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

REASONS AND DECISION ON SANCTIONS AND COSTS
(Section 127 of the Act)

Hearing:	April 23, 2012	
Decision:	May 29, 2012	
Panel:	Christopher Portner	- Commissioner and Chair of the Panel
	C. Wesley M. Scott	- 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 ON SANCTIONS AND COSTS

I. BACKGROUND

[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 it is in the public interest to make an order with respect to sanctions and costs (the "**Sanctions and Costs Hearing**") against Lehman Brothers & Associates Corp. ("**Lehman Corp.**"), Greg Marks ("**Marks**") and Kent Emerson Lounds ("**Lounds**").

[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] A Notice of Hearing was issued by the Office of the Secretary of the Commission on September 3, 2010. On the same date, Staff issued a Statement of Allegations against Lehman Corp., Marks, Lounds and Higgins.

[4] Higgins entered into a settlement agreement with Staff. The Commission approved the settlement on June 7, 2011 ((2011), 34 O.S.C.B. 6566).

[5] The hearing on the merits in relation to Lehman Corp., Marks and Lounds (collectively, the "**Respondents**") was convened on June 6, 2011, and continued on June 8, and July 5, 2011. None of the Respondents attended the hearing on the merits. The Commission was satisfied that Lehman Corp. and Lounds received proper notice of the hearing and that reasonable attempts to locate and give notice to Marks were made by Staff.

[6] A decision on the merits was rendered on December 16, 2011 (*Re Lehman Brothers and Associates Corp. et al*. (2011), 34 O.S.C.B. 12717) (the "**Merits Decision**").

[7] The Sanctions and Costs Hearing was held on April 23, 2012. None of the Respondents appeared before the Commission or made submissions. Staff made oral and written submissions to the Commission on sanctions and costs.

[8] While none of the Respondents attended the Sanctions and Costs Hearing, the Commission was satisfied that it was entitled to proceed to hear the submissions of Staff as to sanctions and costs as permitted under section 7 of the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22, as amended (the "**SPPA**"). Section 7 of the SPPA provides as follows:

> 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.

[9] These are our reasons and decision as to the appropriate sanctions and costs against the Respondents.

II. THE DECISION ON THE MERITS

[10] Staff's Statement of Allegations dated September 3, 2010, raised the following issues:

(a) Did the actions of Lehman Corp., Marks and Lounds relating to the securities of TBS New Media Ltd. and TBS New Media PLC ("**TBS**") constitute the trading of securities without registration contrary to subsection 25(1) of the Act?

(b) Did Lehman Corp., Marks, and Lounds, engage or participate in acts or a course of conduct relating to TBS securities that they knew or reasonably ought to have known perpetrated a fraud on any person or company contrary to subsection 126.1(b) of the Act?

[11] The Commission found in the Merits Decision that:

(a) The Respondents engaged in the trading of securities without registration where no exemption was available contrary to subsection 25(1) of the Act (Merits Decision, *supra* at paras. 90, 91, 94 and 95);

(b) Lehman Corp. and Marks 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. These false and misleading statements induced investors to pay US$146,760 in advance fees (Merits Decision, *supra* at paras. 106 and 107);

(c) Lounds furthered the fraudulent acts of Lehman Corp. and Marks in the advance fee scheme by accepting US$121,260 from investors in the following amounts:

(i) US$8,000 on January 22, 2009;

(ii) US$8,000 on January 29, 2009;

(iii) US$16,000 on January 30, 2009;

(iv) US$18,480 on April 8, 2009;

(v) US$14,280 on April 15, 2009;

(vi) US$13,400 on April 22, 2009;

(vii) US$24,800 on April 28, 2009; and

(viii) US$18,300 on May 5, 2009.

(Merits Decision, *supra* at paras. 57, 65, 74, 110 and 111)

(d) The Respondents engaged or participated in acts, practices or a course of conduct relating to TBS shares, as outlined in paragraphs 11(b) and (c) above, that they knew or reasonably ought to have known perpetrated a fraud on the holders of those TBS shares, contrary to subsection 126.1(b) of the Act and contrary to the public interest (Merits Decision, *supra* at paras. 109 and 113).

III. SANCTIONS REQUESTED BY STAFF

[12] In Staff's view, the high pressure tactics used against TBS investors and the deliberate deceit and misrepresentations by the Respondents, resulting in loss to the investors, constituted reprehensible behavior on the part of the Respondents.

