



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, 19^e 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 NEW FOUND FREEDOM FINANCIAL,
RON DEONARINE SINGH, WAYNE GERARD MARTINEZ, PAULINE LEVY,
DAVID WHIDDEN, PAUL SWABY AND ZOMPAS CONSULTING**

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

Hearing: September 24, 26-28, 2012
October 1-2, 4-5, 10, 2012
November 23, 2012

Decision: December 17, 2012

Panel: James D. Carnwath, Q.C. - Commissioner and Chair of the Panel

Appearances: Amanda Heydon - For Staff of the Commission
Sean Horgan

Ron D. Singh - Self-Represented
Wayne G. Martinez - Self-Represented
Pauline Levy - Self-Represented
New Found Freedom Financial - Unrepresented

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I. INTRODUCTION

[1] This matter is yet another example of investors persuaded to advance money for investment in foreign exchange trading (“**Forex**”) on the promise of unrealistic returns. As with many such schemes, funds from investors late to the program were used to pay earlier investors and the proponents of the scheme, to their detriment.

[2] This was a merits hearing before the Ontario Securities Commission (the “**Commission**”), pursuant to s. 127 of the *Securities Act*, R.S.O. 1990, c. S.5, as amended (the *Act*), to determine whether it is in the public interest to make certain orders against New Found Freedom Financial (“**NFF**”), Ron Deonarine Singh (“**Mr. Singh**”), Wayne Gerard Martinez (“**Mr. Martinez**”), Pauline Levy (“**Ms. Levy**”), David Whidden (“**Mr. Whidden**”), Paul Swaby (“**Mr. Swaby**”) and Zompas Consulting (“**Zompas**”).

[3] The specific allegations advanced by enforcement staff of the Commission (“**Staff**”) are:

- (a) Between April 1, 2008 and October 31, 2009 (the “**Material Time**”), the respondents traded and engaged in or held themselves out as engaging in the business of trading in securities without being registered to do so and without an exemption from the dealer registration requirement, contrary to section 25(1)(a) of the *Act* as that section existed at the time the conduct at issue commenced, and contrary to section 25(1) of the *Act* as subsequently amended on September 28, 2009;
- (b) During the Material Time, the respondents traded in securities for which no preliminary prospectus or a prospectus had been filed and no receipts had been issued for them by the Director, contrary to section 53(1) of the *Act*;
- (c) During the Material Time, NFF, Mr. Singh and Mr. Martinez engaged or participated in acts, practices or courses of conduct relating to securities of NFF that they knew or reasonably ought to have known perpetrated a fraud on persons or companies contrary to section 126.1(b) of the *Act*;
- (d) During the Material Time, Mr. Singh and Mr. Martinez authorized, permitted or acquiesced in NFF’s non-compliance with Ontario securities law and accordingly failed to comply with Ontario securities law, contrary to section 129.2 of the *Act*; and
- (e) The respondents’ conduct was contrary to the public interest and harmful to the integrity of the capital markets in Ontario.

[4] The allegations against Mr. Whidden, Mr. Swaby and Zompas were settled by agreement (the “**Settling Respondents**”).

[5] Staff produced 12 Hearing Briefs (“**H.B.**”) containing part, but not all, of the disclosure made to the respondents. I rejected Staff’s attempt to enter the H.B.s as Exhibits when it was clear that not all of the documents in the H.B.s would form part of the evidence. The H.B.’s are

divided into Tabs and sub-tabs. For purposes of identification, individual exhibits, whether one document or several documents, will be identified as H.B. Volume #, Tab # and sub-tabs -. Where helpful, a page number or numbers will be added. Nine volumes of transcripts were tendered into evidence. Where evidence is quoted, the reference will be to Tr. Vol. #, p. #, l. #. Exhibits will be referred to as Ex. #.

II. OVERVIEW

[6] The following narrative includes findings of fact which either are not in dispute or which were uncontradicted in any material way by the respondents.

[7] NFF was a partnership formed by Mr. Singh and Mr. Martinez in April, 2008. The partnership created an investment program in which NFF took in money from investors, pooled it and transferred it to Forex traders of their choosing. NFF would receive a percentage return from the traders and it would, in turn, pay a smaller percentage to investors.

[8] The Forex trading was unsuccessful and failed to provide sufficient funds to pay the promised returns to the investors.

[9] NFF continued to raise money from investors after they had ceased making payments to any of the Forex traders or receive payments from those traders. NFF received new investments up until mid-September 2009 but ultimately ran out of money by October 31, 2009 when the program was shut down.

[10] From April 2008 until the end of October 2009, NFF raised approximately \$1.8 million from 57 investors. The majority of that money has not been returned to those investors.

[11] Investors entered into written agreements with NFF, the form of which changed over time. At least four different versions of the agreement were put in evidence. The common characteristic of the agreements was that investors gave funds to NFF who in turn pooled those funds and gave them to a Forex trader. Three different traders were used over the course of the period in question. Investors were told that either 80% or 100% of their principal was guaranteed.

[12] None of the respondents was ever registered with the Commission in any capacity. No prospectus was ever filed nor was a prospectus receipt ever issued with respect to the investment. Mr. Singh and Mr. Martinez had signing authority for NFF's bank accounts into which investor funds were deposited and from which funds were transferred to the Forex traders or used for other purposes.

[13] Ms. Levy solicited investors on behalf of NFF. Ms. Levy is a mortgage agent and suggested to some of her clients that they could use the NFF investment to help make their mortgage payments. She assisted clients in making application to NFF and helped with the payment of monthly returns to investors for which she received referral fees.

[14] The first Forex trader retained by NFF was Kevin Harris who operated two companies, Investments International Inc. ("I³") and Corporate Developments Limited ("CDL"). Mr. Harris operated in the state of Ohio, U.S.A. and NFF transferred funds to him in U.S. dollars. In

October 2008, NFF stopped receiving any payments from Mr. Harris and never recovered any of the principal provided to Mr. Harris.

[15] In September 2008, NFF retained a second Forex trader, Sylvan Blackett and his company, 2150129 Ontario Inc. (“**2150129**”). The third Forex trader was the settling respondent, Mr. Swaby.

[16] The last payment NFF made to any of the three traders was on January 23, 2009. Nevertheless, NFF continued to accept new investments in the following months. Of the \$1.8 million invested in NFF only \$1.1 million was transferred to the three traders. The balance of \$700,000 was neither used for trading nor kept on deposit but rather used to fund monthly payments to earlier investors, payments to Mr. Martinez and Mr. Singh, or for other purposes.

[17] The last payment from the three traders was received from the third trader, Mr. Swaby, on July 3, 2009. This coincided with NFF beginning to have difficulty making monthly payments to its investors. These problems continued through July, August and September, 2009. NFF continued to accept new investments until mid-September 2009. From January 24, 2009, when NFF stopped making payments to the traders, until the program was shut down on October 31, 2009, NFF raised over \$640,000 from investors. None of this money was ever transferred to a trader but rather used primarily to fund monthly return payments to other investors, and to pay referral fees and other sums to Messrs. Singh and Martinez.

III. STAFF WITNESSES

A. Michael Ho

[18] Michael Ho is a forensic accountant with the enforcement branch of the Commission since June 2005. He is a Chartered Accountant and has a designation of Certified Management Accountant. He was assigned as primary investigator of the NFF matter on September 21, 2010. His evidence may be found in Tr. Vol. 1, pp. 35-205, Tr. Vol. 2, pp. 9-125, Tr. Vol. 4, pp. 80-150 and Tr. Vol. 5, pp. 5-135.

[19] In the course of his responsibility, Mr. Ho summoned and reviewed documents from the financial institutions that NFF dealt with, including TD Bank and the Bank of Montreal. He summoned investor witnesses for interviews; he also summoned and interviewed Mr. Singh, Mr. Martinez and Ms. Levy pursuant to section 13 of the *Act*. He conducted voluntary interviews with a number of investors and conducted a source and application of funds analysis, relying on the banking documents he obtained.

[20] Mr. Ho was referred to H.B. Vol. 1, entitled “Investigation Documents and Correspondence”. At Tab A, sub-tabs 1-4 are four s. 39 of the *Act* Certificates confirming that none of the Respondents has ever been registered under the *Act* (Exs. 1-4).

[21] Mr. Ho was referred to H.B. Vol. 1, Tab B, sub-tab 1 which he identified as a Business Names Report issued by the Ministry of Government Services showing NFF as registered under the *Business Names Act* R.S.O. 1990, c. B.17, with a mailing address of 85 Pilkey Crescent, Scarborough, Ontario, Canada, M1B 2A8 showing Messrs. Singh and Martinez as the partners of NFF (Ex. 5).

[22] Mr. Ho was then referred to H.B. Vol. 2, Tab 1, sub-tab B, a transcript of the compelled examination of Ron D. Singh with attached exhibits (Ex. 6). Similarly, Mr. Ho identified Vol. 2, Tab 2, sub-tab B as the transcript of the compelled examination of Mr. Martinez with exhibits attached (Ex. 7).

[23] Mr. Ho further identified Vol. 2, Tab 3, sub-tab B, a transcript of the compelled examination of Pauline Levy with exhibits attached (Ex. 8).

[24] Mr. Ho was then asked to summarize the information he obtained from Mr. Singh during the compelled examination. Mr. Singh confirmed that NFF was a partnership owned 50-50 by himself and Mr. Martinez. Mr. Singh described the business activities of NFF as raising funds from investors for the purpose of investing in Forex through independent traders. The program was structured so that a Forex trader would provide NFF a return of 10% on a monthly basis and NFF would in turn provide investors a monthly return of 5.28%. He identified the three traders used by NFF as I3 and CDL, Sylvan Blackett and Paul Swaby. Mr. Singh told investors that 100% of their principal would be guaranteed. He acknowledged that NFF started to hold back funds given by investors late to the program and using some of those funds to make monthly interest payments to previous investors.

[25] Mr. Ho summarized Mr. Martinez's evidence as very consistent with what Mr. Singh had told him. Mr. Martinez did confirm that NFF had no other business activities than the Forex investment program and that the company had no other revenue than the return paid by the traders. He also represented that the principal of investors would be guaranteed 100%.

[26] During Mr. Ho's examination of Ms. Levy, she told him that she introduced 10 different investors to NFF and for doing so she was entitled to a referral fee of 3% to 5%. She arranged to receive those referral payments through one J.B., her business partner, because she was planning to file for personal bankruptcy. Ms. Levy explained the program to the investors that she introduced, assisted them in filling out the application forms and provided informational documents about the program to those clients. For approximately three months, she received payments from NFF which included interest payments owing to the client and her referral fee. Ms. Levy would deduct her referral fee and send the balance to those clients. This was done through J.B.'s bank account.

