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Securities
Commission

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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
M P GLOBAL FINANCIAL LTD.,
AND JOE FENG DENG**

REASONS AND DECISION

Hearing:

February 17, 18, 19, 22, 23, 24 and 25, 2010
March 1, 2010
April 13, 14, 23, 26, 27, 28, 29 and 30, 2010
May 4, 2010
June 2, 2010

Decision:

August 19, 2011

Panel:

David L. Knight, FCA - Commissioner and Chair of the Panel
Margot C. Howard, CFA - Commissioner

Appearances:

Matthew Britton - For the Ontario Securities Commission
Anthony M. Speciale - For M P Global Financial Ltd. and
Joe Feng Deng

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REASONS AND DECISION

A. OVERVIEW

1. History of the Proceeding

[1] This was a hearing before the Ontario Securities Commission (the “Commission”) pursuant to section 127 of the *Securities Act*, R.S.O. 1990, c. S.5, as amended (the “Act”)¹, to consider whether: (a) M P Global Financial Ltd. (“MP”) and Joe Feng Deng also known as Feng Deng and Yue Wen Deng (“Mr. Deng”) (collectively, the “Respondents”) breached subsections 25(1)(a), 25(1)(c) and 53(1) of the Act; (b) by reason of section 129.2 of the Act, Mr. Deng, as a director and officer of MP, should be deemed to have not complied with Ontario securities law; and (c) the Respondents engaged in conduct contrary to the public interest.

[2] This proceeding was commenced by a Statement of Allegations and a Notice of Hearing dated September 10, 2009.

[3] This case involves allegations by Staff of the Commission (“Staff”) that between 2006 and February 28, 2009 (the “Material Time”):

- (1) the Respondents breached subsection 25(1)(a) of the Act by trading “Guarantee Corporation Debentures” issued in the name of MP Global (the “Debentures”);
- (2) the Respondents breached subsection 25(1)(c) of the Act by advising investors;
- (3) the Respondents breached subsection 53(1) of the Act by distributing Debentures without having filed a preliminary prospectus and a prospectus;
- (4) Mr. Deng, as a director of MP, authorized, permitted or acquiesced in the conduct of MP, which was contrary to Ontario securities law and therefore, pursuant to section 129.2 of the Act, himself failed to comply with Ontario securities law; and
- (5) the Respondents’ conduct described above in points (1) to (4) is contrary to the public interest.

[4] During the course of this proceeding, the Respondents were represented by counsel. We heard the evidence in this matter on February 17, 18, 19, 22, 23, 24, and 25, 2010,

¹ The version of the Act referred to in our Reasons is the version which was in force during the material time between 2006 and February 28, 2008 when the conduct in this matter took place.

March 1, 2010, April 13, 14, 23, 26, 27, 28, 29, and 30, 2010 and May 4, 2010. Closing submissions were heard on June 2, 2010.

[5] During the course of the hearing, we heard testimony from 18 witnesses, which included Senior Investigative Counsel from the Commission, a Senior Forensic Accountant from the Commission, MP employees and MP investors. To protect the privacy of the MP employees and MP investors, we will refer to those witnesses by their initials throughout our Reasons. In addition, to protect the personal information of the MP employees and MP investors in this matter, Staff provided a redacted version of the record.

[6] Mr. Deng testified on his own behalf.

[7] For the reasons set out below, we conclude that: (a) the Respondents breached subsections 25(1)(a) and 53(1) of the Act; (b) Mr. Deng is liable for MP's breaches of the Act pursuant to section 129.2 of the Act; and (c) the Respondents engaged in conduct contrary to the public interest.

2. The Respondents

[8] MP is an Ontario corporation. It was incorporated on February 8, 2006 and is located in Markham, Ontario. Its business is the delivery of financial services. It is not a reporting issuer in Ontario. It has never been a registrant pursuant to the Act.

[9] Mr. Deng is an individual who sells investment and insurance products. He resides in Ontario. He is the sole shareholder and director of MP. From May 27, 2004 to June 20, 2006, he was registered as a salesperson under the category of Mutual Fund Dealer with Excel Financial Growth Inc. He was also registered as a salesperson, effective July 25, 2006, and as a branch manager, effective July 18, 2007, under the categories of Mutual Fund Dealer and Limited Market Dealer until July 31, 2008 with Info Financial Consulting Group Inc. ("Info Financial").

3. The Allegations

[10] It is alleged that Respondents engaged in unregistered trading (subsection 25(1)(a)) and advising (subsection 25(1)(c)) and an illegal distribution (subsection 53(1)).

[11] According to Staff, between 2006 and February 28, 2009 the Respondents traded the Debentures to more than 150 individuals. By these trades, the Respondents raised substantial amounts. Investors paid for the Debentures primarily by cheques or bank drafts made payable to MP or to MP Group Ltd., a corporation under Mr. Deng's control. With respect to the funds raised, Staff alleges that some of the funds were used for purposes other than investing. Staff also alleges that MP did not have "\$100 million USD and over \$1 billion of assets under management" as advertised on its website, and MP no longer appears to have assets sufficient to repay investors.

[12] According to Staff, depending on the amount of money invested, investors were promised a monthly return of 1% to 4% (12% to 48% annually).

[13] In addition, according to Staff, through MP's website, the Respondents engaged in or were holding themselves out to be engaged in the business of advising others as to investing in or the buying or selling of securities without being registered to act as an adviser. Specifically, it is alleged that the website and promotional material distributed to the public mentioned the discretionary manner in which MP invested funds raised from investors.

[14] According to Staff, during the period of time that MP raised the monies by the sale of the Debentures to investors, it was not registered to trade securities or to advise and did not qualify for an exemption from the registration requirement. While until July 31, 2008, Mr. Deng was registered as a Mutual Fund Dealer and Limited Market Dealer with Info Financial, the trades of the Debentures were not processed through Info Financial. Furthermore, Mr. Deng traded the Debentures after July 31, 2008 when he was not registered to trade securities in any capacity.

[15] Staff also alleges that the trades of Debentures were distributions of securities because the Debentures had not been previously issued. Staff alleges that the Respondents engaged in a distribution without a preliminary prospectus and a prospectus and without an appropriate exemption from the prospectus requirement.

[16] Further, Staff alleges that Mr. Deng, as a director of MP, authorized, permitted or acquiesced in the conduct of MP contrary to Ontario securities law.

[17] Staff alleges that overall, the conduct of the Respondents was contrary to Ontario securities law and thereby contrary to the public interest.

[18] The Respondents contest all of Staff's allegations. They take the position that Staff has not made out the allegations because the Debentures are not a security, and therefore, there is no basis for the allegations of breaches of the Act.

4. MP Group Ltd.

[19] MP Group Ltd. ("Group") is an Ontario corporation incorporated on February 28, 2007. Like MP, it is located in Markham, Ontario. Mr. Deng is the sole shareholder and director. It is not a respondent in this matter.

[20] While the majority of investor funds were deposited into MP bank accounts, additional funds received from some investors were deposited in bank accounts in the name of Group. Some payments to investors were made from Group's bank accounts. Large amounts were transferred between bank accounts of MP and Group. 95% of the funds that Mr. Deng put into foreign exchange trading came from the accounts of Group. Mr. Deng appears to have managed the bank accounts of MP and Group as if they were one entity.

