

Citation: 2014 BCSECCOM 317

**Daveed Zarr (formerly known as Asi Lalky)
and Zarr Energy Corporation**

Securities Act, RSBC 1996, c. 418

Hearing

Panel	George C. Glover, Jr. Gordon L. Holloway	Commissioner Commissioner
Hearing Date	December 2, 2013 and March 10, 2014	
Submissions Completed	March 10, 2014	
Date of Findings	August 25, 2014	
Appearing		
Neil Cave	For the Executive Director	
Daveed Zarr	For himself	

Findings¹

I Introduction

- ¶ 1 This is the liability portion of a hearing under sections 161(1) and 162 of the *Securities Act*, RSBC 1996, c. 418
- ¶ 2 On May 9, 2013, the executive director issued a notice of hearing (2013 BCSECCOM 35) alleging that Daveed Zarr:
- distributed securities of Zarr Energy Corporation (Zarr Energy) without filing a prospectus, contrary to section 61(1) of the Act,
 - traded securities without being registered, contrary to section 34(a) of the Act, and
 - made misrepresentations, contrary to section 50(1)(d) of the Act.

¹ Vice-Chair Aiken participated in the hearing but retired from the commission before these Findings were issued.

- ¶ 3 Zarr Energy is included in the style of cause but the notice of hearing contains no allegations against it. We therefore make no findings against it.
- ¶ 4 Zarr appeared on his own behalf at the hearing. He cross-examined the executive director's only witness, a commission investigator, entered documents, testified and made written and oral submissions. Counsel for the executive director did not cross-examine him.
- ¶ 5 The evidence includes the transcript of sworn evidence given by Zarr in a voluntary interview by commission staff on July 31, 2013. Zarr was not represented by counsel at the interview.

II Background

- ¶ 6 Zarr was a resident of British Columbia at all relevant times. He has never been registered under the Act.
- ¶ 7 Zarr is the sole director and officer of Zarr Energy. There is no dispute that he is the sole person directing its affairs. Neither is there any dispute that Zarr Energy has never filed a prospectus under the Act.
- ¶ 8 On September 10, 2010, Zarr created a website for Zarr Energy. The home page of the Zarr Energy website stated that Zarr Energy was seeking investors. Under the tab "INVEST" on the website was the following:

Invest in us today, reap the reward tomorrow

Wish you owned Microsoft, Google, Walmart shares before they launched?

Stop wishing and act

We need your help to launch this company...the costs to make our idea a reality are staggering and in the event we are successful we may just be the next Microsoft, Google or WalMart.

Invest today and you will receive a certificate of ownership within 30 days. The more you invest the more you will own. Minimum is 1\$.

Large investors (over \$50,000) contact us before making the deposit.

We are issuing 20 Million shares which represent a total of 40% of company equity, the cost of each share is 1\$. Don't hesitate, each dollar you invest may be worth 100\$ within 10 years.

- ¶ 9 Zarr published an advertisement on Craigslist's Vancouver website directing readers to the Zarr Energy website. He also published similar advertisements on the online Alibaba.com website. Yellow Pages also published an online ad for the website, although Zarr says that was not because of his choosing or directive.
- ¶ 10 Zarr Energy sold no shares.
- ¶ 11 On December 31, 2011, Zarr published this online advertisement on the Vancouver Craigslist website:

Funding needed (250000\$)

... I am looking for someone with some balls to fund me in 2012. I want 250,000\$, and I will show you how to earn 50% on your money every year by trading, if you fund me you will earn 125,000\$ and the rest is mine... what ever the rest is... the funds stay on your trading account but I want exclusive access and full trading control... other than the control to withdraw the funds.

Try to get that from your bank.

Is there anyone out there with big enough balls...?

- ¶ 12 During January 2012, Zarr placed similar advertisements on Craigslist websites in Calgary, Ottawa and San Diego. There were some differences in the wording of these other advertisements.
- ¶ 13 For example, the Calgary ad stated:

"I am a professional currency trader and I'm very good at what I do. Where most people lose I win; Let me win for you. If you have 250,000\$ and can tolerate high risk I can grow your account to 375,000\$ in one calendar [sic] year (50% gain). Open a trading account with a major brokerage and let me trade the account for you, My fee is all the profit made above your gain... I currently signed 3 clients, I'm looking for one more.

