**ALBERTA SECURITIES COMMISSION**

**DECISION**

**Citation: Shire International Real Estate Investments Ltd., Re, 2011 ABASC 608**

**Date: 20111206**

**Shire International Real Estate Investments Ltd., Shire Asset Management Ltd., Hawaii Fund, Bearspaw at 144th Avenue Ltd. and Jeanette Cleone Couch**

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| **Panel:** | Stephen Murison<br>Karen Prentice, QC<br>Fred Snell, FCA |
| **Appearing:** | Tom McCartney<br>for Commission Staff<br><br>Jeanette Cleone Couch<br>for the Respondents |
| **Dates of Hearing:** | 18-20, 25 and 28 July 2011 |
| **Date of Decision:** | 6 December 2011 |

## I. INTRODUCTION

[1] This proceeding involved allegations of misconduct on the part of Jeanette Cleone Couch ("Couch") and four entities of which she was the alleged guiding mind – Shire International Real Estate Investments Ltd. ("Shire"), Shire Asset Management Ltd. ("Shire Management"), Hawaii Fund and Bearspaw at 144th Avenue Ltd. ("Bearspaw" and, together with Couch, Shire, Shire Management and Hawaii Fund, the "Respondents"). The allegations, levelled by staff ("Staff") of the Alberta Securities Commission (the "Commission") in an amended notice of hearing dated 15 July 2011 (the "Notice of Hearing"), were that certain of the Respondents made false and misleading statements in, and falsely certified, one or another of two offering memoranda; that Couch, Shire and Bearspaw engaged in a course of conduct that perpetrated a fraud on Bearspaw investors; that Couch made false and misleading statements to Staff; and that, in so doing, the Respondents acted contrary to the *Securities Act*, R.S.A. 2000, c. S-4 (the "Act"), the public interest, or both.

[2] At the hearing into the merits of Staff's allegations, Staff withdrew certain particulars of three allegations. We received documentary evidence (including excerpts from transcripts of four 2009 Staff investigative interviews of Couch (together, the "Interviews")) and testimony from a Staff investigator, a Staff investigative accountant and two individuals who had business dealings with one or more of the Respondents. Couch (representing all Respondents) did not testify or call any witnesses, but she cross-examined the witnesses called by Staff and, in that process, adduced documentary evidence. We received oral submissions from Staff and Couch.

[3] For the reasons set out below, with the exception of the allegation that Couch breached the Act by making false and misleading statements to Staff, we find the allegations described above to have been proved (albeit not in every particular set out in the Notice of Hearing). This proceeding will now move to a second phase, for a determination of what, if any, orders ought to be made against the Respondents.

## II. BACKGROUND

### A. The Respondents and Others

[4] During the period August 2007 through March 2009 (the "Relevant Period"), Bearspaw and Hawaii Fund sold to investors in Alberta and elsewhere (according to Reports of Exempt Distribution in evidence) investments relating to real estate projects to be undertaken in Alberta and Hawaii.

[5] Shire was incorporated in September 2005 as Berkshire International Development Group Ltd. One year later it changed its name to Shire International Real Estate Investments Ltd. One of three initial directors of the company, Couch, was its sole director throughout the Relevant Period. She was, as well, its sole shareholder throughout the Relevant Period. Offering memoranda in evidence dating from the Relevant Period – two versions of one for Bearspaw (the "Bearspaw OMs") and one for Hawaii Fund (the "Hawaii OM" and, together with the Bearspaw OMs, the "Impugned OMs") – also identified Couch as Shire's president.

[6] Shire Management was incorporated in Alberta in November 2008, with Couch as sole director. The Hawaii OM also identified Couch as Shire Management's president and sole shareholder.

[7] Bearspaw was incorporated in Alberta in August 2007, with Couch its sole director and Shire its sole shareholder. According to the Bearspaw OMs, Couch was Bearspaw's president, Shire was its promoter and manager, and Bearspaw was formed to purchase and sell (before or after subdivision) approximately 38 hectares (119 acres) of land just outside Calgary (the "Bearspaw Land").

[8] Hawaii Fund was described as a private mutual fund trust formed under Alberta laws. A "Master Declaration of Trust" in evidence, dated 1 January 2009 and signed by Couch (for Shire Management), was an apparent response to the wish of Shire Management (according to the opening recital) to establish mutual fund trusts and provide them with "real estate investment and other services". Shire Management was named trustee of such trusts, and various of its powers and duties were specified, but no particular trust was identified. However, a 26 January 2009 "Management Agreement" between Shire Management and Hawaii Fund declared the latter to be "governed by a Master Declaration of Trust dated January 1, 2009 . . . pursuant to which [Shire Management] acts as trustee", and appointed Shire Management as Hawaii Fund's manager. Shire Management thereby committed to provide for Hawaii Fund "services of an administrative, accounting or valuation nature", and to carry out and exercise duties and powers "ancillary or incidental thereto", including distribution of units of Hawaii Fund, preparation and filing of an offering memorandum and maintenance of Hawaii Fund's accounting and financial records. According to the Hawaii OM, Shire and Shire Management were the promoters of Hawaii Fund, which was associated with two projects in Maui, Hawaii – a proposed 32-unit residential condominium ("Paradise Ridge") and another proposal for a separate pair of residential lots ("Halama").

[9] Other companies, not respondents in this proceeding, were mentioned in evidence. These included: Halama Gardens Ltd. ("HGL"), incorporated in Alberta in March 2006 with Couch as sole director and Shire as sole shareholder; and a similarly named Hawaii company, Halama Gardens, LLC ("HGLLC"), with Couch identified as authorized signatory for it. In the Interviews Couch referred to HGL as a Canadian company that managed, and to HGLLC as a US company that owned, the Halama land, although she subsequently (on the same day) stated in the Interviews that Dennis Blain ("Blain") – who testified as a witness for Staff – still owned the Halama land.

[10] Couch headed each of the other Respondents throughout the Relevant Period – in the case of the three corporate Respondents, as their president, sole director and sole shareholder (the latter indirectly, through Shire, in the case of Bearspaw); and, in the case of Hawaii Fund, through its trustee and manager, Shire Management. Asked in the Interviews who she employed, Couch identified seven individuals: an "office administrator"; someone in "investor relations"; her daughter in "sales and marketing"; her husband and Andy Simon ("Simon") as "unpaid project supervisors"; and a chartered accountant and a developer as unpaid "advisors". In an Interview discussion about responsibility for securities-law filings, Couch said that "[t]he way I operate my business is that I delegate and I do not babysit", but acknowledged that she bore ultimate responsibility. We find, on the evidence, that Couch was the sole guiding mind of each of the other Respondents throughout the Relevant Period.

[11] Couch's experience with real estate projects seems, according to the Interviews, to have consisted of: eight years (to 2005) of administrative work in the employ of a land development company owned by a Phil Archer ("Archer"); the completion of perhaps a half-dozen houses in or near Calgary from 2000 to April 2009 through Williamson & Associates Inc. ("Williamson"), an Alberta company in which Couch, her husband and her daughter were involved; and the completion of "a condo conversion" begun by a company that Couch bought in September 2005 from Archer's wife.

## B. The Promises

### 1. Bearspaw

#### (a) The Bearspaw OMs

[12] The first of the two Bearspaw OMs in evidence ("Bearspaw OM 1") was dated 7 August 2007. It was replaced by an amended, restated version dated 11 October 2007 ("Bearspaw OM 2"). Couch (alone) signed and certified – as "not contain[ing] a misrepresentation" – the Bearspaw OMs, for Bearspaw and for Shire in the latter's capacity as "Promoter". Bearspaw OM 1 was filed with the Commission, as required; Bearspaw OM 2 was not.

[13] The Bearspaw OMs described an offering of up to 19 000 units (the "Bearspaw Units"), each consisting of one non-voting preferred share (carrying the right to an 8% dividend that would accrue annually if not paid) and one non-voting Class B Share of Bearspaw, at a price of $1000 per Bearspaw Unit. The minimum subscription was $10 000 for 10 Bearspaw Units. Closing, according to Bearspaw OM 1, was to occur prior to 21 September 2007, changed to 31 October 2007 in Bearspaw OM 2. The Bearspaw OMs stated that a commission of up to 10% might be paid to persons (including directors, officers and employees of Bearspaw) who sold Bearspaw Units.

[14] After deducting offering costs and sales commissions and fees, the maximum net proceeds of the offering (assuming the sale of all offered Bearspaw Units) was specified to be $15 868 000. The Bearspaw OMs declared Bearspaw's intention to spend $14 million of this to buy the Bearspaw Land and another $1.4 million on "Design and Engineering, Planning, Taxes, Insurance, Legal, etc." The amount of $380 000 would be paid as "Project Management Fees" or, it seems, as a "one-time" management fee to Shire. The Bearspaw OMs warned that Bearspaw "will require additional debt and/or equity financing to achieve those objectives and there is no assurance that any such financing will be available". The Bearspaw OMs also stated the following, under the heading "Reallocation": "[Bearspaw] intends to spend the net proceeds as stated. [Bearspaw] will reallocate funds only for sound business reasons."

[15] The business of Bearspaw, as described in the Bearspaw OMs, was "purchasing, subdividing, developing and selling" the Bearspaw Land, in its entirety (before or after subdivision) or by subdivided parcels. The Bearspaw Land was stated to have an appraised value (some details were given) of $14.2 million as at 2 May 2007. Bearspaw's objectives, and associated estimated costs and scheduling, were presented. The short-term objectives were to raise $19 million from the sale of the Bearspaw Units, by 21 September or 31 October 2007, and to buy the Bearspaw Land (by 30 September 2007, according to Bearspaw OM 1, changed to 2 November 2007 in Bearspaw OM 2). Two additional years were forecast for obtaining

subdivision approval and another two years for fully servicing and selling the Bearspaw Land, with Bearspaw to pay all its debts and "distribute any remaining cash" by the end of 2011.

[16] Under the heading "Directors, Management, Promoters and Principal Holders" and the sub-heading "Compensation and Securities Held", the Bearspaw OMs named only Couch, as Bearspaw's president and director from August 2007 and as "sole director, officer and shareholder" of Shire, Bearspaw's "Promoter". A discussion of "Management Experience" again named only Couch, declaring her to have been "employed by a Calgary based real estate development company for 10 years", and citing her involvement, as Shire's president, "in all aspects of the formation and management of" six named issuers, "each of which is or was involved in the development of real estate projects", followed by general project descriptions. One of the named "issuers" was HGL, its project being a "Condominium project in Maui, Hawaii".

[17] The Bearspaw OMs declared that Shire "has entered into an agreement to purchase the [Bearspaw Land] for the purchase price of $13 840 000" and that Bearspaw "will purchase the [Bearspaw Land] (or the right to acquire same) from [Shire] at cost".

[18] The Bearspaw OMs contained a lengthy discussion of "Risk Factors". These included warnings that the Bearspaw Units were illiquid and a speculative investment; a repetition of the warning that the proceeds of the offering would be insufficient to accomplish Bearspaw's objectives and that additional financing might not be obtainable on favourable terms; the fact that Bearspaw "has not carried on active business operations" and thus "faces all of the risks inherent in a new business"; and comments on risks associated with real estate generally. Also mentioned was Shire's involvement in other businesses, with potential for "a conflict of interest in allocation of its management time", and for Shire "and related parties" to "engage in or hold an interest in any other business, venture, investment or activity, as they consider appropriate" without any liability "to account to [Bearspaw] or any [i]nvestor for any profit from such activities".

[19] The Bearspaw OMs noted that Bearspaw was not a "reporting issuer", but stated that holders of Bearspaw Units would receive annual financial statements "together with any other disclosure required by applicable legislation".

[20] Bearspaw OM 2 differed from Bearspaw OM 1 in presenting: a deferred proposed closing of the offering (to 31 October 2007) and some associated minor scheduling changes; restated prior sales; updated financial statements; and an expanded discussion of "Material Agreements" – specifically, discussion of a "Management Agreement" and an "Assignment", each effective 8 August 2007. Under these agreements, Bearspaw appointed Shire as manager of its business "with full and complete power and authority to manage and administer the business and affairs of [Bearspaw]" for the mentioned one-time fee of $380 000 (plus expenses), and Shire assigned its interest in the contract to purchase the Bearspaw Land to Bearspaw.

**(b) Other Marketing of Bearspaw**

[21] There was little evidence as to the process undertaken to sell Bearspaw Units. Some such effort was clearly undertaken by or for Shire. The evidence included what appeared to be PowerPoint slides for a sales seminar. The first of the slides named Shire and presented the

image of a palm tree with the word "Aloha"; the second slide, titled "Agenda", indicated that topics to be covered were Shire's business and "real estate portfolio", a "Current Investment Opportunity" (specifically, Hawaii Fund), and "How do I invest". Despite the Hawaii Fund focus, there were several slides concerning other of "Shire's Projects", among them Bearspaw. The slide for Bearspaw presented a picture of what may have been farmland and the text: "The Plans [–] Rezone and develop 118.76 acres of land located at [a specified location] in the City of Calgary".

**(c) Results of the Bearspaw Sales Effort**

[22] Reports of Exempt Distribution filed by Bearspaw recorded sales of some $16.2 million in Bearspaw Units through May 2008 to about 846 investors, the great majority in Alberta. In addition, two other entities within the Shire orbit – Bearspaw at 144th Equities Ltd. ("Bearspaw Equities") and Bearspaw at 144th Bonds Inc. ("Bearspaw Bonds" and, together with Bearspaw and Bearspaw Equities, the "Bearspaw Companies") – raised money from investors for the purchase (directly or indirectly) of Bearspaw Units. Under an 18 October 2007 offering memorandum Bearspaw Equities offered shares, with most of the proceeds to be used to purchase Bearspaw Units; under another offering memorandum of the same date Bearspaw Bonds offered bonds, with most of the proceeds to be lent to Bearspaw Equities for the purchase of Bearspaw Units.