B. ISSUES

[21] This case raises the following issues for our consideration:

1. Did MP and Mr. Deng engage in unregistered trading in securities in breach of subsection 25(1)(a) of the Act, without any available exemptions?
2. Did MP and Mr. Deng engage in unregistered investment advisory activity in breach of subsection 25(1)(c) of the Act, without any available exemptions?
3. Did MP and Mr. Deng engage in a distribution of securities contrary to subsection 53(1) of the Act?
4. Is Mr. Deng responsible for the breaches of MP, pursuant to section 129.2 of the Act?
5. Did MP and Mr. Deng act contrary to the public interest?

[22] We need to assess each of these issues by examining the evidence in this matter and 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 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” (*F.H. v. McDougall*, *supra* at para. 46).

C. Overview of MP’s Operations

[23] During the proceeding we heard evidence which provided a detailed understanding of MP’s operations – how funds were raised, what they were used for and how MP found itself in the position of being unable to meet promised investment returns or redemption requests.

[24] MP, and its associated legal entities, were created by Mr. Deng to market and manage different types of financial products. There were a number of individuals associated with MP, including Mr. Deng, who were licensed to advise on mutual funds and life insurance products. This part of MP’s business was not at issue during the proceedings. Rather, the evidence focused on the sale of Debentures which raised amounts aggregating in excess of \$25 million that were received by MP and Group and the understanding that funds from investors were to be used to fund currency trading.

[25] Investors purchased Debentures from MP, and were given a certificate entitled “MP Global Financial Guarantee Corporation Debenture”, which specified, among other things, the investor’s name, the amount invested, the rate of return to be paid and a date after which the investor could redeem the investment. The majority of the investors were from the Chinese-Canadian community in and around the Greater Toronto Area and there were also investments made through accounts in Hong Kong and certain Caribbean

islands. The rates of return promised to the holders of the Debentures were high and ranged from 1% to 4% per month.

[26] During the course of the hearing, evidence was adduced that:

1. amounts aggregating \$18,452,272 and US\$3,003,674 were received from investors pursuant to trades in Debentures;
2. amounts aggregating US\$1,084,862 were received from parties who may have been investors;
3. amounts aggregating \$2,765,780 and US\$344,250 were received from unidentified sources, and
4. funds received by the Respondents were used as follows:
 - a. \$10,432,649 and US\$3,108,882 was paid to investors (the funds of investors were used to make interest payments or to return capital to other investors);
 - b. \$2,053,785 and US\$5,283,102 (net of withdrawals) was paid to Forex.com for foreign currency trading;
 - c. \$360,649 was paid to CMC Markets for foreign currency trading;
 - d. \$678,134 and US\$1,387,794 was paid to Mr. Deng or for his personal benefit;
 - e. \$383,044 and US\$108,900 was spent on credit card payments, of which \$127,945 was in respect of jewellery purchases by Mr. Deng; and
 - f. \$864,196 and US\$382,536 was used for unknown purposes.

[27] Aside from a small personal account in Mr. Deng's name, the trading records submitted in evidence focused on three accounts held in MP's or Group's name. From September 2006 until August 2007, deposits and foreign exchange trading occurred in the MP account and from August 2007, deposits and foreign exchange trading occurred in two accounts opened in Group's name. Just over \$1.2 million was deposited into the MP trading account and just over \$7 million was deposited into the Group trading accounts.

[28] Other than inter-account transfers, there were only three withdrawals totaling nearly \$450,000 from the three main foreign exchange trading accounts - \$19,975 in December 2006 from that of MP, \$400,000 from the account of Group in December 2008 and a final \$29,996 from the Group account in March 2009 to bring the Group account to a zero balance. The remaining \$7.75 million was lost through unprofitable trades by March

2009. Although there were periods of profitable trading, the trend was negative, with one notable period of profitable trading from April 2008 until mid July 2008, where prior losses were recouped, only to be lost again in subsequent months.

[29] Given the currency trading losses and the high rates of return promised to holders of the Debentures, Mr. Deng found himself in the position of having to use new investors' money to fund returns and redemptions. This situation was not sustainable as the more money raised from investors, the higher the monthly return commitment, and monthly return cheques and redemptions were suspended in March 2009.

D. CREDIBILITY OF WITNESSES

[30] The Respondents submitted that a number of the investor witnesses we heard from were not credible for a variety of reasons. We disagree. We find that the testimony given by non-Respondent witnesses regarding the nature of the Debentures, the process for investing in the Debentures and Mr. Deng's role at MP, was consistent. In addition, the documentary evidence submitted during the hearing corroborates the testimony that we heard.

[31] We find Mr. Deng's testimony to be unreliable and he was not a credible witness. Throughout his testimony Mr. Deng changed his story a number of times and he also refused to answer some questions put to him. For example, Mr. Deng's testimony regarding the purchase of a diamond ring for his wife, a New Years' celebration held on January 23, 2009 and an investor meeting held on June 7, 2009 was inconsistent and contradicted other witnesses and the documentary evidence presented. In addition, Mr. Deng denied knowledge and refused to answer Staff's cross-examination questions relating to certain deposits into offshore accounts. Later, when questioned by the panel on the same matter, he admitted to knowledge of the deposits and subsequently stated he hadn't answered truthfully in the first instance as he did not want information regarding the offshore depositors to become public.

E. HEARSAY

[32] Subsection 15(1) of the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S. 22 ("SPPA") states:

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.

[33] In *The Law of Evidence in Canada*, it is stated that:

In proceedings before most administrative tribunals and labour arbitration boards, hearsay evidence is freely admissible and its weight is a matter for the tribunal or board to decide, unless its receipt would amount to a clear denial of natural justice. So long as such hearsay evidence is relevant it can serve as the basis for the decision, whether or not it is supported by other evidence which would be admissible in a court of law.

(John Sopinka, Sidney N. Lederman & Alan W. Bryant, *The Law of Evidence in Canada*, 2d ed. (Markham, Ont.: LexisNexis Butterworths, 1999) at p. 308)

[34] Although hearsay evidence is admissible under the SPPA, the weight to be accorded to such 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). In the circumstances, we admitted the hearsay evidence tendered by Staff, subject to our consideration of the weight to be given to that evidence.

F. ANALYSIS

1. Did MP and Mr. Deng Breach Subsection 25(1)(a) of the Act?

i. The Law

The Elements for a Breach of Subsection 25(1)(a) of the Act

[35] Subsection 25(1)(a) of the Act prohibits 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.

[36] Accordingly, the elements of a breach of subsection 25(1)(a) of the Act are findings that, in the absence of an exemption:

1. a respondent traded, which includes any act in furtherance of a trade of a security as defined in the Act; and
2. the person or company was unregistered at the time of the trade.

Securities and Investment Contracts

[37] Subsection 1(1) of the Act defines a “security”. The relevant parts of that subsection provide that a security includes:

(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.

[38] The definition of a “security” uses the term “investment contract”. While the Act does not define that term, an investment contract is defined by the Supreme Court of Canada as being 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). According to the Supreme Court, a “common enterprise” describes a situation where investors’ fortunes are interwoven with and dependent upon the efforts and success of those seeking the investment of third parties (*Pacific Coast Coin Exchange v. Ontario Securities Commission, supra* at 128 (“*Pacific Coast*”).

[39] The elements of an investment contract that constitute a security are therefore:

- a. an investment of money;
- b. with an intention or expectation of income or profit from its employment in the investment;

- c. in a common enterprise, where the investors' fortunes are interwoven and dependent upon the efforts of those seeking to raise money for the investment or of third parties; and
- d. where the efforts made by those other than the investor are the significant ones with respect to the affect on the failure or success of the enterprise.

