop, Kricfalusi, Loman and CBK engaged in an illegal distribution of securities contrary to subsection 53(1) of the Act and contrary to the public interest;

(c) Adams made deceptive representations to induce an investor to purchase Majestic securities contrary to the public interest;

(d) Majestic, through Bishop, and Adams and Bishop, in their individual capacities, made prohibited representations with respect to the future listing or quoting of Majestic shares on a stock exchange or quotation system, contrary to subsection 38(3) of the Act and contrary to the public interest;

(e) Adams and Bishop authorized, permitted or acquiesced in commission of violations of securities law by Majestic, and are deemed, pursuant to section 129.2 of the Act, to have not complied with Ontario securities law and to have acted contrary to the public interest; and

(f) Adams and Kricfalusi authorized, permitted or acquiesced in commission of violations of securities law by Suncastle, and are deemed, pursuant to section 129.2 of the Act, to have not complied with Ontario securities law and to have acted contrary to the public interest.

[224] We will also issue an order dated February 21, 2013 which sets down the date for the hearing with respect to sanctions and costs in this matter.

Dated at Toronto this 21st day of February, 2013.

"Edward P. Kerwin"

Edward P. Kerwin

"Paulette L. Kennedy"

Paulette L. Kennedy