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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
LEHMAN BROTHERS & ASSOCIATES CORP., GREG MARKS,
KENT EMERSON LOUNDS and GREGORY WILLIAM HIGGINS

REASONS AND DECISION
(Section 127 of the Act)

Hearing:	June 6 and 8, 2011 July 5, 2011	
Decision:	December 16, 2011	
Panel:	Christopher Portner C. Wesley M. Scott	- Commissioner and Chair of the Panel - Commissioner
Appearances:	Carlo Rossi	- For the Ontario Securities Commission - No one appeared on behalf of any of the Respondents

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REASONS AND DECISION

I. BACKGROUND

A. History of the Proceeding

[1] This was a hearing before the Ontario Securities Commission (the "**Commission**"), pursuant to section 127 of the *Securities Act*, R.S.O. 1990, c. S.5, as amended (the "**Act**"), to consider whether Lehman Brothers & Associates Corp. ("**Lehman Corp.**"), Greg Marks ("**Marks**") and Kent Emerson Lounds ("**Lounds**") breached the Act and acted contrary to the public interest.

[2] On June 29, 2010, the Commission issued a temporary cease trade order in this matter against Lehman Corp., Marks, Michael (Mike) Lehman (a.k.a. Mike Laymen) ("**Lehman**"), Lounds and Gregory William Higgins ("**Higgins**") (the "**Temporary Order**"). The Commission extended the Temporary Order by orders dated July 12, 2010 and September 10, 2010. The order dated September 10, 2010 also removed Lehman from the Temporary Order. By order dated October 21, 2010, the Commission extended the Temporary Order, as amended, to the conclusion of the hearing on the merits.

[3] The merits proceeding in this matter was commenced against Lehman Corp., Marks, Lounds and Higgins by a Statement of Allegations and Notice of Hearing dated September 3, 2010. The proceeding arose from what Staff of the Commission ("**Staff**") alleges to be a fraudulent advance fee scheme involving securities of TBS New Media Ltd. ("**TBS New Media**") and TBS New Media PLC ("**TBS**").

[4] From December 2008 to May 2009 (the "**Material Time**"), certain TBS investors were solicited by Marks, a representative of Lehman Corp., to sell their shares of TBS. The investors were advised that they would have to pay advance fees in order to complete the sale of their shares. Four investors sent a total of US$146,760 to accounts controlled by either Lounds or Higgins and suffered a complete loss of the amounts paid.

[5] Staff alleges that Lehman Corp., Marks, Lounds and Higgins traded securities without complying with the registration requirement, contrary to subsection 25(1)(a) of the Act and contrary to the public interest. Staff further alleges that their conduct was fraudulent, contrary to subsection 126.1(b) of the Act and contrary to the public interest.

[6] Higgins, who is referred to in the style of cause of the Statement of Allegations and Notice of Hearing in this matter, entered into a settlement agreement with Staff. The Commission approved the settlement on June 7, 2011 ((2011), 34 O.S.C.B. 6566).

[7] The hearing on the merits in relation to Lehman Corp., Marks and Lounds (collectively, the "**Respondents**") commenced on June 6, 2011 (the "**Merits Hearing**"). We heard evidence in this matter on June 6 and 8, 2011 and closing submissions from Staff on July 5, 2011, and received Staff's written submissions dated June 29, 2011. None of the Respondents appeared in person or by counsel, or provided written submissions.

B. The Respondents

1. Lehman Corp.

[8] Lehman Corp. purported to be a brokerage firm operating from Montreal, Quebec. There is no record of Lehman Corp. having been registered to carry on business in Ontario, Quebec or elsewhere in Canada, nor is there any record of Lehman Corp. having been registered under the Act.

[9] Staff alleges that Lehman Corp. is a fictitious business.

2. Marks

[10] Marks purported to be a representative of Lehman Corp. There is no record of Marks having been registered under the Act.

[11] Staff alleges that Marks is an alias for an unknown individual.

3. Lounds

[12] Lounds is a resident of Ontario. During the Material Time, he was the registered owner of Emerson Global Holdings ("**Emerson**"). There is no record of Lounds having been registered under the Act.

C. Other Related Entities

1. TBS

[13] TBS New Media is a company incorporated pursuant to the laws of Ontario.

[14] TBS was incorporated pursuant to the laws of the United Kingdom. TBS was purportedly created to allow the securities of TBS New Media to be traded on an exchange located in Frankfurt, Germany. Between 2004 and 2008, securities of TBS New Media and TBS were distributed to investors in Ontario and throughout Canada purportedly pursuant to a private placement. Some of the investors who originally acquired securities of TBS New Media were asked to return these securities in exchange for securities of TBS. The three investor witnesses who are described in paragraphs 49 and following of these reasons held shares of TBS.

[15] The principal of TBS is Ari Jonathon Firestone ("**Firestone**"), a resident of Ontario.

2. Emerson

[16] Emerson is registered in Ontario as a sole proprietorship. During the Material Time, Lounds was the registered owner of Emerson.

3. Triad

[17] Triad Holdings ("**Triad**") is registered in Ontario as a sole proprietorship. During the Material Time, the registered owner of Triad was Higgins who is a resident of Ontario.

II. PRELIMINARY ISSUES

A. Failure of the Respondents to Appear

1. Orders Sought by Staff

[18] None of the Respondents appeared at the Merits Hearing in person or by counsel. Staff submits that it has provided notice of the proceeding to Lounds, but was unable to effect service on or locate two of the Respondents, Lehman Corp. and Marks. Staff submits that service on these two Respondents has been rendered impossible by the circumstances in this case, including the lack of a valid address for Lehman Corp. and the steps taken by Marks to conceal his true identity.

[19] Accordingly, Staff seeks the following orders from the Commission:

(a) An order that service of the Notice of Hearing and Statement of Allegations be waived with respect to Lehman Corp. and Marks as Staff has taken all reasonable steps to locate and serve these two Respondents; and

(b) An order that, under the particular circumstances of this case, the posting of the Notice of Hearing and Statement of Allegations on the Commission's website constitutes reasonable notice under subsection 6(1) of the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22, as amended (the "**SPPA**").

