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IN THE MATTER OF THE *SECURITIES ACT*,
R.S.O. 1990, c. S.5, AS AMENDED

- AND -

IN THE MATTER OF HOWARD RASH

REASONS FOR ORDER

Hearing: July 26, 2006

Panel:	Wendell S. Wigle, Q.C.	-	Commissioner (Chair of the Panel)
	Robert W. Davis, FCA	-	Commissioner
Counsel:	Pamela Foy	-	On behalf of Staff of the Ontario Securities Commission
	Janice Wright Sara Erskine	-	On behalf of Howard Rash

REASONS FOR ORDER

OVERVIEW

[1] On July 26, 2006, a hearing was held to determine whether the respondent Howard Rash ("Rash") violated a cease-trade order issued by the Commission on July 8, 2005 (the "Cease Trade Order"). The Cease Trade Order provided that all trading in any securities by Rash cease until the conclusion of the hearing on the merits pursuant to section 127 of the *Securities Act*, R.S.O. 1990, c. S.5, as amended (the "Act") involving Rash, other individual respondents and Momentas Corporation ("Momentas"). Three limited exceptions were included in the Cease Trade Order, which are set out below.

[2] In connection with the alleged violation of the Cease Trade Order, the Commission issued a Notice of Hearing in relation to a Statement of Allegations issued by Staff against Rash on July 19, 2006. The Statement of Allegations and the Notice of Hearing were issued following a freeze direction that was issued by the Commission pursuant to section 126 of the Act, which had the effect of freezing all of the assets in two accounts at Dundee Securities ("Dundee") in the name of Panterra Offshore Financial Services ("Panterra").

[3] In their Statement of Allegations, Staff alleged that Rash gave instructions to sell shares of Genoil Inc. ("Genoil") and Agau Resources Inc. ("Agau") in a corporate account held at Dundee in the name of Panterra, an account over which Rash had sole trading authority (the "Panterra Account") and thereby violated the Cease Trade Order. Rash disputed Staff's allegations and submitted that the trading activities at issue were permissible under the Cease Trade Order.

[4] In the Notice of Hearing, Staff asked the Commission to make an order that Rash cease trading in securities permanently or for such period as specified by the Commission; that any exemptions contained in Ontario securities law do not apply to Rash permanently or for such period as specified by the Commission; that Rash be prohibited from becoming or acting as a director or officer of any issuer; that Rash disgorge to the Commission any amounts obtained as a result of non-compliance with Ontario securities law; and that Rash pay the costs of Staff's investigation and the costs of, or related to, the hearing, incurred by or on behalf of the Commission.

[5] Based on the evidence adduced at the hearing, we have concluded that Rash traded in the Panterra Account in breach of the Cease Trade Order and that his conduct was in contravention of Ontario securities law and contrary to the public interest. On July 27, 2006, we issued an Order against Rash that all trading in any securities by Rash shall cease for a period of three years from the date of this Order; that any exemptions contained in Ontario securities law do not apply to Rash for a period of three years from the date of the Order; and that Rash pay the costs of Staff's investigation and the costs of, or related to, the hearing,

incurred by or on behalf of the Commission fixed in the amount of $15,000. These are our reasons for that Order.

THE CEASE TRADE ORDER

[6] The conduct at issue was the alleged violation by Rash of a Cease Trade Order issued by the Commission on July 8, 2005. For ease of reference, we provide the following information regarding the issuance and extension of the cease trade orders by the Commission against the individual respondents, including Rash, and Momentas Corporation.

[7] On June 9, 2005, the Commission ordered that all trading by Momentas Corporation and its officers, directors, employees and/or agents in securities of Momentas shall cease, pursuant to paragraph 2 of subsection 127(1) of the Act, (the "Temporary Order").

[8] The Commission further ordered as part of the Temporary Order that all trading in any securities by Howard Rash ("Rash"), Alexander Funt ("Funt") and Suzanne Morrison ("Morrison") shall cease; and that, pursuant to paragraph 3 of subsection 127(1) of the Act, any exemptions contained in Ontario securities law do not apply to Momentas, Rash, Funt and Morrison.

[9] On June 24, 2005, the Commission issued a Notice of Hearing pursuant to subsection 127(1) and section 127.1 of the Act and an accompanying Statement of Allegations against Momentas, Rash, Funt and Morrison and extended the Temporary Order on consent of the parties until July 8, 2005.

