DECISION OF A PANEL APPOINTED PURSUANT TO THE FINANCIAL AND CONSUMER AFFAIRS AUTHORITY OF SASKATCHEWAN ACT

In the matter of

The Securities Act, 1988 ("the Act")

And

In the Matter of
Edna Keep and
3D Real Estate Investments Ltd.
(the "Respondents")

AMENDED DECISION OF THE HEARING PANEL CONCERNING THE HEARING ON THE MERITS

Hearing dates: November 22, 23, 24, 25, 26 and December 22, 2021 (all virtual hearings via WebEx)

Before: Norman Halldorson, Panel Chairperson
Peter Carton
Honourable Eugene Scheibel

(referred to as the "Panel")

Appearances: Connor Smith on behalf of Staff ("Staff") of the Financial and Consumer Affairs Authority of Saskatchewan (the "FCAA")

Edna Keep, representing herself and 3D Real Estate Investments Ltd. ("3D") as the Respondents

Date of Decision: March 7, 2022

I. INTRODUCTION

1. This decision concerns the merits of the alleged breaches of *The Securities Act*, 1988, SS 1988-89, c S-42.2 [*Act*] by the Respondents, as a result of real estate investments in Regina, Saskatchewan. These allegations were brought by Staff through the Statement of Allegations dated July 15, 2021. Part 1 of the Statement of Allegations relates to investments made by Investors 1 and 2 and include allegations 1 through 10. Part 2 of the Statement of Allegations relates to Investor 3. There has been no evidence on allegations 11 through 21 and Staff submits allegations 11 through 21 be dismissed. The Panel agrees with Staff and allegations 11 through 21 are dismissed. This leaves allegations 22, 23 and 24 remaining from Part 2. We will address the allegations in sequence as numbered.

II. BACKGROUND:

2. The Panel heard the Respondents have experience with some group real estate investments where the target property is identified by the promoter, the terms of acquisition are negotiated with the seller, the financing is arranged (including vendor financing) and investors are sought to raise sufficient cash to bridge the gap between available commercial mortgage financing and the purchase price of the property. The promoter is responsible for overseeing all aspects of management of the residential rental properties, and the cash investors are passive unless required to fund cash calls proportional to their ownership. The group investment is structured where the rights and responsibilities of the participants are documented in a joint venture agreement, title to the property is held in a bare trustee corporation, with beneficial ownership belonging to the joint venture participants in proportion to their interest in the joint venture. The promoter's ownership is in recognition for their contributions in kind and the investors ownership is based on the amount of cash invested. The cash investors are to be repaid in installments, with the remaining balance paid at the end of the term when mortgage refinancing is in place, at which time they retain their proportional ownership of the property.

3. The Respondents are the promoter for two group real estate investment opportunities in Regina, Saskatchewan that invertors 1 and 2 invested in. The Respondents are also engaged to manage the properties on behalf of the Joint Venture participants. During the six days of this hearing, the Panel heard significant evidence pertaining to the Respondent's role as manager of the two rental properties, compliance with the obligations of the Joint Venture agreements, performance of the properties, record keeping, and communication with the Investors. These may be valid concerns for the Investors, but this evidence is not relevant to the alleged breaches of the Securities Act the Panel is tasked to decide.

4. These two real estate investments have the features of both debt and equity. The debt part is the initial investment amount that is to be returned to the cash Investor, in part by monthly installments, with the remaining balance paid at the end of the term, if possible, through refinancing. The equity part is the retention by the Investor of ownership in the property proportional to their interest in the Joint Venture, after their initial investment is repaid.

III. ISSUES TO BE DECIDED BY THE PANEL:

1. Alleged contravention of subsection 27(2)(a) and (b) of the *Act*.
2. Alleged contravention of subsection 44(2) of the *Act*.
3. Alleged contravention of subsection 55(1)(b) of the *Act*.
4. Alleged contravention of subsection 55.11(1) of the *Act*.
5. Alleged contravention of subsection 58(1) of the *Act*.

