FCAA
Financial and Consumer Affairs Authority

Suite 601
1919 Saskatchewan Drive
Regina, SK
Canada S4P 4H2

IN THE MATTER OF

***THE SECURITIES ACT, 1988*, SS 1988-89, c S-42.2**

AND IN THE MATTER OF

THE FINANCIAL AND CONSUMER AFFAIRS AUTHORITY

AND IN THE MATTER OF

LATIN CLEARING CORPORATION AND ANDREW BERGER

Christine Meredith and Sonne Udembga — for The Financial and Consumer Affairs Authority

Andrew Berger — on his own behalf

No one appearing on behalf of Latin Clearing Corporation

Decision dated: August 1st, 2016

Background

[1] As a result of complaints received by The Financial and Consumer Affairs Authority (the Authority or the FCAA) and further investigation on its behalf, it is alleged that the Respondent, Latin Clearing Corporation (Latin Clearing or LCC), and the Respondent, Andrew Berger (Berger), jointly and separately contravened clause 27(2)(a) of *The Securities Act, 1988,* SS 1988-89, c S-42.2 [*SA*] by acting as dealers in Saskatchewan while not registered to do so.

[2] In a Statement of Allegations dated September 24, 2015, and amended by a Statement of Allegations dated October 20, 2015, directed to the Respondents, the Authority alleges that:

1. The Respondent, Latin Clearing Corporation (LCC), purports to be a privately owned and managed international clearing company located in Panama.
2. The Respondent, Andrew Berger (Berger), is an individual of unknown residence or whereabouts. At all material times, Berger held himself out as an agent and broker for LCC.

[3] In order to properly and accurately consider the position of the Authority, paragraphs 3, 4, 5 and 6 of the Statement of Allegations are set out below:

> 3. In or around June 2013, Investor 1, a resident of Saskatchewan, was referred to Berger and LCC (collectively, the Respondents) by a personal friend. Investor 1 phoned Berger to discuss the possibility of investing in futures contracts, through LCC.
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> 4. From in or around June 2013 to in or around October 2013, the Respondents traded in securities or exchange contracts on behalf of Investor 1 through an account with LCC. The details of such activities include, but are not limited to, the following:
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> a. Via email, LCC provided Investor 1 with documents to open a trading account with LCC, and Berger provided banking instructions so that Investor I could deposit funds into a trading account with LCC. Investor 1 was advised that if he deposited between $50,000-$100,000 into his account, LCC would match his deposit, dollar for dollar. He was also advised as to how profits in his account would be shared, and given a schedule for when withdrawals could be made;
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> b. In June 2013 Investor 1 signed the necessary documents and returned them to LCC. A trading account was then opened for Investor 1 at LCC;
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> c. Investor 1 attempted, on June 11, 2013, pursuant to instructions received from Berger, to send USD$100,000 to the Respondents at an account with Banco de Costa Rica. The funds were held up by the intermediary bank in the transaction, and were eventually sent back to Investor 1;
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> d. In or around August 2013, per new instructions received from Berger, Investor 1 wired USD$100,000, in two separate tranches of USD$50,000 each, to an account in the name of [redacted], for deposit into his trading account at LCC. These funds appeared to have been received into the account as intended;
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> e. From time to time between June 2013 and October 2013, Investor 1 received Trading Statements from the Respondents indicating activity within Investor 1's trading account. The statements indicated that Investor 1's account was being used to buy and sell various futures contracts in commodities such as gold, silver, and crude oil. By October 17, 2013, the account showed a balance of USD$335,287.50;
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> f. Given the substantial returns being shown in his account with LCC, in September 2013 Investor 1 discussed the possibility of opening a second account with Berger. Without having definitive instructions to do so, Berger opened a second account for Investor 1 and demanded that he send more money to fund it. When Investor 1 sought to use some of the funds shown to be in his initial account to fund the subsequent account, the relationship with the Respondents broke down;
>
> g. The Respondents refused to allow Investor 1 to transfer any funds from his initial trading account. The Respondents also told Investor 1 that, due to his

failure to provide the additional funds requested to fund the subsequent account, the initial account was then frozen; and

h. From September 2013 to September 2014, Investor 1 demanded a return of his initial USD$100,000 from the Respondents on numerous occasions, but has not received any return of funds. Investor 1 last heard from the Respondents in 2013.