[27] Mr. Ho was referred to Vol. 3, entitled Investor Documents. During the course of his investigation, Mr. Ho obtained a wealth of documents from various investors in the program. These investors must be referred to by their initials in order to meet privacy requirements. The documents they provided to Mr. Ho were remarkably similar although not exactly the same in every instance. The usual sequence of documents included a document entitled NFF terms and condition of participation, an investment account application, description of the NFF Forex investment strategies, a confirmation letter, a welcome letter, etc. The following is a list of those investors and where the documents they provided to Mr. Ho may be found:

- (a) D.B. – H.B. Vol. 3, Tab 1, sub-tabs A-F (Exs. 9-14);
- (b) E.E. – H.B. Vol. 3, Tab 2, sub-tabs A-F (Exs. 15-20);
- (c) D.F. – H.B. Vol. 3, Tab 3, sub-tabs A-C (Exs. 21-23);

- (d) R.G. – H.B. Vol. 3, Tab 4, sub-tabs A-B (Exs. 24-25);
- (e) J.J. and two sons – H.B. Vol. 3, Tab 5, sub-tabs A-O (Exs. 26-40);
- (f) L.K. – H.B. Vol. 3, Tab 6, sub- tabs A-E (Exs. 41-45);
- (g) M.Mc. – H.B. Vol. 3, Tab 7, sub-tabs A-B (Exs. 46-47);
- (h) M.M. – H.B. Vol. 3, Tab 8, sub-tabs A-I (Exs. 46-56); and
- (i) H.S. and family – H.B. Vol. 3, Tab 9, sub-tabs A-S (Exs. 57-75).

[28] Ms. Levy supplied documents and information about the clients she referred to NFF. These documents can be found in H.B. Vol. 3, Tabs 10-20 (Ex. 76-77).

[29] Mr. Ho’s attention was then drawn to H.B. Vol. 1, Tab C, sub-tabs 1-16. These tabs contained correspondence, mainly from NFF addressed to specific investors or to investors in general, explaining or attempting to explain why investors were not receiving their funds. Some of the documents were furnished by Ms. Levy; others were provided by individual investors. The theme of the correspondence from NFF to the investors is “trust us and your principal will be returned to you.”

[30] Mr. Ho then identified the volumes containing the bank statements and supporting documents for several accounts in the name of NFF and others:

- (a) H.B. Vol. 4 contains documents relating to Toronto-Dominion Bank (“**TD**”) Acct. no. 5232283, in the name of NFF and contains bank statements and supporting documents for the period May 28, 2008 to August 31, 2010 (Ex. 104).
- (b) H.B. Vol. 5 contains documents relating to TD Bank Acct. 523283, a US dollar bank account, in the name of NFF and contains bank statements and supporting documents for the period beginning May 29, 2008 to February 11, 2010 (Ex. 105).
- (c) H.B. Vol. 6 contains banking documents relating to a Bank of Montreal (“**BMO**”) bank account at Tab C, sub-tabs 1-4 (Ex. 106).
- (d) H.B. Vol. 6 contains banking documents from the Royal Bank of Canada (“**RBC**”) Financial Group at Tab A, sub-tabs 1-3 (Ex. 107).
- (e) H.B. Vol. 6 contains documents from NFF and DCR Strategies (“**DCR**”) at Tab B, sub-tabs 1-6 (Ex. 108).
- (f) H.B. Vol. 6 contains documents from ICICI Bank Tab D, sub-tab 1 (Ex. 109).

[31] The preceding documents form the basis for Mr. Ho's creation of a document entitled source and application of funds entered as Ex. 114. In preparing his source and application of funds by way of an Excel spreadsheet, Mr. Ho analysed four bank accounts and one account with DCR, the latter used for the purchase of "loaded" debit cards which were transmitted to investors to satisfy interest payments owing to them. Tab 1 of Exhibit 114 is the source and application of funds for NFF from the period of April 4, 2008 to October 31, 2009. It shows investors contributed \$1,844,725 to NFF, the three traders contributed \$305,313 and Messrs. Martinez and Singh each contributed \$4,000. "Other" contributions totalled \$70,500. The overall sum received by NFF was \$2,228,538. From this total, investors received \$702,107 by way of interest. The three traders received a total of \$1,092,119. Payments to Messrs. Martinez and Singh, cash withdrawals and VISA payments accounted for \$173,890. Payments to Pauline Levy and J.B. totalled \$63,849. "Other" payments accounted for \$196,556, for a total of \$2,228,521. The closing balance on October 31, 2009 of \$17.00.

[32] Tab 2 of Exhibit 114 is a source and application of funds from January 24, 2009 to October 31, 2009. It will be recalled that Mr. Ho's evidence was that last payment NFF made to any of the Forex traders was January 23, 2009. Funds transferred to NFF by investors after that date were never applied to Forex trading. The opening balance on January 24, 2009 shows a credit balance of \$23,837. To that sum is added investors' money of \$641,830, transfers from the Forex traders of \$84,252 and "other" deposits of \$35,813, for a total source of funds for the period of \$785,732. From this latter amount \$503,676 was applied by payments to investors. \$74,392 was paid to Messrs. Martinez and Singh, cash withdrawals amounted to \$7,960 and VISA payments of \$22,080 were made. "Other" applications of funds totalled \$177,607. The outgoing funds totalled \$785,715, leaving a closing balance on October 31, 2009 was \$17.00.

[33] Tab 3 of Exhibit 114 shows deposits made by investors for the period April 4, 2008 to October 31, 2009, identified by amount and date. After conversion of USD to CAD the total came to \$1,844,725.71. Tab 3 also breaks out the amounts invested by Ms. Levy's clients, ten in all, of \$283,262.14.

[34] Tab 4 of Exhibit 114 shows payments to investors who received funds from NFF in the period of January 24, 2009 to October 31, 2009. The total amount came to \$503,675.93 after conversion of USD. This figure is confirmed in Mr. Ho's preparation of the source and application of funds for NFF for that period found at Tab 2 of Exhibit 114.

[35] Tab 5 of Exhibit 114 is an Excel spreadsheet of transactions connected with NFF for the period April 4, 2008 to October 31, 2009. The document also separately shows transactions from January 24, 2009 to October 31, 2009, the period when no funds were transferred to traders. The document further identifies the bank accounts into which and from which payments were made and contains a consolidated total that differentiates the overall period from the period January 24, 2009 to October 31, 2009.

[36] Tab 6, sub-tab A of Exhibit 114 is a detailed record of transactions in the TD Bank Canadian bank account, showing debits, credits and balances for each day of the period and identifying details from the supporting documents. Tab 6, sub-tab B is a similar document for the USD account. Tab 7, sub-tab A is a source and application of funds for the TD Bank Canadian bank account for the entire period May 29, 2008 to October 31, 2008 with details

supplied from supporting documents. Tab 7, sub-tab B is a similar document for the TD USD account for the same period.

[37] Tab 8 of Exhibit 114 is the source and application of funds for the NFF BMO account for the period April 4, 2008 to May 30, 2008 when the account was closed. Tab 9 is a source and application of funds for the NFF BMO USD account for the period April 4, 2008 to May 30, 2008 when the account was closed. Tab 10 of Exhibit 114 is the source and application of funds for the NFF DCR account, being the company which issued the “loaded” debit cards transferred to investors to pay interest owing to them. The document contains transactions, identifies the investor and maintains a running balance. In addition, the payments made to Mr. Martinez, Ms. Levy/J.B., David Whidden and Mr. and Mrs. G. are broken out with their respective totals.

[38] Ms. Heydon, for Staff, completed her examination-in-chief of Mr. Ho by asking him to explain various entries contained in the tabs Exhibit 114. This period of his examination-in-chief lasted for a considerable time, giving Mr. Ho an opportunity to demonstrate that he had a complete mastery of the figures entered in each of the tabs, whether a source and application of funds or a record of banking transactions, regardless of which bank account. It was in this period that Mr. Ho testified that the VISA payments in Tabs 1 and Tabs 2 were payments made to VISA accounts in the name of either Mr. Singh or Mr. Martinez.

[39] Mr. Singh’s cross-examination of Mr. Ho demonstrated Mr. Singh had not fully appreciated why Mr. Ho had created two periods, one from April 4, 2008 to October 31, 2009 and the other from January 24, 2009 to October 31, 2009. Mr. Ho explained to Mr. Singh that the second period was a period in which no payments were made by NFF to any traders despite the fact that funds continued to be received from investors. These funds, as identified earlier in Mr. Ho’s examination-in-chief, were applied to other purposes including payments to Mr. Singh and Mr. Martinez, or for their benefit, such as payments on their VISA accounts.

[40] Mr. Singh asked Mr. Ho if he had ever heard the term “roll-over documents” used by himself and Mr. Martinez. Mr. Ho replied that he believed the phrase was used in relation to Mr. Blackett’s arrangement with NFF, that NFF would no longer receive payments from him. In place of payments, Messrs. Singh and Martinez agreed to put the amount of interest supposedly due to them on a form of promissory note which recited that Mr. Blackett owed NFF the amount agreed upon. That concluded Mr. Singh’s cross-examination of Mr. Ho.

[41] Mr. Martinez’s cross-examination of Mr. Ho began with questions directed to the register that the Commission maintains of phone calls received from the general public. Mr. Martinez inquired that if a caller did not identify himself, would there be any record of the call identifying the caller. Mr. Ho was unable give a definitive answer. Mr. Martinez posed one or two other questions, the answers to which did not assist me.

[42] Ms. Levy began her cross-examination of Mr. Ho by producing a sheaf of documents with unnumbered pages that she identified as the banking records of the account maintained in the name of J.B. These, it will be remembered, are the accounts used by Ms. Levy to receive and distribute interest payments from NFF to her 10 clients while retaining for herself the agreed upon interest to be paid for her referrals. Mr. Ho confirmed to Ms. Levy that he did not obtain or request any banking documents from the TD Bank for J.B.’s account. When presented with

banking documents for three accounts at the TD Bank in the name of J.B., Mr. Ho confirmed to Ms. Levy that where the NFF accounts showed payments to J.B. or Ms. Levy, he characterized them as such; he did not focus on the bank account to which those payments were made. Ms. Levy then produced two sets of documents, the first a chronological order of drafts and transfers received and disbursed to clients referred by Pauline Levy to NFF. The Volume was entered as Exhibit 115. The second Volume was described as containing documents from three accounts held by J.B. with TD Canada Trust. Unfortunately the documents used by Ms. Levy and her cross-examination of Mr. Ho did not have numbered pages, which led to considerable confusion, particularly in the mind of Ms. Levy. As I understand her cross-examination, she was attempting to show that monies received by J.B. from NFF were further transmitted at the direction of Ms. Levy to some or all of the 10 clients introduced by Ms. Levy to NFF. Mr. Ho repeated pointed out to Ms. Levy that his analysis filed as Exhibit 114 did not attempt to show what J.B. did with the funds that came into her accounts, merely that NFF sent funds to J.B. Ms. Levy's point, as I understand it, is that the figure in Tab 1 of Exhibit 114 that shows application of funds to Pauline Levy and J.B. of \$63,849 leaves a false impression that all those funds were retained by Ms. Levy. Mr. Ho conceded that it well may have been that funds from NFF received by J.B. were subsequently transferred to Ms. Levy's clients to reflect payment of interest owing to them. This was a matter upon which Mr. Ho could not pronounce.

