BRITISH COLUMBIA SECURITIES COMMISSION

Securities Act, RSBC 1996, c. 418

Citation: Re SPYru Inc., 2015 BCSECCOM 277 Date: 20150707

SPYru Inc., Paradox Distributors (1992) Ltd., Echo Partners Ltd., U-GO Brands Nutritional Products Inc., Peter David Harris, Lorne Neil Cire, Christopher Andrew Burke, Millard Michael Kwasnek, and Joseph Yvan JeanClaude Thibert a.k.a. John Thibert

Panel	Nigel P. Cave	Vice Chair
	Judith Downes	Commissioner
	Audrey T. Ho	Commissioner
Hearing Dates	January 12, 13, 14, 2015 and March 31, 2015	
Submissions Completed	April 16, 2015	
Date of Findings	July 7, 2015	
Appearing		
Mila Pivnenko James Torrance	For the Executive Director	
	For SPYru Inc.	
Peter David Harris	Echo Partners Ltd. and U-GO Brands Nutritional Products Inc. For himself	
Lorne Neil Cire	Paradox Distributors (1992) Ltd. Echo Partners Ltd. and U-GO Brands Nutritional Products Inc. For himself	
Christopher Andrew Burke	Echo Partners Ltd. and U-GO Brands Nutritional Products Inc. For himself	
Millard Michael Kwasnek	Echo Partners Ltd. and U-GO Brands Nutritional Products Inc. For himself	

Joseph Yvan JeanClaude Thibert a.k.a. John Thibert	Echo Partners Ltd. and U-GO Brands Nutritional Products Inc. For himself

Findings

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 February 6, 2014, the executive director issued a temporary order and a notice of hearing against the respondents.

[3] On February 13, 2014, the executive director varied the temporary order.

[4] On February 19, 2014, the Commission extended the temporary order, as varied, until March 13, 2014.

[5] On March 13, 2014, a panel of the Commission further extended the temporary order (Temporary Order) as varied.

[6] On October 1, 2014, the executive director issued an amended notice of hearing (2014 BCSECCOM 404) against the respondents. The executive director alleges that:

a) the respondents contravened section 61 of the Act by raising at least $1,963,659 for SPYru Inc. and U-GO Brands Nutritional Products Inc. from at least 300 investors, thereby distributing securities of SPYru and U-GO without filing a prospectus;
b) U-GO and Peter David Harris contravened section 168.1(1)(b) by providing false information in filed exempt distribution reports (EDRs) with respect to the U-GO distributions;
c) the five individual respondents (the Sales Group), in their respective roles as directors of U-GO and Echo Partners Ltd. and as directors or agents of SPYru, and Lorne Neil Cire in his role as a director of Paradox Distributors (1992) Ltd., authorized, permitted or acquiesced in the contraventions of section 61 by U-GO, Echo, Paradox and SPYru and the contraventions of section 168.1(1)(b) by U-GO, and therefore are liable for those contraventions under section 168.2;
d) the Sales Group contravened section 50(1)(d) when they made the following misrepresentations to SPYru investors:
    i) SPYru would be listed on an exchange;
    ii) SPYru shares bought at $0.01-$0.05 would be worth specified increased prices in the next two years; and
    iii) SPYru would be bought by a large beverage company;
e) Harris contravened section 50(1)(d) when he made the following misrepresentations about the Commission:
    i) the issuance of U-GO share certificates was delayed because the Commission needed to approve them or make a ruling about them;

ii) the Sales Group retained a "BCSC approved" lawyer, and her legal fees were paid to the Commission;
iii) once the Commission approved SPYru, the company and the investors would be in good standing under the Act; and
iv) an investor's request for a refund of investment was delayed because the Commission needed to approve a form or make a ruling;

f) Harris and Cire contravened section 57(b) and committed fraud when they took money from investors purportedly for developing the SPYru drink without disclosing their suspicions that Klaus Glusing was not using the money for the drink, and sending it to Klaus Glusing;

g) Cire contravened section 57(b) and committed fraud when he spent approximately $181,733 of investors' money on personal expenses;

h) Echo, U-GO, Cire and Millard Michael Kwasnek breached the terms of the Temporary Order when they conducted investor relations activities from February 6, 2014 until at least July 2014 while subject to the Temporary Order; and

i) the respondents all acted contrary to the public interest.

[7] During the hearing the executive director called one witness, a Commission investigator, and tendered documentary evidence. John Thibert testified at the hearing. The respondents, other than SPYru, tendered documentary evidence.

[8] Each of the individual respondents attended the hearing and represented themselves and collectively represented Echo and U-GO. Cire represented Paradox at the hearing. There were no representatives of SPYru at the hearing.

[9] Unless the context indicates otherwise, the respondents referred to in the remainder of these Findings refer to all the respondents except SPYru.

II Background

[10] SPYru is a Turks and Caicos company that was incorporated in October 2010. SPYru was in the business of developing a health drink based on spirulina. Harris and Cire were directors of SPYru from November 2010 through March 2013. SPYru had two additional directors, Klaus Glusing and Mark Glusing. Mark Glusing died in October 2011 and Klaus Glusing died in October 2013. SPYru has never filed a prospectus under the *Securities Act*.

[11] Each member of the Sales Group was a resident of British Columbia during the time period relevant to this hearing. Cire is currently a resident of Alberta.

[12] U-GO is a British Columbia company that was incorporated in May 2013. U-GO is in the business of developing a health drink (different from that of SPYru) based on spirulina. Each of the individual respondents has been a director of U-GO since its incorporation. U-GO has never filed a prospectus under the Act.

[13] Echo is a British Columbia company that was incorporated in April 2013. Echo is described by the Sales Group members, in their interviews with the Commission, as a holding company which would own interests in products such as the one being developed by U-GO. Each of the

individual respondents has been a director of Echo since its incorporation. Echo has never been registered under the Act.

[14] Paradox is a British Columbia company that was incorporated in January 1992. Cire is the sole director and president of Paradox. Paradox has a number of business activities unrelated to SPYru or U-GO. However, Paradox entered into a distribution agreement with SPYru to distribute the SPYru beverage. Paradox has never been registered under the Act.

SPYru and U-GO distributions

[15] Both the executive director and the respondents say that SPYru issued shares to investors commencing in January 2010 and continuing until early 2013. However, SPYru was not incorporated until November 2010. No party raised an issue about this during the proceedings. We have therefore inferred that deposits were taken prior to the incorporation of SPYru, and those deposits were then converted into payments for shares which were issued after SPYru's incorporation date.

[16] The total number of shares issued and dollar amount raised by SPYru from investors between January 2010 and early 2013 is unclear. Over the course of the investigation in this matter and the hearing process, the respondents submitted a number of summaries of shares issued by SPYru. These lists differ in their contents. In connection with their written and oral submissions, the respondents said that SPYru issued shares to 298 investors and raised a total of $1,351,200. In a shareholder registry that was filed by the respondents after the completion of submissions, the respondents say that the total amount raised by SPYru was $1,389,700. While this last registry was not entered as an exhibit in these proceedings, we did consider its contents as admissions by the respondents about the distributions it describes.

[17] Both the executive director and the respondents also say that U-GO commenced issuing shares in early 2013 until January 2014. U-GO was not incorporated until May 2013. Counsel for U-GO during the investigation indicated that subscription agreements entered into by U-GO prior to May 2013 were pre-incorporation contracts.

[18] Again, there is a lack of clarity in the evidence as to the number of investors in U-GO securities and the total dollar amount raised through their investments. Filings made by counsel for the respondents during the investigation of this matter indicate that U-GO raised $898,340 from a total of 111 investors. The respondents, as part of their written submissions for this hearing, say that U-GO raised $766,229 from a total of 119 investors.

[19] Echo's bank account was used for some of the funds raised by U-GO. Paradox's bank account was used for some of the funds raised by SPYru. Cire's personal bank accounts were used for some of the funds raised by SPYru and by U-GO.

[20] The executive director says that he is unable to determine the exact number of investors or the exact dollar amount raised by SPYru and U-GO respectively due to poor record keeping by the respondents.

[21] The executive director says that, based on the respondents' own admissions, the total amount raised by SPYru was at least $1.3 million. The executive director also says that he is not relying on the respondents' own admissions and records and that he conducted a review of the bank accounts of Cire, Paradox, SPYru, Echo and U-GO and determined that SPYru and U-GO raised at least $1,963,658 in total. This total was not split by the executive director as between the amount raised by SPYru and the amount raised by U-GO.

[22] The above evidence is not consistent. In the circumstances, the admissions of the respondents in their submissions, as they amount to admissions against interest, are the best evidence and, although not reconciled exactly, are supported by the bank account review conducted by the executive director. We find that SPYru raised a total of $1,390,000 from 298 investors and U-GO raised $766,000 from a total of 119 investors.