Sorry, I will not accept any amount below 250,000\$... and here is the legal disclosure:

Any type of market or trade speculation that can yield unusually high return on investment is subject to unusually high risk. Only surplus funds should be placed at risk and anyone who does not have such funds should not participate in trading foreign currencies. Currency trading is not for everyone.”

- ¶ 14 The Ottawa ad was headed: “**250,000\$ High return investment**” and the body of the ad read, in part: “Do you want to make 30-50% on your money this year? .I can grow your account by 30-50% a year....I also invite people to bet against me; If I don’t make you 30-50% on your money in a clander [sic] year I will give you 10,000\$...Yes, I’m that sure....” The San Diego ad was similar.
- ¶ 15 In his sworn voluntary interview with commission staff, Zarr stated that he had received between three and five responses to his advertisements.
- ¶ 16 On January 11, 2012, a commission investigator, posing as a prospective investor, sent an email to the email address set out in Zarr’s Vancouver Craigslist advertisement, seeking more details on the proposed investment.
- ¶ 17 Zarr responded:

Thank you for contacting me and sorry for the late response.

I am a professional currency trader and I’m very good at what I do, but trading is a percentage game and I need more money to reach my goals. Your broker invests your money in traditional investment portfolio, but I will actively trade your account in the ever dynamic currency market; You just need to have the heart to suffer through the inevitable draw downs, and that is tough for most people.

I was surprised to receive numerous responses, and it’s great to know that people will back me up if I offer something real in return.

My terms are simple:

1. Open a trading account with FXCM or OANDA.
2. Fund it with \$250,000 and grant me a trading access to your account
3. allow me to trade the account for one year

4. You will earn 50% on your money and my fee is what ever amount that is above your gain.

Lets get this ball rolling.

Sincerely,
Daveed Zarr

¶ 18 Zarr admitted in his interview that he is not, and never has been, a professional currency trader. He also acknowledged that he is no good at it. In his two attempts at foreign exchange trading for his own account, he lost US\$54,700 of the US\$127,000 he invested the first time, and managed only a small gain on the US\$10,000 he invested the second time. He testified that he is a terrible currency trader.

III. Analysis and Findings

A. Illegal Distribution

¶ 19 The executive director alleges that Zarr contravened section 61(1) of the Act when he offered to sell shares in Zarr Energy on the Zarr Energy website.

¶ 20 Section 61(1) states that

...a person must not distribute a security unless... a preliminary prospectus and a prospectus respecting the security have been filed with the executive director, and ...the executive director has issued receipts for them.

¶ 21 Section 1(1) of the Act defines “distribution”, “security” and “trade” as follows:

“distribution” is “a trade in a security of an issuer that has not been previously issued.”

“security” includes “shares”

“trade” is

(a) a disposition of a security for valuable consideration... and

(f) any act, advertisement, solicitation, conduct or negotiation directly or indirectly in furtherance of any of the activities specified in paragraphs (a) to (e).

- ¶ 22 The Zarr Energy shares were securities. In posting the offer to sell shares on the Zarr Energy website, and by posting advertisements on other websites directing readers to that website, Zarr engaged in conduct described in paragraph (f) of the definition of trade; i.e. acts, advertisements, solicitations and conduct in furtherance of a disposition of securities for valuable consideration.
- ¶ 23 The Zarr Energy shares that were offered had not been previously issued.
- ¶ 24 Zarr says there was no distribution because the website did not provide a means of payment for purchasing shares, but that is not relevant. Any conduct that constitutes a trade, including promotional and administrative activity of the kind included in paragraph (f) of the definition of trade, also constitutes a distribution if the trade is in a security of an issuer that has not been previously issued. It matters not whether the website offered a means of payment or, indeed, whether any securities were ultimately sold.
- ¶ 25 We find that Zarr distributed Zarr Energy shares contrary to section 61(1).
- B. Trading without Registration**
- ¶ 26 The executive director alleges that Zarr contravened section 34(a) of the Act when he promoted the foreign exchange trading investment.
- ¶ 27 Section 34(a) states that “a person must not... trade in a security ...unless the person is registered in accordance with the regulations... .”
- ¶ 28 Section 1(1) of the Act defines “security” to include an “investment contract”.
- ¶ 29 An investment contract is an investment of money in a common enterprise with profits to come from the efforts of others. (See *SEC v. W. J. Howey Co.* 328 U.S. 293 (1946), *SEC v. Glenn W. Turner Enterprises, Inc.* 474 F. 2d 476 (1973), *Pacific Coast Coin Exchange v. Ontario Securities Commission*, [1978] 2 S.C.R. 112.)
- ¶ 30 The investment Zarr solicited as he described it in the Craigslist advertisement required an investment of money – \$250,000. The investors’ profits were to come from the efforts of persons other than themselves. The investors’ role would be passive – profits were to come from Zarr’s skill in foreign exchange trading, and he had exclusive access to, and full trading control over, the investors’ funds. The commonality that is required by the cases cited above would have existed between Zarr and the investors.
- ¶ 31 We find that the investment Zarr described in the Craigslist advertisement was an investment contract, and therefore a security, under the Act.