[43] Ms. Levy directed questions to Mr. Ho about payments made to Mr. and Mrs. G and inquired why they were not included as investors. Mr. Ho explained that because Mrs. G was Mr. Singh's mother he chose not to consider her an investor but rather as a family member, an explanation that makes considerable sense to me.

[44] I find that the source and application of funds prepared by Mr. Ho (Ex. 114) to be accurate.

B. David Whidden

[45] Staff called David Whidden, a 63 year old retired engineer. Mr. Whidden confirmed that he had no background in securities. He testified by video conference from Windsor, Ontario. His evidence is found in Tr. Vol. 3, pp. 9-143.

[46] He heard about NFF from a friend of his; that friend, in turn, had learned about the program from Mr. Singh's sister.

[47] Mr. Whidden checked NFF's website, spoke with Mr. Singh and met with him in Willowdale in late September 2008. Mr. Singh gave him a brief lesson in currency trading and described its techniques, including only investing a small percentage of principal and holding back the balance. He learned that the Forex trader was an individual named Sylvan Blackett who had eight years of experience. Mr. Whidden was shown a trading log purporting to be one of Mr. Blackett's trades and how he took \$2,000 and turned it into \$104,000 in one day and then in the next two days turned it into \$250,000.

[48] Mr. Whidden took with him to the meeting with Mr. Singh documents previously forwarded to him. The documents showed an 8% return per month on whatever he invested with NFF, which included the normal return of 5% plus an additional 3% because he was being

invited into the program by Mr. Singh's sister. His understanding was that the full amount of his investment would be transferred to the trader who would hold back 80% of the funds and trade only 20% of those funds.

[49] Staff counsel referred Mr. Whidden to documents contained in H.B. Vol. 8, Tabs 1-12 (Ex. 112). Tab 1 is an introduction to Forex trading on the letterhead of NFF offering a program requiring a minimum investment of \$10,000, 5% interest per month return and guaranteeing 100% of the principal. In Tab 1, p. 3 is a page of frequently asked questions about Forex trading.

[50] Tab 2 shows Mr. Whidden's application to NFF providing for a participation amount of \$10,000 with interest at 5%. There is also an addendum to his NFF contract providing for an additional 3%. Mr. Whidden understood that he was to receive \$800.00 per month. At Tabs 3, 4 and 5 are copies of Mr. Whidden's welcome letter, his bank transfer to NFF's bank account for \$10,000 and a confirmation of receipt of the money by NFF. Tabs 7 to 10 are similar documents recording Mr. Whidden's additional investment of \$10,000 made December 21, 2008. All the correspondence including the "welcome letter" and the "confirmation" letter were signed by Mr. Singh's mother.

[51] Mr. Whidden received his first payment of \$800.00 on December 17, 2008 and his first payment on his second investment was February 17, 2009. In late January or early February 2009, Mr. Whidden learned from Mr. Singh of concerns about Sylvan Blackett's management of his bank accounts. In June 2009 Mr. Whidden received a telephone call about banking problems of Mr. Blackett who, it was said, was unable to access his funds. There were late payments over the summer but the payments got up to date until September 2009 when no payment was received. The October payments were made and those were the last payments received by Mr. Whidden.

[52] Mr. Whidden became quite involved with Mr. Singh and Mr. Martinez in efforts to get the payments back on track. He was present at two meetings with Sylvan Blackett, who continued to insist that he had the funds and would meet the payments to be made but was prevented from doing so by "banking difficulties". At other times he said his accounts were "frozen".

[53] Staff counsel referred Mr. Whidden to Tab 10 of Exhibit 112, a document prepared by Mr. Whidden. The document is a spreadsheet showing Mr. Whidden and 12 persons introduced to the NFF program by Mr. Whidden. The document shows the amounts invested, the first payment date, the number of payments, amounts paid and the shortfall for each of the investors. The document also shows that Mr. Whidden received referral fees of \$47,410 for his introductions to the program. Staff counsel obtained Mr. Whidden's confirmation that he had earlier entered into a settlement agreement with the Commission and that prior to the settlement he paid approximately \$47,000 to investors.

[54] Staff drew Mr. Whidden's attention to Tab 12, Ex. 112. This is a document on NFF letterhead entitled True Freedom Marketing Program, Frequently Asked Questions. Mr. Whidden described this as a new program which was established in the spring of 2009. The program was designed by Mr. Singh. It invited persons to refer investors to NFF if they were interested in real estate, mortgages and/or tax services. The document sets out what commission

would be paid and how much that would generate as revenue for NFF. It was an attempt to grow the NFF business in areas other than Forex trading. Mr. Whidden described it as a “restructuring” of what they had been doing and an attempt to get business in other areas. Mr. Whidden believed that most of the investors he referred to NFF filled out the agreements at Tab 12.

[55] Mr. Whidden established he was not an accredited investor.

[56] In cross-examination by Mr. Singh, Mr. Whidden confirmed he received the “frequently asked questions” application forms with the addendum and “Terms and Condition” before meeting with Mr. Singh in person. He further confirmed that a MasterCard program was discussed. Subsequent to June 2009 the program was described as something that would solve some of the banking problems that existed because the late payments and lack of payments were being blamed on banking problems. The MasterCard was reported to be something that was going to help alleviate that. Mr. Whidden had the impression that when the MasterCard came in, NFF would load the cards as it had done with the debit cards.

[57] Mr. Singh obtained confirmation that Mr. Whidden’s funds would be referred to a Canadian trader and it was that program that was discussed in detail. Mr. Singh drew Mr. Whidden’s attention to a line in the contract that said 100% of the principal was guaranteed but that the previous guarantee referred to in the documents was 80%. Mr. Whidden denied that he regarded this as a conflict. He assumed that the guarantee was coming from NFF because it was on its letterhead in the contract and it was NFF with whom he had his contract.

[58] There then followed a series of questions and answers relating to the True Freedom program introduced to take the place of the Forex trading program. Mr. Whidden said his understanding was that the new program did not erase the Forex program, but rather was an addition to their existing contract in trading. Mr. Whidden acknowledged that he assisted in developing the program as it provided diversification.

[59] Mr. Martinez posed one or two questions to Mr. Whidden, the answers to which do not assist me.

[60] Ms. Levy began her cross-examination of Mr. Whidden by asking his understanding of how the referrals were rewarded. He said he did not realise at the outset that he could get a referral fee by bringing investors to the program. Once he learned that, he did make several referrals of family members and friends. He warned them not to invest more than they could afford to lose because he knew it was risky.

[61] When things started to go badly, some referrals never called NFF only Mr. Whidden. Others were calling NFF on a regular basis. Mr. Whidden helped Mr. Singh’s mother to draft emails to investors who made inquiries to NFF. The usual message was to ask for patience, that NFF was “working on it”. He described his activities as those of a speech writer. He may have helped prepare six or seven emails to clients, signed by Mr. Singh’s mother. He said he was not responsible for the content of the emails but rather the form.

[62] As for the acceptance of the referral fees, Mr. Whidden confirmed that he had no concerns about receiving the fee nor did he feel there was anything illegal in receiving a referral fee.

[63] Ms. Levy pointed out to Mr. Whidden that it appeared that those who referred investors received investors interest payment plus the referral fee; it was the responsibility of the referrer to forward the interest payment to that investor. Mr. Whidden expressed surprise because, to his understanding, that was not the way it happened.

[64] Mr. Whidden told Ms. Levy that it took two months to develop the new True Freedom program which he helped to construct. The clients he referred were required to sign a new enrolment into the program but made no new payments. As Mr. Whidden explained it, the clients were enrolled retroactively to the date of their original Forex contracts. The new program was to replace their existing contract. The new contract was pre-dated to the date of their original Forex contract, but the intention was that the original contract would be treated as though it never happened. By signing the new contract, the client agreed to do new referrals. That ended Ms. Levy's cross-examination of Mr. Whidden.

[65] I accept Mr. Whidden's evidence. He was unshaken in cross-examination. The documents in Ex. 8 confirm his testimony as does the analysis of Mr. Ho in Ex. 114.

C. L.M.

[66] Staff called L.M. of Sherwood Park, Alberta who testified by video conference. His evidence may be found in Tr. Vol. 9, pp. 5-78.

[67] Mr. L.M. is 73 years old and describes himself as semi-retired. He was referred to NFF by a co-worker and friend. She had invested \$10,000 with NFF and had known Mr. Martinez for 20 years. At the time they spoke she had received payments for the previous five months on her investment; she trusted Mr. Martinez.

[68] Mr. L.M. called Mr. Martinez towards the end of April 2009. He was told that NFF was dealing in the currency market and trading in Forex, that his funds would be placed with a trader and the funds were 100% guaranteed by the trader. Only up to 20% of the funds would be at risk at any time and the balance of 80% would be held by the trader. He was told that Paul Swaby was the manager overseeing the traders to make sure they complied with the rules and regulations of their company. L.M. was directed to H.B. Vol. 9, Tabs 1-17 (Ex. 113). M.M., L.M.'s wife, invested three amounts of \$10,000 in NFF: at the beginning of March 2009, at the end of May 2009 and at the end of June 2009. Tabs 1-11 of Ex. 113 contain the application to NFF, the transfer of funds, the welcoming letter, the confirmation of funds received and the advice as to when the interest payments would start. The same or similar documents exist for each of the three investments of \$10,000. As was the practice, the letters were signed Mr. Singh's mother.

[69] L.M. confirmed that in addition to his wife's investments, a company controlled by him named LDM Holdings (1994) Ltd. ("**LDM**") also invested in NFF for \$75,000. Tabs 12-15 in Exhibit 113 contained the usual application and responses from NFF, including a contract agreement, a welcoming letter, evidence of the funds transferred and the confirmation letter.