Amounts raised by each individual respondent and Paradox, and commissions paid

[23] Paradox and each member of the Sales Group introduced investors who invested in SPYru. The exact number of investors introduced to SPYru by each member of the Sales Group and Paradox and the amount invested in SPYru by those investors is unclear from the evidence.

[24] Each of Cire, Kwasnek, Thibert and Burke introduced investors who invested in U-GO. The evidence is not clear as to whether Harris introduced investors who invested in U-GO. Again, the number of investors introduced to U-GO by each member of the Sales Group and the amount invested in U-GO by those investors is unclear from the evidence.

[25] The evidence is clear that Paradox received cash commissions from SPYru which were then split between Cire and Harris. Cire and Harris also received bonus shares from SPYru for raising funds in addition to cash commissions. Kwasnek, Thibert and Burke received bonus shares from SPYru for raising funds.

[26] The evidence is also clear that Kwasnek, Thibert and Burke received cash commissions from U-GO for raising funds.

[27] The evidence is less clear on the quantum of commissions received by each member of the Sales Group from SPYru and U-GO.

[28] The executive director says he cannot determine the quantum of commissions that Cire received from SPYru due to the commingling of investors' funds in Cire's personal bank accounts. Cire admitted to receiving $5,000 in cash from U-GO. In his interview with Commission staff, Cire said that this was a director's fee and not a commission.

[29] The executive director says a review of Harris' bank accounts indicates that he received a total of $94,934 in payments from SPYru and U-GO. However, the evidence also shows that Harris received monthly cash payments that were not commissions from both SPYru and U-GO. The evidence does not clarify the quantum of commissions, versus monthly payments, received by Harris from either SPYru or U-GO. While Harris admitted to receiving cash commissions and bonus shares from SPYru for introducing investors to SPYru, he says that he did not receive any cash commissions for introducing investors to U-GO.

[30] At an interview with Commission staff, Kwasnek admitted to receiving $36,559 in cash commissions from U-GO for introducing investors. The executive director submits that a review of bank records indicate that a total of $38,155 was paid by U-GO to Kwasnek. Given that there could be other reasons for U-GO to be making a payment to Kwasnek (such as a reimbursement of expenses), Kwasnek's admission as to the quantum of the commissions is the best evidence before us and we find that he received $36,559 in commissions from U-GO.

[31] Thibert admitted to introducing approximately 100 investors to SPYru and receiving bonus shares from SPYru for those introductions. He also admitted to receiving $2,500 in cash commissions from U-GO for introducing investors to U-GO.

[32] Burke admitted to receiving $5,000 in cash commissions from U-GO for introducing investors to U-GO.

[33] There is no clear evidence that connects particular distributions of SPYru or U-GO securities with the payments of commissions.

Prospectus requirement exemptions

[34] A Commission investigator interviewed 21 SPYru investors and 19 U-GO investors as part of their investigation into this matter. Copies of the investigator's notes of those interviews were filed as evidence in this proceeding. The Commission also sent electronic questionnaires to 277 SPYru and U-GO investors and received 97 responses. The results of those questionnaires were filed as evidence in this proceeding.

[35] The interview notes and the questionnaires indicate that at least 70 of the SPYru investors and at least 13 U-GO investors did not qualify for the prospectus exemption relied upon by the respondents to issue the securities.

[36] The respondents did collect subscription agreements in connection with each of the U-GO distributions. Those agreements, the investor notes and questionnaires also provide evidence that certain of the investors did qualify for the prospectus exemptions relied upon by the respondents.

Commercial activities of SPYru

[37] Some of the funds raised on behalf of investors in SPYru were sent by Harris and Cire to the Glusings in the Turks & Caicos. Harris and Cire say the money was sent at the direction of the Glusings and was sent, at least originally, by Western Union or Moneygram.

[38] Harris and Cire say that approximately $817,000 was sent to the Glusings in the Turks and Caicos between 2010 and 2013. The executive director says that he has only seen evidence of payments of approximately $420,000 to the Glusings.

[39] During the summer of 2012, Harris and Cire began to have concerns about how the money that they sent to Klaus Glusing was actually being used.

[40] In his interview with Commission staff, Cire says that he and Harris confronted Klaus Glusing about this in October 2012. He says they met with Glusing for two reasons: a) they wanted to better understand how the investors' money was being spent; and b) they wanted SPYru to be a company operating in Canada or the US rather than the Turks and Caicos. Cire said that following this meeting in October, Klaus Glusing did hire a lawyer to provide initial advice about moving the company to the US. Cire says that he and Harris became further concerned when Glusing took no steps beyond obtaining this initial legal advice.

[41] Harris and Cire hired a private investigator to investigate Klaus Glusing on November 20, 2012.

[42] During 2012, it also became clear that the spirulina drink being developed by SPYru was having trouble gaining acceptance from retailers as a health food drink due to its additives. SPYru manufactured 80,000 bottles of its drink and was only able to sell approximately 20,000 bottles of this production.

[43] At some point between October 2012 and March 2013, Harris and Cire came to believe that Klaus Glusing was not focused on advancing the commercial prospects of SPYru and that SPYru funds were not being used properly by Glusing. During this time frame, they also determined that SPYru's spirulina drink needed to be reformulated in order to be marketed viably as a health food drink.

[44] In a June 2013 letter to shareholders, Harris suggested that the Paradox distribution agreement with SPYru was terminated as of January 31, 2012. In March 2013, Harris and Cire were terminated as directors of SPYru and Harris stopped receiving monthly payments from SPYru.

Formation of U-GO and U-GO exempt distribution reports

[45] Following the split from Klaus Glusing, the Sales Group members formed U-GO. At some point prior to the formation of U-GO, Cire and Harris commenced work on reformulating a spirulina-based health food drink.

[46] U-GO began raising money from investors in early 2013. As noted above, between April 2013 and January 2014, we find that U-GO raised $766,000 from investors.

[47] U-GO filed 12 EDRs with the Commission. In those reports, U-GO listed share issuances to 61 investors for a total of $464,000. In those reports, U-GO said that each of the 61 investors qualified for one of two prospectus exemptions, either section 2.3 of *National Instrument 45-106 – Prospectus Exemptions* (NI 45-106) (the accredited investor exemption, described below) or section 2.5 of NI 45-106 (the family, close friends or close business associates exemption, described below). Correspondence from U-GO's counsel (at the time) stated that U-GO issued shares to its first 50 investors for a total of $434,090 under section 2.4 of NI 45-106 (the "private issuer" exemption, described below).

[48] Several of the Sales Group members admitted in their interviews with Commission staff that some of the investors listed on the EDRs did not qualify for the exemption listed in the applicable EDR.

[49] None of the commissions paid to members of the Sales Group were disclosed, as required, in the EDRs.

Complaint to Commission

[50] In June 2013, Harris contacted the Commission. The respondents submit that the purpose of this contact was to see if the Commission would assist the SPYru investors in dealing with Klaus Glusing, whom Harris and Cire believed had misappropriated SPYru funds.

[51] In the course of dealings with the Commission in respect of that complaint, information was provided to the Commission by the respondents that led to the allegations set out in the amended notice of hearing for this matter.

[52] Leading up to and during the hearing, the Sales Group have repeatedly pointed to the above as a form of injustice. It is also clear that, at some point, a significant amount of personal animosity arose between the Sales Group, Harris in particular, and Commission staff. Although the executive director points to some of the communications made by Harris to Commission staff as evidence of conduct contrary to the public interest (as will be discussed further below), we generally do not find the manner in which these allegations arose nor the animosity between respondents and staff to be relevant to the allegations in the amended notice of hearing.

Misrepresentations

[53] The executive director alleged that the Sales Group made misrepresentations about the SPYru investment opportunity and that Harris made misrepresentations about the Commission. The following is a summary of the evidence tendered in connection with those allegations.

[54] The executive director did not call any investors to give oral testimony at the hearing. The only evidence tendered by the executive director from an investor of either SPYru or U-GO that is provided under oath is one affidavit of one investor in SPYru. Much of the evidence relied on by the executive director were derived from Commission staff's notes of their interviews of investors and investor responses to the Commission questionnaires.

Statements about the SPYru investment

[55] There are general themes in the responses provided by the investors in the questionnaires and in the investigator's notes of the interviews with investors, with regard to what one or more of the members of the Sales Group allegedly told investors about the SPYru investment opportunity. Those themes include: that SPYru would be/may be listed on an exchange or otherwise undergo an IPO; that the SPYru shares would/may undergo considerable appreciation in price; and that large beverage companies would be/may be interested in acquiring SPYru.

