COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT

COMMERCIAL DIVISION
2020/COM/com/00020

IN THE MATTER of the Companies Act, 1992

AND

IN THE MATTER of a application under the Securities Industry Act, 2011

AND

IN THE MATTER of MINTBROKER INTERNATIONAL LTD. (FORMERLY SWISS AMERICA SECURITIES LTD.) T/A SURE TRADER Swiss America Securities, a Registered Securities Firm

Before:	**The Hon. Madam Justice G. Diane Stewart**
Appearances:	**Mr. Gawaine Ward and Mr. Gladstone Brown for the Petitioner** **Mr. Philip Mckenzie and Ms. Glenda Roker for the Respondent**
Ruling Date:	**December 15, 2021**

Commercial – Securities Commission – Winding Up – Voluntary surrender of registration

RULING

1. By Petition filed on the 5th March 2021, the Securities Commission of The Bahamas **(the "Commission")** sought to have Swiss America Securities Ltd. **(the "Company")** wound up due to the fact that it was non-operational and failed to meet the conditions necessary for a voluntary wind-up which resulted in its registration being suspended.

2. The Commission additionally sought an order that Mr. Igal Wizman, and Ms. Eleanor Fisher be appointed as joint provisional liquidators **(the "Petition")**. This order wasgranted on the 17th March 2020. **(the "JPL Order")**.

3. The Company seeks to have this order set aside and opposes the Petition for winding up.

4. Several affidavits were filed on behalf of the parties in support of their respective positions.

Affidavit of Christina R. Rolle

5. In support of the Petition, the Commission relied on the Affidavit of Christina R. Rolle, also filed on the 5th March 2020 **(the "Principal Affidavit")**. By the Principal Affidavit, Ms. Rolle, the Executive Director of the Commission stated that the Company, a limited liability company, which at all material times was beneficially owned by Mr. Guy Gentile as the CEO and shareholder **("Mr. Gentile")**, was registered as a broker dealer licensed

to provide various services to its clients such as online trading, execution and custodial or licensed brokerage services.

6. The Company was licensed to deal in securities as principal and agent, arrange deals, manage securities and advise on securities. The Commission, utilizing its statutory regulatory purview conducted a For-Cause Exam (FC Exam) in relation to Mr. Gentile's securities dealings in The Bahamas after it became aware that he was the subject of a probe by the United States Securities Exchange Commission and the Department of Justice and was charged for penny stock manipulation schemes **(the "US Probe")**.

7. The FC-Exam, was conducted in May 2016 and revealed numerous breaches, inclusive of the Company's failure to report the US Probe **(the "2016 FC-Exam")**. In 2017, the Commission engaged Ernst and Young to address concerns relative to market manipulation. On 30th August 2018, the Commission executed a settlement agreement with the Company whereby the Company agreed to pay $120,000 in fines and to address the various breaches discovered from the 2016 FC-Exam **(the "Settlement Agreement")**.

8. In December 2018, the Commission conducted a Routine on Site examination (ROS) of the Company's operations which involved a general review of its AML/CFT Policies and Procedures inclusive of its risk management. Further breaches were revealed and it was also discovered that in breach of the Settlement Agreement, none of the regulatory issues had been rectified.

9. In 2019, the Commission conducted an investigation and discovered that Mr. Gentile had incorporated unregulated entities bearing the names Swiss America Custody Ltd and Mintbroker International Ltd. in various jurisdictions including Canada and the United Kingdom. They were used to accept the Company's client's funds instead of the funds being remitted to an account in the Company's name which would be subject to the supervision of the Commission.

10. The funds were transferred to the Company's operational account at Deltec Bank and Trust Ltd and resulted in the lack of segregation of clients' funds contrary to statute. The transfers also raised the concern as to whether the Company conducting fraudulent activities. The Commission met with Mr. Gentile on 12th September 2019 to discuss the various breaches and were informed of even more irregularities discovered.

> **"16. As a result of the September 2019 meeting, the Commission became aware that there were many irregularities regarding SASL's activities, such as:**
>
> **a. SASL characterizes its activity as "trading in principle", however, in the case of equities trading, clients would expect that "as principle", SASL was selling equities to clients from its own proprietary inventory. However, such was not the case;**
>
> **b. The purchase of securities by SASL's clients do not result in those clients having the securities they believe they have purchased;**
>
> **c. SASL's clients not having direct market access, but rather SASL would "act as principal" for the clients and would pay the difference in securities trades;**

d. **Mr. Gentile purported that SASL does not hold any inventory of securities, but rather that it is in a "short" position relative to its clients; and**

e. **SASL established several unregulated entities with similar names to SASL in foreign jurisdictions and had established bank accounts in foreign jurisdictions and these entities were receiving funds on behalf of SASL on terms unknown to the Commission."**

(the "12th September Meeting")

11. The Company's operational structure meant that no actual trading was done in the market based on client's orders. The Company did not own shares in its inventory even though they were of the belief that they did which was unacceptable to the Commission and contrary to industry practice. Efforts were then made to halt the Company's operations and to prevent exposure to clients due to the Company's improper trade practices.

12. By letter dated the 18th September 2019, the Commission issued orders directing the Company to, *inter alia*, suspend its business for approximately five days. By letter dated the 19th September 2019, the Company admitted to improper trading practices and indicated that it was willing to make changes to its operational activity in order to comply with the operational protocols in place for registered firms. The Company also implied that it did not segregate its clients' assets as it promised to move all client related assets to a segregated bank account at Deltec.

13. The Commission stated however, that by moving the clients' assets to the Company's operational account at Deltec, the issue of comingling of funds arose which was contrary to the statutory requirement to segregate. The Commission averred that the Company's operation was potentially fraudulent and that it was misleading to clients who were led to believe that they were involved in trading securities when they were instead trading against a non-existing position.

14. The suspension was to allow the Commission sufficient time to investigate the Company's activities without being overly disruptive to its operations. Mr. James Gomez of Baker Tilly Gomez was appointed by the Commission to conduct an audit of the Company's financial transactions, inclusive of banking, trading and client records. Thereafter, on the 19th, 20th and 23rd September 2019, the Commission was allowed to enter the Company's premises however, the Company did not provide the information requested and in fact did not provide the information at the time the investigation was launched.