[70] L.M. confirmed that his wife's investments received their interest up until August 2009, nothing for September and then the last payment in October 2009. There was some confusion arising from the dates and amounts of the interest payments. The matter is best resolved by reference to Exhibit 114, Tab 4, where Mr. Ho has entered the NFF payments to investors for the period January 24, 2009 to October 31, 2009.

[71] In July 2009 Mr. Martinez flew to Edmonton to meet with L.M. to report that NFF would be starting a new program. L.M. was considering participation in the program because he would receive a fee for providing investors. He was told he would receive 8% on any additional money he put in the Forex program. At Tab 12 is the LDM contract calling for \$75,000 payable to NFF as a "Participation Amount". Tabs 12-15 contain the usual documents associated with an investment in NFF. At Tab 15 is Mr. Singh's mother's letter to confirm that the first payment to LDM would be November 2, 2009. L.M. confirmed that no payments of any kind were ever received for this last investment of \$75,000. At no time up to the end of August 2009 had the couple been told that there were difficulties with the NFF investing program.

[72] When the payments stopped in October 2009, L.M. called Mr. Martinez who told him that they were having some problems with a trader. Mr. Martinez assured him that his funds were secured and safe in a bank account and that they were trying to get this resolved. There followed many conversations and emails between L.M. and Mr. Martinez. Mr. Martinez indicated that a trader had taken off with a considerable amount of money; that they had tracked him down; that this money was going to be paid back; and that everyone would be paid out from the funds they recovered, alleged to be \$1.2 million. At some later date, Mr. Martinez sent copies of four mortgages, the equity in which would allegedly be used to secure the couple's investment.

[73] L.M. tired of trying to find Mr. Martinez and wrote Mr. Swaby. At Tab 16 is an email chain starting with an email to Mr. Swaby dated July 1, 2010. It recites a litany of excuses advanced by Mr. Martinez and the difficulties L.M. had in trying to reach him. Mr. Swaby responded by asking for time to get matters sorted out, but L.M. has not heard back from him since the email from Mr. Swaby dated July 2, 2010.

[74] L.M.'s examination ended with responses to questions from Staff counsel to establish that he did not qualify as an accredited investor at the time he invested in NFF.

[75] In cross-examination by Ms. Levy, L.M. confirmed that his friend A.D.'s referral fee was directed to him. In response to a question from Ms. Levy, L.M. pointed out that he had received some documentation from Ms. Levy, a form letter that was similar to the letters he received from NFF. In Ms. Levy's letter she pointed out the differences between some of the NFF documents. He acknowledged that Ms. Levy was attempting to get the funds returned for all the investors and stated her intention was to seek legal advice. L.M. sent Ms. Levy \$150 as his share for retaining a lawyer. The balance of Ms. Levy's cross-examination does not help me.

[76] In cross-examination by Mr. Martinez, L.M. confirmed that A.D. told him she was invested in the U.S. program and that she had received five payments on her investment.

[77] There then followed a long and confusing series of questions put to L.M. about when Mr. Martinez flew to Edmonton to meet with him and his friends. This evidently had to do with a transaction that never took place and the exchanges on this matter do not help me.

[78] The balance of Mr. Martinez's cross-examination doesn't help me.

[79] Mr. Singh cross-examined Mr. L.M. His cross-examination does not help me.

[80] In re-examination by Staff counsel, L.M. confirmed he was confident in investing \$75,000 because he was receiving payments from his three previous investments, that he understood the traders were legitimate and licensed and there was nothing to indicate there were any problems. Before he invested the \$75,000 Mr. Martinez told him that "everything was rosy." That concluded the re-examination.

[81] I accept L.M.'s evidence. His evidence was consistent with the documents in Ex. 113 and was not challenged in cross-examination. His figures are confirmed by Mr. Ho's analysis in Ex. 114.

D. L.S.

[82] L.S. is a 48 year-old police officer with no background in securities. Her evidence may be found in Tr. Vol. 5, pp. 136-167 and in Tr. Vol. 6, pp. 5-29.

[83] L.S. learned of NFF through her brother H.S., who also invested with NFF. H.S., in turn, learned about NFF through Mr. Martinez. L.S. conducted one or two background checks, spoke with Mr. Martinez a couple of times and after speaking with her brother, filled out the application form to NFF.

[84] At a meeting with Mr. Martinez, she was told that her money was safe and that it was 100% guaranteed. She was shown an Excel spreadsheet that showed different payments that she would receive if she invested a certain amount. Mr. Martinez further told her that NFF used an individual who did all the trading, that he was fully experienced and that he would invest in the correct areas or portfolios to get the best return. She believes that Mr. Martinez told her that the trader's name was Ron. On January 28, 2009, L.S. invested \$40,000 and was told that she would receive a return of \$3,200 a month.

[85] Staff counsel directed L.S. to Ex. 117. At Tab 7 is a document with NFF letterhead discussing managed Forex accounts. The document explains Forex trading, provides fast facts and program features and a series of frequently asked questions. She obtained the document from her brother, H.S. Her understanding was that although the document guaranteed 80% of the principal, that applied to a U.S. investment. L.S. said "I went Canadian, which 100% was guaranteed." Her attention was drawn to p. 22 of Tab 7 which calls for 5% interest per month. L.S. said she got 8% because her brother was a good friend of Mr. Martinez.

[86] L.S.'s attention was drawn to p. 23 of Tab 7, which cited there had been no loss of principal recorded to date. She said this greatly affected her decision to invest because if there was no loss recorded, she believed it was safe.

[87] L.S. referred to Tab 1 of Exhibit 117 which shows an email chain resulting in her brother H.S. forwarding to her a number of forms. In Tab 2, she identified the Canadian contract which she signed being pages 6-9 in Tab 2. She initially invested \$40,000 which she obtained from her line of credit. Her attention was drawn to p. 6 and the term of the contract that said 100% of the principal was guaranteed. L.S. confirmed this was consistent with what Mr. Martinez had told her.

[88] L.S. made an additional investment of \$10,000 on February 6, 2009. She identified the documents in Tab 2, pp. 10-13 to be the application she signed for the second investment. It was pointed out to her that on p. 11, all principal was 100% guaranteed "by our traders". L.S. said that her understanding remained that her principal was 100% guaranteed by NFF. She also maintained she was to receive interest of 8% per month, as confirmed by Mr. Singh's mother in an email found in Tab 5, p. 17 of Ex. 117.

[89] L.S. recalled receiving three or four payments of \$3,200 on her first investment and one or two payments of \$800 on her second investment. The monthly payments changed from a wire transfer to her bank account to a series of debit cards that entitled the holder of the card to obtain cash when the card was presented. The first came from TruCash and later by MasterCard. She recalled that the payments stopped somewhere around July. In Ex. 114, Tab 4, p. 10, Mr. Ho records interest payments to L.S. totalling \$24,000.

[90] When the payments stopped L.S. called Mr. Martinez. When he returned her call he told her not to worry and that everything was alright. She met with him at a restaurant and Mr. Martinez continued to tell her that everything was alright, that she was going to get all of her money; it was all still 100% guaranteed. Mr. Martinez mentioned that he was having trouble finding Ron Singh. At some point, Mr. Martinez stopped returning her calls. None of her principal was returned to her.

[91] In response to questions by Staff counsel, L.S. established that she did not qualify as an accredited investor.

[92] In cross-examination by Mr. Singh, L.S. confirmed that he never told her that her principal was 100% guaranteed. Indeed, L.S. was unsure who Mr. Singh was.

[93] In cross-examination by Mr. Martinez, L.S., in response to a question from Mr. Martinez said as follows: "however, you told me specifically face-to-face that it's 100% guaranteed. Don't worry everything is okay". This conversation took place at the first meeting with Mr. Martinez.

[94] A second meeting took place between L.S. and Mr. Martinez; once again L.S. testified that Mr. Martinez told her that her principal was guaranteed 100% by NFF. An exchange took place about what Mr. Martinez said at that meeting that was not helpful to me.

[95] In cross-examination, Ms. Levy asked L.S. what prompted her to put \$50,000 into NFF. L.S. replied that she did police checks on NFF and found nothing. Moreover, her brother knew Mr. Martinez for a number of years and also Mr. Martinez's father. They developed a very good friendship. Her brother's experiences with NFF were positive. What's more, she relied on the 100% guarantee. Ms. Levy asked L.S. if she was told that NFF had a referral program where, if

you brought somebody else to the program, you could make a better return. L.S. said she never heard of that. L.S. was asked how the conversation about 8% interest came up and L.S. explained that because she was family of Mr. Martinez's good friend, she received 8%.

[96] L.S. was asked if Mr. Martinez or NFF ever said to her that they were having problems with any of their traders. L.S. said there was one occasion before Mr. Martinez stopped returning calls when he said that everything was okay but they were having trouble finding Ron. She never got an email that said they were having difficulties with traders or any correspondence as to why her interest payments were late.

[97] Ms. Levy asked L.S. if she knew what role she, Ms. Levy, played in NFF. L.S. responded she wasn't sure who Ms. Levy was. That ended any useful cross-examination of L.S. No questions were put to her in re-examination.

[98] I accept the evidence of L.S. She did not waiver when Mr. Martinez suggested he did not tell her that her investment was 100% guaranteed. The documents in Ex. 117 confirm her testimony, as does Mr. Ho's analysis in Ex. 114.

E. P.C.

[99] P.C. is 32 years old and is a catering supervisor. Her evidence may be found in Tr. Vol. 6, pp. 30-125.

[100] P.C. testified that she made an investment with NFF through Ms. Levy. Ms. Levy had worked with P.C. and her husband in obtaining a mortgage. Ms. Levy suggested an investment in NFF would be a way to have extra money coming in monthly to make the mortgage payments. It was Ms. Levy who first brought up NFF sometime in June 2009.

[101] P.C. stated that Ms. Levy told the couple that they would be getting a 5% interest on the money they invested, that 20% of the money would be traded in Forex and 80% would be insured. Ms. Levy said nothing about what her investment would be traded in nor who would be doing the trading. They did not speak to anyone from NFF before making the investment.

[102] In Ex. 118, P.C. identified the four pages in Tab 1 of Vol. 10 as her application to enter the True Freedom marketing program sponsored by NFF. The document was given to the couple by Ms. Levy at their residence and was signed the same day.

[103] She did not know why the document she was signing was called a marketing program membership agreement. She did not understand that she was purchasing anything, but rather thought she was investing with NFF. P.C. invested \$15,000 on July 6, 2009 (Ex. 114, Tab 3, p. 1).