(Pacific Coast, supra at 128 to 132)

Trading and Acts in Furtherance of Trades

[40] Under subsection 1(1) of the Act, 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,
- (c) any receipt by a registrant of an order to buy or sell a security,
- (d) any transfer, pledge or encumbrancing of securities of an issuer from the holdings of any person or company or combination of persons or companies described in clause (c) of the definition of "distribution" for the purpose of giving collateral for a debt made in good faith, and
- (e) any act, advertisement, solicitation, conduct or negotiation directly or indirectly in furtherance of any of the foregoing.

[41] The Commission has interpreted the term "trade" in many previous decisions. 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. Allan Sussman* (1993), 16 O.S.C.B. 1209 (Ont. Ct.) at 1230).

[42] The Commission has found that a variety of activities constitute acts in furtherance of trades 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 of materials describing investment programs;
- (e) preparing and disseminating of forms of agreements for signature by investors;
- (f) conducting information sessions with groups of investors; and
- (g) meeting with individual investors.

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

[43] The inclusion of the word “indirectly” in the definition of “acts in furtherance” (cited above in paragraph (e) of the definition of a trade) reflects an express intention on the part of the Legislature to capture conduct which seeks to avoid the registration requirement by doing indirectly that which is prohibited directly.

[44] Any act in furtherance of a trade in securities that occurs in Ontario constitutes trading in securities under the definition in the Act (*Re Lett* (2004), 27 O.S.C.B. 3215 at para. 64). 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).

Registration

[45] 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 *Re Limelight, supra* at para. 135:

Registration serves as 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 Act.

[46] 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 Act.

[47] Therefore, the requirement that individuals and companies be registered to trade and advise in securities is an essential element of the regulatory framework put in place to achieve the purposes of the Act.

Availability of Exemptions

[48] As specified in subsection 25(1)(a) of the Act cited above, 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".

[49] However, there are numerous exemptions from the registration requirement. Many of these exemptions for registration also have parallels in the exemptions from the prospectus requirement. Some exemptions are explicitly set out in securities legislation or rules, while other exemptions are granted on a discretionary basis by the Commission.

[50] Once Staff has shown that the Respondents have traded without registration, the onus shifts to the Respondents to establish that one or more exemptions from the registration requirements was available to them (*Limelight, supra* at para. 142 and *Re Ochnik* (2006), 29 O.S.C.B. 3929 at para. 67).

ii. Discussion

Overview of the Parties' Positions

[51] Staff takes the position that the Respondents were engaging in unregistered trading of the Debentures. According to Staff, the Debentures constitute securities under subsection 1(1) of the Act because they are investment contracts and they are debentures. Acts in furtherance of trades and trades occurred as investors were solicited, and they invested in the Debentures. The Respondents were not registered and there were no exemptions available to them.

[52] The Respondents take the position that subsection 25(1)(a) of the Act was not breached because there was no security and no investment contract present. To summarize, the Respondents argue that:

- the Commission does not have jurisdiction over foreign currency trading;

- no debenture ever came into legal existence, and there is no other evidence of indebtedness that can satisfy the requirements of the definition of a security set out in subsection 1(1)(e) of the Act;
- in respect of the definition of a security set out in subsection 1(1)(g) of the Act, there is no written agreement signed by all the parties;
- according to the Respondents, profit generated from currency trading was not paid out to investors, any revenue generated was from the mutual fund and insurance product side of the business, and investors did not share in the risk associated with the Respondents' business. Instead they received a flat interest rate despite whether profit was generated;
- no investment contract ever came into existence. The Debentures were nothing but an acknowledgement of a receipt of monies having been advanced. The Respondents argue that the Debenture document in and of itself never came into legal existence and that there is no support for "guarantee" in the document. As well, the Respondents argue that the Debentures are unclear, contradictory, ambiguous and not a document signed under a corporate seal;
- the fortunes of the investors were not interwoven with and dependent upon the efforts and success of those seeking the investment or of third parties; and
- there was no reporting to investors as to how the funds were going to be used, no reporting as to the progress of the foreign currency trading activity, and no expectation that losses or profits in the foreign currency trading activity would be shared with the individual who provided the money.

[53] According to the Respondents, there is insufficient evidence to find the existence of an investment contract and therefore there was no security present and subsection 25(1)(a) of the Act could not have been breached in the absence of the existence of a security.

The Debentures are a Security

[54] The Respondents have submitted that there is no security and that what we are dealing with is nothing more than an advance of monies. Whether an advance of monies is considered a security will depend on the circumstances and in this circumstance we have no doubt that the Debentures are a security and that the Act applies. In order to come to this conclusion, we have looked at the applicability of the *Pacific Coast* case, which defines an investment contract and also at the terms of the Debentures.

[55] The criteria for an investment contract as set out by the Supreme Court of Canada in *Pacific Coast* must be applied. An investment contract involves:

- a. an investment of money;

- b. with an intention or expectation of income or profit from its employment in the investment;
- c. in a common enterprise, where the investors' fortunes are interwoven and dependent upon the efforts of those seeking to raise money for the investment or of third parties; and
- d. where the efforts made by those other than the investor are the significant ones with respect to the affect on the failure or success of the enterprise.

[56] In our view, the Debentures satisfy the criteria of an investment contract.

[57] With respect to the first point, "an investment of money", the evidence in this matter demonstrates that many individuals provided funds to Mr. Deng and MP or Group for investment. Specifically, we were provided in evidence with copies of cheques from investors made out to MP or Group. Some investors specified in the memo line on their cheques that the funds were for investment. The investor witnesses explained that once funds were provided, they were issued a document with the title "Guarantee Corporation Debenture", which set out the amount of money invested and had a reference number assigned to it (although there seemed to be no methodology with respect to how the reference numbers were assigned).

[58] During cross-examination by Respondents' counsel, some of the investor witnesses testified that they provided funds for investment and not a loan. For example, in cross-examination by Respondents' counsel, S.H. testified:

Q. And to be fair to you, the only thing you were looking for is to have a return of the monies that you loaned to MP together with interest, correct?

A. It's not a loan.

Q. What is it? Do you know?

A. At that time, we were talking about investment.

(Transcript, Feb. 23, 2010 at p. 29 lines 4-10)

[59] In addition, L.B. provided the following testimony during cross-examination by Respondents' counsel:

...my understanding, it has never been a loan. It's an investment, very clear. Even in the debenture certificate, it clearly says it's an investment, and I'm the investor.

(Transcript, Feb. 25, 2010 at p. 68 lines 11-14)

[60] The majority of investor witnesses in this proceeding gave testimony that corroborated what S.H. and L.B. said and that the investor witnesses understood that the funds being forwarded to MP and Mr. Deng were for investment and not a loan. In addition, the MP website referred to the Debentures as an investment and it explained the risks related to the Debentures and that interest payments are not certain:

Debentures are “fixed interest” investments. This means that the interest rate on the money you lend is set in advance. However, interest payments on your money and return of your capital are not certain. A debenture is not the same as a term deposit.

[61] With respect to the second point, providing funds “with an intention or expectation of income or profit”, the individuals who provided funds to Mr. Deng and MP did so with the understanding that their funds would be invested to generate a profit sufficient to pay their promised returns. Most investors were informed that they would receive a specific return for a fixed period of time. This was specified on the Debenture document itself. While not all the Debentures contained the exact same rates of return, they all specified a rate of return. For example:

- The Debentures provided to J.W. and L.B. stated that “The coupon rate is 2% per month”.
- The Debenture provided to F.L. stated that “The coupon rate is 4.0% per month” and also included a clause which stated, “...The client can’t disclosure [*sic*] this special rate 4% to anybody and will invest at least over 400,000 before June 10, 2008. Otherwise the rate will be back to normal”.
- The Debenture provided to A.H., an employee of MP, stated that “The coupon rate is 2.5% per month”.