[56] A review of this evidence reveals that:

a) what was purportedly said to investors is not consistent when reading the notes. For example, one note suggests that the investor was simply told that the return on investment "would be double plus in the next year". However, another note says that the investor was told that the exit strategy for the company would be to have the company acquired by a large beverage company upon which a penny stock investment would turn into a

massive gain for the investor. Another investor said that he was told that the intended exit strategy was to build up the product and "do an IPO in no more than 2 years and get whatever we can." What investors were purportedly told about the quantum of expected returns on investments also differs widely between investors, and the purported statements on returns differ between a "possible return", "probable return" or a return without any qualifier;

b) the context of these statements is also not clear. In places, the notes of an investor interview state that one or more of the statements made to that investor influenced the investor to make his or her investment in SPYru (suggesting that these statements were made to the investor prior to purchase). In other places, the timing of the statements made to the investor, relative to the timing of their investment decision, is not clear and in yet other cases, it appears that these statements were made to an investor after an investment was made.

[57] Given this, we were not able to determine, with any precision, what was specifically said by individual members of the Sales Group to investors, nor the context of those discussions.

Statements about the Commission

[58] Following the commencement of the investigation into this matter, Harris made a number of statements about the Commission which the executive director says are misrepresentations, including:

a) that a decision to convert SPYru shares into U-GO shares and/or a decision to issue U-GO share certificates was delayed while awaiting a decision or ruling from the Commission;
b) that the Commission would be making a ruling following its investigation and that this would ensure that the company would be compliant with the Act;
c) that a request for an investor refund could not be accommodated as a result of delays caused by the Commission; and
d) that the Sales Group had retained a "BCSC approved" lawyer.

[59] Some of these statements were made to a large number of investors in shareholder update e-mails after their investments were made. Some were made directly to specific investors after their investments were made. Some of the statements were made in e-mails sent by Harris to government officials.

Breach of Temporary Order

[60] The Temporary Order issued against the respondents prohibited all of the respondents from trading in securities and from engaging in investor relations activities.

[61] In October 2013, U-GO and Echo retained a company called Alpha Pacific Financial and its principal to assist them in raising capital. Kwasnek and Cire continued to instruct Alpha and its principal with respect to contacting prospective investors after February 6, 2014.

[62] These fund raising activities continued until early July 2014. These activities focused on raising funds for Echo and U-GO collectively to advance the commercial activities associated with U-GO's new spirulina drink.

Cire – Comingling of funds and personal expenditures

[63] Cire handled the banking arrangements related to the SPYru and U-GO investments. The investors' funds were deposited into personal and family accounts of Cire and corporate accounts for each of Paradox, Echo and U-GO. Cire admits to a comingling of investor funds and personal funds and that, as a result, he is unable to accurately account for all investor funds.

[64] Cire says that he received all of the money relating to SPYru investments and paid all of the expenses for that company.

[65] Commission staff reviewed nine bank accounts controlled by Cire. It is clear from that review that the SPYru and U-GO funds were comingled with Cire's personal funds and Paradox's business income and the SPYru and U-GO expenditures were comingled with Cire's personal expenditures and Paradox's business expenditures.

[66] The executive director says that a conservative tracing exercise (to try and segregate investor deposits and SPYru/U-GO expenditures from Cire's personal funds, deposits and expenditures) shows that Cire spent approximately $182,000 of investors' money on personal expenditures.

[67] The executive director says that he was able to trace a total of $2,060,000 of investor subscription funds into the nine bank accounts controlled by Cire. The executive director also says that he was able to trace a further $461,000 of deposits made by Cire which relate to personal income and a total of $702,000 of personal expenditures made by Cire during the same time period.

III Analysis and Findings

Law

Standard of proof

[68] The standard of proof is proof on a balance of probabilities. In *F.H. v. McDougall* 2008 SCC 53, the Supreme Court of Canada held:

> 49 In the result, I would reaffirm that in civil cases there is only one standard of proof and that is proof on a balance of probabilities. In all civil cases, the trial judge must scrutinize the relevant evidence with care to determine whether it is more likely than not that an alleged event occurred.

[69] The Court also held (at paragraph 46) that the evidence must be "sufficiently clear, convincing and cogent" to satisfy the balance of probabilities test.

[70] This is the standard that the Commission applies to allegations: see *David Michael Michaels and 509802 BC Ltd. doing business as Michaels Wealth Management Group*, 2014 BCSECCOM 327, para. 35.

Prospectus requirements

[71] The relevant provisions of the Act are as follows:

a) Section 1(1) defines "trade" to include "(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)".

b) Section 1(1) defines "security" to include "(a) a document, instrument or writing commonly known as a security", "(b) a document evidencing title to, or an interest in, the capital, assets, property, profits, earnings or royalties of a person" and "(d) a bond, debenture, note or other evidence of indebtedness ..."

c) Section 61(1) says "Unless exempted under this Act, 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.

d) Section 1(1) defines "distribution" as "a trade in a security of an issuer that has not been previously issued".

[72] The respondents purport to rely on what are referred to as the "accredited investor", "family, close friends or close business associates" and "private issuer" prospectus exemptions for the SPYru and U-GO distributions.

[73] NI 45-106 sets out a series of specific prospectus exemptions. Subsection 2.3 removes the prospectus requirement where the purchaser purchases as principal and is an "accredited investor". An accredited investor is a defined term and for an individual, that individual must satisfy one of a number of income or asset tests.

[74] Section 2.4 of NI 45-106 removes the prospectus requirement if the issuer of the securities is a "private issuer" and has only distributed its securities to a restricted set of investors. Generally, a private issuer is an issuer that is not a reporting issuer, has restrictions on the transferability of its securities in the issuer's constating documents and has not more than 50 people (excluding employees and former employees of the issuer and its affiliates) who beneficially own the issuer's securities. A private issuer may only issue its securities to an accredited investor, a list of persons similar (but not identical) to those set out in subsection 2.5 of NI 45-106 (as described below) or a person who is not the public. However, unless the distribution is to an accredited investor, no commission or finder's fee may be paid in connection with a distribution relying on this prospectus exemption.

[75] Section 2.5 of NI 45-106 removes the prospectus requirement if the investor is a family member (from a specified list), close personal friend or close business associate of a director, executive officer or control person of the issuer. However, no commission or finder's fee may be paid in connection with a distribution relying on this prospectus exemption.

[76] Sections 2.7 and 2.8 of the companion policy to NI 45-106 set out guidelines regarding the meaning of "close personal friend" and "close business associate". These guidelines say that the relationship with the director, executive officer or control person must, at the time of the trade, be of a nature that the investor can assess the person's capabilities and trustworthiness. For an investor to be a "close personal friend", the investor must know the person well enough and for a sufficient period of time to be in a position to make that assessment. For an investor to be a "close business associate", the investor must have had sufficient prior business dealings with the person to make that assessment. The Commission acknowledged these guidelines as appropriate in *Re Solara Technologies Inc. and William Dorn Beattie* 2010 BCSECCOM 163.

[77] Section 1.10 of the companion policy to NI 45-106 states that the person distributing securities is responsible for determining, given the facts available, whether an exemption is available.

[78] In *Solara*, the Commission confirmed that it is the responsibility of a person trading in securities to ensure that the trade complies with the Act. The Commission also said that a person relying on an exemption has the onus of proving that the exemption is available. The Commission said

> "37 The determination of whether an exemption applies is a mixed question of law and fact. Many exemptions are not available unless certain facts exist, often known only to the investor. To rely on those facts to ensure the exemption is available, the issuer must have a reasonable belief the facts are true.
>
> 38 To form that reasonable belief, the issuer must have evidence. For example, if the issuer wishes to rely on the friends exemption, it will need representations from the investor about the nature of the relationship…"

Liability under section 168.2(1)

[79] Section 168.2(1) of the Act states that if a corporate respondent contravenes a provision of the Act, an individual who is an employee, officer, director or agent of the company also contravenes the same provision of the Act if the individual "authorizes, permits or acquiesces in the contravention".

Breach of section 168.1(1)(b)

[80] Section 168.1(1)(b) of the Act states a person must not

> make a statement or provide information in any record required to be filed, provided, delivered or sent under this Act that, in a material respect and at the time and in light of circumstances under which it is made, is false or misleading, or omit facts from the statement or information necessary to make that statement or information not false or misleading.

[81] In *Re Nuttall* 2011 BCSECCOM 521, at paragraph 44, the Commission said the following regarding materiality in section 168.1(1)(a), which we consider applicable also to section 168.1(1)(b)

The materiality threshold in section 168.1(1)(a) measures the degree to which the information given is false or misleading – how far it departs from the truth – not its relevance to the investigation.

Misrepresentation

[82] Section 50(1)(d) says

> A person, while engaging in investor relations activities or with the intention of effecting a trade in a security, must not do any of the following
>
> …
> (d) make a statement that the person knows, or ought reasonably to know, is a misrepresentation.

