Ontario Securities Commission
Commission des valeurs mobilières de l'Ontario
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IN THE MATTER OF THE *SECURITIES ACT*,
R.S.O. 1990, c. S.5, AS AMENDED

- AND -

IN THE MATTER OF
BLACKWOOD & ROSE INC., STEVEN ZETCHUS and JUSTIN KRELLER (also known as JUSTIN KAY)

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

Hearing:	In Writing	
Decision:	December 17, 2013	
Panel:	James E. A. Turner	- Vice-Chair
Submissions:	Carlo Rossi	- For Staff of the Ontario Securities Commission

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REASONS AND DECISION

I. INTRODUCTION

[1] This proceeding arises out of a Notice of Hearing issued by the Ontario Securities Commission (the "**Commission**") dated January 29, 2013, pursuant to sections 127 and 127.1 of the *Securities Act*, R.S.O. 1990, c. S.5, as amended (the "**Act**") in relation to a Statement of Allegations, also dated January 29, 2013, filed by Staff of the Commission ("**Staff**") against Blackwood & Rose Inc. ("**Blackwood**"), Steven Zetchus ("**Zetchus**") and Justin Kreller ("**Kreller**") (collectively, the "**Respondents**").

[2] On August 12, 2013, the Commission ordered that, pursuant to Rule 11.5 of the Commission's Rules of Procedure (2012), 35 OSCB 10071 (the "***Rules of Procedure***"), the hearing on the merits would proceed as a written hearing.

[3] Staff filed written submissions on August 26, 2013. None of the Respondents filed written materials. In addition to their written submissions, Staff relies on the affidavit of Wayne Vanderlaan ("**Vanderlaan**"), sworn August 26, 2013 (the "**Vanderlaan Affidavit**") in support of their request for sanctions against the Respondents. Staff also filed an affidavit of service of Tia Faerber, addressing service of key documents (including Staff submissions and the Vanderlaan Affidavit) on the Respondents.

A. Brief Overview of the Facts

Overview

[4] Zetchus incorporated Blackwood in August 2012. Shortly after, he rented an office in Ottawa and began portraying Blackwood to members of the public as an established and "specialized boutique firm" engaged in the business of trading in securities.

[5] Kreller was hired by Zetchus to be a salesperson at Blackwood around late September 2012.

[6] Between September 2012 and December 2012 (the "**Material Time**"), the Respondents held themselves out as engaging in the business of trading in securities and through misrepresentations, deceit and other fraudulent means solicited members of the public in the United States to transfer funds to Blackwood purportedly in furtherance of transactions involving the purchase and/or sale of securities.

The Gigapix Scheme

[7] During the Material Time, Zetchus and Kreller solicited shareholders in Gigapix Studios, Inc. ("**Gigapix**" and the "**Gigapix Shareholders**") to send funds to Blackwood purportedly to facilitate the sale of the Gigapix shares held by the Gigapix Shareholders (the "**Gigapix Scheme**").

[8] As part of the Gigapix Scheme, the Gigapix Shareholders were informed by Zetchus and Kreller that Blackwood had buyers for their Gigapix shares but that various payments were required to be made by the Gigapix Shareholders in order to complete the sales. These representations were false and were solely designed to extract money from the Gigapix Shareholders.

[9] Zetchus and Blackwood raised approximately USD $15,000 from three Gigapix Shareholders. All three of these Gigapix Shareholders are U.S. residents.

[10] The funds transferred by the Gigapix Shareholders were misappropriated by Zetchus and were not used to further any transactions involving the purchase of Gigapix shares by the Gigapix Shareholders.

[11] No sales of securities by the Gigapix Shareholders were completed and the Gigapix Shareholders have received no consideration for their payments to Blackwood.

The Respondents Held themselves out as Engaging in the Business of Trading in Securities

[12] In addition to the Gigapix Scheme, during the Material Time, the Respondents otherwise held themselves out as engaging in the business of trading in securities and engaged in acts in furtherance of trades in securities as outlined below.

[13] During the Material Time, Zetchus and Kreller, through Blackwood, solicited U.S. residents to send funds to Blackwood for the purported purpose of opening an account with Blackwood and to purchase shares Blackwood purportedly held in several companies including Toon Goggles, Inc., Barrick Gold Corporation ("**Barrick**") and Dundee Precious Metals Inc. ("**Dundee**").

