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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 GRAHAM

REASONS AND DECISION
Section 127 of the *Securities Act,* R.S.O. 1990 c. S.5

Hearing:	April 9, 2009	
Decision:	September 4, 2009	
Panel:	Patrick J. LeSage, Q.C.	- Commissioner (Chair of the Panel)
	Suresh Thakrar	- Commissioner
Counsel:	Emily C. Cole	- for Staff of the Ontario Securities Commission
		- no one appeared for the respondent Howard Graham

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REASONS AND DECISION

I. BACKGROUND

[1] This matter came before the Ontario Securities Commission (the "Commission") on April 9, 2009 pursuant to s. 127 of the *Securities Act*, R.S.O. 1990, c. S.5, as amended (the "Act") to consider whether it is in the public interest to make a permanent order imposing certain sanctions against Howard Graham ("Graham").

[2] A Notice of Hearing was issued by the Commission on March 18, 2009, in relation to a Statement of Allegations issued by Staff of the Commission ("Staff") on the same date.

[3] On December 23, 2008, the United States District Court for the District of Massachusetts entered a final judgment (the "Final Judgment") against Graham (a resident of Kingston, Ontario) and against Braintree Energy Inc. ("Braintree"), a corporation domiciled in the United States (the U.S.). This flowed from a civil fraud complaint against Graham and Braintree in the United States District Court – District of Massachusetts (the "Complaint") filed by the United States Securities and Exchange Commission (the "SEC"), relating specifically to the fraudulent offering and sale of unregistered securities, investment contracts and/or fractional interests in oil and gas leases.

[4] Staff asserts that the conduct of Graham which formed the basis of the Final Judgment, is conduct contrary to the public interest, and is applying under s. 127(10) of the Act (the inter-jurisdictional enforcement provision) for a permanent order against Graham on such grounds.

[5] Staff relies on s. 127(10) para. 3 of the Act, which provides that the Commission may make an order under s. 127(1) or s. 127(5) "in respect of a person or company if … [t]he person or company has been found by a court in any jurisdiction to have contravened the laws of the jurisdiction respecting the buying or selling of securities."

[6] This panel's role is to determine whether it is in the public interest that such sanctions be imposed.

[7] Graham is a Canadian citizen who resides in Kingston, Ontario. Graham was the President of and/or controlled Braintree during the relevant time. He has never been registered with the Commission nor has he ever applied for any exemptions from the registration requirements of the Act.

[8] This hearing was originally scheduled to take place on March 26, 2009, but was adjourned at the request of Graham's U.S. counsel, Richard Hewitt ("Hewitt"), and with Staff's consent to April 9, 2009 (the "Adjournment Order").

[9] Staff filed written submissions in advance of the hearing to accompany their oral arguments.

[10] Graham was not present at the hearing, but Staff informed us that Hewitt, on behalf of his client, neither opposes nor supports the permanent order sought by Staff.

II. PRELIMINARY ISSUES

A. Service and Failure to Appear at the Hearing

[11] It is well established that if an oral hearing is held, a party is entitled to notice of it and to be present at all times while evidence and submissions are being presented. However, pursuant to s. 7 of the *Statutory Powers Procedure Act*, R.S.O. 1990 c. S.22 (the "SPPA"), where a party who has been given proper notice of a hearing fails to respond or to attend, the tribunal may proceed in the party's absence and the party is not entitled to any further notice in the proceeding.

[12] Graham was not present at the hearing, but we are satisfied that he received a copy of the Notice of Hearing, a copy of the Statement of Allegations, as well as a copy of the Adjournment Order. Staff served Graham through his counsel by email, and Graham's counsel confirmed receipt of the Notice of Hearing and Statement of Allegations by email.

III. ANALYSIS

A. The Final Judgment

[13] Staff submits that Graham's conduct in the United States, which resulted in the Final Judgment being made against him, is conduct contrary to the public interest.

