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

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

**- AND -**

**IN THE MATTER OF THE *COMMODITY FUTURES ACT*,**
**R.S.O. 1990, c. C.20, AS AMENDED**

**- AND -**

**IN THE MATTER OF AXCESS AUTOMATION LLC,**
**AXCESS FUND MANAGEMENT, LLC, AXCESS FUND, L.P.,**
**GORDON ALAN DRIVER, DAVID RUTLEDGE, 6845941 CANADA INC. carrying on business as ANESIS INVESTMENTS, STEVEN M. TAYLOR,**
**BERKSHIRE MANAGEMENT SERVICES INC. carrying on business as INTERNATIONAL COMMUNICATION STRATEGIES, 1303066 ONTARIO LTD. carrying on business as ACG GRAPHIC COMMUNICATIONS,**
**MONTECASSINO MANAGEMENT CORPORATION,**
**REYNOLD MAINSE, WORLD CLASS COMMUNICATIONS INC.**
**and RONALD MAINSE**

**REASONS AND DECISION**

| | | |
|---|---|---|
| **Hearing:** | April 11, 13, 14, 15, 19 and 20, 2011<br>May 25, 2011 | |
| **Decision:** | September 27, 2012 | |
| **Panel:** | Christopher Portner<br>Paulette L. Kennedy | - Commissioner and Chair of the Panel<br>- Commissioner |
| **Counsel:** | Yvonne Chisholm<br>Sylvia Schumacher | - For the Ontario Securities Commission |
| | Alistair Crawley<br>Anna Markiewicz | - For Reynold Mainse and World Class Communications Inc. |
| | Gordon Alan Driver | - Represented himself |
| | Steven M. Taylor | - Represented himself, Berkshire Management Services Inc., 1303066 Ontario Ltd. and Montecassino Management Corporation |

| | |
|---|---|
| No one appeared for the following respondents | - Axcess Automation LLC, Axcess Fund Management, LLC and Axcess Fund, L.P. |

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## REASONS AND DECISION

## I. BACKGROUND

### A. Overview

[1] This was a hearing before the Ontario Securities Commission (the "**Commission**") pursuant to section 127 of the *Securities Act*, R.S.O. 1990, c. S.5, as amended (the "**OSA**") and section 60 of the *Commodity Futures Act*, R.S.O. 1990, c. C.20, as amended (the "**CFA**") to consider whether Axcess Automation LLC ("**Axcess Automation**"), Axcess Fund Management, LLC ("**Axcess Fund Management**"), Axcess Fund, L.P. ("**Axcess Fund**"), Gordon Alan Driver ("**Driver**"), Steven M. Taylor ("**Taylor**"), Berkshire Management Services Inc. ("**Berkshire**") carrying on business as International Communication Strategies ("**ICS**"), 1303066 Ontario Ltd. ("**1303066**") carrying on business as ACG Graphic Communications ("**ACG**"), Montecassino Management Corporation ("**Montecassino**"), Reynold Mainse ("**Reynold**") and World Class Communications Inc. ("**WCC**") (collectively, the "**Respondents**") breached the OSA and the CFA and acted contrary to the public interest.

[2] Prior to the hearing on the merits in this matter, Ronald Mainse ("**Ronald**"), David Rutledge ("**Rutledge**") and 6845941 Canada Inc. ("**6845941**") carrying on business as Anesis Investments ("**Anesis**" and, together with Ronald and Rutledge, the "**Settling Respondents**") entered into settlement agreements with Staff of the Commission ("**Staff**") which were approved by the Commission on August 13, 2010 (*Re Axcess Automation LLC* (2010), 33 O.S.C.B. 7384 (settlement with respect to Ronald) and *Re Axcess Automation LLC* (2010), 33 O.S.C.B. 7376 (settlement with respect to 6845941 and Rutledge)).

[3] A Statement of Allegations was filed by Staff on August 12, 2010 and a Notice of Hearing was issued by the Commission on the same day. Staff alleges that the Respondents engaged in unregistered trading and a distribution of securities without a prospectus and committed fraud.

[4] The alleged misconduct relates to two investment schemes which together will be referred to in these Reasons and Decision as the "**Axcess Investments**" and, individually, the "**Axcess Automation Investment**" and the "**Axcess Fund Investment**". Staff alleges that, during the period from February 2006 to March 2009 (the "**Material Time**"), more than US$15.0 million was raised from approximately 200 investors, who were primarily Ontario residents, through trading in the Axcess Investments, both of which purportedly generated investment returns through Driver's use of proprietary trading software.

[5] Staff alleges that, through Axcess Automation, Axcess Fund Management and Axcess Fund (collectively, the "**Axcess Companies**"), Driver (i) engaged in fraudulent conduct by using investors' funds to trade E-mini S&P 500 futures[1] and, having incurred

[1] E-mini futures are electronically-traded futures contracts on the Chicago Mercantile Exchange that represent a portion of the normal futures contracts. The E-mini S&P 500 futures contract is one-fifth the size of the standard S&P 500 futures contract.

substantial losses doing so, he then misrepresented the losses and misled investors about the state of their investments; (ii) used investors' funds to pay new or other investors; and (iii) misappropriated approximately US$1.1 million for his personal use.

[6] Staff alleges that Taylor, through Berkshire, 1303066 and Montecassino (collectively, the "**Taylor Companies**"), worked with Driver from the inception of the scheme relating to the Axcess Investments. Staff alleges that Taylor and the Taylor Companies knew, or ought to have known, that a fraud was being perpetrated on the investors.

[7] Staff alleges that Rutledge, 6845941, Ronald, Reynold and WCC engaged in the trading of securities without being registered to do so, but were not party to the fraud.

## B. History of the Proceedings

[8] On April 15, 2009, the Commission issued a temporary cease trade order (the "**Temporary Order**") against the Axcess Companies, Driver and Rutledge. On October 2, 2009, Taylor and ICS (which is referred to as Berkshire in subsequent orders) became subject to the Temporary Order and, on August 13, 2010, 1303066 and Montecassino were also subjected to the Temporary Order. The Temporary Order was extended from time to time and now continues until "this matter is disposed of by a hearing on the merits, and if necessary, a hearing on sanctions, or settlement, as the case may be, or until further order of the Commission".

[9] Reynold was never a subject of the Temporary Order. On April 15, 2009, he undertook to Staff that, among other things, he would not engage in any trading activities, including soliciting investors and receiving commissions or payments in relation to Driver and the Axcess Companies.

[10] The hearing on the merits commenced on April 11, 2011 and continued on April 13, 14, 15, 19 and 20, 2011.

[11] Reynold and WCC, who were represented by counsel, admitted all of the allegations relevant to them. As Reynold admitted the allegations against him in this matter and was not contesting the evidence presented by Staff, he and his counsel only attended certain portions of the hearing. Reynold appeared on April 11, 15, 19 and 20, 2011, and his counsel appeared on April 11, 13, 15, 19 and 20, 2011.

[12] Driver represented himself and, at the outset of the hearing, made a request to participate in the hearing by telephone, which Staff did not oppose. Rule 10.2 of the Commission's *Rules of Procedure* (2010), 33 O.S.C.B. 8017 (the "**Commission Rules**") and sections 1(1), 5.2 and 5.2.1 of the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22, as amended (the "**SPPA**") permit electronic hearings including participation by telephone. We allowed Driver to participate by telephone as he stated that he was in Las Vegas and was unable to attend in person. Driver did not testify and called one witness.

[13] No one appeared on behalf of the Axcess Companies.

[14] Taylor represented himself and the Taylor Companies. He attended in person on April 11 and 13, 2011. At 10:23 a.m. on April 14, 2011, Taylor left the hearing room without explanation and re-attended on April 20 and May 25, 2011. Taylor did not testify and did not call any witnesses.

[15] On May 25, 2011, we heard closing submissions from Staff, Driver and Taylor on behalf of himself and the Taylor Companies. We received from Staff written submissions dated May 6, 2011, a two-volume Compendium of Key Documents, and a three-volume Book of Authorities. None of the Respondents provided written submissions.

[16] The following are our Reasons and Decision on the merits in this matter.

## C. The Respondents

### 1. The Corporate Respondents

[17] Axcess Automation was registered as a limited liability company in Nevada in October 2007. A Private Placement Memorandum[2] of Axcess Fund dated on or about November 11, 2008 (the "**PPM**") describes Axcess Automation as having been established as a sole proprietorship in Nevada in 1987 and later converted to a limited liability company.

[18] Axcess Fund Management, a limited liability company, was incorporated in Nevada in June 2008. Axcess Fund Management was registered with the United States Commodity Futures Trading Commission (the "**CFTC**") as a commodity pool operator in July 2008. As it is the subject of a CFTC proceeding, Axcess Fund Management's CFTC registration has been under suspension since May 2009.

[19] Axcess Fund was registered in Nevada in June 2008 as a limited partnership of which Axcess Fund Management was the general partner and the purchasers of limited partnership interests were the limited partners. Axcess Fund Management is described in the PPM as the general partner, investment or trading advisor and commodity pool operator of Axcess Fund.

[20] Berkshire was incorporated in Alberta in February 2007. In January 2009, Berkshire registered ICS as a trade name in Alberta.

[21] 1303066 was incorporated in Ontario in June 1998. 1303066 carried on business as ACG.

[22] Montecassino was incorporated in Alberta in 2007.

[23] WCC was incorporated in Ontario in September 1998. According to Reynold, he stopped doing business through WCC in 2000 or 2001, but later re-activated WCC which contracted with a Christian non-profit charitable organization to lead and promote international humanitarian aid missions. In December 2008, WCC's registration was cancelled for failure to comply with the *Corporations Tax Act*, R.S.O. 1990, c. C.40, as amended.

[2] Also described as a Private Offering Memorandum.

[24] None of the Axcess Companies, the Taylor Companies and WCC have ever been reporting issuers in Ontario and none of them have ever been registered to trade securities or contracts in Ontario.

### 2. The Individual Respondents

[25] Driver is a Canadian citizen who resided in both Ontario and Nevada during the Material Time. Driver is the founder and owner of Axcess Automation and Axcess Fund Management and created Axcess Fund. Driver was registered with the CFTC in September 2008 as an associated person and principal of Axcess Fund Management. As he is the subject of a CFTC proceeding, Driver's CFTC registration has been under suspension since May 2009.

[26] Taylor, who is a resident of Ontario, is the sole voting shareholder and sole director of Berkshire, the President and a director of 1303066 and the President of Montecassino.

[27] Reynold is a resident of Ontario and was the President and sole director of WCC.

[28] None of Driver, Taylor and Reynold have ever been registered to trade securities or contracts in Ontario.

### 3. The Settling Respondents

[29] While these Reasons and Decision deal with findings against the Respondents, we describe the Settling Respondents below to provide additional background information with respect to this matter.

[30] 6845941 was incorporated federally in Canada in September 2007, and since early 2009, has carried on business as Anesis.

[31] Rutledge is an Ontario resident and an ordained minister who was employed by a Christian non-profit charitable organization from 2003 to 2008. Rutledge incorporated 6845941 and was its sole officer.

[32] Ronald is an Ontario resident and was the President of the same Christian non-profit charitable organization as Rutledge by which he continues to be employed in a senior capacity. Reynold and Ronald are brothers and Rutledge is their cousin.

[33] None of the Settling Respondents have ever been registered to trade securities or contracts in Ontario.

## II. PRELIMINARY ISSUES

### A. Driver's Adjournment Requests

### 1. The First Adjournment Request

[34] At the commencement of the hearing on April 11, 2011, Driver requested an adjournment of the hearing on the merits. An individual named Jack Steven Lambert ("**Lambert**") appeared on Driver's behalf to provide submissions regarding the

adjournment request after explaining that he was acting as an agent for Irving Solnik ("**Solnik**") whom Driver had recently retained to represent him. At a later point in his submissions, Lambert mentioned that Driver had not "completely" retained Solnik. Neither Lambert nor Solnik represented Driver for any part of the merits hearing.

[35] The adjournment was requested on the grounds that Driver (i) was heavily involved with proceedings in the United States (the "**U.S.**") before the Securities Exchange Commission (the "**SEC**") and the CFTC; (ii) was looking for new counsel to represent him before the SEC and needed time for the retainer to be finalized before he could finalize his retainer with counsel in Ontario; (iii) would prefer that the matter before the SEC and the CFTC proceed prior to the Commission proceeding because issues would arise with respect to the use of his Commission testimony to incriminate him in the SEC and CFTC proceedings; and that (iv) Driver's new counsel needed time to review the disclosure in this matter and to speak to the witnesses.

[36] Staff opposed Driver's request for an adjournment on the following basis:

(a) The dates for the hearing on the merits were set down in October 2010 and that Driver had been aware of the hearing dates since that time.

(b) Staff was informed of the adjournment request for the first time on April 8, 2011, just three days before the commencement of the hearing on the merits.

(c) Staff's case was ready to proceed, all of the witnesses had been prepared and were ready and rescheduling the hearing would inconvenience witnesses, one of whom was traveling from the U.S.

(d) The hearing had been booked on the Commission's hearing schedule since October 2010, time and resources of the Commission had been blocked-off for this hearing, and, accordingly, rescheduling at such a late date would impact the Commission's resources.

(e) Driver had waited until the last possible moment to retain counsel and had a history of changing counsel. Specifically, Solnik was previously on the record for Driver from April 2009 to April 2010. Staff was only informed during the weekend of April 8 to 10, 2011 that Solnik was back on the file representing Driver. In addition, for a certain period of time after April 2010, Staff understood that Driver had retained Mark Geragos ("**Geragos**") as his U.S. counsel, but the status of this retainer was never made clear to Staff. Although Geragos never communicated with Staff or appeared before the Commission on behalf of Driver, both he and Driver were served with disclosure by Staff. On Friday April 8, 2011, another lawyer, Jonathan Schwartz, contacted Staff and informed Staff that he would be requesting an adjournment but that he would not appear as he was travelling until April 12, 2011.

(f) The proceedings in the U.S. before the SEC and the CFTC were not new or at the trial/merits stage and each of the SEC and the CFTC had issued

either permanent or preliminary injunctions against Driver, Axcess Automation and Axcess Fund Management.

(g) With respect to the issue of prejudice arising from Driver's testimony before the Commission being used to incriminate him in the U.S., Staff emphasized that a formal motion had not been made with respect to this issue, Staff had only been notified of the issue by Lambert on April 11, 2011 and, accordingly, Staff had not had the time to prepare proper legal submissions on the issue. Staff also pointed out that Driver was not obliged to testify before the Commission.

[37] Counsel for Reynold and WCC did not take any position with respect to Driver's adjournment request, but did mention that they were ready to proceed with the hearing on the merits.

[38] Taylor on behalf of himself and the Taylor Companies took the following position:

> I also don't really have a position.
>
> I'm without counsel, without means for counsel. It's been grossly inconvenient and frustrating to have a cloud hanging over your head this long. It would [be] nice on one side to be able to move along, but, you know, after my last appearance two days later I had a stroke as a result of the stress and the pressure of, you know, this entire thing, but I don't have counsel to proceed, so I probably would not oppose an adjournment but sure would like the cloud lifted.
>
> (Hearing Transcript dated April 11, 2011 at pp. 23 and 24)

[39] Rule 9.2 of the Commission Rules sets out a list of relevant, but non-exhaustive, factors to be considered when deciding whether to grant an adjournment:

> **9.2 Factors Considered –** In deciding whether to grant an adjournment, the Panel shall consider all relevant factors, including, but not restricted to, the following:
>
> (a) whether an adjournment would be in the public interest;
>
> (b) whether all parties consent to the request;
>
> (c) whether granting or denying the adjournment would prejudice any party;
>
> (d) the amount of notice of the hearing date that the requesting party received;
>
> (e) the number of any previous adjournment requests made and by whom;

(f) the reasons provided to support the adjournment request;

(g) the cost to the Commission and to the other parties for rescheduling the hearing;

(h) evidence that the party made reasonable efforts to avoid the need for the adjournment; and

(i) whether the adjournment is necessary to provide an opportunity for a fair hearing.

[40] We decided to dismiss Driver's adjournment request after considering the factors set out in rule 9.2 enumerated above, including, in particular, the factors set out in subrules 9.2(b), (c), (d), (g) and (h) of the Commission Rules. Specifically, (i) Staff contested the adjournment; (ii) granting the adjournment would prejudice all of the other parties who appeared on April 11, 2011 and were ready to proceed with the hearing on the merits; (iii) although denying the adjournment would prejudice Driver to the extent that he had to proceed without counsel, he had ample opportunity to retain counsel, had a history of changing counsel and did not retain counsel until the last possible moment; (iv) we were not provided with any evidence or legal submissions that Driver would be prejudiced in the SEC and the CFTC proceedings if the hearing on the merits proceeded on April 11, 2011; (v) Driver had notice of the dates of the hearing on the merits since October 2010 and had received all relevant materials from Staff; (vi) rescheduling the hearing on the merits would cause the Commission, the other parties and witnesses major inconvenience and unnecessary costs; and (vii) Driver's request for the adjournment was made at the eleventh hour and he made no effort to avoid a delay by communicating with Staff on a timely basis, if in fact he had a legitimate reason to request an adjournment. In light of the foregoing, we were of the view that an adjournment was not necessary to provide an opportunity for a fair hearing and that it was in the public interest to proceed.

[41] We did, however, take into account that Driver was also involved in an SEC proceeding in the U.S. and accommodated Driver's request that the Panel not sit on April 18, 2011 so that he could attend an SEC hearing on that day.

**2. The Second Adjournment Request**

[42] On the second day of the hearing, April 13, 2011, Driver brought another request for an adjournment on the grounds that:

(a) He had spoken with a new lawyer on April 12, 2011 about representing him in this proceeding and that lawyer would be prejudiced and unable to prepare for the hearing appropriately unless there was a two-week adjournment.