15. The Company instead filed an ex-parte application for judicial review on the 23rd September 2019; a day prior to the expiration of the five day suspension. The Company also sought and was granted, an order vacating the Commission's regulatory orders and directives. This order fully disabled the Commission from further investigation into the Company's activities **("the JR Proceedings")**.

16. On the 3rd December 2019, the Company informed the Commission of its intention to voluntarily wind up, although they were statutorily bound to seek the Commission's approval to voluntarily wind-up its operations **(the "3rd December Letter")**. The

Commission, by letters dated the 19th November, 2019 and 10th and 11th December 2019, informed and directed the Company that any approval of its voluntary surrender of its registration would be subject to conditions:

> **"33. Therefore, the Commission, in its 10th December 2019 letter, informed and directed SASL that any approval of SASL's voluntary surrender of registration would be subject to SASL providing:**
>
> a. **Provide a complete transaction history of all activity on the IB brokerage accounts for the period beginning 1st June 2019 up to the closure of the IB accounts;**
>
> b. **Provide a full reconciliation of all client accounts held with SASL, whether or not they are/were held with IB, for the period beginning 01 June 2019 up to the closure of the IB accounts;**
>
> c. **Submit to the Commission its audited financial statements which are currently outstanding for the years ending 31 December 2017 and 31 December 2018;**
>
> d. **Provide a detailed plan (as approved by the directors) for winding up SASL's operations, including, but not limited to, details of any clients who could not be contacted or where there were any issues closing any client's account;**
>
> e. **Submit all of the above items listed (a) through (d) to the Commission by Tuesday 31 December 2019; and**
>
> f. **Upon items (a) through (d) above having been provided, submit the remaining outstanding registration certificates for –**
>
> - **Guy Gentile;**
> - **Edward Cooper; and**
> - **All other registered personnel for whom SASL received registration certificates"**
>
> **(the "10th December Letter")**

17. Despite the numerous requests, the Company failed to comply with and/or provide all of the requested information. By letter dated the 4th February 2020, the Commission formally advised the Company that it would immediately suspend its registration and seek a court supervised winding up due to the failure to comply and its non-operational status **(the 4th February Letter")**.

18. Ms. Rolle averred that it was paramount that the Commission protect the welfare of investors and/or clients as well as maintain the integrity of the Bahamas' securities and investment markets. As a result, it sought the requested orders in order to prevent any further or potential harm to the Company's clients. She added that it was in the public interest for a court supervised winding-up to be ordered.

Affidavit of Guy Gentile filed 26th May 2020 (the "Gentile Affidavit")

19. In response to the Petition and the Principal Affidavit, Mr. Gentile averred that he was the Chief Executive Officer of Mintbroker International, Ltd, the new name of the Company and that he was the sole shareholder and beneficial owner of all the issued

shares. On the date of the Company's application seeking the appointment of the joint provisional liquidators, the Company held no clients' assets on its books and held twenty-four thousand dollars of its own assets with no creditors.

20. During the 12th September Meeting, the Commission questioned why the Company was using the DAS Trader Platform to take clients' orders instead of taking the orders by email or phone. Mr. Gentile explained that the said platform was certified by Nasdaq and the New York stock exchange and that it was the only system the Company had used. The Commission suspended the Company's operations on the 18th September, 2019 on the premise of what was allegedly disclosed during the meeting but failed to provide the transcript thereof despite requests for it.

21. The Commission issued to the Company, the notice of suspension of registration which prohibited the Company from accepting any new clients, accepting funds from existing clients, trading on its own behalf or its clients' behalf and dealing in any manner with its clients' assets.

22. The notice of suspension had also described the Company's trading as being akin to a Ponzi scheme and required it to attend a meeting to show cause why it should not be wound up. On the 23rd September, 2019, the Company filed its JR Application. Leave was granted and the decision/order to suspend the Company's business was stayed pending final determination of the action.

23. The Company informed its clients, stakeholders and interested parties of its suspension. The Company's clearing house, Interactive Brokers terminated its relationship as a result, giving them thirty days' notice and the subsequent efforts to engage another broker/clearing house provided fruitless, which decreased any immediate prospect of the Company continuing its operations.

24. The suspension along with the uncertainty of when the JR Application would be determined, caused the Company to notify the Commission of its decision to liquidate all client accounts, terminate all client relationships and notify all clients that it was closing its operations and that they could either liquidate their accounts or transfer their accounts to another broker dealer.

25. In November 2019, the Company made its decision to comply with the thirty-day notice given by Interactive Brokers. By the 30th December, 2019, the Company liquidated all of its client accounts and client relationships and notified the Commission of what it did. By the Settlement Agreement, the issues raised by the Commission were resolved, despite the fact that he did not fully agree with all of the concerns raised by the Commission.

26. By the Commission's May 2018 letter it confirmed that it had reviewed the Company's trading practices and protocols and did not express any concern of fraudulent activities that would merit urgent and more intrusive investigations in the public interest. Mr. Gentile averred that the Commission did not appear to have technical knowledge of day trading and principal trading.

27. The Company had used its business model from inception and was surprised that after seven years of operation the Commission raised this concern. The Company's website was accessible to its clients, the Commission and the public which clearly set out the

Company's nature and method of trading. He added that their business model was also used by other firms in the jurisdiction, the United States of America and the United Kingdom.

28. Mr. Gentile provided his version of events between the Company and the Commission:

> **"20. Paragraphs 27 through 36 of Rolle's affidavit suggests that SASL deliberately failed to cooperate with the Commission. The series of events were as follows:**
>
> **(a) September 18th, 2019 at 3:00 p.m., the Commission's team led by Mr. Gawaine Ward entered SASL premises demanded the immediate suspension of operations and directed that all employees leave SASL premises immediately;**
>
> **(b) September 18th 2019 from 3:00 p.n. to 5:00 p.m. the Commission's team sought to physically take SASL IT Server. This could not happen as the employees had all left SASL premises save and except two executives and IT personnel who were retrieving documents for the Commission's team.**
>
> **(c) September 18th, 2019 at 5:00 p.m. the Commission's team ensured that the remainder of SASL personnel left SASL premises and requested some employees to return to the premises on September 19th, 2019 at 10:00 a.m.**
>
> **(d) September 19th, 2019 at about 1:00 p.m. the Commission's team attended SASL premises and received assistance as requested.**
>
> **(e) September 20th, 2019 the Commission's team did not visit the premises of SASL. As SASL was not allowed to operate, SASL executives and managers were present but not employees. At about 2:00 p.m. on this date SASL requested an email from Mr. Ward of the Commission that he was at the offices of SASL but no one was present."**

29. He averred that contrary to the Commission's assertion, he provided the Commission with all of the documents requested except for the audited financial statements for 2017 and 2018. The Company provided the Interactive Brokers omnibus account statements which reflected all transactions between them and the broker, the Company's statement for each client, all of the Company's audited financial statements commencing from 2011 and the Company's banking statements and clients' statements.