[83] The following definitions in section 1(1) are relevant to the interpretation of section 50(1)(d)

> "Misrepresentation" means
> - an untrue statement of a material fact, or
> - 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.
>
> "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 reasonable could be expected to promote the purchase or sale of securities of the issuer …

Fraud

[84] Section 57(b) says

> A person must not, directly or indirectly, engage in or participate in conduct relating to securities . . . if the person knows, or reasonably should know, that the conduct
> . . .
> (b) perpetrates a fraud on any person.

[85] In *Anderson v. British Columbia (Securities Commission)*, 2004 BCCA 7, the British Columbia Court of Appeal cited the elements of fraud from *R. v. Theroux*, [1993] 2 SCR 5 (at page 20)

> … the actus reus of the offence of fraud will be established by proof of:
>
> 1. the prohibited act, be it an act of deceit, a falsehood or some other fraudulent means; and
> 2. deprivation caused by the prohibited act, which may consist in actual loss or the placing of the victim's pecuniary interests at risk.

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

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

Analysis

Prospectus Requirements – Direct violations of section 61

[86] There is no dispute that SPYru and U-GO sold their shares to investors, that the shares were securities, that the sales of shares were distributions under the Act, and that no prospectus was filed in connection with the distributions. The only issue is whether exemptions from the prospectus requirements were available for these distributions.

Availability of exemptions

[87] The evidence of the availability of exemptions with respect to SPYru distributions consists of shareholder lists with notations as to the exemptions relied on by the respondents, prepared by the respondents (filed by both the executive director and the respondents). As noted, the lists differed over time during these proceedings.

[88] A notation of the applicable exemption is not the same as evidence as to the facts supporting the availability of that exemption. A notation that someone is an accredited investor or a friend is insufficient evidence to prove the availability of an exemption. Some of the investors, by virtue of their names, would appear to be family members of a respondent. This might be evidence in support of the availability of an exemption. However, in this case, all of the respondents generally indicated in their interviews with Commission staff that cash commissions or commissions in the form of bonus shares were payable on investor subscriptions. The payment of any such commissions would make the exemptions in sections 2.4 and 2.5 of NI 45-106 unavailable.

[89] In certain of the respondents' admissions, there are notations as to whether bonus shares were issued in connection with a particular distribution by SPYru. As noted above, the evidence does not show a clear reconciliation of commissions paid against individual investors. Given the general evidence about commissions before the panel, the onus is on the respondents to clearly establish that commissions were not paid with respect to a SPYru distribution. Other than as set out below, we find that the respondents have not met the burden of establishing, on the balance of probabilities, that no commissions were paid in connection with particular distributions nor that any of the SPYru distributions were exempt from the prospectus requirement.

[90] The Commission staff's interview notes of SPYru investors, SPYru investor questionnaire responses, and the respondents' admissions, lead us to conclude that there were exemptions for share issuances by SPYru to six investors for a total of $43,000. All six were "family, close friends or close business associates" and no commissions were paid for their SPYru subscriptions.

[91] The evidence of available exemptions for the U-GO distributions is in the form of signed subscriptions agreements and a shareholder list prepared by the respondents. U-GO claims to

have relied upon section 2.4 of 45-106 (private issuer exemption) for the distributions to the first 50 investors. The subscription agreements indicate that either the exemption in section 2.3 of 45-106 (accredited investor) or section 2.5 of 45-106 (family, close friends or close business associates) applies.

[92] The U-GO subscription agreements and Commission staff's interview notes of U-GO investors demonstrate that there were exemptions for share issuances to 13 U-GO investors who were accredited investors and they invested a total of $130,000. As noted above, this exemption is available even if commissions were paid to the Sales Group.

[93] The subscription agreements and the Commission investigation also confirmed that certain of the investors would have qualified for the exemption in section 2.5 of NI 45-106 if no commissions were paid in connection to those issuances. In this case, the evidence establishes that the board of U-GO decided that commissions would be paid in connection with subscriptions. There is documentary evidence that U-GO paid commissions. The respondents have failed to prove, on a balance of probabilities, that no commissions were paid in connection with any specific U-GO issuances. Owing to this, we find, on a balance of probabilities, that commissions were paid on all U-GO share issuances. We therefore find that exemptions are not available in connection with any specific share issuances that might otherwise have qualified for an exemption under section 2.5 of NI 45-106.

Direct contraventions of section 61

[94] Notwithstanding the allegation by the executive director that each member of the Sales Group and Paradox directly breached section 61 with respect to all of the illegal distributions, the executive director has not provided evidence that shows that each of these respondents was involved with every distribution.

[95] Notwithstanding this, the executive director says that we should attribute all of the distributions of SPYru and U-GO to all of the individual respondents and Paradox. His argument in support of this proposition is that due to the respondents' poor record keeping, he is unable to accurately determine which distributions are attributable to which individual respondents. He says that section 61 permits us to find a respondent generally liable under that section without articulating specific distributions or a specific quantum of distributions that a respondent participated in. In fact, the executive director says that there is no pre-requisite for him to prove the number or the amount of the distributions connected to each individual respondent to find that individual respondent liable for breach of section 61. He says that this approach is in keeping with the purpose of section 61, which is investor protection, and in keeping with our role as an administrative tribunal to provide a less formal and more flexible forum for litigation.

[96] We disagree with the above submissions. They misconstrue the basic evidentiary burden and onus on the executive director. Section 61 states that "a person must not distribute a security" unless a prospectus has been filed. That wording requires us to consider breaches of section 61 on a trade by trade basis and not in a collective sense. Therefore, the executive director must prove, on a balance of probabilities, that a respondent was involved in certain distributions or a certain quantum of distributions that the executive director alleges breach section 61. Having

done that, the onus then shifts, as set out in *Solara*, to the respondent to prove that an exemption was available for those distributions.

[97] Using that framework, we will assess the evidence that connects each respondent to the distributions of SPYru and U-GO securities.

[98] We have found that SPYru distributed securities and raised a total of $1,390,000 from 298 investors. SPYru obviously participated in these distributions.

[99] We have found that U-GO distributed securities and raised $766,000 from a total of 119 investors. U-GO obviously participated in these distributions.

[100] Echo's involvement in distributions of U-GO shares is limited to the deposit of some of the funds of the U-GO investors to an Echo account. There was also one subscription agreement that was originally signed in the name of Echo but was later rescinded and replaced with a subscription agreement for U-GO shares. We find that the subscription agreement in the name of Echo was merely an error. The deposit of funds into an Echo account could be viewed as an act in furtherance of a trade. However, without clear evidence as to which investor's funds were deposited into an Echo account, the executive director has not proven, on a balance of probabilities, that Echo was connected to any particular distribution. We therefore dismiss the allegation that Echo breached section 61 of the Act.

[101] Both Cire and Harris confirmed during their interviews with Commission staff that Paradox was the vehicle through which Cire and Harris originally introduced investors to SPYru. With respect to the SPYru distributions, we find that each of Paradox, Cire and Harris were responsible for the same distributions. There is no evidence to show that Paradox was linked to any of the U-GO distributions, other than it is possible that Paradox's bank account was used for depositing the proceeds of certain U-GO distributions, although the evidence on this is not clear.

[102] All of the members of the Sales Group admitted to personally introducing investors to SPYru. All of the members of the Sales Group, other than Harris, admitted to personally introducing investors to U-GO. In some cases, the admissions were general, and in some cases the respondents supplied investor lists. These investor lists changed (although in some cases not materially) over the investigation and even after the hearing. In most cases, the revised lists added investors or further information and were therefore further admissions against interest. Notwithstanding that these lists changed, we find the respondents' own admissions (through investor lists) are the best evidence of the distributions that they were involved in.

[103] Based on these admissions, we find the individual respondents were engaged in the following distributions (there is some overlap between the Cire and Harris numbers arising from their joint efforts through Paradox):

a) Paradox – SPYru - $834,000 through 146 investors; U-GO - $0;
b) Cire – SPYru $834,000 through 146 investors; U-GO - $27,500 through 7 investors;
c) Harris – SPYru - $834,000 through 146 investors; U-GO - $0;

d) Kwasnek – SPYru – $238,000 through 25 investors; U-GO - $366,000 through 30 investors;
e) Thibert – SPYru - $392,000 through 72 investors; U-GO - $27,500 through 3 investors; and
f) Burke – SPYru - $65,000 through 55 investors; U- GO - $51,000 through 20 investors.

[104] Therefore, with respect to direct contraventions of section 61, we find as follows:

a) the allegation that Echo breached section 61 is dismissed;
b) SPYru breached section 61 with respect to distributions totaling $1,347,000;
c) U-GO breached section 61 with respect to distributions totaling $636,000;
d) Paradox breached section 61 with respect to distributions totaling $834,000 of SPYru shares;
e) Cire breached section 61 with respect to distributions totaling $834,000 of SPYru shares and $27,500 of U-GO shares;
f) Harris breached section 61 with respect to distributions totaling $834,000 of SPYru shares;
g) Kwasnek breached section 61 with respect to distributions totaling $238,000 of SPYru shares and $366,000 of U-GO shares;
h) Thibert breached section 61 with respect to distributions totaling $392,000 of SPYru shares and $27,500 of U-GO shares; and
i) Burke breached section 61 with respect to distributions totaling $65,000 of SPYru shares and $51,000 of U-GO shares.

