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 PORTUS ALTERNATIVE ASSET MANAGEMENT INC., PORTUS ASSET MANAGEMENT INC., BOAZ MANOR, MICHAEL MENDELSON, MICHAEL LABANOWICH AND JOHN OGG

REASONS AND DECISION with respect to MICHAEL MENDELSON
(Section 127 of the Act)

Hearing:	September 4, 2012 October 2 and 16, 2012	
Decision:	November 29, 2012	
Panel:	Edward P. Kerwin	- Commissioner and Chair of the Panel
Appearances:	Cameron Watson Hugh Craig	- For Staff of the Commission
	Michael Mendelson	- For himself
	No one appeared on behalf of the remaining respondents Portus Alternative Asset Management Inc. and Portus Asset Management Inc.	

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REASONS AND DECISION with respect to MICHAEL MENDELSON
(Section 127 of the Act)

I. OVERVIEW

A. Introduction

[1] This is a decision of 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**") in connection with a Notice of Hearing issued by the Commission on October 5, 2005 and a Statement of Allegations filed by Staff of the Commission ("**Staff**") on the same day with respect to Portus Alternative Asset Management Inc. ("**PAAM**"), Portus Asset Management Inc. ("**PAM**"), Boaz Manor ("**Manor**"), Michael Mendelson ("**Mendelson**"), Michael Labanowich ("**Labanowich**") and John Ogg ("**Ogg**")(collectively, the "**Respondents**").

[2] This decision only relates to the conduct of one of the Respondents, Mendelson. Manor, Labanowich and Ogg entered into settlement agreements with Staff which were approved by the Commission on August 27, 2012. The allegations with respect to PAAM and PAM remained outstanding at the time of this hearing.

B. History of Proceedings

[3] On February 2, 2005, the Commission issued a temporary order precluding PAAM from opening new client accounts and accepting any new funds or assets from investors. A further temporary order was issued on February 10, 2005 to preclude redemptions or withdrawals by investors and to preclude Manor from trading in the principal protected notes issued by Société Générale (together, the "**Temporary Orders**"). The Temporary Orders were extended from time to time, and on October 13, 2005, the Temporary Orders were varied pursuant to section 144 of the Act to permit the court-appointed receiver, KPMG Inc., (the "**Receiver**"), to take action as it considers appropriate with respect to certain securities held by PAAM and PAM (together, the "**Corporate Respondents**"). On December 16, 2005, the Commission extended the Temporary Orders "until the Proceeding is concluded and a decision of the Commission is rendered or until the Commission considers appropriate".

[4] On October 5, 2005, the Commission issued a Notice of Hearing in connection with a Statement of Allegations filed by Staff on the same day, commencing proceedings against the Respondents pursuant to sections 127 and 127.1 of the Act (the "**Administrative Proceeding**").

[5] Staff also commenced quasi-criminal proceedings against two of the Respondents, Manor and Mendelson, before the courts pursuant to section 122 of the Act. On October 4, 2005, proceedings were commenced against Manor in the Ontario Court of Justice pursuant to section 122 of the Act and on April 20, 2006, additional charges were laid against Manor in the Ontario Court of Justice pursuant to section 122 of the Act and Staff

commenced quasi-criminal proceedings against Mendelson in the Ontario Court of Justice pursuant to section 122 of the Act (collectively, the "**Section 122 Proceedings**").

[6] As a result of the commencement of the Section 122 Proceedings, the Commission, on June 16, 2006, adjourned the Administrative Proceeding until the rendering of judgment in respect of the Section 122 Proceedings.

[7] Manor and Mendelson were also subject to charges laid against them pursuant to the *Criminal Code*, R.S.C., 1985, c. C-46, as amended (the "**Criminal Code**") for acts related to the Administrative Proceeding and the Section 122 Proceedings. On November 19, 2007, Mendelson pled guilty to one count of fraud contrary to section 380 of the Criminal Code in the Ontario Court of Justice and was sentenced to two years in jail and three years probation. On November 19, 2010, Manor pled guilty to two counts under the Criminal Code before the Superior Court of Justice and, on May 25, 2011, he was sentenced to four years in jail.

[8] The Section 122 Proceedings concluded on July 13, 2011. The Commission issued a Notice of Hearing on August 4, 2011 giving notice that the Administrative Proceeding would continue.