6. Alleged contravention of section 6.1 of *National Instrument 45-106*.

IV. TIMELINE, LIMITATION PERIOD and JURISDICTION:

5. The Panel is alive to the importance of timeliness in issues of administrative justice. The Panel heard from Staff and reviewed their analyses of the timeline and limitation period as it applies to this case. The Respondents did not raise the limitation period as a defence, but even if it had been raised, the Panel is satisfied the last material event for each of the investments was the date the balance of their investment was to be repaid, which was well within six years from the date of the Statement of Allegations.

6. The Panel is satisfied that the timeliness is reasonable and that we have jurisdiction to hear this case.

V. PART 1 ALLEGATIONS 1 THROUGH 5:

7. Allegations 1 through 5 relate to the real estate investment property located at 2221 Robinson Street in Regina, Saskatchewan ("Robinson"). It is an 18-suite apartment and $400,000 was raised from investors to close on the property. Investors 1 and 2 invested $100,000 on July 11, 2013, to acquire 10% ownership, and signed the Joint Venture Agreement ("JV") on October 13, 2013. The term of the JV was from August 01, 2013 to July 31, 2018. The rights and responsibilities set out in the JV agreement indicate the Venturers shall beneficially own the lands, the building and other assets, and shall be responsible for the liabilities and obligations arising out of that ownership. Title to be held in the name of a # Company as Bare Trustee on behalf of the Venturers. If financing is not available on the security of the assets of the JV, each Venturer shall provide his personal guarantee of the required financing amount. Unless expressly provided in this Agreement, no Venturer shall have the authority to assume any obligation on behalf of the JV. Distributions to Venturers can be made after all operating and debt service costs are paid and a working capital reserve established. 3D shall be engaged to manage the property.

i. Allegation 1

8. Allegation 1 is set out in clause 7 of the Statement of Allegations. It alleges the Respondents were acting as a dealer in Saskatchewan but was neither registered as a dealer, as required by subsection 27 (2)(a)(i) of the *Act*, nor was she registered as a representative of a registered dealer and acting on behalf of that registered dealer, as required by clause 27(2)(a)(ii) of the *Act*.

a. Were the Respondents in contravention of subsection 27(2)(a) of the *Act*?

9. Subsection 27(2)(a) of the *Act* reads:

27… (2) No person or company shall:

(a) act as a dealer or underwriter unless the person or company:

(i) is registered as a dealer; or

(ii) is registered as a representative of a registered dealer and is acting on behalf of the dealer;

b. Were the respondents a "dealer" in respect of the investment by Investors 1 and 2 in Robinson?

10. Subsection 2(1)(n) of the *Act* defines "dealer" as:

(n) **"dealer"** means a person or company engaging in or holding himself, herself or itself out as engaging in the business of **trading in securities** or derivatives as principal or agent

[emphases added]

11. The marketing materials for Robinson were prepared by Ms. Keep (exhibit S5) and attracted four couples (eight investors) to this opportunity.

12. The JV agreement was prepared by Ms. Keep's lawyer (exhibit S6) and Ms. Keep executed forms to evidence that Investors 1 and 2 invested in Robinson. Investors 1 and 2 testified they were invited to a client appreciation night, where Ms. Keep spoke about some Exempt Market Products as well as another real estate investment opportunity. She talked about her book called Multiple Ways To Wealth, and handed out a copy to each household at the gathering.

13. These activities are consistent with what a reasonable observer might expect a dealer would do when engaging in the business of trading in securities. The Panel is persuaded Ms. Keep was acting as a dealer for Robinson.

c. Were the Respondents "trading in securities" in respect of the investment by Investors 1 and 2in Robinson?

14. Staff and the Respondent (Ms. Keep) take very different positions on this question. Staff argue the real estate investment in Robinson governed by the JV agreement, which sets out the rights and responsibilities of the venturers, is an investment contract.

15. Subsection 2(1)(vv)(i) of the *Act* defines a "trade" to include "any transfer, sale or disposition of a security for valuable consideration".

16. Subsection 2(1)(ss)(xiv) of the *Act* defines "security" to include "any investment contract".

17. Ms. Keep argues the Robinson investment is group ownership of real estate, governed by the JV agreement, and is not a security. Ms. Keep testified she had participated in many joint venture deals managed by others, and all used the same joint venture agreements. “There were no filings required or mentioned by any of our lawyers”.