[14] On February 20, 2007, the SEC filed the Complaint. The Complaint asserts that Graham orchestrated a scheme that involved a "fraudulent offering and sale of unregistered securities" through Braintree, a company incorporated in the state of Massachusetts. Braintree's principal office was located in Cheshire, Massachusetts, and was in the business of selling investment contracts and/or fractional interests in oil and gas leases for drilling projects operated by Premier Minerals Inc.

[15] The SEC alleged that Graham was the principal of Braintree and controlled the company at all relevant times. Graham was listed as the president and a director in Braintree's 2003 Annual Report, filed with Massachusetts' Corporations Division.

[16] In particular, the SEC alleged in the Complaint that Graham orchestrated a scheme through Braintree involving a fraudulent offering and sale of unregistered securities in the form of investment contracts and/or fractional interests in oil and gas leases, and in doing so:

> …made numerous oral and written misrepresentations between at least 2000 through 2006 to more than 200 investors nationwide and in foreign countries regarding the investors' expected rate of return and their associated investment risks. Defendants routinely communicated to investors that they could expect to

> earn between 500-900% on their investments, with little or no risk. Moreover, Defendants failed to disclose many material facts to the investors, including that Graham intended to and was routinely diverting up to 30% of investor funds for his personal use. As a result of the scheme detailed herein, Defendants obtained at least [US] $9 million in investor funds and Graham diverted approximately [US] $3 million towards his personal use.

[17] Furthermore, the SEC asserted that Graham and Braintree raised at least US $9 million from at least 200 investors residing in the United States and other countries, and that "most investors have received no profits … have not even recovered their initial investments … [and have] suffered significant losses".

[18] The SEC also alleged that throughout the relevant period, Graham "acted intentionally, knowingly, recklessly and/or negligently".

[19] As noted earlier, on December 23, 2008, the United States District Court – District of Massachusetts entered a Final Judgment against Graham. Graham consented to the entry of the Final Judgment without admitting or denying the allegations of the Complaint, with the exception that he accepted that the court had jurisdiction over the matter. Graham also waived findings of fact or conclusions of law and any right to appeal the Final Judgment.

[20] The Final Judgement, amongst other things, ordered that Graham be permanently restrained and enjoined from violating directly or indirectly s. 10(b) and s. 5(a) of the *Securities Exchange Act of 1934*, 15 U.S.C. § 78a [U.S.A.], and s. 17(a), s. 5(a), and s. 5(c) of the *Securities Act of 1933*, 15 U.S.C. § 77a [U.S.A.]. That judgment also ordered Graham to disgorge US $3,149,903.60 which represents "profits gained as a result of the conduct alleged in the Complaint" together with prejudgment interest, and that he pay a civil penalty in the amount of US $120,000.

B. Section 127(10) of the Act and the Permanent Order Sought by Staff

[21] Section 127(10) of the Act, which came into force on November 27, 2008, provides the following:

> 127(10) **Inter-jurisdictional enforcement -** Without limiting the generality of subsections (1) and (5), an order may be made under subsection (1) or (5) in respect of a person or company if any of the following circumstances exist:
>
> 1. The person or company has been convicted in any jurisdiction of an offence arising from a transaction, business or course of conduct related to securities.
>
> 2. The person or company has been convicted in any jurisdiction of an offence under a law respecting the buying or selling of securities.

3. The person or company has been found by a court in any jurisdiction to have contravened the laws of the jurisdiction respecting the buying or selling of securities.

4. The person or company is subject to an order made by a securities regulatory authority in any jurisdiction imposing sanctions, conditions, restrictions or requirements on the person or company.

5. The person or company has agreed with a securities regulatory authority in any jurisdiction to be made subject to sanctions, conditions, restrictions or requirements.