[23] Insolvency-related court proceedings resulted in Ernst & Young Inc.'s appointment as Monitor (and subsequently Receiver) of several entities defined by the Monitor as the "Shire Group", including Shire, Shire Management, the Bearspaw Companies, HGL and HGLLC. In a 7 October 2009 report on various activities of this defined Shire Group (the "Monitor's Report"), the Monitor referred at times to the Bearspaw Companies collectively, as when reporting that "Bearspaw" raised $20 188 913 from investors. In the Interviews Couch similarly did not appear to make any clear distinctions among the Bearspaw Companies when she indicated that "Bearspaw" raised from $18 to $20 million from investors.

**2. Hawaii Fund**

**(a) The Hawaii Fund OM**

[24] The Hawaii OM, dated 26 January 2009, invited investors to subscribe at least $5000 for trust units in Hawaii Fund (the "Hawaii Units"), offered at $500 each. 20 000 Hawaii Units were offered, for maximum gross proceeds of $10 million. Initial closing was scheduled for 28 February 2009, with a potential extension to 30 June 2009 and potential further closings into April 2010.

[25] A summary in the Hawaii OM set out "Highlights of the Offering", including:

- Hawaii Fund . . . will issue [Hawaii] Units in order to finance investments in real estate development projects on the Properties [defined as the Paradise Ridge and Halama lands].

- Hawaii Fund will invest the proceeds of the Offering through various business structures that will acquire and develop the Properties.

- The initial Manager and Trustee of Hawaii Fund . . . is [Shire Management]. The sole director, officer and shareholder of the Trustee and Manager is [Couch]. The Manager is

responsible for implementing the investment strategy of the Hawaii Fund, including the identification and selection of investment opportunities, related due diligence, negotiation, approvals and ongoing services related to real estate development projects on the Properties.

- Profits, if any, realized from investments in real estate development projects will form the basis of a priority distribution to Unitholders of an amount calculated as 8% per annum on the original investment plus 50% of any profits realized on the sale of the project after the priority distribution, all to be paid upon completion of the project.

. . .

- Term of Project – projected 24 to 36 months.

. . .

- The Hawaii Fund utilizes the expertise and experience of the Manager to manage all the day-to-day operations and to ensure timely and efficient development of the Properties.

- Unitholders have a right to redeem their [Hawaii] Units and are entitled to receive a price per [Hawaii] Unit that equals 90%, or 100% if the date of redemption is after January 1, 2011, of the fair market value of the [Hawaii] Units as determined by the Trustee acting reasonably.

[26] Net proceeds of the offering (assuming the sale of all Hawaii Units offered), after deducting 10% sales commissions of $1 million and legal, accounting, audit and other offering costs of $500 000, would be $8.5 million. The Hawaii OM stated that this amount would be applied to "[a]cquire securities" of an Alberta trust called Hawaii Development Trust, which would in turn be contributed or lent "to a limited partnership for the acquisition and development of the Properties", or that this amount might be directly lent to "the limited partnership". The Hawaii OM was rather reticent about Hawaii Development Trust – a cursory organization chart placed Hawaii Fund between, and linked by arrows to, "Unitholder[s]" and Hawaii Development Trust, with Shire Management shown as trustee of Hawaii Fund and Hawaii Development Trust. Under the heading "Reallocation", the Hawaii OM stated: "The Hawaii Fund intends to spend the Net Proceeds as stated and will reallocate funds only for sound business reasons."

[27] Hawaii Fund's long-term objective, as set out in the Hawaii OM, was "to develop real estate projects on the Properties through a limited partnership" – selling "completed units in each project" and distributing the net proceeds of such sales to Hawaii Unit subscribers. Three short-term objectives were also presented: completing the offering, targeting "1-6 months" and a cost of $1.5 million; completing land acquisition, "1-3 months" and a cost of $7.8 million; and commencing construction, "6-24 months" and a cost of $3.1 million. A so-called "Projected Proforma" in the Hawaii OM (the "Hawaii Estimate") allocated the $7.8 million land cost to the Paradise Ridge and Halama lands at $5.3 million and $2.5 million respectively, and indicated that Hawaii Fund "Projected Income" from the Paradise Ridge and Halama lands of $33 million and $5 million respectively. The Hawaii Estimate concluded, in bold font, "43.6% over 2 years". The Hawaii OM warned that the proceeds of the offering "may not be sufficient . . . to accomplish all of the . . . proposed objectives and there is no assurance that alternative financing will be available".

[28] In a discussion of the mentioned Master Declaration of Trust, the Hawaii OM declared that Hawaii Fund "was created primarily for the purpose of using the Fund Property for the benefit of the Unitholders", and that other purposes included:

> (b) investing in securities of other issuers and in any other business investments as the Trustee may determine;
>
> . . .
>
> (f) temporarily holding cash in interest bearing accounts with Canadian financial institutions and in short term investments for the purposes stated in the Master Declaration of Trust;
> . . .

[29] Shire Management's responsibilities as trustee were stated to include: "(i) supervising the activities and managing the investments and the affairs of the Hawaii Fund, (ii) managing the Fund Property, (iii) maintaining records and providing reports to Unitholders, . . . and (ix) to promote the purposes for which the Hawaii Fund is formed".

[30] The Hawaii OM identified the Paradise Ridge and Halama lands by location or address and legal description. According to the Hawaii OM, the Paradise Ridge land, "a 2.269 acre lot", "has water rights and all required development permits have been obtained to build eight two story buildings with four self-contained units in each building" – a "development permit has been issued . . . approving eight fee-simple four-plex condominium units", which were to be "geared towards the luxury international condominium market". The Halama land was described as "two half acre lots in a residential designated district" (one with an existing home on it, the other vacant), for which "[n]o development permit is required" and "Shire is in the process of making an application for a building permit". Exactly what Shire proposed to build on the Halama land was not explicitly stated but hand-drawn sketches and the mentioned Hawaii Estimate indicated two substantial ($2.2 million in total construction costs) detached houses.

[31] Concerning ownership of the Paradise Ridge and Halama lands, we reproduce here the entirety of a section of the Hawaii OM titled "Land Purchase Agreements":

> *Paradise Ridge Property*
>
> Shire has entered into a land purchase agreement with 1335778 Alberta Ltd. ("**1335778**") dated February 12, 2008, as amended, whereby Shire will obtain the Paradise Ridge Property for an aggregate purchase price of $5,300,000. A deposit of $210,000 has been paid to 1335778 by Shire.
>
> 1335778 originally acquired the Paradise Ridge Property in 2007 from Paradise Ridge Limited Partnership, an unrelated party for an aggregate purchase price of $5,300,000.
>
> *Halama Street Property*
>
> Shire has entered into a land purchase agreement with [HGL] dated October 1, 2008, whereby Shire will obtain the Halama Street Property for an aggregate purchase price of $2,500,000.
>
> [HGL] is a related party controlled by [Couch] and the Halama Street Property was originally acquired from an unrelated party in 2006 for an aggregate purchase price of $2,500,000.

[32] The Hawaii OM provided some information about the "Principal Occupations and Related Experience" of Couch (director and officer of Shire Management) and about Shire:

> [Couch] has over 30 years experience in the accounting field where she branched out [into] the real estate industry, specializing in property management and real estate development. [Couch] is the President, Director and Officer of [Shire], a private corporation. [Shire] is a growth-oriented real estate investment firm in Calgary, Alberta, Canada, with branches in Vancouver, British Columbia, Edmonton, Alberta and Hong Kong.
>
> . . .
>
> . . . Shire's real estate portfolio currently includes the following projects that are held through a number of related corporations in which Shire is a shareholder and [Couch] is an officer and/or director[.]

[33] There followed a summary of five projects, in each of which it was stated that "[i]nvestors will share in the profits": an area in Fort McMurray, Alberta "scheduled for multi-family development in the near future"; "waterfront property located in Orillia, Ontario" with "development potential to include luxury condominiums and a marina"; "waterfront property" in Chemainus, British Columbia for which the preliminary development plans included 82 condominium units; "waterfront property" in Okanagan Falls, British Columbia for which the preliminary development plans included "47 premium lakeshore condominiums"; and the Bearspaw Land that "Shire, together with investors, own[s]".

[34] The Hawaii OM cited a number of "Risk Factors", including:

> The ability of the Hawaii Fund to pay a return to Unitholders depends on numerous factors . . . . There can be no assurance as to the amount of the return to be paid by the Hawaii Fund, if any.
>
> . . .
>
> **8.1.1 Investment Risks**
>
> The purchase of [Hawaii] Units is highly speculative. There can be no guarantee that the Unitholders will not realize losses from an investment in [Hawaii] Units. The success of the Hawaii Fund will depend on the efforts and abilities of the Manager to select or invest in appropriate properties and on a number of external factors such as the general political and economic conditions that may prevail from time to time. Subscribers who purchase [Hawaii] Units are investing in the ability of the Manager to implement the investment strategy and achieve the investment objectives. . . .
>
> . . .
>
> **8.1.2 Issuer Risk**
>
> The Hawaii Fund has only been recently formed, has no operating history, no history of earnings and has not paid any cash distributions. The Hawaii Fund does not own any ongoing business operations and has no assets other than cash. The Hawaii Fund will not generate earnings in the immediate future.
>
> Unitholders must be prepared to rely on the Trustee and Manager of the Hawaii Fund. Investors will be relying on the expertise and good faith of the Trustee and the Manager who will

> provide management services for the Hawaii Fund. Investors must carefully evaluate the personal experience and business performance of the officers and directors of the Trustee and Manager. The success of this project will be largely dependent upon the performance of the Trustee and Manager of the Hawaii Fund.
>
> . . .
>
> Certain transactions contemplated in this Offering may be among related parties. As such, certain contractual terms one would see in documentation that is negotiated with an unrelated party are not necessarily included in agreements entered into among the related parties.
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> . . .
>
> The Hawaii Fund does not have any employees and will rely on the employees of the Manager and/or Shire. The Manager, Shire and [Couch] are engaged in other real estate development projects. As a result, they may have conflicts of interest in allocating their time between the Hawaii Fund and the other projects that they are involved in and there can be no assurance that these persons will devote adequate time to the operations of the Hawaii Fund. . . .
>
> . . .
>
> **8.1.3 Industry Risk**
>
> All real estate investments are subject to elements of risk. Real property values are affected by changes in general economic conditions, local real estate markets, competition from other available properties, changes to government regulation and time sensitivities related to obtaining regulatory approvals from local government agencies. . . .

[35] The Hawaii OM noted that Hawaii Fund was not, and did not intend to become, a "reporting issuer", but stated that holders of Hawaii Units would receive "annual financial information".

[36] Couch (alone) signed and certified – as "not contain[ing] a misrepresentation" – the Hawaii OM, on behalf of Hawaii Fund and for Shire and Shire Management as "Promoters". The Hawaii OM was filed with the Commission, as required.

### (b) Other Marketing of Hawaii Fund

[37] In evidence was some Shire marketing material, including what appeared to be a brochure for Hawaii Fund and PowerPoint slides (mentioned above).

[38] The brochure introduced Shire in the following terms:

> [Shire] is a private company under the direction of [Couch]. [Couch] has over 30 years experience in the accounting field where she branched out into the real estate industry, specializing in property management and real estate development. [Couch's] success in real estate investing allowed her to purchase [Shire] and build a first-rate reputation in the industry. . . .
>
> . . .
>
> . . . two of the main reasons many investors are attracted [to investing in real estate] are appreciation and security. When our investors invest in real estate they can be assured that Shire has utilized our experience and performed our due diligence. . . . Our investors . . . can come on board with us and profit with our easy armchair investments.

[39] The brochure and slides described the proposals for the Paradise Ridge and Halama lands. The brochure included, under "Investment Highlights" (and similar comments were made in the slides): "Short-term - Projected 24 - 36 months"; and "Investors earn both 8% interest, PLUS share in 50% of the projected profits of the project".

[40] The brochure and slides included versions of the Hawaii Estimate presented in the Hawaii OM, with the same conclusion: 43.6% over two years.

#### (c) Results of the Hawaii Fund Sales Efforts

[41] Hawaii Fund raised nowhere near the maximum $10 million it sought from the offering of the Hawaii Units. Reports of Exempt Distribution filed by Hawaii Fund recorded sales through April 2009 of almost $1.1 million to 107 investors, the great majority in Alberta. Other evidence – the Monitor's Report – indicated that the amount raised totalled $1 329 500.

#### (d) HGL Investments

[42] Couch suggested that Hawaii Fund or its investors may have benefited to some extent from money – $2.4 million according to Couch (in the Interviews) and some $2.2 million according to the Monitor's Report – earlier raised by HGL for the purchase and development of the Halama land. According to Couch, none of this money remained by May 2009. On 3 February 2009 Shire (per Couch) wrote to HGL investors, giving them the choice of either rolling their HGL investments (bonds) into Hawaii Fund (the precise mechanism was unclear) or redeeming them "from the sale of the [Halama land] as outlined in the [Hawaii OM]". The Hawaii OM made no mention of either option.

## C. The Reality

### 1. Overview

[43] As we discuss in more detail below, events did not transpire as set out in the Impugned OMs. Bearspaw effectively acquired the Bearspaw Land, but Bearspaw apparently spent nothing on development of the Bearspaw Land once acquired. Hawaii Fund never, directly or through Shire, acquired the Paradise Ridge or Halama lands. Much of the investor money intended for these three projects was applied elsewhere. In June 2009 the Commission issued cease-trade orders against certain of the Respondents, and subsequently in 2009 the Monitor was appointed. Bearspaw and Hawaii Fund investors have apparently received little to nothing on their investments, and prospects for future recovery appear doubtful.