(b) He had only received a few e-mail messages ("**e-mails**") from the Commission, and did not have any documents physically served on him by the Commission as they were delivered to a Niagara Falls address that had not been in service for two years.

(c) There would be no financial loss if an adjournment were to be granted.

(d) An adjournment would benefit the Commission as it would permit Driver time to find representation and have a lawyer prepare his case and present it before the Commission.

[43] Taylor did not object to Driver's adjournment request and counsel for Reynold took no position with respect to the request.

[44] Staff opposed the adjournment request and provided affidavits of service (Affidavits of Service of Lee Crann, sworn April 23, 2009 and April 7, 2011) detailing Staff's service efforts on Driver throughout the proceeding. In addition, Staff filed e-mail correspondence between Staff and Driver for the months of September and October 2010 showing that Staff had informed Driver of the availability of disclosure and the dates for the hearing on the merits and that Driver responded informing Staff that he was represented and that Staff should contact his lawyer. Having reviewed these materials, we found that Staff had taken all reasonable efforts to serve Driver and his counsel with all relevant materials and that Driver had knowledge of the dates of the hearing on the merits since October 2010.

[45] After considering the matter, we dismissed Driver's second adjournment request as we had not been provided with any further information or arguments that would cause us to vary the initial adjournment decision that we made on the first day of the hearing on the merits. Staff demonstrated that Driver and/or his counsel were at all times served with materials and apprised of the hearing dates. Driver waited until the eleventh hour to find representation for the hearing on the merits. Driver was represented by different counsel at various times, he knew the merits hearing dates were set by order in October 2010 for April 2011 and he had ample time to find counsel to represent him and to prepare his case.

### 3. The Third Adjournment Request

[46] At the commencement of his closing submissions on May 25, 2011, Driver requested another adjournment on the grounds that:

(a) He had produced a limited amount of evidence in this matter;

(b) He had two other cases in the U.S. that were ongoing;

(c) He required a lawyer to represent him in order to maintain his Fifth Amendment privilege in the U.S. proceedings; and

(d) He had identified a lawyer and was in the process of making arrangements to retain the lawyer who had just returned from a three-week vacation.

[47] Taylor made the following submissions with respect to Driver's adjournment request:

> I want to state that, you know, I object to the fact that an adjournment was denied for Mr. Driver…but that the adjournment request was denied I do

> object to that and at the same time I object to the fact that he's not even here for me to be able to speak to him, look him in the eye, ask him the questions, the hard questions that he alone could answer as capably and as competently as any.
>
> (Hearing Transcript dated May 25, 2011 at pp. 80 and 81)

[48] Neither Reynold nor his counsel attended the closing submissions or made submissions on this issue.

[49] Staff opposed the adjournment on the basis that they had not been informed of the adjournment request and that Driver made two prior adjournment requests, both of which had been denied by the Panel. Staff emphasized that the U.S. proceedings had been ongoing since May 2009 and Driver had ample notice of those proceedings and the proceeding before the Commission. In Staff's view, Driver's arguments about the U.S. proceedings should not be given much weight as Driver had been previously accommodated to attend an SEC hearing on April 18, 2011, and the evidence revealed that he did not in fact attend. Further, Staff submitted that Driver's involvement in the U.S. proceedings did not impair his ability to participate in closing submissions.

[50] We agreed with Staff's position and denied Driver's third adjournment request. From the outset of the hearing on the merits, Driver had raised the issue of representation and his U.S. proceedings, including his Fifth Amendment privilege in those proceedings. Once again, Driver did not present us with any further information or arguments that would warrant an adjournment. In fact, we are troubled by the evidence that Driver did not attend the SEC hearing on April 18, 2011 given that the Panel decided not to sit on that day to accommodate his request that he be able to attend that hearing. In addition, Driver had been provided with a month from the close of evidence on April 20, 2011 to the date of the closing submissions on May 25, 2011 in which to prepare. Although Driver claimed that he was then in a position to retain counsel, we concluded we could not, and should not, delay this proceeding any further. We find it troubling that, while Driver had a month since the close of evidence to retain counsel, he selected counsel who had just returned from vacation on May 23, 2011, two days before the date of the closing submissions. In our view, Driver had ample opportunity to appoint counsel who would be available when required and, accordingly, we dismissed Driver's request to adjourn the closing submissions.

### B. Request to Summons Witnesses

[51] Driver and Taylor did not provide a witness list or witness summary as required by the Commission Rules. Rule 4.5 states as follows:

> **4.5 Witness Lists and Summaries – (1) Provision of a Witness List –** A party to a proceeding shall serve every other party and file with the Secretary a list of the witnesses the party intends to call to testify on the party's behalf at the hearing, at least 10 days before the commencement of the hearing.

> **(2) Provision of Witness Summaries –** If material matters to which a witness is to testify have not otherwise been disclosed, a party to a proceeding shall provide to every other party a summary of the evidence that the witness is expected to give at the hearing, at least 10 days before the commencement of the hearing.
>
> …
>
> **(4) Failure to Provide a Witness List or a Summary –** A party who does not include a witness in the witness list or provide a summary of the evidence a witness is expected to give in accordance with subrules 4.5(1), 4.5(2) and 4.5(3), may not call that person as a witness without leave of the Panel, which may be on any conditions as the Panel considers just.
>
> …

[52] On April 13, 2011, the second day of the hearing on the merits, both Taylor and Driver requested that the Commission issue a summons to each of the witnesses on their behalf. Section 12 of the SPPA provides that a tribunal such as the Commission has the power to issue a summons to a witness:

> **Summonses**
>
> 12. (1) A tribunal may require any person, including a party, by summons,
>
> > (a) to give evidence on oath or affirmation at an oral or electronic hearing; and
> >
> > (b) to produce in evidence at an oral or electronic hearing documents and things specified by the tribunal,
>
> relevant to the subject-matter of the proceeding and admissible at a hearing.

[53] We agreed to accommodate Taylor's and Driver's requests for assistance and asked each of them to provide us with a list of their proposed witnesses, their locations, witness summaries and submissions regarding the relevance of the proposed witnesses to assist us in determining whether to grant leave to permit certain witnesses to testify pursuant to subrule 4.5(4) of the Commission Rules. We also directed Taylor and Driver to consider whether any of their proposed witnesses would provide duplicative or similar testimony and to consider whether their witness lists could be narrowed.

[54] We explained to Taylor and Driver that the Commission only has the jurisdiction to summon witnesses residing in Ontario and such witnesses would be required to testify in person before the Commission. Should Taylor and Driver have witnesses willing to testify voluntarily from outside the jurisdiction, they would be required to either come and testify in person, or testify by means of a video-conference. We explained the process under section 152 of the OSA for issuing a summons to a witness residing outside

Ontario, which requires an order of the Superior Court of Justice, but as the hearing on the merits was already underway, the Commission could not guarantee that there would be sufficient time to obtain such an order prior to the conclusion of the hearing on the merits.

[55] We explained to Taylor and Driver that the Commission would do its best to facilitate the process for issuing a summons to each of their witnesses, however, the witnesses granted leave to testify and issued a summons would have to testify during the hearing time already allotted and we would not permit any further delay in the hearing on the merits.

[56] Driver requested that two individuals residing in Ontario, R.M. and D.H., be permitted to testify. He explained that these witnesses would testify about their meetings and relationship with him and Taylor and that they would give evidence about e-mails that are included in hearing briefs filed by Staff.

[57] Taylor did not provide us with a list of witnesses or witness summaries.

[58] We were prepared to allow R.M. and D.H. to appear as witnesses at the hearing on the basis that (i) they constituted a reasonable number of witnesses and scheduling them to appear would not cause undue prejudice or delay; and (ii) their anticipated evidence appeared to be relevant to the hearing. Although it is normally the responsibility of a party to serve a summons on its witnesses, we requested that Staff make the necessary arrangements for service as Driver was unrepresented and out of the country, to facilitate the process and to limit the risk of delays. Staff succeeded in serving R.M. personally and he appeared to testify at the hearing on the merits. Staff made all reasonable efforts to serve D.H., however, he was in Florida, would not provide any contact information to Staff to allow Staff to effect service of the summons and informed Staff that he would not be back in Canada prior to the conclusion of the hearing on the merits. As a result, D.H. did not testify.

## C. Taylor's Representation Status

[59] On April 14, 2011, we were informed that Taylor had contacted an individual to represent him. Taylor informed us that the individual had resigned as a member of the Law Society of Upper Canada ("**LSUC**") and was seeking reinstatement. Staff objected to Taylor's proposed representative on the basis that the individual was not qualified to act in these proceedings based on his status with the LSUC. Staff submitted that, pursuant to rule 1.1 and subrule 1.7.1(1) of the Commission Rules, a party may only be represented by a representative licensed by the LSUC.

[60] Once Taylor informed his proposed representative of Staff's objection, he declined to represent Taylor. As a result, Taylor represented himself for the duration of the hearing on the merits.

## D. Taylor's Failure to Appear on Certain Days of the Hearing

[61] As stated above, Taylor only attended portions of the hearing on the merits.

[62] Subsection 7(1) of the SPPA provides that a tribunal may proceed in the absence of a party when that party has been given adequate notice:

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

[63] Taylor was aware of the hearing dates in this matter. He attended the hearing on April 11 and 13, 2011. He attended on April 14, 2011 and left the hearing room at 10:23 a.m. without explanation.

[64] After Taylor left the hearing room, we requested that Staff contact Taylor to keep him apprised of the status of the hearing and that Staff inform Taylor that he could, and was encouraged to, return and attend the hearing. Staff also advised us that Taylor had been informed that he was free to request transcripts of the hearing on the merits from the court reporter. Taylor returned to the hearing on April 20, 2011.

[65] We were satisfied that Taylor was aware of the hearing dates and that the proceeding could continue in his absence in accordance with subsection 7(1) of the SPPA.

## III. POSITIONS OF THE PARTIES

### A. Staff's Allegations

[66] Staff alleges that the conduct of the Respondents was in contravention of the OSA and/or the CFA. The specific allegations of breaches of the OSA and the CFA are set out in Staff's Statement of Allegations in paragraphs 38 to 46 which are reproduced below:

> Para. 38: The respondents' activities in respect of the Axcess Automation Investment constituted trading in contracts without registration in respect of which no exemption was available, contrary to section 22 of the *Commodity Futures Act*.
>
> Para. 39: The respondents' activities in respect of the Axcess Automation Investment constituted trading in securities without registration in respect of which no exemption was available, contrary to section 25 of the *Securities Act*.
>
> Para. 40: The respondents, except Ronald Mainse, undertook activities in respect of the Axcess Fund Investment which constituted trading in securities without registration in respect of which no exemption was available, contrary to section 25 of the *Securities Act*.

Para. 41: The respondents, except Ronald Mainse, undertook activities in respect of the Axcess Fund Investment which constituted trades in securities which were distributions for which no preliminary prospectus or prospectus was filed or receipted by the Director, contrary to section 53 of the *Securities Act*.

Para. 42: Driver, the Axcess Companies, Taylor and the Taylor Companies directly or indirectly engaged in or participated in an act, practice or course of conduct in respect of the Axcess Automation Investment relating to commodities or contracts which he or it knew, or reasonably ought to have known, perpetrated a fraud on investors, contrary to section 59.1(b) of the *Commodity Futures Act*.

Para. 43: Driver, the Axcess Companies, Taylor and the Taylor Companies directly or indirectly engaged in or participated in an act, practice or course of conduct in respect of the Axcess Automation and Axcess Fund Investments relating to securities which he or it knew, or reasonably ought to have known, perpetrated a fraud on investors, contrary to section 126.1(b) of the *Securities Act*.

Para. 44: Each of the individuals who are directors and officers of the corporate respondents, including *de facto* directors and officers of the corporate respondents, authorized, permitted or acquiesced in the corporate respondents' non-compliance with Ontario commodity futures law and accordingly, failed to comply with Ontario commodity futures law contrary to section 60.5 of the *Commodity Futures Act*.

Para. 45: Each of the individuals who are directors and officers of the corporate respondents, including *de facto* directors and officers of the corporate respondents, authorized, permitted or acquiesced in the corporate respondents' non-compliance with Ontario securities law and accordingly, failed to comply with Ontario securities law contrary to section 129.2 of the *Securities Act*.

Para. 46: The respondents' conduct was contrary to the public interest and harmful to the integrity of the Ontario capital markets.

## B. The Respondents

[67] On the first day of the hearing on the merits, counsel for Reynold informed the Panel that Reynold admitted Staff's allegations set out in the Statement of Allegations

that pertain to him. In particular, he admitted the breaches of the registration requirements, whether under the OSA or the CFA, and the prospectus requirements, and acknowledged his liability as a director and/or officer of WCC.

[68] Although Driver and Taylor did not testify, they made closing submissions on May 25, 2011.

[69] We set out the positions of the Respondents below.

**1. Driver's Submissions**

[70] In his oral submissions, Driver took issue with Staff's investigation. He submitted that many Canadian investors were not interviewed by Staff. Further, he submitted that Staff refused to accept statements that he produced which show that one of his trading accounts generated at least 68% profit in three months, and that Staff had tampered with the evidence to create the appearance that his trading activities resulted in a loss. He argued that "the public interest is not being protected because the OSC has not done a complete job with their investigation" (Hearing Transcript dated May 25, 2011 at p. 78).

[71] Driver also submitted that he was not aware that ICS was a corporation of 50 investors and that he "was liable to see through to all their additional investors" (Hearing Transcript dated May 25, 2011 at p. 77).

[72] It was Driver's submission that Taylor misappropriated $400,000 of investor funds and that he never received those funds from investors. He also submitted that Taylor and R.M., Taylor's business partner and a witness called by Driver, threatened to go to law enforcement authorities unless he paid them a large sum of money.

[73] Driver submitted that he was "anxious to protect the innocent investors" and that his "intent was to provide this protection under a regulated hedge fund and get rid of the greed" (Hearing Transcript dated May 25, 2011 at p. 78). He submitted that he had "no desire for personal gain until all this was sorted out" (Hearing Transcript dated May 25, 2011 at p. 78).

**2. Taylor's Submissions**

[74] Taylor also took issue with Staff's investigation. He submitted that Staff did not speak to many of the investors, the mediators who were retained by Taylor in an attempt to resolve the communication problems between him and Driver, or the staff at Taylor's office who were familiar with the situation.

[75] Taylor challenged Staff's flow of funds analysis and argued that "those numbers are inaccurate, duplicates, missing, misapplied" (Hearing Transcript dated May 25, 2011 at p. 128).

[76] In his submissions, Taylor described that his role was to "receive copies of the wires and agreements which they had sent to Mr. Driver so that we could compare their transactions with the spreadsheets which were supplied by Mr. Driver when they arrived…If we found discrepancies in the spreadsheet…we had copies of the records and

were sent by the participants to Mr. Driver on their behalf to get the spreadsheet fixed or adjusted" (Hearing Transcript dated May 25, 2011 at p. 102). He submitted that "We were not administrators of the program in any real way…We didn't handle the money. We didn't have access to anything except Mr. Driver, which became sporadic" (Hearing Transcript dated May 25, 2011 at p. 103).

[77] Taylor disputed that he acted fraudulently. He maintained that he was "dealing with communication and logistical issues in the process" and this was not hidden from investors (Hearing Transcript dated May 25, 2011 at p. 84). He stated "[the Axcess Automation Investment] seemed to be working and generating the results. I had [no] reason to deny the results as they were coming. The problem always was the details, the administration…" (Hearing Transcript dated May 25, 2011 at p. 109). He expressed that he did not understand how communicating what he knew with respect to the spreadsheets amounted to fraud or deception, or how he was being "align[ed]…as a co-mastermind" (Hearing Transcript dated May 25, 2011 at p. 119). He submitted that "I did not have criminally wrong, as best as I can tell, mind or actions. I got caught in something that after the fact started coming out. I realized that this friend seemed to have used me" (Hearing Transcript dated May 25, 2011 at pp. 115 and 116).

[78] Taylor submitted that he had no relevant education or experience in the capital markets or computer software. In his submissions, he referred to his friendship with Driver and described Driver as "somebody that had a big, generous heart and I trusted him in virtually every area. He had never shown me reason to not trust him" (Hearing Transcript dated May 25, 2011 at p. 93).

[79] He further submitted that when he came to realize "Mr. Driver was over the maximum number that he could trade for privately we immediately began to encourage him to get on the right side of regulation" (Hearing Transcript dated May 25, 2011 at pp. 104 and 105). According to Taylor, he retained mediators when there was a communication breakdown between him and Driver and offered to pay for someone to assist Driver with administrative work. As well, he submitted that he stopped soliciting new investors in 2007.

[80] Taylor submitted that he "focused on protecting as best I knew how the participants that were involved. I did everything I knew to do" (Hearing Transcript dated May 25, 2011 at p. 81).

### 3. Reynold's Admissions

[81] Reynold admitted his conduct described in the following paragraphs of the Statement of Allegations:

> Para. 4: " … Reynold Mainse, World Class Communications Inc. ("WCC") … traded to investors, but were not party to the fraud". It was explained that Reynold had no prior investment experience and was not aware of the securities law implications until he spoke to a lawyer in or around October 2008. Reynold now understands that his conduct, which essentially entailed facilitating communications

between Driver and investors and assisting Driver to encourage prospective investors, constituted acts in furtherance of a trade. Reynold does not dispute that he traded in securities or engaged in acts in furtherance of a trade.

Para. 12: "WCC was incorporated in Ontario in September 1998. In December 2008, WCC's registration was cancelled for failure to comply with the *Corporations Tax Act*, R.S.O. 1990, c. C. 40, as amended".