Prospectus Requirements – Liability via section 168.2(1)

[105] The executive director alleges that each of the individual respondents is indirectly liable for the breaches of section 61 by the corporate respondents, SPYru, Paradox, Echo and U-GO, under section 168.2(1) in the following manner

a) Cire – as a director of each of SPYru, Paradox, Echo and U-GO;
b) Harris – as a director of each of SPYru, Echo and U-GO; and
c) Kwasnek, Thibert and Burke – as an agent of SPYru; as a director of each of Echo and U-GO.

[106] We have dismissed the allegation that Echo breached section 61. Therefore, each of the allegations against the individual respondents under 168.2(1) in respect of Echo is also dismissed.

[107] As we have found each of Paradox, Cire and Harris to be directly liable for the same SPYru distributions, we do not need to make further findings under section 168.2(1) against Harris or Cire with respect to Paradox's contravention of section 61.

[108] Harris and Cire were directors of SPYru from November 2010 through March of 2013. It is clear that each of them was responsible, to a great extent, for the capital raising process for SPYru including all of its banking arrangements, sending money to the Glusings and paying

SPYru expenditures. We find that each of Harris and Cire, as directors of SPYru, is liable under section 168.2(1) for the contraventions of section 61 by SPYru.

[109] The executive director says that, as a consequence of Kwasnek, Thibert and Burke being agents of SPYru, they should be held liable for all of the illegal distributions of SPYru pursuant to section 168.2(1). He says that by virtue of their being involved in some of the SPYru distributions as agents, they acquiesced to all of the illegal distributions completed by SPYru and they should be held indirectly liable for all those distributions.

[110] Although the executive director provided decisions of the Commission as to the interpretation of "authorized", "permitted" and "acquiesced", he was not able to direct us to any previous securities regulatory decisions in support of his submission that section 168.2(1) should be applied in the circumstances of this case.

[111] We do not agree that Kwasnek, Thibert and Burke should be liable for all of the illegal distributions of SPYru under section 168.2(1).

[112] The proposition that one agent should be held liable for a contravention of section 61 by the issuer (where that agent had no involvement in the specific illegal distribution) simply because they knew of and participated in other distributions of the issuer is neither consistent with the wording of section 168.2(1), nor would it be in the public interest to make such an order given the broad implications of such a finding for participants in capital raising activities.

[113] A finding of liability under section 168.2(1) requires that the respondent has "authorized", "permitted" or "acquiesced" to the contravention by the corporate respondent. Those words connote a knowledge or intention on the part of the individual respondent with respect to the contraventions of the corporate respondent. They also connote some form of involvement with the conduct that constitutes the contravention of the issuer, whether active or passive. In this case, there is no evidence of Kwasnek, Thibert or Burke having any specific knowledge or involvement in the details (such as the facts, or lack thereof, in support of prospectus exemptions) of those distributions of SPYru that involved investors they did not solicit. In these circumstances, general knowledge that the issuer was engaging in private placements is insufficient evidence to establish the requisite knowledge or intent under section 168.2(1).

[114] Implicit in section 168.2(1) is a requirement that the respondent has some ability to control (or prevent) the actions of the corporate respondent with respect of the contravention. There is no evidence of Kwasnek, Thibert or Burke having control of (or ability to prevent) SPYru's distributions. They had the requisite knowledge and control over the distributions that they were involved in but it is not necessary to make an order under section 168.2(1) where we have already found a direct breach by a respondent of section 61 in respect of those distributions.

[115] Further, a finding that one agent should be held liable for an illegal distribution involving the issuer and another agent defies the basic common law principles of agency. An agent, in most capital raising scenarios, cannot ensure compliance with the Act by the issuer and another agent. That is not typically an agent's role in the process.

[116] Therefore, we dismiss the allegations that Kwasnek, Thibert and Burke are liable under section 168.2(1) for SPYru's contraventions of section 61.

[117] Each of Harris, Cire, Kwasnek, Thibert and Burke were directors of U-GO from April 2013 through January 2014. It is clear that they collectively formed the company and that each of them was involved in the capital raising process for U-GO and in the underlying commercial business associated with U-GO. These five individuals were the corporate entity. We find that each of Harris, Cire, Kwasnek, Thibert and Burke, as directors of U-GO, is liable under section 168.2(1) for the contraventions of section 61 by U-GO.

Breach of section 168.1(1)(b)

[118] The executive director says that each of U-GO and Harris is liable for contraventions of section 168.1(1)(b) as a result of signing and filing EDRs for U-GO that are false. U-GO filed 12 EDRs. Harris signed each of the EDRs. The executive director says that they are false in two ways:

a) they contain a description of a prospectus exemption for a U-GO share issuance when that exemption was not, in fact, available for that issuance;
b) the reports fail to identify commissions paid by U-GO to Kwasnek, Thibert and Burke.

[119] There is no dispute that, by filing an EDR, U-GO and Harris were making a filing under the Act as required under section 168.1(1)(b). The only question is whether one or more of the EDRs contains information that, in a material respect, provides information that is false or misleading or omits facts necessary to make the provided information not false or misleading.

[120] The executive director has not specified which of the 12 EDRs represent violations of section 168.1(1)(b). We are left to assume that the executive director alleges that all 12 EDRs contravened section 168.1(1)(b). The executive director also does not specify in which of the two ways (described in paragraph 118) that a particular EDR contravenes section 168.1(1)(b).

[121] The onus is upon the executive director to prove, on a balance of probabilities, that a particular EDR contravenes section 168.1(1)(b). Therefore, the executive director must prove that an investor listed on an EDR did not qualify for the exemption described in the EDR for the distribution to that investor.

[122] Our findings that the respondents did not prove that an exemption was available for the majority of the distributions of U-GO shares is not one and the same as a finding that the executive director has proven that an EDR (with respect to its description of available exemptions) was false or misleading. Nor is a finding that, generally, cash commissions were paid in respect of U-GO share issuances sufficient to prove that an EDR is false or misleading if it failed to list any cash commissions payable in respect thereof.

[123] This may result in a panel finding, on the one hand, that a breach of section 61 occurred with respect to a particular distribution but, on the other hand, that filing an EDR which lists the available distribution exemption in respect of that distribution has not been proved to contravene section 168.1(1)(b). Breaches of section 61 and 168.1(1)(b) are different allegations with

different underlying misconduct and different onuses of proof. A finding of a contravention, or not, of section 61 does not automatically lead to a conclusion of liability under section 168.1(1)(b) in respect of an EDR filed in connection with that distribution.

[124] The evidence shows that six investors, listed on the EDRs filed by U-GO on September 13, September 24, October 15 and November 20, 2013, did not qualify for the exemptions set out in those forms. We therefore find that U-GO and Harris, as signatory of those EDRs, to be liable under section 168.1(1)(b) in respect of those four EDRs.

[125] With respect to the eight other EDRs, we do not find sufficient evidence to prove, on a balance of probabilities, that those EDRs contained false or misleading information and we dismiss those allegations.

[126] With respect to U-GO's breaches of section 168.1(1)(b) described in paragraph 124, the executive director alleges that Cire, Thibert, Kwasnek and Burke, as directors of U-GO, should be held liable under section 168.2(1) in respect of those contraventions.

[127] There is no evidence that any of the directors, other than Harris, were aware of the specific contents of or even the filing of a particular EDR in respect of particular trades. As noted above, general awareness of distributions – even awareness that exemptions might not be available for some of the distributions – does not meet the connoted knowledge element of the corporate misconduct alleged in this case. We dismiss the allegations under section 168.2(1) in respect of U-GO's contraventions under section 168.1(1)(b) against Cire, Kwasnek, Thibert and Burke.

Misrepresentations

[128] The executive director alleges that Harris breached section 50(1)(d) by making various statements to investors about the Commission as described in paragraph 58.

[129] In order to prove a contravention of section 50(1)(d), the executive director must prove that:

a) the statement was made while engaging in investor relations activities or with the intention of effecting a trade in a security;
b) the statement is a misrepresentation; and
c) the respondent knew or ought reasonably to have known that the statement was a misrepresentation.

[130] In order to prove that a statement is a misrepresentation, the executive director must prove that there has been an untrue statement of a material fact or an omission to state a material fact that is required to be stated or is necessary to prevent a statement that is made from being false or misleading.

[131] In order to prove that something is a material fact, the executive director must prove that it is a fact that would reasonably be expected to have a significant effect on the market price or value of the securities.