18. The Panel is not persuaded by Ms. Keep’s comment that all used the same joint venture agreements and no filings required or mentioned by any of our lawyers, as clause 3.02 (d) of the Esterhazy JV agreement in evidence as an exhibit, makes the reference that each qualify under an exemption category of investor, with respect to capital raising statutory exemptions, as stated in National Instrument 45-106 Prospectus and registrations exemptions.

19. Staff offer two legal precedents in support of their position.

20. The first is a Supreme Court of Canada decision in the *Pacific Coast Coin Exchange v Ontario Securities Commission,* [1978] 2 SCR 112 [*Pacific Coast Coin Exchange*]. The Court had the opportunity to consider the term “investment contract”, and concluded an investment contract exists where:

1. a person invests money;
2. the investment is in a common enterprise; and
3. there is an expectation of profit derived from the efforts of a third party (p. 128).

21. The Supreme Court also noted that when considering the efforts made by those other than the investor, the question is whether those efforts made “are the undeniably significant ones, those essential managerial efforts which affect the failure or success of the enterprise” (p. 129).

22. Furthermore, the Supreme Court stated that having a “common enterprise” meant that the “fortunes of the investor are interwoven with and dependent upon the efforts and success of those seeking the investment or of third parties” (p. 129). “[T]he test of common enterprise is met … when it is undertaken for the benefit of the supplier of capital (the investor) and of those who solicit the capital (the promoter). In this relationship, **the investor’s role is limited to the advancement of money**, the managerial control over the success of the enterprise being that of the promoter; therein lies the community. In other words the “commonality” necessary for an investment contract is that between the investor and the promotor.” (p. 129 [emphasis added]) Substance, and economic reality, trump form in this test (p. 127).

23. The second legal precedent was the British Columbia Securities Commission case *Re Braun,* 2018 BCSECCOM 332 [*Braun*]. The *Braun* case involved real estate, and the respondents argued that the investments were real estate transactions and that they did not meet the definition of an “investment contract” because it was a "one-off" transaction in which investors acquired a beneficial interest in real property (paras. 77-78). The panel in that case disagreed and, found that the transactions in question were

investment contracts as defined under the *Act*. The panel looked to the economic substance of the agreement and found: "the investors' returns were not conditional on the completion of the purchase of the properties, nor on the actual value of the properties; the investors were promised a fixed return. … The actual worth of the property might have been less than or more than the amount necessary to generate the promised return. Yet the respondents guaranteed that return." (para 83) The panel held that in substance the agreement was a loan with guaranteed repayment, not a "one-off" purchase of a beneficial interest in real estate (at para 84).

24. With respect the *Pacific Coast Coin Exchange* test the Panel in *Braun* found: the money to generate returns for the investors was intended to come from a "flip" of the properties. All the material efforts made to generate a return – the location of undervalued property, the efforts made to acquire and sell a specific property, and the efforts in selling a property – were to be made by the respondents, and not the investors (at paras 91 and 95).

25. In the present case the Panel considered the arguments presented by Staff and by Ms. Keep. The Panel found Staff's position persuasive, as the features of an investment contract, cited by the Supreme Court, exist in the investment made by Investors 1 and 2 in Robinson:

1. Investors 1 and 2 invested money
2. The investment is a common enterprise;
3. There is an expectation of profit derived from the efforts made by those other than the investor; and
4. The efforts made by Ms. Keep and 3D are the undeniably significant ones, those essential managerial efforts which affect the failure or success of the enterprise.

26. In substance, Investors 1 and 2 were passive investors, and the Respondents were active promotors and property managers. The Panel is persuaded the Robinson investment is an investment contract, and thereby a security under the *Act*.

d. Having established Ms. Keep was a dealer with respect to the Robinson investment, and the investment is a security under the *Act*, did the Respondents contravene subsection 27(2)(a) of the *Act*?