Para. 13: "…WCC [has] never been [a] reporting [issuer] in Ontario and [has] never been registered to trade securities…in Ontario".

Para. 17: "Reynold Mainse is an Ontario resident. Reynold Mainse was the President and sole director of WCC, which had contracts with the Christian non-profit charitable organization to lead and promote international humanitarian aid missions". It was explained that WCC's connection to this proceeding arose as a result of its receipt of funds from Driver.

Para. 20: "…Reynold Mainse…[has] never been registered to trade securities…in Ontario".

Para. 33: "Between July 2007 and March 2009, Reynold Mainse's trading in the Axcess Automation Investment resulted in investments by about 22 investors of about USD 4,100,000.00. Of this amount, Driver paid back about USD 2,875,054.00 to these investors, which Driver characterized as returns on investments". There is no dispute that Reynold played a role in introducing prospective investors to Driver. Counsel for Reynold explained that, while Reynold introduced investors to Driver, some of them, particularly the larger investors, subsequently dealt with Driver directly. As a result, although Reynold could not testify about the exact amounts invested by those investors with whom he had been involved, he did not contest the amounts calculated by Staff.

Para. 34: "Reynold Mainse identified and corresponded with prospective investors and provided them with copies of the Private Offering Memorandum which described the Axcess Fund Investment".

Para. 35: "Reynold Mainse received commissions directly, and through WCC, of about CAD 210,219.50".

Para. 39: "[Reynold's] activities in respect of the Axcess Automation Investment constituted trading in securities without registration in respect of which no exemption was available, contrary to section 25 of the *Securities Act*".

Para. 40 "[Reynold] undertook activities in respect of the Axcess Fund Investment which constituted trading in securities without registration in respect of which no exemption was available, contrary to section 25 of the *Securities Act*".

Para. 41 "[Reynold] undertook activities in respect of the Axcess Fund Investment which constituted trades in securities which were distributions for which no preliminary prospectus or prospectus was filed or receipted by the Director, contrary to section 53 of the *Securities Act*". Specifically, Reynold's counsel explained that:

> There's also no dispute that the – that in effect the investment scheme as offered by Mr. Driver when analyzed through the lens of securities laws would constitute a distribution of securities. In this case the securities – we agree with the analysis of OSC staff that the agreements that were entered into with respect to the first phase of the investment scheme, being the Axcess Automation phase, the – that that letter agreement between the investor and Axcess Automation would constitute an investment contract and therefore qualify as a security under the Securities Act. That by acting to assist in the distribution of those securities, there is therefore at the same time as a breach of the registration requirements there's a breach of the prospectus requirements of the [OSA] and as is often the case, those two breaches go hand in hand and the same conduct results in a breach of both sections and that is why it has occurred here and Mr. Reynold Mainse admits that.
>
> (Hearing Transcript dated April 11, 2011 at pp. 58 and 59)

Para. 45 "Each of the individuals who are directors and officers of the corporate respondents, including *de facto* directors and officers of the corporate respondents, authorized, permitted or acquiesced in the corporate respondents' non-compliance with Ontario securities law and accordingly, failed to comply with Ontario securities law contrary to section 129.2 of the *Securities Act*".

Para. 46 "The respondents' conduct was contrary to the public interest and harmful to the integrity of the Ontario capital markets". Reynold's counsel explained that:

> …Reynold Mainse's participation in this and his actions that assisted Mr. Driver in obtaining investor funds was harmful to the public interest and Reynold Mainse's failure to be engaged within the securities regulatory regime, which may well have stopped this at an earlier stage, that his failure to do that has been contrary to the public interest

> and harmed the integrity of the Ontario capital markets. So Mr. Mainse makes that admission as well.
>
> (Hearing Transcript dated April 11, 2011 at pp. 59 and 60)

## IV. TESTIMONY

### A. Overview

[82] Staff called the following six witnesses at the hearing on the merits:

(a) Daniella Kozovski ("**Kozovski**") is an investigative counsel in the Enforcement Branch of the Commission. She testified about the investigative steps taken in this matter, including Staff's cooperation with the SEC and the CFTC, the compelled examinations of Driver and Taylor, and the documents obtained by Staff. She also testified about the funds raised from investors and the commissions received by the Respondents.

(b) Ramy Kassabgui ("**Kassabgui**") is an Internet Surveillance Specialist from the Los Angeles Regional Office of the SEC. His evidence pertained to the use of investor funds by Driver and his trading activities.

(c) A.T. worked for Taylor in 2007 as an event coordinator and assistant. She testified about her contractual relationship with Taylor, Taylor's office, the other employees who worked for Taylor, the work that she did for Taylor relating to the Axcess Automation Investment, her interaction with investors and her investment in Axcess Automation.

(d) P.A. was an investor in the Axcess Automation Investment through Taylor. He gave evidence about his investment and his interaction with Taylor.

(e) Rutledge, one of the Settling Respondents, testified about his involvement in the Axcess Investments.

(f) Ronald, another of the Settling Respondents, also testified about his involvement in the Axcess Investments.

[83] Reynold, who was interviewed voluntarily by Staff and voluntarily provided Staff with documents relating to the Axcess Investments, made admissions on the first day of the hearing on the merits. His counsel explained that, but for Reynold's personal financial situation, he would have settled with the Commission. His counsel further explained that Reynold does not have the means to disgorge to the Commission the funds he received through his and WCC's involvement in the Axcess Investments given the nature of his career and the dedication of his time and resources, including the money that he received from Driver, to Christian not-for-profit charitable organizations. As a result, he elected to participate in the hearing on the merits and testified to provide a full factual record to the Commission.

[84] Driver did not testify. He called one witness, R.M., who was an investor in the Axcess Automation Investment and a business partner of Taylor, so that he could "testify

to [his] meetings and relationship to Gordon Driver and Steve Taylor. [He would] be questioned about e-mails received or sent by [him]" (Hearing Transcript dated April 14, 2011 at p. 103).

[85] None of the remaining Respondents testified or called any evidence.

[86] Staff introduced into evidence a number of documents which are hearsay evidence and admissible pursuant to subsection 15(1) of the SPPA. They include e-mails from Driver and Taylor regarding the Axcess Investments, such as e-mails between Driver and Taylor and e-mails between Taylor and investors. The e-mails were obtained pursuant to a summons that Staff served on Taylor and subpoenas that the SEC and the CFTC served on Driver.

[87] Staff also relies on client files maintained by Taylor which Staff also obtained pursuant to the summons described in paragraph [86] above. Each such client file typically included banking documents showing the investments made by the investor, the funds paid to the investor and a spreadsheet maintained by Taylor in relation to the investments made by the investor.

[88] Although not evidence, Staff presented us with an analysis showing the funds raised from investors and the funds received by Rutledge and Taylor. Staff prepared the analysis on the basis of banking records obtained by Staff, the SEC and the CFTC directly from financial institutions as well as client files maintained by Taylor. We also received an analysis of the use of investor funds by Driver and his trading activities in three trading accounts located in the U.S., prepared by the SEC on the basis of the trading records obtained by the SEC.

### B. Admissibility of Compelled Testimony

[89] Driver gave evidence in the U.S. under oath on April 23 and 24, 2009 pursuant to subpoenas issued by the SEC and the CFTC. Driver's counsel was present throughout the compelled interview and Staff participated by telephone. Taylor gave evidence in this matter under oath on August 6 and 26, 2009 pursuant to a summons issued under section 13 of the OSA. Taylor was made aware of his right to be represented by counsel during his examination but chose not to exercise that right.

[90] Staff sought to have the transcripts of the compelled examinations of Driver and Taylor admitted for the truth of their contents. Staff submitted that statements made by a respondent would only be used as evidence against that particular respondent.

[91] On April 19, 2011, we made the following oral ruling with reasons to follow:

> …we've considered the submissions of staff and the proposal to employ the compelled testimony of each of Mr. Taylor and Mr. Driver and the Panel has concluded that we will permit the use of the compelled testimony for the reasons that will be set out in our decision relating to the matter.

> The Panel would, however, make two observations. Number one, that the materials provided in evidence should meet the purpose set out in paragraph 10 of your submission, as stated is already your intention. And, secondly, that they should – and we were somewhat unclear about your comment in that regard, but that they should be submitted with a reasonable level of specificity that supports both staff's submissions and the statement of allegation, so that we can tie those submissions and the statement of allegations to specific references in the compelled testimony and support.
>
> If I understood you correctly, you proposed to provide more than that to give a context for the statement that was made, but the Panel does not wish to read the entire compelled testimony in order to find them.
>
> (Hearing Transcript dated April 19, 2011 at pp. 187 and 188)

[92] In his closing arguments, Taylor objected to the use of his compelled evidence.

[93] As mentioned in paragraph [86] above, subsection 15(1) of the SPPA gives the Panel discretion to admit relevant evidence that might not be admissible as evidence in a court, including hearsay evidence:

> **What is admissible in evidence at a hearing**
>
> **15.**(1)Subject to subsections (2) and (3), a tribunal may admit as evidence at a hearing, whether or not given or proven under oath or affirmation or admissible as evidence in a court,
>
> (a) any oral testimony; and
>
> (b) any document or other thing,
>
> relevant to the subject-matter of the proceeding and may act on such evidence, but the tribunal may exclude anything unduly repetitious.

[94] The Commission has held that "Staff is entitled to use the information and materials of its investigation (i.e. compelled testimony gathered pursuant to sections 11 and 13 of the [OSA]) in this merits hearing which is directly related to the investigation" (*Re Al-Tar Energy Corp*. (2010), 33 O.S.C.B. 5535 ("***Al-Tar***") at para. 40). The compelled testimony before us is hearsay evidence that is admissible under the SPPA, subject to the weight to be accorded to the evidence by the Panel. As Driver and Taylor did not testify, we accept the transcripts of their compelled examinations as the best evidence in the limited circumstances to which they relate. We also agree with Staff's position set out in paragraph [90] that the compelled testimony made by a respondent would only be used as evidence against that particular respondent.

## V. THE INVESTMENT SCHEMES

### A. The Axcess Investments

[95] We were presented with evidence that Driver operated two investment schemes during the Material Time, namely, the Axcess Automation Investment and its successor, the Axcess Fund Investment. Staff's flow of funds analysis shows that approximately 252 investors, most of whom were Ontario residents, invested a total of US$15,169,160.72 in the Axcess Investments. Almost all of the foregoing amount can be attributed to the Axcess Automation Investment. Staff's analysis also shows that US$10,356,704.72 was returned to investors.

#### 1. The Axcess Automation Investment

[96] The Axcess Automation Investment, also known to some investors as the "test", was an investment scheme operated by Driver from February 2006 to the end of 2008. The Axcess Automation Investment was premised on Driver's trading in E-mini S&P 500 futures on the Chicago Mercantile Exchange using his proprietary software which would purportedly generate superior returns by monitoring and capitalizing on market volatility.

[97] An investor's participation in the Axcess Automation Investment was evidenced by a letter of agreement that set out the terms of the investment. There are various versions of the letter of agreement in evidence. For example, some letters of agreement identify Driver as the party to the agreement and an "attorney-in-fact" of the investor's funds while others identify Axcess Automation as the party to the agreement and the "trader". In addition, there is an agreement entitled "letter of loan agreement for a test" which will be discussed in further detail in paragraph [119] below. The versions of the letter of agreement in evidence all provide that:

(a) The investor's funds will be used for the purpose of trading E-mini S&P 500 futures;

(b) The investor understands and accepts the risk of the investment and will not hold Driver liable for any losses; and

(c) The investor will receive the principal amount of his or her investment and 20% to 25% of the profit generated by Driver.

In some versions of the letter of agreement, the investment is stated to be on a "best efforts basis".

[98] At the hearing, we heard evidence from witnesses who invested in the Axcess Automation Investment. The evidence shows that (i) A.T. invested US$10,000 in April 2007; (ii) P.A. made an initial investment of US$1,000 in May 2006 and a subsequent investment of US$1,566.08 in June 2006; (iii) Rutledge made an initial investment of $10,000 in July 2007 and a subsequent investment of $16,000 in April 2008; (iv) Ronald invested US$31,200 in July 2007; (v) Reynold invested US$5,000 in July 2007; and (vi) R.M. invested US$1,000 in May 2006, US$3,566.08 in June 2006, US$5,000 in August

2006 and US$6,617.83 in November 2006. A company controlled by R.M. invested US$34,990 in March 2007.

[99] The foregoing witnesses testified about their understanding of the Axcess Automation Investment. For example, witnesses such as P.A. and Rutledge confirmed that the terms of the letter of agreement were consistent with their understanding of the Axcess Automation Investment.

[100] The witnesses were led to believe that Driver's proprietary software would generate "a superior return" by capitalizing on market volatility (Hearing Transcript dated April 14, 2011 at p. 111). In other words, investors would be able to realize returns based on price movement in the market and it did not matter whether the market went up or down. At the hearing, P.A. confirmed his understanding as follows: "whether the market went up or down, Mr. Driver's automated computer system would make money" (Hearing Transcript dated April 14, 2011 at p. 145). Rutledge also testified that "But when a trading index is just flat-lining, your opportunity to make money is minimized. It's the volatile swings where you have your greatest opportunity to make money" (Hearing Transcript dated April 15, 2011 at pp. 99 and 100).

[101] According to the witnesses, the proprietary software designed by Driver would "trade in an automated fashion" (Hearing Transcript dated April 14, 2011 at p. 111). On this point, Rutledge, Ronald and Reynold further elaborated that the computer software was purportedly able to "track the movement of the markets" (Hearing Transcript dated April 15, 2011 at p. 109). The program would indicate when it was a good time to buy and sell, and it was up to Driver to determine whether to execute a trade.

[102] Consistent with the terms set out in the letter of agreement, P.A., Rutledge, Ronald and Reynold understood that investors would receive 25% of the profits generated by Driver's trading activities as a return on their investment. They explained that the remaining 75% of the profits would be retained by Driver, some of which was purportedly used to satisfy his tax obligations with respect to the profits generated.

[103] Witnesses testified that it was conveyed to them that the Axcess Automation Investment was meant to be a short-term investment. According to P.A., he was told that Driver "did not want to commit to a long-term situation where he would be investing other people's funds" and it was "with some convincing that Gordon [Driver] was agreeing to use investors' funds to essentially test out his program" (Hearing Transcript dated April 14, 2011 at p. 125). Rutledge also testified about his understanding, one shared by Ronald and Reynold, that Driver "had no long-term goal or plan to be a day trader, that this was something that was a means to an end. His heart, his passion was in the film industry" (Hearing Transcript dated April 15, 2011 at p. 61). Accordingly, it was the understanding of some investors, such as P.A., Ronald and Reynold, that the continuing participation in the Axcess Automation Investment was subject to Driver's willingness to trade at the end of the terms set out in their respective letters of agreement.

[104] We were presented with evidence that, at its inception, the Axcess Automation Investment had a term of 30 days. At the end of the term, investors had the option of remaining in the program, adding funds to their existing investments or having some or

all of their investments returned, subject to Driver's decision as to whether or not he intended to continue trading for investors. Subsequently, the terms of the investments became 90 days. As investors were given the option to renew their investments at the end of each term, most of the investments continued beyond the 30 or 90-day period stipulated in the various letters of agreement.

[105] As discussed above, investors were given the option to withdraw some or all of their investments. Rutledge and Reynold testified that withdrawal requests made by investors in the Rutledge-Ronald Group and the Reynold Group (as such terms are defined in paragraph [113] below) during the period that the Axcess Investments were still in operation were honored for the most part. We heard further evidence that investors in the Taylor Group (as such term is defined in paragraph [113] below) were also given the option to withdraw funds from their investments. P.A. testified that he confirmed with Driver in e-mail exchanges dated October 10, 2006 that it was open to investors to withdraw their funds. He withdrew US$3,000 in February 2007 and US$10,000 in October 2007.

**2. The Axcess Fund Investment**

[106] The Axcess Fund Investment, also known as the "hedge fund", was the successor to the Axcess Automation Investment and some of the funds invested in the Axcess Automation Investment were purportedly to be transferred to the Axcess Fund Investment. Although it is unclear from the evidence when the Axcess Fund Investment commenced, it appears that the Axcess Fund Investment was mentioned to investors as a possibility in 2008 and first came into existence some time in late 2008 while its predecessor, the Axcess Automation Investment, was still in operation. On April 15, 2009, the Commission issued the Temporary Order against Driver and the Axcess Companies which resulted in the cessation of the operations of the Axcess Investments.

[107] The Axcess Fund Investment was also premised on the use of investors' funds by Driver to trade in E-mini S&P 500 futures, as well as other futures contracts or options. The PPM states: "The business of the Partnership includes, but is not limited to, buying and selling futures contracts, futures options, and any rights pertaining thereto". At the hearing, P.A. and Rutledge confirmed their understanding that the core profit-generating activity would remain Driver's trading activities. Reynold also believed that he would obtain similar returns on the Axcess Fund Investment "because [Driver's] performance would not have changed" (Hearing Transcript dated April 20, 2011 at p. 29).

[108] The structure of the investment scheme, however, was altered purportedly on the advice of Driver's legal counsel to enable Driver to trade on a larger scale. In a teleconference with investors on March 31, 2009, Driver stated:

> ...and when [the Axcess Automation Investment] became successful my concern was that okay so is this you know are we legally having a problem here because of the success? So and at that time that I start to visit the options of getting fully registered into a hedge fund and getting my license and to be able to proceed forward to get people taken care of and to carry on into something that's a, a commercial [*sic*] viable product.