[104] P.C. was drawn to the terms of agreement on p. 1 of Tab 1 that recited that the applicant was applying for three units of membership. She said that Ms. Levy told her that those words did not apply to the couple. Ms. Levy told them that the reference to gold, silver and bronze memberships also did not apply. The form contains an undertaking that the applicant will market and promote the NFF products. Ms. Levy also told them it did not apply to them.

[105] At Tab 2 of Ex. 118, P.C. identified the draft she sent payable to NFF. The draft is dated July 2, 2009. At Tab 3, p. 9 is an invoice from P.C. to NFF for \$750.00 described as “for marketing and professional services rendered as per membership agreement”. She confirmed that she never rendered any marketing or professional services to NFF.

[106] P.C. received her first payment on September 16 through a debit card issued by TrueCapital. She received a second payment in October through a MasterCard debit card. Following the October payment, no further payments were received from NFF.

[107] At Tab 7 of Ex. 118 is an email addressed to “Dear Valued Member” from NFF. It is an invitation to an important client meeting being held on Sheppard Avenue East on Wednesday, November 4, 2009. The email explains that NFF would be making important changes to their current programs and refers to ongoing problems with NFF banking. In the meantime, NFF advised that it was suspending all payments until the changes referred to were implemented.

[108] Following the suspension of interest payments, a series of emails found at Tabs 8-14 of Ex. 118 evidence a litany of cancelled meetings, explanations, reassurances and bafflebagg designed to placate NFF investors who lost their money, including P.C. and her husband.

[109] In cross-examination by Mr. Singh, P.C. testified her introduction to NFF was done through Ms. Levy. Ms. Levy did not describe the role she had with NFF nor did she describe herself as a salesperson or an owner or anything of that nature. P.C. was unaware that Ms. Levy had other clients in the program. Ms. Levy never made reference to other programs not working out or that there were issues with the program or anything of that nature.

[110] P.C. signed one contract and stated there was never any discussion about being part of the investor Canadian program. She said her understanding was that she was investing to get a 5% return, that 20% of the money was going to be traded and 80% of it would be insured.

[111] In response to questions put by Mr. Martinez in cross-examination, P.C. confirmed she never met or talked to or had any communication with Mr. Martinez before she invested. She was unaware that Ms. Levy was paid a referral bonus of 5% on her money for investing. She was unaware that Ms. Levy went to the United States with Mr. Martinez and met with a trader before her investment. Before investing, she was unaware that the U.S. program was shut down.

[112] In cross-examination by Ms. Levy, P.C. testified that she first met Ms. Levy when she and her husband arranged a mortgage for a condo purchase. She felt she received good, fair and honest information regarding the mortgage and the interest rate. When they sold their condo they looked for a larger mortgage in order to buy a house. Ms. Levy pointed out that NFF could assist in making the increased mortgage payments that were being arranged.

[113] Ms. Levy showed P.C. a series of documents involving other clients Ms. Levy introduced to NFF. Ms. Levy’s questions to P.C. about the documents (which P.C. had never seen) led nowhere other than to establish that P.C.’s application form was different from the one shown to her.

[114] In order to make the investment of \$15,000 in NFF, P.C. increased the mortgage being arranged by Ms. Levy by \$15,000. Ms. Levy suggested to P.C. that when she brought a draft for

the \$15,000 to P.C.'s house, Mr. Martinez was with her. P.C. denied that. She confirmed that Ms. Levy discussed the compensation to gold members, silver members and bronze members in the application which she signed; however she confirmed that Ms. Levy told her that it did not apply to her. Ms. Levy continued to suggest that Mr. Martinez met P.C. in June 2009 and P.C. continued to confirm that the first time she met him was in February of the following year.

[115] Ms. Levy asked a number of questions about recitals in the application she signed and in every instance P.C. replied that Ms. Levy told her that those recitals did not apply to her. P.C. stated she never went to the office of NFF because Ms. Levy told her that NFF had no office but that it was operated out of somebody's home. P.C. said the first time she ever met Mr. Singh and Mr. Martinez was in the hearing room "awhile back".

[116] Ms. Levy asked a long series of questions pertaining to email chains, which show that P.C. was attempting to find out why she was not receiving interest payments and expressing concerns about her principal. These emails confirm the disappearance of Mr. Singh and Mr. Martinez from time to time; they also confirm that a series of promises were made, mainly by Mr. Martinez, that things would sort themselves out and the investors would get their money back.

[117] Further questions were put to P.C. about the terms of the agreement that she signed. Ms. Levy pointed out many references in the document which P.C. said she paid no attention to, because Ms. Levy had told her that they did not apply to her. This was a common response to the questions put by Ms. Levy. That concluded the cross-examination.

[118] P.C. steadfastly denied propositions put to her on cross-examination in a calm and unemotional manner, devoid of animosity towards Ms. Levy's questions. Her evidence is confirmed by the documents in Ex. 118 and by Mr. Ho's analysis in Ex. 114.

IV. RESPONDENT WITNESSES

A. Pauline Levy

[119] Pauline Levy testified. Her evidence may be found in Tr. Vol. 7, pp. 5-82.

[120] Ms. Levy said she came to know NFF through Mr. Martinez. She and her partner in the restaurant business were having difficulty. Mr. Martinez told her he was involved with a company that was doing currency trading. They had checked out their trader, the trader was licensed and the trading was legal. Ms. Levy said that since then she now knows that none of what Mr. Martinez told her was true.

[121] Ms. Levy referred 10 people to NFF. After two years, people she referred were not getting their interest, were not getting their principal back and were not getting any response from Messrs. Martinez and Singh.

[122] Ms. Levy then submitted that she could not understand why she was accused of trading in securities when all she did was refer clients to NFF and receive a referral fee for doing so. She pointed out that there were other people who had referred investors to NFF and received referral fees but that these persons had not been the subject of allegations by the OSC. When asked what

that had to do with the allegations against herself, Ms. Levy replied that “there’s a prejudicial case for having me solely and as with Mr. Whidden” (Tr. Vol. 7, p. 13, ll. 2-5). There follows several exchanges in between Ms. Levy and myself where I attempted to get her to concentrate on the allegations against her, rather than identifying other persons who had referred investors to NFF.

[123] Finally, Ms. Levy turned to a matter that was pertinent to the allegations made against her. She pointed out that in Mr. Ho’s figures she received funds from NFF in the approximate amount of \$63,000. Ms. Levy said that the first time she met Mr. Ho, she explained to him how those funds amounting to \$63,000 were distributed. That number did not reflect what she forwarded to investors. The investors were to get 5% and the balance was retained for her referral fee. Ms. Levy went on to explain that this applied for the U.S. account number 7121753 maintained in the name of J.B. However, once the Canadian program was initiated it was no longer Ms. Levy’s responsibility to receive a sum from NFF, deduct her referral fee and forward the balance to the investor. Rather, NFF sent the investors portion directly to that investor and paid Ms. Levy her referral fee.

[124] In the course of her testimony, Ms. Levy referred to Exs. 115 and 116, documents she had earlier produced in her cross-examination of Mr. Ho. The documents purport to show transactions in three TD Bank accounts in the name of J.B., two in Canadian dollars and one in U.S. dollars. These documents confirm that Ms. Levy did indeed receive payments from NFF in U.S. dollars via J.B.’s U.S. dollar account and confirm she made out drafts to clients she introduced to the NFF program. What is not clear from Ms. Levy’s submission is the exact amount that she transferred to investors and the exact amount she retained as a referral fee.

[125] Ms. Levy concluded her evidence by stating that the nature of what she does is what a broker does. She works with fees and referral fees are nothing out of the ordinary to brokers. She said there was no spirit of being devious or underhanded with anybody. She said the people joined NFF because there was a guarantee that the money would not be touched, other than a portion to be invested. Twenty per cent was the risk they were willing to take. That concluded Ms. Levy’s evidence-in-chief.

[126] In cross-examination Staff counsel recalled to Ms. Levy that she affirmed to tell the truth during her interview with Mr. Ho, that she had told the truth to the best of her ability, that there was a court reporter present and a transcript produced, that she had a chance to read her transcript and to the best of her recollection everything in the transcript was true and accurate. Ms. Levy further confirmed that the first eight pages in Ex. 115 were prepared by her.

[127] Ms. Levy then identified the 10 clients that she referred to NFF – P.B., B.E., J.W., R.F., P.S., M.A., S.W., V.H., H.K., H.W. and P.C. These persons were mortgage clients of Ms. Levy. Some of them ultimately decided to take some equity out of their homes in order to invest in NFF. Believing what Mr. Martinez said, she told her clients as follows: NFF had checked out the trader and the trader was licensed; Forex trading was legal; gave an explanation of the NFF program to the people she referred; told the clients they would receive 5% interest per month; explained to them how they could provide their funds to NFF and that their principal was guaranteed by NFF; received the paperwork required from Mr. Martinez and gave investors

blank NFF agreements to complete; for some clients, she filled out the entire form; and received confirmation letters from NFF for each of her clients.

[128] Ms. Levy confirmed the evidence of other witnesses called by Staff about the difficulty in learning from NFF what the situation was when the payments stopped. That concluded Staff's cross-examination.

[129] In cross-examination, Mr. Singh asked Ms. Levy if she recalled going to Ohio with Mr. Martinez to meet Kevin Harris, the owner of I3 and CDL and the U.S. trader for NFF. She confirmed this and said there were a lot of screens in Mr. Harris' building with screens for trading on every floor with obvious security in place. Mr. Singh asked how confident Ms. Levy was following the demonstration at Mr. Harris' office. She said "I had some questions", but Mr. Martinez continued to tell her, during the drive back from Ohio, that the program was safe and worthwhile.

[130] Ms. Levy confirmed that she never met Mr. Sylvan Blackett. She confirmed that when the money stopped coming from NFF she was determined to try and stay in touch with Mr. Martinez to find out what happened. Mr. Martinez continued to tell her that the money was safe and he was in touch with Sylvan's lawyer to unfreeze the money.

[131] In cross-examination by Mr. Martinez, Ms. Levy described how they first met and discussed NFF. Mr. Martinez posed questions about the trip to Ohio that mirrored those put by Mr. Singh. Ms. Levy was consistent in her answers.

[132] Ms. Levy was asked if she was a plaintiff in a civil suit against NFF; she confirmed she was. She explained the suit by saying that NFF had helped to destroy her good name. She acknowledged that she was upset when she stopped getting referral money. At a meeting with Messrs. Martinez, Singh and Swaby, Ms. Levy was told that she was no longer a part of NFF. She was fired by Mr. Singh. The clients that she referred were no longer her clients, they belonged to NFF. "I was dismissed and that was it." (Tr. Vol. 7, p. 78, ll. 9-11). In conclusion, Ms. Levy said that the civil suit was not about the money.