[20] In support of its requests, Staff relies on the Affidavits of Charlene Rochman ("**Rochman**") sworn June 3 and 7, 2011 and the Affidavit of Service of Daniela De Chellis ("**De Chellis**") sworn July 5, 2011 which detail the steps taken by Staff to locate and serve the Respondents, as well as the evidence adduced at the hearing as part of Staff's case.

[21] Staff refers us to Rule 1.5.3 of the Ontario Securities Commission *Rules of Procedure* (2010), 33 O.S.C.B. 8017 (the "**Commission's Rules**") for the power of the Commission to waive service when service cannot be effected. Staff also refers us to the jurisprudence that deals with the inability to effect service in the civil context, as it is Staff's position that Rule 16.04 of the Ontario *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 (the "**Rules of Civil Procedure**") is a provision dealing with the inability to effect service that is similar to Rule 1.5.3 of the Commission's Rules. Staff submits that Rule 16.04 of the Rules of Civil Procedure has been considered by the courts in Ontario and urges the Commission to rely on those cases.

[22] In particular, Staff cites *Joe v. Joe* (1984), 46 O.R. (2d) 764 as support for the proposition that "the law does not compel a person to do that which he cannot possibly

perform". Staff also proposes the legal test articulated in *Zhang v. Jiang* (2006), 82 O.R. (3d) 306 at para. 18 as the test to be considered by the Commission in determining when service can be substituted or dispensed with: "[s]ervice is impractical when it is 'unable to be carried out or done', which is proven 'by showing that all reasonable steps have been taken to locate the party and to personally serve him or her'".

2. The Law

[23] Subsection 6(1) of the SPPA, which is set out below, requires that "reasonable notice" be given to the parties to a proceeding:

> **Notice of hearing**
>
> **6.**(1)The parties to a proceeding shall be given reasonable notice of the hearing by the tribunal.

[24] Subsection 7(1) of the SPPA, which is set out below, authorizes a tribunal to proceed in the absence of a party when that party has been given notice of the hearing:

> **Effect of non-attendance at hearing after due notice**
>
> **7**.(1)Where notice of an oral hearing has been given to a party to a proceeding in accordance with this Act and the party does not attend at the hearing, the tribunal may proceed in the absence of the party and the party is not entitled to any further notice in the proceeding.

[25] In the event that a person required to serve a document is unable to effect service, Rule 1.5.3 of the Commission's Rules gives a Panel of the Commission the power to order substituted, validated or waived service as follows:

> **1.5.3 Inability to Effect Service – (1)** If a person required to serve a document is unable to serve it by one of the methods described in Rule 1.5.1, the person may apply to a Panel for an order for substituted, validated or waived service.
>
> **(2) Application for an Order for Substituted, Validated or Waived Service –** The application shall be filed with an affidavit setting out the efforts already made to serve the person and stating:
>
> (a) why the proposed method of substituted service is likely to be successful; or
>
> (b) why a Panel should validate or waive service on that person.
>
> **(3) Substituted, Validated or Waived Service –** A Panel may give directions for substituted service or, where necessary, may validate or waive service if it considers it appropriate.

3. Did Staff satisfy the service requirement?

[26] The facts of this case raise the issue of whether Staff has satisfied the service requirement under the SPPA, particularly as it pertains to Lehman Corp. and Marks who could not be located by Staff. We will address below whether the service requirement has been met with respect to each of the Respondents.

(a) Lehman Corp. and Marks

[27] Based on Staff's affidavit evidence and the oral evidence from the Staff investigator, Stephen Carpenter ("**Carpenter**"), we are satisfied that Staff has taken the steps outlined below to locate and serve Lehman Corp. and Marks:

(a) Staff conducted corporate profile searches and found no record of Lehman Corp. in databases maintained by the Ontario Ministry of Government Affairs and Industry Canada (Corporations Canada).

(b) The correspondence that investors received from Lehman Corp. lists Lehman's address as: 180 [Intentionally deleted] Avenue, Suite 200, Montreal, Quebec, H3T ***. According to Staff, this is also the last known address for Lehman Corp. and Marks. Staff attempted service at this address and determined that this address does not exist. The postal code, H3T ***, is in fact the postal code for 5174 to 5216A [Intentionally deleted] Avenue. Staff also attempted service at 5180 [Intentionally deleted] Avenue, an address most similar to 180 [Intentionally deleted] Avenue and falling within the ambit of H3T ***, however, Lehman Corp. is unknown at that address.

(c) The correspondence that investors received from Lehman Corp. contains the following information: the Lehman Corp. website is located at www.lehmanbrotherscorp.com and the email by which investors can contact Lehman Corp. is info@lehmanbrotherscorp.com. According to Staff, the foregoing are the last known website and email addresses for Lehman Corp. Staff conducted computer searches and determined that the Lehman Corp. website is no longer accessible, and that the email account is no longer active.

[28] Staff also introduced into evidence a memorandum from the Autorité des Marchés Financiers (the "**AMF**") dated April 14, 2009 which details the investigation undertaken by the AMF with respect to Lehman Corp. (the "**AMF Memorandum**"). The AMF Memorandum states that the AMF was unable to find any registration record for Lehman Corp. or its representatives in any AMF database, the Quebec Registry of Enterprises or the records of Corporations Canada. The AMF Memorandum further discloses that the address found in Lehman Corp.'s promotional materials is not valid or does not exist. The AMF also attempted to locate Lehman Corp. representatives by tracing telephone and fax numbers associated with Lehman Corp., however, the investigation led to commercial addresses in some instances, and hotels in others, none of which related to Lehman Corp.

[29] The AMF came across the name Marks in its investigation of Lehman Corp. According to the AMF Memorandum, a cell phone number that was provided to service

providers in connection with Lehman Corp's subscription for telephone services belonged to Marks. The AMF attempted to locate Marks by tracing that cell phone number, however, the investigation led to the address of a hotel in Montreal.

