Ontario Securities Commission
Commission des valeurs mobilières de l'Ontario
22nd Floor
20 Queen Street West
Toronto ON M5H 3S8
22e étage
20, rue queen ouest
Toronto ON M5H 3S8

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

- AND -

IN THE MATTER OF
PAUL CAMILLO DINARDO

REASONS AND DECISION

Hearing:	In writing	
Decision:	January 25, 2016	
Panel:	Timothy Moseley	Commissioner and Chair of the Panel
Submissions by:	Clare Devlin	For Staff of the Commission

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REASONS AND DECISION

I. OVERVIEW

[1] On February 27, 2015, Paul DiNardo ("**DiNardo**") was convicted in the Ontario Superior Court of Justice on five counts of contravening various provisions of the *Criminal Code*[1]. Of those five convictions, two were for fraud over $5,000, with one resulting from each of:

a. DiNardo's participation, along with several others, in investment schemes through which approximately 160 individuals invested approximately $13 million (the "**Investment Schemes**"); and

b. DiNardo, together with one other person, defrauding his 87-year-old physician of more than $1 million.

[2] Enforcement Staff of the Ontario Securities Commission ("**Staff**" of the "**Commission**") asks the Commission to order, pursuant to subsection 127(1) of the *Securities Act*[2] (the "**Act**"), that:

a. trading in any securities or derivatives by DiNardo cease permanently;

b. DiNardo be prohibited permanently from acquiring any securities;

c. any exemptions contained in Ontario securities law not apply to DiNardo permanently;

d. DiNardo resign any positions he holds as director or officer of any issuer, registrant or investment fund manager, and that he be prohibited permanently from acting in any such position; and

e. DiNardo be prohibited permanently from becoming or acting as a registrant, an investment fund manager or a promoter.

[3] In seeking the order, Staff relies upon subsection 127(10) of the Act, which provides that an order under subsection 127(1) may be made in respect of a person who has been convicted in any jurisdiction of an offence arising from a course of conduct related to securities.

[4] For the reasons set out below, I find that DiNardo was convicted of offences arising from a course of conduct related to securities, and that it is in the public interest to make the order requested by Staff.

II. PRELIMINARY MATTERS

[5] On August 20, 2015, the Commission issued a Notice of Hearing (the "**Notice of Hearing**"), naming DiNardo as the sole respondent, in relation to a Statement of Allegations filed by Staff on August 17, 2015. The Notice of Hearing fixed September 9, 2015, as the date of a hearing at which the Commission would consider whether it was in the public interest to make the order referred to in paragraph [2] above.

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[1] RSC 1985, c C-46.
[2] RSO 1990, c S.5.

[6] The Notice of Hearing advised that at the September 9 hearing Staff would apply to continue this proceeding in writing.

[7] DiNardo did not appear at the September 9 hearing, although properly served. I heard submissions from Staff on the application to proceed in writing, and I granted that application. I ordered that Staff deliver its written materials by September 21, and that DiNardo deliver his responding materials, if any, by October 19. [3]

[8] Staff served and filed its materials as required. Those materials included written submissions and a hearing brief comprising a number of documents. I have marked the following documents as exhibits in this proceeding:

a. transcript of DiNardo's plea of guilty to all counts, on February 27, 2015 (Exhibit 1);

b. transcript of the reasons for sentence of Wein J. on April 15, 2015 (Exhibit 2);

c. indictment sworn February 27, 2014 (Exhibit 3);

d. indictment sworn February 23, 2015 (Exhibit 4); and

e. transcript of the sentencing submissions on April 15, 2015 (Exhibit 5).

[9] In this proceeding, DiNardo did not deliver any responding materials and did not otherwise respond.

III. FACTUAL BACKGROUND

[10] The facts that are relevant to this proceeding and described below are found in the documents referred to above. Exhibit 1 sets out facts, agreed to by DiNardo in court, that supported his guilty plea and conviction. Exhibit 2 sets out the findings of the sentencing judge.

A. Investment Schemes

[11] DiNardo's role in the Investment Schemes was to recruit investors. Investors were told that they were investing in oil and real estate companies and that their investment would yield high rates of return. The investors were given printed material to support those claims.

[12] The minimum investment was $25,000 but investors often invested more, and sometimes invested more than once. The investments were for terms of three months to five years, with the promised rate of return varying depending upon the term.

[13] In fact, the Investment Schemes were Ponzi schemes. Investor funds were not invested as promised, and interest payments made to some investors were generated through funds contributed by other investors.