[62] Some investors also testified that they understood the rate of return on their investment was based on the amount they would invest. For example:

- S.H. testified that she would receive 2% interest on \$10,000 and 3% interest if \$30,000 or more was invested. She also understood that her principal was guaranteed, otherwise she would have not have invested.
- F.L. testified that “My rate at that time was not determined. He [Mr. Deng] mentioned about – there’s a rate based on the amount you invest” (Transcript, March 1, 2010, at p. 12 lines 22-24).

[63] Overall, we find that the testimony we heard during the hearing from the different investors and documents provided in evidence demonstrated that there was an intention or expectation of income or profit when deciding to invest in the Debentures.

[64] With respect to the third point that the funds invested must be “in a common enterprise, where the investors’ fortunes are interwoven and dependent upon the efforts

of those seeking ... the investment”, the evidence in this matter demonstrated that the Respondents pooled all the investors’ monies from various MP and Group accounts and used the funds for various purposes including foreign currency trading, at the Respondents’ absolute discretion. Some investor witnesses thought that all their funds would be used for foreign currency trading, while others thought that some of their funds would be invested in other investments such as term deposits.

[65] With respect to the fourth point that “efforts made by those other than the investor are the significant ones with respect to the affect on the failure or success of the enterprise”, we find that Mr. Deng’s efforts in trading foreign currency underpinned the whole investment scheme. While many investors provided cheques for their investment made out to MP and to a lesser extent Group, the evidence demonstrated that Mr. Deng was personally and solely responsible for the foreign currency trading activity. The potential for profits was dependent on Mr. Deng’s success at trading foreign currency.

[66] Investors were told and understood that their funds would be used for foreign currency trading; however they did not participate in foreign currency trading directly themselves, all they did was provide funds to MP, Group and Mr. Deng. For example, F.L. explained during cross-examination that:

Q. And you knew that your money, in whole or in part, was dedicated or would be dedicated to foreign exchange trading, didn't you?

A. That's what he mentioned, yes.

Q. You knew that?

A. Yeah. But they misled me, said there's no risk. No risk at all.

Q. That's what Mr. Deng said to you?

A. Yeah, no risk. Guaranteed return.

Q. So that I'm clear, will you agree with me that if Mr. Deng told you that he was in Forex trading, and the Forex trading business was doing okay, and that's an honest fact at that time --

A. He told me he can make the money at any kind of market condition. If market goes up, goes down, has no impact to him. That's what he told me.

(Transcript, March 1, 2010 at p. 120 line 22 to p. 121 line 12)

[67] A.H. an employee of MP, who also was an investor, explained how the investment worked:

Q. What was your understanding of what the money you were investing was going to be used for?

A. Foreign currency exchange trading.

Q. And what is your understanding of what foreign currency exchange trading is?

A. It was to invest our money into the foreign exchange market.

Q. And did you ever discuss with Mr. Deng what markets he invested in, which form of currency markets he invested in?

A. I knew that he traded eight major currencies in the market.

Q. Do you recall any of which of those currencies?

A. I remember there were American dollars, Canadian dollars, Switzerland dollars, Japanese yen -- I don't remember if there were Japanese yen or not -- Australian dollars, francs, and euros.

Q. And do you know when Mr. Deng did his trading?

A. I assumed he was supposed to do the trading at home.

Q. Why did you assume that?

A. Because he came to the office only to meet with his clients.

(Transcript, March 1, 2010 at p. 189 line 3 to p. 190 line 2)

[68] In addition, some investors understood that they would only make a profit if MP did well. For example, A.L. testified that:

I was able to get my principal back plus the interest, but I also know if the company -- if one company doesn't do well, investor is not expected to get the money back.

...

I was mentally prepared in some way. I assumed that the company was doing well. I invested the money and I would get the money back, but on the other hand, I was somewhat mentally prepared that if the company doesn't do well, you won't get your money back. If the company goes bankrupt, you won't get the money back.

(Transcript, Feb. 24, 2010 at p. 70 line 22 to p. 71 line 13)

[69] Mr. Deng clearly had control of investors' funds and made all the decisions relating to foreign currency trading in his attempt to generate a profit to pay the interest on the Debentures to investors.

[70] The Respondents submitted that the Commission does not have jurisdiction over foreign currency trading, a position with which we agree. The trading we are concerned with here are the trades that occurred when the Respondents sold Debentures to investors. As seen from applying the criteria from *Pacific Coast*, an investment contract was in place between the investors and MP. Investors purchased a security, the Debenture, and all funds from the sale of Debentures were pooled together so that Mr. Deng could operate an entity which traded in foreign currencies to generate a profit. The profits generated were to be used to pay the Debenture interest owed to investors. The manner in which the profits were to be generated (i.e. through Mr. Deng's foreign currency trading) does not preclude the application of the Act. Regardless of how Mr. Deng planned to generate profits to pay interest to investors, he created an investment product, the Debentures, provided investors with a certificate of their investment, and promised to pay investors a rate of return as specified in the certificate. We find there are many similarities to the case *Re WNBC et al* (2010), 33 O.S.C.B. 1569 ("*WNBC*"), where the Commission found that pooled funds which were used to trade in foreign currencies satisfied the definition of an investment contract. Specifically, paragraphs 65 to 67 of the *WNBC* decision explain:

White and Qureshi created Eggvestments as a fund in which investors purchased units to give them exposure and participation on a pooled basis to foreign currency markets. Each Egg unit in itself constitutes a security, and the sale of these securities constitutes a trade.

The Eggvestment contracts also fulfill the requirements for an investment contract as described in *Pacific Coast Coin Exchange v. Ontario Securities Commission* ... :

- (i) the Eggvestment investors provided money to be invested;
- (ii) the investors had expectations of profit from the rates of return of up to 20% per annum guaranteed to them;
- (iii) the Eggvestment program was a common enterprise, where the fortunes of the Eggvestment investors were dependent upon White's management of their money and Qureshi's successful trading of their investments in the Eggs on foreign currency markets; and
- (iv) the investors themselves had no role in the scheme, beyond providing the investment money. White, Qureshi and *WNBC*'s management control of the Eggvestments and Qureshi's expert trading were the only efforts that mattered.

The Eggvestments contracts therefore constituted securities under the Supreme Court of Canada's definition of "investment contracts". As a result, any acts by the Respondents in furtherance of these contracts would constitute trades governed by Ontario securities law.

[71] Considering all of the evidence, we find that all the criteria for an investment contract are met. Funds were invested and there was an expectation of profit. The Respondents sold Debentures to investors, all investors' funds were pooled together, investors expected to be paid a fixed rate of interest on the Debentures and the ability to pay interest depended on Mr. Deng's generation of profits by trading in the foreign currency markets. Debenture investors had no role other than providing funds to the Respondents. Everything was under the control of Mr. Deng. This fulfills the criteria for the existence of an investment contract, which is a security.