[14] To entice potential investors, Zetchus and Kreller informed investors that Blackwood had purchased the shares in Dundee and Barrick from a distressed brokerage and offered to sell the shares below their market value. Blackwood held no such shares and Zetchus and Kreller used deceit, falsehood and other fraudulent means to solicit funds from the potential investors in this manner.

[15] No funds were raised from these solicitations.

[16] This matter came to Staff's attention as a result of a referral from an examiner for the Wisconsin Department of Financial Institutions, Division of Securities (the "**Examiner**"). On December 11, 2012, an individual who identified himself as "Justin Kay" telephoned the Examiner and attempted to solicit him to purchase shares in Toon Googles, Barrick and Dundee.

B. Temporary Order

[17] On December 18, 2012, the Commission issued a temporary cease trade order that all trading of securities by the Respondents shall cease (the "**Temporary Order**"). The Temporary Order also provided that any exemptions contained in Ontario securities law do not apply to any of the Respondents. The Temporary Order, as amended, was extended from time to time, and on August 12, 2013, it was extended until the conclusion of the merits hearing.

C. The Respondents

[18] Blackwood was incorporated under the Canada Business Corporations Act on August 8, 2012.

[19] Zetchus is a resident of Ontario. Zetchus incorporated Blackwood and has been its sole director and directing mind since its incorporation. Blackwood's registered address is the address of Zetchus's family home in Ottawa.

[20] Zetchus rented an office for Blackwood in Ottawa, Ontario (the "**Blackwood Office**") and created a website for the company (the "**Blackwood Website**").

[21] Kreller is a resident of Ontario and from October 2012 to December 2012 was a salesperson at Blackwood. Kreller used the alias "Justin Kay" when corresponding with investors.

[22] None of the Respondents have ever been registered in any capacity with the Commission.

II. PRELIMINARY ISSUES

A. Failure of the Respondents to Participate

[23] Staff provided a number of affidavits of service as evidence that Staff served each of the Respondents with respect to this proceeding in accordance with the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22, as amended (the "**SPPA**") and the Commission's *Rules of Procedure*. None of the Respondents participated in this written hearing.

[24] Subsection 6(1) of the SPPA requires that a tribunal provide "reasonable notice of the hearing" to the parties to a proceeding. Subsection 7(1) of the SPPA permits a tribunal to proceed in the absence of a party when that party has been given notice of the hearing. Similarly, subsection 7(2) of the SPPA permits a tribunal to proceed where notice of a written hearing has been given and the party fails to participate. Subsection 7(2) of the SPPA states:

> [7](2) Where notice of a written hearing has been given to a party to a proceeding in accordance with this Act and the party neither acts under clause 6 (4) (b) [to satisfy the tribunal that there is good reason for not holding a written hearing] nor participates in the hearing in accordance with the notice, the tribunal may proceed without the party's participation and the party is not entitled to any further notice in the proceeding.

[25] Further, Rule 7.1 of the Commission's *Rules of Procedure* provides:

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

[26] The Commission has exercised its jurisdiction in a number of proceedings to proceed with a matter when it is satisfied that a respondent who has not appeared or participated has been

given adequate notice (see *Re Sunwide Finance Inc.* (2009), 32 OSCB 4671 ("***Sunwide***") at para. 18; *Re First Global Ventures, S.A.* (2007), 30 OSCB 10473 at paras. 110-112 and *Lehman Brothers & Associates Corp. (Re)* (2011), 34 OSCB 12717 ("***Lehman Brothers***") at paras. 18-34).

[27] On December 19, 2012, Vanderlaan attended the Blackwood Office for the purpose of serving the Commission's Temporary Order dated December 18, 2012 on the Respondents. Both Zetchus and Kreller provided Vanderlaan with their respective contact information, including their e-mail addresses. Zetchus and Kreller were served with the Notice of Hearing and the Statement of Allegations at the e-mail addresses they provided to Vanderlaan. They were also served with all subsequent orders of the Commission setting down dates in connection with this matter.