- ¶ 32 The Craigslist posting was also a trade, on the same reasoning we set out above in connection with our finding that Zarr contravened section 61(1); namely, that Zarr engaged in an advertisement, solicitation or conduct in furtherance of a trade in a security for valuable consideration.
- ¶ 33 Zarr submitted that there was no security offered by the Craigslist advertisement because the investors were invited to open their own accounts and because Zarr had no ability to access the funds that investors would have in their accounts or to transfer funds from the investors' accounts to himself. He says that he was just offering advice on how to trade currencies.
- ¶ 34 The submission that Zarr was only offering advice is unpersuasive as the Craigslist advertisement clearly called for the investors to set up the accounts and allow Zarr exclusive trading authority. This is not simply advice on how to trade currencies. Zarr says that the Craigslist advertisement, the posting on the Zarr Energy website and his communications with the commission investigator were not trades in securities or distributions of securities because he never intended to accept any funds from investors or trade currencies in investors' accounts. He said all of this was a game, research, a documentary, a prank, an essay, and how he expresses himself.
- ¶ 35 We have not assessed the truth of these statements because, even if they are true, they are not relevant to the issue of whether his conduct constituted trades.
- ¶ 36 We find that Zarr, in posting the Craigslist advertisement, traded in a security without being registered.
- ¶ 37 The next issue is whether Zarr was required to be registered.
- ¶ 38 Section 8.4(1) of National Instrument 31-103 *Registration Requirements, Exemptions and Ongoing Registrant Obligations* says:
- “(1) ...a person ...is exempt from the... registration requirement if the person...
- (a) is not engaged in the business of trading in securities..., and
- (b) does not hold himself... out as engaging in the business of trading in securities... ”
- ¶ 39 The executive director submits that Zarr held himself out to be in the business of trading; therefore, the exemption in section 8.4(1) does not apply and Zarr was required to be registered. We agree.

¶ 40 The Craigslist advertisements and the emailed response to the commission investigator demonstrate that Zarr held himself out as being in the business of trading. The ads included phrases such as: “I am a professional currency trader”, “I want exclusive access and full trading control”, “Give me \$250,000 and I will turn it into a million dollars”, “let me trade the account for you” and “I can grow your account by 30-50% a year” and the email to the investigator stated “allow me to trade your account for one year”.

¶ 41 These and other statements made by Zarr prove that Zarr was holding himself out as being engaged in the business of trading in securities. Accordingly, we find that the exemption in section 8.4 of NI 31-103 does not apply and therefore Zarr was required to be registered under the Act.

C. Misrepresentation

¶ 42 The executive director alleges that Zarr made misrepresentations, contrary to section 50(1)(d) of the Act, in promoting the foreign exchange trading investment when he stated that he was a professional currency trader and when he stated the investment he was offering would provide a 50% annual return.

¶ 43 Section 50(1)(d) says:

“50(1) A person, while engaging in investor relations activities or with the intention of effecting a trade in a security, must not...

(d) make a statement that the person knows, or ought reasonably to know, is a misrepresentation”.

¶ 44 Section 1(1) of the Act defines “misrepresentation”, “material fact”, and “investor relations activities” as follows:

‘misrepresentation’ means

(a) an untrue statement of a material fact, or

(b) an omission to state a material fact that is

(i) required to be stated, or

(ii) necessary to prevent a statement that is made from being false or misleading in the circumstances in which it was made”

‘material fact’ means, when used in relation to securities issued or proposed to be issued, a fact that would reasonably be expected to

have a significant effect on the market price or value of the securities”

‘investor relations activities’ means any activities or oral or written communications, by or on behalf of an issuer or security holder of the issuer, that promote or reasonably could be expected to promote the purchase or sale of securities of the issuer, but does not include

...