[30] The evidence shows that Lehman Corp. and Marks used false names, telephone numbers and addresses that could not be traced to the true owner, making it impossible for Staff, other regulators or investors to identify or locate Lehman Corp., Marks or other representatives. Accordingly, we find that Staff has taken all steps reasonable in the circumstances to locate and serve Lehman Corp. and Marks.

(b) Lounds

[31] Lounds did not appear at the Merits Hearing. Based on the Affidavit of Rochman sworn June 3, 2011, we find that Lounds was served with notice of the Merits Hearing. Accordingly, we find that we were authorized to proceed in the absence of Lounds in accordance with subsection 7(1) of the SPPA.

[32] After Staff concluded its case on June 8, 2011, a subsequent appearance was scheduled to take place on July 5, 2011 for the Panel to receive submissions from Staff and the Respondents. According to the Affidavit of Service of De Chellis sworn July 5, 2011, Staff served Lounds with notice of the resumption of the Merits Hearing and Staff's written submissions by email on June 29, 2011 at 5:03 p.m. Staff attempted to deliver hard copies of the materials by having a process server attend Lounds's last known address on June 30, 2011 at 5:00 p.m. and on July 2, 2011 at 3:00 p.m., but such copies of the materials were not deliverable at those times. On July 4, 2011, at approximately 3:20 p.m., the process server simply left such copies of the materials at the front door of Lounds's last known address. Lounds did not appear on July 5, 2011.

[33] In paragraph 31 above, we found that Lounds was given notice of the Merits Hearing. Accordingly, we were entitled to proceed on July 5, 2011 without giving Lounds any further notice pursuant to subsection 7(1) of the SPPA.

4. Conclusion

[34] We are satisfied that Staff made all reasonable efforts to serve the Respondents with notice of the Merits Hearing. We also note that the Notice of Hearing and the Statement of Allegations were posted on the Commission's website, as was a Commission order dated October 21, 2010 which set out the dates on which the Merits Hearing was scheduled to take place. We order that, pursuant Rule 1.5.3 of the Commission's Rules, service of the Statement of Allegations and Notice of Hearing on Lehman Corp. and Marks is waived. We further note that, as we found in paragraph 31, Lounds was given notice of the Merits Hearing. We were therefore authorized to proceed in the absence of the Respondents in accordance with subsection 7(1) of the SPPA.

B. Does the Commission have jurisdiction over the Respondents?

[35] In *Gregory & Co. v. Quebec (Securities Commission)*, [1961] S.C.R. 584 ("***Gregory***"), the Supreme Court of Canada considered the circumstances in which a

securities commission would have jurisdiction over an individual and his or her conduct. The Court held that "[t]he fact that the securities traded by appellant would be for the account of customers outside of the province…does not…support the submission that appellant was not trading in securities…in the province, within the meaning and for the purposes of [the Quebec securities legislation]" (*Gregory*, *supra*, at pp. 587-588; see also *Re Allen* (2005), 28 O.S.C.B. 8541 at paras. 20-21 ("***Allen***"); and *Re Lett* (2004), 27 O.S.C.B. 3215 ("***Lett***") at para. 69).

[36] In this case, the offers to purchase TBS shares were made to investors outside Ontario. All of the investors whom we find in these reasons to have sent advance fees to the Respondents are residents of Alberta. In addition, Lehman Corp. purported to operate from outside Ontario, namely, from Montreal, Quebec. However, the evidence discloses that some substantial aspects of each transaction occurred within Ontario. Investor funds were sent to accounts located in Toronto on the instructions of Lehman Corp. and Marks. These accounts were opened and maintained by either Lounds or Higgins, both Ontario residents, in the name of Emerson or Triad, both sole proprietorships established and registered in Ontario. The evidence shows that investor funds were withdrawn and disbursed in Toronto for the benefit of these two Ontario residents.

[37] We find that there is a substantial connection to Ontario thereby entitling the Commission to exercise jurisdiction over the Respondents.

III. ISSUES

[38] Staff's evidence raises the following issues:

(a) Did the Respondents engage in unregistered trading, contrary to subsection 25(1)(a) of the Act and contrary to the public interest?

(b) Did the Respondents engage in fraud, contrary to subsection 126.1(b) of the Act and contrary to the public interest?

IV. EVIDENCE

A. Overview

[39] Staff called four witnesses during the hearing, namely, Carpenter and three investors who testified by means of video conference facilities. The three investor witnesses will be referred to individually as Investors One to Three, and collectively as the "**Three Investors**" in these reasons.

[40] Staff also introduced 16 exhibits into evidence through its witnesses.

[41] None of the Respondents attended the hearing or gave any evidence.

B. Staff Investigator

[42] Carpenter is an investigator in the Enforcement Branch of the Commission. He was assigned the file, which was opened as a result of a referral from the Saskatchewan Financial Services Commission, in November 2009.

[43] Carpenter reviewed the documents that were obtained by other Staff investigators who had previously worked on the file, and complaints that were referred to him by other regulatory bodies, including the Manitoba Securities Commission, the AMF and the Investment Industry Regulatory Organization of Canada ("**IIROC**"). As part of the investigation, he obtained section 139 certificates which show that none of the Respondents was registered under the Act during the Material Time. He also conducted corporate and other searches to locate and identify Lehman Corp. and Marks, as discussed in paragraphs 27 to 29 above.

[44] Carpenter obtained banking records pursuant to summonses issued under section 13 of the Act. More specifically, he caused: the Canadian Imperial Bank of Commerce ("**CIBC**") to produce records relating to two accounts in the name of Emerson (the "**Emerson Canadian CIBC Account**" and the "**Emerson US CIBC Account**", and together, the "**Emerson Accounts**"); the Bank of Nova Scotia to produce records relating to an account in the name of Triad (the "**Triad Scotia Account**"); and the Royal Bank of Canada ("**RBC**") to produce records relating to two accounts in the name of Triad (the "**Triad Canadian RBC Account**" and the "**Triad US RBC Account**", and together, the "**Triad RBC Accounts**"). The Triad Scotia Account and the Triad RBC Accounts will be collectively referred to as the "**Triad Accounts**".