[10] On July, 8, 2005, Rash, Funt and Morrison consented to and the Commission ordered an extension of the Temporary Order as it relates to them until the conclusion of the hearing of this matter (the "Cease Trade Order"), with the following exceptions:

(a) each of Rash, Funt and Morrison shall be permitted to trade securities *for his or her own account(s)* through a registered dealer pursuant to paragraph 10 of subsection 35(1) of the Act; (emphasis added)

(b) each of Rash, Funt and Morrison shall be permitted to trade in mutual fund units and securities described in paragraphs 1 and 2 of subsection 35(2) of the Act; and

(c) each of Rash, Funt and Morrison shall be permitted to trade in securities for their registered retirement savings plan or registered retirement income fund pursuant to

section 2.11 of Rule 45-501.

[11] On July 14, 2005, the Commission ordered that all trading by Momentas shall cease, including trading in equities and in foreign currencies, and all exemptions contained in Ontario securities laws shall not apply to Momentas until the earlier of the conclusion of the Hearing in this matter or the date upon which Momentas becomes registered with the Commission as a Limited Market Dealer and any of its officers, directors, and/or employees involved in the sale of securities of Momentas to the public become registered in accordance with Ontario securities law, subject to certain exceptions set out in the Order.

BREACH OF THE CEASE TRADE ORDER

[12] The Cease Trade Order permits Rash to trade securities for his own account(s) through a registered dealer. It is the interpretation of the words "for his own account(s)" used in the Cease Trade Order that led to a dispute between Staff and Rash. The meaning of these words was central to determine whether Rash's instructions to Dundee to sell shares of Genoil and Agau in the Panterra Account were in violation of the Cease Trade Order.

Parties' Submissions

[13] Staff submitted that Rash's trading activities were in violation of the Cease Trade Order as trading through a corporate entity was not allowed by the words "for his own account(s)". Staff took the position that these words meant that Rash was only entitled to trade in a personal account opened in his name only.

[14] Staff argued that although the Cease Trade Order provided exceptions for personal trading, trading through the auspices of a corporation was not consistent with the wording or spirit of that Order. In making this submission, Staff referred us to the overall context of the Act as well as the purposes of the Act set out in section 1.1 of the Act.

[15] Staff submitted that the registration provisions of the Act allow a person or company to trade on their own behalf without being registered but that the Act does not allow individuals to trade on account of others without registration unless there are specific exemptions that apply. According to Staff, if the phrase "trading on his own account(s)" meant trading by Rash in accounts in which he has sole legal and beneficial ownership as well as accounts in the name of corporate entities in which he has some beneficial interest in, then the Cease Trade Order would be rendered ineffective because such a broad carve-out would effectually only prohibit that which the Act already prohibits. In other words, there would be no reason to have Cease Trade Order in effect which allows Rash as an unregistered person to do what he was entitled to do prior to the issuance of the Cease Trade Order.

[16] The respondent took the position that that language used in the Cease Trade Order permits trading in accounts that are beneficially owned or legally owned by Rash. Counsel for Rash submitted that the Cease Trade Order was clearly designed to allow this type of trading and, any ambiguity ought to fall in favour of the respondent. Counsel further submitted that it is not appropriate nor is it fair to draw a conclusion that there is an ambiguity in an Order and then seek to punish the respondent for this ambiguity.

[17] Counsel for Rash further submitted that Rash's interpretation was wholly appropriate and correct when considering the context and purpose of the Act. The purposes of cease trade orders are to protect the public interest and to ensure that respondents such as Rash are not dealing with the public or with third parties in order to protect the public and the capital markets. Counsel submitted that Staff was seeking a very narrow view, a strict interpretation of the carve-out language in the Cease Trade Order.

Evidence and Analysis

[18] Staff provided us with documentary evidence to establish the occurrence of the alleged trading activities. In particular, Staff filed a document which sets out the division and the ownership of the shares in the company of Panterra. At the hearing, Staff also acknowledged that at the time of trading, Rash was a sole officer, director and sole shareholder of Panterra.

[19] At the hearing, we heard the evidence of Sean McGratten, a senior legal counsel with Dundee Securities ("McGratten") and Shauna Flynn, an investigation counsel with the Enforcement Branch of the Commission ("Flynn").

[20] McGratten testified that, on July 4, 2006, Rash contacted Brian Ferguson (Ferguson), the sales assistant to Brian Gibson, who was the registered salesperson on the Panterra account. He gave two sell orders, one was for 12,000 shares of GENOIL Inc. and the other was for 9,000 shares of AGAU Resources. Ferguson, on receiving Rash's request contacted the compliance department at Dundee because the Panterra account had been restricted. Larry Fraser ("Fraser"), the compliance officer who received the call, noted the restriction but due to miscommunication as to the nature of the restriction said that the sell orders would be allowed although purchases would not be permitted. On that basis, Ferguson entered the order which subsequently led to the trades at issue.