[22] Staff submit that there is significant evidence of misconduct by Graham which is harmful to the public interest, and consequently seek a permanent order against Graham in order to protect Ontario capital markets. They seek the following order:

a) trading in any securities by Graham cease permanently pursuant to s. 127(1) para. 2 of the Act;

b) the acquisition of any securities by Graham be prohibited permanently pursuant to s. 127(1) para. 2.1 of the Act;

c) any exemptions contained in Ontario securities laws do not apply to Graham pursuant to s. 127(1) para. 3 of the Act;

d) Graham resigns any positions he holds as a director or officer of an issuer pursuant to s. 127(1) para. 7 of the Act; and that,

e) Graham be prohibited from becoming or acting as a director or officer of any issuer pursuant to s. 127(1) para. 8 of the Act.

C. Findings

[23] Staff submits that s. 127(10) is applicable to these proceedings because the Final Judgment is a decision of a Court that its laws of its jurisdiction respecting the buying or selling of securities have been contravened. We agree.

[24] Having determined that Staff may rely on s. 127(10) para. 3 in this case, the question becomes whether sanctions are in the public interest and, if so whether the permanent order proposed by Staff is appropriate, taking into account all the circumstances.

D. Should Sanctions be Imposed?

[25] In considering whether the public interest requires that an order be made against Graham, we are guided by the underlying purposes of the Act, as set out in s. 1.1:

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

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

[26] We are also guided by the fundamental principles of the Act as enunciated by s. 2.1 which include:

- restrictions on fraudulent and unfair market practices and procedures;
- requirements for the maintenance of high standards of fitness and business conduct to ensure honest and responsible conduct by market participants;
- effective and responsive securities regulation requires timely, open and efficient administration and enforcement of the Act by the Commission; and
- integration of capital markets is supported and promoted by the sound and responsible harmonization and co-ordination of securities regulation regimes.

[27] In making an order under s. 127 of the Act, the Commission exercises its public interest jurisdiction in a protective and preventative manner. As stated in *Re Mithras Management Ltd*. (1990), 13 O.S.C.B. 1600 at pp. 1610-1611:

> …, 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 doing so 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; we are not prescient, after all.

[28] Although the United States District Court did not make specific findings of fact in its judgment, Staff submits, and we agree, that we may consider the facts set out in the Complaint because they form the basis of the judgment. As stated in *In the Matter of Marshall E. Melton and Asset Management & Research, Inc*., 2003 SEC LEXIS 1767 at p.8 (SEC)(Lexis) ("Melton"), in which the SEC outlined its approach to consent injunctions:

> We hereby take this opportunity to refine and expand, for future cases, our policy for administrative disciplinary proceedings based on consent injunctions – and, in

particular, antifraud injunctions – that are both agreed to and entered by a court in Commission enforcement actions after issuance of this opinion. The policy reflects our view of the meaning that a settlement in a Commission injunctive action will have for a disciplinary proceedings against the same party.

…

As noted above, the … *Act* draws no distinction between injunctions entered after litigation or by consent. **We do not believe that the statutes require the Enforcement Division to prove the allegations of an injunctive complaint in a follow-on administrative proceeding before any disciplinary action can be taken.**

…

For purposes of consent injunctions that are agreed to and entered by a court after issuance of this opinion, we will construe the "neither admit nor deny" language as precluding a person who has consented to an injunction in a Commission enforcement action from denying the factual allegations of the injunctive actions must understand that, if the Commission institutes an administrative proceeding against them based on an injunction to which they consented after issuance of this opinion**, they may not dispute the factual allegations of the injunctive complaint in the administrative proceeding. Moreover, those allegations potentially can be dispositive of what remedial action is appropriate in the public interest.**

[Emphasis added]

[29] The rationale and the comments in Melton are relevant both to the Act and this case.

[30] Graham was obviously aware that his consent to final judgment would result in factual allegations as set out in the Complaint being used against him in the administrative proceedings before the SEC, notwithstanding his consent was on a "neither admit nor deny" basis. We accept that it is fair and in the public interest for the purpose of this s. 127(10) application that the factual allegations in the Complaint which gave rise to the consent judgment, are proper and relevant information for us to consider in determining whether an order should be issued in this application.

