ALBERTA SECURITIES COMMISSION

DECISION

Citation: Re GIC Capital Corp., 2024 ABASC 129 **Date: 20240723**

GIC Capital Corp., Maljaars Financial Inc., Jeff Barrie Wilkie and Robert Jacob Maljaars

Panel:	Tom Cotter Bryce Tingle, K.C.
Representation:	Matthew Bobawsky Amanda Goodwin for Commission Staff
	Robert Jacob Maljaars for himself and Maljaars Financial Inc.
	Jeff Barrie Wilkie for himself and GIC Capital Corp.
Submissions Completed:	June 10, 2024
Decision:	July 23, 2024

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I. OVERVIEW

[1] On May 28, 2024, Staff (**Staff**) of the Alberta Securities Commission (the **Commission**) issued a notice of hearing (the **Application** cited as *Re GIC Capital Corp.*, 2024 ABASC 97), naming the following respondents: GIC Capital Corp. (**GIC**), Maljaars Financial Inc. (**MFI**), Jeff Barrie Wilkie (**Wilkie**), and Robert Jacob Maljaars (**Maljaars**, and together with GIC, MFI, and Wilkie, the **Respondents**).

[2] In the Application, Staff alleged that, from January 1, 2019 to the present (the **Relevant Period**), the Respondents had, on a *prima facie* basis, contravened ss. 92(4.1) and 93(1)(b) of the Act or authorized those contraventions. Staff sought a 12-month interim order that the Respondents cease trading in securities issued by GIC and MFI, and that exemptions contained in Alberta securities laws would not apply to the Respondents. Staff also sought an order that the evidence provided in support of the Application remain confidential and not be divulged except in accordance with s. 45 of the Act.

[3] We heard the Application on June 10, 2024 (the **Hearing**). The Respondents attended in person and requested an adjournment; they had not reviewed Staff's materials until the day before the Hearing, even though they had been served with the Application and Staff's materials on May 30, 2024. We denied the Respondents' request and the Hearing proceeded.

[4] The Hearing record comprised the following:

(a) the Application;
(b) Affidavit of Service (on GIC and Wilkie) dated June 10, 2024;
(c) Affidavit of Service (on MFI and Maljaars) dated June 10, 2024;
(d) Affidavit of Trina Richards sworn May 28, 2024;
(e) Affidavit of Kevin Dusseldorp affirmed May 28, 2024; and
(f) Written Submissions of Staff dated May 30, 2024.

[5] After hearing from the parties and considering the evidence and the parties' submissions, we granted the orders sought in a brief oral ruling with written reasons to follow. These are our reasons.

II. BACKGROUND

[6] In November 2023, Staff commenced an investigation into whether the Respondents had contravened Alberta securities laws. Staff interviewed Wilkie and Maljaars under oath, and compelled bank records related to the transactions under investigation. Staff also sought records from the Respondents that were not delivered because the Respondents objected to the Commission's jurisdiction to compel those records. At the time of the Hearing, Staff's investigation remained ongoing.

A. Parties

[7] MFI is a BC company registered in Alberta and Maljaars is its sole officer and director.

[8] GIC is an Alberta company in the business of raising funds for "social impact" and humanitarian projects. Wilkie and Maljaars are directors of GIC.

[9] Maljaars claimed that MFI had contacts for various global investment opportunities and worked with GIC to raise capital to invest in those opportunities. Maljaars was responsible for MFI's and GIC's finances and had bank signing authority for both companies during the Relevant Period.

[10] Wilkie, as "Chief Relationship Officer", raised funds for GIC, signed contracts on GIC's behalf, and had bank signing authority for GIC during the Relevant Period.

B. Business

[11] GIC entered joint venture agreements (**JVAs**) or joint venture funding agreements (**JVFAs**) with investors who provided capital.

[12] Under the JVAs, the investors agreed to provide capital to GIC in consideration of receiving a return of two percent per month until the end of the stipulated term at which time they would be repaid their capital.