27. Staff called Deborah Workman, the Chief Compliance Officer for Pinnacle Wealth Brokers (Pinnacle), as a witness. Ms. Workman testified Pinnacle's records indicate Ms. Keep was a registered representative of Pinnacle from October 22, 2010 through to December 31, 2015. The records show Ms. Keep did not disclose the sale of other products to Pinnacle. Ms. Workman reviewed Ms. Keep's outside business activity forms and her annual attestations. Ms. Workman was asked "Based on your review, did any of those forms make any reference to joint venture agreements or real estate investments in joint ventures?" Ms. Workman's answer was "No".

28. The Panel accepts Ms. Workman's testimony as fact. Ms. Keep did not challenge her testimony in cross examination, and Ms. Keep confirmed the duration of her term as a Representative of Pinnacle, in her own testimony.

29. Investors 1 and 2 invested in Robinson on July 11, 2013 and signed the JV agreement on October 13, 2013. Ms. Keep was a registered representative of Pinnacle during 2013. The Robinson investment was not a Pinnacle approved product for sale by their representatives, so Ms. Keep was not acting on behalf of Pinnacle when she sold the Robinson investment to Investors 1 and 2.

30. Based on the above, the Panel finds the Respondents were in contravention of subsection 27(2)(a) of the *Act*.

e. Allegation 1 went on to allege the Respondent was also in contravention of *National Instrument 31-103*

31. The Panel finds this allegation deficient as it does not specify what provision or clause of the Instrument the Respondents are alleged to have breached. The onus is on Staff to fully set out their theory of the case with specific allegations of breach.

32. The Panel does not find the Respondents in contravention of *National Instrument 31-103*, as Staff has failed to meet the burden necessary to allow the Respondents to know the case against them regarding *National Instrument 31-103*.

ii. Allegation 2.

33. Allegation 2 is set out in clause 8 of the Statement of Allegations. Staff allege that by supplying Investors 1 and 2 with marketing materials with the intention of affecting a trade in a security, the Respondents gave written undertakings relating to the future value of the security, in contravention of subsection 44(2) of the *Act*.

a. Were the Respondents in contravention of subsection 44(2) of the *Act*?

34. That section reads:

> 44 (2) No person or company shall, with the intention of affecting a trade in a security or derivative, give any undertaking, written or oral, relating to the future value or price of that security or derivative.

35. The marketing materials for Robinson say the investor principal will come back to the investor at the end of the five-year term upon refinance. Cash flow was to be $400/month per $100,000. At refinance the mortgage pay down was to be $266,000 and the value of the building was projected to be $2.5M. There

is no specific reference to the future value of the security (i.e. the investment contract) that Investors 1 and 2 purchased for $100,000.

36. Ms. Keep points to the wording “the value of the building is projected to be” and argues a projection is not an undertaking as to future value.”

37. Staff argue that the marketing materials are more than just mere representations. Their oral closing arguments acknowledge the documents do not say the value of your investment will be X dollars at a future point in time. Staff argue the materials do provide an undertaking as to what is going to happen, and an undertaking as to what the future value of the security will be because it says you’re going to be paid out in five years.

38. The Panel notes the statements in the marketing materials that Investor principal will come back to the investor at the end of the five-year term, and that cash flow will be $400/month, is a representation for a refund of all or any of the purchase price of the security. Such representation is specifically prohibited by subsection 44(1)(b) of the *Act*. Staff could have alleged a contravention of subsection 44(1)(b) of the *Act*. They did not, and the Panel is limited to considering the case as brought.

39. Based on the above, the Panel finds allegation 2 has not been proven, and finds the Respondents are not in contravention of subsection 44(2) of the *Act*.

iii. Allegation 3.

40. Allegation 3 is set out in clause 9 of the Statement of Allegations. Staff allege the granting of a mortgage on the Robinson property for $150,000 on February 18, 2016, and another mortgage on the Robinson property for $210,000 on December 07, 2019, without the knowledge and consent of the Investors was in contravention of subsection 55.11 (1)(a)(ii) of the *Act*.

a. Were the respondents in contravention of subsection 55.11 (1)(a)(ii) of the *Act*?