[31] In view of the factual allegations contained in the Complaint, we considered the following factors in determining whether sanctions against Graham are necessary in order to protect the public interest:

- the proposed sanctions by Staff are prospective in nature, and only affect Graham if he attempts to participate in the capital markets in Ontario;

- the proposed sanctions by Staff correspond with the fundamental principles that the Commission restrict "fraudulent and unfair market practices and procedures",

and maintain "high standards" of fitness and business conduct to ensure honest and responsible conduct by market participants" (s. 2.1 para. 2 of the Act);

- relying on the Final Judgment in a s. 127.(10) application, represents a timely, open and efficient administration and enforcement of the Act by the Commission (s. 2.1 para. 3 of the Act);

- Graham engaged in aggressive sales tactics, and made misrepresentations to investors regarding the expected rate of return of the securities and their associated investment risks, which included representations to investors, that they could earn between 500-900% on their investments, and that investments in Braintree were more safe than investments in certificates of deposit, despite the fact that earlier investors had lost their entire investments; and

- the scale of Graham's violation of the *Securities Act of 1933*, 15 U.S.C. §77a et seq., was large and egregious; Graham misappropriated for his personal use approximately US $3 million of the at least US $9 million raised from at least 200 investors through unregistered offerings; and

- the Complaint refers to the fact that most investors have received no profits and most have not even recovered their initial investments. Instead, most suffered significant losses.

[32] The terms of the Final Judgment indicates that Graham's conduct was a serious threat to the public interest.

[33] In our opinion, if Graham's conduct, as described in the Complaint, had occurred in Ontario with Ontario investors, that conduct would have amounted to egregious violations of Ontario securities laws, including s. 25.(1)(a) of the Act for trading in securities without registration, s. 53.(1) of the Act for distributing securities without a prospectus or receipt from the Director, s. 126.1(b) of the Act for perpetrating a fraud on investors, s. 126.2(1) of the Act for making misleading or untrue statements to investors, and s. 127.(1) of the Act for acts contrary to the public interest.

[34] In light of the reasons listed above, we find that there is strong evidence that Graham presents a potential risk to Ontario investors and that sanctions are necessary in order to protect the public interest and ensure the integrity of the Ontario capital markets.

E. The Appropriate Sanctions

[35] In determining the nature and duration of the appropriate sanctions, we consider a number of factors which include:

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 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; and

f) any mitigating factors.

(*Re Belteco Holdings Inc*. (1998), 21 O.S.C.B. 7743, at paras. 25-26)

[36] In addition, we recognize that the Supreme Court of Canada *in Re Cartaway Resources Corp.*, [2004] 1 S.C.R. 672 has affirmed that the Commission may properly impose sanctions which are a general deterrent, stating "…it is reasonable to view general deterrence as an appropriate, and perhaps necessary, consideration in making orders that are both protective and preventative."

[37] We are also mindful that in determining the appropriate sanctions in this matter, we must consider the specific circumstances to ensure that the sanctions are proportionate to the conduct involved (see *Re M.C.J.C. Holdings Inc. and Michael Cowpland*, (2002), 25 O.S.C.B. 1133 ("*Re M.C.J.C. Holdings*") at para. 26.)

[38] Graham did not make any submissions, and hence we did not have the benefit of any evidence which might tend to mitigate the risk Graham poses to the capital markets.

[39] Consequently, we find that Staff's proposed sanctions further the goals of the Act, and reflect a fair and proportionate outcome relative to Graham's conduct.

IV. CONCLUSION

[40] For the aforementioned reasons, we find it is in the public interest that: trading in any securities by Graham cease permanently; Graham be permanently prohibited from acquiring any securities; that any exemptions contained in Ontario securities law do not apply to Graham; Graham resign any position he holds as a director or officer of an issuer; and Graham be prohibited from acting as a director or officer of any issuer, as set out in our order dated September 4, 2009.

[41] Dated at Toronto this 4th day of September, 2009.

"Patrick J. LeSage"	"Suresh Thakrar"
_____	_____
Patrick J. LeSage, Q.C.	Suresh Thakrar