(Transcript of Teleconference on March 31, 2009 at p. 7)

[109] According to the PPM, Axcess Fund was a limited partnership of which Axcess Fund Management was to be the general partner and the purchasers of limited partnership interests were to be the limited partners. Investors had an opportunity to become a limited partner by purchasing limited partnership units at a minimum price of US$250,000.

[110] The PPM further stipulates that "Accredited Investors and a limited number of non-accredited investors will be permitted to make investments in the Partnership pursuant to this offering". The PPM defined "accredited investor" as (i) "Any natural person whose individual net worth, or joint net worth with that person's spouse, at the time of his purchase exceeds $1,000,000"; and (ii) "Any natural person who had an individual income in excess of $200,000 in each of the most recent years or joint income with that person's spouse in excess of $300,000 in each of those years and has a reasonable expectation of reaching the same income level in the current year".

[111] We heard evidence from witnesses that investors were provided with the PPM and a subscription agreement and that an investor could only participate in the Axcess Fund Investment if he or she was deemed eligible by the general partner. In their evidence, the witnesses described the eligibility requirements as requiring "A million dollars [of] assets", "a net worth of…a million dollars", "an annual income of $200,000 U.S.", or being qualified as an "accredited investor" or "sophisticated investor" (Hearing Transcript dated April 14, 2011 at p. 198; and Hearing Transcript dated April 15, 2011 at pp. 129 and 135). P.A.'s testimony, supported by an e-mail from Taylor to another investor dated September 18, 2008 which was introduced into evidence by Staff, suggests that another requirement to participate in the Axcess Fund Investment was to "give back" or to donate to a faith-based charity.

## B. The Investor Groups

[112] The evidence shows that Driver had limited contact with the investors and that many investors learned about and participated in the Axcess Investments through Taylor, Reynold or the Settling Respondents who became known as the "point persons".

[113] The evidence also shows that each of Taylor and Reynold independently operated his own investor groups and that the Settling Respondents together operated another independent investor group. These investor groups will be referred to as the "**Taylor Group**", the "**Reynold Group**" and the "**Rutledge-Ronald Group**", respectively.

### 1. The Taylor Group

[114] An e-mail from Driver to Taylor dated April 26, 2006 in evidence describes the formation of the arrangement between Driver and Taylor. In the e-mail, Driver and Taylor discussed the prospects of Taylor introducing investors to Driver's "investment opportunity".

[115] Taylor acted as a point person for the Taylor Group throughout the Material Time. He established a scheme that facilitated the participation of two groups of investors in the

Axcess Automation Investment that were described as (i) the "direct investors"; and (ii) the "piggyback investors".

[116] The direct investors were investors in the Taylor Group who met the minimum investment requirement of US$25,000 and participated in what was known as the "test", that is, the Axcess Automation Investment. The letter of agreement signed by a direct investor was an agreement between the direct investor and Driver, and included a statement that Driver would not be held liable for the investor's losses. Direct investors were instructed to wire their funds directly to Driver pursuant to wiring instructions provided by Taylor. The investments of the direct investors were administered by Taylor and various versions of the letter of agreement signed by direct investors identify Taylor as having "organized" the agreement or as having coordinated the paperwork for the investment.

[117] P.A., an investor discussed in paragraph [82] above, was a direct investor. Although his principal investment was less than the minimum investment requirement of US$25,000, he was classified as a direct investor because he invested directly with Driver prior to the implementation of a minimum investment requirement, wired funds directly to Driver and entered into a letter of agreement with Driver.

[118] The piggyback investors, including, for example, R.M. and A.T., were investors who wished to invest in the Axcess Automation Investment but were unable to meet the minimum investment requirement of US$25,000. Taylor provided the piggyback investors with the opportunity to invest in the Axcess Automation Investment by pooling their funds and investing the pooled funds with Driver.

[119] The letters of agreement that evidence the investments by piggyback investors were in a different form than the agreements signed by the direct investors. The letter of agreement signed by a piggyback investor was called the "letter of loan agreement for a test". Staff's evidence indicates that a letter of loan agreement for a test was a loan agreement between the piggyback investor and Taylor, rather than Driver, and it is "Taylor or any other person" who would not be held liable for investors' losses under these agreements.

[120] To participate in the Axcess Automation Investment, the piggyback investors would first forward their funds to accounts in the name of Taylor or 1303066 by either wire or cheque. Taylor would, in turn, send the funds to Driver through ICS.

[121] Staff's analysis shows that the Taylor Group was comprised of approximately 130 investors who invested a total of US$2,126,085.48. Of this amount, US$1,337,836 could be attributed to the direct investors and US$788,249.48 could be attributed to the piggyback investors. The Taylor Group collectively received payments from Driver totaling US$4,098,564.91, of which US$2,913,145.54 was received by the direct investors and US$1,185,419.37 was received by the piggyback investors.

### 2. The Reynold Group

[122] Reynold testified at the hearing and admitted that he acted as a point person for the Reynold Group.

[123] Reynold testified that he first met Driver as a teenager at Crossroads Christian Communications, a Christian media ministry, and did not have any further contact with Driver until he moved into the neighborhood in which Reynold's brother, Ronald, resided.

[124] Reynold knew Driver to be a "computer expert" (Hearing Transcript dated April 19, 2011 at p. 118). In 2007, he visited Driver at his home in Freelton, Ontario to purchase a computer from him. During the visit, he noticed charts on Driver's computer screen and inquired about them. Driver explained that he was trading E-mini S&P 500 futures. Driver further explained that he helped develop software to trade which would purportedly "give him the edge" (Hearing Transcript dated April 19, 2011 at p. 123). As a result, Driver "decided to do some paper trading…and it worked really well for [him] and then he started to trade real money once he felt he proved the software is really working" (Hearing Transcript dated April 19, 2011 at p. 122). Driver told Reynold that he was "batting 700 or batting 800", meaning "7 or 8 out of ten trades were favourable for him" (Hearing Transcript dated April 19, 2011 at p. 123). Driver also gave Reynold a brief demonstration during which purportedly "in just a couple of minutes he made about 300 for so, [$]3 or $400" (Hearing Transcript dated April 19, 2011 at p. 122).

[125] At the hearing, Reynold testified that he was very impressed with the results of the demonstration, the technical equipment and the professional setup with "three large monitors in front of him with a lot of information on it" (Hearing Transcript dated April 19, 2011 at p. 121). He thought that the investment was a "fabulous" opportunity and asked Driver if he would trade on his behalf (Hearing Transcript dated April 19, 2011 at p. 124).

[126] Reynold described Driver as being reluctant to trade for Reynold initially, however, when Reynold asked approximately a week later whether Driver would be willing to trade for him if he "gave [Driver] a thousand dollars", Driver agreed to trade for Reynold provided that he was able to "pull together a few of your family or friends and you pull together $25,000" (Hearing Transcript dated April 19, 2011 at p. 124). Reynold testified that Driver "made it clear very early on that he wants to be busy with his trading. He didn't want to deal with a lot of people, so that's when he asked me if I could communicate for him, keep people informed and communicate for him" (Hearing Transcript dated April 19, 2011 at p. 146).

[127] From July 2007 to the end of 2008, Reynold acted as a point person between Driver and investors who were identified by Reynold at the hearing as being his family and friends. The Reynold Group, comprised of 23 people, invested a total of US$4,131,400.96 and subsequently received payments from Driver totaling US$2,875,054.87.

### 3. The Rutledge-Ronald Group

[128] The Settling Respondents testified that they acted as point persons for the Rutledge-Ronald Group.

[129] Ronald also testified that he had been acquainted with Driver in his teenage years, and they only renewed their friendship when Driver moved into the same neighbourhood as Ronald in 2005.

[130] Ronald testified that, in 2007, he learned from his brother, Reynold, that Driver was conducting trading using his computer program. According to Ronald, when he mentioned this to Driver, Driver explained that he did not tell Ronald about his trading activities "because of [their] friendship…Didn't want to have anything come between it" (Hearing Transcript dated April 19, 2011 at p. 53). Nonetheless, having presented Reynold with the opportunity to act as a point person, Driver asked Ronald whether he would like to do the same and "[get] a group of people together to invest" (Hearing Transcript dated April 19, 2011 at p. 55).

[131] Ronald indicated that he did not want to be a point person and asked Driver whether another person could act as a liaison between Driver and investors and Driver indicated that he would be content with that arrangement. Rutledge subsequently became the point person for the Ronald-Rutledge Group.

[132] Rutledge testified that, while Driver had never given him or Ronald a script or asked them to solicit investors, Driver was aware that Rutledge was acting as a point person and was introducing investors to the Axcess Automation Investment.

[133] The Rutledge-Ronald Group was comprised of 45 investors who invested a total of US$2,051,199.39 and subsequently received payments from Driver totaling US$746,507.

### 4. Other Investors

[134] Staff's flow of funds analysis shows 54 investors unrelated to the investor groups discussed above. The 54 investors invested a total of US$6,860,474.89 and subsequently received payments from Driver totaling US$2,636,577.94.

## VI. ISSUES

[135] Staff has made allegations with respect to the Axcess Automation Investment under identical provisions of the OSA and CFA (specifically, sections 25, 126.1(b) and 129.2 of the OSA and sections 22, 59.1(b) and 60.5 of the CFA), in each case relating to the same underlying conduct. In paragraph 23 of the Statement of Allegations, Staff alleges that the Axcess Automation Investment can be defined as a "security" within the meaning of the OSA and/or a "contract" within the meaning of the CFA, which is why the OSA and/or the CFA may be triggered:

> The Axcess Automation Investment was a "security" as defined in clauses (n) and/or (p) of section 1(1) of the *Securities Act*, R.S.O. 1990 c. S.5, as amended (the "*Securities Act*") and/or a "contract" as defined in section 1(1) of the *Commodity Futures Act*, R.S.O. 1990, c. C.20, as amended (the "*Commodity Futures Act*").
>
> [Emphasis added.]

[136] For the reasons set out below, we find that the Axcess Automation Investment is an investment contract and falls in the category of a security and, accordingly, the OSA is applicable. To avoid the unnecessary duplication of allegations and in keeping with the principle articulated in *R. v. Kienapple*, [1975] 1 S.C.R. 729, it is unnecessary to apply the CFA in this matter as the conduct establishing breaches of the CFA is essentially the same conduct that establishes breaches under the identical provisions of the OSA.

[137] Accordingly, this matter raises the following issues for our consideration:

(a) Did the Respondents trade in securities of Axcess Automation Investment and/or the Axcess Fund Investment contrary to subsection 25(1)(a) of the OSA?

(b) Did the Respondents engage in a distribution with respect to the Axcess Fund Investment without a prospectus contrary to subsection 53(1) of the OSA?

(c) Did Driver, the Axcess Companies, Taylor and the Taylor Companies, directly or indirectly, engage or participate in acts, practices or a course of conduct in relation to the Axcess Investments that they knew or reasonably ought to have known would perpetrate a fraud contrary to subsection 126.1(b) of the OSA?

(d) Was Driver responsible for the breaches of the Axcess Companies, was Taylor responsible for the breaches of the Taylor Companies and was Reynold responsible for the breaches of WCC pursuant to section 129.2 of the OSA?

(e) Was the Respondents' conduct contrary to the public interest and harmful to the integrity of the Ontario capital markets?

[138] We will assess each of these issues by considering the evidence in this matter, including the evidence summarized below, and by determining whether, on a balance of probabilities, "…it is more likely than not that the event occurred" (*F.H. v. McDougall*, [2008] 3 S.C.R. 41 ("***McDougall***") at para. 44). As stated by the Supreme Court, evidence must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test (*McDougall*, *supra*, at para. 46).

## VII. EVIDENCE AND ANALYSIS

### A. Did the Respondents trade in the securities of the Axcess Automation Investment and/or the Axcess Fund Investment contrary to subsection 25(1)(a) of the OSA?

#### 1. The Applicable Law

#### (a) Securities and Investment Contracts

[139] Subsection 1(1) of the OSA defines a "security" to include:

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

…

(e) any bond, debenture, note or other evidence of indebtedness, share, stock, unit, unit certificate, participation certificate, certificate of share or interest, preorganization certificate or subscription…,

…

(n) any investment contract,

…

whether any of the foregoing relate to an issuer or proposed issuer;

[140] The definition of a "security" includes an "investment contract" and, although, the OSA does not define that term, an investment contract has been defined by the Supreme Court as an investment of money in a common enterprise with profits to come from the efforts of others (*Pacific Coast Coin Exchange v. Ontario Securities Commission*, [1978] 2 S.C.R. 112 ("***Pacific Coast Coin***") at p. 128). According to the Supreme Court, a "common enterprise" describes a situation in which investors' fortunes are interwoven with and dependent upon the efforts and success of those seeking the investment of third parties (*Pacific Coast Coin*, *supra*, at p. 129).

[141] The elements of an investment contract that constitute a security can be summarized as follows:

(a) The advancement of money by an investor,

(b) with an intention or expectation of profit,

(c) in a common enterprise in which the fortunes of the investor are interwoven with and dependent upon the efforts and success of those who solicit the capital or third parties, and

(d) where the efforts made by those other than the investors are the undeniably significant ones, those essential managerial efforts which affect the failure or success of the enterprise.

(See *Pacific Coast Coin*, *supra*, at pp. 128 to 132; *Re Sabourin* (2009), 32 O.S.C.B. 2707 ("***Sabourin***") at para. 35; and *Re Borealis International Inc*. (2011), 34 O.S.C.B. 777 ("***Borealis***") at para. 60)

**(b) Trading and Acts in Furtherance of Trades**

[142] Under subsection 1(1) of the OSA, a "trade" in securities includes:

(a) any sale or disposition of a security for valuable consideration, whether the terms of payment be on margin, instalment or otherwise, but does not include a purchase of a security or, except as provided in clause (d), a

transfer, pledge or encumbrance of securities for the purpose of giving collateral for a debt made in good faith,

(b) any participation as a trader in any transaction in a security through the facilities of any stock exchange or quotation and trade reporting system,

…

(e) any act, advertisement, solicitation, conduct or negotiation directly or indirectly in furtherance of any of the foregoing.

[143] The Commission has established that trading is a broad concept that includes any sale or disposition of a security for valuable consideration, including any act, advertisement, solicitation, conduct or negotiation directly or indirectly in furtherance of such a sale or disposition. This interpretation has also been confirmed by the Ontario courts in their acknowledgement that "[r]egarding 'trade', the legislature has chosen to define the term and they have chosen to define it broadly in order to encompass almost every conceivable transaction in securities" (*R v. Sussman* (1993), 16 O.S.C.B. 1209 (Ont. Ct.) at p. 1230).

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

(a) Providing potential investors with subscription agreements to execute;

(b) Distributing promotional materials concerning potential investments;

(c) Issuing and signing share certificates;

(d) Preparing and disseminating materials describing investment programs;

(e) Preparing and disseminating forms of agreements for signature by investors;

(f) Conducting information sessions with groups of investors; and

(g) Meeting with individual investors.

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

[145] The inclusion of the word "indirectly" in the description of acts in furtherance of trades reflects the intention by the legislature to capture conduct which seeks to avoid registration requirements by doing indirectly that which is prohibited directly (*Momentas*, *supra*, at para. 79).

[146] Whether an act is in furtherance of a trade in securities is a question of fact, to be determined in each case, based on whether there is a sufficiently proximate connection to the trade (*Re Costello* (2003), 26 O.S.C.B. 1617 at para. 47).

**(c) Registration**

[147] Subsection 25(1)(a) of the OSA prohibits persons or companies from trading in securities without being registered:

> 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.

[148] Registration requirements play a key role in Ontario securities law. They impose requirements of proficiency, good character and ethical standards on those people and companies trading in and advising on securities. As the Commission stated in *Limelight*:

> Registration serves an important gate-keeping mechanism ensuring that only properly qualified and suitable individuals are permitted to be registrants and to trade with or on behalf of the public. Through the registration process, the Commission attempts to ensure that those who trade in securities meet the applicable proficiency requirements, are of good character, satisfy the appropriate ethical standards and comply with the [OSA].
>
> (*Limelight*, *supra*, at para. 135)

[149] In order for there to be fairness and confidence in Ontario's capital markets, it is critical that brokers, dealers and other market participants who are in the business of selling or promoting securities meet the minimum registration, qualification and conduct requirements of the OSA (*Momenta*s, *supra*, at para. 46).

[150] Accordingly, the requirement that individuals and companies be registered to trade in securities is an essential element of the regulatory framework established to achieve the purposes of the OSA (*Limelight*, *supra*, at para. 135).

## 2. Analysis

### (a) Registration

[151] Based on the testimony of Kozovski and the section 139 certificates introduced into evidence by Staff, it is clear that none of the Respondents was registered in any capacity under the OSA.

### (b) Investment Contracts

[152] For the following reasons, the letters of agreement relating to the Axcess Automation Investment satisfy the requirements for an investment contract set out in *Pacific Coast Coin* and are therefore "securities" within the meaning of the OSA:

(a) Investors provided money to be invested in the Axcess Automation Investment. As set out in paragraphs [95] and [98] above, we heard from a number of witnesses who invested in the Axcess Automation Investment. We accept Staff's analysis that approximately 252 investors invested a total of US$15,169,160.72 in the Axcess Investments and that most of the funds raised could be attributed to the Axcess Automation Investment.

(b) Investors had expectations of profit based on the terms of the letters of agreement and the representations made to them. They expected that they would receive 20% to 25% of the total trading profits generated by Driver.

(c) The investors and Driver were in a common enterprise in which the investors' fortunes were interwoven and dependent on Driver's successful trading of E-mini S&P 500 futures using his proprietary software. This is well illustrated by P.A.'s testimony with respect to an e-mail he received from Taylor dated June 16, 2006 stating that "The Test's gain as of today, June 16 is $22,100". P.A. explained his understanding that a pool of funds, including his own investment, was being used by Driver to trade in E-mini S&P 500 futures and that the gain of US$22,100 as of June 16, 2006 was shared by all of the investors, including himself.