41. Subsection 55.11(1)(a)(ii) reads:

> 55.11 (1) No person or company shall make a statement if that person or company knows or reasonably ought to know that:
>
> (a) the statement either:
>
> (i) is misleading or untrue in a material respect and at the time and in the light of the circumstances under which it is made; or
>
> (ii) does not state a fact required to be stated or that is necessary to make the statement not misleading in a material respect and at

> the time and in the light of the circumstances under which it was made;

42. Documentary evidence was provided that demonstrated the granting of the two mortgages, the dates, the dollar amounts, and the granting without the knowledge and consent of the Investors.

43. The Panel notes a requirement of subsection 55.11(1) is for a person or company to "make a statement". The evidence is that no statement was made. The mortgages were granted without the knowledge and consent of the Investors. Investor 2 testified the third mortgage was put on the building without the knowledge or consent of Investor 1 and 2, and Investor 1 an 2 did not find out about that for three years.

44. In ordinary language, a breach of subsection 55.11(1) occurs where someone deliberately says something that is untrue (commission) or says something but leaves out a critical detail (omission). Silence in and of itself is not sufficient for a misrepresentation, there must be an actual representation.

45. Based on the above, the Panel finds the Respondents were not in contravention of subsection 55.11(1)(a)(ii) of the *Act*.

iv. Allegations 4 and 5.

46. Allegation 4 is set out in clause 10 of the Statement of Allegations. Staff allege the Respondents traded in a security on their own behalf where the trade was a distribution of the security without filing a preliminary prospectus in contravention of subsection 58(1) of the *Act*. That section reads in part:

> 58 (1) No person or company shall trade in a security on the person's or company's own account or on behalf of any other person or company where the trade would be a distribution of the security unless:
>
> > (a) A preliminary prospectus relating to the distribution of that security has been filed and the Director has issued a receipt for it;

47. Subsection 2(1)(r) defines a distribution in part as:

> "**distribution**", where used in relation to a trade in a security, means a trade:
>
> > (i) in a security of an issuer that has not been previously issued;

48. Allegation 5 is set out in clause 11 of the Statement of allegations. Staff allege that insofar as the Respondents are able to prove the availability of exemptions from the requirement of subsection 58(1) of the *Act*, the Respondents contravened section 6.1 of *National Instrument 45-106*.

49. Part 6.1 of *National Instrument* is titled 'Report of exempt distribution' and requires that issuers that distribute their own securities must file a completed report if they make a distribution under one or more of ten listed exemptions.

50. The Panel notes the investment in Robinson either required a prospectus which was not filed, or it is an exempt security for which the proper notice was not filed with FCAA. It is one or the other for these charges, not both.

51. Evidence was provided to demonstrate that a prospectus required by subsection 58(1) had not been filed, nor had a report of exempt distributions required by *National Instrument 45-106* been filed. The Panel accepts this evidence as fact as it was not contested.

52. There is no evidence the Respondents were able to prove the availability of exemptions from the requirements of subsection 58(1) of the *Act*. In light of this, the Panel finds section 6.1 of *National Instrument 45-106* does not apply to the investment by Investors 1 and 2 in Robinson.

53. The Panel finds the Respondents are in contravention of subsection 58(1) of the *Act*, but they are not in contravention of section 6.1 of *National Instrument 45-106*.

VI. PART 1 ALLEGATIONS 6 THROUGH 10:

54. Allegations 6 through 10 relate to the real estate investment property located at 27 Vaughn Street in Regina, Saskatchewan ("Vaughn"). It is a 27-suite residential apartment building, and the promoters wanted to raise $700,000 from investors to close on the property and were offering 40% ownership. Investors 1 and 2 invested $100,000 on February 03, 2014 to acquire 5.714% ownership, and signed the JV Agreement on February 27, 2015. The term of the JV is stated as from May 27, 2014 to May 26, 2019. The rights and responsibilities set out in the JV agreement indicate the Venturers shall own the lands, the building and other assets, and shall be responsible for the liabilities and obligations arising out of that ownership. Title is held in the name of a numbered company as Bare Trustee on behalf of the Venturers. If financing is not available on the security of the assets of the JV, each Venturer shall provide his personal guarantee of the required financing amount. Unless expressly provided in the Agreement, no Venturer shall have the authority to assume any obligation on behalf of the JV. Distributions to Venturers can be made after all operating and debt service costs are paid and a working capital reserve established. 3D shall be engaged to manage the property.

i. Allegation 6.