30. The Company also provided the Commission with its unaudited financial statement for 2017, 2018 and 2019 as was statutorily required. By email dated the 11th December, 2019, the Company instructed BDO Bahamas, a chartered accountant firm **("BDO")**, to complete the 2017 and 2018 financial audit. BDO advised him that they had met with the Commission and had advised them that because the Company's operation ceased, it was no longer required to provide audited financial statements and as a result it would not provide the same. By letter dated the 24th January, 2020, BDO advised the Company similarly.

31. Mr. Gentle stated that the Company fully cooperated with the Commission on its requests for disclosure save and except for privileged information and that the Company

understood the obligations under its licences and statute to provide certain information, documents and to otherwise comply with lawful requests of the Commission.

32. Mr. Gentile sought the revocation/discharge of JPL Order on the basis that there was no public interest, client interest or other regulatory basis for the appointment of joint provisional liquidators and their continuation.

Reply Affidavit of Christina R. Rolle filed 29th May 2020

33. In response, the Commission filed the Reply Affidavit of Christina R. Rolle on the 29th May, 2020. Ms. Rolle averred that, by the Principal Affidavit, the Commission fully disclosed the events which led up to the filing of the Petition. Since then, it received additional information that on or around the 20th April, 2020, it was informed that the Company's certiorari application to overturn the USSEC matter was denied by the U.S. Supreme Court. This cleared the way for the USSEC to continue its matter against Mr. Gentile which was underway in the U.S. courts.

34. The Commission was still awaiting the outcome of the JR Proceedings which was the subject of the concerns set out in the Commission's 18th September 2019 letter and depending on the outcome, would require the Commission to make a further decision concerning those actions.

35. The event and circumstances leading up to the Petition, related to the Company's actions taken after the hearing of arguments in the JR Application specifically that the Company informed the Commission, by way of the 3rd December Letter, that inter alia it had closed its offices and was surrendering its registration and was surrendering its registration certificate.

36. The 10th December reply Letter from the Commission had informed the Company of its duty to obtain the Commission's approval prior to taking such action; failing to do so was a breach of the Act. Satisfied that the present action was distinct from the JR Application, the Commision addressed the Company's breach and gave it sufficient time to obtain the approval lawfully required to surrender its registration. It also petitioned the Court only after the Company failed to satisfy the conditions and obtain the approval lawfully required to surrender its registration.

37. The Company's actions placed it into a de facto winding up position without taking the lawful steps required to do so. It was the desire of the Commission to ensure that no further action was taken that would likely prejudice the Company's clients and bring its jurisdictional reputation into disrepute. Ms. Rolle added that the Company's abrupt ceasing of operations was contrary to prior discussions with the Commission concerning whether it would do so in accord with the regulatory requirements and the undergoing of a court supervised winding up or the continuation of its business.

38. The Commission averred that the discussions during the 12th September Meeting covered more than the Company's use of its trading platform. Most of the discussion was in relation to the use of unregulated foreign entities and the fact that the method of the Company's operation prior to them was unknown.

39. The discussions also covered the details of the use of the foreign entities and how the Company operated with respect to trade on behalf of clients despite not placing client's

orders in the markets or against its own inventory, such activity which gave rise to the the 18th September, 2019 letter.

40. The Commission stated that it was only made aware of the Company's brokerage relationship with Interactive Brokers being terminated by the letter dated the 1st November, 2019. They averred that the letter had only been sent further to the Company's obligation to inform the Commission and that it did not disclose the Company's intentions concerning its Clients as a result of such termination.

41. The Commission raised the issue of the USSEC action because the Company failed to disclose the action to the Commission as statutorily required. The Company's response that it did not agree with the Commission's concerns was not satisfactory and the Company entered into the Settlement Agreement agreeing to commit to the terms and conditions established by the Commission and agreeing to remedy the breaches by the 31st August 2018.

42. The breaches were found to be unresolved during a subsequent routine exam conducted in December 2018; The Company's annual financial statements for 2016 were qualified which the Commission noted was unacceptable and the audits for 2017 and 2018 remained outstanding.

43. The Commission denied that it lacked technical knowledge of day trading or principal trading or that the Company's auditors or Ernst and Young knew that the Company purported to trade as principal even though it did not own the shares it purportedly sold and had directed payments made by clients to unregulated foreign entities.

44. The issue arose because the Commission did not know of the Company's method of trading. Additionally, the Company did not provide any evidence in support of its claim that other firms used their so called business model. Ms. Rolle averred that the Commission's meeting with BDO on the 3rd January, 2020 was to ascertain the status of the outstanding 2017 and 2018 audited financials because the extension deadline had long passed. However, BDO was unable to indicate when they would have the audited financials as they were awaiting the required information from the Company.

45. The Commission noted that it first saw the letter dated the 24th January 2020 during these proceedings and that it clearly stated that BDO was resigning from the Company because it had ceased operations. With respect to the email threads, they showed that the Company was supposed to discuss with BDO whether they would continue as the Company's auditors.

46. The Commission averred that the Company was statutorily obligated to disclose all of this information which they failed to do. This failure in addition to the failures mentioned throughout, were the underlying reasons for the filing of the Petition. The Commission refused to admit to any allegation made in the Gentile Affidavit.

47. The Commission questioned whether Mr. Gentile maintained clients' records as well as the records of the assets of the Company as statutorily required. While Mr. Gentile responded by letters dated the 6th May 2020 and the 29th May 2020, he did not provide any proof. Accordingly, the answer was still outstanding and it was not known where the assets were due to the lack of records.