[13] Staff argued that the gravity of the Respondents' conduct and risk to the public warrant sanctions that will permanently prevent the Respondents from participating in the capital markets in any way. In Staff's view, any Order of the Commission should (a) remove the Respondents permanently from the capital markets; (b) impose significant administrative penalties; and (c) disgorge all funds obtained from the investors. In Staff's submission, such an Order would act as both specific and general deterrent, thereby preventing future misconduct, the primary purpose of a sanctions Order.

[14] In their written and oral submissions, Staff requested that the following sanctions be imposed against the Respondents:

(a) the Respondents cease trading in securities permanently pursuant to clause 2 of subsection 127(1) of the Act;

(b) the acquisition of any securities by Lehman Corp., Marks and Lounds is prohibited permanently pursuant to clause 2.1 of subsection 127(1) of the Act;

(c) any exemptions contained in Ontario securities law not apply to Lehman Corp., Marks and Lounds permanently pursuant to clause 3 of subsection 127(1) of the Act;

(d) Marks and Lounds resign all positions that they may hold as a director or officer of an issuer pursuant to clause 7 of subsection 127(1) of the Act;

(e) Marks and Lounds be prohibited permanently from becoming or acting as a director or officer of any issuer, registrant, and investment fund manager pursuant to clauses 8, 8.2, and 8.4 of subsection 127(1) of the Act;

(f) Marks and Lounds be prohibited permanently from becoming or acting as a registrant, as an investment fund manager and as a promoter pursuant to clause 8.5 of subsection 127(1) of the Act

(g) Marks pay an administrative penalty of $250,000 pursuant to clause 9 of subsection 127(1) of the Act;

(h) Lounds pay an administrative penalty of $200,000 pursuant to clause 9 of subsection 127(1) of the Act;

(i) Marks and Lounds disgorge to the Commission the amount of US$121,260 obtained as a result of their non-compliance with Ontario securities law on a joint and several basis, to be designated for allocation to or for the benefit of third parties pursuant to subsection 3.4(2)(b) of the Act;

(j) Marks disgorge to the Commission the amount of US$25,500 obtained as a result of his non-compliance with Ontario securities law to be designated for allocation to or for the benefit of third parties pursuant to subsection 3.4(2)(b) of the Act; and

(k) Marks and Lounds pay, on a joint and several basis, $39,915.69 representing a portion of the costs incurred in this matter pursuant to section 127.1 of the Act.

[15] In Staff's submission, the sanctions requested are appropriate in light of the Respondents' serious breaches of the Act and conduct contrary to the public interest.

IV. THE LAW ON SANCTIONS

[16] The Commission's mandate is to (a) provide protection to investors from unfair, improper or fraudulent practices; and (b) foster fair and efficient capital markets and confidence in capital markets (section 1.1 of the Act).

[17] In exercising its public interest jurisdiction, the Commission must act in a protective and preventative manner, as stated by the Commission in *Re Mithras Management Ltd*:

> …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; we are not prescient, after all (*Re Mithras Management Ltd.* (1990), 13 O.S.C.B. 1600 at pp. 1610-1611).

[18] The Supreme Court of Canada has described the Commission's public interest jurisdiction as follows:

> The purpose of an order under s. 127 is to restrain future conduct that is likely to be prejudicial to the public interest in fair and efficient capital markets. The role of the [Commission] under s. 127 is to protect the public interest by removing from the capital markets those whose past conduct is so abusive as to warrant apprehension of future conduct detrimental to the integrity of the capital markets (*Committee for Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission*), [2001] 2 S.C.R. 132 at para. 43).

[19] In addition, the Commission should consider general deterrence as an important factor when determining appropriate sanctions. In *Re Cartaway Resources Corp.*, [2004] 1 S.C.R. 672 at para. 60, the Supreme Court of Canada stated that "… it is reasonable to view general deterrence as an appropriate, and perhaps necessary, consideration in making orders that are both protective and preventative".

[20] In determining the appropriate sanctions in this matter, we must ensure that the sanctions imposed are proportionate to the conduct involved (*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).

[21] The Commission has previously identified the following as factors that the Commission should consider when imposing sanctions:

(a) the seriousness of the conduct and the breaches of the Act;

(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 by a respondent of the seriousness of the improprieties;

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

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

(g) the size of any financial sanction or voluntary payment;

(h) the effect any sanctions may have on the ability of a respondent to participate without check in the capital markets;

(i) the reputation and prestige of the respondent;

(j) the remorse of the respondent; and

(k) any mitigating factors.