### 2. Bearspaw

[44] Bearspaw effectively acquired the Bearspaw Land pursuant to a real estate purchase contract between Shire and an arm's-length corporate vendor (specifying a price of $13.84 million and a completion date of 30 September 2007) and an assignment agreement dated 26 September 2007 between Shire and Bearspaw by which the former agreed to sell, and the latter agreed to purchase, the Bearspaw Land. An amending agreement effective 8 November 2007 between the vendor and Shire "as trustee for" Bearspaw changed the completion date to 15 November 2007 and specified that payment would be made as follows: cash deposits of $1.1 million; a vendor take-back second mortgage for $4.6 million; and the balance of $8.14 million "to be paid by new financing obtained by the Purchaser".

[45] Alberta land title records included a transfer of the Bearspaw Land for $13.84 million from the vendor to Shire, dated 14 September 2007, with an affidavit of value sworn by Couch on 15 November 2007, all apparently registered on 22 November 2007. According to the Monitor's Report, although Shire did not transfer title to Bearspaw as contemplated by the assignment agreement, "the Monitor understands from [Couch] that this was an administrative oversight and that [Bearspaw] is intended to own the Bearspaw [Land]".

[46] Shire apparently obtained the requisite additional financing from an entity called Realty Investments Corporation ("Realty"), a subsidiary of Investit Financial Inc. ("Investit"). A 5 October 2007 letter from Realty to Shire, identified as borrower, offered a loan of up to $9 million "[t]o provide equity [sic] to facilitate the acquisition of the [Bearspaw Land]", with "An Unlimited Guarantee" to be provided by Couch and her husband; this offer was accepted on 9 October 2007. A corresponding mortgage was registered against the Bearspaw Land on 22 November 2007, the mortgagee being identified as Investit. The $4.6 million vendor take-back mortgage was also registered against the Bearspaw Land on 22 November 2007.

[47] While Bearspaw effectively acquired the Bearspaw Land on 22 November 2007, difficulties ensued. On 29 January 2008 a caveat was registered against the Bearspaw Land by the vendor claiming "an interest as an unpaid vendor". Effective 31 March 2009 Bearspaw, "by its trustee" Shire, entered into a "Mortgage Amending Agreement" with the vendor, in which Bearspaw: acknowledged failing to pay the full principal balance of the $4.6 million vendor take-back second mortgage when due, despite several extensions of the due date; acknowledged principal and interest owing of some $880 000; agreed to a revised outstanding principal mortgage amount of almost $1.9 million; committed to paying 36% annual interest; and committed to paying all obligations by 31 December 2009. In June 2009 Investit sued Shire, alleging default of some $7.2 million on the $9 million mortgage financing.

[48] Given that the Bearspaw Companies had raised from $18 to $20 million from investors, Bearspaw should have had no difficulty paying, up front, the full purchase price (under $14 million) for the Bearspaw Land, or in satisfying the mortgage obligations on it. However, the evidence was clear that much of that investor money was applied elsewhere.

[49] In the Interviews Couch indicated that all of the Bearspaw Companies' investor money went, first, to Shire. This was consistent with what she agreed was the "general practice" – investor money for various projects going into the Shire bank account, "[a]s needed". According to the Monitor's Report, approximately $5.1 million of the money raised by the Bearspaw Companies was used for the purchase of the Bearspaw Land – to pay "deposits" and "to pay interest and reduce the outstanding mortgages". The Monitor characterized almost $15.5 million of the money raised by the Bearspaw Companies as "Net intercompany transfers to Shire". The Monitor also characterized almost half of that amount as having been applied by Shire for purposes related to the Bearspaw project – sales commissions, Shire's management fee, costs relating to Bearspaw Land mortgage payments, and other administrative expenses – leaving some $7.7 to $8 million as a net receivable from Shire. As mentioned, Bearspaw apparently spent nothing on development of the Bearspaw Land once acquired.

[50] At the time of the Monitor's Report, the Bearspaw Land was subject to a foreclosure proceeding initiated by Investit. In a December 2010 order made in that proceeding, an offer to purchase the Bearspaw Land for $8.4 million was approved, with none of that money being allocated to the second mortgagee or Bearspaw investors.

[51] Asked in the Interviews whether the Bearspaw Companies' investor money went "to other projects under the Shire umbrella", Couch first responded "[p]ossibly" but then acknowledged that this happened without the Bearspaw Companies' investors having been told. According to a "summary sheet" provided by Realty's president, Couch was quite forthcoming about why Bearspaw was not paying off the mortgage debt owing to Investit. Among the comments made were that, in February 2008, Shire informed Realty that Shire had "raised the $19 [million]" and "promised that by April [Realty] will be paid out from the proceeds of the offering memorandum". That did not happen, but payments of $500 000 each were made in April, May and June, with monthly interest payments also being made. As for the remainder: "Verbally, Shire states that the balance of the funds were used to close on their next project in Sorrento, BC. [Couch] confirms that once the offering memorandum for Sorrento is complete, the funds will return to the Bearspaw project and our loan will be paid out."

### 3. Paradise Ridge

[52] Hawaii Fund never, directly or through Shire, acquired the Paradise Ridge land.

[53] Hawaii land records as of June 2011 showed the Paradise Ridge land to have been acquired in 2003 by a Hawaii limited partnership, Paradise Ridge LP, and not to have been transferred thereafter. According to Hawaii business registration records, Paradise Ridge LP was a Hawaii limited partnership formed in 2003, with four corporate partners: Akale Holdings, Inc. ("Akale"), the general partner; and three limited partners – Lokwa Homes, Inc. ("Lokwa"); Kelikea Homes, Inc. ("Kelikea"); and Kelemi Homes, Inc. ("Kelemi"). The partners were Hawaii corporations formed in 2003 by members of a British Columbia family of homebuilders named Richardson, they being the only officers and directors of the corporations. One of them, Glenn Richardson ("Richardson"), testified as a witness for Staff. Richardson explained that Kelikea was his company, Lokwa his brother's, and Kelemi his father's. These three companies together owned Akale, of which Richardson was president and "managing partner of the whole thing".

[54] Richardson described the Paradise Ridge land as undeveloped land for which the previous owner had preliminary approval to build 32 housing units. The approval process was time-consuming and, although the Richardsons were "about 90[%] finished with the plans" by late 2006 or early 2007, concerns about the US housing market and other issues prompted them to try to sell the Paradise Ridge land. Working through a realtor, they received their first offer – for US$3 million – in November 2007. The purchase contract indicated that a $50 000 deposit was received, the depositor identified initially in typewriting as "Shire Investments, et al[.]" but replaced, in handwriting, by 1335778 Alberta Ltd. ("133"). (133 was incorporated in Alberta in July 2007. Its initial directors were Simon and Couch's husband. The latter resigned on 30 or 31 January 2008, leaving Simon as sole director and shareholder.)

[55] Shortly thereafter, in December 2007, Shire and 133 signed a purchase contract under which Shire would buy – on or before 15 April 2008 – the Paradise Ridge land from 133 for US$4.4 million.

[56] Richardson rejected 133's November 2007 offer for the Paradise Ridge land but continued to have discussions with the prospective buyer. He dealt with Simon, and assumed he was thereby dealing with Shire – that was the name given when Richardson telephoned Simon's office, and Richardson also had Simon's business card identifying Simon as Shire's "V.P. Special Project". They eventually reached agreement on a sale price of US$3.5 million with a 12 May 2008 closing date, as recorded in a purchase contract dated 8 February 2008 between Paradise Ridge LP and 133. An addendum allowed 133 a due diligence period and gave 133 the option of also acquiring Paradise Ridge LP, among other things.

[57] According to the Monitor's Report, Shire and 133 signed another purchase contract dated 12 February 2008 under which Shire would buy – by 12 May 2008 – the Paradise Ridge land from 133 for US$4.41 million.

[58] The transaction between Paradise Ridge LP and 133 did not close on 12 May 2008. Nor, despite three extensions, had it closed by 1 December 2008. On 17 December 2008 Paradise Ridge LP, as seller, and 133 and Paradise Ridge LLC, as buyer, signed – Simon on behalf of both 133 and Paradise Ridge LLC – a new agreement for purchase of the partnership, for $3.4 million, with $299 000 of that (deposited in, or to be deposited into, escrow by 133) termed non-refundable. Closing was to occur on 27 February 2009.

[59] When Richardson was unable to reach Simon, Richardson spoke with Couch on or about 16 February 2009 and told her that there would be no more extensions. Her response, according to Richardson, was: "[S]he couldn't make the decision. [Simon] was the file manager in this case, and she would have to speak to him." Richardson said that, in early 2009 before the scheduled 27 February 2009 closing date, he first saw the Hawaii OM – which Simon, while in British Columbia, hand-delivered to him – because Richardson "wanted to be assured that these guys were actually doing something to raise money". Richardson acknowledged meeting with Couch once in British Columbia, recalling that Simon "wanted a face-to-face, just for me to meet [Couch] and see who we're dealing with". Asked by Couch whether at that meeting she "went through" the Hawaii OM and explained "how we raised our funds", Richardson denied any review of the Hawaii OM and could not recall any explanation about money-raising. The evidence leaves us in no doubt that everyone involved at the time perceived 133 as a mere Shire conduit, and the Hawaii OM as the means by which 133 could fund its contracted purchase of the Paradise Ridge land.

[60] The 27 February 2009 closing did not occur. In mid-March 2009 Richardson had Paradise Ridge LP's lawyer send 133's lawyer a notice of breach. At the same time Richardson sent an email to Simon, copied to Couch, which said (among other things): "At this time we are instructing our Attorney and Realtor to close escrow and terminate our dealings with Shire. We welcome you to reopen negotiations in the future when your finances have been finalized." Soon after, Simon made four alternative proposals, two of which Richardson rejected outright and for two of which he suggested modifications for discussion. Nothing apparently ensued, and on 20

April 2009 Richardson sent a formal notice cancelling the 17 December 2008 agreement. It seems, from the Monitor's Report, that 133 forfeited the $299 000 in non-refundable deposits under that agreement.

**4. Halama**

[61] Hawaii Fund never, directly or through Shire, acquired the Halama land.

[62] Hawaii land records in evidence indicated the following:

- On 4 January 2006 Blain, an Alberta homebuilder and developer, acquired the Halama land from a company that had bought the land – the two lots separately – in the preceding 13 months.

- On 7 March 2006 ownership changed such that Blain and Archer each held an undivided 50% interest in the Halama land.

- On 27 July 2006 Blain and Archer conveyed the Halama land to CDN Maui LLP, formed and registered as a limited partnership in Hawaii in March 2006 with Blain and Archer its partners.

- On 26 January 2010 CDN Maui LLP conveyed the Halama land to Archer.

[63] Blain, in his testimony, confirmed this sequence of ownership of the Halama land.

[64] Blain told us that, in about 2001 or 2002, he met Couch through Archer, whom he had met a few years before. Blain understood that Couch "was interested in purchasing something in Hawaii". Shire (under its original Berkshire name, as was the case in other instances concerning the Halama land) agreed in January 2006 to buy the Halama land for US$2.5 million with a closing date of 15 March 2006. The purchase contract dated 11 January 2006 (the "Halama Purchase Contract") was signed by Couch, for Shire, and by Blain, as seller. In March 2006 Shire assigned its rights under the Halama Purchase Contract to HGL, which raised some $2.2 to $2.4 million from investors for the purchase and development of the Halama land.

[65] The purchase was deferred several times, with Couch for Shire (or, actually, for HGL) agreeing to several amendments to the Halama Purchase Contract, including the making of several deposit and mortgage payments, a series of closing extensions (the second to last calling for closing by 15 December 2007 with an incentive were it to occur by mid-October), the assumption of two mortgages on the Halama land, and the seller's retention of title until one of these mortgages (if not assumable) was refinanced or cleared. In a 9 October 2007 letter, Blain warned Couch that closing in December was "critical", and that he was about to list the Halama land for sale. The evidence included a 20 October 2007 realtor's listing agreement for one of the Halama lots, with a handwritten rider concerning Shire "should they be able to perform on current contract". Blain testified that there was a similar listing agreement for the other lot, and that Couch "was in agreement to list . . . to minimize damages". The final extension agreement, dated 21 December 2007, acknowledged "the release of $500,000 today" and called for "immediate" closing on and transfer of the Halama land, with the seller agreeing to carry "a

second blanket mortgage" and Shire (per Couch) acknowledging that it might have to refinance the existing first mortgages and that "all payments to date are liquidated as late charges".

[66] All of the amending agreements in evidence were signed, for the seller, by Blain in his own right or for an entity or entities, one being CDN Maui LLP; one (signed by Couch for Shire) also had space (unused) for the co-signature of Archer, for the seller.

[67] Blain testified that Shire was unable to assume one or both of the existing mortgages and that the transaction did not close. However, Shire (for HGL) had made several mortgage and other payments relating to the Halama land totalling, according to the Monitor's Report, almost $3.2 million. This result clearly puzzled the Monitor, which noted in its report that it was continuing to analyze how such expenses could have been incurred in relation to a US$2.5 million purchase transaction that never closed.

[68] In October 2008 Shire entered into an agreement to purchase the Halama land from HGL for $2.5 million, despite HGL not owing the land. Shire then switched to Hawaii Fund as the funding vehicle for this and the Paradise Ridge projects, raising (as discussed) approximately $1.1 to $1.3 million.

[69] Eventually, in February 2009, at Blain's request, the Hawaii escrow agent sent cancellation instructions. The instruction in evidence concerned only one of the Halama lots, but presumably there was such an instruction for the other lot. The instruction in evidence had signature lines for Blain and Archer for the seller, identified as CDN Maui LLP, and a signature line for Couch for the buyer, identified as Shire and HGLLC; it was signed by only Blain and Archer.