[72] In addition to the investment contract analysis, we also find that the Debentures qualify as a security as defined in subsection 1(1)(e) of the Act, which defines a security to include "any bond, debenture, note or other evidence of indebtedness...". The Debenture itself has numerous aspects that one would expect to see in a debt security regardless of whether the language was naïve in places. While all Debenture certificates that were introduced into evidence were similar, they did have differences depending on the amount invested and the date invested. The following attributes were common to all Debentures introduced into evidence:

- a certificate issued with the name "MP Global Financial" at the top of one page, the term "Guarantee Corporation Debenture" underneath and a border around the page that one would expect to see on a security certificate;
- the name of the Investor and the amount invested;
- the signature of the President of MP Global Financial;
- the issue date;
- the interest (coupon) rate; and
- numerous terms consistent with a security:

"The debentures are convertible and redeemable."

"The interest rate is guarantee [*sic*] at [coupon rate specified] % per month payable at end of each month start [*sic*] from [month and year specified]."

"The investors have right to convert debenture to preferred share if MP Global decided [*sic*] to do so."

"The record date for redemption is any day after [date specified – 6 months from issue] and MP Global will pay in full after two week [*sic*] late of record date of redemption including principle [*sic*] plus unpaid interest." and

"Each investor has right [*sic*] to have physical debenture certificate."

[73] The Respondents argued that the form and features of the Debentures were not identical to actual debentures and that Mr. Deng used different terminology compared to conventional debentures. While the Debentures created by the Respondents had some unconventional features, we find that the intent was to create an investment product and that this investment product displayed many characteristics that one would associate with a security. The title “Guarantee Corporation Debenture” was listed on the investment document and each one was assigned a contract number. Investors were provided with a certificate when they invested in a Debenture which displayed the amount invested. Each Debenture had a term and specified a rate of return. The Debentures also included a redemption feature and conversion feature. For example, a Debenture provided to L.B. stated:

FEATURES OF DEBENTURES

What is the salient features of a Debentures and its redemption?

The following is the salient features of debentures. The issue date is May 29, 2008. The debentures are convertible and redeemable. The interest (coupon) rate is guarantee [sic] at 2.0% per month payable at the end of each month start from May, 2008. The investors have right [sic] converting debenture to preferred shares if MP Global Financial decide [sic] to do so.

[74] In addition, an MP brochure which was provided to investors provided the following description of the Debentures:

MP Corporate Debenture

A bond is an agreement on a loan between the issuer and the bondholder, that the bondholder has lent a certain amount of money to a government or corporation, and is given interest payments throughout the term of the loan. Term of the bond [sic] is given at time of issue and expires on a specified maturity date. At that time, the issuer must pay the bondholder the face amount of the bond.

A debenture is similar to a bond except debentures have no pledges on specific assets, but is [sic] secured by the issuer’s earning power.

MP Global Financial introduced the MP Global Corporate Debenture in 2006. The feature of this debenture is to preserve invested principle [sic] and to provide a constant rate of return. Investments can be as low as \$10,000, giving fair opportunity to average investors. For the past two years, we have successfully managed the MP Global Corporate Debenture and proved our earning power with an outstanding record. Reasons to [sic] our success include:

- Alternative investment tools
- Professional manager with years of experience operating this investment on a daily basis
- Strong team of analysts who watch the market 24/5 [sic] and react to trading opportunities in a timely manner

- Proven trading strategy combined with strict risk controls to reduce risk and gain profit

[75] The description above explains (although in a rudimentary fashion) characteristics of securities such as bonds and debentures and then goes on to explain the characteristics of MP's Debentures. We find that grouping the Debentures into a discussion about bonds and debentures on the website was meant to show that the Debentures created by MP are an investment product and a type of security.

[76] Investors were to be paid interest on their Debenture investment. In evidence we saw records of MP which noted interest payments to specific individuals. The Respondents promoted the Debentures as a successful interest-bearing investment product that they created and the MP website also specified that "MP successfully launched their corporate debenture in 2006, and has achieved excellence in fulfilling their obligation of all their debenture contracts".

[77] In addition, the Respondents submitted that the Debentures were not a security because they were issued by a sole proprietorship. We do not agree with the Respondents' position. Many of the Debentures that we saw in evidence at the hearing were issued by a corporation, MP, and signed by Mr. Deng in his capacity as President of MP. The Debenture itself uses the language "Debenture". Proprietorships do not issue debentures. The Debentures provided a right to convert to preferred shares and a proprietorship does not have the power to issue preferred shares (only a corporation can). The Debentures also contained a clause which referred to the "Transmission in Case of Deceased Shareholder". Shareholders can only hold shares in corporations and not in proprietorships. In addition, during his testimony, Mr. Deng often used the words proprietorship and company interchangeably, but in our view it is evident from the following testimony that Mr. Deng intended and knew that MP was a corporation:

When I first started the company, I always had the idea I wanted to make the company go public. So I created this debenture document and provided the document to the customers who required a document. Like I said, the ultimate purpose of setting up the company limited was to make the company go public.

(Transcript, April 26, 2010 at p. 26 lines 20-25)

[78] While the investment product created by the Respondents displayed some naïveté in the language used in drafting the Debenture document and contained some unusual features and grammatical and spelling mistakes, we find that the Debenture falls into the definition of a security.

The Respondents Engaged in Trading the Debentures

[79] Having found that the Debentures constitute a security, we must now examine whether the Respondents engaged in trading.

[80] As stated above, the case law established that trading in securities includes both trades and acts in furtherance of trades.

[81] With respect to MP, the following conduct, which constitutes trades in securities or acts in furtherance of trades in securities took place:

- investors provided cheques made out to MP for the purpose of investing in the Debentures. Some investors specified on the memo line of the cheque that the purpose was for investment;
- in exchange for their funds, investors were provided with a certificate, the Debenture, which specified the amount invested, term, rate of return and other features of the Debenture; and
- investors provided large sums of money and in many cases made repeated investments.

[82] Certain investors were informed that all or part of the money invested in the Debentures would be used by Mr. Deng for trading in foreign currency. All investors were informed they would receive a guaranteed return on their investment as specified on the Debenture certificate.

[83] Investors were solicited to invest in Debentures through:

- individual meetings with Mr. Deng where Mr. Deng answered potential investors' questions as to foreign currency trading and the terms of the Debentures;
- marketing material provided on MP's website;
- other promotion materials; and
- word of mouth of other MP employees and investors.

[84] With respect to Mr. Deng, the following conduct, which constitutes acts in furtherance of trades or trades took place:

- Mr. Deng personally accepted investor funds. While he did not receive cheques personally from all the investors (some investors provided their cheques to other MP employees), investor funds were deposited in accounts that were controlled by Mr. Deng.
- Mr. Deng dealt directly with certain investors who made very large investments and he also met with some of the investors to explain the investment to them. In our view, meeting with investors to explain the investment to them is a form of solicitation which constitutes an act in furtherance of a trade. For example, he met with investors who invested very large sums of money, such as F.L., to

discuss the investment. In addition, some investors, such as J.D., testified that Mr. Deng explained that their investment was “guaranteed”:

Q. Did you meet anybody while you were there?

A. Yeah, I meet Mr. Deng.

Q. Was that the first time you had met him?

A. Yeah, right.

Q. How long did the meeting last?

A. About an hour.

Q. Did you talk about how your money was going to be used?

A. Yes.

Q. How was your money going to be used, as you understood?

A. Okay. They say that they do the foreign currency exchange trading. But they put only the 50 percent in the foreign currency trading. And other 50 percent fund, they put in very safe place.