48. The Commission averred that the actions of Mr. Gentile did not inspire any confidence that the Company would do what is statutorily required of it. The Commission is mandated to protect the welfare of investors and/or clients as well as maintain the integrity of this jurisdiction's securities and investment markets.

First Supplemental Affidavit of Christina R. Rolle filed 1st March 2021

49. By her First Supplemental Affidavit filed 1st March, 2021, Ms. Rolle informed the Court that the JR Application had been dismissed as the Court was not satisfied that there was any unreasonable conduct by the Commission. The Court found that the Commission did not act improperly and that there were several breaches committed by the Company both before and after the action was initiated.

50. Ms. Rolle averred that Mr. Gentile was un-cooperative with the joint provisional liquidator despite the JPL Order to provide them with the statutory Statement of Affairs and related information. She added that the Commission had been copied on the communications between the joint provisional liquidators and Mr. Gentile and as a result they had become aware that the Court had directed Mr. Gentile to do so.

51. Mr. Gentile's actions were at best unhelpful and at worst, calculated to obfuscate and attempt to stymy the joint provisional liquidator's efforts to carry out their statutory mandate. She added that his actions had demonstrated a contemptuous disregard for the law and the Court.

VIVA VOCE EVIDENCE

Ms. Rolle's Evidence

52. Ms. Rolle further supplemented her written evidence by oral testimony and averred that after the Commission had received the 3rd December 2019 Letter, they sought to ensure that the Company was winding up its affairs satisfactorily. The Commission wrote to the Company by letter dated the 4th February, 2020 and asked to be provided with certain information to ensure this, including questioning whether all clients' matters were being addressed in an orderly and satisfactory way.

53. The Company was given a timeline to provide the information which was not met. The Commission then suspended the Company's licence until a response was received. No response was received and the present Petition was filed. With respect to the 10th December Letter Ms. Rolle stated that it was the Commission's understanding that the Company kept some of its clients' funds as well as their own proprietary funds with Interactive Brokers. Ms. Rolle did not recall receiving a response to the Commission's 4th February Letter.

54. Under cross examination, Ms. Rolle was referred to the 3rd December Letter and she stated that it was her understanding that the Company was informing the Commission that it was winding up its operations. She believed that the Commission would consider the Company's voluntary surrender of its licence but under certain conditions and that it would have to be under their supervision.

55. The Company submitted an incomplete excel document that was purported to consist of the transaction history between itself and Interactive Brokers for the period beginning the

1st June 2019. Ms. Rolle averred that the Commission was not able to identify what the transactions were. The Commission received a jump drive from the Company but a full reconciliation of all of the Company's clients' accounts with or without Interactive Brokers for the period beginning 1st June 2019 to its closure was not included.

56. As the Executive Director she did not see all of the documents that came into the Commission and that it was possible that she did not see all of the documents submitted by the Company. She confirmed that she did not see the Company's letter dated the 30th December 2019 to the Commission.

57. The Commission's meeting with BDO did not yield any conclusive information as to whether BDO was going forward with the audits. BDO wanted the Commission to give it guidance on whether they should complete the audits or not; but the Commission's position was that BDO needed to make that determination on their own. It was her impression that they were going to complete the financials. It was not a misstatement that the Company failed to deliberately produce its financials for December 2017 and 2018.

58. When registrants are unable to submit their financials on time, they would usually make extension requests. Ms. Rolle stated that the Act spoke generally to trading in securities as long as the securities were not unlawful. As for the Regulations, it was inaccurate to say that they encompassed every single point of how a company would conduct its business. The point was to ensure that there was fairness and honesty in the way a registrant conducted business.

59. Ms. Rolle averred that it was the aim of the legislation to simply provide a framework as it would have been impossible to have an exhaustive list of activities. The Regulations were flexible enough to allow for instances which may arise. With respect to the Commission's claim that the Company's operation was potentially fraudulent, Ms. Rolle accepted that Mr. Gentile never agreed that his activities were fraudulent however, in his letter to them, the description was implicitly accepted as it was not refuted.

60. After being directed to the 19th September 2019 letter, she accepted that Mr. Gentile writing to clear up the Commission's misunderstandings was not an admission that the manner in which they operated was wrong, improper or even illegal. She did not accept however that Mr. Gentile was in a precarious or desperate position to get the Company's operation going again.

61. Ms. Rolle averred that if the Commission was satisfied with the disclosure the Company made to its clients the Commission would have probably taken a different course in its investigation. She did not recall whether the auditors or the Commission's examiners looked specifically at whether the Company had any inventory to trade against. The Commission would usually check whether the licensee was conducting a reconciliation of its books against a client's trade however, they would not normally check themselves. This would be done by reviewing the licensee's records of reconciliation.

62. The probe conducted by the Commission was on penny stock manipulation. She recalled receiving a download of more than a million trades within a five month period. The regulatory framework gives the Commission authority to conduct inspections but does not specifically require the Commission to do so. Best practice would be to first

have a risk rating system of the licensee and then to determine a frequency for inspections based on the regulator's perceived risk of the licensee. The Company was a high risk licensee, one they had ongoing regulatory concerns with.

63. Ms. Rolle could not recall whether the Company was labeled as high risk sometime in 2017 after an internal risk rating exercise was conducted. It was not a practice of the Commission to inform a licensee of its rating even though It could mean frequent examinations. She did not instruct anyone from the USSEC with respect to the Company's dealings. She could not recall whether there were any complaints by clients that they were defrauded or cheated and that the Settlement Agreement had made no mention of any acts of fraud although it did not cover every infraction as there was still an open investigation pending.

64. During re-examination Ms. Rolle averred that from the context of a regulator, the impact of a resolution by a board to wind down its operations would be that they would have to advise the Commission and then seek the Commission's approval for the surrender of its licence. A wind up plan should be put in place by the board.

65. A complaint by a client was not necessary for the Commission to determine whether registrant's actions were acceptable or not. The Commission did not get very far with its investigation because they were not getting access to information requested and required. If the Commission did not have outstanding issues with a licensee then a voluntary surrender would be accepted as opposed to a court supervised one. The Company never gave the Commission a winding up plan.