[13] The JVFAs contained somewhat similar terms. An investor with an identified development project paid GIC a deposit, and in exchange would receive interest on the deposit and scheduled payments from GIC. At the conclusion of the term, the investor's initial deposit would be repaid. In contrast to the JVAs, JVFA investors were to receive funding for their development projects from GIC in scheduled tranches (although the tranche payments were not part of the JVFAs).

[14] In the case of both JVAs and JVFAs, investors were told that their capital or deposit, as the case may be, would be held in trust or deposited in a segregated account.

[15] The means by which the Respondents would use investor funds to earn a return was less clear. According to Wilkie and Maljaars, GIC transferred investor funds to MFI, which in turn transferred the funds to Ngana Trustees Limited to be held in a trust located in New Zealand. The trust administrator would use the funds as collateral to show "the bankers" that there was "proof of funds". The bankers, one of whom was named Eckie, were "high rollers" able to generate significant returns by relying on the proof of funds and paying MFI in return. Neither Wilkie nor Maljaars knew how the bankers were earning those returns. For ease of reference, we define this scheme as the **Proof of Funds Venture**. In July 2021, Maljaars learned that Eckie had died and the money invested in the Proof of Funds Venture was tied up in probate. Wilkie said that Eckie died in June or July 2023, but deferred to Maljaars who "would know specifically".

[16] The key figure in the Proof of Funds Venture was Eckie. Maljaars had never met him in person, but was introduced to him through an acquaintance. Maljaars had no account documentation from Eckie, but was satisfied with viewing account statements via Zoom. When Maljaars made arrangements to meet Eckie, the plans fell through because Eckie became ill. During Eckie's illness, Maljaars was introduced to a "chief compliance officer" as the person who would "carry the baton" while Eckie was purportedly recovering. On the phone with the chief compliance officer, Maljaars was told that Eckie had passed away. Staff investigators asked Maljaars about the chief compliance officer:

Q: . . .this gentleman was the chief compliance officer of what? . . . The individual you were talking to, I think you referred to him as the "chief compliance officer", and he's the one that told you about the administrator's passing. He was the chief compliance officer of what?

A: Of the -- he's an international chief compliance officer of major banks in the region, and heads of state bring him in to be head of – to do compliance work on their major transactions.

Q: So he's sort of a freelance chief compliance officer?

A: Yeah. There's – there's not many of them left anymore.

Q: And where is he based, Bob?

A: Hong Kong, Singapore. He bounces all over the place.

Q: Have you ever met him?

A: Not yet. We've only been talking since August. We're just busy scheduling a trip. It's been bumped a few times, but we're – we're busy getting that together. It will be within the next few months.

Q: And what is his name?

A: . . .Because of his position and who he is, its – it's a delicate name to pass around. I can tell you that he has the head of state of – the head of IMF, the head of the feds – he has them on speed dial.

Q: And can you confirm that?

A: Yes.

Q: How can you confirm that?

A: We can go to my friend Greg Schroeder out of Calgary. He's the one who referred me to these people. He resided over there in Mr. Ekkie's house for – I believe, if I recall correctly, he told me, out of the ten years that he was over there in Singapore, Philippines, that whole area, I believe he was in – living in Mr. Ekkie's house, doing some things over there, for a period of two or three years.

Q: Okay. And have you ever researched him on the internet or done some due diligence?

A: Absolutely. Not only that – the internet – you can't rely on anything on the internet because he's not a guy that you'll find on LinkedIn or whatever. But because of my relationships with the minister of mines and different people that I run into, that I work with, that I know, they have – they have verified that.

. . .

Q: And – sorry – how do you know Greg Schroeder?

A: Like I said, one of my friends that I knew was friends with Greg's son.