[132] The allegation that Harris breached section 50(1)(d) by virtue of various statements to investors about the Commission fails, on the basis that there is insufficient evidence to support a finding that either:

a) the statements were made while engaging in investor relations activities or with the intention of effecting a trade in a security; or

b) the statements contained an untrue statement of a material fact or an omission to state a material fact that is required to be stated or is necessary to prevent a statement that is made from being false or misleading.

[133] The statements made by Harris about the Commission were untrue. However, the statements were made to existing shareholders (in one form or another) and there is no evidence that any of those statements were made to potential investors. There is no evidence that would allow us to find that Harris made the statements with the intention of effecting a trade in securities or to induce someone to make a purchase or sale of SPYru or U-GO securities. Further, the executive director has not demonstrated how a reasonable investor would conclude that the untrue statements would have a significant effect on the market price or value of the SPYru or U-GO securities.

[134] We dismiss the allegation that Harris breached section 50(1)(d) by virtue of his statements made about the Commission.

[135] The executive director alleges that each of Harris, Cire, Kwasnek, Thibert and Burke breached section 50(1)(d) by making various statements to investors, the themes of which are described in paragraph 55 above.

[136] As there were no investor witnesses who testified at the hearing, we do not have direct oral evidence of what specific statements were made to investors, by whom and in what context. The evidence about the exact contents of the alleged statements made by each of Harris, Cire, Kwasnek, Thibert and Burke is as follows:

a) confirmation by Harris at his interview with Commission staff that a promotional document entitled "SPYru Product Introduction" was provided to many potential investors. Within that document is a section entitled "Exit Strategy" which states:

> Management's intentions in this respect are focused on two alternatives:
>
> The company may be taken over by one of the existing beverage conglomerates because of the uniqueness of SPYru's products. Incidentally, a prospect that is not altogether unlikely since this has been witnessed in the immediate past with other less "unique", water beverages.
>
> The company may be listed on one of the recognized venture exchanges at some future date and its shares being publicly traded.

b) electronic investor questionnaires sent out by Commission staff and then completed by SPYru investors;

c) notes of interviews of SPYru investors conducted by Commission staff;

d) one sworn affidavit provided by one SPYru investor who purchased $7,500 of SPYru shares through Kwasnek. That affidavit states that he was told by Kwasnek that SPYru would be acquired by a large company for between $.80 per share and $1.50 per share or that the company would be sold as an IPO and that the company was secure as it had already received offers to purchase the beverage recipe; and

e) statements made by the individual respondents during their interviews with Commission staff, including:

Thibert

Q What did you tell them (investors) about your future intentions?
A Exactly the orders that were given to me by Mr. Harris and Lorne Cire which we would be selling out the company within a short period.
Q So you told investors that the company would be sold in a short amount of time?
A We were. That was our intention.

Cire

A What I would tell people is I'd say, we're going to make the best decisions out of – for respect for the shareholders. Whether to go public, whether to go with a private sale, whether we run the company… that's indetermined (sic)…

Harris

He stated that several investors were told that Coke was interested in them. He further went on to state that if the product could be in distribution coast to coast then he believed that Coke would be interested in the company but that they would not be interested in just purchasing the rights to the formula.

[137] The amended notice of hearing does not make explicit the extent of the allegations of a breach of section 50(1)(d) either in totality or by each of Harris, Cire, Kwasnek, Thibert and Burke. The amended notice of hearing simply states that "several investors" were told statements that were misrepresentations. The executive director provided reference in his submissions to the following numbers of investors that each individual respondent is alleged to have made misrepresentations to – Cire 8; Harris 5; Thibert 9; Kwasnek 2 and Burke 1 (there is some overlap as several of the investors spoke to both Harris and Cire). Notwithstanding the executive director's submissions that the written materials containing alleged misrepresentations were broadly distributed to potential investors we have limited our analysis of the allegations of a breach of section 50(1)(d) to the investors listed above.

[138] The first issue to address is the weight to be given to the investor questionnaires and notes of interviews of investors made by the Commission investigator. This Commission has looked at this issue before in *Re Barker*, 2005 BCSECCOM 146. That case also involved allegations of misrepresentation and fraud.

[139] In *Barker*, the panel said that in considering allegations of fraud and misrepresentation, the evidence of investors is important as it is often through this evidence that the executive director is able to establish the element of intent necessary to make a finding of fraud. The evidence before the panel included the testimony of investors, a transcript of the interview of the respondent by Commission staff, notes of telephone interviews with investors by Commission staff and questionnaires completed by investors. The panel had this to say about the weight to be given to the interview notes and the investor questionnaires:

> 100 Third best is evidence consisting of a Commission staff investigator's notes of telephone interviews with other shareholders. The statements of the shareholders are not sworn, nor is there a transcript of their conversation with staff, so we do not have the context of the questions that Commission staff put to them, or their *verbatim* answers. Nor is the evidence, for the most part, corroborated by other, more reliable evidence. We therefore gave this evidence no weight when considering the allegations of misrepresentation and fraud.
>
> 101 Finally, the evidence includes questionnaires completed by investors who were not interviewed by Commission staff. Investor questionnaires are undoubtedly a useful tool to help staff determine which investors may have relevant evidence in an investigation. However, on their own these questionnaires have little probative value and we gave them no weight when considering the allegations of misrepresentation and fraud.

[140] The executive director submits that as an administrative tribunal we are not bound by the principle of *stare decisis* and are therefore not bound to follow the decision set out in *Barker*. Secondly, the executive director submits that the investor questionnaires, investor notes, the one investor affidavit and the respondent interviews all corroborate each other and that, unlike *Barker*, this corroboration means that we should give substantial weight to the interview notes and questionnaires. Finally, the executive director says that the questionnaires were sent electronically without the potential bias created by a Commission investigator taking an investor through the questionnaire so that, again, unlike *Barker*, we should place substantial weight on these questionnaires.

[141] We agree with the executive director that we are not bound by the principle of *stare decisis*. However, we see no reason to depart from the general finding outlined in the excerpt above from *Barker*. In cases where misrepresentation or fraud is alleged the best evidence is often written documents provided to an investor or the testimony of an investor. The very nature of the contraventions of fraud and misrepresentation make it important that the trier of fact understand exactly what was said to an investor, by whom, and in what context. This is particularly true where, as in this case, a statement can be viewed either as a statement of intention or as a statement of fact.

[142] We do not agree with the executive director that, when viewed collectively, the notes of the investor interviews, the investor questionnaires, the one investor affidavit and the respondent interviews all corroborate each other. We agree that they corroborate that there were themes in communications to investors. The evidence diverges significantly on content (i.e. acquisition by a beverage company; acquisition by a named beverage company; IPO; share price increases; etc.) but, even more importantly, the evidence diverges on the context of the statements (i.e. some show that the statements were merely aspirational or statements of management's intent; some statements state that significant qualifiers were linked to an IPO or a sale of the business and some suggest that unqualified promises were made).

[143] Finally, we disagree that an electronic questionnaire versus one conducted through an investigator substantially alters the analysis of the weight to be placed upon it as described in *Barker*.

[144] In this case, the best evidence with respect to what was told to investors with respect to a future sale of the company or IPO and the potential value of the company's shares is the written promotional material that Harris says was circulated to many potential investors. That document is clear that a sale of the company to a beverage company or an IPO was management's intended exit strategy. There is no mention of a particular price for the shares. There is no evidence that this was not actually the intended exit strategy contemplated by management.

[145] The next best evidence comes from interviews of the respondents. Those interviews were conducted under oath. The contents of those interviews on this subject are broadly consistent with the written promotional materials.

[146] The next best evidence is the affidavit of one of the investors introduced to SPYru by Kwasnek. At best, this evidence would go to establishing a contravention of section 50(1)(d) against Kwasnek and not the other individual respondents. Although some of the statements in the affidavit are generally consistent with the written promotional materials, other statements are not corroborated by other evidence and/or are difficult to reconcile with statements in the promotional materials and in the respondents' interviews. Without the benefit of testimony from the investor regarding the actual statements made to him and the opportunity for cross-examination, we prefer the written evidence directly from the company over the affidavit evidence.

[147] The next best evidence are the notes of investor interviews and questionnaires. As noted in paragraph 56 above, although there are some consistent themes in what the investors said was told to them by one or more of Harris, Cire, Kwasnek, Thibert and Burke, the exact contents of those notes differ considerably and in material ways. Because the better evidence listed above does not corroborate the contents of the investigator's notes and the investor questionnaires and the responses of investors within those notes and questionnaires are not consistent, we do not place any weight on that evidence in this case.

[148] Therefore, we are unable to find that the executive director has proven, on the balance of probabilities, that misrepresentations, as contemplated by section 50(1)(d), were made to investors by the individual respondents in connection with the distribution of SPYru shares. We

dismiss the allegations of a breach of section 50(1)(d) against Harris, Cire, Thibert, Burke and Kwasnek.