[9] Manor, Labanowich and Ogg entered into settlement agreements with Staff in respect of the Administrative Proceeding against them which were approved by the Commission on August 27, 2012 (*Re Portus Alternative Asset Management Inc.* (2012), 35 O.S.C.B. 8128 (settlement with respect to Manor); *Re Portus Alternative Asset Management Inc.* (2012), 35 O.S.C.B. 8119 (settlement with respect to Labanowich); and *Re Portus Alternative Asset Management Inc.* (2012), 35 O.S.C.B. 8136 (settlement with respect to Ogg)). As a term of the settlement agreement between Staff and Manor, Manor was ordered to disgorge to the Commission the amount of $8.8 million.

[10] The hearing on the merits in this matter commenced on September 4, 2012. At that time, I was advised by Staff and Mendelson, the latter of whom attended by teleconference in accordance with Rule 4 of the Commission *Rules of Practice* (1997), 20 O.S.C.B. 1947, that they have reached an agreement regarding the facts against Mendelson in this matter and were discussing the sanctions that would be appropriate in the circumstances. The parties jointly requested that the hearing on the merits be converted into a sanctions hearing in the event that they could not resolve their differences regarding sanctions. I granted that request and adjourned the hearing to October 2, 2012.

[11] On October 2, 2012, the hearing was further adjourned to October 16, 2012 to allow Staff and Mendelson to finalize the agreed statement of facts. The Commission requested that Staff file written submissions on sanctions with the Commission by the close of business on October 5, 2012 and that Mendelson file written submissions on sanctions by the close of business on October 12, 2012.

[12] The hearing resumed on October 16, 2012. Mendelson was present at the hearing and was not represented by counsel. Although no one appeared on behalf of the

Corporate Respondents, I was satisfied that the Receiver received notice of the hearing based on the Affidavit of Service of Peaches A. Barnaby sworn October 15, 2012.

[13] Staff and Mendelson submitted an agreed statement of facts (the "**Agreed Statement of Facts**") upon which I made my findings and concluded the hearing on the merits. The sanctions hearing was then held as requested jointly by the parties. Staff made oral submissions on sanctions, supported by written submissions on sanctions and a book of authorities. Mendelson indicated by e-mail to Staff, dated October 12, 2012 and copied to the Office of the Secretary, that he would not be filing written submissions on sanctions but intended to make oral submissions at the hearing. At the hearing, Mendelson indicated that he had prepared a written version of his oral submissions on sanctions, although he "[did not] have to submit them" (Hearing Transcript dated October 16, 2012 at p. 19). As Mendelson confirmed that this document is merely the text of his oral submissions, I decided that it was not necessary for Mendelson to file it as written submissions. Oral submissions were received from Mendelson during the hearing.

[14] As requested by the Panel during the hearing, Staff filed additional submissions regarding investor losses, which is information made publicly available by the Receiver, on October 16, 2012, informing the Panel that the investors in the Corporate Respondents were "out well in excess of $9.12 million".

C. Mendelson

[15] Mendelson was a directing mind of PAM, a company incorporated on January 8, 2003. In that capacity, he engaged in marketing and record keeping for the Portus investment funds. Mendelson pled guilty to one count of fraud contrary to section 380 of the Criminal Code in the Ontario Court of Justice in connection with the sale of twelve series of investment products to members of the public by the Corporate Respondents.

II. THE AGREED STATEMENT OF FACTS AND FINDINGS

[16] As discussed above, an Agreed Statement of Facts was filed jointly by Staff and Mendelson in this matter. The Agreed Statement of Facts is appended to these Reasons and Decision as Schedule "A". No other evidence was presented by Staff or Mendelson.

[17] The following facts were among those agreed to between Staff and Mendelson as set out in the Agreed Statement of Facts:

(a) Funds received from the investors flowed into PAAM and were controlled solely by Manor and Mendelson signed cheques on behalf of PAAM at Manor's direction.

(b) PAM was controlled by Mendelson and engaged in marketing and record keeping for the Portus investment funds. Neither PAM nor Mendelson ever managed or directed any money on behalf of investors.

(c) Contrary to representations made to PAAM investors, certain securities were not purchased, certain securities issuers were not validly constituted, certain

agreements were not valid, certain counterparties were not arm's length or legitimate and investor funds were not actively managed, were not safeguarded or segregated and were not invested in or held in appropriate accounts.