(d) As P.A. and Ronald testified, the investors themselves had no role in the Axcess Automation Investment beyond the provision of funds. Driver's efforts with respect to his trading activities determined the failure or success of the enterprise.

[153] A limited partnership unit of the Axcess Fund is clearly a "bond, debenture, note or other evidence of indebtedness, share, stock, unit, unit certificate, participation certificate, certificate of share or interest, preorganization certificate or subscription" as set out in paragraph (e) of the definition of "security" in subsection 1(1) of the OSA. The limited partnership units also satisfy the requirements for an investment contract as described in *Pacific Coast Coin* for the reasons set out in paragraph [152] above.

[154] We find that the agreements underlying the Axcess Automation Investment and the limited partnership units underlying the Axcess Fund Investment constituted securities within the meaning of the OSA.

**(c) Trading and Acts in Furtherance of Trades**

**(i) Driver and the Axcess Companies**

[155] Driver was the creator of the Axcess Investments. With respect to the Axcess Automation Investment, Driver and Axcess Automation entered into investment contracts which provided for their receipt of investors' funds in exchange for the investors' right to receive a return of the principal amounts they invested and a share of the purported gains derived from Driver's trading in E-mini S&P 500 futures.

[156] With respect to the Axcess Fund Investment, Driver created Axcess Fund and Axcess Fund Management and established Axcess Fund Management as the general partner of Axcess Fund. The limited partnership units issued by Axcess Fund were to be sold for valuable consideration in the amount of US$250,000 each.

[157] In paragraph [152](a) above, we accept Staff's analysis that Driver received a total of US$15,169,160.72 from investors in the Axcess Investments.

[158] The evidence shows that Driver had occasionally met or directly communicated with investors about the Axcess Investments. Ronald and Rutledge gave consistent and credible testimony that they facilitated meetings between small groups of investors and Driver. According to Ronald, two such meetings took place in Burlington, the first in early to mid-July 2007 and, the second, at Ronald's home in late July 2007. Rutledge testified that he arranged for investors to meet Driver at Ronald's house in July 2007 and in Las Vegas in February 2009 and personally attended these meetings. Reynold also testified that he arranged meetings between Driver and investors and that he attended some of these meetings.

[159] In their testimony, Ronald and Rutledge were consistent in their descriptions of what happened during the meetings with Driver. They testified that Driver demonstrated his computer program, explained how the software was able to generate returns and discussed the percentage returns he would be able to realize. For example, Rutledge described the meeting in Las Vegas in February 2009 as follows:

> …[Driver] had a laptop and he utilized the laptop to show the software. He logged in and showed it monitoring the indices, although with the time change, it was coming very close to the end of trading day, so we weren't on long, but we saw how the software operated.
>
> And then essentially we just had a question-and-answer time fielding questions from these men, went into his background, his computer development, the development of the software, his own experience with the trading of the program in its initial test phase, the returns that he had been getting.

…

> He described, as we have been stating, that when he went into his test phase and then on into the real money, that he was typically getting close to 25 percent a month for an investor.
>
> (Hearing Transcript dated April 15, 2011 at p. 151)

[160] We were also presented with a recording of a teleconference held on March 31, 2009 involving Driver, Taylor and the Taylor Group. Although the link to the recording was provided by an anonymous source, it was verified independently by a Staff investigator and corroborated by the records that Staff obtained from the Respondents. It is also consistent with A.T.'s testimony that Taylor held telephone conferences every month to answer questions from investors. Accordingly, we accept that the recording evidences Driver and Taylor's participation in a teleconference on March 31, 2009. The recording indicated that, during the teleconference, Driver discussed the Axcess Investments, including his trading activities of the day, the 100% return that he was able to achieve over the span of one week, the transition from the Axcess Automation Investment to the Axcess Fund Investment and the eligibility requirements for the Axcess Fund Investment.

[161] The evidence nonetheless shows that, while Driver sold securities to investors, he had little or no direct contact with many of them. Instead, as set out in paragraphs [112] to [133] above, he entered into informal arrangements with point persons who would communicate with investors and perform administrative tasks on his behalf for which they were paid commissions.

[162] For example, Rutledge and Ronald understood that they would receive 5% of "[Driver's] company's growth" as commissions which were to be shared between them (Hearing Transcript dated April 15, 2011 at p. 44). Reynold also understood that he would be paid "five percent of the money that [he brought] to [Driver]" (Hearing Transcript dated April 19, 2011 at p. 125). More specifically, Reynold explained that the commissions would be 5% of the trading profits that Driver retained, or 3.75% of the total profits generated by Driver's trading activities.

[163] We accept Staff's flow of funds analysis which shows that both Taylor and Reynold received funds from Driver. Driver transferred US$1,430,216 to Taylor and the Taylor Companies, and $210,219.50 to Reynold and WCC. Although Reynold testified that there was no clear distinction as to whether the funds he received were a return on his investment or commissions, we find that Taylor and Reynold received payments as a result of acting as point persons for Driver.

[164] As part of the arrangement with the point persons, Driver provided them with documents and information to be conveyed to investors. For example, each of Ronald, Rutledge and Reynold testified that they provided letters of agreement to friends and family who wished to invest in the Axcess Automation Investment. An e-mail from Driver to Taylor dated May 8, 2006, introduced into evidence through Kozovski, shows

that Driver attached to the e-mail a form of a letter of agreement for Taylor to provide to investors in the Taylor Group.

[165] The form of letter of agreement that Driver provided to the point persons set out wiring instructions directing investors to wire funds to Driver's bank accounts, and Driver also provided wiring instructions to point persons to be given to investors. For example, A.T. testified that Taylor received wiring instructions from Driver. Reynold, Ronald and Rutledge testified that Driver provided them with wiring information and instructed them to inform investors that any funds were to be transferred directly to Driver's bank accounts.

[166] Further, Driver communicated the return on or value of the investments to the point persons with the expectation that the information would be conveyed to investors. Rutledge testified that Driver initially provided him with investor statements that included the investors' names and the value of their investments, and subsequently with percentage returns, to be provided to investors. Rutledge explained that, as the number of investors increased, Driver suggested "why don't I just send you the percentage…I'll just provide you the percentage return each week and then you put that into your Excel spreadsheet and you can fire off your reports to your investors" (Hearing Transcript dated April 15, 2011 at p. 70). Rutledge's testimony was corroborated by the e-mail correspondence in evidence.

[167] Similarly, Ronald testified that, during one of the meetings discussed in paragraph [158] above, Driver said to investors "here's what you can expect and I'll send you regular e-mails through the point person that would let you know how I'm doing" (Hearing Transcript dated April 19, 2011 at p. 72).

[168] Reynold also testified that he received updates from Driver with trading results. During the hearing, Reynold was asked about a statement on the letter of agreement that "the trader will send reports by electronic mail to the investor on a weekly basis". Reynold responded that the statement meant he would receive percentage returns from Driver and relay them to investors.

[169] In the case of the Taylor Group, A.T. testified that Driver sent spreadsheets to Taylor with information about the investors and the value of their investments, and that she overheard discussions between Taylor and Driver on the telephone about the spreadsheets. This is supported by the evidence of Kozovski that she conducted a metadata examination of the spreadsheets obtained from both Driver and Taylor and found that Driver was the creator of the spreadsheets.

[170] In addition to the value of or return on the investments, we were presented with evidence that Driver sent the point persons screenshots of purported trading on Driver's computer to be passed on to investors. Rutledge, Ronald and Reynold described these screenshots as comparable to the contents of the screen they saw during Driver's demonstrations of his trading activities.

[171] In 2008, Driver began communicating information to the point persons about his progress in obtaining a "Series 3" license in the U.S. and in establishing the hedge fund,

which information was forwarded to investors by the point persons. According to Rutledge, Driver "made it very clear that it was his intent to get his Series 3 exam because that would be required by law to manage a hedge fund" (Hearing Transcript dated April 15, 2011 at p. 122). Similarly, Reynold testified that, on the basis of information provided to him by Driver, he sent an email to some investors in the Reynold Group dated September 6, 2008 in which he stated that Driver had "passed the series 3 exam. He now will be licensed to run a hedge fund. Gord [Driver] is having his prospectus being approved by the governing body and feels that the Hedge Fund should be operational before October 1st".

[172] Subsequently, the PPM and a subscription agreement for the Axcess Fund Investment were provided to the point persons for distribution to investors. Ronald, Rutledge and Reynold all testified that they received a subscription agreement and/or the PPM from Driver and provided them to investors. E-mails from Driver dated November 7 and 17, 2008 show that Driver provided Taylor with the PPM and an application for the Axcess Fund Investment.

[173] We were also presented with evidence that Driver maintained bank accounts related to the activities of the Axcess Investments. We are satisfied that Staff's flow of funds analysis, supported by the banking records, shows that Driver maintained and controlled eight bank accounts in his name or in the name of Axcess Automation for the receipt and transfer of investor funds. Driver is listed as a signing authority for these accounts and signed all cheques drawn on, and endorsed all deposits to, these accounts.

[174] The analysis further shows that these accounts were used, among other things, to (i) receive investor funds, usually by wire transfer, in the aggregate amount of US$15,169,160.72; (ii) make payments to investors by wire transfer or cheque in the aggregate amount of US$10,356,704.72; (iii) pay commissions to point persons, as described in paragraph [163] above; and (iv) transfer funds to trading accounts in the aggregate amount of approximately US$3,621,665.

[175] Staff's analysis shows that, during the Material Time, Driver used the US$3,621,665 described in paragraph [174] above for futures trading and incurred a cumulative net loss of approximately US$3,532,237.52.

[176] We conclude that the conduct of Driver and the Axcess Companies discussed above constituted trades and acts in furtherance of trades within the meaning of the OSA relating to both the Axcess Automation Investment and Axcess Fund Investment.

**(ii) Taylor and the Taylor Companies**

[177] Throughout the Material Time, Taylor acted as the point person between Driver and the investors in the Taylor Group. As set out in paragraphs [115] to [121] above, Taylor established a scheme which enabled two types of investors, the direct investors and the piggyback investors, to participate in the Axcess Automation Investment. Staff's analysis shows that the Taylor Group invested a total of US$2,126,085.48 and received payments from Driver totaling US$4,098,564.91.

[178] Taylor solicited investors to participate in the Axcess Automation Investment. We heard evidence from A.T., who worked for Taylor from April to September 2007, that she was required to invest in the Axcess Automation Investment and a portion of her salary in the amount of $10,000 was withheld by Taylor for that purpose. A.T. testified that, when requiring her to invest, Taylor described the Axcess Automation Investment as "a good investment and that your money will grow and we could teach you how to invest your money and how you will get an increase on it" (Hearing Transcript dated April 13, 2011 at p. 142).

[179] We also heard from A.T. and P.A. that Taylor solicited investors to participate in the Axcess Automation Investment at events and seminars that Taylor hosted. P.A. testified that, at these events and seminars, various speakers were invited to discuss particular investment products and Taylor discussed the Axcess Automation Investment with a number of people who were interested. Similarly, A.T. testified that, as the employee who arranged travel for Taylor, she understood that the Axcess Automation Investment was discussed at these events and seminars.

[180] According to P.A., in Taylor's solicitation of investors, he described the Axcess Automation Investment as "a program that had been written by Gordon [Driver] and was being tested by Gordon [Driver] and was brought to us as an opportunity to potentially get or be involved in a [*sic*] investment that gave us a better return than we might normally expect" (Hearing Transcript dated April 14, 2011 at pp. 111 and 112). P.A. further testified that Taylor also described Driver as "being genius in what he did" and "vouched for his…abilities, integrity, because he knew Steven [Taylor] as a childhood friend and had known him since that time" (Hearing Transcript dated April 14, 2011 at p. 112).

[181] In his capacity as a point person, Taylor was responsible for the administration of the Axcess Automation Investment on behalf of the investors in the Taylor Group and the evidence shows that Taylor maintained an office and hired staff for that purpose. A.T. testified that she worked for Taylor from April to September 2007, her relationship with Taylor was that of an independent contractor, she would only take instructions from Taylor and that her compensation was paid by Montecassino. She described Taylor's office in Markham and other employees at the office, including an individual who will be referred to as "**T.**" in these Reasons and Decision.

[182] P.A. also testified that Taylor maintained a home office in Markham which P.A. was able to describe in his testimony as he had visited Taylor's office to discuss the Axcess Automation Investment or to attend learning events or seminars. P.A. testified that he knew Taylor had hired employees, including A.T. and T., to administer the Axcess Automation Investment. The evidence also shows that P.A. received e-mail updates from T. about both the Axcess Automation Investment and the Axcess Fund Investment.

[183] The process of administering the Axcess Automation Investment was initiated by the provision of the form of a letter of agreement (or letter of loan agreement). A.T. confirmed that letters of agreement (or letters of loan agreement) were provided by Taylor or his staff to investors to be completed and signed.

[184] The letters of agreement (or letters of loan agreement) set out wiring or payment instructions, and both A.T. and P.A. testified that Taylor orally communicated these instructions to investors.

[185] According to A.T., following the receipt of a completed letter of agreement and payment for the investment, a client file would be opened and maintained at Taylor's office. A.T. testified that when she was working for Taylor at his office, one of her duties was to maintain the client files. She testified that the files were colour-coded and that the contents of the file included "signed papers or any correspondence that happened between us and the client" (Hearing Transcript dated April 13, 2011 at p. 149).

[186] The evidence shows that withdrawal requests by investors were communicated to Driver through Taylor, and that Taylor implemented a system to facilitate the withdrawal requests. In her evidence, A.T. described an automated system by which an investor would simply click on a link and enter the dollar amount that he or she wished to withdraw, and the request would be forwarded to e-mail accounts held by Taylor and A.T. P.A. also testified that he communicated his withdrawal requests to Taylor by e-mail.

[187] Following an investor's withdrawal request, the name of the investor would be added to a document referred to as the "queue", which A.T. described as "a list of names with the dollar amount and where you were as in whether you're first or last" (Hearing Transcript dated April 13, 2011 at p. 176). Based on her metadata examination of the queue, Kozovski testified that the document had been created by ACG.

[188] Taylor and his staff also facilitated the withdrawal process by distributing cheques to investors. For example, A.T. testified that she would receive cheques payable to investors from Taylor who had received them from Driver. She was responsible for reviewing the cheques as there would always be mistakes. In that case, she would return the cheques to Taylor to be returned to Driver. Once she confirmed that the cheques were correct, A.T. would send them to investors. P.A.'s testimony that he went to Taylor's office to pick up a cheque is confirmatory of Taylor's role in the distribution of cheques.

[189] Staff provided us with documents relating to bank accounts at the Royal Bank of Canada in the name of Taylor and 1303066. The banking documents show that Taylor was a signing authority on the accounts to which he deposited investor funds and from which he transferred funds to Driver to be invested and make payment to investors.

[190] In addition to administrative work, Taylor's role as a point person also included communicating with investors about the status of their investments. According to A.T., she responded to investor inquiries over the telephone and indicated that investors were usually "calling in to see where their money was, when they're going to get their cheque, what number were they on in the queue" (Hearing Transcript dated April 13, 2011 at p. 156).

[191] Throughout the Material Time, Taylor or his staff sent e-mail communications to investors advising them of the purported value of or return on their investments. For example, A.T. gave evidence that she received an e-mail update from Taylor dated

October 4, 2007 that the US$10,000 investment she made in April 2007 had grown to US$19,600 in October 2007. P.A. testified that he received similar updates throughout the Material Time, including an e-mail from Taylor dated June 19, 2006 that the initial US$1,000 investment he made in May 2006 had grown to US$1,433.92 in June 2006.

[192] As mentioned in paragraph [169], A.T. testified that Taylor and Driver were in contact every day and that she overheard discussions between them about spreadsheets which Driver provided to Taylor and which included investors names and the value of, or return on, their investments. A.T. testified that Taylor "always worked on them, so they never went out directly to the clients right away. He would work on them. What he did I'm not sure…And then after a certain point he would give me the okay and we would send them out" (Hearing Transcript dated April 14, 2011 at p. 8).

[193] Similarly, when P.A. was asked about the spreadsheets during the hearing, he described his understanding that Taylor was "taking that information [from Driver] and verifying the information and then turning it over…" (Hearing Transcript dated April 14, 2011 at p. 188).

[194] E-mail communications originating from Taylor or his office also included, for example, information about Driver's willingness to continue trading on behalf of investors, screenshots of Driver's computer screen that captured Driver's purported trading activities and a document entitled "An Interview with Gordon" dated December 17, 2007 in which Taylor stated that "I as well as many others are so pleasantly pleased with the outcome" and Driver stated "I didn't realize the test was going to be so successful".

[195] P.A. also received e-mails from Taylor or T. regarding the transition to the Axcess Fund Investment. For example, an e-mail from Taylor dated November 27, 2007 discussed the "resturcting [*sic*]", the "incorporation side of the plan" and "becoming a CTA[3]". In an e-mail dated June 25, 2008, T. stated "I firmly believe that everything is moving forward towards the hedge fund. Once there most of the issues will disappear". We were also presented with evidence that Taylor made reference to the PPM in various e-mails to investors, including an e-mail to P.A. dated June 16, 2008 and an e-mail to an investor dated October 29, 2008 stating "All the REAL details will be in the PPM. It will answer your questions" [emphasis added.]. A.T. similarly testified that she received an e-mail dated April 11, 2008 in which Taylor made reference to Driver being excited about the Axcess Fund Investment.