[45] The banking records include account opening documentation, account statements and other supporting documentation for transactions.

[46] During the hearing, Carpenter testified about these documents and the movement of investor funds. His evidence is that four investors sent a total of US$146,760 to the Emerson Accounts and the Triad Accounts, as follows:

(a) A total of US$121,260 of investor funds were sent to the Emerson Accounts, as follows:

(i) The Three Investors sent a total of US$96,460 to the Emerson Canadian CIBC Account; and

(ii) Investor One sent US$24,800 to the Emerson US CIBC Account.

(b) A total of US$25,500 of investor funds were sent to the Triad Accounts, as follows:

(i) An investor who did not testify at the Merits Hearing ("**Investor Four**", who will be described in more detail in paragraph 78 below) sent a total of US$8,000 to the Triad Scotia Account; and

(ii) Investor One sent a total of US$17,500 to the Triad Canadian RBC Account.

[47] Relying on the banking records, Carpenter testified that the majority of investor funds transferred to the Emerson Accounts and the Triad Accounts were withdrawn, primarily in cash, by the respective account holder almost immediately following the deposits to such accounts.

[48] During his investigation, Carpenter also conducted compelled examinations of Firestone, Lounds and Higgins as well as voluntary interviews of TBS investors, including Investor Four.

C. The Three Investors

[49] The Three Investors testified about their interaction with the Respondents in relation to the alleged advance fee scheme. They testified that they all dealt almost exclusively with Marks, who held himself out as acting on behalf of Lehman Corp., and were instructed by Marks to wire advance fees to the Emerson Accounts or the Triad Accounts. The advance fees were generally a percentage of the amount that Lehman Corp. would purportedly pay the investors for their TBS shares.

[50] During their testimony, the Three Investors identified packages of documents that they received from the Respondents. Generally speaking, each such package consisted of:

(a) A facsimile transmittal page setting out the name of the sender, Marks, as well as Lehman Corp.'s address, telephone number, facsimile number and website address;

(b) An invoice-type document setting out, among other things, the advance fee requested and the purchase price for the investor's TBS shares (the "**Invoice**");

(c) A document entitled "Pay Order/Fee Protection" purporting to be a binding agreement of Lehman Corp.'s purchase of the investor's TBS shares and the repayment of any advance fees (the "**Agreement**");

(d) A non-disclosure agreement; and

(e) Wiring instructions directing the investor to send his funds to one of the Emerson Accounts or the Triad Accounts.

1. Investor One

[51] Investor One operates a farm in Bashaw, Alberta. He is 76 years old and has a Bachelor of Science degree from the University of Alberta. He described himself as having no investment experience.

[52] Investor One owned 10,000 shares of TBS during the Material Time. He purchased the shares at a price of US$1 per share.

[53] In January 2009, Investor One received a telephone solicitation from an individual who identified himself as Marks and as a representative of Lehman Corp. to sell his shares of TBS. From his conversation with Marks, Investor One understood Lehman Corp. to be a broker operating from Montreal, Quebec. He was told that Lehman Corp. was acting for a company in the United States in the acquisition of TBS, and that the American company was willing to pay a substantial premium for the TBS shares in order to ensure a controlling interest in TBS and the proper management of the company.

[54] Marks offered to purchase Investor One's TBS shares at US$16 per share for a total of US$160,000. He told Investor One that, in order to sell his shares, Investor One must send a security deposit of 5% of the value of the shares, or US$8,000, the purported purpose of which was to guarantee the completion of the transaction by the investor. Marks informed Investor One that the security deposit would be returned to the investor within five or six days, along with the purchase price for the investor's TBS shares. On January 27, 2009, following the telephone conversation, Investor One received a package of documents, described in paragraph 50 above, purporting to confirm the transaction.

[55] In accordance with the wiring instructions provided by Marks, Investor One sent US$8,000 to the Emerson Canadian CIBC Account on January 29, 2009. Investor One was told that Emerson was a Toronto-based trust company, and as Lehman Corp. had no access to such account, his funds would be protected.

[56] Investor One was subsequently solicited by Marks for a number of other advance fees, all of which Marks claimed were necessary for the completion of the transaction and would be refunded to the investor. For example, Investor One was asked to pay non-resident taxes and to purchase 4,500 warrants. On another occasion, Investor One was asked to send additional funds because he purportedly misunderstood the amount of funds required and sent insufficient funds as a result.

[57] Investor One sent eight advance fees, totalling approximately US$114,760, to the Emerson Accounts or the Triad Accounts. They included:

(a) US$8,000, representing a security deposit which was sent to the Emerson Canadian CIBC Account on January 29, 2009;

(b) US$18,480, representing a 11% U.S. non-resident tax which was sent to the Emerson Canadian CIBC Account on April 8, 2009;

(c) US$14,280, representing a further U.S. non-resident tax which was sent to the Emerson Canadian CIBC Account on April 15, 2009;

(d) US$13,400 sent to the Emerson Canadian CIBC Account on April 22, 2009;

(e) US$24,800 sent to the Emerson US CIBC Account on April 28, 2009;

(f) US$18,300 sent to the Emerson Canadian CIBC Account on May 5, 2009;

(g) US$7,200 sent to the Triad Canadian RBC Account on May 15, 2009; and

(h) US$10,300 sent to the Triad Canadian RBC Account on May 21, 2009.

[58] During the Merits Hearing, Investor One described Marks as "putting the screws to [him] a bit, for pressure" (Hearing Transcript, June 8, 2011, p. 18). For example, Investor One testified that for the initial wire transfers, Marks would phone two or three times a day to ensure that payments were wired. As well, when Investor One was away on vacation for two months, Marks left ten to fifteen "urgent" voice messages requesting payment of non-resident taxes, claiming that "we had to get this done because [Investor One] was holding up any settlement that was going to be made to the other shareholders" (Hearing Transcript, June 8, 2011, p. 18).