[28] None of the Respondents attended at any of the appearances in this matter. Staff brought a motion to have the oral hearing converted into a written hearing (the "**Motion**") pursuant to Rule 11 of the Commission's *Rules of Procedure*.

[29] Neither Zetchus nor Kreller attended or participated in the Motion on August 12, 2013. However, Zetchus responded to service of Staff's Motion materials by indicating that he took no position on the Motion.

[30] The Commission granted Staff's Motion by order dated August 12, 2013 (the "**August 12 Order**") and set a schedule for the service and filing of documents in connection with this written hearing.

[31] The August 12 Order was served on Zetchus and Blackwood by e-mail to Zetchus at the address he provided to Vanderlaan and that he has previously used to correspond with Staff. The August 12 Order was served on Kreller personally by process server.

[32] I am satisfied that the Notice of Hearing of this written hearing, the Statement of Allegations and notice of the Motion were served on the Respondents, that Staff took reasonable steps to provide notice of this proceeding to the Respondents and that I am entitled to proceed in their absence in accordance with section 7 of the SPPA and Rule 7.1 of the Commission's *Rules of Procedure*.

B. Jurisdiction over the Respondents

[33] The Commission has jurisdiction to proceed against a respondent where there is trading in securities in Ontario and where there is a substantial connection between the conduct at issue and Ontario (see *Lehman Brothers, supra,* at paras. 35-37 and *Al-Tar Energy Corp. (Re)* (2010), 33 OSCB 5535 at paras. 45-52 ("***Al-Tar***").

[34] There is ample evidence providing a substantial connection to Ontario in this case, including the following:

(a) Blackwood is a Canadian corporation with its registered office in Ottawa, Ontario;

(b) the Blackwood Office was located in Ottawa, Ontario;

(c) Zetchus and Kreller are residents of Ontario;

(d) the solicitation of investors took place from the Blackwood Office in Ottawa, Ontario;

(e) the Blackwood bank accounts were at bank branches located in Ontario; and

(f) the Gigapix Shareholders sent their funds to the Blackwood Office, or wired them directly to the Blackwood bank accounts.

[35] Where there is trading in securities with a substantial connection to Ontario the Commission is entitled to exercise its jurisdiction over respondents. The panel in *Lehman Brothers* found:

> In this case, the offers to purchase TBS shares were made to investors outside Ontario. […] In addition, Lehman Corp. purported to operate from outside Ontario, namely, from Montreal, Quebec. However, the evidence discloses that some substantial aspects of each transaction occurred within Ontario. Investor funds were sent to accounts located in Toronto on the instructions of Lehman Corp. and Marks. These accounts were opened and maintained by either Lounds or Higgins, both Ontario residents, in the name of Emerson or Triad, both sole proprietorships established and registered in Ontario. The evidence shows that investor funds were withdrawn and disbursed in Toronto for the benefit of these two Ontario residents.
>
> We find that there is a substantial connection to Ontario thereby entitling the Commission to exercise jurisdiction over the Respondents.
>
> (*Lehman Brothers, supra,* at paras. 35-37)

[36] I find that the conduct of the Respondents has a substantial connection to Ontario, justifying the exercise of my jurisdiction under the Act. Further, it is clear that the conduct referred to in paragraphs [34]and [35] constitute acts in furtherance of trades in Ontario and therefore trading by the Respondents in Ontario for purposes of the Act.

III. EVIDENCE

A. Standard of Proof

[37] The standard of proof in this written hearing is the civil standard of proof on a balance of probabilities. (*F.H.* v. *McDougall*, [2008] 3 S.C.R. 41 at para. 46 ("***McDougall***")).

[38] In *McDougall*, the Supreme Court of Canada made clear that there is only one civil standard of proof. That standard requires proof on a balance of probabilities. This standard requires a trier of fact to decide "whether it is more likely than not that the event occurred" (*McDougall, supra,* at paras. 40, 43-44). In order to meet that standard, the evidence must be clear, convincing and cogent (*McDougall, supra*, at para. 49).

[39] The Supreme Court of Canada's decision in *McDougall* has been applied by the Commission in numerous hearings before it.