5. In carrying out the acts indicated in paragraph 4, above, the Respondents engaged in actions in furtherance of trades in securities or exchange contracts and also bought and sold securities or exchange contracts on behalf of Investor 1, and as such, engaged in the business of trading securities or exchange contracts.

6. Neither of the Respondents has ever been registered as a 'dealer' as required by the Act and therefore, the Respondents contravened clause 27(2)(a) of the Act.

Issues for Determination

[4] Counsel for the Authority requests that the Panel determine the following issues:

1. **Were the investments made by the Respondent, Latin Clearing and the Respondent, Berger, a security within the meaning of the *SA*?**

2. **Did the Respondent, Latin Clearing and the Respondent, Berger, act as dealers in Saskatchewan while not registered to do so, contrary to clause 27(2)(a) of the *SA*?**

3. **In the event the Respondent, Latin Clearing and the Respondent, Berger, are found in contravention of the *SA*, what is the appropriate Order for the Panel to impose?**

The Hearing May 9, 2016

[5] A Panel was convened, pursuant to the mandate of the Authority, to hear and determine the issues raised in the Statement of Allegations.

[6] At the hearing, evidence under oath was tendered by [redacted], an investigator employed by the Authority in this matter, [redacted], the Investor (referred to as Investor 1 in the Statement of Allegations), and the Respondent, Berger who testified via Webinar from South America. No evidence or representations were given by or on behalf of the Respondent, Latin Clearing.

The Evidence

[7] Based upon the evidence of [redacted], the investigation commenced when [redacted] (a resident of Saskatchewan) contacted the enforcement branch of the securities division of the Authority, with respect to investments made with the Respondent, Latin Clearing and the Respondent, Berger. The initial contact with Berger was made by [redacted] after he was referred to the Respondents by a personal friend. In the month of June 2013, [redacted] telephoned Berger to discuss the possibility of investing in futures contracts through Latin Clearing.

[8] During [redacted] investigation it was determined that [redacted] had invested $100,000 US dollars with the Respondents, Latin Clearing and Berger, to trade in futures contracts.

[9] Subsequently in June 2013, [redacted] received an email from the Respondents which contained attachments that included Latin Clearing's acknowledgment of risk factors, option fee and the corporation's account application form.

[10] Based on the specific instructions of Berger, [redacted] on or around June 11, 2013, attempted to wire transfer $100,000 US dollars. However, due to certain bank restrictions, the funds were returned to [redacted]. As a result of new specific instructions received by [redacted] from Berger, two wire transfers each totalling $50,000 US dollars were sent to the Respondents.

[11] On the detailed instructions of Berger, the first $50,000 US dollars was sent to [redacted] in Panama City. The second $50,000 US dollars was cleared through a company called [redacted] of San Jose, Costa Rica, a company owned by Berger. Berger acknowledged to [redacted] that the funds were subsequently received by the Respondents and put into a trading account.

[12] All of the instructions for the investment of the funds came from Berger and he told [redacted] that he would control all of the account funds and make all of the investments on behalf of [redacted] and report back to him.

[13] An email to [redacted] from Latin Clearing dated June 7, 2013 and authored by Berger states:

> ...My company is willing to put our money where our mouth is.... Depending on the amount you invest, Latin Clearing will either match your investment dollar for dollar in broker guarantee, or as much as $2.00 for every $1.00 invested.... After we accomplish a 50% return you will have 100% gain in your investment... Profits from that point forward will be shared client 80%, Latin Clearing 20% of profit.... If you deposit more than $100,000 into your trading account Latin Clearing will award a broker guarantee in the amount of $2.00 for every $1.00 deposited to your account.

[14] From June 7, 2013 to October 17, 2013, [redacted] received trading statements from Berger on Latin Clearing letterhead, evidencing the trading activity in his Latin Clearing account. This further confirms that both deposits were eventually deposited to the Respondent, Latin Clearing. The trading statements indicated that the $100,000 investment had realized a very significant profit in the four-month period.