[70] Blain testified that he knew Couch was having difficulties with Archer and, indeed, that "there was a lot of hatred seeming to go back and forth". Blain did not recall any discussions with Couch, or notice to Shire, about Archer's interest in the Halama land, but he believed that "it was common knowledge". He also believed that "it came up once that [Couch] was quite upset with [Archer], and she didn't want to be involved with anything to do with [Archer]". He elaborated: "I think she wanted it known that she didn't want to have anything to do with [Archer] if he had involvement with [the Halama land]. . . . I don't believe she wanted his name anywhere to be seen on these documents."

[71] Blain also testified about apparently adverse effects of some development regulation changes in Hawaii in the Relevant Period.

[72] In the result, Hawaii Fund (and its investors) – as well as earlier investors in HGL – ended up with nothing to show for significant expenditures relating to the Halama land.

### 5. Monitor's Findings Generally

[73] Further context is provided in the Monitor's Report, notably in the Monitor's comments on hurdles it faced in conducting its investigation, and in its summary of "Key Findings" applicable to what it called the Shire Group.

[74] According to the Monitor:

- The books and records were sufficiently deficient as to "significantly" prolong its investigation, and even then, some banking and financial information was missing and "[s]ignificant payments" had yet to be adequately explained.

- Completion of financial statements for the periods ended 30 April in 2008 and 2009 had been suspended "due to the availability [sic] of financing".

- The extensive use of multiple credit cards, including personal credit cards in the names of shareholders, for purchases of approximately $1.1 million, made it "difficult to determine personal versus corporate expenses".

- Some $67 million was raised from investors in the Shire Group, this total including amounts raised by Shire, Shire Management, the Bearspaw Companies, HGL and HGLLC, and, we infer, Hawaii Fund (given that, while Hawaii Fund was not among the monitored entities, its money-raising was discussed in the Monitor's Report). Of this total, Shire received approximately $51.3 million, "primarily used" for 10% sales commissions and project-related expenses, to enable Shire to acquire assets in its own name and to pay Shire's overhead costs. The result was that Shire apparently owed in excess of $5.6 million to entities within the Shire Group, including, it seems, Hawaii Fund.

- Agreements were missing or incomplete. Intercompany transactions occurred "without apparent investor approval or supporting documentation" and did not "balance in the underlying general ledgers". What was stated in certain offering memoranda did not accord with what was actually done (for example, assets to be acquired by one entity were acquired and held by another or not acquired at all). Money was not returned to investors despite certain transactions contemplated in offering memoranda not being completed.

- Its investigation thus far had not found evidence of "any significant funds" being paid by the Shire Group to Couch other than approximately $590 000 in "repayments of shareholder loan accounts" relating, according to her, to reimbursement of expenses she had incurred for, or other money she contributed to, the Shire Group. Indeed, the Monitor suggested that Couch might be owed $663 000 or more by the Shire Group.

**6. Money Tracked by Staff Investigation**

[75] The evidence included banking information and an analysis of that information (the "Staff Analysis") by a Staff investigative accountant, who also testified as a witness. That evidence was broadly consistent with the conclusions in the Monitor's Report concerning the Bearspaw Companies, which (according to the Monitor) apparently had "only one set of books and records, general ledger and bank account".

[76] Among other things, the Staff Analysis concluded that deposits to the Bearspaw bank account totalled almost $20.9 million. Apart from $646 000 received from two "other Shire companies" – Maples and White Sands Investments Ltd. ("Maples") and Tsehum Harbour Bonds Ltd. ("Tsehum Bonds") – the evidence indicated that substantially all of the $20.9 million came from investors. The Staff Analysis noted that, with this and the mortgage financing related to the Bearspaw Land, Bearspaw had available almost $34.5 million – far in excess, we note, of that necessary to pay the full purchase price (under $14 million) for the Bearspaw Land.

[77] Staff were able to trace almost $5.2 million of the almost $20.9 million in deposits as having been paid towards the purchase of the Bearspaw Land or the mortgage obligations thereon. The Staff Analysis found that almost $15.5 million was transferred from the Bearspaw bank account to Shire and that another $100 000 was transferred to a bank account for a Shire-related project in Fort McMurray, Alberta.

[78] According to the Staff Analysis, of the $15.5 million transferred to Shire, almost $1.4 million was applied in respect of the Bearspaw Land. Three deposits on the Bearspaw Land totalling $600 000 were also made from the Shire bank account before the Bearspaw bank account was opened. As well, in June 2009 an $89 000 mortgage interest payment on the Bearspaw Land was made by Shire, using money it received from Maples.

[79] In the end, though, according to the Staff Analysis, almost $7.6 million of the money transferred from the Bearspaw bank account to Shire was "unaccounted for".

[80] Evidence, including banking records, shed some light on specific uses of some of the money raised for the Bearspaw project.

*Bearspaw Money Used for Maples*

[81] A 16 May 2008 Maples offering memorandum (the "Maples OM") described Maples' plans to acquire and redevelop some hotel and resort properties near Kamloops, British Columbia. Maples would buy the properties from Shire, which would have bought them (directly or indirectly) from arm's-length vendors. The Maples OM identified Couch as Maples' president and director, and Shire as its sole shareholder and promoter.

[82] The evidence included confirmations of various payments made by Shire in relation to the Maples projects, some of which, we are persuaded, were funded (wholly or in part) by the Bearspaw bank account, despite having nothing at all to do with the Bearspaw Land. For example, the evidence persuades us, and we find, that a 31 August 2007 Shire cheque for $200 000 payable to a law firm connected with the Maples projects (the "Maples Lawyers") was funded, wholly or in part, by a $200 000 transfer from the Bearspaw bank account to Shire on 30 August (given the same amounts and proximate dates of the transfer and this payment, as well as the 29 and 31 August Shire bank account balances and the intervening activity in the account). We find that on 19 September 2007 a $450 000 transfer from the Bearspaw bank account to Shire funded to some extent (Shire's bank account balance would otherwise have been insufficient) a Shire cheque for $760 000 to the Maples Lawyers. We find that a 29 February 2008 Shire cheque for $500 000 to the Maples Lawyers was funded mostly, if not wholly, by one or other of two $500 000 transfers from the Bearspaw bank account on 27 and 28 February,

which resulted in a Shire bank account balance of some $1 million when the cheque cleared on 3 March. We also find that a $300 000 Shire cheque to the Maples Lawyers dated, and cleared, on 14 April 2008 was funded to some extent (given the 10 and 14 April Shire bank account balances and the intervening activity in the account) by one or other of two transfers from the Bearspaw bank account for $500 000 on 11 April and $450 000 on 14 April.

[83] However, the evidence was insufficient to persuade us that other payments made by Shire in relation to the Maples projects were also funded, wholly or in part, by the Bearspaw bank account. For example, while $700 000 was transferred from the Bearspaw bank account to Shire on 12 February 2008, incomplete information about activity in the Shire bank account from that day through 21 February does not enable us to reach a conclusion about the funding of the 21 February Shire cheque for $215 000 payable to the Maples Lawyers. We similarly reach no conclusion about a 2 May 2008 Shire cheque for $160 000 to the Maples Lawyers because of incomplete banking records for Shire for that and immediately preceding days. On 30 May 2008 $225 000 was transferred from the Bearspaw bank account to Shire, and Shire issued a cheque for $1.1 million to the Maples Lawyers. However, given that Shire's bank account balance (bolstered by another larger infusion the same day from another source) was sufficient apart from the $225 000 transfer to cover this payment and apparently all other outlays on 30 May 2008, we are unable to conclude that this payment was funded by the Bearspaw bank account. Finally, on 21 July 2008 Shire received a $31 000 transfer from the Bearspaw bank account, and Shire wired $250 080 in connection with one of the Maples projects. However, Shire also received three larger transfers that day from other sources and in any event began the day with a bank account balance sufficient for all its outlays that day, leaving us unable to conclude that this payment was funded by the Bearspaw bank account.

*Bearspaw Money Used for Okanagan Falls*

[84] Shire acquired some land in Okanagan Falls, British Columbia housing an old motel and RV park. British Columbia land records showed Shire as the registered owner as at 9 October 2007. Shire issued a $681 365.46 cheque for that purchase on 28 September 2007. Given that on the same day the same amount – to the penny – was transferred to Shire from the Bearspaw bank account, we find that the money for this payment came from the Bearspaw bank account. We further find that this payment was in no way connected to the Bearspaw Land.

*Bearspaw Money Used for Williamson*

[85] Shire made payments to Williamson – the company with or through which Couch partnered with her husband and her daughter on some housebuilding projects. Couch's daughter was Williamson's sole director and shareholder. In the Interviews Couch explained the general arrangement with Williamson:

> Q Did you issue cheques and facilitate the mortgages on the properties that are -- that the title is held by [Williamson]?
>
> A Yes.
>
> Q So Shire paid for the mortgages or paid for those properties?
>
> A Yes.

Q Did you ever get refunded for the purchase of those properties from [Williamson]?

A On the sale, we were to get refunded and split the profits.

Q Has that happened?

A There are no profits.

[86] The evidence included copies of two Shire cheques signed by Couch's daughter – a 15 October 2007 cheque for $106 500 to Williamson and a 7 November 2007 cheque for $663 000 to a law firm (the "Marda Loop Lawyers") in trust and marked "Re Marda Loop". Banking records showed that Shire received transfers from the Bearspaw bank account of $100 000 on 15 October 2007 and $650 000 on 7 November 2007.

[87] We find that the $100 000 transfer from the Bearspaw bank account on 15 October 2007 funded, mostly or partly (Shire's bank account balance would otherwise have been insufficient), Shire's $106 500 cheque to Williamson, despite this payment having nothing at all to do with the Bearspaw Land.

[88] Concerning the other transfer, the evidence included: a document, bearing Shire's name and logo, relating to some proposed infill houses on four parcels in Calgary's Marda Loop area (this was derived from Couch's affidavit filed in the insolvency-related court proceedings); August 2007 real estate purchase contracts for those parcels, each naming "Shire Investments" or its nominee as the buyer and the Marda Loop Lawyers as the buyer's lawyers, and stating a purchase price of $650 000 per parcel; an agreement conveying Shire's interest under one of those contracts to Williamson; and Alberta land title certificates showing Williamson to have acquired the four parcels on 19 November 2007 for $650 000 each. We are satisfied on the totality of the evidence (including the 6 and 7 November 2007 Shire bank account balances) – and we find – that the $650 000 transfer from the Bearspaw bank account on 7 November funded all but $13 000 of Shire's 7 November cheque for Williamson's purchase of one of the Marda Loop parcels, despite this payment being in no way connected to the Bearspaw Land.

[89] Williamson was also involved in a project to build a duplex on a lot in Calgary's Killarney neighbourhood. Evidence suggested that this was tied to an August 2007 joint venture agreement between Williamson and a third party, under which Williamson was to fund $125 000 in initial construction costs and a percentage of total costs. A real estate purchase contract named "Shire Investments" or its nominee as buyer of the lot, for $570 000, and Alberta land title certificates (the lot having been subdivided in two) showed Williamson as the registered owner in December 2008. Mortgage financing of some $1 million was arranged for the land purchase and construction, the lender also taking guarantees from several parties, among them Couch, her husband and her daughter (personally) and Williamson's joint venture partner.

[90] Shire issued a 3 December 2007 cheque for $125 000 to Williamson's joint venture partner; this cheque cleared on 6 December. Staff contended that this payment – which we note tallied with Williamson's initial construction funding commitment under the joint venture agreement – was funded by a 30 November 2007 transfer of $500 000 from the Bearspaw bank account to Shire. However, incomplete information about activity in the Shire bank account from 3 through 6 December 2007 does not enable us to make such a finding.

*Bearspaw Money Used for Minaki Lodge*

[91] On 14 December 2007 Shire completed the purchase of Minaki Lodge, a resort property near Kenora, Ontario. A lawyer's "Closing Funds Summary" showed that some $1.6 million required to close was satisfied in part by an amount – $680 313.46 – "Received" from Shire. We find that a 13 December 2007 Shire cheque for that amount to that lawyer was funded (given the 6 and 13 December Shire bank account balances and the intervening activity in the account) by a 7 December transfer of $800 000 from the Bearspaw bank account to Shire. We further find that this payment had nothing at all to do with the Bearspaw Land.

*Bearspaw Money Used for Hawaii Projects*

[92] Staff contended that the same $800 000 transferred from the Bearspaw bank account also funded a $105 000 payment made the same day by Shire to 133 – the company involved in the abortive purchase of the Paradise Ridge land. However, because Shire ended 6 December 2007 with a bank account balance of $186 545, and spent just under $186 105 the next day (including the $105 000 paid to 133), we cannot find that any of the $800 000 infusion from the Bearspaw bank account on 7 December went to 133.

[93] Shire received another $800 000 infusion from the Bearspaw bank account less than two weeks later, on 20 December 2007. The next day, Shire issued to "Blain Homes Ltd." a $500 000 cheque bearing the notation "Balance Escrow #6820004291-LP" (the escrow number assigned to the failed purchase of the Halama land). Blain Homes and Holdings Ltd. is a company of the witness Blain, who was involved in and testified about the abortive purchase. A statement Blain apparently prepared in January 2010 included, among the amounts received from Shire (Berkshire) over a two-year period towards the purchase, a payment in December 2007 of $500 000. This was consistent with the evidence concerning the final (21 December 2007) extension agreement, which acknowledged release that day of $500 000 towards the purchase. Having regard to the totality of the evidence (including the 19 and 21 December 2007 Shire bank account balances and the intervening activity in the account), we are in no doubt – and we find – that the Bearspaw bank account funded the 21 December $500 000 Shire payment towards the purchase of the Halama land. We further find that this payment was in no way connected to the Bearspaw Land.