(d) Contrary to representations made to investors and without their knowledge, Manor and Mendelson misappropriated approximately $94 million of the principal invested by clients and used the money for the ongoing operations of the Corporate Respondents.

(e) After receiving advice from legal counsel that the structure and conduct of the business of the Corporate Respondents was risky and problematic and that the Corporate Respondents should stop taking new investor funds immediately, the Corporate Respondents received in excess of $258 million of new investor funds for investment in securities issuers that had been identified as risky and problematic.

(f) In February 2005, after Staff was well into its investigation of the Corporate Respondents, under Manor's direction and to Mendelson's knowledge, electronic files and e-mail accounts were deleted, servers were re-formatted, the hard drives of approximately 90 desktop and laptop computers were re-formatted and voluminous paper files were destroyed.

(g) In January 2005 and March 2005, Mendelson authorized payments to himself over and above his salary in the amount of $320,000 both before and after the commencement of Staff's investigation.

(h) Mendelson has co-operated with Staff's investigation and has been unable to participate in the capital markets since June 2006 pursuant to an undertaking given by Mendelson to the Commission.

(i) Investors in the Corporate Respondents have received at least 97% and up to 102% of the funds invested.

(j) Mendelson has been engaged in community service for the last three years.

[18] In the Agreed Statement of Facts, Mendelson admits to having engaged in conduct which contravened Ontario securities law and was contrary to the public interest, including:

(a) by engaging in the conduct described in the Agreed Statement of Facts, his actions were contrary to subsections 2.1(1) and 2.1(2) of OSC Rule 31-505 – Conditions of Registration ("**OSC Rule 31-505**") respectively;

(b) as a consequence of his position of seniority and responsibility at the Corporate Respondents, he authorized, permitted or acquiesced in their failure to exercise their powers and discharge their duties as a Fund Manager in the best interests of the mutual funds, and in connection therewith, failed to exercise the degree of

care, diligence and skill expected of a reasonably prudent Fund Manager in the circumstances, contrary to subsection 116(1) of the Act; and

(c) by authorizing payments to himself over and above his salary in the amount of $320,000.00 both before and after the commencement of Staff's investigation into Mendelson and the Corporate Respondents.

[19] Subsections 2.1(1) and (2) of Rule 31-505 provide that:

> **2.1 General Duties – (1)** A registered dealer or adviser shall deal fairly, honestly and in good faith with its clients.
>
> **(2)** A registered salesperson, officer or partner of a registered dealer or a registered officer or partner of a registered adviser shall deal fairly, honestly and in good faith with his or her clients.

[20] Subsection 116(1) of the Act provides that:

> **116.(1) Standard of care for management of mutual fund** – Every person or company responsible for the management of a mutual fund shall exercise the powers and discharge the duties of its office honestly, in good faith and in the best interests of the mutual fund, and in connection therewith shall exercise the degree of care, diligence and skill that a reasonably prudent person would exercise in the circumstances.

[21] Based on the Agreed Statement of Facts, I found that Mendelson engaged in conduct contrary to subsections 2.1(1) and 2.1(2) of OSC Rule 31-505 and subsection 116(1) of the Act and acted contrary to the public interest and concluded the merits hearing.

III. SANCTIONS

A. The Positions of the Parties

1. Staff's Submissions

[22] Staff requested that the following sanctions be imposed on Mendelson:

(a) pursuant to clause 2 of subsection 127(1) of the Act, trading in any securities by Mendelson cease permanently;

(b) pursuant to clause 2.1 of subsection 127(1) of the Act, Mendelson is prohibited permanently from the acquisition of any securities with the exception that Mendelson is permitted to acquire securities in mutual funds through a registered dealer for the account of his Registered Retirement Savings Plan (as defined in the *Income Tax Act* (Canada));

(c) pursuant to clause 3 of subsection 127(1) of the Act, any exemptions contained in Ontario securities law do not apply to Mendelson permanently;

(d) pursuant to clause 6 of subsection 127(1) of the Act, Mendelson is reprimanded;

(e) pursuant to clause 7 of subsection 127(1) of the Act, Mendelson resign one or more positions that he holds as a director or officer of a reporting issuer;

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

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

(h) pursuant to clause 10 of subsection 127(1) of the Act, Mendelson disgorge to the Commission the amount of $320,000 obtained as a result of his non-compliance with Ontario securities law, for allocation, through the Receiver/Trustee KPMG Inc., if appropriate, to or for the benefit of third parties.