[15] After the trading statements were sent to [redacted], Berger contacted [redacted] to discuss the possibility of [redacted] opening a second trading account with Latin Clearing which would require a further deposit of $100,000 US dollars.

[16] Initially [redacted] agreed to open a second trading account on the condition funds become available or, alternatively, that Berger transfer the alleged profit from his initial trading account to cover the funds required for the second trading account. Berger refused to transfer money from the first trading account to the second.

[17] Notwithstanding [redacted] clear instructions to the contrary, Berger opened a second trading account in the name of [redacted] which [redacted] refused to fund. As a result of [redacted] refusing to send a further $100,000 US dollars to fund the second account, Berger stopped sending all trading statements to [redacted] as of October 17, 2013, and froze his initial trading account.

[18] Numerous requests were made by [redacted] to Berger to refund his initial investment of $100,000 US dollars. However, Berger refused to do so and he permanently ended all communication with [redacted].

[19] In his direct testimony, Berger provided little by way of evidence. Instead he raised three legal arguments.

[20] First, that he was contacted directly by [redacted] and he did not solicit funds from [redacted], but rather that it was [redacted] who took the lead in arranging the investment. Berger claims this relationship was in the nature of a partnership and therefore not caught by the *SA* because he was not a dealer.

[21] Second, Berger claims he was never a Saskatchewan resident and therefore the Authority does not have any jurisdiction to hear this matter.

[22] Third, he argues that there was no security in Saskatchewan and therefore no breach of clause 27(2)(a) of the *SA*.

[23] In cross-examination, Berger admitted he knew [redacted] was a resident of Saskatchewan. He also confirmed that he was not registered in any capacity with the Authority under the *SA*. In addition, Berger admitted that he was conducting business with residents of Saskatchewan other than [redacted].

[24] Initially, Berger denied any knowledge of the Respondent, Latin Clearing. However, that evidence is false based on the testimony of [redacted]. On August 21, 2014, [redacted] viewed and printed a LinkedIn account which identified Berger as the CEO and President of the Respondent, Latin Clearing.

[25] After first denying any relationship with Latin Clearing, Berger later admitted to having trading accounts with Latin Clearing as far back as the year 2010. He also admitted he received

the emails directed to Latin Clearing and that he was allowed to use Latin Clearing's accounts for his own transactions.

[26] The clear inference to be drawn from all of the evidence is that the Respondent, Berger, and the Respondent, Latin Clearing, were acting in concert with respect to the entire transaction with [redacted].

[27] Therefore, where there is a conflict in the evidence between that given by [redacted] and [redacted] with the evidence given by Berger, the Panel prefers and accepts the evidence of [redacted] and [redacted] over that given by Berger. It is the view of the Panel that Berger's testimony falls far short of being truthful in crucial portions of the evidence.

[28] In the opinion of the Panel, the comprehensive legal brief filed by counsel for the Authority correctly sets out the law as it applies to the facts of this case. Therefore, portions of the legal brief have been reproduced herein.

Analysis

1. Were the investments made by the Respondents, Latin Clearing and the Respondent, Berger, a security within the meaning of the *SA*?

[29] The investments in the present case are "future contracts" under subclause 2(1)(ss)(xvi) of the *SA* and thus a "security," as defined by clause 2(1)(ss) of the *SA*.

[30] During the relevant time, a future contract was included within the definition of "security" at subclause 2(1)(ss)(xvi):

> (ss) **"security"** includes:
>
> ...
>
> (xvi) any item or thing not mentioned in subclauses (i) to (xv) that is a futures contract or option but is not an exchange contract.

[31] The definition of "exchange contract" was provided at clause 2(1)(s.2) of the *SA* as follows:

> (s.2) **"exchange contract"** means a futures contract or an option that:
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> (i) has its performance guaranteed by a clearing agency; and
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> (ii) is traded on an exchange pursuant to standardized terms and conditions set forth in the bylaws, rules or regulations of that exchange at a price agreed on when the futures contract or option is entered into on the exchange;
>
> and includes any instrument or class of instruments that meets the requirements mentioned in subclauses (i) and (ii).