[94] Shire ended 11 February 2008 with just under $130 000 in its bank account. The next day it paid out over $136 000, including $110 000 to 133. Given that the Shire bank account did not go into overdraft only because of a $700 000 infusion from the Bearspaw bank account that day, we find that infusion to have funded to some extent the $110 000 payment to 133, despite this payment having nothing at all to do with the Bearspaw Land.

[95] On 16 June 2008 Shire issued to 133 a $110 000 cheque bearing the notation "Paradise Ridge". The cheque cleared the next day, on which date Shire received a transfer in the same amount from the Bearspaw bank account. Although Shire's bank account balance apart from the transfer was sufficient to have covered the cheque, and although we could not determine, from the banking records in evidence, whether we had full information about the activity in the Shire bank account on 17 June 2008, the matching amounts and dates of the transfer and this payment

make it probable – and we find – that the Bearspaw bank account was meant to, and did, fund this payment. We further find that this payment was in no way connected to the Bearspaw Land.

*Bearspaw Money Used for Tsehum*

[96] Terry Petras and Couch were directors of a British Columbia company called Tsehum Harbour Place Holdings Ltd. ("Tsehum Holdings"), and directors of another British Columbia company called Bosun's Holdings Ltd. ("Bosun"). According to a 15 October 2008 offering memorandum for Tsehum Harbour Ltd. ("Tsehum Harbour") – which identified Couch as Tsehum Harbour's president, sole director and promoter, and Terry Petras among the principal shareholders – Tsehum Harbour intended to use the proceeds of the offering and money lent by Tsehum Bonds (whose sole officer and director was Couch) to purchase and develop lands in Sidney, British Columbia owned by Bosun, which in turn had been owned by Tsehum Holdings.

[97] On 15 January 2008 Shire transferred $130 000 to "T Petras" – who, we are satisfied, was the mentioned Terry Petras. The same day, a total of $400 000 was transferred from the Bearspaw bank account to Shire. However, given the Shire bank account balances on 14 and 15 January 2008 and the activity in – including other credits to – the account on the latter date, we cannot find that the Petras transfer was funded by these Bearspaw bank account transfers.

[98] Shire paid $400 000 to Tsehum Holdings by a 14 April 2008 cheque bearing a notation that included the word "Sidney", which cheque cleared the next day. Having regard to the Shire bank account balances on 11 and 15 April 2008 and the activity in the account on the latter date, Shire's ability to cover that cheque depended to an extent on a $450 000 transfer from the Bearspaw bank account on 14 April. We so find, and further find that this payment had nothing at all to do with the Bearspaw Land.

*Bearspaw Money Used for Couch*

[99] On 25 February 2008 Couch wrote a $100 000 Shire cheque payable to herself, which cleared on 28 February. With that, Shire paid out a total of over $161 500 that day. It was able to do so, and still end the day with a bank account balance of some $1 million, thanks in part to two transfers from the Bearspaw bank account, of $500 000 each, made that day and the day before. That said, one of those two transfers we have linked, mostly if not wholly, to a Maples-related payment that cleared on 3 March 2008 (as discussed above). The evidence did not suffice for us to conclude that the other transfer was necessarily used to pay – or even prompted by – the Shire cheque to Couch. We make no finding on this.

*Bearspaw Money Used for Skaha*

[100] On 4 April 2008 Shire issued to an architectural firm a $126 276.40 cheque with a notation that we are satisfied referred to several numbered invoices. One such invoice in evidence was addressed by the architects to Skaha Lake Development Ltd. ("Skaha"), an Alberta company of which Couch was the sole director. Also in evidence was an 8 November 2006 term sheet for an offering of Skaha shares and bonds, the proceeds to be applied to purchase and develop certain land in Okanagan Falls, British Columbia (not the same as the motel/RV park land mentioned above). The term sheet stated that deposits for the land had been paid by Shire on Skaha's behalf.

[101] The 4 April 2008 cheque cleared on 7 April. While Shire received a $900 000 infusion from the Bearspaw bank account on 1 April 2007, incomplete banking records for Shire from that date through 7 April do not enable us to determine whether the Bearspaw bank account funded this payment. We make no finding on this.

*Bearspaw Money Sent to Belize*

[102] On 28 April 2008 Shire wired just under $102 000 to what seems to have been a Belize bank, for the account of an entity called Bay Breeze Inc. ("Bay Breeze"). Staff alleged in the Notice of Hearing that this was an offshore Shire bank account, and that this payment was funded by a $700 000 transfer from the Bearspaw bank account that day. A Staff investigator testified that her investigation revealed the matter to have involved a contemplated, but never realized, purchase of property in Belize.

[103] Shire's bank account balance at the time was more than sufficient apart from the $700 000 transfer to cover this payment. Further, the banking records for 28 April 2008 appear incomplete, so we do not necessarily know whether other credits or debits were recorded that day. The evidence was thus insufficient to demonstrate that this payment – however puzzling – was funded by the Bearspaw bank account. We make no finding on this.

*Bearspaw Money Used in Mexico*

[104] On 15 May 2008 Shire received a transfer of $300 000 from the Bearspaw bank account, and wired approximately $296 000 to "Stewart Title Puerto Vallarta". Given that Shire could not have funded this wire transfer without this infusion from the Bearspaw bank account, we find that this payment was funded wholly or in part by the Bearspaw bank account.

[105] In evidence were documents – bearing Shire's name and logo – describing three properties in Mexico. Two of these properties, the acquisition of which Shire had apparently pursued, seemed to be land for which redevelopment was contemplated; the other was a single unit in an existing condominium near Puerto Vallarta. Also in evidence was a March 2008 agreement for what appears (although the agreement mentioned two different unit numbers) to have been the same condominium unit, Couch and her husband agreeing to buy the unit for US$326 000 in two instalments, the second in the amount of US$293 400, for June 2008 possession. We think it probable – and we find – that the 15 May 2008 Shire wire transfer to Puerto Vallarta related to the second instalment payment on this condominium unit.

[106] This purchase, which may not have finalized, would be consistent with a personal purchase of a holiday home. However, given ample evidence that Couch did not make or adhere rigorously to distinctions among herself, her family and the many companies under her control, this purchase might have been for some Shire business purpose. In any event, it is not in doubt – and we find – that the approximate $296 000 payment, funded wholly or in part by the Bearspaw bank account, had nothing at all do with the Bearspaw Land.

## III. ISSUES FOR DETERMINATION

### A. The Allegations

[107] The Notice of Hearing alleged the following breaches:

> 40. . . . Couch, Shire, Shire Management and Hawaii Fund:

(a) breached s. 92(4.1) of the *Act* by making statements in the Hawaii Fund OM that they knew or ought to have known were misleading or untrue, and would reasonably be expected to have a significant effect on the market price or value of the Hawaii Fund securities;

(b) breached s. 221.1 of the *Act* by falsely certifying that the Hawaii Fund OM did not contain a misrepresentation[.]

41. . . . Couch, Shire [and] Bearspaw . . . breached section 93(b) of the *Act* and engaged in a course of conduct relating to the Bearspaw securities that they knew or ought to have known perpetrated a fraud on Bearspaw investors.

42. . . . Couch, Shire and Bearspaw:

(a) breached s. 92(4.1) of the *Act* by making statements in the Bearspaw OM that they knew or ought to have known were misleading or untrue, or did not state all the facts that were required to be stated or that were necessary to be stated to make the statements not misleading, and would reasonably be expected to have a significant effect on the market price or value of the Bearspaw securities;

(b) . . . falsely certif[ied] that the Bearspaw OM did not contain a misrepresentation[.]

43. . . . Couch breached s. 93.4(1) [of the Act] by making statements under oath which were false, and which were made to withhold or conceal information reasonably required for the investigation[.]

44. . . . each of the Respondents[’] conduct described above constitutes conduct contrary to the public interest.

[108] The Notice of Hearing also alleged that "Couch authorized, permitted or acquiesced in the conduct of each of the corporate Respondents".

## B. The Issues to be Determined

[109] This proceeding is not an inquiry into Couch's skills as a businessperson, or the merits of the Bearspaw or Hawaii Fund investments. Rather, the issues for determination are:

- Did the Impugned OMs contain statements that, in any material respect, were misleading or untrue, or omitted to state facts required to be stated or necessary to make the statements not misleading, and, if so, did such statements or omissions amount to misrepresentations in breach of section 92(4.1) of the Act?

- Were Couch, Bearspaw and Shire responsible for any such misrepresentations in the Bearspaw OMs?

- Were Couch, Hawaii Fund, Shire and Shire Management responsible for any such misrepresentations in the Hawaii OM?

- Did Couch, Bearspaw and Shire engage in a course of conduct relating to the Bearspaw Units that they knew or reasonably ought to have known would perpetrate a fraud on Bearspaw investors?

- Did Couch attempt to or actually conceal or withhold information reasonably required for the investigation, by making false statements to Staff in the Interviews?

- Did the Respondents, through any such conduct, act contrary to the public interest?

## C. Positions of the Parties

### 1. Staff's Position

[110] Staff submitted that this is a case about deceit and that the evidence they presented proved that deceit. Staff contended, more particularly, that the evidence they presented proved to the requisite standard – a balance of probabilities – the allegations as particularized (except, of course, those particulars withdrawn by them). To that end, Staff cited Commission decisions considering sections 92(4.1) and 93(b) of the Act, including *Re Capital Alternatives Inc.*, 2007 ABASC 79. Staff also contended that there was "an abundance of evidence" that Couch was "the guiding mind and moving force of Shire and all of the Shire-related entities".

### 2. The Respondents' Position

[111] Couch submitted, in general, that Staff failed to prove any of the allegations. She asserted that the allegations "are based . . . on incomplete information, unsubmitted evidence, one-sided accounting entries, hearsay, and opinions", and that there was no "intent to act in any misleading or fraudulent manner".

[112] Couch directed us to statements in the Impugned OMs – mentioned or quoted above – to the effect that Bearspaw and Hawaii Fund were not reporting issuers and that, despite the Bearspaw OMs' disclosure of the intended uses of the money raised, the money might still be "reallocate[d]" for "sound business reasons". The intended implications of these submissions, in our view, were that: any deviations from what was set out in the Hawaii OM would not have to be reported to investors under that document; and investors under the Bearspaw OMs had fair warning that things might not go as described in the documents, and knew (or should have known) that their investments, and the handling of their invested money, depended on Couch's assessment from time to time of how to conduct the various businesses – of what would constitute "sound business reasons" – without (given Bearspaw's non-reporting-issuer status) any entitlement to be told what was happening.

[113] Couch denied having personally profited from any wrongdoing – pointing, for example, to having provided a $9 million personal guarantee in relation to the Bearspaw Land, and indicating that she herself had lost "all my investments" in the Shire projects and "my life savings". She suggested that things would not have ended as unhappily as they did for Bearspaw and Hawaii Fund investors – for example, the Paradise Ridge land purchase would not have been cancelled and the Bearspaw Land would not have been forced into foreclosure – had the Commission not issued cease-trade orders against certain of the Respondents in June 2009.

## IV. ANALYSIS

[114] Before embarking on our analysis of the facts and law as they pertain to the extant allegations (as particularized), we make a preliminary point. There was no dispute, and we find, that the investments offered under the Impugned OMs – the Bearspaw Units and the Hawaii Units – were securities. Not only were they identified as such on the face pages of the respective Impugned OMs, they fall squarely within at least one of the categories (certainly section 1(ggg)(v)) of the definition of "security" in the Act.

### A. The Impugned OMs – Misrepresentations and False Certifications

#### 1. The Bearspaw OMs

##### (a) Use of Investor Money on Bearspaw Land

[115] Section 92(4.1) of the Act prohibits the making of what amount to misrepresentations:

> (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 or an exchange contract.

[116] Staff alleged a variety of materially misleading or untrue statements or omissions, amounting to misrepresentations within the meaning of section 92(4.1) of the Act, in what prospective investors were told in the Bearspaw OMs.

[117] The first such alleged material misstatement, as we understand Staff's position, was simply that the Bearspaw OMs said Bearspaw intended to spend $14 million of the money raised to buy the Bearspaw Land and to spend another $1.4 million on it for such things as design and engineering, whereas in fact Bearspaw financed (with mortgages) the great majority – $13.6 million – of the purchase price, putting down only $1.1 million.

[118] This was indeed inconsistent with what prospective investors were told, and would reasonably infer, from the use-of-proceeds disclosure in the Bearspaw OMs, even considering the Bearspaw OMs' warning that Bearspaw "will require additional debt and/or equity financing to achieve" its stated objectives. We think it was a material disparity, in the sense that it would reasonably be expected to affect, significantly, the value prospective investors would place on the Bearspaw Units offered – it being one thing to have one's money spent more-or-less immediately to pay for land, quite another to have it spent mostly in some other, unexplained way with the land purchase ending up heavily debt-financed.

[119] We therefore find that the Bearspaw OMs materially misstated – by misleading or untrue statements, or by the omission of facts necessary to make what was stated not misleading, or both – how investor money would be applied in the purchase of the Bearspaw Land.

### (b) Actual Uses of Investor Money

[120] Staff also set out in the Notice of Hearing 13 instances of what they alleged were materially misleading or untrue statements or omissions, amounting to misrepresentations within the meaning of section 92(4.1) of the Act, in the Bearspaw OMs, each in respect of a particular expenditure or expenditures of what Staff alleged was Bearspaw investor money. Generally, Staff asserted that the impropriety lay in failures to disclose the purposes of the expenditures, and in several cases to disclose particulars about the transactions to which the payments related.