[17] The Respondents' description of the business included unconventional jargon and vague terms, but lacked an air of reality. The description of the chief compliance officer was also vague and did not correspond with the typical role of a compliance officer for any financial institution. Wilkie and Maljaars referred elusively to "the bankers" as the source of capital, but had no understanding of how the payments were generated. They referred to "know your client" information, but Wilkie described the requirement to send such information to INTERPOL for a "scrub through their database". Ordinary means of due diligence were unreliable because of the secretive status of the bankers (or the chief compliance officer). Communications with investors blamed delayed repayment on various banking problems, bank holidays lasting as long as an entire month, difficulties with the "Paymaster pulling down the funds", and several compliance officer requests.

[18] Maljaars estimated that from 2020, GIC had raised over $11,000,000 from approximately 43 investors through joint venture agreements. He also estimated that from the inception of the Proof of Funds Venture (approximately 2018), the Respondents had sent $9,000,000 to Eckie. Even though the Respondents were sending money to Eckie, they had not received any returns during the Relevant Period. In fact, they did not expect to receive any returns. The minimum buy-in to the investment was $3,000,000 at the start. However, by the time GIC had raised $3,000,000 for Eckie (and the bankers), the minimum buy-in had increased to $5,000,000. Again, when GIC raised $5,000,000, the minimum increased to $25,000,000 and sat at $100,000,000 when Maljaars was interviewed. We could not interpret any logic to the investment, how profit would be generated, or the reason for ongoing transfer of funds to the un-vetted scheme (without any returns being earned or paid).

[19] Investors VV, DP, and RL (identified by initials for privacy reasons) are among those that contributed capital to GIC pursuant to JVAs.

C. VV

[20] Investor VV wanted to invest in a GIC-funded project. In a March 13, 2023 email, Wilkie confirmed that VV would receive two percent per month on her capital deposited in a segregated trust account. The draft JVA given to VV on March 14, 2023 provided that:

(a) VV would pay $200,000 referred to as the "Participant Asset" to GIC;
(b) the Participant Asset would be used for "private placement/enhancement activities" as determined by GIC and the parties would share in the proceeds from those activities;
(c) VV would receive two percent of the Participant Asset per month for a term of one year;
(d) at the end of the term, the Participant Asset would be released and returned to VV; and
(e) VV could withdraw the Participant Asset without penalty at any time upon giving five days' notice to GIC.

[21] On March 31, 2023, VV wired $200,000 to GIC's bank account, shortly after which the funds were transferred through MFI and through GIC's USD account to earlier investors. None of VV's funds were deposited in a segregated trust account or transferred to Ngana Trustees Limited.

[22] VV requested a return of her investment a few days after paying the funds to GIC, however Wilkie told her that was not possible. VV received payments totalling $4,000 from GIC, but her capital was not returned at the end of the JVA term.

D. DP

[23] DP knew Wilkie as a good friend of her husband. After DP's husband died, Wilkie contacted DP to introduce her to an investment opportunity. On February 27, 2020 and May 14, 2021 respectively, DP invested US$50,000 and US$100,000 with GIC. Both investments were pursuant to JVAs that contained similar terms whereby she would receive a return of two percent per month for one year plus 15 days. At the end of the term, DP would be repaid her initial investment.

[24] GIC and MFI bank records indicate that DP's investment on May 14, 2021 was not deposited in a segregated account. A portion was paid to another investor and US$71,000 was wired to a cryptocurrency exchange. Maljaars told Staff that when funds were transferred to the cryptocurrency exchange, a corresponding amount of Bitcoin was deposited to MFI's Bitcoin wallet and then transferred to Eckie, who then converted the Bitcoin to fiat currency for deposit in the Ngana Trust (because the trust did not accept Bitcoin). Maljaars did not have records of the funds being transferred to the Ngana Trust – in his words, he was only concerned that investor funds were correctly allocated on the spreadsheets as being available for the Proof of Funds Venture.

