Ontario Securities Commission
Commission des valeurs mobilières de l'Ontario
P.O. Box 55, 19th Floor 20 Queen Street West Toronto ON M5H 3S8
CP 55, 19e étage 20, rue queen ouest Toronto ON M5H 3S8

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

AND

**IN THE MATTER OF RODNEY INTERNATIONAL,
CHOEUN CHHEAN (ALSO KNOWN AS PAULETTE C. CHHEAN) AND
MICHAEL A. GITTENS (ALSO KNOWN AS ALEXANDER M. GITTENS)**

REASONS AND DECISION ON SANCTIONS AND COSTS

Hearing:	February 11, 2009	
Decision:	March 6, 2009	
Panel:	Wendell S. Wigle, Q.C.	- Commissioner and Chair of the Panel
	Suresh Thakrar	- Commissioner
Counsel:	Matthew Britton	- For the Ontario Securities Commission
	Michele Brady (Student)	
	No one appeared for Rodney International or Michael A. Gittens	

REASONS AND DECISION ON SANCTIONS AND COSTS

I. Background

[1] This was a bifurcated hearing before the Ontario Securities Commission (the "Commission") pursuant to sections 127 and 127.1 of the Securities Act, R.S.O. 1990, c. S.5, as amended (the "Act"). The hearing on the merits was held on September 18, 2008 and a decision was rendered on November 19, 2008, whereby the Commission found that Rodney International ("Rodney") and Michael A. Gittens (also known as Alexander M. Gittens) ("Gittens") (collectively the "Respondents") violated registration and prospectus requirements under the Act with respect to the sale of Rodney securities.

[2] Following the release of the decision for the hearing on the merits (*Re Rodney International* (2008), 31 O.S.C.B. 11393 (the "Rodney Merits Decision")), we held a separate hearing (the "Sanctions and Costs Hearing"), on February 11, 2009, to consider additional evidence and submissions from Staff and the Respondents regarding sanctions and costs.

[3] The Sanctions and Costs Hearing, held on February 11, 2009, was attended by Staff of the Commission ("Staff"); the Respondents did not attend.

[4] At the conclusion of the Sanctions and Costs Hearing, based on the uncontested submissions of Staff, the Panel gave an oral ruling approving Staff's recommended order, and an Order was issued on February 11, 2009.

[5] These are our reasons for the Order issued in this matter on February 11, 2009.

II. Reasons and Decision Dated November 19, 2008

[6] At the hearing on the merits, counsel for Staff advised that Staff would not be proceeding against Choeun Chhean (also known as Paulette C. Chhean) ("Chhean"). Staff subsequently filed a Notice of Withdrawal with respect to Chhean on October 6, 2008, effective September 18, 2008. Accordingly, at the hearing on the merits no findings or orders were made with respect to Chhean.

[7] Upon considering the evidence, the following findings were made with respect to the Respondents:

(a) by advertising an investment product, soliciting investors and accepting and depositing into the Rodney account at least one cheque from an investor, Gittens and Rodney engaged in an "act, advertisement, solicitation, conduct or negotiation directly or indirectly in furtherance of" a "trade" as that term is defined in subsection 1(1) of the Act;

(b) as neither Gittens nor Rodney is registered with the Commission, they breached subsection 25(1) of the Act in that they traded in securities without being registered, no exemption being available; and

(c) Gittens and Rodney breached subsection 53(1) of the Act by distributing securities without a preliminary prospectus and a prospectus having been filed and receipts having been issued by the Commission.

[8] It is this conduct that we must consider when determining the appropriate sanctions to apply in this matter.

III. The Respondent's Failure to Appear at the Sanction and Costs Hearing

[9] At the hearing on the merits, on September 18, 2008, no one attended on behalf of the Respondents. In the Rodney Merits Decision the Commission made the following finding:

> In light of the circumstances, we accept that Gittens was served with the Statement of Allegations and the Notice of Hearing, as well as the August 5, 2008 Temporary Order, and that he received sufficient notice that a hearing on the merits would take place on September 18, 2008, but advised Staff that he would not attend. In the circumstances, considering Staff's inability to find Gittens' current mailing address, we are satisfied this was sufficient. (Rodney Merits Decision, *supra* at para. 14)

[10] At the Sanctions and Costs Hearing, Staff submitted that they contacted Gittens by phone and obtained from him an address, to which they could send notification of the date of the Sanctions and Costs Hearing. Staff further submitted that they sent a letter dated February 4, 2009 to Gittens, at the address that Gittens provided, notifying him of the date of the Sanctions and Costs Hearing, however that letter was returned with a note that there was no one residing at the address.