B. Admissibility of Evidence

[40] The Commission has broad discretion to admit relevant evidence that might not otherwise be admissible as evidence in a court, including hearsay evidence, subject to the weight given to such evidence. Subsection 15(1) of the SPPA states:

> 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.

[41] In *Rex Diamond Mining Corp.* v. *Ontario Securities Commission*, the Ontario Divisional Court confirmed that "the Commission is expressly entitled by statute to consider hearsay evidence" and that "hearsay evidence is not, in law, necessarily less reliable than direct evidence." Justice Nordheimer, speaking for the Court, specifically rejected the appellants' submission that it was improper for the Commission to rely on hearsay evidence (*Rex Diamond Mining Corp.* v. *Ontario Securities Commission* (2010) ONSC 3926 at para. 4 ("***Rex Diamond***")).

[42] Staff submits that all of the hearsay statements that Staff relies upon to prove the allegations against the Respondents are consistent with each other and are corroborated by the documentary evidence as a whole.

[43] None of the Respondents appeared or objected to Staff's Motion that the hearing on the merits proceed in writing and, accordingly the Respondents have waived any right to object to the admissibility of hearsay evidence in this hearing.

[44] The weight to be accorded to hearsay evidence must be determined by the panel. Care must be taken to avoid placing undue reliance on uncorroborated evidence that lacks sufficient indicia of reliability (*Starson* v. *Swayze*, [2003] 1 S.C.R. 722 at para. 115; *Sunwide, supra*, at para. 22). I will admit the hearsay evidence tendered by Staff, subject to my consideration of the weight to be given to that evidence.

Use of Compelled Evidence and Testimony

[45] 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 Act) in [the] merits hearing which is directly related to the investigation" (*Al-Tar, supra*, at para. 40).

[46] In *Boock*, the Commission noted that a "principal purpose of compelled testimony is to permit Staff to obtain relevant documents and evidence for use at a hearing." The Commission stated that while compelled testimony is a form of hearsay, a merits panel has discretion to determine the basis upon which such evidence may be used at a hearing.

[47] In *Sextant*, the Commission admitted compelled testimony from a respondent having concluded that to do so was consistent with the regulatory regime established by sections 16 to 18 of the Act, was not prohibited by subsection 9(2) of the *Evidence Act*, R.S.O. 1990, and did not contravene the respondent's Charter rights (*Al-Tar, supra,* at para. 40, *Boock (Re)* (2010), 33 OSCB 1589 ("***Boock***") at paras. 106 and 109 and *Sextant Capital Management Inc. (Re)*, (2011) 34 OSCB 5829 ("***Sextant***") at paras. 7, 9, 16 and 24).

[48] Both *Sextant* and *Boock* relied on the Alberta Court of Appeal's decision in *Brost*. In that case, the Court considered whether the Alberta Securities Commission (the "**ASC**") had properly admitted and relied on transcripts of the respondents' compelled examinations and stated:

> The use of the appellants' hearsay statements was not a situation like that in *British Columbia Securities Commission* v. *Branch*, [1995] 2 S.C.R. 3, 123 D.L.R. (4th) 462 [*Branch*], where the question was whether the information and evidence acquired by investigators could be used on a derivative basis for a criminal, or quasi-criminal, law purpose. The use made of the content of the investigative interviews conducted in this case was not outside the scope of the very regulatory proceedings for which the authority to investigate was enacted. As noted in *Branch*, at para. 64, "[a]11 those who enter into [the securities] market know or are deemed to know the rules of the game." Accordingly, they do not have a reasonable expectation that the content of their investigative interviews will not be used for the purposes of the *Act*.
>
> (*Alberta (Securities Commission)* v. *Brost* [2008], A.J. No. 1071 at para. 38)

[49] In support of the allegations, Staff relies primarily on the Vanderlaan Affidavit, sworn August 26, 2013 and entered as Exhibit 1 to this written hearing.

[50] As previously noted, none of the Respondents participated in this written hearing. Accordingly, none of the Respondents tendered evidence or made submissions.

[51] In this case, as in *Sextant*, Staff was carrying out the regulatory mandate of the Act in interviewing Zetchus and Kreller (the "**Individual Respondents**"). That evidence was obtained for a *bona fide* purpose under the Act: use at a Commission hearing. Staff submits that the transcripts should be admitted to fulfill that purpose.