(See *Re Belteco Holdings Inc.* (1998), 21 O.S.C.B. 7743 at page 7746; and *Re M.C.J.C. Holdings Inc.*, *supra* at para. 26)

V. ANALYSIS

A. Appropriate Sanctions in this Case

(i) Specific Factors Applicable in this Matter

[22] When the Commission imposes sanctions, it must do so (a) based only on the findings in the Merits Decision and on the other evidence presented at the merits hearing and the sanctions hearing (see for example *Re First Global et al.* (2008), 31 O.S.C.B. 10869, at para. 65); (b) in respect of trades and acts in furtherance of trades that occurred in Ontario; and (c) with the objective of protecting Ontario investors and Ontario capital markets.

[23] Overall, the sanctions imposed must protect investors and Ontario capital markets by barring or restricting the Respondents from participating in those markets in the future and by sending a clear message to the Respondents and to others participating in our capital markets that these types of illegal activities and abusive sales practices will simply not be tolerated.

[24] The Commission found in the Merits Decision that the Respondents engaged in an advance fee scheme, promising to purchase TBS shares at a price significantly higher than the market price, and then soliciting fees from the investors for the purpose of facilitating the transaction. The scheme was based on intentional misrepresentations designed to deprive the investors of their funds.

[25] In *Re First Global et al*, *supra* at para. 49, the Commission emphasized that high pressure sales techniques, selective solicitation of vulnerable investors and solicitations made without regard to the investor's needs and without regard to the requirements of the Act, damage the integrity of the capital markets and is activity contrary to the public interest. The Respondents applied a high level of pressure to the investors to induce them to engage in the scheme. Such actions, when employed in the course of trading in securities, is damaging to the integrity of Ontario capital markets and warrants the imposition of sanctions by this Commission.

[26] In considering the factors referred to in paragraph 21 of these Reasons and Decision, we find the following factors and circumstances to be particularly relevant:

(a) Lehman Corp. and Marks obtained fees from TBS investors in the amount of US$146,760. Of that total, Lounds was responsible for receiving and disbursing US$121,260.

(b) Lehman Corp. and Marks made deliberate misrepresentations. Lehman Corp. had no valid business purpose and the proposed investment scheme was a complete fabrication. The advance fee scheme was a deliberate attempt to defraud TBS investors through the use of high pressure tactics.

(c) None of the funds obtained from the investors have been recovered.

(d) The Respondents breached key provisions of the Act which are intended to protect investors from the very conduct that occurred in this matter. The Respondents' actions caused serious financial harm to investors and to the integrity of Ontario's capital markets and were contrary to the public interest.

(e) There is no evidence to suggest that either Marks or Lounds have shown any recognition of the seriousness of the breaches, or any remorse for the losses suffered by the investors.

B. Trading and Other Prohibitions

[27] One of the Commission's principal objectives in imposing sanctions is to restrain future conduct that could be harmful to investors or Ontario capital markets. In this case, we find that the public interest requires that the Commission restrict the Respondents' future participation in Ontario's capital markets.

[28] We have concluded that it is in the public interest to make the following orders, on the terms requested by Staff, against each of the Respondents:

(a) a permanent cease trade order against each of the Respondents;

(b) a permanent prohibition order on the acquisition of securities by the Respondents;

(c) a permanent order that any exemptions contained in Ontario securities law do not apply to any of the Respondents;

(d) an order that Marks and Lounds resign all positions that they may hold as a director or officer of an issuer;

(e) an order that Marks and Lounds be permanently prohibited from becoming or acting as a director or officer of any issuer, registrant and investment fund manager;

(f) an order that Marks and Lounds be permanently prohibited from becoming or acting as a registrant, as an investment fund manager and as a promoter;

C. Disgorgement

i. The law on Disgorgement

[29] Subsection 127(1)10 of the Act provides that a person or company that has not complied with Ontario securities law can be ordered to disgorge to the Commission "any amounts obtained" as a result of the non-compliance. The disgorgement remedy is intended to ensure that respondents do not retain any financial benefit from their breaches of the Act and to provide specific and general deterrence.

[30] In considering a disgorgement order, the Commission views the following factors to be relevant:

(a) whether the amount that a respondent obtained as a result of non-compliance with the Act is reasonably ascertainable;

(b) the seriousness of the misconduct and the breaches of the Act, and whether investors were seriously harmed;

(c) whether the individuals who suffered losses are likely to be able to obtain redress by other means; and

(d) the deterrent effect of a disgorgement order on the respondents and other market participants.