[25] Maljaars explained this convoluted chain of transactions as him wanting to facilitate the use of Bitcoin for those who wanted to transact with cryptocurrency, however there was no indication that DP ever expressed any interest in wanting to use Bitcoin for her investment. DP was apparently an elderly widow, which circumstance compounds our skepticism about Maljaars' explanation. Maljaars did not explain why an investor wanting to transact with Bitcoin would first pay GIC in fiat currency, being the only form of currency that the trustee (ostensibly, the ultimate transferee) would accept, yet the intermediate transactions would involve cryptocurrency. This was yet another example of many nonsensical assertions about the impugned transactions made by Wilkie and Maljaars in their interviews.

[26] In July 2022, approximately one month before she died, DP requested a return of her investments. In an email, Wilkie told DP's executor that the funds took approximately 90 days to be released, but that the investment was "still safe in the Trust Account" until its release, expected to occur in October 2022. According to Wilkie's statement, DP's investment could not be repaid to CP because the funds were "locked up in probate". GIC made some interest payments but did not repay DP's investment.

E. RL

[27] RL invested $50,000 under an initial JVA with GIC dated February 25, 2021. RL entered into a second JVA with GIC dated June 8, 2021, investing $320,000. The contracts provided that GIC would pay a return of two percent per month, and at the conclusion of the term, return RL's capital to her.

[28] Bank records indicated that, on June 9, 2021, GIC transferred $300,000 to MFI and MFI transferred $290,000 to a cryptocurrency exchange. We had no evidence that RL's funds were paid into trust or set aside in a segregated trust account.

[29] On May 28, 2022, Wilkie sent an email to RL regarding "Funding update" which said, in part:

> . . .I just wanted to give you a quick update on status of funding.
>
> . . .
>
> The segregated trust accounts that we utilize for project funding are, in my opinion, the most effective and quickest vehicle for funding that I have ever seen or experienced. Also, these accounts are the ultimate in Capital preservation and security. That being said, we clearly have had some hiccups in the form of delays that have been beyond our control. This has caused most clients to

> have to adjust cash flows and commitments based on these delays. Rest assured, your deposit in the trust are still in the trust and have never moved as per the agreement.
>
> . . .
>
> . . .Thank you so much for your patience during this temporary delay. Again, we have all the fund payment are in our account [*sic*] but have not been authorized to forward them as of yet. . . [emphasis added].

[30] GIC made payments to RL, but did not repay RL's capital.

III. LEGAL FOUNDATION FOR INTERIM ORDERS

[31] Section 33 of the Act authorizes an ASC panel to issue an interim order for preventative and protective measures under s. 198 of the Act if the length of time required to conduct an enforcement hearing and render a decision could be prejudicial to the public interest. An interim order is an important tool that allows the ASC to protect Alberta investors and the capital market if warranted. As described in *Re Workum and Hennig*, 2008 ABASC 719 (at para. 130), interim orders are not sanctions, but are ". . .interim protective measures to forestall the continuation of *prima facie* improprieties while an investigation and hearing proceed".

[32] On an application for an interim order under ss. 33 and 198, Staff must establish, on a *prima facie* basis, that Alberta securities laws have been contravened as alleged. A *prima facie* case arises where the available evidence supports the material parts of one or more of Staff's allegations and the evidence appears credible and reliable, having regard to all of the circumstances including its source, detail, and the presence or absence of any explanations or evidence that may contradict it (*Re CatalX CTS Ltd.*, 2024 ABASC 23 at para. 15, citing *Re Omega Securities Inc.*, 2017 ONSEC 42 at para. 25). However, an ASC panel is not required to find actual misconduct when considering whether there is a *prima facie* case. *Prima facie* means "at first sight" or "upon initial examination", and does not include as thorough an examination and consideration of all the evidence as would be necessary in a merits hearing (*CatalX* citing *Magneson v. Alberta Securities Commission*, 2023 ABCA 348 at para. 54).