[59] After the last wire transfer, Investor One had two further conversations with Marks during which Marks reassured Investor One that there would be a complete refund of all moneys he paid. However, Investor One testified that he never received any payments for the sale of his TBS shares and did not receive a refund of the advance fees he paid.

2. Investor Two

[60] Investor Two is a resident of Rimbey, Alberta. He is 56 years old and currently employed in the field of oil field manufacturing. He completed high school and some post-secondary education, and assessed his investment experience as "average" (Hearing Transcript, June 8, 2011, p. 40).

[61] During the Material Time, Investor Two held 20,000 shares of TBS.

[62] Investor Two testified that an individual, who identified himself as Marks and as working for Lehman Corp., telephoned Investor Two about buying Investor Two's shares of TBS. Investor Two believed Lehman Corp. to be a brokerage company. While Investor Two is not certain whether Lehman Corp. was acting on its own behalf or on behalf of another company, he was told that Lehman Corp. was acquiring TBS shares from investors in order to better manage TBS.

[63] Marks offered to pay US$16 per share, or a total of US$320,000, for Investor Two's 20,000 shares of TBS. He told Investor Two that the investor must send a security deposit of 5% of the value of the shares, in order to show that he was committed to the transaction. He advised Investor Two that once the security deposit was sent by the investor, the investor would receive the sale proceeds and a refund of the security deposit. Investor Two expected to receive the entire amount from Lehman Corp. within a day of his payment of the advance fee.

[64] On January 21, 2009, Marks sent Investor Two a package of documents by e-mail, as described in paragraph 50 above, which purported to confirm the transaction.

[65] On January 30, 2009, Investor Two wired US$16,000 to the Emerson Canadian CIBC Account in accordance with the instructions provided by Marks. Investor Two was told that Emerson was a holding company that was gathering all of the TBS shares for Lehman Corp.

[66] Investor Two did not receive any funds as promised by Marks. He contacted and followed-up with Marks about the sale of his TBS shares, but Marks informed him that Lehman Corp. had encountered some problems with the U.S. tax authorities. Marks told Investor Two that Investor Two would have to pay a non-resident tax which would be refunded to him.

[67] Marks initially requested that Investor Two pay a 19.75% non-resident tax in order to complete the transaction. After Investor Two indicated that he would pay the U.S. government directly, Marks claimed that he had negotiated with the U.S. government so that Investor Two would only have to pay an 11% tax, or US$35,200. Investor Two declined to send additional funds to the Emerson Canadian CIBC Account, as directed by Marks, and maintained that he would pay the U.S. government directly.

[68] Marks subsequently contacted Investor Two one more time in an attempt to dissuade Investor Two from paying the U.S. government directly. Marks told the investor that it would take too long and that Lehman Corp. needed Investor Two's shares right away. Investor Two refused, saying that he was not comfortable with spending more money. Since that conversation, Investor Two had tried to contact Marks again, but was unable to speak to Marks or any Lehman Corp. representatives.

[69] Investor Two never transferred his TBS shares to Lehman Corp. He never received consideration for those shares and did not receive a refund of the advance fee he paid.

3. Investor Three

[70] Investor Three is 53 years old and lives in Bonnyville, Alberta. He has a secondary school education and is currently working in the oil field industry. He testified that he has been investing for the past five or six years and considers himself a "pretty experienced" investor who "understand[s] the markets" (Hearing Transcript, June 8, 2011, p. 65).

[71] During the Material Time, Investor Three owned approximately 10,000 shares of TBS which he purchased at US$1 per share.

[72] Investor Three testified that Marks contacted him in 2009 regarding an opportunity to sell his shares of TBS to a company in the United States. Marks told Investor Three that he was acting for Lehman Corp., the Canadian brokerage division of Lehman Brothers Holdings Inc., which was an investment bank in the United States.

[73] Marks offered to buy Investor Three's shares of TBS at US$16 per share, for a total of US$160,000. Marks discussed TBS's business with Investor Three which convinced Investor Three that TBS shares were worth US$16 per share. He asked Investor Three to pay a security deposit of 5% of the value of the shares, or US$8,000, in order to facilitate the transaction and pay for the work that he was doing. Marks explained that once

Investor Three sent the security deposit, a payment representing the proceeds of the sale of the investor's shares and a refund of the security deposit would be sent to the investor at the end of the same day. As described in paragraph 50, Investor Three received a package of documents from Marks for the transaction on January 19, 2009.

[74] At Marks's instructions, Investor Three wired US$8,000 to the Emerson Canadian CIBC Account on January 22, 2009.

[75] Having heard nothing from Marks a week after he transferred the security deposit, Investor Three contacted Marks to discuss what happened to the transaction. At first, Marks assured Investor Three that the transaction would take time. However, Marks eventually communicated with Investor Three, both by telephone and in writing, to solicit additional funds. Marks explained that additional funds were required to pay non-resident taxes to the U.S. tax authorities, and in fact, Lehman Corp. was able to negotiate a lower tax rate of 11% rather than 19.75% for Investor Three due to Investor Three's status as a Canadian citizen. Investor Three was directed to wire US$17,600 to the Emerson Canadian CIBC Account.

[76] Although Marks claimed that the non-resident tax would be refunded to Investor Three, Investor Three refused to pay more money. Investor Three testified that Marks subsequently called to demand payment about five or six times, sometimes on the investor's home phone, sometimes on his cell phone and sometimes on his business phone. Investor Three described those phone calls as "rude" and "argumentative" (Hearing Transcript, June 8, 2011, p. 77), and on the last occasion, Investor Three asked Marks to stop contacting him.

[77] Investor Three testified that he never received any payments from the Respondents or anyone else for the sale of his TBS shares and did not receive a refund of the advance fee he paid.