Evidence of Mr. Gentile

66. Mr. Gentile also supplemented his written evidence by oral testimony and averred that after receipt of the letter from the Commission informing his Company what was needed to surrender its registration, the Company tried to comply but the Commission rejected its efforts. The Commission did not approve the Company's request to surrender its licence. The Company never requested approval to close down or cease its operations but at some point it did stop operating and notified the Commission that it would do so on a certain date.

67. He believed that the Company's 1st November 2019 letter was sent in compliance with its obligation to inform the Commission in any change of circumstances. On the 3rd December 2019 the Company surrendered its licence without the Commission's approval. The Company did everything the letter advised it to do to wind up except for the audit because the auditors refused to complete the audit. He added that what was requested was not required by legislation but what the Commission had requested.

68. The auditors did not complete the audit because after meeting with the Commission they were informed that it was no longer a going concern. He did not have a choice but to close the brokerage and bank accounts of the Company and he did not get the Commission's approval to do so. The Company had no ability to operate and its customers obviously wanted their money back so they could not wait for the Commission. The Company felt pressured by the Commission's request for it to surrender its licence.

69. They informed the Commission that they were considering other lines of business but the Commission's response was to inform them how to surrender their licence and also required a business plan and other documents which led them to make the decision that it was not worth the effort to continue.

70. He agreed that the Commission's responses to him was based on the communication between it and the Company and that the Commission had informed the Company what had to be done based on the information the Company provided. An email was sent to all of the Company's clients informing them that they had lost their relationship with Interactive Brokers, the clearing firm and that they had thirty days to wind down their positions and transfer their cash which they all did.

71. The Company then distributed the Company's funds to him, its sole shareholder as well as paid outstanding bills and expenses. Mr. Gentile confirmed that the Company's electronic records were housed by Cloud Carib and that Ernst & Young and his attorneys also had a copy.

72. During re-examination, he stated that by the 3rd December Letter, the Company informed the Commission that all of its clients had been informed that the clients' records would be given to the firm's attorney in addition to the firm's registered agent. The records referred to included trade history, identification, account documents and proof of address; records that were required to be kept for seven years. All records were placed on a hard drive and given to the Commission. While he did not personally send it, he informed a member of the Company's staff to send to the Commission a copy of its files kept at Cloud Carib. He received confirmation that it was sent.

73. As a result of the loss of the relationship with Interactive Brokers they could not operate because it took two to six months to find another broker and some of its clients were day traders and would not be able to trade. This led to the business having to cease operation immediately. He was not aware of one client's complaint in relation to outstanding funds. He advised the Commission that he had returned funds to clients which they did not forbid him from doing.

74. He did not have any documents in his possession which had been requested but not given to the Commission. He stated that the issue the Commission had with the Company was not a liquidation issue as it did not run out of funding. The liquidation would make it harder for him to get a licence in another jurisdiction. The Commission never told them if there was information missing or asked them to clarify anything. He explained that information provided may have been seen as incomplete because the brokers' transaction would never have information that would identify the client's transactions.

Affidavit of Eugene Andrew Edwards filed 3rd March 2021

75. By his Affidavit, Mr. Edwards advised the Court that the charges levied by the government of the United States of America were dismissed against Mr. Gentile and exhibited the decision.

ISSUES

76. The issue to be determined is whether the Company could and should be wound up on the Regulators petition for breach of regulatory requirements.

SUBMISSIONS

THE COMMISSION'S SUBMISSIONS

77. The Commission relied on numerous provisions from the Securities Industry (Amendment) Act, the Securities Industry Regulations, 2012, the Companies (Winding Up) (Amendment) Act 2011 **(the "Winding Up Act")** and the Companies Liquidation Rules 2012 **(the "CLR")**.

78. As the regulator of the securities industry, the Commission is responsible for the implementation of the Securities Industry Act **(the "Act")**. They cited **Pezim v. British Columbia (Superintendent of Brokers) [1994] 2 S.C.R. 557** which was accepted by the Court of Appeal in **Securities Commission of The Bahamas v. Alliance Investment Management Ltd. SCCiv App No. 199 of 2014**. In **Pezim** the Supreme Court opined:

> **"It is important to note from the outset that the Act is regulatory in nature. In fact, it is part of a much larger framework which regulates the securities industry throughout [the country]. Its primary goal is the protection of the investor but other goals include capital market efficiency and ensuring public confidence in the system.....It must also be noted that the definitions in the Act exist in a factual or regulatory context. They are part of the larger regulatory framework discussed above. They are not to be analyzed in isolation but rather in their regulatory context. This is something that requires expertise and thus falls within the jurisdiction of the Commission. This is yet another basis for curial deference."**

79. The Commission contended that it was authorized to impose conditions on the Company's registratrants in order to ensure that it had no outstanding obligations or at least a mutually agreed position on the same. The Commission sought an orderly process to facilitate the Company's voluntary eventual closure, bearing in mind the mentioned letters to the Company which spoke to the closure.

80. The Commission contended that the Company's actions were tantamount to a de facto winding up as its actions fell just short of commencing a formal winding up action. Mr. Gentile terminated the Company's employees, closed the business and all client accounts; which were all acts which should have been made known to the Commission prior to them being done pursuant to Regulation 64 of the Securities Industries Regulations which states,

> **"64. Voluntary surrender of registration or liquidation.**
>
> **(1) No registered firm shall cease to carry on securities business or go into voluntary liquidation without the prior approval of the Commission.**
> **(2) A registrant may voluntarily surrender the registrant's registration by making application to the Commission and the surrender of the registration shall not take effect until the later of-**
> **(a) 21 days after the notice has been received by the Commission; or**
> **(b) all conditions imposed by the Commission on the registrant have been complied with.**

(3) Where a registered firm decides to cease to carry on any securities business, it shall ensure that any securities business that is outstanding is properly completed or is transferred to another firm registered to carry on that securities business."