[32] The definition of "futures contract" was set forth at clause 2(1)(t.1) of the *SA* and states:

> (t.1) **"futures contract"** means:
>
> (i) a contract to make delivery or take delivery on a specified date or during a specified period of a specified asset or of a specified cash equivalent of the subject-matter of that contract; or
>
> (ii) a contract designated to be a futures contract in an order made pursuant to section 11.1.

[33] Section 11.1 of the *SA* provided in part:

> **11.1**(1) Subject to the regulations, if it is satisfied that it would not be prejudicial to the public interest to do so, the Commission may make an order designating all or any of the following for all or any provisions of this Act or the regulations:
>
> (a) a contract or class of contracts to be, or not to be, a futures contract.

[34] The Panel is satisfied that the investments in this case were futures contracts within the meaning of the *SA*. The trading statements received by [redacted] show that the Respondents were buying and selling various futures in commodities such as gold, silver, and crude oil on behalf of [redacted]. Since these trading statements indicate that [redacted] account was being used by the Respondents to trade in futures, the clear inference to be drawn is that there was, or at least the Respondents were, holding out as if there was a contract, to take delivery during a specified

period of a specified cash equivalent of the subject matter of that contract. As such, the investments are futures contracts pursuant to clause 2(1)(t.1) of the *SA*.

[35] Subclause 2(1)(ss)(xvi) of the *SA*, articulated above, provides that a futures contract that is not an exchange contract is a security under the *SA*. The futures contracts in this case are not exchange contracts within the *SA* because they do not meet the legal requirements for exchange contracts. Specifically, there is no evidence to suggest that the futures contracts here have their performance guaranteed by a clearing agency, a necessary requirement for an instrument to be classified as an exchange contract.

[36] For the reasons outlined above, it is clear to the Panel that the futures contracts in the present case fall squarely within subclause 2(1)(ss)(xvi) of the *SA*, and are therefore, securities within the meaning of the *SA*. Having made this determination, the next issue is whether the Respondents acted as dealers in Saskatchewan while not registered to do so, contrary to clause 27(2)(a) of the *SA*.

2. Did the Respondent, Latin Clearing and the Respondent, Berger, act as dealers in Saskatchewan while not registered to do so, contrary to clause 27(2)(a) of the *SA*?

[37] Based on the evidence, the Panel is convinced that the Respondents acted as dealers in Saskatchewan while not registered to do so, contrary to clause 27(2)(a) of the *SA*.

[38] During the relevant time, clause 27(2)(a) of the *SA* stated:

> **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.

[39] "Dealer" was defined at clause 2(1)(n) of the *SA* as "a person or company engaging in or holding himself, herself or itself out as engaging in the business of trading in securities or exchange contracts as principal or agent."

[40] Clause 2(1)(vv) of the *SA* read:

> (vv) **"trade"** includes:
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> (i) any transfer, sale or disposition of a security for valuable consideration, whether the terms of payment be on margin, instalment or otherwise, but does not include a purchase of a security or, except as provided in subclause (iv), a transfer, pledge, mortgage or encumbrance of securities for the purpose of giving collateral for a bona fide debt;
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> ...
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> (v) any act, advertisement, solicitation, conduct or negotiation directly or indirectly in furtherance of anything mentioned in subclauses (i) to (iv).

[41] These sections of the *SA* prohibit anyone from engaging in the business of trading in securities in Saskatchewan, or holding themselves out as engaging in the business of trading in securities in Saskatchewan, unless registered as a dealer.

[42] The Respondents solicited or advertised for investors through the Website, via email, and via telephone and also traded in securities on behalf of the public, including members of the Saskatchewan public. These solicitations by the Respondents constitute the act of engaging in the business of trading in securities in Saskatchewan, and the failure to be registered as a dealer is a breach of clause 27(2)(a) of the *SA*.

[43] Even if no trades were effected, the definition of "dealer" not only captures those parties who are engaged in the business of actually trading in securities, but also those who are holding themselves out as engaging in the business of trading in securities. It is clear that the Respondents were holding themselves out as engaging in the business of trading in securities.

[44] The Respondents' public solicitation brings them squarely into engaging in the business of trading. On the Website, the Respondents call the instruments options, they offer futures contracts, they say they are trading them, and they call their clients investors. The Respondents took steps in furtherance of trades by maintaining the Website, which solicits investors into financial instruments creating ease for the investor with a view to making profit on the horizon.