55. Allegation 6 is set out in clause 18 of the Statement of Allegations. Staff allege Ms. Keep was acting as an adviser in Saskatchewan but was neither registered as an adviser, as required by subsection 27(2)(b)(i) of the *Act*, nor was she registered as a representative of a registered adviser and acting on behalf of that registered adviser, as required by clause 27(2)(b)(ii) of the *Act*.

a. Were the Respondents in contravention of subsection 27(2) of the *Act*?

56. Subsection 27(2) of the *Act* reads:

> **27**… (2) No person or company shall:
>
> (b) Act as an adviser unless the person or company:
>
> (i) is registered as an adviser,
>
> (ii) is registered as a representative of a registered adviser and is acting on behalf of the adviser

57. An adviser is defined in subsection 2(1)(a.1) and reads:

> "**adviser**" means a person or company engaging in or holding himself, herself, or itself out as engaging in the business of advising another as to the investing in or buying or selling of securities or derivatives.

58. When Investor 2 was testifying, he was asked how he heard about Vaughn Street. His response included "from our investment adviser at I G who sent us some marketing materials…and recommended we invest in that as well". "We hired companies like I G to manage our investment portfolio…she saw us through some pretty tough years…she did pretty well…and we trusted her".

59. When Investor 1 was testifying and asked about Vaughn Street, she said "we discussed it with our investment adviser…and she said she thought it would be a good investment for us". Earlier in her testimony Investor 1 said they had been with their investment adviser for 13 or 14 years.

60. Investor 1 and 2 testified they met Ms. Keep for the first time in December 2013, when they heard her talk at a client appreciation night.

61. It is clear from this testimony someone other than Ms. Keep was the investment adviser for Investors 1 and 2.

62. Staff argue that Ms. Keep became an investment adviser to Investor 1 and 2 when they purchased some exempt market products through her in 2014. Staff argue that advising on these investments make Ms. Keep an adviser for the purchase of Vaughn.

63. Documents and testimony in evidence shows this timeline of events:

a. Investor 1 testified they attended a reception in December, 2013 and discussed the Vaughn investment opportunity with their investment adviser, and she said she thought it would be a good investment for them.

b. On December 22, 2013 Investors 1 and 2 emailed their investment adviser saying “we’re in for $100,000. Please let us know when you need the $$.”

c. Investors 1 and 2 invested the $100,000 in Vaughn on February 03, 2014.

d. In May of 2014 Investors 1 and 2 attended a Walton night at the invitation of their investment adviser, who said Walton was a very good company to invest in, and she recommended that they do so.

e. Subsequently to that they moved $50,000 each out of our RRSP’s over to Pinnacle Wealth. Their investment adviser helped them complete forms.

f. Investor 2 testified Ms. Keep was the agent at Pinnacle, but until it became time to sign things, all their dealings were with their investment adviser.

g. Investor 1’s Know Your Client (“KYC”) form with Pinnacle is dated August 26, 2014.

h. Investor 2’s KYC form with Pinnacle is dated February 19, 2015.

64. The Panel accepts this timeline as fact, as none of the evidence establishing it was contested.

65. The above timeline indicates Investors 1 and 2 invested in Vaughn several months before Ms. Keep was engaged to purchase exempt market products offered by Pinnacle. This timeline does not support Staff’s argument that Ms. Keep was an adviser to Investors 1 and 2 when they purchased Vaughn.

66. Based on the above, the Panel finds that Ms. Keep was not acting as an adviser to Investors 1 and 2 when they invested in Vaughn, and the Respondents are not in contravention of subsection 27(2) of the *Act*.

ii. Allegation 7.

67. Allegation 7 is set out in clause 19 of the Statement of Allegations. This allegation is in respect of Vaughn and is identical to allegation 1 in respect of Robinson. The applicable legislation and the legal tests are the same for both investments. Rather than repeating the lengthy analyses in support of our findings for allegation 1, we refer the reader back to that section of this decision.