81. The Commission contended that the Company failed to abide by the conditions imposed on it after the Commission was satisfied that the surrender of a registration would not be prejudicial to the public interest, in contravention of Regulation 64(2) of the Securities Industry Regulations above and Section 71 of the Securities Amendment Act – Secttion 71 provides,

> **"71. Surrender of registration.**
> **(I) The Commission may, on application by a registrant, accept, subject to such terms and conditions as it may impose, the voluntary surrender of the registration of the registrant if the Commission is satisfied that the surrender of the registration would not be prejudicial to the public interest.**
> **(2) On receiving an application under subsection (I), the Commission may, without providing an opportunity to be heard, suspend or impose any condition or restriction on the registration that the Commission deems appropriate."**

82. The Commission further contended that it had the authority to suspend the Company's registration and commence proceedings for its supervisory winding up due to the fact that they did not receive a response to its letter dated the 4th February, 2020 nor any verifiable data on the Company's client accounts and records. Regardless of any position taken by the Company, it should have responded to the said letter as it was direct evidence of the Commission's desire to pursue winding up; the authority being founded in Section 134(b) of the Securities Amendment Act which states,

> **"134. Application to court. Notwithstanding any other provision, if the Commission considers it in the public interest to do so, the Commission may, at any time and without a hearing, apply to the court for an order to take any action as it considers necessary.**
> **(a).....**
> **(b) for a market participant to be wound up, dissolved, liquidated, or otherwise terminated, as appropriate; or**
> **(c).....**"

83. The Commission maintained that its actions in seeking to wind up the Company were reasonable, lawful and responsible as it petitioned the Court via Section 186 of the the "Winding Up Act and Order 3 of the CLR which provides the manner in which a petition for a winding up should be presented. Section 186 of the Winding Up Act states,

> **"186. Circumstances in which a company may be wound up by the court. A company may be wound up by the court if-**
> **(a) the company has passed a resolution requiring the company to be wound up by the court;**
> **(b) the company does not commence its business within a year from its incorporation, or suspends its business for a whole year;**
> **(c) the company is insolvent;**
> **(d) the members are reduced in number to less than two;**
> **(e) the court is of the opinion that it just and equitable that the company should be wound up; or**
> **(f) a regulator petitions for the winding up of a company over which it has regulatory authority and whose licence or registration has been suspended or revoked."**

84. By the Winding Up Act, it immediately sought to place the Company in provisional liquidation to secure the Company's assets and related property and/or documents.

THE COMPANY'S SUBMISSIONS

85. The Company submitted that shortly after vacating the Commission's suspension over his Company, it set out to continue its operations however its clearing house terminated its relationship with it. The Company was unable to secure a relationship with another clearing house to facilitate its operations. Additionally, it was not certain when the judicial review proceedings would be determined. Given the exposure to its clients assets the Company notified the Commission of its decision to, *inter alia*, liquidate all client accounts.

86. It was further submitted that contrary to the Commission's contention that it suspended the Company's licence, in the Company's letter dated 3rd December 2019, they advised the Commission of its decision to voluntarily surrender its licence and that it was not winding up voluntarily or otherwise because of the matters before the Court and of its intention to seek damages from the Commission.

87. The Company submitted that section 134 of the Securities Industry Act, as amended in 2016, empowered the Commission to take any action as the Commission considered necessary in the public interest. In **Re Senator Hanseathise (1997) 1 WLR 515** Lord Justice Saville stated that the expression in the public interest is of the widest import; it means what it says. He said the Secretary of State had the right and some say duty to apply to the Court to protect members of the public from suffering inevitable loss.

88. In **Secretary of State for Business, Energy and Industrial Strategy v. PAG Asset Preservation Limited (2020) EWCA Civ 1017**, Lady Justice Asplin of the Court of Appeal of England of Wales stated,

> **"39. The principles to be applied are not in dispute. They were helpfully summarised by Norris J in the *PAG Management* case at [5] and were set out by the judge in this case at [31] and adopted at [32]. They are as follows:**
>
> **"5. There was a large measure of agreement about the principles to be adopted in the exercise of this jurisdiction. The principles I shall apply are these:-"**
> **a) Even if the SoS thinks it expedient in the public interest to wind up a company, the Court still has a discretion whether or not to make an order.**
> **b) Before making an order the Court must be satisfied that it is just and equitable to wind the company up.**
> **c) The burden of proof lies on the SoS to persuade the Court (having proved matters of fact to the requisite civil standard) that it is just and equitable to wind the company up.**
> **d) The Court must balance competing reasons why the company should be wound up and why it should not be wound up upon a consideration of the totality of the evidence (per Nicholls LJ in *Re Walter L Jacob & Co Limited* [1989] BCLC 345 at 353 b-d).**
> **e) As a result of undertaking that exercise the Court must be able to identify for itself the aspects of the public interest which would be promoted by making a winding up order in the particular case (ibid at p353f);**

f) It is not necessary for the business of the company to involve illegality. As Millett LJ said in *Re Senator Hanseatische* [1997] 1 WLR 515 at 522h:-
"On the contrary the phrases used (namely "expedient in the public interest" and "just and equitable") to my mind indicate that Parliament did not intend to impose such a restriction but instead simply decided to leave to the Secretary of State to form a view as to what was expedient in the public interest and the court then to decide on the material before it whether the justice and equity of the case dictated that the company concerned should be wound up".
g) Where the business of the company does not involve the commission of illegal acts or breaches of regulatory requirements the company may nonetheless be wound up if its business is "inherently objectionable" because its activities are contrary to a clearly identified public interest. So in *Abacrombie & Co Limited* [2008] EWHC 2520 (Ch) the company operated a debtor advisory service. David Richards J explained:-
"The purpose of the company's business as it related to clients with equity in their residential property was, prior to the client's bankruptcy, to sell the equity to the client's spouse or partner at as low a price as possible and to use the proceeds to fund the company's charges which were both excessive and unjustifiably charged to the debtor client. The effect, as the company...well appreciated, was to deprive the debtor's estate of any substantial return or value from the debtor's beneficial interest which was likely to have been the only asset of any substance. The effect was detrimental to creditors and undermined the proper administration of the bankruptcy of the debtor" (see paragraph [60]).
He had earlier at paragraph [15] held:-
"The arrangements, as operated by the company, in my judgment, subverted the proper functioning of the law and procedures of bankruptcy".
h) Such conduct is sometimes described as disclosing "a lack of commercial probity", and whilst this frequently might involve preying on the public and inducing individual members of the public to participate in transactions which are without benefit to them, it can also involve prejudice to the public generally (for example by casting burdens on the general body of tax payers). An illustration of this may be found in *SoS for Business Innovation and Skills v PGMRS Limited* [2010] EWHC 2864 (Ch) in which four companies traded at the expense of HMRC (by not paying either VAT or PAYE) until such time as they were insolvent, conduct that the judge held represented a lack of commercial probity.
.....
j) Finally, to wind up an active and solvent company is a serious step, and the Court must be satisfied that reasons of sufficient weight have been advanced to justify taking that course (*Re Walter L Jacob & Co Limited* (supra) at p354d-e)."