[33] Staff alleged a *prima facie* breach of ss. 92(4.1) and 93(1)(b) of the Act, each of which relates to a "security" as defined under the Act. The Respondents suggested that the JVAs and JVFAs were not securities, and thus the Commission was without jurisdiction to make the interim order. Therefore, we first considered whether the JVAs and JVFAs met the definition of "security" under the Act, and if so, whether the available evidence supported Staff's allegations.

IV. ANALYSIS

A. Definition of Security

[34] The term "security" is defined in s. 1(ggg) of the Act to include: a share; a bond or other evidence of indebtedness; a document evidencing an interest in a company's property, profits or earnings; a profit-sharing agreement; and an investment contract. The definition is "broadly worded" and "designed to cover virtually every method by which money could be raised from the public" (*R v. Stevenson*, 2017 ABCA 420 at para. 9). The broad scope of the definition must be viewed within the policy of securities legislation, which includes protection of the public.

[35] The Act does not define "investment contract" but the term has been consistently construed as an investment of money in a common enterprise (as between the investor and the promoter) with the expectation of profit to come significantly from the efforts of others (See *Pacific Coast Coin Exchange of Canada Limited v. Ontario (Securities Commission)*, [1978] 2 S.C.R. 112). A common enterprise is found to exist when "it is undertaken for the benefit of the supplier of capital (the investor) and of those who solicit the capital (the promoter)" (para. 50). In determining what is an investment contract, substance prevails over the form of the transaction involved (para. 43).

[36] Generally, joint venture agreements have been found to be securities when the promoting partner of the contract receives money from the investing partner, manages or controls the funds, and ultimately pays a return to the investor. (See, for example, *British Columbia (Superintendent of Brokers) v. Balmoral Properties Corp.*, 1982 CarswellBC 283; *Re Carruthers*, 2020 ABASC 177; *Re Harmer*, 2022 CarswelNat 4140 (Can. M.F.D.A.); *Re Ellis*, 2024 ABASC 50). The success of the venture is based on the efforts of the promoter alone.

[37] The JVAs in evidence are investment contracts on their face. They stated that:

(a) the investor would provide funds to GIC;
(b) GIC or its agents would place the funds into "asset enhancement activities" as determined by GIC; and
(c) GIC in association with the investor would share in the earnings.

[38] Under the contract, the investor provided funds for the joint benefit of the investor and GIC, and the profits to be earned by the parties were derived from the efforts of GIC. The investor's role was limited to the payment of money, and GIC retained managerial control over the success of the enterprise.

[39] We found on a *prima facie* basis that the JVAs are investment contracts and therefore meet the definition of "security" under the Act.

[40] The JVFAs were substantively similar to the JVAs, providing that the invested capital would be used for a project funding structure determined by GIC. GIC would make payments to the investor according to a schedule for the term of the agreement, and at the end of the term return the investor's capital.

[41] Wilkie and Maljaars described the scheme as a way to partner with, and fund, an investor to carry out a social impact project. Even though the investor may have had a development project underway, the project itself was disconnected from the investor's payment to GIC and GIC's obligations to pay returns under the JVFA. The success or failure of the investor's project had no bearing on GIC's obligations under the JVFA. Under the contract, the investor provided funds to GIC for the joint benefit of the investor and GIC – each was to earn a profit.

[42] Therefore, we also found on a *prima facie* basis that the JVFAs are investment contracts, and thus securities within the meaning of the Act.