[133] Ms. Levy took the opportunity in re-examination to state that it was not a conscious effort on her part to have the investors incur losses. She didn't understand the process and had no idea of all the ramifications of NFF. It was not intentional on her part and she wished that she could have read or seen that participation in this activity was going to be an infraction. That concluded the evidence of Ms. Levy.

B. Wayne Gerard Martinez

[134] Mr. Martinez began his evidence by describing how he and Mr. Singh registered the partnership of NFF in March 2008. Mr. Martinez described his background as real estate investing and stated that Mr. Singh had a mortgage company.

[135] They heard about Kevin Harris and his reputation as an exceptional trader in Forex trading. The two men met with K.S., a business partner of Mr. Harris in Barrie, Ontario. She told Messrs. Singh and Martinez about the Forex program. Mr. Martinez said he made a call to

the OSC and was told that “Forex currency, Forex is not within our jurisdiction.” (Tr. Vol. 8, p. 9, ll. 3-4). Mr. Martinez said that was all they needed to move forward.

[136] Mr. Martinez described the trip to Ohio with Mr. Singh where they met Kevin Harris, saw all his trading screens and met with the IT team at the trading office. They were shown trading reports that confirmed Mr. Harris as a successful trader. Mr. Harris showed on a screen how 80% of the money he received was kept back and only 20% was leveraged in the Forex trading. Messrs. Singh and Martinez were sufficiently impressed by Mr. Harris that they decided to look for investors whose money would be placed with Mr. Harris.

[137] The first deposits NFF received was from Mr. Singh’s mother and his girlfriend. Mr. Martinez learned through Pastor K of Ms. Levy who was described as “very influential, she has some people and she’s about business.” (Tr. Vol. 8, p. 11, ll. 9-10). Mr. Martinez then described the trip to Ohio with Ms. Levy.

[138] NFF was launched and everything was going well until October of 2008. Mr. Harris wrote to say that he was ending the Forex trading program and moving over to real estate in Dubai. The returns to investors would diminish but the program would continue as a real estate investment. From that point on, NFF received many promises from Mr. Harris that the investors’ principal was safe and they would get their money back.

[139] Mr. Martinez then explained how NFF started trading with Sylvan Blackett. NFF decided it would be better to have a trader in Canada. It investigated Mr. Blackett and confirmed that he was legitimate. Mr. Blackett showed Messrs. Martinez and Singh a trade that turned \$2,000 into \$100,000 in one day. Needless to say, they were impressed. NFF started placing investors’ funds with Mr. Blackett. Meanwhile, Kevin Harris continued to promise the return of the investors’ principal in the U.S. program.

[140] In January 2009 NFF received a call from Sylvan Blackett stating that he was having some “issues” with his bank. The explanation was that he had left BMO and was going to TD Bank and that TD Bank shut him down; he was looking for a bank that could help him. Mr. Blackett proposed a “roll-over” to NFF whereby Mr. Blackett would acknowledge that he owed the investors funds to NFF. NFF continued to supply investors to Mr. Blackett until September 2009. In the period from March 2009 until September 2009, Mr. Blackett continued to tell NFF that he couldn’t “move any money.”

[141] Sometime in April or May 2009 Mr. Blackett proposed that investors interest payments could be made by debit card. NFF adopted this method and worked through a company called TrueCash, which they subsequently changed to MasterCard. NFF continued collecting deposits and meeting with Sylvan to find out when he would solve his frozen funds. Mr. Blackett said the problem would be solved by September 2009, which is when they learned from Mr. Blackett that his bank funds were no longer frozen, but his trading account was frozen. NFF wrote their investors saying they weren’t going to continue the Forex trading and promised a return of their money in about four weeks. Mr. Martinez acknowledged that that never happened.

[142] Mr. Martinez concluded his evidence by saying that if the OSC representative with whom he had spoken had told him that what was proposed couldn't be done, NFF would have moved forward somewhere else and then "we wouldn't be here."

[143] Staff commenced Mr. Martinez's cross-examination, by reminding him of the circumstances of his compelled examination with Mr. Ho and that he had been sworn to tell the truth and had done so.

[144] There followed a series of questions asked by Staff counsel and admissions made by Mr. Martinez to the following effect. NFF was a 50/50 partnership between Mr. Martinez and Mr. Singh. The business address was 85 Pilkey Crescent where Mr. Martinez lived with his mother. Mr. Martinez' role with NFF was as a salesperson whose task it was to tell people about the program and get money into the program. Mr. Singh was responsible for the administrative side of the program.

[145] Over the course of NFF's operations it had a total of four bank accounts, a BMO Canadian, BMO American, TD American and TD Canadian. Both partners had to sign for transactions in NFF's bank accounts. The email address of the enterprise was info@NFFFfinancial.com and both Mr. Martinez and Mr. Singh had access to that email address.

[146] NFF began providing funds to Kevin Harris in April or May 2008. NFF was to receive monthly payments and, in fact, did so until October 2008. Mr. Harris told NFF that its principal was safe and would be returned within 60 to 90 days but stopped communicating with NFF in December 2008 or January 2009.

[147] NFF hired a private investigation firm to look into Mr. Harris' activities and received an investigation report in January or February 2010. At that point, NFF sued Mr. Harris.

[148] Staff counsel referred Mr. Martinez to H.B. Vol. 1, Tab C, sub-Tab 5, filed as Ex. 82. The document was an email dated June 17, 2009 and includes the statement that NFF had filed a lawsuit against Mr. Harris' company I3. Proceedings had started.

[149] There followed a series of questions and answers reported at Tr. Vol. 8, pp. 35-36:

Q. Well, at least investors were informed that a lawsuit was commenced in June 2009.

A. Right.

Q. Does that assist in your recollection of when you would have found out that I3 was a Ponzi scheme?

A. No. I -- I still -- I mean, I still -- I'm going by what ... what we -- what the person who assisted us in the lawsuit, what he -- the information he has, which is he dealt with the lawyers and stuff like that,

Q. Your evidence this morning was that you commenced the lawsuit after learning that I3 was possibly a Ponzi scheme.

A. That's correct.

Q. You also learned that Mr. Harris had stopped trading any investor funds in November 2007?

A. Are you asking me whether I learned that in '07 or are you asking me whether I learned that he stopped doing it in '07?

Q. I'm asking whether you learned that at any point.

A. Yes.

Q. And you would have learned that at or around the same time that you learned that I3 was possibly a Ponzi scheme?

A. That's correct.

Q. But you didn't advise New Found Freedom investors that their funds had possibly been invested in a Ponzi scheme?

A. Did I advise them of that? I can't remember if we did that. I know I spoke to some of my clients, because the majority of the clients that – in Kevin Harris was a lot of my friends, so I didn't need to send an email, I spoke to them directly.

Q. You didn't advise any New Found Freedom investors that Mr. Harris had stopped trading in 2007?

A. Well, the conversation -- are you asking me the conversation I had with my friends? Is that what you're asking me?

Q. I'm asking you whether you advised any New Found Freedom investors that Mr. Harris had stopped trading in 2007.

A. I advised them about the whole details of his Ponzi scheme when we found out.

Q. But you didn't provide any emails do that effect to investors.

[150] Mr. Martinez confirmed Mr. Ho's evidence that NFF stopped making deposits from any of the four bank accounts to any of the three traders on January 23, 2009. Instead of depositing money with Mr. Blackett the money was rolled-over, that is to say, that if NFF had \$50,000 in investor funds to deposit with Mr. Blackett and Mr. Blackett owed NFF \$20,000 in monthly payments, NFF would only deposit the difference, i.e. \$30,000. The remaining \$20,000 of investors' funds was used to pay out other investors. During the period from January to September 2009, NFF never told investors that it had stopped providing funds to the traders. New investor funds that NFF received from the end of January to September 2009 were deposited into one of the four NFF bank accounts and were not segregated from other funds in

those accounts. Payments were made out of NFF accounts for a variety of purposes during that January to September 2009 period, including payments to other investors.

[151] Mr. Martinez was referred to H.B. Vol. 9, Tab 15 filed as Ex. 113. The document is a letter from NFF dated August 28, 2009 addressed to investor L.M. and the letter states that L.M.'s funds will be deposited "with our trader" on September 30, 2009. Mr. Martinez confirmed that L.M.'s funds were never deposited with a trader but were deposited into NFF's bank account. The funds would have been used to pay other investors. Letters with similar statements would have been sent to other investors after January 23, 2009.

[152] Mr. Martinez confirmed that NFF investor funds were transferred to a company called Greenland Developments ("**Greenland**"), a property development enterprise. It had nothing to do with Forex trading. A contract signed with Greenland recorded a loan from NFF to Greenland. Mr. Martinez acknowledged that it would be fair to say that before January 29, 2009 investor funds were provided to parties other than Forex traders.

[153] Mr. Martinez was asked to refer to H.B. Vol. 3, Tab 9, sub-tab O. Mr. Martinez identified the documents as those received by investors. There are two documents that describe Forex trading, the first beginning at p. 137. Mr. Martinez confirmed that on p. 137 it states that 80% of the principal was guaranteed. At p. 138 it states that I3 is the party doing the trading. On the second document, beginning at p. 140, Mr. Martinez identified the document as one used after Mr. Blackett became the trader for NFF. At the top of p. 141 it states that 80% of the principal is guaranteed.

[154] In further questioning, Mr. Martinez conceded that after July 3, 2009 NFF did not receive any payments from any of the three traders. He confirmed that NFF told investors that the pre-paid debit cards would solve the problem that Sylvan Blackett was having with banking issues. He further confirmed that investors were not told about Mr. Blackett's accounts being frozen before October 2009, despite the fact Mr. Blackett first told NFF that the accounts were frozen in February or March 2009.

[155] Mr. Martinez confirmed that the True Freedom program started in the summer of 2009. Existing investors of NFF were "grandfathered" into the new program, which required them to sign a marketing agreement. The marketing agreement required those investors to refer clients to NFF in order to fund their monthly payments. Mr. Martinez was unable to remember if the new referral program generated any money. That concluded the relevant responses given by Mr. Martinez in cross-examination by Staff.

[156] In cross-examination, Mr. Singh took Mr. Martinez through a series of documents prepared by NFF which varied in some particulars over the period of time that NFF was soliciting investor funds. The cross-examination was particularly unhelpful since all it did was to establish that NFF changed its marketing approach as it changed traders and subsequently changed to a debit card system.

[157] In cross-examination by Ms. Levy, Mr. Martinez confirmed that NFF did not have a lawyer or an accountant at the start of its business. Mr. Martinez repeated what he had said earlier – he called the OSC and a lady on the phone confirmed that Forex trading was not within

the jurisdiction of the OSC. That, said Mr. Martinez, was all he needed to be satisfied that the OSC could not get involved with their activity.