[11] We are satisfied that Staff has made sufficient efforts to notify the Respondents about the Sanctions and Costs Hearing hearing.

[12] Accordingly, having satisfied ourselves that Staff took sufficient efforts to notify the Respondents about the Sanctions and Costs Hearing we continued the hearing in the absence of the Respondents, as permitted pursuant to section 7 of the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22 ("SPPA").

IV. Sanctions Requested by Staff

[13] Staff requested that the following sanctions be ordered in this matter:

(a) that the Respondents cease trading for 10 years;

(b) that the Respondents cease the acquisition of securities for 10 years;

(c) that the exemptions contained in Ontario securities law not apply to them for 10 years;

(d) that the Respondent, Gittens, resign any position he holds as an officer or director of any issuer;

(e) that the Respondent, Gittens, be prohibited from becoming or acting as a director of any issuer for 10 years; and

(f) that the Respondent be reprimanded

[14] Staff also requested a costs award of $2,000 for the costs of the investigation and hearing in this matter.

[15] Staff submitted that these sanctions were appropriate in light of the fact that the allegations and findings in the Rodney Merits Decision are serious ones.

[16] Staff submitted that although the evidence did not establish that the Respondents were successful in obtaining large amounts from investors, they appear to have been prevented from continuing their scheme due to the quick response of regulators in the U.S.A. and Canada.

[17] Staff submitted, and we agree, that when respondents engage in serious misconduct involving a scheme to deprive investors of their money, there is a strong likelihood that they will not be deterred by protective orders and will engage in similar conduct in the future. As a result the Commission must craft an order which will protect investors from the potential future misconduct of the Respondents and, at the same time, send a deterrent message to persons who may contemplate committing similar abusive acts upon investors. The Commission must also send a message to like-minded persons that Ontario will not be allowed to be a base from which to engage in securities schemes against foreign residents.

V. Analysis and Conclusion

[18] In considering Staff's submissions, we were guided by the mandate of the Commission as outlined in section 1.1 of the Act:

(a) to provide protection to investors from unfair, improper or fraudulent practices; and

(b) to foster fair and efficient capital markets and confidence in the capital markets.

[19] Further, as stated in *Re Momentas et. al.* (2007), 30 O.S.C.B. 6475 ("*Momentas"*) at para. 40, the Commission has "… a duty to take steps to make sure that manipulative or other improper practices in the financial marketplace are not tolerated … and this can be accomplished by ensuring that the appropriate sanctions are imposed to deter similar conduct from occurring in the future."

[20] Staff submitted, and we agree, that our role is not to punish the Respondents but rather to make an order that will protect investors and prevent their exposure to similar conduct in the future. The *Momentas* case, cited by Staff, refers to the following quote by the Commission in *Mithras Management Ltd*. (1990), 13 O.S.C.B. 1600 ("*Mithras"*) at 1610 and 1611:

> […] the role of this Commission is to protect the public interest by removing from the capital markets -- wholly or partially, permanently or temporarily, as the circumstances may warrant -- those whose conduct in the past leads us to conclude that their conduct in the future may well be detrimental to the integrity of those capital markets. We are not here to punish past conduct; that is the role of the courts, particularly under section 118 [now 122] of the Act. We are here to restrain, as best we can, future conduct that is likely to be prejudicial to the public interest in having capital markets that are both fair and efficient. In so doing we must, of necessity, look to past conduct as a guide to what we believe a person's future conduct might reasonably be expected to be ... (*Momentas, supra* at para. 39)

[21] In evaluating the sanctions proposed by Staff we were guided by the sanctioning factors listed in *Re Belteco Holdings Inc.* (1998), 21 O.S.C.B. 7743, which Staff referred us to in their submissions. These factors are:

(a) the seriousness of the allegations;

(b) the respondent's experience in the marketplace;

(c) the level of a respondent's activity in the marketplace;

(d) whether or not there has been a recognition of the seriousness of the improprieties;

(e) whether or not the sanctions imposed may serve to deter not only those involved in the case being considered, but any like-minded people from engaging in similar abuses of the capital markets;

(f) any mitigating factors; and

(g) the remorse of the respondent.