B. Allegation of Misrepresentation

[43] Next, we considered whether Staff's evidence could support a contravention s. 92(4.1) of the Act, which provides:

> **(4.1)** No person or company shall make a statement that the person or company knows or reasonably ought to know
>
> (a) in any material respect and at the time and in the light of the circumstances in which it is made,
>
> (i) is misleading or untrue, or
>
> (ii) does not state a fact that is required to be stated or that is necessary to make the statement not misleading,
>
> and
>
> (b) would reasonably be expected to have a significant effect on the market price or value of a security, a derivative or an underlying interest of a derivative

[44] ASC panels have held that to establish a contravention of s. 92(41), Staff must prove that:

(a) a statement was made by a respondent;

(b) the respondent knew or reasonably ought to have known that the statement was, in a material respect, untrue or omitted a fact required to be stated or necessary to make the statement not misleading; and

(c) the respondent knew or reasonably ought to have known that the statement would reasonably be expected to have a significant effect on the market price or value of a security.

[45] In determining whether a statement would be expected to have a significant effect on the market price or value of the security, we consider whether a reasonable prospective investor would have found the statements to be important or useful for deciding whether to invest in the securities on offer at the price asked (See *Re Ward*, 2022 ABASC 139 at para. 136).

[46] Staff argued that GIC contravened s. 92(4.1) of the Act by telling investors that funds would be held in trust, when in fact GIC never put the funds into trust or into a segregated account. Instead, the Respondents used the funds for unauthorized purposes and therefore knew the statements were not true, but continued to make the representations to solicit further investments.

[47] Staff's evidence (including admissions from the Respondents) showed that GIC, through Wilkie, made statements to investors that their funds would be held in segregated trust accounts, for the purpose of assuring investors and soliciting their capital. The situation of investor VV is illustrative. Wilkie sent an email to VV on March 13, 2023 attaching the draft JVA. In the email he wrote:

> So great to meet you guys today. Here are the documents that I mentioned. You would receive 2% per month on your capital placed into our segregated Trust account. We will also be assisting Greg

> in his project as we provide social impact funding. The world needs all the help it can get before covid happened and now it needed even more.
>
> . . .
>
> When you choose to move ahead and agreement is completed and you passed the KYC/CIS Application, we will email you the banking co-ordinates or wire instructions for the TD Bank in Calgary where it is then moved to the GIC Segregated Trust Account.

[48] The JVA provided that "[t]he Participant has the right to withdraw the Participant Asset at any time upon five (5) days' written notice to GIC and there shall be no fees or penalty associated with such withdrawal." Following her meeting with Wilkie, email communications with Wilkie, and receipt of the JVA, VV wired $200,000 to GIC's account. As mentioned, VV requested her money back a few days after sending it, but GIC did not return VV's money.

[49] GIC, through Wilkie, communicated to VV that her funds would be safe and easily accessible – risk and liquidity being two fundamental considerations for any investment. GIC repeatedly told investors their funds would be held in trust. Those statements had an impact on the value of the security because they signalled low risk to investors.

[50] GIC's statements to VV and other investors were untrue. Banking records indicated that, following investor deposits, the funds were not deposited in a trust account. VV's deposit to GIC's account, for example, was disbursed through GIC And MFI accounts to earlier investors (identified by Maljaars).

[51] In his compelled interview (March 2024), Maljaars told Staff that he and MFI had not yet raised sufficient investor funds to meet the minimum threshold for the Proof of Funds Venture. Maljaars further explained that because he had not reached the threshold, investor funds were not yet generating any profit, and the Respondents were not receiving returns from the trust or from the investment scheme. To continue to raise funds, GIC needed to use new investor funds to pay earlier investors. He explained that although investor funds were not sent to a segregated trust account, he maintained a purported trust ledger that accurately recorded notional transfers in and out. The Respondents asserted that they were able to use the investor funds as they wished, while those funds were theoretically held in the putative trust account. Maljaars told us in the hearing that they know "in their heart of hearts" that the unpaid investor funds are still in trust and will be released soon.

[52] Notwithstanding the Respondents' purported belief in the trust, we saw no evidence that the majority of investor funds were held in trust. There were no trust documents, accounting statements, or trust ledgers referred to by the Respondents and, in the circumstances, the existence of the trust seems dubious. The Respondents' assertions about investor funds being tied up in probate, because of the death of a banker seemingly unconnected to the supposed trust, was a further example of nonsensical explanations proffered by Wilkie and Maljaars concerning the whereabouts of the invested capital.