[52] Further, Staff submits that the transcripts of evidence given under oath are highly relevant to the matters to be decided in this proceeding. They are the transcripts of the testimony of the Individual Respondents themselves, the central figures in this proceeding and the architects of the impugned transactions. The transcripts directly relate to the conduct in issue.

[53] The Individual Respondents made admissions in the compelled examinations. In giving that testimony, the Individual Respondents were under oath, there was a court reporter present

transcribing the statements contemporaneously and the admissions have significant indicia of reliability. When viewed within the context of the evidence as a whole, including the statements and supporting documents provided by investors or potential investors, the records for the Blackwood bank accounts and other documentary evidence, the admissions are consistent and corroborate the evidence as a whole. Staff submits that the admissions are properly admissible and should be accorded significant weight by the Panel.

[54] A panel may consider a respondent's admissions as consistent with and corroborative of the evidence as a whole in making its findings. However, the panel should be skeptical when considering self-serving statements (*Global Partners Capital (Re)* (2011), 33 OSCB 7783 at paras. 34-35 and 38).

[55] Staff submits that the evidence introduced by Staff by means of the Vanderlaan Affidavit is consistent and reliable.

[56] Based on the foregoing, I find that the evidence tendered by Staff is admissible (including the Vanderlaan Affidavit and compelled testimony of the Respondents given under oath) and I base my findings and conclusions on the totality of that evidence. In admitting the transcripts, I would note that my decision to do so might be different in a contested hearing where parties are objecting to the admission of transcripts of compelled testimony.

IV. LAW

[57] In this matter, I must consider allegations and Staff submissions related to:

(a) fraud, contrary to subsection 126.1(b);

(b) unregistered trading, contrary to subsection 25(1); and

(c) the liability of directors and officers.

A. Fraud

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

> 126.1 Fraud and Market Manipulation - A person or company shall not, directly or indirectly, engage or participate in any act, practice or course of conduct relating to securities […] that the person or company knows or reasonably ought to know […]
>
> (b) perpetrates a fraud on any person or company.

[59] In previous decisions, this Commission has adopted the interpretation of the fraud provision in provincial securities legislation established by the British Columbia Court of Appeal in *Anderson* v. *British Columbia (Securities Commission)* (2004), 192 B.C.C.A. 7 ("***Anderson***") at para. 26; leave to appeal to the Supreme Court of Canada denied [2004], S.C.C.A. No. 81

(S.C.C.). In *Anderson*, the British Columbia Court of Appeal held that the fraud provision in the British Columbia Securities Act, which is substantially similar to the Ontario provision, requires proof of the same elements of fraud as in a prosecution under the Criminal Code. The fraud provision in the Act merely broadens the ambit of liability to those who knew or reasonably ought to have known that a person or company engaged in conduct that perpetrated a fraud. The words "knows or reasonably ought to know" do not diminish the onus on Staff to prove that a person accused of fraud has subjective knowledge of the facts concerning the dishonest or deceitful acts.

[60] The Commission has also referred to the legal test for fraud set out in the leading criminal case of *Théroux* (*R.* v. *Théroux*, [1993] 2 S.C.R. 5 (S.C.C.) ("***Théroux***") at para. 27). In *Théroux*, the Court summarized the elements of fraud:

> …the *actus reus* of the offence of fraud will be established by proof of:
>
> 1. the prohibited act be it an act of deceit, a falsehood or some other fraudulent means; and
>
> 2. deprivation caused by the prohibited act, which may consist in actual loss or putting of the victim's pecuniary interests at risk.
>
> Correspondingly, the *mens rea* of fraud is established by proof of:
>
> 1. subjective knowledge of the prohibited act; and
>
> 2. subjective knowledge that the prohibited act could have as a consequence the deprivation of another (which deprivation may consist of knowledge that the victim's pecuniary interest is put at risk).
>
> *Theroux*, *supra*, at para. 27.