[23] Staff submitted during the hearing that it has been informed by Mendelson that he consents to the above-requested sanctions, except for the requested disgorgement order set out in subparagraph 22(h) above. Accordingly, Staff's submissions during the hearing mainly related to the imposition of a disgorgement order.

[24] Staff referred to a number of authorities, including *Re Sabourin* (2010), 33 O.S.C.B. 5299 ("***Sabourin Sanctions and Costs***"), *Re Limelight Entertainment Inc.* (2008), 31 O.S.C.B. 12030 ("***Limelight Sanctions and Costs***"), *Re Lehman Brothers and Associates Corp*. (2012), 35 O.S.C.B. 5357 and *Re Maitland Capital Ltd*. (2012), 35 O.S.C.B. 6500 ("***Maitland Sanctions and Costs***") in support of its submission that it is appropriate to order Mendelson to disgorge to the Commission the amount of $320,000, which Mendelson acknowledged as having received in contravention of Ontario securities law and contrary to the public interest. In Staff's submission, the facts before the Panel involve a multi-million-dollar investment scheme for which Mendelson had pled guilty and was sentenced to two years in a federal penitentiary. Mendelson's misconduct and breaches of the Act were serious and demonstrate a disregard for the rules governing the sale of securities to investors and a failure to meet the high standards of fitness and business conduct required by the Act. Although investors have received a high amount of their principal investments through the good work of the Receiver, it was Staff's submission that they were seriously harmed and lost well in excess of $9.12 million. According to Staff, it is not highly probable that investors would be able to obtain redress by other means. Staff submits that all of these factors support the granting of a disgorgement order.

[25] Staff submitted that disgorgement is necessary in this case for specific and general deterrence. Staff acknowledged that, due to Mendelson's circumstances and in particular the time he spent in jail, it may be the case that Mendelson had been deterred from

engaging in similar misconduct. However, it is Staff's position that the absence of a disgorgement order in the face of Mendelson's explicit acknowledgement in the Agreed Statement of Facts that he received money in contravention of Ontario securities law and contrary to the public interest would send a signal to the public that wrongdoers would be able to retain financial benefit derived from contravening Ontario securities law. This, according to Staff, would not achieve general deterrence. Rather, the Commission should be known to the public to protect the capital markets from "those people who deprive the citizens of their hard-earned money and deprived their children of their parents' future and their futures" (Hearing Transcript dated October 16, 2012 at p. 60).

[26] Staff also submitted that it is not seeking an administrative penalty or costs in respect of Mendelson because Mendelson had pled guilty to fraud in the criminal courts, had been convicted and had been sentenced to two years in the federal penitentiary.

2. Mendelson's Submissions

[27] Mendelson confirmed at the hearing that he consented to the imposition of the sanctions set out in paragraph 22 above except for the requested disgorgement order set out in subparagraph 22(h).

[28] In his oral submissions, Mendelson indicated that he accepts responsibility for his actions. He acknowledged that he was "greedy", "dishonest" and "selfish" and his behaviour arose out of his "fear…this universal self-limiting belief of not enough" (Hearing Transcript dated October 16, 2012 at p. 46).

[29] He submitted that when Staff commenced its investigation, he retained counsel and cooperated fully. He further submitted that when he was being charged with fraud under the Criminal Code, he "made a decision at that point that [his] life had to be about truth and honour 100 percent". As a result, he went to the police "unprotected,…shared [his] truth, prepared to accept whatever consequences were in store for [him]" (Hearing Transcript dated October 16, 2012 at p. 47). He was sentenced to two years in prison and served six months of that sentence.

[30] Mendelson in his submissions described the impact of his misconduct on his family. Mendelson submitted that he went through a very difficult time, lost his business and all of his money and went into debt and his reputation and career prospects were severely damaged. He submitted that as a result of this experience, he underwent a change in attitude and has since done his best to "[d]o the right thing" and "right any wrongs and to mend any damage that [he] was part of causing" (Hearing Transcript dated October 16, 2012 at pp. 50 and 51).