D. Investor Four

[78] Investor Four is a resident of Alberta. He was voluntarily interviewed by Carpenter as part of Staff's investigation, but did not testify at the hearing. Although we would have preferred to hear *viva voce* evidence from this investor, hearsay evidence from Investor Four in the form of a transcript of the interview was admitted into evidence through Carpenter pursuant to section 15 of the SPPA, subject to the weight given to such evidence (*Re Sunwide Finance Inc*. (2009), 32 O.S.C.B. 4671 ("***Sunwide***") at para. 22). Investor Four's statements that he was solicited by Lehman Corp. to send advance fees for the purpose of selling his TBS shares are consistent with the testimony of the Three Investors and corroborated by the banking records that are in evidence as part of Staff's case. The evidence shows that Investor Four transferred an advance fee of US$8,000 to the Triad Scotia Account on March 13, 2009. Investor Four informed Staff that he never received any payments for the sale of his TBS shares and did not receive a refund of the advance fee he paid.

V. ANALYSIS

A. Did the Respondents engage in unregistered trading, contrary to subsection 25(1)(a) of the Act and contrary to the public interest?

1. The Law

[79] Subsection 25(1)(a) of the Act sets out the registration requirement as follows:

> **25. (1) Registration for trading** – No person or company shall,
>
> (a) trade in a security or act as an underwriter unless the person or company is registered as a dealer, or is registered as a salesperson or as a partner or as an officer of a registered dealer and is acting on behalf of the dealer;
>
> …
>
> and the registration has been made in accordance with Ontario securities law and the person or company has received written notice of the registration from the Director and, where the registration is subject to terms and conditions, the person or company complies with such terms and conditions.

[80] Subsection 25(1)(a) refers to a trade in a security. A "trade" or "trading" is defined in subsection 1(1) of the Act as follows:

> **"trade"** or **"trading"** includes,
>
> (a) any sale or disposition of a security for valuable consideration, whether the terms of payment be on margin, instalment or otherwise, but does not include a purchase of a security or, except as provided in clause (d), a transfer, pledge or encumbrance of securities for the purpose of giving collateral for a debt made in good faith,
>
> …
>
> (e) any act, advertisement, solicitation, conduct or negotiation directly or indirectly in furtherance of any of the foregoing;

[81] In *Sunwide*, *supra*, at para. 48, the Commission held that, although a purchase of a security is expressly excluded from the definition of "trade" in the Act, when a respondent solicited the sale of shares and made various misrepresentations to induce the sale, those actions constituted acts in furtherance of a trade and not the mere purchase of a security.

[82] It is not necessary for there to be a completed trade in order for someone to be trading in a security. An act in furtherance of a trade is itself a trade for the purposes of the Act (*Sunwide*, *supra*, at para. 45).

[83] The Commission has also held that solicitation of or direct contact with investors is not required for an act to constitute an act in furtherance of a trade (*Lett*, *supra*, at paras. 48-51 and 64). Accepting investor funds for the purpose of an investment can constitute "trading" within the meaning of the Act (*Allen*, *supra*, at para. 85).

2. Analysis

[84] Although the evidence before us suggests that no transfer of securities actually took place, an act in furtherance of a trade does not require a completed trade of a security. We are also cognizant of the express exclusion of a purchase of a security from the definition of "trade" or "trading" in the Act. However, based on the evidence, we are of the view that the conduct of the Respondents, as in the case of *Sunwide*, was not the mere purchase of securities. We find that the Respondents engaged in acts in furtherance of trading TBS securities for the reasons that follow.

(a) Lehman Corp. and Marks

[85] We heard consistent and credible testimony from the Three Investors, supported by documentary evidence which includes the Invoices, the Agreements and banking records, that Lehman Corp. and Marks solicited investors to sell their TBS shares. The acts of solicitation by Lehman Corp. and Marks included the following:

(a) Marks held himself out to be a representative of Lehman Corp. and telephoned investors about selling their shares of TBS.

(b) Marks offered to purchase TBS shares at US$16 per share which represented a substantial premium over the price of US$1 per share which investors originally paid for the shares.

(c) Marks discussed the purchase of TBS shares by Lehman Corp. with investors, including the reason for the substantial premium and the purpose of Lehman Corp's acquisition of those shares.

(d) Marks told investors that they would have to provide an advance fee representing a refundable security deposit in order to complete the sale of their TBS shares.

(e) Marks directed investors to wire advance fees to the Emerson Accounts or the Triad Accounts, and explained to investors that Emerson and Triad were trust companies holding investor funds in escrow.

(f) Once investors paid the initial security deposit, Marks would approach them again for further advance fees. For example, all of the Three Investors were solicited to pay non-resident taxes. Investor One was also asked to purchase warrants. Marks explained to the Three Investors that the advance fees were necessary to complete the sale of their TBS shares and would be refunded to the investors.

(g) When investors failed to pay advance fees as requested, Marks would make repeated telephone calls requesting payments.

(h) Marks sent packages of documents by facsimile or e-mail to the Three Investors purporting to confirm the sale of their TBS shares and the repayment of the advance fees they had paid. These documents, including facsimile transmittal pages, the Invoices, the Agreements, non-disclosure agreements and wiring instructions, as described in paragraph 50 above, were sent on Lehman Corp's letterhead.

[86] We note that Investor One was solicited by Marks to purchase 4,500 warrants. We have little evidence before us as to the exact terms and nature of the warrants, and it does not appear that these warrants exist. However, we can conclude they were nothing more than an artifice that was intended to induce investors to pay additional fees.

[87] It is clear from the evidence that Marks and Lehman Corp., of which Marks was a representative, actively solicited and induced the sales of TBS shares. Lehman Corp. and Marks solicited investors to sell their TBS shares and to pay advance fees for the purported reason of facilitating those sales. Marks and Lehman Corp. made representations to induce those sales and sent documents and materials relating to those sales. As in the case of *Sunwide*, we find that the actions of the Respondents were not the mere purchase of securities, but involved a solicitation of the sale of the relevant shares and constituted acts in furtherance of a trade.