[121] The cited instances corresponded to one or other of the alleged payments made by Shire but funded by the Bearspaw bank account, discussed above. In respect of those which have not been proved to have been funded by the Bearspaw bank account, we find no corresponding breach of section 92(4.1) of the Act.

[122] Even for those expenditures found above to have been funded by the Bearspaw bank account for a purpose unrelated to the Bearspaw Land, such findings do not in themselves demonstrate the alleged breaches of section 92(4.1) of the Act. Rather, a breach of that section in relation to any of these expenditures would require, among other things, a materiality finding – that is, a finding of a reasonably expected significant effect on the value of the Bearspaw Units.

[123] The amounts of some of these expenditures were not large when compared to the $18 to $20 million raised by the Bearspaw Companies. We could not and would not, therefore, find a breach of section 92(4.1) of the Act in respect of the lesser of these expenditures, in isolation. However, more important, in our view, is the overall pattern of Bearspaw money being used to fund other Couch-led ventures, and the corresponding absence of disclosure in the Bearspaw OMs that such would happen. We find that the Bearspaw OMs contained misleading or untrue (or both) statements that money raised would be spent in relation to the Bearspaw Land, and omitted facts – that much of the money raised would instead be used to fund other Couch-led ventures, with some description of just what these ventures were, who was involved in them, who stood to profit from them, to what extent Bearspaw would fund them, and how that would affect Bearspaw investors – necessary to make what was stated not misleading. These misstatements, we also find, were clearly material. They would reasonably be expected to affect, significantly, the value prospective investors would place on the Bearspaw Units offered – the risks associated with funding one venture would generally differ from the risks associated with funding multiple ventures. Addressing the particulars of this allegation set out in the Notice of Hearing, these findings apply to the following (individually or collectively concerning the larger Shire expenditures found above to have been funded by the Bearspaw bank account, and collectively concerning the lesser Shire expenditures found above to have been so funded):

- the Maples projects;
- the Okanagan Falls project;
- the Williamson projects (other than the Killarney project, for the reason set out above);
- the Minaki Lodge project;

- the Paradise Ridge project;
- the Halama project;
- the Tsehum project; and
- whatever it was that prompted the payment of approximately $296 000 towards the purchase of a condominium unit in Mexico.

**(c) Knowledge and Responsibility**

[124] Bearspaw was the issuer of the securities offered under the Bearspaw OMs; it was directly raising the money. The Bearspaw OMs were its documents, and it bore direct responsibility for them.

[125] Shire also bore – and acknowledged – direct responsibility for the Bearspaw OMs as signatory to the concluding certificate in its capacity as promoter.

[126] We found above that Couch was the sole guiding mind of all the other Respondents. In the circumstances, we consider that what they knew, she knew and what she knew, they knew. As sole guiding mind, as well as signatory of the Bearspaw OMs, she too bore direct responsibility for the documents.

[127] None of the misstatements that we found above concerned merely technical or obscure matters; all concerned material matters – matters of significance – in the context of the Bearspaw project. Couch, in her many roles within the Shire orbit, and through her also Bearspaw and Shire, knew or should have known of the misleading or untrue nature of the impugned disclosure in the Bearspaw OMs. Moreover, in our view, the materiality of the misstatements – the reasonably-expected significant effect of them on the value of Bearspaw Units – must have been obvious to Couch and, therefore, also to Bearspaw and Shire. For these reasons, we find that each of Couch, Bearspaw and Shire knew or reasonably ought to have known that the misstatements found above were such and were material. All elements of a contravention of section 92(4.1) of the Act by Couch, Bearspaw and Shire are thus established. For similar reasons, we find that Couch authorized, permitted or acquiesced in such misconduct by Bearspaw and Shire.

**(d) Other Disclosure in Bearspaw OMs Is No Answer**

[128] As mentioned, Couch in her submissions directed us to certain statements in the Bearspaw OMs, with the possibly intended implication that Bearspaw investors had fair warning that things might not go as described in the documents. We did not overlook this suggestion in making our findings above.

[129] We have read the Bearspaw OMs in their entirety. They did indeed disclose the fact that Bearspaw was not a reporting issuer (although also noting that financial statements would be delivered annually, something the evidence indicated did not happen) and that investor money

might be "reallocate[d]" for "sound business reasons". They also disclosed numerous risk factors, among them some associated with investment in new ventures or real estate generally.

[130] None of this undoes or excuses the material misstatements we found in the Bearspaw OMs.

[131] Reporting issuer status under Alberta securities laws carries with it extensive responsibilities for the provision of prescribed periodic (calendar-driven) and episodic (event-driven) disclosure to investors after they have invested. That said, the fact that an issuer is not a reporting issuer does not mean that it has no obligation to provide accurate information when soliciting investments – nor that it has an entirely free hand, without accountability, in its use of investor money after it has been invested. The Bearspaw OMs' disclosure of risk factors neither justified nor offset the material misstatements in the same documents.

[132] Furthermore, the Bearspaw OMs' disclosure of potential reallocation of funds did not give Bearspaw investors reasonable warning that their money would be used for non-Bearspaw-Land purposes, as we discuss below.

#### (e) False Certificates

[133] Staff withdrew their allegation that the certificates in the Bearspaw OMs contravened a particular provision of the Act (enacted only subsequently), but maintained that they were still misrepresentations – and by implication still prohibited by section 92(4.1) of the Act. We agree, and we so find.

[134] As noted, the Bearspaw OMs each ended with a certificate, signed by Couch (for both Bearspaw, as issuer, and Shire, as promoter), that the respective document "does not contain a misrepresentation". However, as found above, the Bearspaw OMs did contain misrepresentations. The certificates were, therefore, untrue, which Couch, and through her also Bearspaw and Shire, knew or reasonably ought to have known. In our view, the truth or falsity of the certificates was also material – in the sense that it is reasonable to expect that a security sold under an offering document certified, by the individual in charge of the issuer and its business, to be free of misrepresentation would command a significantly higher price than one sold under a document not so certified or accompanied by a certificate saying the opposite – which was or reasonably ought to have been known by Couch and, therefore, also by Bearspaw and Shire. All elements of a contravention of section 92(4.1) of the Act by Couch, Bearspaw and Shire are thus established. For similar reasons, we find that Couch authorized, permitted or acquiesced in such misconduct by Bearspaw and Shire.

### 2. Hawaii OM

#### (a) Purchase of the Paradise Ridge Land

[135] The Hawaii OM stated the following about the Paradise Ridge land:

> Shire has entered into a land purchase agreement with [133] dated February 12, 2008, as amended, whereby Shire will obtain the Paradise Ridge [land] for an aggregate purchase price of $5,300,000. . . .

> [133] originally acquired the Paradise Ridge [land] in 2007 from Paradise Ridge Limited Partnership, an unrelated party, for an aggregate purchase price of $5,300,000.

[136] Staff alleged three material flaws in these two sentences.

*Price*

[137] Staff challenged the $5.3 million specified in the Hawaii OM as the purchase price for the Paradise Ridge land.

[138] The December 2007 and February 2008 purchase contracts between Shire and 133 specified prices of US$4.4 and US$4.41 million respectively for the Paradise Ridge land. The Monitor's Report – presumably applying the exchange rate prevailing at the date of the Hawaii OM (the evidence was that the exchange rate in late 2007 would not have produced a similar result) – indicated parenthetically that the Canadian-dollar equivalent would have been $5.3 million. As such, the price as presented in the first quoted sentence was not proved to have been incorrect.

[139] As to the same price presented in the second quoted sentence, 133 entered into two agreements with Paradise Ridge LP for the Paradise Ridge land (in one case indirectly, through the purchase of the partnership that owned it), for US$3.5 and US$3.4 million respectively. In this case, currency exchange rates prevailing at the dates of either agreement or of the Hawaii OM would not seem to account for the large difference between the agreed and disclosed prices. Given that two sets of agreements were being discussed (between Shire and 133, and between 133 and the arm's-length seller, with markedly lower prices agreed in the latter cases than in the former), we believe that the appearance in the Hawaii OM of an identical price for both sets of agreements would have struck any reader (Couch included) who knew the facts as obviously and significantly inaccurate, and requiring correction. That the error remained indicates to us a concealment of the price difference – the mark-up – between the two sets of agreements for the land.

[140] This price misstatement – an untruth – was, in the circumstances, material. We consider that prospective investors presented with two scenarios – the actual arm's-length agreed price (the best available measure of the value) for the Paradise Ridge land, and the stated price – would reasonably have reached two significantly different conclusions as to the value of the Hawaii Units offered. First, the error was proportionately large, significantly overstating the arm's-length price. Second, given what had been agreed at arm's length, the error considerably overstated the amount of investor money that had to be applied to the land acquisition. Finally, the nature and magnitude of the error would reflect badly on the competence, if not the integrity, of Hawaii Fund, Shire, Shire Management and Couch.

*133 as a Related Party*

[141] Staff asserted that the Hawaii OM did not identify 133 as a related party of Hawaii Fund. There was indeed no such explicit statement. However, while the second of the quoted sentences stated that 133 acquired the land from "an unrelated party", the sentence that preceded it did not include similar words in respect of 133. We think a reader, reading the two sentences together, could reasonably have inferred that 133 and Shire, not being "unrelated", were related parties.

While the disclosure was far from ideal, we are not persuaded that, in context, it was misleading or untrue. This particular of Staff's allegation is not sustained.

*133 as Owner*

[142] The quoted sentences, read together, asserted that Shire had an agreement to buy the Paradise Ridge land from its owner 133. This was untrue and misleading. 133 was not the owner, and never acquired the land, at any price.

[143] There is a further problem. As just discussed, the quoted sentences could reasonably have conveyed to a reader the understanding that 133 and Hawaii Fund were related parties. We consider that a reasonable inference from such relationship, coupled with the depiction of 133 as owner of the Paradise Ridge land, would be that the risk of Hawaii Fund failing to gain ownership of the land was less than might have been the case had the land still been in the hands of someone unrelated to Hawaii Fund. Thus the misleading nature of the quoted sentences was compounded.

[144] This misstatement about a fundamental contingency (acquisition of the land on which one of the projects was to be developed) was, obviously, also material, given that the Paradise Ridge land was one of only two development projects touted in the Hawaii OM and those projects were the very business purposes to which investor money would be directed. We consider that prospective investors presented with two scenarios – the one presented, and the truth (that 133 had yet to purchase the Paradise Ridge land from an unrelated party) – would have reasonably assessed the investment merits of Hawaii Fund very differently, and therefore assigned very different values to the Hawaii Fund Units offered.

### (b) Purchase of the Halama Land

[145] The Hawaii OM stated the following about the Halama land:

> Shire has entered into a land purchase agreement with [HGL] dated October 1, 2008, whereby Shire will obtain the Halama [land] for an aggregate purchase price of $2,500,000.
>
> [HGL] is a related party controlled by [Couch], and the Halama [land] was originally acquired from an unrelated party in 2006 for an aggregate purchase price of $2,500,000.

[146] We think a reader could reasonably glean from the two quoted sentences (and that such an understanding was intended when they were written) that it was HGL that acquired the Halama land in 2006. Further, we think such a reader could reasonably infer from that, and the stated fact that HGL was controlled by Couch, that there were no significant ownership risks or uncertainties that would impede Hawaii Fund's development plans for the Halama land as described elsewhere in the Hawaii OM.

[147] The quoted sentences in the Hawaii OM were untrue, as well as misleading. Neither HGL nor anyone else in the Shire orbit ever acquired the Halama land.

[148] This misstatement about a fundamental contingency (acquisition of the land on which one of the projects was to be developed) was, obviously, also material, for the same reasons discussed above in connection with the Paradise Ridge land.

### (c) Roll-in or Redemption of HGL Investments

[149] As indicated, on 3 February 2009 Shire wrote to HGL investors, giving them the choice of somehow rolling their HGL investments into Hawaii Fund or "redeem[ing]" them through the sale of the Halama land (with a reference to the Hawaii OM). This arrangement was not mentioned in the Hawaii OM. There was evidence of 15 HGL investors rolling their HGL investments into Hawaii Fund.

[150] Staff contended that this arrangement involved a dilution of the investments of those who directly subscribed for Hawaii Units under the Hawaii OM (we will refer to them as "Hawaii Subscribers"), and that the Hawaii OM's non-disclosure of the arrangement amounted to a misrepresentation within the meaning of section 92(4.1) of the Act. Couch countered that there was no dilution: "If you have 'X' number of units to sell, and you reduce that number by rollovers, there is no de-value for the other investors; each is a unit holder."

[151] We note that the Shire letter announcing the arrangement to HGL investors postdated (by roughly one week) the date of the Hawaii OM. That does not dispose of the issue, because Hawaii Units were being sold under the Hawaii OM after the roll-in offer was made.

[152] The flaw in Couch's contention is clear. If rolled-in HGL investors would indeed become holders of Hawaii Units just like the Hawaii Subscribers, they would share in the associated entitlements, anticipated or realized. This would be problematic were Hawaii Fund not enriched by the roll-ins to the same extent (per Hawaii Unit) as when Hawaii Subscribers paid it cash for their Hawaii Units. There was no evidence that HGL investors would or did bring any value to Hawaii Fund in the course of the roll-ins; such evidence as there was indicated the contrary. HGL never acquired the Halama land. Couch (as noted) said that none of the money raised by HGL remained by May 2009, and it seems from the Monitor's Report that the money had all been spent by December 2007. There being no evidence of any other asset that might be moved from HGL into Hawaii Fund, it is difficult to perceive what value HGL investors would have brought to Hawaii Fund by rolling in their HGL investments.

[153] Although none of the parties focused on the alternative redemption option, it presents similar issues. Hawaii Subscribers (who would have contributed cash to Hawaii Fund) would have to share the benefits of an eventual resale of the Halama land with redeeming HGL investors even though the latter would seem not to have made equivalent (or any) contributions to Hawaii Fund.