[53] Even if the funds were held in trust as the Respondents say, the various reasons given by Wilkie and Maljaars for the funds being "held up" such that they could not be released to the beneficiaries of the trust – the investors – were ludicrous. Those reasons included the intervention

of world bank compliance officers and the US Department of Homeland Security. Maljaars also told Staff investigators that the funds in trust are not subject to probate, but that he did not want to pull the money out from the projects.

[54] The investments were neither liquid nor securely held in trust, making GIC's representations untrue.

[55] GIC knew, or reasonably ought to have known, that the statements were untrue. It did not hold investor funds in trust but instead used the funds for unauthorized purposes, including payments to other joint venture investors, transfers to a cryptocurrency exchange, and Wilkie's and Maljaars' personal expenditures. GIC was unable to return capital to investors at the conclusion of JVA terms because it had used the funds and was not earning a return.

[56] GIC's actions were carried out by Wilkie and Maljaars, both directors and signing officers of GIC. ASC panels have long held that the "[a]uthority over the acts of a corporation generally rests, ultimately with its directors and officers – who in consequence will bear responsibility for having approved or condoned (authorized, permitted or acquiesced in) those acts" (*Re Aurora*, 2011 ABASC 501 at para. 199). Wilkie was the principal contact with investors. Maljaars managed the financial affairs of GIC and MFI, all three of whom were complicit in transferring or spending investor funds contrary to representations made to investors.

[57] We need not make conclusive findings for the purpose of a *prima facie* standard of proof. We need only consider whether the evidence before us is sufficiently reliable and supports the material parts of one or more of Staff's allegations. GIC, through Wilkie, made statements to the joint venture partners about the security and liquidity of their investments. We concluded that those statements were material because they would affect a reasonable investor's decision to purchase the securities, thereby having a significant effect on the value of the securities. Based on Staff's evidence and the absence of any evidence to the contrary from the Respondents, those statements were misleading or untrue at the time they were made. Maljaars and Wilkie were the guiding minds and responsible for GIC's actions. Therefore, Staff's evidence supported a finding of misconduct under s. 92(4.1).

C. Allegation of Fraud

[58] We also considered whether Staff's evidence could support a finding of fraud under s. 93(1)(b), which provides:

> No person or company shall, directly or indirectly, engage or participate or attempt to engage or participate in any act, practice, or course of conduct relating to a security . . . that the person or company knows or reasonably ought to know may perpetrate a fraud on any person or company.

[59] ASC panels analyze the elements of fraud as they have been stated by the Supreme Court of Canada in *R. v. Théroux*, [1993] 2 S.C.R. 5 (at para. 27). Staff must prove:

(a) the *actus reus*, which is established by proof of a "prohibited act, be it an act of deceit, a falsehood or some other fraudulent means" and proof of "deprivation caused by the prohibited act, which may consist in actual loss or the placing of the victim's pecuniary interests at risk"; and

(b) the *mens rea*, which is established by proof of "subjective knowledge of the prohibited act" and "subjective knowledge that the prohibited act could have as a consequence the deprivation of another".

[60] Certain acts are generally characterized as an act of deceit or falsehood. For example, the Supreme Court of Canada recognized that a falsehood may include "representing a situation was of a certain character, when, in reality, it was not", and that other dishonest acts may include "the use of corporate funds for personal purposes, nondisclosure of important facts, exploiting the weakness of another, or unauthorized diversion of funds (*Théroux* at para. 18).

[61] Intention is proved if the "fraudulent party knowingly undertook the acts which constitute the falsehood, deceit or other fraudulent means" and "was aware that deprivation could result" (*Ward* at para. 279).