[196] In addition, the evidence shows that Taylor personally met with investors to discuss their investments. A.T. testified that she scheduled Taylor's appointments with investors and prepared client files for Taylor in advance of the meetings. P.A. confirmed that he met with Taylor at Taylor's office to review his investments and recalled being shown his account information on the computer screen at one of the meetings.

[197] We also heard evidence that Taylor held conference calls to answer questions about the Axcess Investments. As set out in paragraph [160] above, A.T. testified that

[3] Commodity Trading Advisor.

Taylor held monthly teleconferences which she helped to organize. She explained that questions about the Axcess Automation Investment would be collected from investors in advance and that she would mute each investor during the teleconferences, Taylor responded to the questions and gave updates by way of a general overview. Again, we accept the recording of the teleconference on March 31, 2009 as an example of such teleconference and we find that Taylor played a significant role in the teleconference in discussing the Axcess Investments. Among other things, he spoke about the transition from the Axcess Automation Investment to the Axcess Fund Investment and continued to endorse both.

[198] Staff's flow of funds analysis shows that Taylor received commissions or other payments from Driver totaling US$1,430,216, of which US$120,000 was received by Taylor personally, US$314,606 was received through 1303066, US$805,610 was received through Berkshire and US$190,000 was received through Montecassino.

[199] Based on the foregoing, we conclude that the evidence demonstrates that Taylor and the Taylor Companies engaged in trades and acts in furtherance of trades within the meaning of the OSA in relation to both the Axcess Automation Investment and the Axcess Fund Investment.

**(iii) Reynold and WCC**

[200] From July 2007 to the end of 2008, Reynold acted as the point person for the Reynold Group. Staff's analysis shows that the Reynold Group invested a total of US$4,131,400.96 and that payments totaling US$2,875,054.87 were subsequently made to them by Driver.

[201] As set out above in paragraph [81], Reynold admitted to paragraphs 20, 33, 34, 35, 39 and 40 of the Statement of Allegations. Reynold also testified at the hearing and provided us with further evidence concerning his involvement in the Axcess Investments. He admitted that he introduced investors to the Axcess Automation Investment, all of whom he identified as family and friends. In his evidence, Reynold described the way in which he discussed the Axcess Automation Investment with investors. He testified that he prepared an Excel document showing the growth of his investment and showed them to investors:

> And just in the course of family life or just with my friends, I just told them this [is] an amazing opportunity that has just landed in my lap, so to speak, and it's there and I'm doing this and I'm excited about it, and here are the numbers, here are some of the returns. Here's what's happening to me. Some of them I showed them that chart that I did on my own investment. I said, "Look at this, isn't this amazing," and –
>
> (Hearing Transcript dated April 19, 2011 at p. 144)

[202] Reynold acknowledged that he organized or facilitated meetings between Driver and approximately 15 investors.

[203] As a point person, Reynold was responsible for administering the Axcess Automation Investment on behalf of the Reynold Group. He testified that he obtained the form of a letter of agreement from Driver, made suggestions to Driver to "make it more clear and understandable" and distributed letters of agreement to investors (Hearing Transcript dated April 19, 2011 at p. 132). Once investors completed and signed the letters of agreement, they returned them to Reynold who in turn returned them to Driver for his signature. If an investor wanted to retain a copy of the completed letter of agreement signed by Driver, Reynold would make that request to Driver on behalf of the investor.

[204] Reynold admitted that he relayed wiring instructions given to him by Driver to investors. He testified that, on rare occasions, he accepted cheques from investors in sealed envelopes and delivered them to Driver. He also assisted Driver by keeping track of incoming investor funds and by informing Driver that investors would be wiring funds to Driver's account.

[205] He also facilitated the return of investor funds by communicating withdrawal requests by investors to Driver.

[206] In addition to the administration of the Axcess Automation Investment, another function of a point person performed by Reynolds was to inform investors about Driver's trading activities. Having obtained the percentage returns on the Axcess Automation Investment from Driver, Reynold would communicate those returns to investors by e-mail.

[207] E-mail messages Reynold sent to investors also included, for example, screenshots of Driver's computer screen that captured Driver's purported trading activities and updates informing investors when Driver would be able to start trading for the Reynold Group.

[208] In 2008, Reynold informed investors about the transition from the Axcess Automation Investment to the Axcess Fund Investment. For example:

(a) In an e-mail dated April 14, 2008, Reynold communicated to investors that: "…there are some changes that will be coming down the pipe in the next few months that will take the whole investment to the next level professionally, in security, in accountability etc. Gord [Driver] is heading toward licensing and establishing a registered 'hedge fund'. Don't know all the details at this point but it will be ultimately better for us as investors".

(b) In an e-mail dated September 10, 2008, Reynold communicated to investors that: "Gord [Driver]…has passed his licensing exam for the hedge fund which was the final hurdle he needed to get over. The hedge fund is now in final stage approvals. There are some changes that are coming into effect like the 3 month compound cycle…we'll keep you posted on the transitions that will take place over the next few weeks and months".

Reynold confirmed in his testimony that he received the foregoing information from Driver.

[209] When the Axcess Automation Investment was purportedly to be transferred to the Axcess Fund Investment, Reynold provided the PPM for the Axcess Fund Investment to some investors.

[210] Reynold was promised commissions for acting as a point person. He understood that the commissions would be 5% of the trading profits that Driver retained, or 3.75% of the total profits generated by Driver's trading activities, which was the same as the arrangements with Rutledge and Ronald described in paragraph [162] above. According to Reynold, although commissions were not paid to him directly on a regular basis and were only paid to him on request, they were purportedly accrued for him, added to the principal of his investment and recorded in a separate column on a statement. He admitted that he received funds from Driver either personally or through WCC, although it is unclear whether the amounts represented the return on Reynold's investment or commissions, or both.

[211] Staff's flow of funds analysis shows that Reynold received a total of $210,219.50 from Driver, of which $9,987 was received by Reynold personally and $200,232.50 was received through an account in the name of WCC.

[212] Based on Reynold's admissions and evidence described above, we find that Reynold and WCC engaged in trades and acts in furtherance of trades within the meaning of the OSA in relation to both the Axcess Automation Investment and the Axcess Fund Investment.

### 3. Findings

[213] We find that all of the Respondents engaged in trades or acts in furtherance of trades in relation to both the Axcess Automation Investment and the Axcess Fund Investment without being registered to do so. As discussed in paragraphs [224] to [233] below, as no exemptions from the registration requirements were available, the Respondents acted contrary to subsection 25(1)(a) of the OSA.

## B. Did the Respondents engage in a distribution with respect to the Axcess Fund Investment without a prospectus contrary to subsection 53(1) of the OSA?

### 1. The Applicable Law

[214] Subsection 53(1) of the OSA sets out the prospectus requirement for trades that constitute a distribution:

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

[215] The definition of "distribution" under subsection 1(1) of the OSA provides that:

> "distribution", where used in relation to trading in securities, means,

(a) a trade in securities of an issuer that have not been previously issued,

…

[216] The prospectus requirement plays an essential role for the protection of investors. As stated by the Supreme Court of Ontario (now the Superior Court of Justice) in *Jones v. F.H. Deacon Hodgson Inc.* (1986), 9 O.S.C.B. 5579 (H.C.) at p. 5590: "There can be no question but that the filing of a prospectus and its acceptance by the Commission is fundamental to the protection of the investing public who are contemplating purchase of the shares". The prospectus requirement ensures that prospective investors have sufficient information to ascertain the risk level of their investment and to make informed investment decisions (*Re First Global Ventures, S.A.* (2007), 30 O.S.C.B. 10473 at para. 145).

[217] For a trade in securities of an issuer that have not been previously issued, it is therefore important that a prospectus be issued to protect the public.

**2. Analysis**

[218] Staff only made allegations that the Respondents contravened subsection 53(1) of the OSA in their conduct relating to the Axcess Fund Investment. Staff did not allege that the Respondents contravened subsection 53(1) of the OSA in their conduct relating to the Axcess Automation Investment.

[219] As established above in our discussion of subsection 25(1)(a) of the OSA, the Respondents all engaged in trades and/or acts in furtherance of a trade in relation to the Axcess Fund Investment. Accordingly, the Respondents traded the securities of an issuer as contemplated by paragraph (a) of the definition of "distribution" under the OSA.

[220] The second requirement of the definition is that the securities in question have not been previously issued. In the present matter, the sale of the limited partnership units in connection with the Axcess Fund Investment was the first issuance of the securities thereby satisfying the requirement that the securities have not been previously issued. Accordingly, the trades of these securities constituted a distribution within the meaning of the OSA.

[221] We received no evidence that a prospectus was filed with the Commission.

[222] We also note that Reynold admitted to having engaged in a distribution of securities in relation to the Axcess Fund Investment for which no preliminary prospectus or prospectus was filed and for which no receipt was issued by the Director.

**3. Findings**

[223] We find that all of the Respondents engaged in a distribution of securities in relation to the Axcess Fund Investment for which no prospectus was filed. As discussed in paragraphs [224] to [233] below, no exemptions from the prospectus requirement were available. Accordingly, we find that the Respondents contravened subsection 53(1) of the OSA in their conduct relating to the Axcess Fund Investment.

## C. Were any Exemptions Available to the Respondents?

[224] As set out in subsection 25(1)(a) of the OSA, no person or company shall "trade in a security" unless the person or company "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". Subsection 53(1) of the OSA provides that "no person or company shall trade in a security…if the trade would be a distribution of the security, unless a preliminary prospectus and a prospectus have been filed and receipts have been issued for them by the Director".

[225] However, there are numerous exemptions from the registration requirement, many of which are similar to the exemptions from the prospectus requirement. Some exemptions are explicitly set out in securities legislation or rules, while other exemptions are granted by the Commission on a discretionary basis.

[226] Once Staff has shown that the Respondents have traded securities without registration or engaged in a distribution without filing a prospectus, the onus shifts to the Respondents to establish that one or more exemptions from the registration or distribution requirements were available to them (*Limelight*, *supra*, at para. 142).

[227] The evidence suggests that, from time to time in connection with their sale of the Axcess Investments, the Respondents purported to rely on certain exemptions from the registration and prospectus requirements set out in Part 2 of National Instrument 45-106 – Prospectus and Registration Exemptions, such as the accredited investor exemption and the private issuer exemption and in the case of the Axcess Fund Investment, the minimum amount investment exemption. Having considered the evidence before us, such as the financial circumstances of the investors and the absence of any intention or process to determine the eligibility of investors to participate in the Axcess Investments, including whether prospective investors would quality as accredited investors, and whether there should be controls on the number of investors, we are not persuaded that any exemptions were available to the Respondents.

[228] Staff submits that, pursuant to the Commission Rule 91-503 – *Trades in Commodity Futures Contracts and Commodity Futures Options Entered into on Commodity Futures Exchanges Situate Outside of Ontario – Rules Under the Securities Act* ("**OSC Rule 91-503**"), an exemption from the registration and distribution requirements under the OSA was available to the Respondents.

[229] OSC Rule 91-503 provides that:

> A. Registration Exemption – Section 25 of the [OSA] does not apply to a trade in, or advice given in respect of, an exempt exchange contract.
>
> B. Prospectus Exemption – Section 53 of the [OSA] does not apply to a trade in an exempt exchange contract.

[230] OSC Rule 91-503 also provides the following definitions:

> "CFA["] means "the *Commodity Futures Act*";

> "commodity futures contract", "commodity futures exchange" and "commodity futures option" have the respective meanings ascribed to them in the CFA;
>
> "exempt exchange" means a commodity futures exchange that is not registered with or recognized by the Commission under the CFA and the forms of contracts of which are not accepted by the Director under the CFA; and
>
> "exempt exchange contract" means a commodity futures contract or a commodity futures option entered into on an exempt exchange.

[231] "Commodity futures contract", "commodity futures exchange" and "commodity futures option" are defined in the CFA as follows:

> "commodity futures contract" means a contract to make or take delivery of a specified quantity and quality, grade or size of a commodity during a designated future month at a price agreed upon when the contract is entered into on a commodity futures exchange pursuant to standardized terms and conditions set forth in such exchange's by-laws, rules or regulations;
>
> "commodity futures exchange" means an association or organization, whether incorporated or unincorporated, operated for the purpose of providing the facilities necessary for the trading of contracts;
>
> "commodity futures option" means a right, acquired for a consideration, to assume a long or short position in relation to a commodity futures contract at a specified price and within a specified period of time and any other option of which the subject is a commodity futures contract;

[232] Staff submits that the Chicago Mercantile Exchange is an "exempt exchange" and the contracts traded by Driver were "exempt exchange contracts", in each case as defined in OSC Rule 91-503 and in the CFA. Staff submits that an exemption was therefore available to the Respondents in relation to the Axcess Automation Investment as sections 25 and 53 of the OSA do not apply to the Axcess Automation Investment, and the registration and prospectus requirements would be confined to the Axcess Fund Investment.

[233] In our view, the securities underlying the Axcess Automation Investment, as discussed in paragraph [152] above, were separate investment contracts between Driver or Axcess Automation on the one hand and investors on the other which provided investors with an interest in the profits generated by Driver's trading activities. The securities had none of the characteristics of, and were clearly not, commodity futures contracts within the meaning of the CFA. Accordingly, we disagree with Staff's submission that the Axcess Automation Investment was exempt from the application of sections 25 and 53 of the OSA.

## D. Did Driver, the Axcess Companies, Taylor and the Taylor Companies engage in fraud in respect of the Axcess Automation Investment and Axcess Fund Investment contrary to subsection 126.1(b) of the OSA?

### 1. The Applicable Law

[234] Subsection 126.1(b) of the OSA states that:

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

[235] In interpreting the term "fraud", the Commission has taken the approach by other securities regulators and adopted the definition from the decision of the Supreme Court in *R. v. Théroux*, [1993] 2 S.C.R. 5 ("***Théroux***") (See, for example, *Al-Tar*, *supra*, at paras. 216 to 221; *Re Lehman Cohort Global Group Inc.* (2010), 33 O.S.C.B. 7041 at paras. 86 to 100; and *Re Global Partners Capital* (2010), 33 O.S.C.B. 7783 at paras. 239 to 245).

[236] In *Théroux*, the elements of fraud were summarized as follows:

> …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 the placing 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 in knowledge that the victim's pecuniary interests are put at risk).
>
> (*Théroux*, *supra*, at para. 27)

[237] The *actus reus* of the offence of fraud is therefore established on proof of two essential elements, namely, a dishonest act and deprivation (*Théroux*, *supra*, at para. 16). The first element, the dishonest act, is established by proof of deceit, falsehood or "other fraudulent means".

[238] In order to find fraud by deceit or by falsehood, "all that need be determined is whether the accused, as a matter of fact, represented that a situation was of a certain character, when, in reality, it was not" (*Théroux*, *supra*, at para. 18).

[239] The third category of dishonesty, other fraudulent means, encompasses all other means, other than deceit or falsehood, which can properly be characterized as dishonest. In considering whether an act is dishonest, the Supreme Court has held that the issue is "determined objectively, by reference to what a reasonable person would consider to be a dishonest act". (*Théroux*, *supra*, at paras. 17 and 18; and *R. v. Olan*, [1979] 2 S.C.R. 1175 ("***Olan***") at p. 1180).

[240] In considering the meaning of other fraudulent means, courts have included the non-disclosure of important facts, the unauthorized diversion of funds and the unauthorized arrogation of funds or property (*Théroux*, *supra*, at para. 18).

[241] The second essential element of the *actus reus* of fraud, namely, deprivation, is satisfied on proof of detriment, prejudice, or risk of prejudice to the economic interests of the victim caused by the dishonest act (*Théroux*, *supra*, at paras. 16 and 27).

[242] While actual economic loss suffered by a victim may establish deprivation, it is not required for a finding of fraud. In *Borealis*, the Commission found that the respondents breached subsection 126.1(b) of the OSA although no loss was suffered by the investors, and that in fact, investors were repaid their capital and received an 18% return on their investments because of the gratuitous payment by the respondents.

> The fact that, at the end of the day, they suffered no loss, is not and should not be determinative. The investors put their money at risk on the assurance that not only their capital, but also their interest was "guaranteed." It was not. It was not, notwithstanding that they received both the interest and the principal, as promised. That occurred only because of the 'good will' of Villanti and his company, IBC. It occurred not because of the contractual obligation, that the Borealis GRIC was secured, insured or reinsured. It occurred in spite of the fact that the GRIC was not invested as promised, to generate funds through loans to small and medium businesses. The contractual obligation entered into with the investors was based on a number of false premises. It was misleading. It was fraudulent. Borealis, Villanti and Haliday's 'after the fact' letter did not change the fact that the investment contracts entered into, with the acquiescence of Villanti were false and misleading. For all these reasons, we, therefore, notwithstanding Villanti's original honourable intention, conclude that he violated subsection 126.1(b) of the [OSA].
>
> (*Borealis*, *supra*, at para. 108)

[243] In *Théroux*, *supra*, at paras. 16, 17 and 27, the Supreme Court stated that either prejudice or the risk of prejudice to an economic interest is sufficient to support a finding of fraud.

[244] With respect to the mental element of fraud, this subjective awareness can be inferred from the totality of the evidence. Direct evidence as to the accused's specific knowledge at the time of the fraudulent acts is not required (*Théroux*, *supra*, at paras. 23 and 29).

[245] This subjective awareness of the accused may also be established by evidence showing that the accused was reckless or wilfully blind to the consequence of his or her conduct and the truth or falsity of their statements (*Théroux*, *supra*, at paras. 26 and 28).