[45] The fact that the Respondents are not located in the province is not relevant when determining whether the Respondents acted as dealers in Saskatchewan. In *Global Securities Corp. v British Columbia (Securities Commission)* 2000 SCC 21 at para 41, [2000] 1 SCR 494 [*Global*], the Supreme Court of Canada elucidated that it is well established that a provinces' authority over securities regulation is not limited to purely intraprovincial matters. The Supreme Court of Canada noted as follows:

> 41 Moreover, it is well established that the provinces authority over securities regulation is not limited to purely intraprovincial matters. In *Gregory, supra,* the Quebec-based broker in question was prosecuted solely for transactions outside the province. This Court nonetheless held that Quebec had a legitimate interest in those transactions. Conversely, in *R. v. W. McKenzie Securities Ltd.* (1966), 56 D.L.R. (2d) 56 (Man. C.A.), the Manitoba Court of Appeal held that a province can regulate a broker located outside the province if that broker transacts with clients within the province.

[46] As acknowledged by the Supreme Court of Canada in *Global,* the Manitoba Court of Appeal in *R v W. McKenzie Securities Ltd.* (1966), 55 WWR 157 (Man CA) [*McKenzie*] held that a province can regulate a broker located outside the province if that broker transacts with clients within the province. In *McKenzie,* a broker-dealer who was registered in Ontario made telephone calls and mailed literature to a resident of Manitoba in order to solicit orders for the purchase of shares in various companies. In response to the promotional effort, the Manitoba resident acquired certain shares making payment by drawing a cheque on a branch office of a Manitoba bank and mailing the cheque to the broker-dealer in Toronto. The Manitoba Court of Appeal found that the acts of the non-resident respondent constituted trading of securities in the province even though the respondent was never physically within the province. The court stated:

> 19 It seems clear that the true nature of the provincial statutes above considered, no less than the Securities Act of our own province, is to provide protection to the public through a system of regulating and supervising the conduct of persons who engage in trading activities in securities within the province. The Securities Act of Manitoba is not designed to reach out beyond provincial borders and to restrain conduct carried on in other parts of Canada or elsewhere. Its operation is effective within Manitoba, and nowhere else. For a person to become subject to its restraint he must trade in securities in Manitoba. This is not to say that a non-resident of Manitoba can never become subject to the controls of the statute. If the activities of such a non-resident can fairly and properly be construed as constituting trading within the province, then they fall within the purview of the *Act*.

Therefore, the argument of Berger that the Authority has no jurisdiction to hear this matter because he was never a resident of Saskatchewan fails as a defence in this process.

Conclusion

[47] The Panel is unanimous in finding the Respondents have jointly and separately breached clause 27(2)(a) of the *SA* in the transactions involving [redacted]. Therefore, pursuant to its authority, the Panel will issue its consequential Order in due course that reflects the following determinations on sanctions in a manner consistent with the public interest:

- Pursuant to subclause 134(1)(a) of the *SA* "all the exemptions in Saskatchewan securities law do not apply" to the Respondents;

- Pursuant to subclause 134(1)(d) of the *SA*, the Respondents shall permanently cease trading in any securities, including derivatives, in Saskatchewan;

- Pursuant to subclause 134(1)(d.1) of the *SA*, the Respondents shall permanently cease acquiring securities, including derivatives, for and on behalf of residents of Saskatchewan;

- Pursuant to section 135.1 of the *SA*, the Respondents shall pay an administrative penalty to the Financial and Consumer Affairs Authority of Saskatchewan in the amount of $50,000;

- Pursuant to the provisions of the *SA*, the Respondents shall pay compensation to each person or company found to have sustained financial loss as a result, in whole or in part, of the Respondents' contraventions of the *SA*, in an amount to be determined; and

- Pursuant to subsection 161(1) of the *SA*, the Respondents shall pay the costs of or relating to the hearing in this matter as may be determined by the Authority.

Peter Carton, Hearing Panel Chairperson

The Honourable Eugene A. Scheibel
Hearing Panel Member

FOR Mary Ann McFadyen
Hearing Panel Member