68. The considerations for investments by Investors 1 and 2 in the two real estate properties were the same and the findings of the Panel are the same. For the purposes of this analysis the Vaughn JV Agreement was identical to the Robinson JV Agreement. The economic substance of the investment is identical, and the roles of Investors 1 and 2 as passive investors and the Respondents as active promotors is identical.

69. The Panel finds the Respondents were in contravention of subsection 27(2)(a) of the *Act*, but the Respondents were not in contravention of *National Instrument 31-103*.

iii. Allegation 8.

70. Allegation 8 is set out in clause 20 of the Statement of Allegations. Staff allege the Respondents gave written and oral undertakings relating to the future value of the security in contravention of subsection 44(2) of the *Act*.

71. Subsection 44(2) reads:

> No person or company shall, with the intention of affecting a trade in a security or derivative, give any undertaking, written or oral, relating to the future value or price of that security or derivative.

72. The marketing materials for Vaughn say principal payback to Investors will be $700 per month per $100,000 after the end of year one, with balance coming back at refinancing between year 5 and 7.

73. There is no statement in the marketing material indicating the future value of anything.

74. Staff argue the statement that principal payback will be $700 per month, with balance coming back at refinancing, amounts to an undertaking relating to the future value or price of that security.

75. The Panel notes the statements about principal payback are a refund of all or any of the purchase price of the security, and such a representation is specifically prohibited by subsection 44(1)(b) of the *Act*. Staff could have alleged a contravention of subsection 44(1)(b) of the *Act*. They did not, and the Panel is limited to considering the case as brought.

76. The Panel finds allegation 2 has not been proven, and finds the Respondents are not in contravention of subsection 44(2) of the *Act*.

iv. Allegation 9 and 10:

77. Allegation 9 is set out in clause 21 of the Statement of Allegations. Staff allege the sale of the investment in Vaughn to Investors 1 and 2 was a distribution of the security without filing a preliminary prospectus in contravention of Subsection 58(1) of the *Act*.

78. Allegation 10 is set out in clause 22 of the Statement of Allegations. Staff allege the sale of the investment in Vaughn, insofar as the Respondents are able to prove the availability of exemptions from the requirements of subsection 58(1) of the *Act*, without filing a Report of Exempt Distribution, are in contravention of section 6.1 of *National Instrument 45-106*.

79. Uncontested evidence shows that a prospectus had not been filed for the investment in Vaughn, nor had a notice of exempt distribution been filed with FCAA for the investment in Vaughn.

80. The Panel notes the investment in Vaughn either required a prospectus which was not filed with FCAA, or it is an exempt security for which the proper notice was not filed with FCAA. It is one or the other of these charges, not both.

81. There is no evidence the Respondents were able to prove the availability of exemptions from the requirements of subsection 58(1) of the *Act*. In light of this, the Panel finds section 6.1 of *National Instrument 45-106* does not apply to the investment made by Investors 1 and 2 in Vaughn.

82. The Panel finds the Respondents are in contravention of subsection 58(1) of the *Act*, but they are not in contravention of section 6.1 of *National Instrument 45-106*.

VII. PART 2 ALLEGATIONS:

83. Part 2 allegations relate to Investor 3. Throughout 2016 the Respondent and Tamco Homes (2013) Ltd., a company with which Ms. Keep and her husband were directors, borrowed significant funds and issued promissory notes to Investor 3. Clause 39 of the Statement of Allegations contains a table detailing the date of issuance, the Borrower, the amount, the interest rate and terms. Six promissory notes were issued for various amounts that aggregated $445,000. Staff reviewed the details of each promissory note with Ms. Keep during cross examination, and Ms. Keep agreed the notes were issued on the dates indicated and for the amounts shown.

i. Allegation 22.