[154] Couch might have thought it fair to offer HGL investors some prospect of eventually benefiting from the Halama project (the apparent focus of their initial investment) after Hawaii Fund became the chosen vehicle for that project. Even were that the motivation for the arrangement (this was neither argued nor established), it would neither diminish the detriment to Hawaii Subscribers nor answer the allegation.

[155] We conclude that the roll-in option would indeed dilute Hawaii Subscribers, in that they would have to share with rolled-in HGL investors whatever advantages Hawaii Units might offer, Hawaii Subscribers having paid Hawaii Fund for their Hawaii Units whereas the rolled-in

HGL investors seem not to have contributed equivalent (or any) value to Hawaii Fund for theirs. For the reasons given, we reach a similar conclusion about the alternative redemption option. We think it unarguable in principle that such an arrangement (and its consequences) would reasonably be of interest – and importance – to prospective Hawaii Subscribers. We find it to have been material in the sense that it would reasonably have been expected to have a significant effect on the value that prospective Hawaii Subscribers would assign to Hawaii Units. We further find that the lack of disclosure on the topic in the Hawaii OM was, from 3 February 2009, an omission of facts necessary to make what was stated therein not misleading.

**(d) Knowledge and Responsibility**

[156] Hawaii Fund was the issuer of the securities offered under the Hawaii OM; it was directly raising the money. The Hawaii OM was its document, and it bore direct responsibility for it.

[157] Hawaii Fund operated through its manager and trustee, Shire Management. As such, the Hawaii OM was also Shire Management's document, for which Shire Management bore direct responsibility.

[158] Shire and Shire Management also bore – and acknowledged – direct responsibility for the Hawaii OM as signatories to the concluding certificate in their capacities as promoters.

[159] We found above that Couch was the sole guiding mind of all of the other Respondents. In the circumstances, we consider that what they knew, she knew and what she knew, they knew. As sole guiding mind, as well as signatory of the Hawaii OM, she too bore direct responsibility for the document.

[160] None of the misstatements that we found above concerned merely technical or obscure matters; all concerned material matters – matters of significance – in the context of the Hawaii Fund projects. Couch, in her many roles within the Shire orbit, and through her also Hawaii Fund, Shire and Shire Management, knew or should have known of the misleading or untrue nature of the impugned disclosure in the Hawaii OM. (To that end, we repeat that everyone involved in the Paradise Ridge land purchase perceived 133 as a mere Shire conduit.) Moreover, in our view, the materiality of the misstatements – the reasonably-expected significant effect of them on the value of Hawaii Units – must have been obvious to Couch and, therefore, also to Hawaii Fund, Shire and Shire Management. For these reasons, we find that each of Couch, Hawaii Fund, Shire and Shire Management knew or reasonably ought to have known that the misstatements found above were such and were material. All elements of a contravention of section 92(4.1) of the Act by Couch, Hawaii Fund, Shire and Shire Management are thus established. For similar reasons, we find that Couch authorized, permitted or acquiesced in such misconduct by Shire and Shire Management.

**(e) Other Disclosure in Hawaii OM Is No Answer**

[161] As mentioned, Couch in her submissions directed us to the Hawaii OM's disclosure that Hawaii Fund was not a reporting issuer. We did not overlook this submission, or its apparently intended implication, in making our findings above.

[162] We have read the entire Hawaii OM. It did indeed disclose the fact that Hawaii Fund was not a reporting issuer (although also noting that annual financial information would be delivered, something the evidence indicated did not happen). It also disclosed numerous risk factors, among them some associated with investment in new ventures or real estate generally.

[163] None of this undoes or excuses the material misstatements we found in the Hawaii OM.

[164] As discussed above in connection with Bearspaw, non-reporting-issuer status does not relieve an issuer of the obligation to provide accurate information when soliciting investments – nor give it an entirely free hand, without accountability, in its use of investor money. The risk-factor disclosure neither justified nor offset the material misstatements in the Hawaii OM.

#### (f) False Certificate

[165] As noted, the Hawaii OM ended with a certificate, signed by Couch (on behalf of Hawaii Fund, and for Shire and Shire Management as promoters), that the document "does not contain a misrepresentation". As found above, though, the Hawaii OM did contain misrepresentations. The certificate was, therefore, untrue, and in a material respect, for the same reasons discussed above in connection with Bearspaw. All elements of a contravention of section 221.1 of the Act by Couch, Hawaii Fund, Shire and Shire Management are thus established. For similar reasons, we find that Couch authorized, permitted or acquiesced in such misconduct by Shire and Shire Management.

## B. Fraudulent Course of Conduct

### 1. The Allegation

[166] Staff alleged a breach of section 93(b) of the Act by way of "a course of conduct which perpetrated a fraud" when "about $7.4 million" was "converted . . . to Shire's own use, and the use of other real estate projects owned or managed by Shire or Couch, and to Williamson Inc." They set out 23 paragraphs of particulars of such allegedly fraudulent conversion payments. Each dealt with a claimed misuse of money of Bearspaw, which in turn originated in the offering under the Bearspaw OMs.

### 2. The Law

[167] Section 93(b) of the Act states:

> 93 No person or company shall, directly or indirectly, 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 will . . .
>
> (b) perpetrate a fraud on any person or company.

[168] The Act does not define "fraud". The meaning, though, is quite clear in law. This Commission adopted the following characterization of the concept (citing D. Johnston & K.D. Rockwell, *Canadian Securities Regulation*, 4th ed. (Markham: LexisNexis, 2007)) in *Capital Alternatives* (at para. 309):

> . . . The gist of the meaning is not, however, difficult to discern. Johnston and Rockwell point to the elements of fraud as enunciated at common law by the Supreme Court of Canada in *R. v. Théroux*, [1993] 2 S.C.R. 5 at 27, which has been adopted in the context of securities regulation

(for example, in *Anderson v. British Columbia (Securities Commission)*, 2004 BCCA 7 at para. 27):

> . . . the actus reus of the offence of fraud will be established by proof of:
>
> 1. the prohibited act, be it an act of deceit, a falsehood or some other fraudulent means; and
>
> 2. deprivation caused by the prohibited act, which may consist in actual loss or the placing of the victim's pecuniary interests at risk.
>
> Correspondingly, the *mens rea* of fraud is established by proof of:
>
> 1. subjective knowledge of the prohibited act; and
>
> 2. subjective knowledge that the prohibited act could have as a consequence the deprivation of another (which deprivation may consist in knowledge that the victim's pecuniary interests are put at risk).

### 3. Use of Bearspaw Money

[169] We discussed above the evidence, and our findings, concerning several payments alleged to have been made by Shire but funded by the Bearspaw bank account, cited by Staff as instances of the alleged fraud.

[170] In some cases the linkage between Bearspaw money transferred to Shire and Shire's application of the money to obviously non-Bearspaw-Land purposes was striking ($681 365.46 spent on an Okanagan Falls land purchase, for example). In other cases a direct linkage was not shown. Overall, however, there was abundant evidence – in or corroborated by banking records, the analyses of a Staff investigative accountant and the Monitor, and Couch herself in the Interviews – of a persistent, indeed routine, course of conduct in which Shire took in money from Bearspaw to cover all manner of expenditures, a considerable portion quite readily traceable to particular land purchases or projects – unrelated to the Bearspaw Land – of Shire itself, of other entities run by Couch or (in the case of Williamson) members of her family, or (in the case of a condominium unit bought in Mexico) of Couch and her husband.

[171] Even in instances alleged by Staff to have been misuses of Bearspaw money on which we could not make such findings, the evidence was supportive of the overall pattern of Bearspaw money being routinely commingled with other money under Shire's control, in the Shire bank account. Once in that account, there was no apparent method to its application, nor any apparent manner by which such application might easily be traced (apart from looking for similarities in dates and amounts) to source.

[172] Most of the Bearspaw money clearly went into the Shire pot, from which Couch directed it towards whatever seemed the most pressing or attractive use at the time. This reality was anything but the sort of business-like approach that an investor might reasonably expect (certainly from a reading of the Bearspaw OMs). Couch was attempting to juggle dozens of ventures – land purchases or projects in many locations, associated with an array of corporations and other entities within the Shire orbit. As any one of these ventures called for an infusion of money, she might try to postpone the demand (there were serial extension agreements in

evidence) or draw what was needed from whichever of her ventures had money then available. Since all were under Couch's control, this was easily done. Often, it was Bearspaw that supplied the needed money. We know where some of that went (as discussed), but much of it remains unaccounted for. When the movement of money eventually ceased, far less had been spent on the Bearspaw Land than the $18 to $20 million invested for that purpose, and what ought to have been an easily-afforded $14 million purchase of the Bearspaw Land resulted in foreclosure.

[173] Couch suggested in the Interviews that money supplied by Bearspaw was meant to come back to Bearspaw from profits on these various non-Bearspaw ventures – though precisely how or when or on what terms were other matters not disclosed to prospective Bearspaw investors. Even were one to accept that Couch genuinely intended ultimately to recycle Bearspaw money back to Bearspaw – we do not rule out the possibility – there was no evidence of anything approaching a businesslike plan or timetable for doing so. The fact that neither a Staff investigative accountant nor the court-appointed Monitor could make enough sense of the financial records available to account for the ultimate disposition of almost $7.6 to $8 million of Bearspaw money indicates to us that, whatever her intentions, Couch would have had an exceedingly difficult time in sorting it all out herself.

[174] We conclude that prospective investors were deceived, by the misleading or untrue disclosure in the Bearspaw OMs, as to how a sizeable portion of their money was going to be used. A result – both foreseeable and intended, we believe – could and at least in some cases would have been a (misinformed) decision to invest in Bearspaw.

[175] Did such deception arise in circumstances contemplated in *Théroux*? Following the *Capital Alternatives* approach, we analyze whether there was proof of: (i) a "prohibited act"; and (ii) subjective knowledge of it – in regard to which we consider the states of mind of Couch, Bearspaw and Shire when they undertook the Bearspaw offering, using the Bearspaw OMs for that purpose.

[176] We found above multiple instances in which Bearspaw money was applied to uses unconnected to the Bearspaw Land or business described in the Bearspaw OMs, and inconsistent with the latter's use-of-proceeds disclosure. Had they given any thought to the matter, the disparity would have been immediately obvious to each of Couch, Bearspaw and Shire. The manner in which they handled Bearspaw money made the use-of-proceeds disclosure in the Bearspaw OMs misleading and untrue (positively and by omitting disclosure of actual use of proceeds). We find that this was material: it gave prospective investors an inaccurate picture of what they were investing in, to the extent that it would reasonably have affected the value they assigned to the Bearspaw Units offered, or their decision to invest at all. The result was misrepresentation.

[177] We are further in no doubt, and we find, that Couch, Bearspaw and Shire knew all this to be so. We found above that Couch was the sole guiding mind of all of the other Respondents – that what she knew, they knew, and vice versa. Each of Couch, Bearspaw and Shire was (as found) directly responsible for the Bearspaw OMs. Each had the responsibility and the opportunity to consider, and correct, the use-of-proceeds disclosure therein. We are further satisfied that Couch, and through her also Bearspaw and Shire, were fully aware of how

Bearspaw money was transferred to Shire and then how Shire used that money – certainly but not only when Couch was writing the cheques or otherwise applying the money (in evidence were a few Shire cheques signed by Couch's daughter).

[178] Accordingly, we find both the prohibited act and that Couch, Bearspaw and Shire had knowledge of it.

[179] We next consider the questions of deprivation and knowledge of deprivation attributable to the prohibited act. That there was deprivation was clear, as was its link to the prohibited act. As noted, a result of the prohibited act – both foreseeable and intended, we believe – could and at least in some cases would have been the decision to invest in Bearspaw. Bearspaw investors injected more than enough money for Bearspaw to buy the Bearspaw Land outright, or to retire the mortgage debt that Bearspaw (unnecessarily) incurred to primarily fund the purchase. Because of the diversion of most of the Bearspaw money to Shire and then Shire's application of much of it to purposes either found to have been unconnected to the Bearspaw Land, or simply unknown, Bearspaw ended up with too little money to service the mortgage debt. The Bearspaw Land was not developed as expected, nor resold as developed or subdivided land as expected, according to the disclosure in the Bearspaw OMs. Indeed, a foreclosure proceeding has resulted in the forced sale of the Bearspaw Land, with none of the proceeds being allocated to Bearspaw investors. Whether they will ever receive any of their investment back is not known to us – prospects appear doubtful – but it is clear that they will not get what they were led to expect when they invested.

[180] We find deprivation – both exposure to risk of financial loss and actual financial loss – and its causation by the prohibited act of Couch, Bearspaw and Shire.

[181] We further find that Couch, Bearspaw and Shire had subjective knowledge of these outcomes. We noted Couch's suggestion that she had intended to recycle the Bearspaw money back from the various other ventures to which she had applied it, and her suggestion that, had events been allowed to run their course, things might not have ended as they did. We also noted that: (i) this intention was not explained to prospective investors before they invested, so they had no opportunity to determine whether to invest in that sort of arrangement, and (ii) there was no evidence of the sort of businesslike arrangements that would give us any confidence that, even had Couch's intention been as described – and had all her other ventures been successful – the complicated flow of funds could have been untangled such that all Bearspaw money would have been returned to Bearspaw in any reasonable time. While it may not have been her (or, by extension, Bearspaw's or Shire's) intention that everything go sideways as it did, it is clear to us that she (and they) knew that Bearspaw investor money was not being applied to the uses disclosed, and that this at the very least put in jeopardy the return of that money to Bearspaw for use in the disclosed Bearspaw Land purposes, further jeopardizing the entire business touted, and the investments sold, under the Bearspaw OMs.