Q. When you say 'they', who do you mean?

A. Safe, that means no loss, something like that, no risk.

Q. But when you said they said this, who do you mean? Who said that?

A. Mr. Deng.

Q. And you said that he said that it was 50 percent foreign exchange trading and 50 percent safe?

A. Safe, yeah, in safe place. Investment in safe place, yeah.

Q. What did that mean to you, in a safe place?

A. Maybe in GIC or something. Guaranteed certificate, something like that.

Q. This investment of \$12,000 that you made on November the 3rd of 2008, did you think it was guaranteed?

A. Yeah.

Q. Why did you think it was guaranteed?

A. Mr. Deng told me that time, also explained this certificate is guaranteed.

(Transcript, Feb. 23, 2010 at p. 72 line 11 to p. 73 line 23)

- Mr. Deng's name, signature and title of president were on each Debenture. He also testified that he created the Debenture documents for investors:

Q. Now, many of the investors that we heard testify, Mr. Deng, said that when they came in to make -- when they came in to receive their debenture that you actually created it on the computer. Do you remember them testifying to that?

A. Yes, correct, especially for some later investors, but for earlier, the earliest investors, I handwrote those debentures.

(Transcript, April 27, 2010 at p. 51 lines 13 to 20)

- Investor funds were deposited in accounts of MP or Group (which were controlled by Mr. Deng) or into Mr. Deng's personal account. The Respondents argued that Mr. Deng did not receive the funds and that the funds were paid to either MP or Group. However, this is not entirely accurate. We were provided with evidence of cheques made out specifically to "MP Global Financial", and Mr. Deng personally received some of the investor cheques and some investor funds were deposited directly into Mr. Deng's personal accounts. In any event, Mr. Deng admits he was the sole owner, shareholder or proprietor of all the MP related companies, and, therefore Mr. Deng was controlling all investor funds received regardless of which MP entity actually received the funds.
- Mr. Deng oversaw the payment of interest and the repayment of principal to investors. He signed the cheques making the interest and principal payments.

[85] The Respondents submitted that a trade in securities could not have taken place because the Debentures were not traded on an exchange in the secondary market. However, in order for a trade to occur, a trade does not need to take place between two investors through an exchange. A trade also occurs when an issuer, such as MP, issues a security (such as the Debenture) for the first time to an investor. This constitutes a distribution of securities as defined in subsection 1(1) of the Act. The evidence shows that many investors provided funds to the Respondents in exchange for a Debenture.

Investors' Funds were Deposited into Accounts Controlled by Mr. Deng

[86] The Respondents submitted that much of the conduct at issue was carried out by Mr. Deng through a sole proprietorship and therefore the legal structure required for the issuance of securities and a breach of the Act did not exist. As stated above in paragraph 77, we do not accept this argument.

[87] The evidence in this matter focused on cash flows involving investors' funds. In excess of \$21.4 million was received from investors and in excess of \$1 million from parties who may have been investors. The investors who provided evidence in this hearing all provided cheques to Mr. Deng, MP or Group which were deposited into corporate bank accounts (which were all controlled by Mr. Deng) and investors were issued Debenture certificates which bore the name of "MP Global Financial" at the top of the certificate along with the title "Guarantee Corporation Debenture".

[88] While Mr. Deng did receive funds directly from certain parties, in making our findings we have focussed on the evidence that Staff introduced relating to the MP corporate bank accounts.

[89] Considering all of the above evidence, we find that both MP and Mr. Deng engaged in acts in furtherance of trades and trades of Debentures.

The Respondents were not Registered Under the Act

[90] Staff provided section 139 certificates which provide a statement as to "the registration or non-registration of any person or company" (subsection 139(a) of the Act).

[91] These section 139 certificates, which were prepared by the Assistant Manager of Registrant Regulation at the Commission, confirmed that there is no record of MP ever being registered under the Act.

[92] The section 139 certificates confirmed that Mr. Deng was only registered as a salesperson under the categories of mutual fund dealer with Excel Financial Growth Inc. from May 27, 2001 to June 20, 2006 and registered as a salesperson under the categories of mutual fund dealer and limited market dealer with Info Financial Consulting Group Inc., from July 25, 2006 to July 31, 2008.

[93] During the Material Time, Mr. Deng's salesperson registration was specifically with Excel Financial Growth Inc. or Info Financial Consulting Group Inc. He was never registered as a salesperson in any category with MP and, as mentioned above, MP itself was never registered.

There were no Exemptions Available to the Respondents

[94] The Respondents take the position that they were not dealing with the public, and that they were only advanced money by either family members, friends, existing

customers or individuals introduced by the aforementioned. Basically, the Respondents sought to demonstrate that they qualify for an exemption from the registration requirements of the Act pursuant to the private issuer exemption set out in section 2.4 of NI 45-106.

[95] In our view, the Respondents do not qualify for the private issuer exemption. This exemption is only available for an issuer that is limited to not more than 50 security holders. This exemption is not available to the Respondents because they issued Debentures to over 150 individuals. While the Debenture investment started off as an investment between close family and friends, the evidence at the hearing revealed that Debenture investors referred other people they knew in their community who did not have a personal relationship with Mr. Deng.

[96] We also note that the majority of the investor witnesses we heard from were not accredited investors as defined in section 1.1 of NI 45-106 and therefore the accredited investor exemption was also not available. Staff questioned investor witnesses about their financial circumstances, financial background and knowledge. The testimony of the investors reveals that certain of them did not qualify as accredited investors, and in fact many of them borrowed funds in order to invest with the Respondents.

[97] Therefore, there were no exemptions available to the Respondents.

iii. Findings

[98] Based on the conduct described above, we find that the Respondents were not registered, engaged in trading in securities and acts in furtherance of trades contrary to subsection 25(1)(a) of the Act, and there were no registration exemptions available to them.

[99] As part of their defense, the Respondents submitted at paragraph 87 of their written submissions that “it was incumbent upon investors to exercise a minimum level of due diligence” before investing. We do not accept this as a valid defense. Regardless of whether investors conduct their own due diligence, MP and Mr. Deng had a requirement under subsection 25(1)(a) of the Act to ensure that they had the proper registration in place in order to trade in securities. They cannot blame the naïveté of investors for their failure to comply with the securities laws in place. In addition, the Respondents did not verify whether any of the investors they dealt with qualified as accredited investors. Inquiries were not made as to the financial background and/or knowledge of investors.

2. Did MP and Mr. Deng Breach subsection 25(1)(c) of the Act?

i. The Law

[100] Subsection 25(1)(c) of the Act prohibits acting as an advisor without being registered:

No person or company shall,

...

(c) act as an adviser unless the person or company is registered as an adviser, or is registered as a representative or as a partner or as an officer of a registered adviser and is acting on behalf of the adviser,

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.

[101] An “advisor” is defined in subsection 1(1) of the Act as “a person or company engaging in or holding himself, herself or itself out as engaging in the business of advising others as to the investing in or the buying or selling of securities.”

[102] In *Costello v. Ontario (Securities Commission)*, [2004] 242 D.L.R. (4th) 301 (Div. Ct.) at para. 62, the court applied a business purpose requirement for advising, but noted that it need not be the only business the person or company in question is engaged in.

[103] The British Columbia Securities Commission set a low threshold for the business purpose requirement in *Re Donas* 1995 LNBCSC 18. The requirement can be met even if the business purpose behind the advising is not the primary business of the person or company (*Jack Maguire and J.K. Maguire & Associates* (1995), 18 O.S.C.B. 4623), or in situations where there is no evidence that investors acted on the advice given (*Re Hrapstead (c.o.b. North American Group)* [1999] 15 B.C.S.C. Weekly Summary 13).