[21] Fraser brought to the attention of McGratten the fact that the account was restricted due to: (1) a lack of updated communication to ascertain who had the authority to give instructions on behalf of the corporation; and (2) a request made by Rash that a cheque be issued in respect of the proceeds. After receiving this information, McGratten did research

on the Commission's Website and found the Cease Trade Order. Upon reviewing the Cease Trade Order, McGratten became concerned that implementing Rash's instructions would result in a violation of the Cease Trade Order.

[22] McGratten decided to contact Rash to discuss the interpretation of the Cease Trade Order. McGratten testified that Rash disputed the interpretation of the Cease Trade Order, and that Rash was of the view that he was permitted to trade as long as it was through a registered dealer. Following that conversation with Rash, McGratten contacted outside counsel to confirm his interpretation of the wording used in the Cease Trade Order.

[23] On July 7, 2006, Rash provided Dundee with updated corporate documentation regarding Panterra. That documentation changed the signing authority to Ms. Irene Gruenstein, the spouse of Rash. Rash then asked McGratten whether Dundee would be willing to proceed now that he was no longer the person with the signing authority on the account. McGratten raised his concern with Rash that it could be perceived that Dundee would be helping him to do indirectly what he could not do directly under the Cease Trade Order and that, accordingly, the freeze would remain in place on the account.

[24] Counsel for Rash submitted that Rash did not violate the Cease Trade Order and referred us to the language used in other cease trade orders issued by the Commission.

[25] Counsel for Rash referred us to the wording used in the decisions of *Valentine*, *Donnini*, *Lett* and *Allen.* Counsel submitted that if the Commission's intention was to limit Rash's trading activities in the manner argued by Staff, the Commission could have drafted the Cease Trade Order more explicitly [*Re Valentine*, 2003, 26 O.S.C.B. 1606; *Re Donnini*, 2002, 25 O.S.C.B. 6216, *Re Lett*, 2004; *Re Allen*, 2006, 19 O.S.C.B. 3944]. We disagreed with counsel for Rash and did not find that it was helpful to look at the wording of these orders. Each order is fact-specific and we find these orders to be unhelpful in this case. The interpretation of the words "for his own account(s)" is plain and obvious. These words do not allow for trading though corporate vehicles even if Rash is the beneficial owner.

[26] The initial Order prohibited any trading by Rash. Later, the Commission maintained this prohibition by continuing a Cease Trade Order but allowed for certain limited exceptions. These limited exceptions cannot be interpreted so broadly as to essentially render the Cease Trade Order ineffective. An interpretation which allows trading both in a personal capacity and in a corporate capacity would be inconsistent with the purposes of the Act.

[27] Further, the evidence before us established how easy it was for Rash to transfer the beneficial ownership from him to his spouse on July 6, 2006. The July 6, 2006 new account application form identities as of July 6, 2006, Ms. Gruenstein was the beneficial owner of the account, whereas the day before it was Rash.

[28] We agreed with Staff that there is an issue with the transparency of trading activities through corporate vehicles. Corporate vehicles makes trading activities less transparent both from a regulatory perspective and for registrants acting as gatekeepers to the capital markets. Allowing trading activities through corporate vehicles could result in having the public interest not adequately protected.

[29] The evidence established that Rash traded in the Panterra Account. Further, Rash did not ensure that his trading activities fell within the exceptions of the Cease Trade Order. As a person seeking to comply with an exception to the trading ban set out in the Cease Trade Order, the onus was on Rash to ensured that his activities fell within these exceptions. Rather, when confronted with Dundee's interpretation of the Cease Trade Order, Rash's immediate response was first to transfer trading authority to his spouse and beneficial ownership in Panterra to his spouse in order to get around the interpretation and secondly, to advise through counsel that, if Dundee did not essentially agree with his interpretation and act on his instructions, the would transfer the account out of Dundee.

[30] Rash did not attempt to file an application under section 144 of the Act nor did he file a motion for direction to resolve any difficulty encountered by the Cease Trade Order. Further, rash did not attempt to contact Staff to seek clarification of the Cease Trade Order.

[31] Based on the foregoing evidence and analysis, we found that Rash violated the Cease Trade Order.