Fraud

[149] The executive director alleges that, contrary to section 57(b) of the Act, Harris and Cire committed fraud by taking money from investors purportedly for developing the SPYru drink without disclosing their suspicions that Klaus Glusing was not using the money for the drink, and sending it to Klaus Glusing.

[150] A finding of fraud requires that the executive director prove, as one element of the contravention, that Harris and Cire were involved in a deceit or other prohibited act.

[151] The executive director submits that the following *taken together* constitute the actus reus or the prohibited act necessary to establish fraud:

- Cire and Harris were sending investors' money to the Turks and Caicos on the Glusings' instructions, most of it to Klaus Glusing;
- since mid-2012, Harris and Cire suspected that Klaus Glusing was not using the money to develop the SPYru spirulina drink;
- Harris and Cire did not inform their investors about their suspicions of Klaus Glusing;
- despite their suspicions, Cire and Harris continued to raise money from investors, raising approximately $441,140 between June 2012 and February 2013; and
- despite their suspicions, Cire and Harris continued to send money to Klaus Glusing, sending at least $346,742 between June 2012 and February 2013.

[152] We have some difficulty discerning exactly the nature of the prohibited act alleged by the executive director. There are a number of different concepts set out in the above paragraphs. The executive director says that it is all of the facts taken together that constitute the prohibited act. We must give this some meaning. We take from the executive director's submissions the basis of this allegation to be that Harris and Cire suspected that Klaus Glusing was misappropriating SPYru funds yet they continued to cause SPYru to raise money from investors (after they had formed this suspicion) and sent SPYru funds raised from investors to Glusing (after they had formed this suspicion), all without informing SPYru investors of their concerns.

[153] In order for this to constitute a deceit or other prohibited act for the purposes of fraud, the "suspicions" of Harris and Cire must have crystallized to a significant state based upon some evidence of misappropriation, otherwise we do not see a failure to advise investors of a suspicion as a deceit. In other words, a failure to disclose every remote risk or risk factor does not constitute fraud. The risk must have crystallized to a substantial degree, such that a failure to inform investors of that risk forms the basis of a deceit.

[154] There is no evidence before us of actual misappropriation of funds by Klaus Glusing, so there is no evidence of Harris or Cire actually discovering a misappropriation. We do know that in June 2013 they came to the Commission with their concerns about Glusing. By June 2013, those concerns must have crystallized to a substantial degree to file a complaint with the Commission.

However, SPYru had ceased raising funds by June 2013. We are left to make inferences about Harris' and Cire's state of mind and state of belief in these suspicions at dates prior to June 2013.

[155] The executive director points to the following evidence in support of a finding of the deceit or prohibited act described above:

- that Harris and Cire transferred funds to the Glusings at the Glusings' instructions, in many cases without asking about or knowing the specific use of funds by the Glusings;
- that Harris and Cire visited Klaus Glusing in June of 2012 because they had concerns about how SPYru funds were being used;
- that Harris admitted, in information supplied to the Commission as part of his complaint to the Commission about Klaus Glusing, that from October 2012 onwards he had concerns about Glusing's commitment to focusing on the commercial success of SPYru;
- that Harris and Cire visited Klaus Glusing again in October 2012 and confronted him about their concerns about how SPYru money was being used by Glusing and about redomiciling the company to Canada or the US;
- that during their October 2012 meeting with Glusing, Harris and Cire did not receive satisfactory answers to their questions about the use of SPYru money;
- that on November 20, 2012 Harris and Cire hired a private investigator to investigate Klaus Glusing;
- that Harris sent a shareholder letter in June 2013 indicating that the Paradox distribution arrangements were terminated at the end of January 2013; and
- that Harris admitted in his interview that the frequency of money transfers to Glusing increased during the period of October 2012 to February 2013, and that he suggested that this was because Glusing realized that "Lorne and I were onto him".

[156] The executive director submits that Harris and Cire had the requisite level of concern from June 2012 onwards and that the raising by SPYru and the sending of funds to Glusing thereafter constitute fraud.

[157] All of the above indicates that Harris and Cire did have concerns about the use of SPYru funds and Klaus Glusing. What it does not clarify is when those concerns crystallized to the requisite level in order to form the element of deceit requisite to establish fraud.

[158] The following evidence is contrary to the submission of the executive director that the requisite level of concern was formed in June 2012:

- the evidence makes clear that Harris and Cire remained passionate about the prospects for a health drink based on Spirulina after June 2012 – during the October 2012 visit to Glusing, it is clear that Harris and Cire raised concerns but also continued to discuss the business of SPYru including a re-domiciling of the company;
- Harris and Cire hired a private investigator on November 20, 2012, which is a highly unusual step to take, but is also inconsistent with Harris and Cire having reached a firm conclusion about Glusing as of this date;

- other than commissions, there is no evidence that Harris and Cire financially benefitted from this conduct (and the Commission had access to their bank accounts). While it is not necessary to find that Harris and Cire benefitted from the deceit in order to establish fraud, the fact that they did not benefit from the conduct makes it difficult for us to make negative inferences about their state of mind;
- Harris and Cire self-reported their concerns about Glusing to the Commission and provided most of the evidence in support of these fraud allegations. Again, this is not direct evidence of their lack of involvement in the prohibited act, but this makes it difficult for us to make a negative inference about their state of mind that would lead us to conclude that Harris and Cire participated, through omission, in the deceit.

[159] We find that the executive director has not established, on a balance of probabilities, that Harris and Cire committed the actus reus of fraud, being a deceit or other prohibited act prior to March 2013. Therefore, we dismiss the allegation of a contravention of section 57(b) against Harris. We also dismiss the first allegation of a contravention of section 57(b) against Cire.

[160] The second fraud alleged by the executive director against Cire concerns the use of SPYru and U-GO funds by Cire on personal expenses. In total, the executive director alleges that Cire used approximately $182,000 of investors' money on his personal expenses.

[161] The evidence in support of this allegation is a review conducted by a Commission investigator of the bank accounts maintained by Cire. These accounts included his own accounts, a joint account with a family member and corporate accounts for Echo, Paradox and U-Go.

[162] A review of these accounts, and Cire's own admission, confirms that Cire co-mingled personal deposits and deposits of investor funds from SPYru and U-GO investments. Cire also paid personal expenditures and expenditures on behalf of SPYru, U-GO and Paradox out of those accounts.

[163] Given this, the first question is whether the evidence clearly establishes that Cire used investor funds for personal expenditures. If the evidence does support this finding then, given that Cire/Paradox earned cash commissions from sales to certain investors, the second question becomes whether the evidence clearly establishes that Cire was spending money from investors that he was not otherwise entitled to.

[164] There are a number of problems in answering both of these questions in a manner that supports findings in favour of the fraud allegation made by the executive director.

[165] First, the executive director says that they can attribute $2,060,460 of deposits into the various accounts as deposits of investor funds. In his submissions in connection with the allegations of breaches of section 61, the executive director said they could trace $1,964,000 of investor funds. The evidence does not make clear how we reconcile these two figures. We therefore question how much weight should be placed on the accuracy of the $2,060,460 amount.

[166] Secondly, there was no evidence establishing what portion of the $2,060,460 represented subscription proceeds. Bank records indicate that funds were received from a person who

appears on an investor list. In many cases this may be sufficient evidence to establish that those funds are subscription proceeds. However, in this case, due to the co-mingling of funds and the large number of Cire family members who were both investors and involved in unrelated business ventures of Paradox, we find it equally possible, that some of the funds were deposited for purposes unrelated to this hearing. In this case, the mere deposit of funds does not necessarily prove that the funds were provided for investment in SPYru and U-GO. It is natural to infer that many of these were, in fact, investments but were they all deposits for that purpose? Again, this raises questions about the weight to be placed on the $2,060,460 figure.

[167] As for the review of expenditures, we do not have comfort on the amount of commissions payable or paid to the Sales Group. The executive director tendered into evidence a summary table of the expenditures paid out of the nine accounts. This summary table, prepared by the Commission investigator, does not clearly deal with how commission monies flowed as between payments to Paradox, Cire and Harris.

[168] Over $200,000 of the personal expenditures attributed to Cire are payments for credit card bills. We do not have any evidence that all of the uses of those cards were for personal expenses. Cire, in his interview with Commission staff, indicated that certain of his credit cards were used for a mixture of personal and business expenses. We do not have any evidence to contradict this or to provide any context for the extent of the personal versus business expenses.

[169] All of the above leaves us with a significant concern that there were personal expenditures of Cire that were paid for from investor funds. However, we do not have certainty of the amount of investor's dollars that flowed through these accounts. We do not have certainty about the amount of commissions that Paradox/Cire were entitled to. Finally, we know that Cire was paying legitimate business expenses of SPYru and U-GO but do not have evidence to support the quantum of these payments. Therefore, we find that the executive director has not met the evidentiary burden to make this finding on the balance of probabilities.