89. The Company submitted that there was no complaint from any client or investor of the Company nor anyone else who would support the Commission's complaint that the winding up was needed for the protection of the public interest. The case against the Company could only properly be considered by reference to the Petition and the supporting affidavits.

90. It was material and incorrect for the Commission to say that the Company's clients were led to believe that they were involved in trading securities but instead were trading against a non-existent position. The Commission never communicated with any of the Company's clients. In any event, the Company's website was accessible to its clients, the Commission and the public; although Ms. Rolle stated that she had not personally visited the web page. The nature and method of its trade was clear.

91. The Company also submitted that the Commission's failure to disclose that the Company had entered into a settlement agreement with respect to the Company's failure

to disclose the existence of the USSEC and Department of Justice's complaint, was also material.

92. It submitted that it was mandatory that the Court have regard to the undetermined issues pending before the Court which formed the basis of the Petition. If the issues were resolved in favor of the Company but after the winding up, it would be an injustice to the Company's shareholders. In those circumstances, it would not be just and equitable for the Company to be wound up.

93. To determine what would be just and equitable, the statutory parameters within which the Company operated must be recognized. There was no evidence adduced by the Petitioner of examples of breaches of the Securities Industry Act, as trading as a principal was a category under the Act which therefore made it lawful and his trading was not the same as what the Commission considered as trading.

94. The Commission failed to disclose that the Company notified the Commission of its intention to pursue legal action against it for the recovery of loss and damages it suffered as a result of the Commission's actions.

95. The Company submitted that the Court ought to carry out a balancing exercise and must give such weight to the various factors that may be appropriate in the particular case. The factor considered appropriate in this case was that day trading and principal trading was the business model that the Company had utilized from inception which was why it was surprising that after seven years the Commission made an issue of it.

96. Other Bahamian firms used the business model used by the Company and there were several inspections of the Company's operations, all of which did not reveal that the business model was inconsistent with the norms of the Commission or was a violation of the Act.

97. The Company submitted that the orders sought in the Petition should be refused as much of what was alleged therein as breaches of the statute were disputed by the Company and uncorroborated by the Commission, who omitted material information within its knowledge. The Company relied on **Re Wear Engine Works Co. 16 Ch App 188** in support of its contention that the winding up order should be refused if a sufficient case for winding up was not stated in a petition.

98. The Company also relied on **Re Ipswich, Norwich & Yarmouth Ry Co. Ex Barnett (1849) 1 De G &Sm 744, 63 ER 1277** in support of its submission that the Petition should be dismissed because of the omission by the Commission of material knowledge from the Petition.

99. It submitted that the supervision of the Court after the Company liquidated all clients' accounts would achieve very little with respect to the protection of clients and investors. At the time the Petition was presented, the Company had less than $25,000.00 in assets whereas prior to the liquidation it had substantially more assets.

DECISION

100. The Court's jurisdiction to make an order for the winding up of a company is set out in sections 185 and 186 of the **Winding Up Act**. Section 185 provides;

"**Jurisdiction of the Court.**
The court has jurisdiction to make winding up orders in respect of-
(a) an existing company;
(b) a company incorporated and registered under this Act;
(c) a body incorporated under any other law; and
(d) a foreign company which -
(i) has property located in The Bahamas
(ii) is carrying on business in The Bahamas or
(iii) is registered under Part VI."

Section 186 states;

"186. Circumstances in which a company may be wound up by the court.
A company may be wound up by the court if-
(a) the company has passed a resolution requiring the company to be wound up by the court;
(b) the company does not commence its business within a year from its incorporation, or suspends its business for a whole year;
(c) the company is insolvent;
(d) the members are reduced in number to less than two;
(e) the court is of the opinion that it just and equitable that the company should be wound up; or
(f) a regulator petitions for the winding up of a company over which it has regulatory authority and whose licence or registration has been suspended or revoked."

101. The Company's licence had been suspended accordingly the court has jurisdiction to wind up a company on a regulators petition if the licence has been suspended

102. Section 190 of the Winding Up Act enables the Commission as the relevant Regulator of the securities industry the power to present a winding up petition in respect of a company which carries on securities dealings as the Company was. The relevant provision provides.

"190. Application for winding up.
(1) An application to the court for the winding up of a company shall be by petition presented either by-
(a) the company;
(b) any creditor or creditors (including any contingent or prospective creditor or creditors);
(c) any contributory or contributories; or
(d) subject to subsection (4), a relevant regulator pursuant to the regulatory laws.
(4) A winding up petition may be presented by a relevant regulator in respect of any company which is carrying on a regulated business in The Bahamas upon the grounds that it is not duly licensed or registered to do so under the regulatory laws or for any other reason as provided under the regulatory laws or any other law."

103. The Commission also relies on Section 134(b) of the Securities Amendment Act which states that the Commission may petition for a market participant to be wound up if it thought that it was in the public interest for such an order to be made. They make the

submission that there was a concern as to whether the Company's clients received the money that would have been owed to them after the Company ceased its operations without the Commission's supervision as mandated by the Act and without complying with the directives of the Commission.

104. The Company on the other hand relies on common law which states that the definition of public interest should be given a wide meaning and that because there were no complaints to the Commission by the Company's clients, the order should not be made for a winding-up as there was no evidence that it was in the public interest to wind the Company up.

105. I note that one of the principles relied on by Lady Justice Asplin in **Secretary of State for Business, Energy and Industrial Strategy v. PAG Asset Preservation Limited,** a case which involved an application by the Secretary of State to wind up a company in the public interest, implies that a company can be wound up if it involves the breaches of regulatory requirements. The principle states,

> **"g) Where the business of the company does not involve the commission of illegal acts or breaches of regulatory requirements the company may nonetheless be wound up if its business is "inherently objectionable" because its activities are contrary to a clearly identified public interest. So in *Abacrombie & Co Limited* [2008] EWHC 2520 (Ch) the company operated a debtor advisory service.**

Inherent in this holding is that a regulator is empowered to wind up a company where there are breaches of regulatory requirements such as directives given to a licensee.