[61] Accordingly, the act of fraud is established by two elements: a dishonest act and deprivation. The dishonest act is established by proof of deceit, falsehood or other fraudulent means. A dishonest act may be established by proof of "other fraudulent means." Other fraudulent means encompasses all other means other than deceit or falsehood, which can properly be characterized as dishonest and is "determined objectively, by reference to what a reasonable person would consider to be a dishonest act" (*Théroux, supra,* at para. 17). The courts have included within the meaning of "other fraudulent means" the "use of corporate funds for personal purposes, non-disclosure of important facts, exploiting the weakness of another, unauthorized diversion of funds, and unauthorized arrogation of funds or property" (*Théroux, supra,* at para. 18). The use of investors' funds in an unauthorized manner has been determined to be "other fraudulent means" (*R.* v. *Currie*, [1984] O.J. No. 147 (Ont. C.A.) pp. 3-4).

[62] The second element of the *actus reus* of fraud, deprivation, is established by proof of detriment, prejudice or risk of prejudice to the economic interests of the victims caused by the dishonest act. Actual economic loss suffered by the victim may establish deprivation, but it is not required. Prejudice or risk of prejudice to an economic interest is sufficient (*Théroux, supra*, at paras. 16-17; *R.* v. *Olan*, [1978] 2 S.C.R. 1175 at p. 6).

[63] The mental element of fraud is established by proof of subjective knowledge of the prohibited act and subjective knowledge that the prohibited act would have the deprivation of another as a consequence. The subjective knowledge can be inferred from the totality of the evidence (*Théroux, supra,* at para. 29).

[64] There is ample evidence in the Vanderlaan Affidavit demonstrating that the Respondents engaged in conduct relating to securities that they knew or reasonably ought to have known would perpetrate a fraud on the Gigapix Shareholders in connection with the Gigapix Scheme.

[65] The Respondents deceived investors with respect to the nature of the Gigapix Scheme and the Gigapix Shareholders suffered actual loss of all amounts they sent to Blackwood.

[66] Zetchus represented Blackwood to be an established firm with a broad and reputable client base. The Blackwood Website described Blackwood as a "specialized boutique firm, serving Venture Capital Companies, Corporate & Institutional Clients, as well as Individual Consumers, Small and Middle Market Businesses and Large Corporations with a full range of Market Data & Trending Metrics Research". The Blackwood Website also indicated, among other things, that Blackwood:

- [serves] more than 2000 consumer and small business relationships;
- offers industry leading support through a suite of innovative services;
- serves clients in more than 20 countries;
- has relationships with U.S. Fortune 500 companies and Fortune Global 500; and
- has a team of analysts that provide specialized data research and trending metrics.

[67] In reality, the evidence shows that Blackwood had only been established in August 2012, had no clients, no business relationships, no analysts, no innovative services and the only deposits, other than those from the Gigapix Shareholders, into the Blackwood bank accounts came from Zetchus's mother and from the sale of a list of potential investors to an individual that Zetchus declined to name in his compelled interview.

[68] The Gigapix Shareholders were all solicited by Blackwood on the basis that Blackwood could arrange for the sale of their shares. The Individual Respondents' own admissions in the compelled testimony acknowledge that the solicitations were based on deceitful representations about Blackwood's business and about its role in the fictitious acquisition of Gigapix shares.

[69] Kreller lied about his name and made representations to the Gigapix Shareholders that he knew or ought to have known were false and misleading. Kreller knew that the salespersons at Blackwood used aliases; he saw the information on the Blackwood website and acknowledged that he knew it was inaccurate. He knew he was not working for an established firm and he knew or ought to have known that by soliciting two of the Gigapix Shareholders on the basis of these fraudulent representations that a deprivation would likely result.

[70] Kreller attempted to mislead the Examiner and others by telling them that Blackwood had acquired shares from a distressed brokerage and offered to sell shares that Blackwood did not in fact own. Kreller also suggested to one potential investor that Blackwood had "insider information" with respect to Barrick and Dundee, when it in fact did not.

[71] Kreller was reckless as to the consequences of his actions, including the risk that perpetuating Zetchus's misrepresentations would result in a deprivation of two of the Gigapix Shareholders.