[14] When interest payments ceased to be made, investors contacted Commission staff and police, both of whom carried out investigations. An accounting review concluded that of the $13 million invested, approximately $6 million had been

[3] *Paul Camillo DiNardo (Re)* (2015), 38 OSCB 8037.

paid to investors as interest payments. Approximately $400,000 was recovered, leaving more than $6 million unaccounted for. DiNardo personally benefited in an amount exceeding $2.1 million.

[15] Most investors were not wealthy. Many invested borrowed funds, funds that had been set aside for retirement, or funds set aside for university tuition or housing costs for their children.

[16] One investor was DiNardo's son-in-law.

[17] The sentencing judge described the matter as involving "a serious and huge fraud, which has had devastating impact on some of the victims".[4] The judge noted the following as aggravating factors:

a. DiNardo "took advantage of friendships, some of which were nurtured in order to involve people in the fraud";[5]

b. the Investment Schemes took place over a lengthy period of time (*i.e.*, over more than five years); and

c. DiNardo was motivated by "simple reasons of greed".[6]

B. Fraud upon DiNardo's physician

[18] DiNardo persuaded his physician to invest more than $1.1 million in DiNardo's company, on the strength of promises of a high rate of return.

[19] Only $32,500 was returned to DiNardo's physician, leaving a deficiency of more than $1 million.

IV. ISSUES

[20] Paragraph 1 of subsection 127(10) of the Act provides that an order may be made under subsection 127(1) in respect of a person if the person "has been convicted in any jurisdiction of an offence arising from a transaction, business or course of conduct related to securities or derivatives."

[21] Staff's application for an order pursuant to subsection 127(1), made in reliance upon subsection 127(10), therefore presents two issues:

a. Did DiNardo's convictions arise from transactions or a course of conduct related to securities?

b. If so, what if any sanctions should the Commission order against DiNardo?

V. ANALYSIS

A. Did DiNardo's convictions arise from transactions or a course of conduct related to securities?

[22] DiNardo's fraud convictions arise from a series of transactions, all of which constitute a course of conduct over a number of years. It therefore remains to be

[4] Exhibit 1 at page 1.
[5] Exhibit 1 at page 4.
[6] Exhibit 2 at page 5.

determined whether these transactions, and the resulting course of conduct, related to securities.

[23] The term "security" is defined in subsection 1(1) of the Act to include an "investment contract". That term is not defined in the Act, but as the Supreme Court of Canada has held, an investment contract will be found where: (i) there is an investment of funds with a view to profit, (ii) in a common enterprise, and (iii) the profits are to be derived solely from the efforts of others.[7]

[24] I now apply that three-pronged test to the facts of this case.

1. Investment of funds with a view to profit

[25] There can be no dispute that the transactions at issue were investments of funds with a view to profit. As noted above in paragraphs [11], [12] and [18], all of the victims of the frauds perpetrated by DiNardo made their investments having been promised high rates of return.

2. Investment of funds in a common enterprise, where the profits are to be derived solely from the efforts of others

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

> …such an enterprise exists when it is undertaken for the benefit of the supplier of capital (the investor) and of those who solicit the capital (the promoter). In this relationship, the investor's role is limited to the advancement of money, the managerial control over the success of the enterprise being that of the promoter; therein lies the community. In other words the "commonality" necessary for an investment contract is that between the investor and the promoter. There is no need for the enterprise to be common to the investors between themselves.[8]

[27] At least from the point of view of the investors in this case, *i.e.* the victims of the frauds, the transactions at issue were undertaken for their benefit. The investors did nothing more than advance the funds. They believed, based upon representations made to them by DiNardo and/or the other perpetrators of the fraud, that DiNardo and/or the others would ensure that their investments would be in legitimate enterprises that would generate returns. They understood that DiNardo and/or the others had at least some managerial control over their investments.

[28] These facts establish commonality between the investors and DiNardo, in circumstances where the anticipated profits were to be derived solely from the efforts of others.

3. Conclusion

[29] The transactions in respect of which DiNardo was convicted of fraud were investments with a view to profit, in a common enterprise between DiNardo and

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[7] *Pacific Coast Coin Exchange v Ontario (Securities Commission)*, [1978] 2 SCR 112 at 128.
[8] *Ibid* at 129-30.

the investors, where the profits were to be derived solely from the efforts of someone other than the investors. As a result, all three prongs of the test referred to above are satisfied and the investment contracts were securities as that term is defined in the Act.

[30] It follows that DiNardo's convictions arose from transactions, and a course of conduct, relating to securities. The test prescribed by subsection 127(10) of the Act is satisfied.

B. If so, what if any sanctions should the Commission order against DiNardo?

[31] Having found that the test in subsection 127(10) of the Act has been met, I must now determine what sanctions, if any, should be ordered against DiNardo.