Breach of Temporary Order

[170] The Temporary Order prohibited all of the respondents from trading in securities and from engaging in investor relations activities during the currency of the order.

[171] The documentary evidence is clear that after February 6, 2014, each of Echo, U-GO, Cire and Kwasnek:

- continued to engage and instruct a finder to contact investors to raise additional funds for Echo/U-GO; and
- communicated with potential investors with respect to raising additional funds for Echo/U-GO, whether by loan or otherwise.

[172] During the hearing, the respondents acknowledged that they continued to look for commercial lenders following the issuance of the Temporary Order.

[173] Loans are evidence of indebtedness which is included in the definition of "security" under the Act. Those communications were clearly acts in furtherance of a trade and also constituted investor relations activities.

[174] Therefore, we find that each of Echo, U-GO, Cire and Kwasnek contravened the Temporary Order.

Conduct Contrary to the Public Interest

[175] The executive director alleges that the following conduct of the respondents harmed the reputation and credibility of the province's securities markets and regulatory environment, and, therefore asks the we make an order that the following constitutes conduct contrary to the public interest:

a) the Sales Group did not familiarize themselves with the securities laws before raising money from investors;
b) the Sales Group deprived investors of the protection of full disclosure in the absence of a prospectus or an offering memorandum;
c) the Sales Group raised money from investors, most of whom did not qualify for any exemptions;
d) Cire and Harris commingled investors' money in personal and business accounts without keeping accurate records that would permit them to segregate investors' money;
e) Cire spent a portion of investors' money on personal expenses;
f) Cire and Harris recklessly sent a large portion of investors' money to Klaus Glusing, even though he refused to say what he was using the money for;
g) after the bank became concerned about the possibility of money laundering, on Klaus Glusing's instructions Cire and Harris avoided using banks to send money to him, and used Moneygram and Western Union instead for approximately two years;
h) Cire and Harris failed to inform investors about their suspicions about Klaus Glusing, continuing to raise money from investors;
i) Cire and Harris continued to send investors' money to Klaus Glusing even after they suspected he was mishandling it, causing deprivation to investors;
j) Cire and Harris did not keep receipts for money transfers and did not know the exact amount of money raised from SPYru investors or transferred to Klaus Glusing;
k) the Sales Group had poor record-keeping practices and did not have accurate records of the number of investors they had or the money they raised from them;
l) the Sales Group members were not competent to handle investors' money;
m) Echo, U-GO, Cire and Kwasnek breached the Temporary Order issued against them;
n) U-GO and Harris filed false EDRs with the Commission;
o) Harris lied to investors about the actions of the Commission;
p) the Sales Group members were unfit to be involved in the securities markets;
q) U-GO, Echo, SPYru and Paradox allowed their corporate identities to be used to illegally raise money, make misrepresentations to investors and commit fraud on them; and

r) U-GO, Echo, SPYru and Paradox allowed their bank accounts to be used to handle investors' money.

[176] The conduct described above, save for those in paragraphs (d), (j), (k) and (l), is either essentially the same as or a component of the conduct that forms the basis of the allegations under sections 61, 168.1(1)(b), 50(1)(d) and 57((b).

[177] In some cases, we have found that the conduct set out does contravene one or more provisions of the Act. Where that is the case, it is unnecessary to make a further order that the conduct is contrary to the public interest.

[178] In some cases, we have found that the conduct set out does not contravene the Act. As outlined recently by this Commission in *Re Carnes*, 2015 BCSECCOM 187, where the executive director alleges that conduct contravenes a specific provision of the Act and fails in that endeavor, it will only be in very rare circumstances that that same conduct could be used as the basis for obtaining an order that the conduct is contrary to the public interest. *Carnes* outlines that the test in these circumstances is one of abuse of the capital markets. We do not see that the conduct described in (a), (b), (e), (f), (g), (h), (i), (o), (q) and (r), which we have found does not contravene a specific provision of the Act, is abusive to the capital markets.

[179] Therefore we dismiss the allegations in (a), (b), (c), (e), (f), (g), (h), (i), (m), (n), (o), (q) and (r) as being the basis for us to make an order that that conduct is contrary to the public interest.

[180] The conduct described in paragraphs (d), (j), (k) and (l) above, all focus on the respondents' poor record keeping, co-mingling of funds and lack of competence in conducting capital raising activities. This conduct is separate and distinct from any of the allegations of a breach of a specific provision of the Act. Further, the Act does not contain specific contraventions that address questions of poor record keeping, co-mingling of funds and incompetence in conducting capital raising activities. Therefore, this circumstance is unlike that in *Carnes*.

[181] In circumstances such as this, a consideration of the public interest cannot start with the consideration of enumerated provisions of the Act. There are none that are directly applicable or even analogous. Therefore, the public interest must be considered in the context of the Act and the twin mandates of the Commission, investor protection and ensuring fair and efficient capital markets.

[182] The conduct of the respondents as set out in paragraphs (d), (j), (k) and (l) cannot be condoned. Their poor record keeping and co-mingling of funds was significant. One of the considerations in connection with assessing the appropriate sanctions against the respondents is whether they are fit to be participants in the capital markets. Poor record keeping and co-mingling of funds are appropriate factors to be considered in the context of sanctions and a respondent's fitness to participate in the capital markets and do not, in this case, require a separate finding that it constitutes conduct contrary to the public interest.

[183] Finally, the executive director alleges, in paragraph (p) above, that the respondents are unfit to be involved in the securities markets.

[184] In his submissions, the executive director submits that what paragraph (p) means is that the conduct of the respondents in the course of the investigation, including their refusal to co-operate with the investigation, their refusal to recognize the jurisdiction of the Commission and their abusive behavior to Commission staff demonstrate that they are unfit to participate in the securities market which is a market regulated by the Commission.

[185] Much of the evidence led by the executive director on this allegation related to communications between the respondents and Commission staff that occurred after the notice of hearing was issued. We agree with the executive director that the respondents, Harris in particular, have communicated with Commission staff, on multiple occasions, in a manner that is abusive and offensive.

[186] But we have concerns regarding how events that occurred after the notice of hearing could be relevant to the allegations in the amended notice of hearing. The executive director says that while a hearing is ongoing, matters that are relevant to allegations that occur before the completion of a hearing may be considered by the panel. While that can be true in certain circumstances, the executive director has failed to show how the respondents' engagement with Commission staff regarding enforcement efforts against the respondents relate to the allegations in the amended notice of hearing and render the respondents unfit to participate in the capital markets.

[187] The conduct alleged is conduct that relates to the respondents' relationship with the Commission and is not conduct that relates either to investors or the broader capital markets. We do not condone this conduct but it does not require us to make an order in the public interest. We dismiss the allegation that the conduct in paragraph (p) above should be the basis for us to make an order in the public interest.

IV Summary of findings

[188] We have found that:

a) with respect to contraventions of section 61,

- SPYru breached section 61 with respect to distributions totaling $1,347,000;
- U-GO breached section 61 with respect to distributions totaling $636,000;
- Paradox, Cire and Harris breached section 61 with respect to distributions totaling $834,000 of SPYru shares and Cire breached section 61 with respect to distributions totaling $27,500 of U-GO shares;
- Kwasnek breached section 61 with respect to distributions totaling $238,000 of SPYru shares and $366,000 of U-GO shares;
- Thibert breached section 61 with respect to distributions totaling $392,000 of SPYru shares and $27,500 of U-GO shares; and
- Burke breached section 61 with respect to distributions totaling $65,000 of SPYru shares and $51,000 of U-GO shares.

b) each of Harris and Cire, as directors of SPYru, is liable under section 168.2(1) for the contraventions of section 61 by SPYru;

c) each of Harris, Cire, Kwasnek, Thibert and Burke, as directors of U-GO, is liable under section 168.2(1) for the contraventions of section 61 by U-GO;

d) each of U-GO and Harris is liable under section 168.1(1)(b) in respect four EDRs filed by U-GO; and

e) each of Echo, U-GO, Cire and Kwasnek contravened the Temporary Order.

V Submissions on Sanctions

[189] We direct the parties to make their submissions on sanctions as follows:

By July 31, 2015	The executive director delivers submissions to the respondents and to the secretary to the Commission.
By August 14, 2015	The respondents deliver response submissions to one another, the executive director and to the secretary to the Commission. Any party seeking an oral hearing on the issue of sanctions so advises the secretary to the Commission. The secretary to the Commission will contact the parties to schedule the hearing as soon as practicable after the executive director delivers reply submissions (if any).
By August 21, 2015	The executive director delivers reply submissions (if any) to the respondents and to the secretary to the Commission.

July 7, 2015

For the Commission

Nigel P. Cave
Vice Chair

Judith Downes
Commissioner

Audrey T. Ho
Commissioner