[31] Mendelson submitted that he now "devote[s] [his] time through teaching and coaching to helping others discover the seductive and destructive nature of greed and how it wreaks havoc in people's lives" (Hearing Transcript dated October 16, 2012 at p. 52). He informed the Commission that he is a self-employed consultant and coach helping clients "grow their business and themselves", that is "behaviors, attitudes, beliefs, and that stuff – that matters" (Hearing Transcript dated October 16, 2012 at p. 49). He

also submitted that he was using "what was a difficult experience for the greater good", including sharing his story "pro bono to university students, to churches, synagogues, to youth groups" (Hearing Transcript dated October 16, 2012 at pp. 49 and 50).

[32] According to Mendelson, he is trying to build a new career and leads a modest lifestyle. He submitted, without evidence, that he does not have the ability currently or in the foreseeable future to pay $320,000. He submitted that he did not settle with Staff because he does not want to agree to monetary sanctions that he has no ability to pay.

[33] He also asked the Commission to consider the following mitigating factors when considering disgorgement: (i) investors received at least 97% and up to 102% of the funds invested; (ii) he paid himself a considerably below market salary in the amount of approximately $150,000 annually while he was CEO of PAAM; (iii) he was not a registrant with the Commission; (iv) he never managed any funds directly or indirectly; (v) he did not have knowledge of the offshore investment for which Manor was responsible; (vi) he went to prison which was a powerful deterrent; and (vii) he agreed to lifetime trading and other prohibitions. He asked that the Commission not further punish him by asking for payment that he has no ability to pay and placing strain on his family and his ability to contribute to the society.

[34] Mendelson did not propose an amount of disgorgement that would be appropriate in the circumstances. He did propose that he serve 300 hours of community service as an alternative to paying disgorgement.

3. Reply Submissions

[35] In reply submissions, Staff acknowledged that Mendelson had undergone a difficult and life-altering circumstance when he received a sentence of two years of prison of which he served six months. Staff also acknowledged that Mendelson had a journey of self-discovery and has acknowledged his misconduct. However, Staff described Mendelson as having "gone a ways down the road of remorse…but not far enough" (Hearing Transcript dated October 16, 2012 at p. 60). Staff submitted that Mendelson's remorse was qualified to the point where he had to pay. It was Staff's submission that those who are truly remorseful and want to "right any wrongs" would offer to pay something back, and Mendelson had not even made a modest offer to pay anything back in his submissions.

[36] Staff submitted that while Mendelson had lost his business and all of his money and had gone into debt, the business of the Corporate Respondents was conducted, and the money was received, in contravention of Ontario securities law. With respect to Mendelson's ability to pay, Staff pointed out that there is no evidence before the Panel regarding his financial circumstances.

[37] Staff also submitted that the Commission has no jurisdiction to impose a community service order as proposed by Mendelson in his oral submissions.

[38] Following Staff's reply submissions, Mendelson stated that he is "open to paying something back on a monthly basis over time. [Staff] is exactly right that that is the right

thing to do. It's just [$]320,000 right now feels overwhelming to me" (Hearing Transcript dated October 16, 2012 at pp. 62 and 63).

B. The Law on Sanctions

[39] The Commission's mandate, set out in section 1.1 of the Act, is (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.

[40] 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*. (1990), 13 O.S.C.B. 1600 ("***Mithras***"):

> …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 section 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.
>
> (*Mithras*, *supra*, at pp. 1610 and 1611)

[41] 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 OSC 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 the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, [2001] 2 S.C.R. 132 at para. 43)

[42] The Supreme Court of Canada has recognized that general deterrence is an important factor in imposing sanctions: "… it is reasonable to view general deterrence as an appropriate and perhaps necessary, consideration in making orders that are both protective and preventative" (*Re Cartaway Resources Corp*., [2004] 1 S.C.R. 672 at para. 60).

[43] 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, for example, *Re Belteco Holdings Inc.* (1998), 21 O.S.C.B. 7743 at p. 7746 ("***Belteco***"); *Re M.C.J.C. Holdings Inc.* (2002), 25 O.S.C.B. 1133 ("***M.C.J.C. Holdings***") at p. 1136; *Limelight Sanctions and Costs*, *supra*, at para. 21; and *Sabourin Sanctions and Costs*, *supra*, at para. 57)

[44] In determining the appropriate sanctions to be ordered, the Commission will also consider the specific circumstances in each case and ensure that the sanctions are proportionate to those circumstances (*M.C.J.C. Holdings*, *supra*, at p. 1134).