[88] Further, we find that the conduct of Marks and Lehman Corp. in their solicitation of TBS investors reveals a pattern of high pressure sales tactics. The evidence shows that:

(a) Investors One and Two were told that they must pay advance fees promptly because they were delaying the acquisition of TBS or payments to other investors. Investor One was told that he was "holding up any settlement that was going to be made to the other shareholders" (Hearing Transcript, June 8, 2011, p. 18). Investor Two was told that Lehman Corp "needed to get the shares sold right away" and that "we needed to do it to stop the thing from getting held up" (Hearing Transcript, June 8, 2011, pp. 55 and 57).

(b) For the initial wire transfers, Marks called Investor One two to three times a day to ensure that funds were wired, and during the two months that Investor One was away on vacation, left him ten to fifteen "urgent" voice messages requesting the payment of non-resident taxes (Hearing Transcript, June 8, 2011, p. 18).

(c) After Investor Three refused to make additional payments, Marks called the investor five to six times on the investor's home phone, cell phone and business phone. Investor Three described the phone calls in the following way: "he was trying to get me and saying you have to give us this money, it'll get this deal through. And I said there's no way I'm giving you any more more money, it's not going to happen" (Hearing Transcript, June 8, 2011, p.

> 81). He further described these conversations as “rude” and “argumentative” (Hearing Transcript, June 8, 2011, p. 77).

[89] We find the high pressure sales tactics employed by these two Respondents to be egregious and contrary to the public interest.

[90] During the Material Time, neither Lehman Corp. nor Marks was registered under the Act in any capacity. We received no evidence of any available exemption which would allow Lehman Corp. or Marks to trade TBS securities in Ontario.

[91] We find that Lehman Corp. and Marks traded securities without registration and without a registration exemption being available, contrary to subsection 25(1)(a) of the Act and contrary to the public interest.

(b) Lounds

[92] Lounds had little direct contact with investors. However, as noted in paragraph 83 above, solicitation or direct contact with investors is not required for an act to constitute an act in furtherance of a trade. Accepting investor funds for the purpose of an investment can constitute “trading” within the meaning of the Act.

[93] In the present case, the banking records introduced by Staff through Carpenter establish that the Three Investors sent a total of US$121,260 to the Emerson Accounts. The Emerson Accounts were opened by Lounds, the registered owner of Emerson. Account opening statements show, and Lounds admitted in the compelled examination of him by Staff, that, during the Material Time, he was the sole authorized signatory on the Emerson Accounts and the only person authorized to withdraw money from those accounts. Accordingly, we find that Lounds opened and maintained bank accounts that accepted investor funds and thereby engaged in acts in furtherance of trading TBS shares.

[94] Lounds was not registered during the Material Time in any capacity. We received no evidence of any available exemption which would allow Lounds to trade TBS securities in Ontario.

[95] We find that Lounds traded securities without registration and without a registration exemption being available, contrary to subsection 25(1)(a) of the Act and contrary to the public interest.

B. Did the Respondents engage in fraud, contrary to subsection 126.1(b) of the Act and contrary to the public interest?

1. The Law

[96] Subsection 126.1(b) of the Act sets out the fraud provision as follows:

> **126.1 Fraud and market manipulation** – A person or company shall not, directly or indirectly, engage or participate in any act, practice or course of

> conduct relating to securities or derivatives of securities that the person or company knows or reasonably ought to know,
>
> …
>
> (b) perpetrates a fraud on any person or company.

[97] It is well established in the Commission's jurisprudence that the elements of fraud under subsection 126.1(b) of the Act are:

> …the *actus reus* of the offence of fraud will be established by proof of:
>
> 1. the prohibited act, be it an act of deceit, a falsehood or some other fraudulent means; and
>
> 2. deprivation caused by the prohibited act, which may consist in actual loss or the placing of the victim's pecuniary interests at risk.
>
> Correspondingly, the *mens rea* of fraud is established by proof of:
>
> 1. subjective knowledge of the prohibited act; and
>
> 2. subjective knowledge that the prohibited act could have as a consequence the deprivation of another (which deprivation may consist in knowledge that the victim's pecuniary interests are put at risk).
>
> (*R. v. Théroux*, [1993] 2 S.C.R. 5 ("***Théroux***") at p. 20)

[98] In *Anderson v. British Columbia (Securities Commission)* (2004), 192 B.C.A.C. 119 (leave to appeal to the Supreme Court of Canada denied) ("***Anderson***"), the British Columbia Court of Appeal discussed the mental element of the fraud provision of the British Columbia *Securities Act*, R.S.B.C. 1996, c. 418, as amended (the "**BC Act**"). As the fraud provision of the BC Act has the identical operative language as section 126.1 of the [Ontario] Act, the Commission has adopted the analysis in *Anderson* in cases involving subsection 126.1(b) of the Act. In interpreting the fraud provision as it relates to the mental element of fraud, the British Columbia Court of Appeal stated:

> …[the fraud provision of the BC Act] does not dispense with the requirement that there must be a fraud involved in the transaction, which requires a guilty state of mind.…[the fraud provision of the BC Act] simply widens the prohibition against participation in transactions to include participants who know or ought to know that a fraud is being perpetrated by others, as well as those who participate in perpetrating the fraud. It does not eliminate proof of fraud, including proof of subjective knowledge of the facts constituting the dishonest act, by someone involved in the transactions.
>
> (*Anderson*, *supra*, at paras. 24 and 26)

2. Analysis

(a) Lehman Corp. and Marks

[99] It is clear from the evidence that Lehman Corp. and Marks operated a fraudulent advance fee scheme in which Lehman Corp. and Marks made material misrepresentations to induce TBS investors to pay a number of advance fees.

[100] The evidence before us shows that an individual using the name Marks solicited TBS investors by telephone, e-mail and facsimile. In Marks's solicitation and the materials that he sent to investors, Marks identified himself as acting on behalf of Lehman Corp. Marks further led TBS investors to believe, either by telling the investors explicitly or through implication, that Lehman Corp. was a brokerage company, and in some instances, that it was related to Lehman Brothers Holding Inc.