[158] Ms. Levy asked who prepared the application forms that investors were required to sign. Mr. Martinez replied that NFF had “copycatted” the forms that I3 had produced. This was on the advice of Kevin Harris because the program was basically the same with the exception of different percentages. When asked what sold the clients on the program Mr. Martinez said it was the guarantee that Kevin Harris gave of 80% of the principal being returned to investors.

[159] Mr. Levy asked how NFF qualified Sylvan Blackett to trade for NFF. Mr. Martinez replied that he relied on the opinions of two people who told him how great Mr. Blackett was, how amazing he was and the returns that people were getting by investing with him. Ms. Levy repeatedly asked why NFF did not make more inquiries about the traders and Mr. Martinez continued to give the same response – because of what they were told by other persons who had invested with them.

[160] Ms. Levy asked Mr. Martinez why M.L. and Greenland got back all their funds. Mr. Martinez said that Greenland did not invest with NFF and he couldn’t remember why M.L. got all his funds returned to him. A great deal of the cross-examination by Ms. Levy was spent on establishing that Mr. Martinez’ memory of events and Ms. Levy’s memory did not coincide. That concluded Ms. Levy’s cross-examination of Mr. Martinez.

[161] At that point in the hearing Mr. Singh said he would not be calling any witnesses and would not be testifying.

[162] Following the lunch recess, Staff reported they were not calling any evidence in reply. Written submissions by Staff were to be filed with the Secretary’s Office by November 16, 2012 and a date of November 23, 2012 was set for the hearing of oral submissions.

V. POSITIONS OF THE PARTIES

A. Commission Staff

[163] Staff submits the evidence is overwhelming that all the allegations against each of the Respondents have been made out. In Staff’s written submissions, the individual actions of the Respondents relating to the alleged breaches of the *Act* are set out with detailed references to the undisputed evidence.

B. Ron Deonarine Singh

[164] Mr. Singh called no evidence, did not testify and did not appear to make final submissions.

C. Wayne Gerard Martinez

[165] Mr. Martinez virtually acknowledged the breaches of sections 25 and 53 of the *Act*. He denied he committed fraud. He submitted that the information given to investors was based on information he received from others, such as Harris and Blackett. He stated that he and Mr.

Singh believed everything they were told. Further, they believed everything would be solved. They had no intention of defrauding anyone.

D. Pauline Levy

[166] Ms. Levy questioned the fairness of Staff proceeding against her, claiming others had referred investors to the program. This ignored the evidence given by Mr. Whidden who settled the allegations made against him with Staff. Ms. Levy blamed Messrs. Singh and Martinez for what happened to the investors she introduced to the program. Ms. Levy submitted they left her “high and dry”. This does not excuse her obligation to investigate the legality of her position in assisting investors to participate.

VI. THE APPLICABLE LAW

A. Unregistered Trading of Securities

(i) Section 25 of the *Act*

[167] Prior to September 28, 2009, subsection 25(1)(a) of the *Act* provided that no person or company shall trade in a security unless that person is registered with the Commission as a dealer, or as a salesperson, partner, or officer of a registered dealer:

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.

[168] The current subsection 25(1) of the *Act* came into force on September 28, 2009. Subsection 25(1) of the Act provides that a person or company shall not engage in or hold himself, herself, or itself out as engaging in the business of trading in securities unless the person or company is registered with the Commission:

25. Registration – (1)Dealers - Unless a person or company is exempt under Ontario securities law from the requirement to comply with this subsection, the person or company shall not engage in or hold himself, herself or itself out as engaging in the business of trading unless the person or company,

- (a) is registered in accordance with Ontario securities law as a dealer;
or
- (b) is a representative registered in accordance with Ontario securities law as a dealing representative of a registered dealer and is acting on behalf of the registered dealer.

(ii) Acts in Furtherance of Trade

[169] “Trade” or “trading” are defined in subsection 1(1)(e) of the *Act* and includes acts in furtherance of trade.

[170] The jurisprudence in this area reflects a contextual approach to determine whether non-registered individuals or companies have engaged in acts in furtherance of a trade. A contextual approach examines the totality of the conduct and the setting in which the acts have occurred, as well as the proximity of the acts to an actual or potential trade in securities. The primary consideration of the contextual approach is the effect the acts had on those to whom they were directed (*Re Momentas Corp.* (2006), 29 O.S.C.B. 7408 (“*Momentas*”) at para. 77).

(iii) Definition of Security

[171] The definition of a “security” provided for in subsection 1(1)(n) of the *Act* includes any investment contract. “Investment contract” is not a term defined in the *Act*, but its interpretation has been the subject of a long line of established jurisprudence.

[172] In the leading case, *Pacific Coast Coin*, the Supreme Court of Canada considered and reviewed the test established by the United States Supreme Court in *Howey*: “Does the scheme involve ‘an investment of money in a common enterprise, with profits to come solely from the efforts of others?’” (*Pacific Coast Coin Exchange of Canada Ltd. v. Ontario (Securities Commission)*, [1978] 2 S.C.R. 112 (Q.L.) (“*Pacific Coast Coin*”) at pp. 10-11; (*Securities and Exchange Commission v. W.J. Howey Co.*, 328 U.S. 293 (1946) (“*Howey*”) at pp. 298-299).

[173] In deciding *Pacific Coast Coin*, above the Supreme Court of Canada relied upon a decision of the Supreme Court of Hawaii to craft a risk capital approach to defining an investment contract. The Hawaiian Court stated that:

[T]he salient feature of securities sales is the public solicitation of venture capital to be used in a business enterprise ... This subjection of the investor’s money to the risks of an enterprise over which he exercises no managerial control is the basic economic reality of a security transaction.

(*State of Hawaii, Commissioner of Securities v. Hawaii Market Center, Inc.* 485 P. 2d 105 (1971) at p. 3)

[174] As formulated by the Supreme Court of Canada, the test for the existence of an “investment contract” thus requires:

- (1) an investment of money;

- (2) with an intention or expectation of profit;
- (3) in a common enterprise, in which the fortunes of the investor are interwoven with and dependent upon the efforts and success of those seeking the investment or of third parties; and
- (4) where the efforts made by those other than the investor are undeniably significant ones, those essential managerial efforts which affect the failure or success of the enterprise.

(*Pacific Coast Coin*, above at pp. 12-13 (Q.L.))

[175] The application of the investment contract test formulated by the Supreme Court of Canada in *Pacific Coast Coin* must be consonant with the important public policy goals and mandate of the Commission. To achieve the purposes of the Act, the definition of “investment contract” must embody a flexible rather than a static principle, one that adapts to the countless investment schemes devised by those who seek to use others’ money on the promise of profits (*Pacific Coast Coin*, above at pp. 11-12 (Q.L.) citing *Howey*, above at p. 299).

(iv) Findings

[176] I agree with Staff’s submission that the evidence establishes NFF, Mr. Singh, Mr. Martinez and Ms. Levy (the “**Respondents**”), traded in securities, committed acts in furtherance of trading and were engaged in the business of trading in securities. The evidence establishes:

- they each provided potential investors with investment agreements (the “**NFF Investment Contracts**”) for signature;
- they each met with investors to discuss the NFF Investment Contracts; and
- they each prepared and/or distributed promotional materials describing the NFF Investment Contracts.

[177] The evidence establishes that Mr. Singh and Mr. Martinez:

- accepted funds from investors for the purpose of investing in NFF;
- had joint signing authority for the NFF accounts where the investor funds were placed;
- directed the use of investor funds from the NFF accounts;
- paid referral fees to Ms. Levy and others who brought investors into the NFF program; and
- entered into an agreement with Ms. Levy in the knowledge that she would solicit individuals to invest in NFF.

[178] I find that the NFF Investment Contracts constitute securities within the meaning of the *Act*.

[179] None of the Respondents has ever been registered with the Commission in any capacity. None of them was exempt from registration.

[180] I find the Respondents traded and engaged in or held themselves out as engaging in the business of trading in securities without being registered to do so and without an exemption from the dealer registration requirement, contrary to subsection 25(1)(a) of the *Act* as that section existed at the time of conduct at issue and contrary to subsection 25(1) of the *Act* as subsequently amended on September 28, 2009.

B. ILLEGAL DISTRIBUTION OF SECURITIES

(i) Importance of Prospectus

[181] Subsection 53(1) of the *Act* provides:

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 has been filed and receipts have been issued for them by the Director.

[182] The prospectus requirement plays an essential role in the protection of investors. It ensures that prospective investors have the information necessary to make informed investment decisions (*Re Al-Tar Energy Corp.* (2010), 33 O.S.C.B. 5535 at para. 136).

(ii) Distribution of Securities

[183] Subsection 1(1) of the *Act* defines a “distribution” as follows:

“distribution”, where used in relation to trading in securities, means,

(a) a trade in securities of an issuer that have not been previously issued [...]

[184] I find that the Respondents traded in securities that had not been previously issued.

[185] Trades of the NFF Investment Contracts were distributions since there is no evidence before the panel that any of the NFF Investment Contracts had previously been issued in accordance with the *Act*. No prospectus was filed in respect of the NFF Investment Contracts and no receipts were issued by the Director. No evidence was provided that any exemptions from the prospectus requirements were available to any of the Respondents.

[186] I find that the activities of the Respondents included a distribution in securities for which no preliminary prospectus or prospectus has been filed and for which no receipt has been issued by the Director, contrary to subsection 53(1) of the *Act*.

C. Securities Act Fraud

[187] Subsection 126.1(b) of the *Act* prohibits conduct relating to securities that a person or company knows or reasonably ought to know would perpetrate a fraud. Subsection 126.1(b) of the *Act* states:

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

(b) perpetrates a fraud on any person or company.

[188] In previous decisions, this Commission has adopted the interpretation of the fraud provision in provincial securities legislation as set out by the British Columbia Court of Appeal in the *Anderson* decision. In *Anderson*, the British Columbia Court of Appeal held that the fraud provision in the British Columbia *Securities Act*, which is similar to the Ontario provision, requires proof of the same elements of fraud as in a prosecution under the *Criminal Code*, R.S.C. 1985, c. C-46. The fraud provision in the *Act* merely broadens the ambit of liability to those who knew or reasonably ought to have known that a person or company engaged in conduct that perpetrated a fraud. The words “knows or reasonably ought to know” do not diminish the requirement of Staff to prove subjective knowledge of the facts concerning the dishonest act by someone accused of fraud. As McKenzie J. stated at para. 26:

...I find that it is clear that s. 57(b) [the fraud provision in the British Columbia *Securities Act*] does not dispense with proof of fraud, including proof a guilty mind. *Derry v. Peak* (1889), 14 A.C. 337 (H.L.) confirmed that a dishonest intent is required for fraud. Section 57(b) simply widens the prohibition against [... those] who know or ought to know that a fraud is being perpetrated by others, as well as those who participate in perpetrating the fraud. It does not eliminate proof of fraud, including proof of subjective knowledge of the facts concerning the dishonest act, by someone involved in the transaction.