[72] Staff submits that Zetchus knew that the representations he was making to the Gigapix Shareholders were untrue and that he used deceitful representations to: (i) obtain money from the Gigapix Shareholders purportedly to further a transaction involving the sale of their Gigapix shares; (ii) extract a further payment from one of the Gigapix Shareholders using high pressure tactics to convince her that she had to send a wire payment on an urgent basis as her cheque had not cleared and time was of the essence; (iii) attempt to extract further payments on the basis of fictitious meetings with the Securities and Exchange Commission; and (iv) stall for time by misleading two of the Gigapix Shareholders into thinking they would receive a refund.

[73] Further, Zetchus provided various documents to investors that he created to further the deception that give an air of legitimacy to Blackwood and the purported transactions involving the Gigapix shares, including a letter of intent/guarantee and a client agreement purporting to confirm that the funds sent to Blackwood would be held in trust as a security deposit.

[74] All of the actions and representations made by Zetchus and Kreller were made on behalf of Blackwood. It was Blackwood that purported to carry out the Gigapix Scheme.

[75] Zetchus spent the funds received from the Gigapix Shareholders for his own personal purposes.

[76] Based on the foregoing, Staff has established dishonest acts on the part of Blackwood, Zetchus and Kreller and a deprivation to the Gigapix Shareholders. The evidence establishes subjective awareness and subjective intent on the part of Blackwood, Zetchus and Kreller to perpetrate a fraud.

B. Trading Without Registration

[77] Staff submits that Blackwood, Zetchus and Kreller traded in securities and engaged in and held themselves out as engaging in the business of trading in securities without registration, in circumstances in which no exemption from the dealer registration requirement was available, contrary to section 25 of the Act.

[78] Subsection 25(1) of the Act provides that:

> Unless a person or company is exempt under Ontario securities law from the requirement to comply with this subsection, the person or company shall not engage in or hold himself, herself or itself out as engaging in the business of trading unless the person or company,

(a) is registered in accordance with Ontario securities law as a dealer; or

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

i. Trade in a Security

[79] The definition of "trade" or "trading" under subsection 1(1) of the Act is a broad one, which includes any sale or disposition of a security for valuable consideration and any act, advertisement, solicitation, conduct or negotiation directly or indirectly in furtherance of such a sale or disposition.

ii. Acts in Furtherance of a Trade

[80] The Commission has adopted a contextual approach to determining whether non-registered individuals or companies have engaged in acts in furtherance of a trade. The contextual approach examines "the totality of the conduct and the setting in which the acts have occurred" and focuses on the effect the acts had on those to whom they were directed (*Re Momentas Corp.* (2006), 29 OSCB 7408 ("***Momentas***") at para. 77).

[81] A variety of conduct has been found by the Commission to constitute acts in furtherance of trade, including:

(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;

(g) meeting with individual investors;

(h) accepting investor funds for the purpose of an investment; and

(i) setting up a website that offers securities to investors.

(*Momentas*, *supra*, at para. 80; *Re Lett* (2004), 27 OSCB 3215 ("***Lett***") at paras. 48-51 and 64; *Re Allen* (2005), 28 OSCB 8541 at para. 85; Re *Limelight Entertainment Inc.* (2008), 31 OSCB 1727 ("*Limelight*") at para. 133; *Re First Federal Capital (Canada) Corp.* (2004), 27 OSCB 1603 at para. 45)

[82] Accordingly, steps taken to facilitate the administrative aspects of trading have been found by the Commission to be an act in furtherance of a trade. In *Lett*, investors transferred,

deposited or caused to be deposited funds into the bank accounts of the corporate respondents, which had been opened by an individual respondent. The Commission found that the investors' funds were deposited into the bank accounts and accepted by the respondents for purposes of selling securities and held that the respondents had engaged in acts in furtherance of trades (*Lett*, *supra*, at paras. 60 and 64).

iii. Definition of Security

[83] The definition of "security" in subsection 1(1)(e) of the Act includes "a bond, debenture, note or other evidence of indebtedness or a share, stock, unit, unit certificate, participation certificate, certificate of share or interest".

iv. Findings Regarding Trading without Registration

[84] The evidence in this case overwhelmingly establishes that the Respondents engaged in and held themselves and itself out as engaging in the business of trading in securities.