[104] As for the nature of the communication, providing factual information is not sufficient to constitute advising under the Act:

A person who does nothing more than provide factual information about an issuer and its business activities is not advising in securities. A person who recommends an investment in an issuer or the purchase or sale of an issuer’s securities, or who distributes or offers an opinion on the investment merits of an issuer or an issuer’s securities, is advising in securities.

(*Re Donas* 1995 LNBCSC 18 at 5 (QL))

[105] Advising requires subjective commentary on the value of the investment.

ii. Discussion

Overview of the Parties' Positions

[106] Staff takes the position that the Respondents were acting as unregistered investment advisors. Specifically, Staff submits that:

MP Global maintained an on-line website. Through the website, through the promotional material they distributed to the public and through the discretionary manner in which they invested funds raised from investors, the [R]espondents engaged in or held themselves out to be engaged in the business of advising others as to investing in or buying or selling securities while they are not registered to act as advisors.

(Transcript, February 17, 2010 at p. 34 lines 4 to 12)

[107] Paragraphs 7 and 8 of the Statement of Allegations also provide further particulars about the alleged unregistered advising conduct and MP's website:

7. MP Global maintained an online website at www.mpgf.com. As at April 1, 2009, the "about us" section stated:

Who are we?

MP Global Financial is a fully integrated wealth management organization that focuses on building financial prosperity. Founded in 2004, MP Global Financial is one of Canada's fastest growing wealth management companies and our sound history is complemented by a proven track record of accomplishment. We strive to achieve global recognition with branches in Toronto Canada, California USA, and Hong Kong China.

Over the years, we have built trust within the communities and successfully launched our own product, the MP Global Corporate Bond, which promises a definite percentage of return and provides protection against lost of wealth accumulation. We are now managing more than \$100 million USD and over \$1 billion of assets under management.

What do we do?

We offer tailored products that meet the independent financial needs of our investors. We are devoted to provide [sic] a safeguard and protection of capital for those seeking for short or long term financial plans. We provide a broad range of investment services

to investors through mutual funds, insurance, fixed income equities, and segregated funds. [italics in original]

8. Through the website, through the promotional material they distributed to the public and through the discretionary manner in which they invested funds raised from investors, the Respondents engaged in or were holding themselves out to be engaged in the business of advising others as to investing in or the buying or selling of securities without being registered to act as an adviser.

[108] Staff further submits in their written submissions at paragraph 47 that:

... the Respondents engaged in advising through the discretionary manner in which they invested monies provided by investors. The Respondents pooled all the investors' monies and made investment decisions in their absolute discretion. To exercise absolute discretion over investment decisions with a view to profit is to engage in the business of advising.

[109] At the hearing, counsel for the Respondents questioned whether sufficient evidence had been led by Staff to establish that the Respondents engaged in advising. The Respondents take the position that Staff did not make out the alleged breach of subsection 25(1)(c) of the Act against the Respondents. Specifically, in their written submissions at paragraphs 79 to 81, the Respondents explain that:

The evidence is clear that neither Respondents [*sic*] engaged in the business of providing advice. What the Respondents did is to provide nothing but financial information. At no time did the Respondents provide any opinion. The Respondents received no commissions or paid referral fees as a result of forex trading activity. The Respondents only engaged in or held themselves out in respect to the buying or selling of insurance and mutual fund products.

It is submitted that the MP Global website does not totality [*sic*] support Staff Submission [*sic*] that the acts of advising occurred. There is no reference in the web site [*sic*] regarding foreign currency exchange activity but, a reference to "MP Global Corporate Bond". This reference is clearly incorrect and cannot mean the "Guarantee Corporation Debenture". At best it can be taken that the Respondents were advising on a product which did not exist.

Furthermore, there was absolutely no evidence addressed that any person read or relied upon the website in relation to his or her decision to advance money. ...

The Respondents did not Engage in Advising

[110] From the evidence presented at the hearing, we find that there is insufficient evidence to demonstrate that the Respondents engaged in advising.

[111] The testimony of the investor witnesses did not demonstrate that Mr. Deng himself directly engaged in advising although he certainly met with individuals interested in investing in the Debentures. Mr. Deng provided investors information about the interest rate and term of the Debentures and answered questions about the Debentures as did some MP employees. However, we find that the information provided to investors by MP employees and Mr. Deng was done in order to solicit funds from investors and the information provided to investors falls short of advising. The information was a factual description of the Debentures and, as established by the case law, providing factual information about an investment is not sufficient to constitute advising (*Re Donas, supra*).

[112] MP's website clearly indicated that MP provided financial advice, however, it is unclear from the evidence that such advice relates to the Debentures. The context is such that the advising reference could relate to insurance and mutual fund products, which certain individuals were appropriately licensed to provide advice on.

[113] As a whole, the evidence in this matter demonstrates that investors invested in the Debentures based on Mr. Deng's reputation as a business man in the Chinese-Canadian community in Toronto. Their investment was not based on investment advice from Mr. Deng or MP.

iii. Findings

[114] We find that there is insufficient evidence to establish that the Respondents breached subsection 25(1)(c) of the Act.

3. Did MP and Mr. Deng Breach Subsection 53(1) of the Act?

i. The Law

[115] Subsection 53(1) of the Act sets out the prospectus requirement for trades that comprise 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.

[116] The definition of “distribution” under subsection 1(1) of the Act states 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

[...]

[117] The prospectus requirement plays an essential role for the protection of investors. As stated by the Court in *Jones v. F.H. Deacon Hodgson Inc.* (1986), 9 O.S.C.B. 5579 (H.C.) at 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 (*First Global, supra* at para. 145).

[118] 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.

ii. Discussion

Overview of the Parties’ Positions

[119] Staff takes the position that the evidence in this proceeding demonstrates that investors purchased Debentures that had not previously been issued. Staff also emphasizes that for a distribution a prospectus plays an important role to provide disclosure to investors to remedy information asymmetry between the issuer and the investor. In this specific case, Staff submits that investors did not have full disclosure as to how their funds would be used and that their funds were used to pay other investors, pay credit card accounts and/or pay Mr. Deng directly. The investors were also unaware of Mr. Deng’s performance in trading foreign currencies. Had investors been provided with a prospectus and disclosure, Staff submit that investors might not have invested in the Debentures.

[120] The Respondents take the position that since the Debentures do not constitute securities, trading did not take place and therefore a distribution did not take place. In addition, the Respondents submit that none of the investors were taken advantage of and there is no evidence that money received from one investor was paid to another investor. The Respondents take the position that they did not need to disclose to investors any information about MP.

The Respondents Distributed the Debentures

[121] As established above in our discussion of section 25(1)(a) of the Act, the Respondents engaged in trades in securities and/or acts in furtherance of trades, as

defined in the Act. The Respondents have therefore met the trading requirement under part (a) of the definition of “distribution” under the Act.

[122] The second requirement of this definition is that the securities in question have not been previously issued. We note that the Debentures were an investment product created by MP. This was explained on MP’s website:

MP Global Financial introduced the MP Global Corporate Debenture in 2006. The feature of this debenture is to preserve invested principle [*sic*] and to provide a constant rate of return.

[123] The Debentures were not previously issued, and there is no record that MP was ever a reporting issuer or filed a prospectus in Ontario.

[124] Additionally, there is no evidence that any investors were provided with a prospectus with respect to the Debentures. Indeed, there is evidence that investors were not provided with a prospectus.