1. Legislative framework

[32] Subsection 127(10) of the Act does not itself empower the Commission to make an order; rather, it provides a basis for an order under subsection 127(1). The Commission must still consider whether it is in the public interest to make an order under subsection 127(1), and if so, what the order ought to be.

[33] The purpose of section 127 of the Act, and the principles that should "animate" its application, were reviewed by the Supreme Court of Canada in *Committee for Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*.[9] In that decision, the Court held[10] that "in considering an order in the public interest", the Commission shall have regard to both of the two purposes of the Act, as set out in section 1.1 of the Act:

a. to provide protection to investors from unfair, improper or fraudulent practices; and

b. to foster fair and efficient capital markets and confidence in capital markets.

[34] The Court then described the purpose of the section 127 public interest jurisdiction as being "neither remedial nor punitive; it is protective and preventive, intended to be exercised to prevent likely future harm to Ontario's capital markets".[11] Further, the Court held that section 127 orders are not punitive. Rather, their purpose is to:

> …restrain future conduct that is likely to be prejudicial to the public interest in fair and efficient capital markets. The role of the OSC under s. 127 is to protect the public interest by removing from the capital markets those whose past conduct is so abusive as to warrant apprehension of future conduct detrimental to the integrity of the capital markets. [12]

[9] 2001 SCC 37 ("***Asbestos***").
[10] *Ibid* at para 41.
[11] *Ibid* at para 42, adopting the words of Laskin J.A. from the court below.
[12] *Ibid* at para 43, citing with approval *Mithras Management Ltd. (Re)* (1990), 13 OSCB 1600.

2. Facts of this case

[35] With those purposes and principles in mind, I turn to a review of the facts cited above and consider their significance in light of those purposes and principles.

[36] In my view, each of the following facts is relevant to an assessment of the gravity of DiNardo's conduct and the effects of that conduct on DiNardo's victims (investors) and on confidence in Ontario's capital markets:

a. DiNardo exploited securities (investment contracts) to carry out his frauds, and thereby engaged Ontario's capital markets;

b. DiNardo promised his investors high rates of return but used funds from subsequent investors to repay earlier investors;

c. most investors were not wealthy and were deprived of funds that were borrowed or that had been set aside for essential family obligations;

d. some investors suffered devastating consequences;

e. DiNardo took advantage of friendships and one family relationship;

f. DiNardo nurtured some friendships in order to involve people in the fraud;

g. the frauds were not simple lapses and took place over a lengthy period of time;

h. DiNardo personally benefited by receiving funds in excess of $2 million;

i. more than $6 million remains unaccounted for; and

j. DiNardo was motivated simply by greed.

[37] I respectfully agree with the sentencing judge's characterization of this matter as "a serious and huge fraud".

[38] In this proceeding, there are no relevant mitigating circumstances. As noted above, DiNardo neither appeared nor responded to Staff's submissions.

3. Conclusion

[39] Taken together, all of the facts listed in paragraph [36] above easily qualify DiNardo's frauds as among the worst possible abuses of the capital markets that an individual could commit upon numerous innocent victims. DiNardo's conduct was, to use the words of the Supreme Court of Canada in *Asbestos*, cited in paragraph [34] above, "so abusive as to warrant apprehension of future conduct detrimental to the integrity of the capital markets".

[40] DiNardo's conduct engages both of the two purposes of the Act. Allowing him to participate in the capital markets would not offer sufficient protection to investors and would undermine confidence in the capital markets.

[41] In my view, it is in the public interest to remove DiNardo from Ontario's capital markets permanently, and to issue the order requested by Staff.

VI. ORDER

[42] I will therefore issue an order that provides that:

a. pursuant to paragraph 2 of subsection 127(1) of the Act, trading in any securities or derivatives by DiNardo shall cease permanently;

b. pursuant to paragraph 2.1 of subsection 127(1) of the Act, acquisition of any securities by DiNardo is prohibited permanently;

c. pursuant to paragraph 3 of subsection 127(1) of the Act, any exemptions contained in Ontario securities law shall not apply to DiNardo permanently;

d. pursuant to paragraphs 7, 8.1 and 8.3 of subsection 127(1) of the Act, DiNardo shall resign any positions that he holds as director or officer of any issuer, registrant or investment fund manager;

e. pursuant to paragraphs 8, 8.2 and 8.4 of subsection 127(1) of the Act, DiNardo is prohibited permanently from becoming or acting as a director or officer of any issuer, registrant or investment fund manager; and

f. pursuant to paragraph 8.5 of subsection 127(1) of the Act, DiNardo is prohibited permanently from becoming or acting as a registrant, as an investment fund manager or as a promoter.

Dated at Toronto this 25th day of January, 2016.

"Timothy Moseley"

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Timothy Moseley