(*Re Limelight Entertainment Inc.* (2008) OSCB 12030 at para. 52 ("*Re Limelight*"))

[31] The disgorgement orders being sought by Staff in this proceeding are consistent with the disgorgement orders issued in *Re York Rio Resources Inc. and Adam Sherman* (2011), 34 OSCB 5261, *Re York Rio Resources Inc. and Peter Robinson* (2010), 33 OSCB 10434 and *Re Sabourin* (2010), 33 OSCB 5299 ("*Re Sabourin*") at para. 69. In each of those decisions, the salespersons were ordered to disgorge the entire amount earned in contravention of the Act. In *Re Sabourin*, the Commission stated:

> In our view, the disgorgement order is appropriate in these circumstances because it ensures that none of the respondents will benefit from their breaches of the Act and because such an order will deter them and others from similar conduct.

ii. Findings on Disgorgement

[32] We note that the misconduct by Marks and Lounds involved obtaining substantial fees from investors who were misled to believe that the fees would be refunded. The investors have lost all of the fees paid to the Respondents, and there does not appear to be any avenue for redress available to the investors.

[33] In our view, a disgorgement order is appropriate in these circumstances because it will ensure that none of the Respondents benefit from their breaches of the Act and because such an order will deter them and others from similar misconduct.

[34] The Commission found in the Merits Decision that a total of US$146,760 was paid by TBS investors in advance fees. The Commission also found that of that total amount obtained from investors, US$121,260 was deposited by investors to a bank account controlled by Lounds, and was subsequently withdrawn by Lounds.

[35] The Commission further found that US$25,500 was deposited by investors to an account controlled by Higgins (Merits Decision, *supra* at paras. 17 and 46(b)).

[36] Staff requested that the Commission order that Marks and Lounds disgorge to the Commission the amount of US$121,260 on a joint and several basis. Subject to our comments below concerning the conversion of US dollars to Canadian dollars, we agree that such a disgorgement order should be issued against Marks and Lounds.

[37] Staff also requested that Marks disgorge to the Commission the amount of US$25,500, representing the amount received by Higgins on behalf of Lehman Corp. and Marks.

[38] As noted earlier in these reasons, Higgins entered into a settlement agreement with Staff which was approved by the Commission on June 7, 2011 ((2011), 34 O.S.C.B. 6566). As a result of that settlement, an Order was issued by the Commission requiring Higgins to disgorge to the Commission the amount of $29,661, representing the US$25,500 which he received from the investors on behalf of Lehman Corp. and Marks.

[39] In determining the appropriate amount to be ordered disgorged, the Commission must take into account any amounts which have already been ordered disgorged by any other Canadian securities regulator. In this instance, Staff is requesting that the Commission order Marks to disgorge an amount to the Commission which has already been ordered to be disgorged by Higgins. It would be unfair and inconsistent with the principles underlying the disgorgement remedy for the aggregate amount ordered to be disgorged by the Commission to exceed the total amount obtained from investors. As a result, we find that it would not be appropriate for the Commission to issue an additional disgorgement Order against Marks in the amount of US$25,500.

iii. Conversion to Canadian Funds

[40] At paragraph 11(c) of these Reasons and Decision, we set out the findings made in the Merits Decision with respect to the specific amounts obtained by Marks and Lounds from the TBS investors.

[41] For the purposes of the disgorgement order, the Commission will convert the above amounts into Canadian funds (rounded to the nearest dollar). In doing so, the Commission takes notice of the Bank of Canada nominal noon exchange rate in effect on the date of each of the above-noted transactions, as published by the Bank of Canada on its website. The exchange to Canadian funds is calculated as follows:

Date	Amount in US$	Exchange Rate	Amount in Can$
January 22, 2009	$8,000	1.2630	$10,104
January 29, 2009	$8,000	1.2188	$9,750
January 30, 2009	$16,000	1.2364	$19,782
April 8, 2009	$18,480	1.2354	$22,830
April 15, 2009	$14,280	1.2038	$17,190
April 22, 2009	$13,400	1.2360	$16,562
April 28, 2009	$24,800	1.2238	$30,350
May 5, 2009	$18,300	1.1760	$21,521
Total	**$121,260**		**$148,089**

iv. Conclusion as to Disgorgement

[42] The Commission will order that Marks and Lounds jointly disgorge to the Commission the amount of $148,089 pursuant to paragraph 10 of subsection 127(1) of the Act for allocation to or for the benefit of third parties in accordance with subsection 3.4(2)(b) of the Act.