(*Anderson v. British Columbia (Securities Commission)* (2004), 192 B.C.C.A. 7 (“*Anderson*”) at para. 26; leave to appeal to the Supreme Court of Canada denied [2004], S.C.C.A. No. 81 (S.C.C.))

[189] In previous decisions, this Commission has also referred to the legal test for fraud set out in the leading case of *Théroux*. In this decision, McLachlin J. (as she then was) summarized the elements of fraud:

...the *actus reus* of the offence of fraud will be established by proof of:

1. the prohibited act, be it an act of deceit, a falsehood or some other fraudulent means; and
2. deprivation caused by the prohibited act, which may consist in actual loss or putting of the victim's pecuniary interests at risk.

Correspondingly, the *mens rea* of fraud is established by proof of:

1. subjective knowledge of the prohibited act; and
2. subjective knowledge that the prohibited act could have as a consequence the deprivation of another (which deprivation may consist of knowledge that the victim's pecuniary interest are put at risk).

(*R v. Théroux*, [1993] 2 S.C.R. 5 (S.C.C.) ("**Théroux**") at para. 27)

[190] The Commission has also recognized that, for a corporation, it is sufficient to show that its directing minds knew that the acts of the corporation perpetrated a fraud to prove breach of subsection 126.1(b) of the Act (*Al-Tar Energy, supra* at para. 221).

(i) The Actus Reus of Fraud

[191] The act of fraud is established by two elements: a dishonest act and deprivation. The dishonest act is established by proof of deceit, falsehood or other fraudulent means. Deprivation is established by proof of detriment, prejudice or risk of prejudice to the economic interests of the victims caused by the dishonest act.

[192] A dishonest act may be established by proof of "other fraudulent means." Other fraudulent means encompasses all other means other than deceit or falsehood which can properly be characterized as dishonest. The courts have included within the meaning of "other fraudulent means" the unauthorized diversion of funds and the unauthorized arrogation of funds or property. The use of investors' funds in an unauthorized manner has been determined to be "fraudulent" (*R. v. Currie*, [1984] O.J. No. 147 (Ont. CA) pp. 3-4).

[193] The conduct of Messrs. Singh and Martinez is nothing less than a litany of deceit, falsehoods or other fraudulent means as follows:

- the investor accounts were not segregated despite representations to the contrary in one of the NFF Investment Contracts;
- they represented to investors that their funds would be used for Forex trading or kept on deposit, but some investor funds were loaned to a property development company;
- they admitted that NFF used investor funds to make monthly payments to investors;

- they continued to seek new investments after January 23, 2009, without informing investors that NFF would stop providing funds to any of the Forex traders;
- after January 23, 2009, investors were provided with “Confirmation” letters which stated their funds would be deposited with a trader on a particular date when, in fact, no deposits were being made to any of the traders;
- they continued to seek new investments after July 3, 2009, without informing investors that NFF had stopped receiving payments from any of the Forex traders;
- they failed to disclose the true state of affairs to investors when NFF began having difficulties making monthly payments in July 2009, instead telling investors that the issue was banking problems;
- they used \$173,890 of the funds in NFF’s accounts for personal purposes including direct transfers to their individual accounts, cash withdrawals and Visa payments; and
- contrary to the representations made to investors by Mr. Singh and Mr. Martinez, their principal was not guaranteed – a total of over \$1.1 million has never been returned to investors.

[194] The second essential element of the *actus reus* of fraud, “deprivation”, is satisfied on proof of: (i) actual loss to the victim; (ii) prejudice to a victim’s economic interest; or (iii) the risk of prejudice to the economic interests of a victim (*Théroux*, above at para. 16).

[195] “Prejudice” may be established by proof that a victim faced a risk of economic loss even if no loss took place. If, through an act of dishonesty, someone makes an investment or borrows money, even if that action did not cause an actual loss, it constitutes prejudice to the economic interests of the victim (*Re Lewis* (2011), 34 O.S.C.B. 11127 at para. 227).

[196] Suffice it to say there was actual loss to many, if not all, of the investors.

[197] I find the *actus reus* of fraud has been established by the evidence, as against NFF, Mr. Singh and Mr. Martinez.

(ii) The *Mens Rea* of Fraud

[198] The *mens rea* of fraud is established by proof of subjective knowledge of the prohibited act and subjective knowledge that the prohibited act could have as a consequence the deprivation of another. Deprivation may consist of knowledge that the victims’ pecuniary interests are put at risk. In Ontario, the legislature has chosen to impose liability of fraud under the *Act* where a person “reasonably ought to know” that their conduct perpetrates a fraud on any person.

[199] Subjective knowledge of the prohibited act and the risk posed to another’s interests can be inferred from the evidence, including the act itself. It may also be established by evidence

showing that the perpetrator was “wilfully blind” or “reckless” as to the conduct and the truth or falsity of any statements made (*Théroux*, above at paras. 23, 26 and 29).

[200] A sincere belief or hope that no risk or deprivation would ultimately materialize does not vitiate fraud. As the Supreme Court stated in *Théroux*:

A person who deprives another person of what the latter has should not escape criminal responsibility merely because, according to his moral or personal code, he or she was doing nothing wrong or because of a sanguine belief that all will come out right in the end. Many frauds are perpetrated by people who think there is nothing wrong in what they are doing or who sincerely believe that their act of placing other people’s property at risk will not ultimately result in actual loss to those persons. If the offence of fraud is to catch those who actually practice fraud, its *mens rea* cannot be cast so narrowly as this.

(*Théroux*, above at para. 36)

[201] Messrs. Singh and Martinez had subjective knowledge they were undertaking dishonest acts which could, and did, put investors financial interests at risk as illustrated by the following findings:

- they were the directing minds of NFF and were responsible for creating the NFF investment program and for directing the use of investors’ funds;
- they controlled the NFF accounts. Deposits were received from investors into those accounts and paid to investors, the Forex traders and others;
- they admitted that they loaned investor funds to Greenland Developments, and that they knew that these funds were not being used for Forex trading;
- despite knowing that NFF had not made any payments to any of the Forex traders since January 23, 2009, they continued to solicit new investments without informing investors of this fact;
- further, despite knowing that NFF had not made any payments from any of the Forex traders since July 3, 2009, they represented to investors that NFF was having difficulty making monthly payments in July, August and September 2009 due solely to “banking problems”. They also continued to solicit new investments after July 3, 2009 without informing investors of the true state of affairs. Rather, Martinez told an investor that things were “rosy”; and
- they used to \$173,890 of the funds in NFF’s accounts for personal purposes including direct transfers to their individual accounts, cash withdrawals and VISA payments

[202] The mental element of fraud is established by proof of subjective knowledge of the prohibited act and subjective knowledge that the prohibited act would have the deprivation of

another as a consequence. The subjective knowledge can be inferred from the totality of the evidence (*Théroux*, above at para. 27).

[203] I find that Messrs. Singh and Martinez, as the directing minds of NFF, had subjective knowledge that they were undertaking dishonest acts which could, and did, put investors' interests at risk.

D. Directors and Officers Liability

[204] Section 129.2 of the *Act* provides:

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.

[205] A “person” is defined in subsection 1(1) of the *Act* as including a partnership or other unincorporated organization.

[206] Subsection 1(1) of the *Act* also defines “director” and “officer” as:

“director” means a director of a company or an individual performing a similar function or occupying a similar position for any person;

[...]

“officer”, with respect to an issuer or registrant, means,

(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 a 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);

[207] There is a low threshold for finding liability against a director or officer under section 129.2 of the *Act*:

Although these terms have been interpreted to include some form of knowledge or intention, the threshold for liability under section 122 and 129.2 is a low one, as merely acquiescing the conduct or activity in question will satisfy the requirement of liability. 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*, above at para. 118)

[208] Messrs. Singh and Martinez were the directing minds of NFF. They made all significant business decisions including the use of investor funds and communications with investors.

[209] I find that Messrs. Singh and Martinez authorized, permitted or acquiesced in NFF’s non-compliance with sections 25, 53(1) and 126.1(b) of the *Act*. They are liable under Ontario securities law pursuant to section 129.2 of the *Act*.

VII. CONCLUSION

[210] I conclude that:

- (a) NFF, Mr. Singh, Mr. Martinez and Ms. Levy traded and engaged in or held themselves out as engaging in the business of trading in securities without being registered to do so and without an exemption from the dealer registration requirement, contrary to subsection 25(1)(a) of the *Act* as that section existed at the time of the conduct at issue, and contrary to section 25(1) of the *Act* as subsequently amended on September 28, 2009;
- (b) the activities of NFF, Mr. Singh, Mr. Martinez and Ms. Levy constituted a distribution of securities for which no preliminary prospectus or prospectus has been filed and for which no receipt has been issued by the Director, contrary to subsection 53(1) of the *Act*;
- (c) NFF, Mr. Singh and Mr. Martinez directly or indirectly engaged or participated in acts, practices or a course of conduct relating to securities that they knew or reasonably ought to have known perpetrate a fraud on persons contrary to subsection 126.1(b) of the *Act*;
- (d) as *de facto* directors of NFF, Mr. Singh and Mr. Martinez authorized, permitted or acquiesced in NFF’s non-compliance with Ontario securities law

and accordingly are liable under Ontario securities law, pursuant to section 129.2 of the *Act*; and

- (e) NFF, Mr. Singh, Mr. Martinez and Ms. Levy's conduct outlined above was contrary to the public interest and harmful to the integrity of the capital markets in Ontario.

[211] It is ordered that the hearing to determine sanctions and costs will be held at the office of ASAP Reporting Services Inc. at the Bay Adelaide Centre, 333 Bay Street, Suite 900, Toronto, commencing on March 13, 2013 at 10:00 a.m. Written submissions to be filed with the Secretary of the Commission no later than (5) business days of the scheduled sanctions hearing.

[212] It is ordered upon the failure of any party to attend at the time and place aforesaid, the hearing may proceed in the absence of that party, and such party is not entitled to any further notice of the proceeding.

Dated at Toronto this 17th day of December, 2012.

"James D. Carnwath"

James D. Carnwath, Q.C.