[182] In the result, all elements of a contravention of section 93(b) of the Act by Couch, Bearspaw and Shire are established. For similar reasons, we find that Couch authorized, permitted or acquiesced in such misconduct by Bearspaw and Shire.

### 4. Bearspaw OMs Reallocation and Risk Disclosure Is No Answer

[183] Couch also implied that Bearspaw investors had fair warning (through disclosure in the Bearspaw OMs) that their money might be reallocated to uses other than the Bearspaw Land, and hence that there was no wrongdoing. In that, Couch was wrong.

[184] By raising money under offering memoranda, Couch was relying on the offering memorandum exemption from the fundamental requirements of Alberta securities laws that investors be given the benefit of Commission-vetted disclosure in the form of a prospectus, and the involvement of a knowledgeable registrant. The offering memorandum exemption is widely used, and – used properly – affords efficiencies that can benefit both businesses seeking finance and investors. That said, proper use of the exemption relies heavily on those raising money giving prospective investors, through an offering memorandum, a fair and true – not misleading – picture of what they will be investing in.

[185] It is to that end that Alberta securities laws prescribe certain disclosure that must, at minimum, be included in an offering memorandum. Among such mandatory content – for reasons we think self-evident – is disclosure of the issuer's business and the way investor money is to be used. The law does not prescribe (apart from the obvious – for example, whatever is criminally prohibited) the sorts of business that are or are not permissible, nor how exactly they should use investor money. The key, simply, is that whatever the plan is, it be communicated honestly to prospective investors before they hand over their money.

[186] Any of a wide variety of businesses and business models might be conceived, even under the rubric of real estate development. One such model (for example) might be the creation of some sort of portfolio of properties for purchase and development, to be selected and run by an issuer, perhaps according to specified criteria. Told of such a plan, a prospective investor could assess its merits and the worth of the securities offered, and make an informed investment decision.

[187] In the case of Bearspaw, a different, narrower business was touted. The Bearspaw OMs spoke of only one business, and prospective investors who read them would have no reason to doubt that this was the business they were investing in: the purchase and development (and later resale, piece-by-piece or as a whole) of the Bearspaw Land. There was no hint of some other project or projects, nor of a portfolio, nor of leaving the choice of projects for future determination. Similarly, while there was mention of commissions and other costs of the offering itself, and a $380 000 project management fee to Shire, there was no hint that any portion of the money invested was expected to be applied to any purpose unrelated to Bearspaw, the offering itself or the Bearspaw Land.

[188] We reproduce again the "reallocat[ion]" warning from the Bearspaw OMs: "The Issuer intends to spend the net proceeds as stated. The Issuer will reallocate funds only for sound business reasons." Did this (as implied by Couch) give prospective investors fair warning of how she, and Bearspaw and Shire, would actually operate?

[189] The warning was, admittedly, worded broadly. It did not specify precisely what alternative uses might be found for Bearspaw investor money. That said, it was not open-ended.

[190] First, it must be read in context. That warning directly followed a fairly detailed discussion of how many dollars were to be spent on what aspects of the Bearspaw offering and business, most of that being the purchase and development of the Bearspaw Land. That, then, was the starting point for this reallocation disclosure.

[191] Second, the reallocation statements were themselves limiting. The first statement reiterated what we think a reader would reasonably have assumed, that the intention was to do with the money what had just been disclosed in some detail. The second statement casts a reallocation as something exceptional, "only" to happen in certain circumstances.

[192] Third, those certain circumstances were described as "sound business reasons". While not stated expressly, we think a reader would reasonably have inferred – and would have been entitled to infer – two things: (i) that the "business reasons" would have something to do with the business of Bearspaw, which (as discussed) was the purchase and development (and eventual resale) of the Bearspaw Land; and (ii) that the soundness of such exceptional business reasons would be assessed, in a businesslike way, with a view to their consistency with the interests of Bearspaw and its investors.

[193] To place any broader interpretation on the reallocation disclosure would, in our view, render the mandatory "use of net proceeds" disclosure in the Bearspaw OMs devoid of any value or purpose.

[194] We noted above the Bearspaw OMs' disclosure of various risk factors, including risks associated with new ventures or real estate generally. This disclosure did not, however, alert readers to the prospect that much Bearspaw investor money would be applied to purposes unrelated to the Bearspaw Land.

[195] It follows, and we find, that the Bearspaw OMs' disclosure of potential reallocation, and of risk factors, did not give prospective investors reasonable warning that their money would be used for non-Bearspaw-Land purposes as, we found above, it in fact was.

### C. Concealing or Withholding Information Required for Investigation

[196] Staff alleged that Couch made false statements to Staff and thereby contravened section 93.4(1) of the Act:

> A person . . . shall not, and shall not attempt to, . . . conceal or withhold any information . . . reasonably required for [an] . . . investigation under this Act.

[197] Specifically (after withdrawing one of the pertinent particulars alleged in the Notice of Hearing), Staff pointed to two statements Couch made in the course of the Interviews concerning the Halama land – that it was owned by HGLLC, and that she did not know whether Archer had any connection to the sellers – and asserted that both were false and that they were made to withhold or conceal information reasonably required for the investigation.

### 1. Statement Concerning Ownership of Halama Land

[198] We noted above Couch's statement in the Interviews that HGL managed, and HGLLC owned, the Halama land.

[199] Couch in her submissions and cross-examinations seemed not to make the appropriate distinction between agreements to acquire something and the actual consummation of such agreements. That said, the evidence was clear (as discussed) that ownership of the Halama land remained throughout the Relevant Period with Blain or with Blain and Archer (directly or through a partnership). Ownership never passed to any Shire-related entity. (Nor was there any evidence that the owners delegated management of the Halama land to any Shire-related entity.) Couch's characterization of HGLLC as owner was untrue, and the evidence persuades us that she would have known it to be so when she made the statement.

[200] This statement, in our view, was clearly untrue, but that does not determine the allegation. Section 93.4(1) of the Act prohibits both actual concealment or withholding, and attempts to do so, in respect of information reasonably required for an investigation.

[201] We are satisfied that the fact that no Shire-related entity owned the Halama land was reasonably likely to be important, indeed essential, to any investigation into the propriety of Hawaii Fund's money-raising activities and the veracity of the Hawaii OM, given that document's focus on just two projects, Halama being one. The "required" element of the alleged breach is proved.

[202] Concerning the remaining element, Staff asserted that Couch made this statement to conceal or withhold information, suggesting either attempted or actual (or both) concealment or withholding.

[203] We consider Couch's overall conduct in the course of the session of the Interviews at which she made the mentioned untrue statement. We note that later in that day's session, when asked directly "Do you own the [Halama] properties?", she responded truthfully "No" and "The vendor still owns the properties", and she identified Blain by name. Taken as a whole, therefore, Couch's statements in that day's session of the Interviews did not in fact conceal or withhold the facts about ownership of the Halama land. Without overlooking or in any way condoning her initial untrue statement, in the circumstances we are also unable to conclude that she attempted to conceal or withhold the truth. This particular of her alleged breaches of section 93.4(1) of the Act is therefore not sustained.

### 2. Statement Disavowing Knowledge of Archer's Ownership

[204] In the Interviews Couch did indeed disavow knowledge of Archer's ownership of the Halama land.

[205] As noted, Archer clearly was (directly and then indirectly) an owner of the Halama land for much of the Relevant Period. This was demonstrated by Hawaii public records in evidence, and corroborated by Blain's testimony. There was, however, no proof that Couch had the benefit of such evidence at the time of the Interviews.

[206] That said, Couch was neither unsuspecting nor wholly unaware of Archer's role. We accept Blain's testimony (mentioned above) that Couch had made known that she wanted no dealings with Archer "if he had involvement" with the Halama land, and that she did not wish to see his name on any documents. As noted, Archer's name appeared on a document that Couch signed in connection with the failed Halama land purchase – a very short purchase extension agreement that, in its entirety, took up only half a typewritten page, with Archer's name below a signature line very close to where Couch signed her own name. It defies belief – given the apparent animosity between them (according to Blain, whom we believed) – that Couch failed to notice Archer's name there, where he was identified as a seller of the Halama land.

[207] Couch thus not only suspected, but also had a documentary indication, that Archer had some sort of seller's interest in the Halama land. We therefore find her denial of such knowledge to Staff to have been clearly misleading if not downright false.

[208] Turning to the elements of section 93.4(1) of the Act, the first element is proved. By her denial (which in this instance she did not correct in any timely fashion – if at all – during the course of the Interviews), we find that Couch both attempted to and did conceal or withhold information.

[209] Less clear is the second element of this alleged particular – that the information was reasonably required for the investigation. We found above that the fact that no Shire-related entity owned the Halama land was required information. We do not reach the same conclusion as to Archer's identity as an owner. His specific identity did not determine our findings above on the merits of other allegations. That, of course, does not dispose of the alleged particular, which turns on the investigation rather than the hearing. Still – while recognizing that an investigation may be broader in scope than a resulting hearing – we are unconvinced that the identity of Archer as an owner of the Halama land was information reasonably required for the investigation. (Perhaps Staff had an investigative theory that made it so, but there was no evidence of such.) This particular of the alleged breaches of section 93.4(1) of the Act, and therefore also the allegation as a whole, are not proved.

**D. Conduct Contrary to the Public Interest**

[210] The offering memorandum exemption is a departure from the basic requirements, under Alberta securities laws, for distributions of securities, obviating the need for a vetted prospectus on conditions designed to provide investors with an alternative basis on which to make reasonably informed investment decisions – the offering memorandum itself.

[211] Used responsibly, this exemption can serve the interests of both investors and those who seek investment capital. Used irresponsibly, as in the present case, identifiable investors are placed in jeopardy or directly harmed – deprived of the ability to base an investment decision on reasonably accurate, reliable disclosure. That jeopardy or harm has broader ramifications: misuse of the exemption in one instance can undermine the willingness of directly-affected investors to participate in other prospectus-exempt offerings (or, potentially, in offerings of any description) – and their concern can spread to friends, family, acquaintances and strangers who come to learn of the negative experience. Such impaired investor confidence – in prospectus-

exempt offerings, or in the capital market generally – in turn jeopardizes the ability of law-abiding businesses to raise money legitimately.

[212] In short, the misrepresentation-laden Impugned OMs, for which the Respondents were variously responsible, were contrary to the spirit and intent of the offering memorandum exemption. The conduct of each Respondent, as regards the misrepresentations found in the Impugned OMs, was clearly contrary to the public interest, and we so find.

[213] It is difficult to conceive of circumstances in which conduct involving deceit and investor deprivation, with an element of culpable knowledge, could be anything other than contrary to the public interest. The fraudulent use of Bearspaw investor money not only put those investors' financial interests at risk but indeed financially harmed them. Such fraudulent conduct also foreseeably jeopardizes investor confidence, with the broader harmful consequences discussed above. We find that the conduct of Couch, Bearspaw and Shire in breach of section 93(b) of the Act was also contrary to the public interest.

## V. CONCLUSION AND NEXT STEPS

[214] We found above that:

- Couch, Bearspaw and Shire breached section 92(4.1) of the Act by making misrepresentations in the Bearspaw OMs, and by falsely certifying that the Bearspaw OMs did not contain a misrepresentation, and Couch authorized, permitted or acquiesced in such breaches by Bearspaw and Shire;

- Couch, Hawaii Fund, Shire and Shire Management breached section 92(4.1) by making misrepresentations in the Hawaii OM, and Couch authorized, permitted or acquiesced in such breaches by Shire and Shire Management;

- Couch, Hawaii Fund, Shire and Shire Management breached section 221.1 by falsely certifying that the Hawaii Fund OM did not contain a misrepresentation, and Couch authorized, permitted or acquiesced in such breaches by Shire and Shire Management;

- Couch, Bearspaw and Shire breached section 93(b) by engaging in a course of conduct relating to the Bearspaw Units that perpetrated a fraud on Bearspaw investors, and Couch authorized, permitted or acquiesced in such breaches by Bearspaw and Shire; and

- in so doing, the Respondents acted contrary to the public interest.

[215] It remains to be determined what, if any, orders for sanctions and costs ought to be made against the Respondents. This proceeding will thus move to a second phase for that purpose.

[216] We direct that Staff provide to the panel (through the Commission Registrar) and to the Respondents any written submissions that Staff wish to make on the issue of appropriate orders **by 16:00 on Wednesday 4 January 2012**.

[217] The Respondents may each reply in writing to Staff's submissions. Any such written submissions must be provided to the panel (through the Registrar), to Staff and to each other Respondent **by 16:00 on Friday 27 January 2012**.

[218] Staff may reply in writing to any such written submissions by the Respondents, such reply to be provided to the panel (through the Registrar) and to the Respondents **by noon on Thursday 2 February 2012**.

[219] If any party wishes to make supplementary oral submissions or to adduce evidence on the issue of appropriate orders, the panel will hold an in-person hearing session **on Tuesday 7 February 2012 commencing at 10:00**. A party requesting such an in-person hearing session must advise the Registrar **by 16:00 on Friday 3 February 2012**, indicating whether that party proposes to adduce evidence (via witnesses or otherwise) and the amount of hearing time that party expects to require. (In the event any requesting party does propose to adduce evidence, under section 2.3 of Rule 15-501 *Rules of Practice and Procedure for Commission Proceedings* we direct that party to provide to each other party at the same time as they make their request: (i) the names of all proposed witnesses; (ii) summaries of the proposed witnesses' anticipated evidence; and (iii) copies of all documents intended to be entered as evidence.) Even if no party requests such an in-person hearing session, one may be required by the panel. The Registrar will inform the parties as to whether an in-person hearing session will proceed.

6 December 2011

**For the Commission:**

"original signed by"
Stephen Murison

"original signed by"
Karen Prentice, QC

"original signed by"
Fred Snell, FCA