(b) activities or communications necessary to comply with the requirements of... this Act or the regulations”

¶ 45 The executive director relies on the following statements Zarr made in the Craigslist advertisement and in his correspondence with the commission investigator, posing as an investor:

- Zarr was a professional currency trader, and
- investors would earn annual returns of 50%.

¶ 46 Zarr made these statements with the intention of effecting a trade in a security, namely the sale of the investment contracts described in the advertisement. Given this finding, we do not need to decide if he was also engaging in investor relations activities when he made these statements.

¶ 47 These statements were false or misleading.

Professional currency trader

¶ 48 Zarr was not a professional currency trader. He had no training in currency trading and was not registered in any capacity under the Act. As he admitted in his sworn interview and in his submissions, he was no good at currency trading and lost significant amounts of money in his own trading activities.

¶ 49 To a prospective investor, the representation that the investor’s funds would be traded by a professional currency trader would be material in relation to the market price or value of the securities proposed to be issued.

¶ 50 We find that Zarr contravened section 50(1)(d) when he stated that he was a professional currency trader.

Expected returns and omission of risk

¶ 51 Zarr’s statement that an investor could earn 50% annually is clearly material as having a significant effect on the market price or value of the securities.

- ¶ 52 The commission has held in other cases² that risk is a key factor in making an investment decision and bears directly on the value of the security; that promised high returns are impossible to achieve through legal means on a sustained basis without substantial risks; and that the value of any investment is linked to the risk associated with the investment.
- ¶ 53 The Craigslist advertisement and the response to the commission investigator omitted to state the material fact that the expected returns could not be made without substantial risk. Without this material fact, the statements about the expected return were misleading, and were therefore misrepresentations under the Act.
- ¶ 54 We find that Zarr contravened section 50(1)(d) when he made statements about the expected return of the foreign exchange trading investment.
- ¶ 55 In his submissions, Zarr argued that he should not be found liable for making misrepresentations. He stated that
- I believed with all my heart that I will be successful. I believed there was no chance I would fail. I was wrong.
- ¶ 56 Notably, these submissions contradict his submissions that he never intended to accept any funds from investors or trade currencies in investors’ accounts and that the Craigslist advertisements were a game, research, a documentary, a prank, an essay and how he expresses himself.
- ¶ 57 Even if Zarr did not know that his statements were misrepresentations within the meaning of the Act, the test under the Act is whether Zarr knew or ought reasonably to have known that his statements were misrepresentations.
- ¶ 58 The test is an objective test—how would the objective, reasonable person perceive the alleged misrepresentations³. We find that an objective, reasonable person would find the statements made in the Craigslist advertisements and in the response to the commission investigator false or misleading in light of the true facts.

² *Manna Trading Corp Ltd. et al.*, supra, at para. 318

International Fiduciary Corp SA et al., supra at para. 45

Paul Lester Stiles, 2012 BCSECCOM 383 at para. 31

³ *Queen v. Cognos*, [1993] 1 S.C.R. 87, para. 63.

IV Summary of Findings

¶ 59 We find that Zarr:

1. contravened section 61(1) of the Act when he offered to sell Zarr Energy shares on the Zarr Energy website;
2. contravened section 34(a) of the Act when he solicited an investment in foreign exchange trading through the Craigslist advertisement; and
3. contravened section 50(1)(d) of the Act when he stated that he was a professional currency trader and that the investment he was offering would provide a 50% annual return.

V Submissions on Sanction

¶ 60 We direct the parties to make their submissions on sanctions as follows:

By September 15 The executive director delivers submissions to Zarr and to the secretary to the Commission

By September 29 Zarr delivers response submissions to the executive director and to the secretary to the Commission

Either party seeking an oral hearing on the issue of sanctions so advises the secretary to the Commission

By October 6 The executive director delivers reply submissions (if any) to Zarr and to the secretary to the Commission.

¶ 61 August 25, 2014

¶ 62 **For the Commission**

George C. Glover, Jr.
Commissioner

Gordon L. Holloway
Commissioner