[22] In addition, the *Momentas* case, cited by Staff, also refers to additional sanctioning factors set out in *Re M.C.J.C. Holdings Inc*. (2002), 25 O.S.C.B. 1133 at para. 26. These additional factors are:

(a) the size of any profit or loss avoided from the illegal conduct;

(b) the size of any financial sanctions or voluntary payment when considering other factors;

(c) the effect any sanction might have on the ability of a respondent to participate without check in the capital markets;

(d) the reputation and prestige of the respondent; and

(e) the shame or financial pain that any sanction would reasonably cause to the respondent and the remorse of that respondent.

(*Momentas*, *supra* at para. 42)

[23] Applying the above sanctioning factors to the specific facts of this case, we find that by acting in a manner that is contrary to the public interest through the unauthorized trading in and distribution of securities, the Respondents have committed a serious breach of Ontario securities law.

[24] We note that the Respondents did not participate in the hearing and we have no evidence of remorse on the part of the Respondents, nor do we have any evidence of mitigating factors.

[25] We are of the view that sanctions are needed to protect investors by deterring the Respondents from engaging in similar conduct in the future and at the same time send a deterrent message to persons who may contemplate committing similar abusive acts upon investors. In our view, the combination of the sanctions imposed achieve this goal.

[26] We have reviewed Staff's proposed sanctions against the sanctions ordered in *Momentas*, a case which also involved illegal distribution of securities. In *Momentas*, investors lost almost $8,000,000 and as a result, in addition to a disgorgement order, the principal participants in the

illegal distribution were permanently cease traded and permanently banned from being or acting as directors or officers of any issuer.

[27] In the present matter before us, while the Respondents engaged in a scheme to deprive investors of their money and acted in a manner contrary to the public interest, the evidence is that only one unidentified investor lost money. We therefore find that the 10 year cease trade ban for both Respondents and the 10 year director and officer ban for Gittens is appropriate.

[28] Staff sought an order requiring that Gittens and Rodney be jointly and severally responsible for a portion of the costs of the investigation and hearing in this matter in the amount of $2,000. Given the nature, timing and length of the proceeding and the relative narrowness of the issues, we find that $2,000 in costs is appropriate.

[29] Accordingly, by Order dated February 11, 2009, we ordered that:

1. Pursuant to clause 2 of subsection 127(1) of the Act, trading in any securities by each of the Respondents, Gittens and Rodney, cease for a period of 10 years from the date of this Order;

2. Pursuant to clause 2.1 of subsection 127(1) of the Act, the acquisition of any securities by each of the Respondents, Gittens and Rodney, cease for a period of 10 years from the date of this Order;

3. Pursuant to clause 3 of subsection 127(1) of the Act, any exemptions contained in Ontario securities law do not apply to each of the Respondents, Gittens and Rodney, for a period of 10 years from the date of this Order;

4. Pursuant to clause 7 of subsection 127(1) of the Act, the Respondent, Gittens, resign all positions as a director or officer of any issuer;

5. Pursuant to clause 8 of subsection 127(1) of the Act, the Respondent, Gittens, is prohibited from becoming or acting as director or officer of any issuer for a period of 10 years from the date of this Order;

6. Pursuant to clause 6 of subsection 127(1) of the Act, the Respondent, Gittens, is reprimanded; and

7. Pursuant to section 127.1 of the Act, the Respondents, Gittens and Rodney shall jointly and severally pay the costs of Staff's investigation and the hearing in this matter in the amount of $2,000 to the Ontario Securities Commission.

DATED at Toronto this 6th day of March, 2009

"*Wendell S. Wigle*"	"*Suresh Thakrar*"
Wendell S. Wigle, Q.C.	Suresh Thakrar