[101] Marks represented to investors that he and Lehman Corp. were involved in the acquisition of TBS shares. One of the purported reasons for the acquisition disclosed in the evidence of Investors One and Two was to take over the management of TBS to better manage the company.

[102] Marks offered investors a substantial premium over the purchase price they paid for their TBS shares. Marks would then tell investors that, in order to complete the transaction, the investors had to pay a security deposit which would be refunded to them along with the purchase price for their TBS shares. He instructed investors to wire funds to the Emerson Accounts or the Triad Accounts, sometimes explaining to investors that Emerson and Triad were holding companies independent of Lehman Corp. which would hold the funds in escrow until the completion of the share purchase transaction.

[103] If investors agreed to pay the security deposit, Marks would approach them again, stating that Lehman Corp. had encountered problems with the U.S. tax authorities. Investors were told that, in order for them to receive the proceeds of the sale of their TBS shares, they would have to pay a non-resident tax. Marks would, once again, reassure the investors that the fee was refundable and ask the investors to wire their funds to the Emerson Accounts or the Triad Accounts.

[104] When investors refused to make the requested payments, such as Investors Two and Three, Marks would claim that Lehman Corp. was able to negotiate a lower tax for the investors. However, when an investor demonstrated a willingness to pay, such as Investor One, the evidence shows that Marks continued to solicit that investor for other advance fees that were purportedly necessary to complete the sale transaction.

[105] All of the statements and claims made by Marks were completely devoid of substance. We reiterate our finding that Marks is an alias that was used to deceive TBS investors as to Marks's true identity. Additionally, the investment scheme, premised on the purchase of TBS shares and represented to investors by Marks, was a complete fabrication. Lehman Corp. was not affiliated with Lehman Brothers Holdings Inc. Staff's investigation uncovered no record of Lehman Corp. other than as part of the solicitations received by TBS shareholders. There is no evidence that Lehman Corp. ever intended to

purchase TBS shares from the investors or required advance fees to complete the sale transaction. Accordingly, we conclude that Lehman Corp. had no underlying legitimate business or business purpose, and was merely part of a fraudulent advance fee scheme.

[106] We find that Marks and Lehman Corp. engaged in acts of deceit or falsehood. They made false and misleading statements to investors which deceived the investors about the investment scheme, including misrepresentations about Marks's identity, the nature of Lehman Corp.'s business, the underlying acquisition of TBS by Lehman Corp. or another U.S. company, the purchase of the investors' TBS shares and the necessity of advance fees.

[107] These false and misleading statements induced investors to pay US$146,760 in advance fees. More specifically, Investor One sent eight advance fees totalling US$114,760; Investor Two sent an advance fee of US$16,000; Investor Three sent an advance fee of US$8,000; and Investor Four sent an advance fee of US$8,000. None of the investors received any consideration for their TBS shares, nor did they receive a refund of the advance fees they paid in response to the representations made to them. We conclude that investors were deprived of those funds as a result of the false and misleading statements.

[108] There is compelling evidence that Marks knew about the dishonest acts and the deprivation suffered by the investors that would result therefrom. Marks is an alias designed to deceive investors about his identity. Lehman Corp., of which Marks claimed to be a representative, is a fictitious business which we found to have no legitimate business or business purpose. The Lehman Corp. documents that Marks sent to TBS investors listed contact information that was false and misleading. The AMF Memorandum shows that the contact information provided by Lehman Corp. and Marks to telephone service providers was also false. The testimony of the Three Investors further demonstrates that Marks ceased contact with investors and could not be found, and suffice it to say, steps were taken to conceal Marks's identity. It is clear from the circumstances that Marks knew that his representations to the investors were false and misleading but nonetheless actively participated in making them knowing that the TBS investors would be deprived of the advance fees that they paid.

[109] Accordingly, we find that Lehman Corp. and Marks perpetrated a fraudulent advance fee scheme, contrary to subsection 126.1(b) of the Act and contrary to the public interest.

(b) Lounds

[110] As we found in paragraph 93, of the US$146,760 paid by TBS investors in advance fees, US$121,260 was sent to the Emerson Accounts. As noted in paragraph 93 above, Lounds was the sole signing authority on the Emerson Accounts and the only person authorized to withdraw money from those accounts.

[111] The banking records in evidence further show that the majority of investor funds in the Emerson Accounts were withdrawn by Lounds, primarily in cash, almost

immediately following the related deposits. There is no evidence before us that accounts for the use of the investor funds. We find that Lounds furthered the fraudulent acts in the scheme by diverting investor funds from their intended use that was represented to the investors which deprived investors of their funds.

[112] Having received investor funds and disposed of them in the manner described in paragraph 111 above, Lounds knew or reasonably ought to have known that such actions would result in deprivation on the part of the TBS investors.

[113] We find that Lounds participated in fraudulent misconduct, contrary to subsection 126.1(b) of the Act and contrary to the public interest.

VI. CONCLUSION

[114] For the reasons given above, we find that:

(a) Lehman Corp., Marks and Lounds traded in TBS securities without registration, contrary to subsection 25(1)(a) of the Act and contrary to the public interest;

(b) The high pressure sales tactics employed by Lehman Corp. and Marks in their solicitation of investors was contrary to the public interest; and

(c) Lehman Corp., Marks and Lounds engaged or participated in acts, practices or a course of conduct relating to TBS shares that they knew or reasonably ought to have known perpetrated a fraud, contrary to subsection 126.1(b) of the Act and contrary to the public interest.

[115] Staff and the Respondents shall contact the Office of the Secretary to the Commission within ten days to schedule a sanctions and costs hearing.

DATED at Toronto this 16th day of December, 2011

"*Christopher Portner*"	"*C. Wesley M. Scott*"
Christopher Portner	C. Wesley M. Scott