[62] In oral submissions, Staff argued that the circumstances of VV's investment alone demonstrates a fraud: VV was deceived when told her funds would be transferred into a segregated trust account even though the funds would be used to pay other investors. VV's pecuniary interests were jeopardized when her investment was not safeguarded. The Respondents knew that VV's funds could be used to pay other investors because that was the Respondents' practice, and they knew that doing so deprived VV of the promised security of her funds being held in trust.

[63] In their interviews, Wilkie and Maljaars maintained that investor funds could be used at their discretion, including for operational expenses or to pay other investors. The investor funds were never put at risk because of the trust ledger and accounting treatment of invested funds. At the Hearing, the Respondents continued to express their view that the trust funds will soon be released so that the investors can be repaid.

[64] We concluded that Staff's evidence, on a *prima facie* basis, supported a finding that the Respondents engaged in fraud.

[65] Our conclusion was premised on the same facts underlying GIC's *prima facie* contravention of s. 92(4.1). GIC told investors that their funds would be held in trust, when they were in fact used for unauthorized purposes. The Respondents did not move investors' money to a trust account or keep it segregated, but instead relied on a ledger to mark the money as "segregated" while disbursing funds as they saw fit. We have no evidence of funds being held in trust on behalf of the Respondents and for the reasons previously noted, we are skeptical that a trust exists.

[66] According to Maljaars, MFI did not reach the threshold necessary to participate in the Proof of Funds Venture with the bankers. Over the course of approximately 4 years, GIC raised over $11,000,000 of capital and promised returns to investors when no returns were being made or paid back to GIC. Therefore, Maljaars told Staff investigators, some of the investor funds had to be used to pay other investors.

[67] The Respondents' actions fall squarely within the categories of "deceitful act" identified by the Supreme Court of Canada. By not putting investor funds into a segregated trust account as investors were told, the Respondents put the investors' pecuniary interests at risk. Investors were

not repaid, including VV, DP, and RL, a result that the Respondents knew could happen since they were not retaining or safeguarding the money as they represented to investors. On a *prima facie* basis, Staff's evidence was sufficient to prove the *actus reas* and *mens rea* of fraud.

[68] All of the Respondents were complicit in the fraud. Wilkie was a Director of GIC and the principal contact with investors, and had bank signing authority for the company's accounts. Maljaars was a director of both GIC and MFI. He brought GIC and Wilkie into the Proof of Funds Venture, he was the principal contact with the purported bankers (on behalf of MFI), and he controlled the flow of money through GIC's and MFI's accounts. MFI, through its principal Maljaars, made arrangements with these bankers to invest large sums in the Proof of Funds scheme, and with the purported trust to segregate and hold investor funds. We therefore found Staff's case was sufficient to prove that each of the Respondents contravened s.93(1)(b) of the Act.

V. CONCLUSION

[69] Staff's evidence demonstrated on a *prima facie* basis that the Respondents contravened ss. 92(4.1) and 93(1)(b) of the Act. The Respondents had an opportunity to be heard. Staff had not issued a Notice of Hearing relating to the merits of this case and required time to complete their investigation.

[70] An interim order was necessary to forestall the continuation of *prima facie* capital market misconduct while an investigation and hearing proceed. The Respondents raised more than $11,000,000, admitted to using some investor funds to pay others, and asserted that investor funds remain safe and secure albeit unavailable because of probate or otherwise. GIC has continued to communicate with investors that their funds are held in trust and would be released for repayment (as recently as February 2024). They maintained that they are working to have funds released from trust to be repaid to the investors, and could not articulate any cogent reason why the orders sought by Staff would impede that process.

[71] Given the serious and continuing nature of the alleged misconduct, the substantial amount of capital involved, and the potential for further harm to investors, we found that the length of time required to conduct a hearing and render a decision could be prejudicial to the public interest. Accordingly, it was in the public interest that we issued the Interim Order.

July 23, 2024

For the Commission:

"original signed by"
Tom Cotter

"original signed by"
Bryce Tingle, K.C.