106. In **Securities Commission of The Bahamas v Alliance Investment Management Ltd SCCiv App No. 199 of 2014**, the Commission had ordered Alliance, via letter, as a result of inadequate responses to previously indicated breaches, to cease taking on new business and give immediate attention to the deficiencies raised. There was an exchange of additional letters between the parties and Alliance in turn filed an application in the Supreme Court for an order of certioriari, to remove the orders as it was of the belief that the Commission exceeded its jurisdiction in issuing them. On appeal it was held that the Commission could issue an order to a person before holding a hearing provided it was satisfied that it was necessary in the public interest to do so.

107. Isaacs JA, in delivering the judgment of the Appellate Court, considered Pezim v British Columbia (Superintendent of Brokers) [1994] 2 R.C.S. 557, where the British Columbia Securities Commission concluded that there had been breaches of the Securities Act. That decision was appealed to the Canadian Supreme Court where Locabuccis J. stated,

> **"21. In Pezim v British Columbia (Superintendent of Brokers) [1994] 2 R.C.S. 557 the Superintendent of Brokers, the chief administrative officer of the British Columbia Securities Commission (the BC Commission), instituted proceedings against persons connected with two companies. The BC Commission concluded that there had been breaches of the Securities Act. On appeal to the Canadian Supreme Court, Locabuccis, J, speaking on behalf of the Court observed at p. 589, letter d:**
>
> > **"The Securities Act is part of a much larger framework which regulates the securities industry throughout Canada primarily for the protection of the**

investor but also for capital market efficiency and ensuring public confidence in the system."

22. He continued at pp. 592-3:

> **"As already mentioned, the primary goal of securities legislation is the protection of the investing public. The importance of that goal in assessing the decisions of securities commissions has been recognized by this Court in *Brosseau v. Alberta Securities Commission*, [1989] 1 S.C.R. 301 (*Brosseau*), where L'Heureux- Dubé J., writing for the Court, stated the following at p. 314:**
>
> **Securities Acts in general can be said to be aimed at regulating the market and protecting the general public. This role was recognized by this Court in *Gregory & Co. v. Quebec Securities Commission*, [1961] S.C.R. 584, where Fauteux J. observed at p. 588:**
>
> **The paramount object of the Act is to ensure that persons who, in the province, carry on the business of trading in securities or acting as investment counsel, shall be honest and of good repute and, in this way, to protect the public, in the province or elsewhere, from being defrauded as a result of certain activities initiated in the province by persons therein carrying on such a business. This protective role, common to all securities commissions, gives a special character to such bodies which must be recognized when assessing the way in which their functions are carried out under their Acts."**

23. In the same vein that the BC Commission's function under the Securities Act is to ensure "public confidence in the system", the Commission under the Act is intended to do the same in The Bahamas."

The Appeal

24. I hold the view that the question is amenable to a qualified affirmative response, to wit, the appellant can issue an order to a person before holding a hearing; however, it must be satisfied that it is necessary and in the public interest to do so. Parliament expressly stated the order is to have a temporary effect; and is intended to protect the integrity and reputation of our securities industry. <u>The power is engaged in circumstances where the appellant, as a prudent regulator charged with oversight of the industry, deems it crucial to intervene quickly and nip in the bud, practices or actions which may be harmful to the country's financial sector, of which the securities industry is a part. As one of the pillars of our economy, it is important that no effort be spared to ensure that those who engage in the business of handling investors' funds do so with probity and integrity; and are not allowed to tarnish the reputation of our financial industry</u>." [Emphasis Added]

108. The Court of Appeal had to consider whether the order made by the Securities Commission was in breach of the company's right to be afforded a fair hearing. Although the Company in this case did not raise the issue of being denied the right to be heard, I adopt the Court's findings that the Commission has the authority to intervene quickly and nip in the bud, practices or actions which may be harmful to the country's financial sector which include the cessation of operating a business as a licensee without the proper approval or compliance with the directives of the Commission. The Commission's

responsibilities are important and onerous. Their task is to regulate, guide and protect the reputation of the industry and its users.

109. Here, the Commission chose to intervene and seek the assistance of the Court, to nip in the bud the Company's breaches of various provisions of the securities legislation. The statutory provisions are not whimsical or arbitrary. They are there for a reason.

110. Regulation 64 of the Regulations makes it mandatory for a registered firm to obtain the Commission's approval prior to ending its business or going into voluntary liquidation. Once an application for approval is made, the surrender of registration would not take effect until the later of twenty days after the notice to do so has been received by the Commission and all conditions imposed by the Commission were complied with. The purpose for the requirements is clear- to protect investors and the reputation of the industry.

111. By his own evidence Mr. Gentile admitted that he could not wait on the Commission to approve the surrender of his registration or the closure of his business because some of his clients were day traders and after the loss of his relationship with Interactive Brokers the Company would not have been able to provide that service.

112. He stated that the Company had given its clients thirty days to transfer their funds in response to Interactive Brokers' thirty day notice. Mr. Gentile also admitted that he liquidated the Company, paid all its receivables and distributed the remaining funds to himself as he was the main shareholder of the Company.

113. I accept that the Company did not comply with the provisions of the regulations which required it to seek the Commission's approval before it sought to cease its operations and liquidate its assets. Even after being informed of the Company's breaches the Commission still gave the Company an opportunity to comply with the provisions and I accept that the Company did not do so satisfactorily.

114. The evidence of the Commission that the Company was not co-operative with the joint provisional liquidators was not disputed. To my mind this bolsters the Commission's suspicions and reasons for the necessity of the order sought to be made.

115. Therefore, after considering all of the evidence and submissions put forth by the parties, I find that it would be just and equitable to accede to the Commission's petition and order the Company be wound up and I so order. I hereby appoint the Joint Provisional Liquidators as Official Liquidators of the Company, with the powers as set out in the statute.

116. The costs incurred by the Joint Provisional Liquidators and their advisors shall be costs in the winding up.

Dated this 15th day of December 2021

Hon. G. Diane Stewart