[43] The Commission will not order that Marks disgorge to the Commission the additional amount of US$25,500 as that amount has already been ordered to be disgorged by Higgins in the Commission's Order dated June 7, 2011.

D. Administrative Penalties

[44] The purpose of an administrative penalty is to deter the particular respondents from engaging in the same or similar conduct in the future and to send a clear message of deterrence to other market participants that the conduct in question will not be tolerated in Ontario's capital markets.

[45] In our view, in the circumstances, the administrative penalties requested by Staff are appropriate and in accordance with the public interest. We therefore order that Marks pay an administrative penalty of $250,000 pursuant to clause 9 of subsection 127(1) of

the Act. We further order that Lounds pay an administrative penalty of $200,000 pursuant to clause 9 of subsection 127(1) of the Act.

E. Costs

[46] Staff submitted that the Respondents should be ordered pursuant to section 127.1 of the Act to jointly and severally pay costs in the amount of $39,915.69 to indemnify the Commission for its investigation and hearing costs in this matter.

[47] According to Staff, the costs claimed in this case are reasonable and conservative and relate only to the time of the lead litigator and investigator. Staff indicated that costs are being sought only for expenses incurred up to the litigation phase of this proceeding. The costs sought by Staff do not include the costs of the investigation conducted into this matter or the time spent to prepare for and attend at the sanctions hearing.

[48] To support its claim for costs, Staff provided information specifying the hours worked by Staff employees on this matter.

[49] We have concluded that it is appropriate to impose costs against Marks and Lounds in this matter. Based on the submissions and information presented by Staff, we assess the total costs payable by Marks and Lounds at $39,915.69. We order that Marks and Lounds shall be jointly and severally responsible for the costs payable.

F. The Sanctions imposed against Marks

[50] In our Merits Decision, we determined that Marks was in fact an alias used by an individual for the purpose of perpetrating a serious fraud against TBS Investors. The fact that this individual is known to the Commission only by an alias does not detract from the public interest in imposing sanctions on that individual. Indeed, the Commission should not permit an individual to elude sanctions for serious contraventions of the Act simply by hiding behind a false identity. Therefore, we believe that it is in the public interest to impose sanctions against the individual known to the Commission as Marks.

VI. ORDER

[51] For the reasons discussed above, we have concluded that the sanctions and costs imposed by us are in the public interest and are proportionate to the circumstances of this matter. Accordingly, we order that:

(a) pursuant to clause 2 of subsection 127(1) of the Act, Lehman Corp., Marks and Lounds shall cease trading in securities permanently;

(b) pursuant to clause 2.1 of subsection 127(1) of the Act, the acquisition of any securities by Lehman Corp., Marks and Lounds is permanently prohibited;

(c) pursuant to clause 3 of subsection 127(1) of the Act, any exemptions contained in Ontario securities law shall, permanently, not apply to Lehman Corp., Marks and Lounds;

(d) pursuant to clause 7 of subsection 127(1) of the Act, Marks and Lounds shall resign all positions that they may hold as a director or officer of an issuer;

(e) pursuant to clauses 8, 8.2, and 8.4 of subsection 127(1) of the Act, Marks and Lounds are permanently prohibited from becoming or acting as a director or officer of any issuer, registrant, and investment fund manager;

(f) pursuant to clause 8.5 of subsection 127(1) of the Act, Marks and Lounds are permanently prohibited from becoming or acting as a registrant, as an investment fund manager and as a promoter;

(g) pursuant to clause 9 of subsection 127(1) of the Act, Marks shall pay an administrative penalty of $250,000;

(h) pursuant to clause 9 of subsection 127(1) of the Act, Lounds shall pay an administrative penalty of $200,000;

(i) pursuant to clause 10 of subsection 127(1) of the Act, Marks and Lounds shall disgorge to the Commission the amount of $148,089 obtained as a result of their non-compliance with Ontario securities law on a joint and several basis, to be designated for allocation to or for the benefit of third parties pursuant to subsection 3.4(2)(b) of the Act; and

(j) pursuant to section 127.1 of the Act, Marks and Lounds shall pay $39,915.69 on a joint and several basis representing a portion of the costs incurred by the Commission in this matter.

DATED at Toronto this 29th day of May, 2012

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