[246] A sincere belief or hope that no risk or deprivation would ultimately materialize does not vitiate fraud. As stated in *Théroux,* a "sanguine belief that all will come out right in the end" is not a defence:

> Pragmatic considerations support the view of *mens rea* proposed above. A person who deprives another person of what the latter has should not escape criminal responsibility merely because, according to his moral or her 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 practise fraud, its *mens rea* cannot be cast so narrowly as this.
>
> (*Théroux*, *supra*, at para. 36)

[247] The operative language of subsection 126.1(b) of the OSA is identical to the comparable provisions of subsection 57(b) of the *Securities Act* (British Columbia), R.S.B.C. 1996, c. 418, as amended (the "**BCA**"). In interpreting subsection 57(b) of the BCA as it relates to the mental element of fraud, the British Columbia Court of Appeal in *Anderson v. British Columbia (Securities Commission)*, 2004 BCCA 7 (leave to appeal to the Supreme Court of Canada denied, [2004] S.C.C.A. No. 81 (S.C.C.)) at para. 26 stated that:

> …s. 57(b) does not dispense with proof of fraud, including proof of a guilty mind…Section 57(b) simply widens the prohibition against participation in transactions to include participants 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 constituting the dishonest act, by someone involved in the transactions.

[248] To prove a breach of subsection 126.1(b) of the OSA when considering the mental element with respect to a corporation, it is sufficient to show that its directing minds knew or reasonably ought to have known that the acts of the corporation perpetrated a fraud (See, for example, *Al-Tar*, *supra*, at para. 221).

## 2. Analysis

### (a) Driver and the Axcess Companies

[249] In letters of agreement and his communications with the point persons and investors in connection with the Axcess Automation Investment, Driver represented that investor funds would be used to trade E-mini S&P 500 futures on the Chicago Mercantile Exchange. In the case of the Axcess Fund Investment, the PPM provides that investor funds would be used to trade future contracts and options.

[250] Driver also represented that his trading activities were capable of generating a substantial return. According to Reynold, Driver told Reynold in July 2007 that he was able to "pretty much double the money within a month, but – and the type of returns he's able to get to the investors is about 25 percent, though, a month" (Hearing Transcript dated April 19, 201 at p. 125). Rutledge also testified that "[Driver's] claim to us was that he was doubling his money every month" (Hearing Transcript dated April 15, 2011 at p. 43).

[251] Ronald and Rutledge testified that, during meetings with the investors in the Ronald-Rutledge Group, Driver made representations about his trading activities and percentage returns realized. Rutledge testified that, in a meeting in July 2007, the clear message conveyed by Driver was that "he had been very successful in trading…to the point where the returns were, for a typical investors, were coming in at 20, 25 percent a month return" (Hearing Transcript dated April 15, 2011 at p. 58). He further testified that, in a similar meeting in February 2009, Driver described that he was "typically getting close to 25 percent a month for an investor" and showed investors a brokerage statement that purportedly showed that he had US$57 million in that account (Hearing Transcript dated April 15, 2011 at p. 151).

[252] In the teleconference on March 31, 2009 described in paragraph [160] above, Driver told investors in the Taylor Group that the Axcess Automation Investment was "successful" (Transcript of Teleconference on March 31, 2009 at p. 7). He informed investors that "I had another incredible day in the market and if anybody saw the S&Ps today it shot up quite a bit so" (Transcript of Teleconference on March 31, 2009 at p. 19). He also claimed that he was making "almost a hundred percent return in one week":

> Last week I sent out to Steve [Taylor] and I know he sent it out to a quite a few of the investors a test account which was an experiment and where I took some funds and over a 5 day period and, and even tried to push this off for a little bit harder and got more aggressive and was able to generate a very strong return in one week and I started out with 30,000 dollars and got to 56,000 dollars within 5 days and generate those kinds of returns which is almost you know almost a hundred percent return in one week. That doesn't that's not what I do in terms of the large fund but a lot of the trades are parallel but instead of trading for one point I might trade for three points or four points or you know because I know that the range is much bigger so they're, they're parallel to the fact the trades are probably the same but I, I'm trying to reach for more profit in the test account.

(Transcript of Teleconference on March 31, 2009 at p. 39)

[253] Driver regularly communicated purported returns on the Axcess Automation Investment to Ronald, Rutledge and Reynold to be relayed to investors. This is supported by the e-mail correspondence in evidence and the testimony of Ronald, Rutledge and Reynold. For example:

(a) In an e-mail dated November 4, 2007, Driver communicated to Rutledge and Reynold that the "percentages for the weeks ending" October 19, 2007, October 26, 2007 and November 2, 2007 were 4.62%, 4.71% and 6.35%, respectively.

(b) In an e-mail dated November 26, 2007, Driver stated that "Today was a great day" and sent Rutledge a spreadsheet showing positive returns on the investment.

(c) In an e-mail dated February 28, 2008, Driver communicated to Rutledge and Reynold that the "return[s] for the week ending" February 15, 2008 and February 22, 2008 were 4.79% and 3.61%, respectively.

(d) In an e-mail dated April 12, 2008, Driver provided Rutledge with the weekly returns for the period from February 8, 2008 to April 4, 2008 which ranged from 0% to 5.23%.

(e) In an e-mail dated October 8, 2008, Driver communicated to Rutledge and Reynold that the weekly returns from July 11, 2008 to October 3, 2008 ranged from 1.60% to 6.71%.

Reynold and Rutledge confirmed in their evidence that they relayed these percentage returns to investors.

[254] In the case of the Taylor Group, we found above in paragraph [169] that Driver communicated percentage returns to Taylor to be relayed to investors. A review of an example of the spreadsheets provided to Taylor by Driver shows that Driver reported positive returns on the Axcess Automation Investment. For example, the spreadsheets reported a return of 2.27% for the week of July 15, 2006, 6.92% for the week of December 22, 2006, 6.02% for the week of June 8, 2007 and 6.28% for the week of July 20, 2007. No losses were reported on the spreadsheets.

[255] Throughout the Material Time, Driver made representations that the Axcess Investments were generating substantial returns. As noted in paragraph [108] above, Driver represented to investors that the Axcess Automation Investment was "successful" and that he created the Axcess Fund Investment in order to ensure the legality of his trading activities (Transcript of Teleconference on March 31, 2009 at p. 7). Ronald confirmed in his testimony that Driver never reported a loss. Rutledge and Reynold testified that, when investors made requests to withdraw their funds, the requests were usually honoured. They further testified that Driver told them that he had been working with his legal counsel and accountants to obtain a license and to establish a hedge fund in an effort to ensure that his trading activities were legal.

[256] Staff's flow of funds analysis shows that Driver's representations about the Axcess Investments were false and misleading. We note that, although we are unable to reconcile the amounts received and dispersed by Driver, the discrepancies do not affect the outcome of our analysis. In particular, we accept that, of the US$15,169,160.72 that Driver received from investors, a majority of the investor funds were not used to trade in E-mini S&P 500 futures (or other futures contracts or options) as represented by Driver. Although Kassabgui's evidence suggests that Driver may have spent a small portion of the funds on his business, as described below, we accept Staff's flow of funds analysis and find that, on balance, Driver diverted approximately US$1,158,329.40 to pay personal expenses as follows:

(a) US$68,304.53 was used to pay auto-related expenses;

(b) US$469,369.03 was withdrawn in cash;

(c) US$162,877.91 was used to fund retail purchases;

(d) US$71,946.34 was used to pay travel-related expenses;

(e) US$59,206.59 was spent on computers and electronics, although it is unclear to us whether the funds were used in relation to Driver's business;

(f) US$13,879.05 was used to fund PayPal transactions;

(g) US$9,546.55 was spent at restaurants or for other entertainment;

(h) US$159,886.70 was used to pay other personal expenses, including groceries, insurance, telephone services, postal and shipping services, rent, tuition, dental expenses, medical expenses and veterinary expenses, which included US$30,777.03 spent on tuition, part of which was paid in relation to courses taken by Driver that pertained to his business; and

(i) US$143,312.70 was spent on accounting and legal services and other expenses that did not appear to be business expenses, although Kassabgui testified that it was unclear to him whether the amount was for Driver's personal use or for his business.

[257] Staff's flow of funds analysis also shows that Driver used investor funds to pay the point persons, Taylor and Reynold, US$1,430,216 and $210,219.50, respectively.

[258] In addition, US$10,356,704.72 was used to pay investors.

[259] Of the US$15,169,160.72 received from investors by Driver, only approximately US$3,621,665 was in fact used to trade in E-mini 500 S&P futures. Staff's trading analysis shows that, rather than resulting in positive returns as he consistently represented to investors, Driver's trading activities incurred a cumulative net loss during the Material Time of approximately US$3,532,237.52. In his testimony, Kassabgui was asked whether Driver made any trading profits, and his response was that "He had one or two days where he did very well, but in subsequent days he lost whatever gains he had" (Hearing

Transcript dated April 14, 2011 at p. 82). Kassabgui's assessment is consistent with his trading analysis which we accept as accurate.

[260] Witnesses consistently testified that they relied on the false information discussed above when deciding whether to invest or to remain invested. Ronald testified that he and his family invested US$31,200 because he "saw it as a – it appeared to be a great opportunity, a great investment, that I trusted what Gord [Driver] was saying with the kind of returns that he was getting and there was no reason for me to doubt what he said, so I took it at face value" (Hearing Transcript dated April 19, 2011 at pp. 57 and 58).

[261] Rutledge testified that the fact that withdrawal requests made by investors in the Rutledge-Ronald Group were honoured in a timely manner "raise[d] the comfort level of the investors and potentially any new investors that guys had invested and, yes, they had made withdrawal requests and received money off of their investments. This was the functioning, you know, working investment" (Hearing Transcript dated April 15, 2011 at p. 86).

[262] The Axcess Investments caused deprivation to investors. Of the US$15,169,160.72 raised, US$10,356,704.72 was returned to investors, which demonstrates that some of the investors suffered actual losses. We accept Staff's analysis that the Ronald-Rutledge Group, comprised of 45 investors, invested a total of US$2,051,199.39 and subsequently received payments from Driver totaling only US$746,507. Similarly, the Reynold Group, comprised of 23 investors, invested a total of US$4,131,400.96 and subsequently received payments from Driver totaling only US$2,875,054.87.

[263] We take note that not all of the investors suffered losses. P.A. invested just over US$2,500 and received US$13,000 from his investment. The Taylor Group, comprised of the direct investors and the piggyback investors, invested a total of US$1,337,836 and US$788,249.48, respectively. The evidence shows that the direct investors subsequently received payments from Driver totaling US$2,913,145.54 and the piggyback investors subsequently received payments from Driver totaling US$1,185,419.37. The Taylor Group, collectively, did not suffer any losses.

[264] The fact that some of the investors did not suffer losses, or even made profits on their investments, does not preclude a finding of fraud. We adopt the analysis set out in *Borealis*, *supra*, at para. 108, set out in paragraph [242] above. In particular, we find that investors' money was put at significant risk of loss because the majority of their money was being diverted to pay Driver's personal expenses, commissions or returns to investors and that, in many cases, investors were paid with the proceeds of the investments made by subsequent investors.

[265] It is clear that Driver knew that these fraudulent acts would cause deprivation to investors. Driver made representations that he was trading in E-mini S&P 500 futures (or futures contracts or options, in the case of the Axcess Fund Investment) with investor funds and that he was generating positive returns, when in reality he applied investor funds in a manner that was contrary to the representations made to investors and incurred substantial losses in the trading in which he was actually involved.

[266] In his cross-examination of Kassabgui, Driver put to Kassabgui a document purporting to show that he made a profit of US$34,177.40 on an investment of US$50,000 during the period from March to June 2009. Driver also argued that the results of his trading during the three-month period were "critical in terms of the success rate of the software that [he] designed" (Hearing Transcript dated April 14, 2011 at p. 96). In our view, even if Driver's contentions about the trading profits generated in the three-month period were true, the fact remains that throughout the Material Time, while Driver consistently represented that he was generating substantial gains, he suffered a cumulative net loss of approximately US$3,532,237.52, diverted investor funds for personal use or uses unrelated to the trading of E-mini S&P 500 futures (or other futures contracts or options, in the case of the Axcess Fund Investment) and subjected investor funds to a significant risk of loss.

[267] The Axcess Companies furthered the fraudulent acts which caused deprivation to investors. The Axcess Companies represented to investors in letters of agreement and the PPM that investors' funds would be used to trade E-mini S&P 500 futures and/or futures contracts or options. Axcess Automation held accounts to which investor funds were deposited and from which they were dispersed in an unauthorized manner. Axcess Fund and Axcess Fund Management were the entities established purportedly to ensure the legality of Driver's trading activities and were investment vehicles designed to raise additional funds by issuing limited partnership units which would purportedly permit investors to participate in Driver's trading activities**.**

[268] As Driver was the directing mind of the Axcess Companies, his knowledge of the fraudulent acts was attributable to the Axcess Companies. We find that the Axcess Companies knew about the dishonest acts and the deprivation of investors that would result.

[269] We conclude that Driver and the Axcess Companies knowingly perpetrated a fraud, contrary to subsection 126.1(b) of the OSA.

**(b) Taylor and the Taylor Companies**

[270] As described above, an essential aspect of Taylor's role as a point person was to provide information about the Axcess Investments to investors and prospective investors. We heard evidence from P.A. which we find to be illustrative of Taylor's interaction with investors during the Material Time.

[271] P.A. testified that, in Taylor's solicitation of investors, he described that the Axcess Automation Investment would be able to generate a "superior return" or "a better return than we might normally expect" (Hearing Transcript dated April 14, 2011 at pp. 111 and 112). He further testified that he received communications from Taylor throughout the Material Time informing him of the alleged returns on his investment. In 2006, P.A. made principal investments totaling US$2,566.08. In an e-mail dated May 31, 2007, Taylor informed P.A. that the value of his investment had grown to US$13,821.65. Based on this information, P.A. made a withdrawal request of US$10,000 in June 2007.

[272] P.A. experienced a delay in obtaining the requested funds, and did not receive the US$10,000 requested until October 2007. Meanwhile, P.A. received e-mail updates from Taylor informing him that his investment continued to grow but there were "new technical glitches" (Hearing Transcript dated April 14, 2011 at p. 168). For example:

(a) In an e-mail dated July 5, 2007, Taylor informed P.A. that the value of P.A.'s investment was US$16,730.13. Taylor stated that he had noticed "a glitch in the reporting spreadsheet but it has been fixed and is being re-checked so these numbers my [*sic*] be slightly out…We have said that we are working on some technical, logistical and reporting changes that will happen over the summer and into the fall to streamline and make the process smoother and easier all around".

(b) In an e-mail dated August 2, 2007, Taylor stated: "THE TEST WOW!!! The numbers are in. Even in the summer. Wow!!! Its [*sic*] not too late" [emphasis in the original.]. Another e-mail on the same day advised P.A. that the value of his investment as of June 29, 2007 was in fact US$17,366.39. The e-mail reiterated that "We are working on some technical, logistical and reporting changes".

[273] P.A. testified that communication from Taylor became sporadic in the fall or early winter of 2007. According to P.A., he was told by Taylor that this was because Driver was "not a very good communicator and was not responding" (Hearing Transcript dated April 14, 2011 at p. 181). P.A. nonetheless received e-mail messages from Taylor in late 2007 and in 2008 that reported positive returns and explained that the delays in reporting were due to Driver. For example:

(a) In an e-mail dated December 18, 2007, Taylor stated "There is so much activity going on and although things are moving slower than any of us would like, I am confident that Gordon [Driver] is making the progress we so want". In the attached "An Interview with Gordon [Driver]", Taylor stated that progress was being made and "I as well as many others are so pleasantly pleased with the outcome". In that interview, Driver also stated that "I didn't realize the test was going to be so successful".

(b) In an e-mail dated January 28, 2008, T., on behalf of Taylor, provided P.A. with the following update on the Axcess Automation Investment:

> Great news! We have received the update spreadsheet from Gordon [Driver].
>
> We are currently verifying the transactions against our records to ensure accuracy. We will then have Gordon [Driver] make any necessary adjustments. We anticipate having all of this complete by the early part of this week and as soon as possible, we will be sending you the much anticipated results of the last few months.

> FYI, we know you will be happy with the results and for those who have been asking, Gordon [Driver] was able to capitalize on the volatility during the large market correction last week and he produced excellent results for us. So, hang in there just a little longer. As the old saying goes, "Good things come to those that wait".

(c) In an e-mail dated March 18, 2008, T. represented to P.A. that the value of his investment in January 2008 was US$39,187.95. T. also stated: "**The update is finally here!** We think once you review your account balance that you will see that Gordon [Driver] has done a great job of growing your investment. Kudos to Gordon [Driver]! Your patience is being rewarded so please enjoy the update" [Emphasis in the original.].

(d) In an e-mail dated April 11, 2008, Taylor stated "we are not concerned by the lack of communication, and that we consider it good news because we know Gordon [Driver] is extremely busy working on the new program. [T.] and I are every bit (and maybe even more) frustrated by the slowness of this process and the slow flow of information as you are".

[274] Beginning in March or April 2008, Taylor began making references to the "new structure" and "hedge fund", that is, the Axcess Fund Investment and indicated that the Axcess Fund Investment would be the solution to Driver's communication problems:

(a) In an e-mail dated April 11, 2008, Taylor stated that "I have been asked a few times about my thoughts on the hedge fun [*sic*]. My response is that the hedge fund certainly is not the best solution but it is the best solution given the situation we have with the person who is in charge – given his attention to detail and his sharpness in the trading area that he has demonstrated. When it all is said and done we should all be happier than when we first got in and somewhere more advanced on our wealth plan".

(b) In an e-mail dated June 25, 2008, T. stated that "I firmly believe that everything is moving forward towards the hedge fund. Once there most of the issues will disappear".