[85] I find that the evidence establishes that:

(a) Blackwood was held out, through the Blackwood Website and the representations to members of the public by Zetchus and Kreller, as an established firm engaged in the business of trading in securities;

(b) the Gigapix Shareholders were solicited by the Respondents to: (i) send funds to purportedly open trading accounts with Blackwood; (ii) purchase shares in two publicly listed companies: Barrick and Dundee, and one private company; and (iii) sell shares they held in Gigapix, on the basis of deceitful representations made by the Respondents in connection with that solicitation;

(c) the Respondents sent emails and other documents to the Gigapix Shareholders in support of their solicitations that purported to, among other things, confirm the terms of transactions involving the purchase or sale of securities, provide deposit instructions to the investors, record the investors' investment preferences, provide Blackwood with authority to undertake trades on the investors' behalf, and promote transactions involving the sale of securities;

(d) Blackwood received funds from the Gigapix Shareholders in connection with the purported transactions involving the sale of their Gigapix shares and Zetchus and Kreller profited from their conduct; and

(e) Kreller worked on a commission basis and received a commission for one of the transactions.

[86] The Respondents were not registered with the Commission in any capacity during the Material Time.

[87] Based on the foregoing, I find that the Respondents engaged in and held themselves out as engaging in the business of trading in securities without registration under the Act.

[88] Staff submits that in the breaching of section 25 of the Act, the Respondents engaged in the deceitful conduct referred to in paragraphs [66] to [74] of these reasons. I find that conduct of the Respondents to have been contrary to the public interest.

v. Availability of Exemptions

[89] Once Staff has established that a respondent has engaged in an activity for which registration or a prospectus exemption is required, the onus is on the respondent to prove facts establishing the availability of an exemption (*Limelight, supra,* at para. 142). The Respondents did not appear on this matter and they have not established the availability of any such exemption.

C. Directors and Officers

[90] Section 129.2 of the Act provides that:

> 129.2 Directors and Officers - For the purposes of this Act, if a company or a person other than an individual has not complied with Ontario Securities law, a director or officer of the company of person who authorized, permitted or acquiesced in the noncompliance 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 had been made against the company or person under section 127.

[91] The threshold for a finding of liability against a director or officer under section 129.2 of the Act is low. Merely acquiescing in the conduct or activity in question will attract 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 [*sic*] the conduct or activity in question will satisfy the requirement of liability. The degree of knowledge of [*sic*] 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)

[92] A "director" is defined in subsection 1(1) of the Act to include "a director of a company or an individual performing a similar function or occupying a similar position for any person."

[93] Zetchus was the sole director and directing mind of Blackwood during the Material Time and he authorized, permitted and acquiesced in all the conduct undertaken on behalf of Blackwood. Among other things, the evidence shows that Zetchus:

(a) incorporated Blackwood;

(b) rented the office space on behalf of Blackwood and hired salespersons;

(c) supervised Kreller;

(d) created the Blackwood Website;

(e) opened the Blackwood bank accounts and was the sole signatory on those accounts;

(f) solicited the Examiner; and

(g) misappropriated the funds that the Gigapix Shareholders sent to Blackwood.

[94] Zetchus was a director and officer of Blackwood and I find that he authorized, permitted and acquiesced in Blackwood's non-compliance with Ontario securities law described in these reasons. Accordingly, he is deemed pursuant to section 129.2 of the Act to have also failed to comply with Ontario securities law.

V. CONCLUSION

[95] Based on the foregoing I find that:

(a) each of the Respondents engaged in and held themselves out as engaging in the business of trading in securities without registration in circumstances in which no exemption from registration was available, contrary to section 25 of the Act;

(b) each of the Respondents directly or indirectly engaged in or participated in an act, practice or course of conduct relating to securities which they knew, or reasonably ought to have known, perpetrated a fraud on investors, contrary to subsection 126.1(b) of the Act;

(c) Zetchus authorized, permitted or acquiesced in Blackwood's non-compliance with Ontario securities law and is therefore deemed under section 129.2 of the Act to also have not complied with Ontario securities law; and

(d) each of the Respondents' conduct was contrary to the public interest and harmful to the integrity of the Ontario capital markets.

[96] Staff should contact the Secretary of the Commission within 30 days of this decision to schedule a sanctions hearing.

Dated at **TORONTO** this 17th day of December, 2013.

"James E. A. Turner"

James E. A. Turner