[32] In the Notice of Hearing, Staff asked the Commission to make an order pursuant to paragraph 2 of subsection 127(1) that Rash cease trading in securities permanently or for such period as specified by the Commission; pursuant to paragraph 3 of subsection 127(1) that any exemptions contained in Ontario securities law do not apply to Rash permanently or for such period as specified by the Commission; pursuant to paragraph 8 of subsection 127(1) that Rash be prohibited from becoming or acting as a director or officer of any issuer; pursuant to paragraph 10 of subsection 127(1) that Rash disgorge to the Commission any amounts obtained as a result of non-compliance with Ontario securities law; pursuant to section 127.1 that Rash pay the costs of Staff's investigation and the costs of, or related to, the hearing, incurred by or on behalf of the Commission.

[33] In their closing submissions, Staff specifically asked that the Commission make an order pursuant to paragraph 2 of subsection 127(1) that Rash cease trading in securities permanently and that Rash pay an administrative monetary penalty of $15,000. Staff also sought costs in the amount of $19,000.

[34] Counsel for Rash submitted that the appropriate sanction in the circumstances of this case was for a declaration to be made that Rash was in breach of the Cease Trade Order. Counsel argued that the sanctions suggested by Staff should not be ordered by the Commission and hence did not make alternative submissions as to sanctions.

COSTS

[35] Staff asked the Commission to make an order pursuant to section 127.1 that Rash pay the costs of Staff's investigation and the costs of, or related to, the hearing, incurred by or on behalf of the Commission in the amount of $19,000.

[36] Counsel for Rash submitted that the Commission should not order costs against Rash because Rash acted in a reasonable fashion in dealing with this dispute. Counsel submitted that this was not a case where the Commission could find callous disregard for orders of the Commission.

[37] Rash's decision not to communicate with Staff to ensure that his activities were within the limited exceptions led Staff to initiate proceedings against him and resulted in costs of $19,000 for the Commission.

[38] As stated in *Re Tindall*, (2000) 23 O.S.C.B. 6889 at para 68, the purpose of a costs award under section 127.1 is not to punish, but to indemnify the Commission for expenses incurred and to exercise some control over the hearing process. The reasonableness of a respondent does not nullify a request for costs.

[39] The seriousness of the charges and the conduct of the parties; whether a respondent's conduct was abusive of the process; the greater investigative/hearing costs that the specific conduct of a respondent required in the case (see *Re YBM Magnex International Inc.* cited above at paras. 606 and 608); and the reasonableness of the costs requested by staff (see *Re Lydia Diamond Exploration of Canada*, (2003), 26 O.S.C.B. 2511 at para. 217) are factors that can be considered by the Commission.

[40] Staff adduced documentary evidence to support their claim for costs including timesheets calculated for the hours of work completed on the file by two staff members: Pamela Foy, Litigation Counsel with the Enforcement Branch and Shauna Flynn, Investigation Counsel with the Enforcement Branch. Costs for other staff members who assisted in this matter were not included.

[41] In this case, the evidence of staff establishes that the costs claimed for the hearing are appropriate and reasonable.

[42] Rash was represented by counsel and was provided with a fair opportunity to assess Staff's claim for costs but did not file evidence or make submissions to challenge these costs other than arguing that $19,000.00 in costs for a one-day hearing seemed to be exorbitant.

CONCLUSION

[43] Based on the foregoing evidence and analysis, we made our Order dated July 27, 2006 that:

> (a) pursuant to paragraph 2 of subsection 127(1) that all trading in any securities by Rash shall cease for a period of three years from the date of this Order;
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> (b) pursuant to paragraph 3 of subsection 127(1) that any exemptions contained in Ontario securities law do not apply to Rash for a period of three years from the date of this Order; and
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> (c) pursuant to section 127.1 that Rash pay the costs of Staff's investigation and the costs of, or related to, the hearing, incurred by or on behalf of the Commission fixed in the amount of $15,000.

[44] Although we found that a violation of a Commission's order is a very serious matter, we did not find that this case warranted an order that Rash pay an administrative monetary penalty. In deciding this issue, we considered the fact that Rash did not attempt to conceal his conduct.

[45] We were of the view that it was appropriate to award costs against Rash in the amount of $15,000.00 and interest as required by law. In coming to this decision to reduce the amount of costs sought by Staff, we took into consideration the fact that Rash did not attempt to conceal his conduct during the investigation nor acted in a manner that was unreasonable at the hearing.

DATED at Toronto this 5th day of September, 2006.

"Wendell S. Wigle"	"Robert W. Davis"
Wendell S. Wigle, Q.C.	Robert W. Davis, FCA