84. Allegation 22 is set out in clause 37 of the Statement of Allegations. Staff allege the Respondent was acting as an adviser in Saskatchewan, but was neither registered as an adviser, as required by subsection 27(2)(b)(i) of the *Act*, nor was she registered as a representative of a registered adviser and acting on behalf of that registered adviser, as required by clause 27(2)(b)(ii) of the *Act*. In so doing, the Respondent was therefor in contravention of subsection 27(2)(b) of the *Act*. Staff allege the Respondent was also in contravention of the provisions of *National Instrument 31-103*, Registration Requirements, Exemptions and Ongoing Registrant Obligations during the material time.

85. Investor 3 was not called as a witness. There was no documentary evidence indicating Ms. Keep had provided advice to Investor 3 in connection with the Promissory notes. There was no evidence of any kind other than the fact the Promissory notes were issued.

86. The Panel views the mere existence of the Promissory notes as insufficient evidence, for Staff to meet their burden of proof, to establish that the Respondents were acting as an adviser to Investor 3.

87. The Panel finds the Respondents were not in contravention of subsection 27(2)(b) of the *Act*, nor were they in contravention of *National Instrument 31-103*.

ii. Allegation 23.

88. Allegation 23 is set out in clause 38 of the Statement of Allegations. Staff allege the Respondent was acting as a dealer in Saskatchewan but was neither registered as a dealer, as required by subsection 27(2)(a)(i) of the *Act*, nor was she registered as a representative of a registered dealer and acting on behalf of that registered dealer, as required by clause 27(2)(a)(ii) of the *Act*. In so doing, the Respondent was therefor in contravention of subsection 27(2)(a) of the *Act*. Staff allege the Respondent was also in contravention of the provisions of *National Instrument 31-103*, Registration Requirements, Exemptions and Ongoing Registrant Obligations during the material time.

89. Investor 3 was not called as a witness. There was no evidence, documentary or otherwise, indicating Ms. Keep was acting as a dealer (no marketing materials, correspondence, promotional events, etc.). The only evidence was the fact the Promissory notes were issued.

90. Staff argue that the issuance of six promissory notes in the span of a year, with the same person or party, indicate the Respondents were in the business of doing this. It wasn't a one-off transaction with one person.

91. The Panel is not persuaded by this argument, in the absence of any other evidence indicative of being a dealer. It may not have been a one-off transaction with one person, but it was one person's companies wishing to borrow and another party willing to lend.

92. The Panel finds Staff did not provide sufficient evidence to establish that the Respondents were acting as a dealer with respect to the Promissory notes issued to Investor 3. The applicant has not met the burden to prove their case.

93. The Panel finds the Respondents were not in contravention of subsection 27(2)(a) of the *Act*, nor were they in contravention of *National Instrument 31-103*.

iii. Allegation 24.

94. Allegation 24 is set out in clause 39 of the Statement of Allegations. Staff allege the Respondent in issuing the Promissory notes, was directly or indirectly engaging in or participating in a course of action relating to the sale of securities, that the respondent reasonably ought to have known perpetuated a fraud on Investor 3 in contradiction of section 55.1 of the *Act*.

95. Staff submitted, in their written closing arguments, that there is not sufficient evidence on this allegation to support an argument for conviction on the same. As such, Staff submits that this allegation should be dismissed.

96. The Panel agrees with Staff, and allegation 24 is dismissed.

VIII. CONCLUSIONS AND NEXT STEPS:

97. In summary, based on the evidence, the Panel finds the Respondents contravened subsections 27 (2)(a) and 58(1) of the *Act* in respect of Investors I and 2.

98. Having found the Respondents contravened various securities laws, the next step in these proceedings is for the Panel to receive submissions from the parties in respect to sanctions and costs in accordance with section 19.3 of the *Local Policy*. After consulting with the parties, the Registrar will set a date for a sanctions hearing.

99. In respect to the issue of orders for financial compensation pursuant to section 135.6 of the *Act*, if Staff files a request by the Director for financial compensation, a hearing will be scheduled and held in accordance with Part 13 of the *Local Policy*.

100. This is the unanimous decision of the Panel.

Dated at Regina, Saskatchewan this 7 day of March, 2022.

"Norman Halldorson"
Norman Halldorson, Chairperson

"Peter Carton"
Peter Carton, Panel member

"Honourable Eugene Scheibel"
Honourable Eugene Scheibel, Panel member