[275] Staff's analysis shows that, although most of the investments made by investors in the Taylor Group were made in 2006 or early 2007, Taylor did accept new investments from investors throughout the Material Time. Staff also placed into evidence e-mail messages that Taylor sent to investors in the Taylor Group regarding the purported performance of the Axcess Automation Investment. These e-mail messages are similar in tenor to those received by P.A. They provided positive percentage returns on the investments, updated investors on Driver's trading activities, including the development of the Axcess Fund Investment, and ascribed any delays in withdrawal or communication to "technical glitches" or failure on the part of Driver to communicate information.

[276] In the teleconference on March 31, 2009, Taylor continued to endorse the Axcess Investments:

> …and as we all know when we began this thing we named it the Test cause that's indeed what it was and you know in many ways it's a test that has gone extremely right in so many ways….By all indication especially after my, my discussions with Gordon [Driver] last week you know it really feels like we are making headroom and, and that's really exciting to see.
>
> (Transcript of Teleconference on March 31, 2009 at pp. 4 and 5)

[277] The overall message communicated to investors in the Taylor Group throughout the Material Time was that the Axcess Automation Investment was generating substantial returns. As A.T.'s testified, "[t]hey would say that we would always have a good month" (Hearing Transcript dated April 13, 2011 at pp. 169 and 170). Similarly, P.A. testified that no losses were ever reported to him, he was never told that there were serious concerns about the investment and the fundamentals of the investment were "never in doubt" (Hearing Transcript dated April 14, 2011 at p. 176). As we found in paragraphs [256] to [259] above, however, these statements were false and misleading.

[278] Investors relied on the misinformation communicated to them by Taylor to determine whether to withdraw their investments or to remain invested. For example, P.A. testified that he believed the value of his investment as represented to him in various e-mail updates to be true. He testified that, in June 2006, he perceived the Axcess Automation Investment as giving "very good return and…we were very happy with that" (Hearing Transcript dated April 14, 2011 at p. 131) and as a result, P.A. wrote to Taylor in an e-mail dated June 17, 2006 stating that he and his wife were "interested in continuing with the experiment for obvious reasons". He further explained that, initially, his "attitude was we'll see if this thing is real or not and we'll see if we can actually withdraw money from it" (Hearing Transcript dated April 14, 2011 at p. 163). When his withdrawal request was honoured, P.A. wrote to his family endorsing the Axcess Automation Investment.

[279] For the reasons set out in paragraphs [263] and [264] above, we find that the misinformation caused deprivation to investors. More specifically, despite the evidence that the Taylor Group collectively did not suffer a loss, the misinformation induced investors to participate in the Axcess Investments and placed their funds at significant risk of loss.

[280] The e-mail exchanges between Taylor and Driver in Staff's evidence show that Taylor knew that the representations he made to investors were false and misleading and would put investor funds at significant risk of loss. The evidence shows that Taylor was aware as early as May 2007 that Driver had trouble honouring withdrawal requests, which led to complaints from many investors in the Taylor Group. In an e-mail dated May 24, 2007, Taylor wrote to Driver stating that "I am getting calls and emails from people. This guy is desperate…The implications area [*sic*] very large. I am still waiting to find out about the wires you were to have sent". Shortly after, in an e-mail dated June 1, 2007, Taylor described the situation as "It seems we are now [at] a crisis level. Looks like almost all cheques have bounced".

[281] A.T., who worked at Taylor's office during that time, also testified that she received telephone calls from angry investors asking where their money was. According to A.T., she was "being yelled at and screamed at every single day" (Hearing Transcript dated April 13, 2011 at p. 157).

[282] The statements made by Taylor in e-mail communications to Driver show that Taylor was aware of the fraudulent nature of Driver's actions. For example:

(a) In an e-mail dated June 1, 2007, Driver asked Taylor: "I've still have not received any new funds that you said were coming. How much is coming and when? It would make it much easier to re-allocate and disburse".

In an email to Driver on the same day, Taylor stated that "using incoming funds to pay outgoing requests is a problem according to acceptable practices (ponzi)".

(b) In an e-mail dated October 6, 2007, Taylor told Driver that "if money does not flow faster and communication improve you will find yourself behind bars. I totally think that is possible".

(c) In an e-mail dated December 13, 2007, Taylor told Driver that "The queue is a poor bandaid solution at best because you either cannot or will not advance people what they request. That, all by itself has legal implications that are quite serious…I do not want to have to open the circle to expose things as they are but will because both our lives are on the line…If I don't put a stop to this I will continue to be complicit in this matter. I have to say now it [*sic*] the time of action".

(d) In an e-mail dated February 20, 2008, Taylor told Driver that "The skipping of so many weeks is not only bad and wrong it is dangerous and likely fraudulent".

(e) In an e-mail dated June 10, 2008, Taylor told Driver that "Apart from the phantom transactions that you have NEVER let you [*sic*] administrator know about we have a SERIOUS FRAUDULENT ISSUE concerning this spreadsheet" [Emphasis in the original.].

[283] Further, Taylor's statements in various e-mails demonstrate that he had never seen, and was never provided with, proof of any legitimate trading activities. For example:

(a) In an e-mail dated December 13, 2007, Taylor told Driver that "I have no proof of ANY activity" [Emphasis in the original.].

(b) In an e-mail dated August 20, 2008, Taylor told Driver that "you have furnished NO evidence of the timeline of the progress or the access to funds on the go-forward basis or any paperwork…As you are well aware, I have not seen any proof of funds, nor has there been an update on this account in many months. Your agreement with me also indicated that any account

> connected to me would be given a significantly better split on the return…If you fail to respond or fail to transfer [funds to ACG] by Friday, August 22, 2008 then I will treat it as fraud and as breach and take actions accordingly, including having you co-named in the pending suit against me and others that may follow" [Emphasis in the original.].

[284] An e-mail from Taylor to an investor dated September 25, 2008, introduced into evidence through Kozovski, indicated that Taylor counseled the investor not to contact law enforcement authorities:

> There is one option but is [*sic*] is NOT A GOOD OPTION. The option is calling in authorities and regulators. Why is this not a good option? Well, the first thing they do is FREEZE EVERYTHING, then they take their time and do an audit. This can take years sometimes AND they eat up much of the proceeds while they are doing their investigation. Then, you may or may not get anything at the end of the day. So, that being our only viable option that would make the whole thing vulnerable is just not a very good one.
>
> [Emphasis in the original.]

[285] The e-mails from Taylor described above show that Taylor was aware of the fraudulent nature of his and Driver's actions in late May 2007 at the latest. Taylor never received proof of Driver's trading activities. He knew that Driver had trouble meeting withdrawal requests and that Driver was using newly-received investor funds to pay previous investors. Taylor nonetheless never informed investors that there were serious concerns about the Axcess Investments. Taylor continued to issue letters of agreement and accept new investments after May 2007, as shown by the letters of agreement in evidence issued in June and July 2007 and Staff's analysis discussed in paragraph [275] above. In addition, as exemplified by Taylor's communications to P.A. described above, Taylor continued to represent after May 2007 that investors' investments were growing at a steady rate and attributed any delays in withdrawal or communication to technical problems. It is clear that he knew that making these representations would put investors' funds at a significant risk of loss. We find that Taylor provided incomplete information and misinformation and failed to provide accurate information, all of which clearly constitutes deceit and material misrepresentation.

[286] The Taylor Companies enabled the misrepresentations by Driver and the unauthorized diversion of investor funds by (i) receiving funds from and sending funds to investors; (ii) sending funds to Driver for purported investment; and (iii) receiving payments from Driver. In particular, we note that, as set out in paragraph [198] above, 1303066 received US$314,606, Berkshire received US$805,610 and Montecassino received US$190,000. There is further evidence that Montecassino and 1303066 formed part of the infrastructure implemented to administer the Axcess Investments. For example, A.T. testified that she was paid by Montecassino and the evidence shows that the queue document was created by 1303066 (ACG). As Taylor was the directing mind of the Taylor Companies, Taylor's knowledge is attributable to the Taylor Companies. Accordingly, we find that the Taylor Companies acted in furtherance of the fraudulent

scheme with knowledge of the dishonest acts and the deprivation of investors that would result.

[287] For the reasons set out above, we find that Taylor and the Taylor Companies knowingly engaged in fraud, contrary to subsection 126.1(b) of the OSA.

### 3. Findings

[288] We conclude that Driver, the Driver Companies, Taylor and the Taylor Companies knowingly perpetrated a fraud, contrary to subsection 126.1(b) of the OSA.

## E. Was Driver responsible for the breaches of the Axcess Companies, was Taylor responsible for the breaches of the Taylor Companies and was Reynold responsible for the breaches of WCC pursuant to section 129.2 of the OSA?

### 1. The Applicable Law

[289] By virtue of section 129.2 of the OSA, a director or officer who authorized, permitted or acquiesced in a company's non-compliance with the OSA is deemed to be liable for such non-compliance. Specifically, section 129.2 states that:

> 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.

[290] In subsection 1(1) of the OSA, a "director" is defined as "a director of a company or an individual performing a similar function or occupying a similar position for any person". An "officer", in relation to an issuer or registrant, is defined as:

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

[291] The language of section 129.2 also uses the terms "authorize", "permit" and "acquiesce". The threshold for a finding of liability against a director or officer under section 129.2 of the OSA is low. Indeed, merely acquiescing in the conduct or activity in question will satisfy the requirement of liability. As stated in *Momentas*:

> 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 [in] 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*, *supra*, at para. 118)

## 2. Analysis

### (a) Driver

[292] The corporate documents in evidence show that, during the Material Time, Driver was the President and Secretary of Axcess Automation. Driver executed letters of agreement on behalf of Axcess Automation and controlled the accounts in the name of Axcess Automation to which investor funds were deposited and from which investor funds were dispersed. As we found in paragraph [173], Driver was listed as a signing authority on these accounts, and signed all of the cheques drawn on, and endorsed the cheques deposited to, those accounts.

[293] Driver was listed as the resident agent and manager (or managing member) of Axcess Fund Management and the resident agent of Axcess Fund. He created Axcess Fund and Axcess Fund Management to provide an investment vehicle which would purportedly allow investors to participate in his trading activities legally. The evidence shows that the issuance of limited partnership units of Axcess Fund was to be approved by Driver.

[294] Driver was a director or officer of the Axcess Companies and authorized, permitted or acquiesced in their contraventions of subsections 25(1)(a), 53(1) and 126.1(b) of the OSA. It is clear that Driver acted on behalf of the Axcess Companies in organizing and setting up the Axcess Investments and in receiving investor funds.

### (b) Taylor

[295] The corporate documents in evidence show that, during the Material Time, Taylor was listed as a director and officer of 1303066 and the sole director of Berkshire. Although we were not provided with copies of supporting account statements in some instances, we accept Staff's analysis which shows that Taylor was the signing authority for or controlled accounts in the name of 1303066 and Berkshire. These accounts were used, among other things, to deposit funds received from investors for their investments and to receive commissions or payments from Driver. In particular, 1303066 received US$314,606 from Driver and Berkshire received US$805,610 from Driver. In addition, ACG (1303066), under the direction of Taylor, carried out certain tasks related to the administration of the Axcess Investments including the creation of the queue document.

[296] We received no corporate documents or banking documents with respect to Montecassino, however, Taylor testified in the compelled examination on August 6, 2009 that he established Montecassino in 2007 and was its President. The evidence shows that he performed the functions of and exercised powers similar to those of a director or officer. For example, he directed that A.T.'s compensation be paid out of account(s) in the name of Montecassino, and account(s) in the name of Montecassino received payments totaling US$190,000 from Driver.

[297] We find that Taylor was a director or officer of the Taylor Companies within the meaning of the OSA. He authorized, permitted or acquiesced in the Taylor Companies' contraventions of subsections 25(1)(a), 53(1) and 126.1(b) of the OSA.

### (c) Reynold

[298] As set out above in paragraph [81], Reynold admitted to paragraphs 17 and 45 of the Statement of Allegations. More specifically, he admitted that he was the President and sole director of WCC, and authorized, permitted or acquiesced in WCC's non-compliance with Ontario securities law.

## 3. Findings

[299] We find that Driver authorized, permitted or acquiesced in the Axcess Companies' contraventions of subsections 25(1)(a), 53(1) and 126.1(b) of the OSA and is, therefore, responsible for such contraventions pursuant to section 129.2 of the OSA.

[300] We find that Taylor authorized, permitted or acquiesced in the Taylor Companies' contraventions of subsections 25(1)(a), 53(1) and 126.1(b) of the OSA and is, therefore, responsible for such contraventions pursuant to section 129.2 of the OSA.

[301] We also find that Reynold authorized, permitted or acquiesced in WCC's contraventions of subsections 25(1)(a) and 53(1) of the OSA and is, therefore, responsible for such contraventions pursuant to section 129.2 of the OSA.

# F. Was the Conduct of the Respondents Contrary to the Public Interest?

## 1. The Applicable Law

[302] As set out in section 1.1 of the OSA, it is the Commission's mandate:

> (a) to provide protection to investors from unfair, improper or fraudulent practices; and
>
> (b) to foster fair and efficient capital markets and confidence in capital markets.

[303] In pursuing the purposes of the OSA, the Commission must consider fundamental principles as stated in paragraph (2) of section 2.1 of the OSA, the relevant parts of which are as follows:

i. requirements for timely, accurate and efficient disclosure of information,

ii. restrictions on fraudulent and unfair market practices and procedures, and

iii. requirements for the maintenance of high standards of fitness and business conduct to ensure honest and responsible conduct by market participants.

[304] Staff alleges that the conduct of the Respondents is contrary to the public interest.

**2. Analysis**

[305] The Respondents engaged in conduct contrary to Ontario securities law. All of the Respondents traded in securities without being registered to do so and engaged in a distribution without satisfying the distribution requirements of the OSA when no exemption was available, contrary to subsections 25(1)(a) and 53(1) of the OSA. The Respondents' conduct was contrary to the public interest as registration and distribution requirements are essential to protect investors and to ensure the integrity of the capital markets.

[306] For the reasons described above, we have also found that Driver, the Axcess Companies, Taylor and the Taylor Companies knowingly engaged in fraud contrary to subsection 126.1(b) of the OSA. The evidence demonstrates that Driver was the directing mind of an investment scheme that, whatever its original objectives, was clearly fraudulent notwithstanding periodic allusions to the desirability of investors using the proceeds derived from their investments for charitable and religious purposes. Taylor was inextricably involved in furthering the fraudulent elements of the scheme and was clearly aware that he and Driver and their respective companies were acting illegally.

[307] Reynold acknowledged that his participation in the Axcess Investments assisted Driver in obtaining investor funds and his failure to comply with the securities regulatory regime was harmful to the investors whose funds he solicited and the public interest. Reynold testified that whatever returns he derived from his personal investment were used for his Christian ministry and not personally and that the collapse of the Axcess Investments was a source of considerable personal embarrassment and humiliation and resulted in serious financial hardship for his family. Although Reynold may have been insensitive to obvious flaws in the Axcess Automation Investment, he eventually ceased to solicit funds from new investors although he did continue to accept new funds from existing investors. Staff did not allege any fraudulent behaviour by Reynold and we saw no evidence of such behaviour.

[308] The conduct of the Respondents undermined the integrity of and confidence in the capital markets, which we find to be contrary to the public interest.

### 3. Findings

[309] We conclude that all of the Respondents engaged in conduct contrary to the public interest.

## VIII. CONCLUSION

[310] For the reasons stated above, we find that:

(a) Axcess Automation, Axcess Fund Management, Axcess Fund, Driver, Taylor, Berkshire, 1303066, Montecassino, Reynold and WCC traded in securities of the Axcess Investments without being registered to trade in securities, contrary to subsection 25(1)(a) of the OSA;

(b) Axcess Automation, Axcess Fund Management, Axcess Fund, Driver, Taylor, Berkshire, 1303066, Montecassino, Reynold and WCC engaged in a distribution of securities of the Axcess Fund Investment for which a preliminary prospectus or a prospectus had not been filed and for which receipts had not been issued by the Director, contrary to subsection 53(1) of the OSA;

(c) Axcess Automation, Axcess Fund Management, Axcess Fund, Driver, Taylor, Berkshire, 1303066 and Montecassino engaged or participated in acts, practices or a course of conduct relating to the Axcess Investments that they knew perpetrated a fraud, contrary to subsection 126.1(b) of the OSA;

(d) Driver authorized, permitted or acquiesced in the contraventions of subsections 25(1)(a), 53(1) and 126.1(b) of the OSA by Axcess Automation, Axcess Fund Management and Axcess Fund and is deemed to be liable for such contraventions pursuant to section 129.2 of the OSA;

(e) Taylor authorized, permitted or acquiesced in the contraventions of subsections 25(1)(a), 53(1) and 126.1(b) of the OSA by Berkshire, 1303066 and Montecassino and is deemed to be liable for such contraventions pursuant to section 129.2 of the OSA;

(f) Reynold authorized, permitted or acquiesced in the contraventions of subsections 25(1)(a) and 53(1) of the OSA by WCC and is deemed to be liable for such contraventions pursuant to section 129.2 of the OSA; and

(g) Axcess Automation, Axcess Fund Management, Axcess Fund, Driver, Taylor, Berkshire, 1303066, Montecassino, Reynold and WCC acted contrary to the public interest.

[311] We will also issue an order dated September 27, 2012 which sets down the date for the hearing with respect to sanctions and costs in this matter.

Dated at Toronto this 27th day of September, 2012.

| | |
|---|---|
| "*Christopher Portner*" | "*Paulette L. Kennedy*" |
| _____ | _____ |
| Christopher Portner | Paulette L. Kennedy |