[125] To prove a breach of subsection 53(1) of the Act, it is unnecessary to prove that investors were taken advantage of or to prove exactly how the investment funds were used. What is necessary is that a distribution of securities occurred, that no prospectus was issued and no exemptions were available. We find that Staff has provided sufficient evidence to prove this breach.

iii. Findings

[126] We conclude that the Respondents engaged in trades in securities and acts in furtherance of trades. At the time of these acts, the Debentures were not previously issued, and we therefore conclude that the trades constitute a distribution. Since no prospectus was filed for these trades, we find that the Respondents contravened subsection 53(1) of the Act. As stated above at paragraphs 95 to 97, there were no exemptions available to the Respondents.

4. Is Mr. Deng Responsible for MP’s Breaches of the Act Pursuant to Section 129.2 of the Act?

i. The Law

[127] Pursuant to section 129.2 of the Act, a director or officer is deemed to be liable for a breach of securities law by the issuer where the director or officer authorized, permitted or acquiesced in the issuer’s non-compliance with the Act. Specifically, section 129.2 states:

129.2 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.

[128] Basically, the director or officer is also held responsible as the directing mind behind the company's actions if the director or officer authorized, permitted or acquiesced in the company's actions.

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

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

[130] The language of section 129.2 uses the terms "authorize", "permit" and "acquiesce". "Acquiesce" means to agree or consent quietly without protest. "Authorize" means to give official approval or permission, to give power or authority or to give justification. "Permit" means to allow, consent, tolerate, give permission or authorize permission particularly in writing.

ii. Discussion

[131] Mr. Deng is the sole director of MP. The articles of incorporation for MP list Mr. Deng as the sole director. His MP business card states that he is the President. As well, the Respondents' written submissions specify at paragraph 10 that "At all times Mr. Deng was sole director, sole officer, sole shareholder and sole proprietor, as applicable to all the combined businesses".

[132] During his testimony Mr. Deng stated that MP was a sole proprietorship and not a corporation, and there was testimony as to the timing of events in this matter and when MP became incorporated. Also, throughout his testimony Mr. Deng used the terms sole proprietorship, company and corporation interchangeably.

[133] Based on the documents filed at the hearing, we find that Mr. Deng was the sole director of MP, and based on the testimony of the witnesses that were MP employees, we find that Mr. Deng was the directing mind of MP.

[134] Mr. Deng's testimony also demonstrates that he was responsible for MP's issuance of the Debentures. For example, Mr. Deng testified:

Q. And the other question I wanted to ask you about the corporation debenture is if it was the proprietorship that was issuing the debenture, why was it signed by Mr. Deng as president?

A. So I assumed three roles. I was the president and person in charge for the company limited. I was the person in charge for sole proprietorship, and I was responsible for my person -- for the person myself. So I actually combined the responsibilities of the three different roles into one.

Q. So you were signing as the president of the corporation then?

A. My name appeared on the document of the sole proprietorship.

Q. I thought your evidence was you were acting in three capacities ?

A. In that particular document, I signed as a person in charge of the sole proprietorship as the company name appeared on the right-hand, top corner when the company's name appeared there, and the person in charge of that company signed at the bottom. I had the letterhead there as all other companies have.

[135] Mr. Deng tried to give the impression that he was acting as a sole proprietor and not acting through MP as President. However, the documentary evidence at the hearing shows that Mr. Deng signed documents, including the Debentures, in his capacity as President of MP.

[136] Mr. Deng also controlled the MP bank accounts. He testified that:

So I believe I transferred the money from the company to my personal account, and then I transferred the money out of my personal account back into the company account.

(Transcript, April 28, 2010 at page 41 lines 16 to 19)

[137] Through his conduct, it is clear that Mr. Deng was the directing mind behind MP's actions and the creation of the Debentures, and as the sole director, Mr. Deng authorized the conduct of MP. For example, Mr. Deng signed, on behalf of MP,

documents to open bank accounts, cheques to investors and the actual Debentures. Pursuant to section 129.2 of the Act, Mr. Deng is liable for MP's breaches of the Act.

[138] The fact that certain transactions took place in Mr. Deng's personal account does not convince us that MP was operating as a "sole proprietorship". Investors' cheques were deposited in MP's or Group's corporate accounts, over which Mr. Deng had sole control. The majority of funds returned to investors came from MP's corporate accounts and the majority of foreign currency trading occurred in the MP and Group accounts.

iii. Findings

[139] We conclude that Mr. Deng authorized, permitted or acquiesced in MP's contraventions of the Act and he is responsible for MP's conduct in this matter pursuant to section 129.2 of the Act.

5. Did the Respondents Act Contrary to the Public Interest?

i. The Law

[140] The Commission has a public interest jurisdiction to prevent likely future harm to Ontario's capital markets (*Committee for the Equal Treatment of Asbestos Minority Shareholders v. Her Majesty in Right of Quebec*, [2001] 2 S.C.R. 132 at para. 42). The scope of the Commission's discretion in defining the public interest is limited by the general purposes of the Act (*Gordon Capital Corp. v. Ontario (Securities Commission)* (1991), 14 O.S.C.B. 2713 (Ont. Ct. J.) at para. 37).

[141] As set out in section 1.1 of the Act, it is the Commission's mandate to:

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

[142] In pursuing the purposes of the Act, the Commission must consider fundamental principles as stated in section 2.1 of the Act. The relevant parts of section 2.1 of the Act 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 fairness and business conduct to ensure honest and responsible conduct by market participants.

[143] Staff alleges that the Respondents engaged in conduct contrary to the public interest.

ii. Discussion

[144] Both of the Respondents breached two key provisions of the Act, by trading without registration (subsection 25(1)(a)) and by engaging in a distribution without satisfying the distribution requirements under the Act (subsection 53(1)), which are intended to protect investors.

[145] These breaches of the Act caused harm to investors and to the integrity of Ontario's capital markets, and were clearly contrary to the public interest. They are contrary to the public interest because registration and distribution requirements are essential to protect investors and to ensure the integrity of the capital markets. Through this conduct, the Respondents failed to maintain high standards of fairness and business conduct to ensure honest and responsible conduct.

[146] The Respondents received substantial amounts from investors pursuant to trades in Debentures. Some investors made requests to redeem their investments and many of them did not receive repayment of their principal, not to mention the interest promised to them by the Respondents. In addition, investors were not provided with full disclosure as to how Mr. Deng was managing their money. Investors were under the impression that Mr. Deng was generating profits through his foreign currency trading to pay interest owed to investors on their Debentures, however, the foreign currency trading records show that for the majority of the time, Mr. Deng actually lost investors' funds by trading in foreign currencies.

[147] Mr. Deng was the mind and management of the operation and was responsible for the acts of MP.

iii. Findings

[148] Based on the conduct described above, we find that the Respondents engaged in conduct contrary to the public interest by breaching Ontario securities law.

G. CONCLUSION

[149] For the reasons stated above we find that:

- (a) the Respondents breached subsection 25(1)(a) of the Act;
- (b) the Respondents did not breach subsection 25(1)(c) of the Act;

- (c) the Respondents breached subsection 53(1) of the Act;
- (d) Mr. Deng is liable for MP's breaches of the Act pursuant to section 129.2 of the Act; and
- (e) the Respondents engaged in conduct contrary to the public interest by virtue of the breaches referred to in points (a), (c) and (d).

[150] The parties are directed to contact the Office of the Secretary within the next 10 days to set a date for a sanctions hearing, failing which a date will be set by the Office of the Secretary.

Dated at Toronto this 19th day of August, 2011.

"David L. Knight"

David L. Knight, FCA

"Margot C. Howard"

Margot C. Howard, CFA