[45] Further, in imposing financial sanctions such as disgorgement, overall financial sanctions imposed on each respondent is a relevant consideration (*Sabourin Sanctions and Costs*, *supra*, at para. 59). The Commission has also held in prior decisions that ability to pay, while not a predominant or determining factor, is clearly relevant in determining the appropriate financial sanctions to be imposed (*Sabourin Sanctions and Costs*, *supra*, at para. 60).

C. Analysis

1. Findings with respect to Sanctions

[46] Overall, the sanctions imposed must protect investors and Ontario capital markets by barring or restricting the respondents who have contravened Ontario securities law from participating in those markets in the future and by sending a strong message of specific and general deterrence.

[47] In considering the factors referred to in paragraph 43 above, I find the following factors and circumstances to be particularly relevant.

(a) Seriousness of the conduct and breaches of the Act

[48] The contraventions of Ontario securities law as admitted by Mendelson in the Agreed Statement of Facts are serious. As discussed in *Re Momentas Corp*. (2006), 29 O.S.C.B. 7408 at para. 46, brokers, dealers and other market participants in the business of selling or promoting securities must meet the minimum registration, qualification and conduct requirements of the Act. Mendelson failed to uphold the high standards of fitness and business conduct by failing to act in the best interests of the funds and failing to exercise the degree of care, diligence and skill that a reasonably prudent fund manager would exercise in the circumstances. The Agreed Statement of Facts further suggests that members of the public were induced to invest on the basis of dishonest representations and funds raised from investors were improperly used. I also note that the conduct underlying these contraventions formed the basis of Mendelson's guilty plea to one count of fraud under the Criminal Code and his two-year sentence in a federal penitentiary.

(b) The respondent's experience in the marketplace

[49] Mendelson had never been registered under the Act, which I consider to be a neutral factor in determining the appropriate sanctions.

(c) The size of any profit obtained or loss avoided from the illegal conduct

[50] Approximately 26,000 investors invested approximately $750 million in products offered by the Corporate Respondents. Mendelson acknowledged that he authorized payments to himself over and above his salary in the amount of $320,000 and that this contravened Ontario securities law and was contrary to the public interest.

[51] Investors in Portus received at least 97% and up to 102% of the funds invested, although there is no evidence that the recovery was a result of efforts on the part of Mendelson. The Agreed Statement of Facts discloses that this is a result of the fact that in all of the domestic structures, investor funds were invested in guaranteed notes with Société Générale. Also, the funds returned included the return of referral and brokerage fees from registered brokers and dealers who sold units in the Portus investment structures.

(d) Specific and General Deterrence

[52] Mendelson was a directing mind of one of the Corporate Respondents and discussed decisions made by the Corporate Respondents with Manor. He agreed to use investor funds to operate and support the Corporate Respondents contrary to the representations made to investors. He did so with the understanding that this use of existing investor funds meant that the Corporate Respondents were not sustainable without reducing the operating costs of the companies or the infusion of new funds from investors. The Agreed Statement of Facts also shows that despite having received legal advice in or around July 2004 that any further action taken by them in relation to the Corporate Respondents would be risky and may result in further criminal law problems, the Corporate Respondents continued to receive funds in excess of $258 million. Mendelson was also aware that, in February 2005, following the issuance of the Temporary Orders, Manor took steps to destroy documents and delete electronic information to impede Staff's investigation. The sanctions imposed in this case should deter him and other like-minded people from engaging in similar misconduct.

[53] I do note, however, that the Agreed Statement of Facts provide that Mendelson "did not always know all the details" about the decisions made by Manor and the Corporate Respondents, that he believed the use of investor funds to operate and support the companies was to be on a short-term basis and that he was not involved in the transferring of funds to off-shore entities.

(e) Remorse/Recognition of the seriousness of the improprieties

[54] Mendelson acknowledged in the Agreed Statement of Facts that he contravened Ontario securities law and accepted certain sanctions against him. He expressed remorse at the hearing and made submissions that indicate his acceptance of responsibility for his actions.

(f) Mitigating Factors

[55] Mendelson cooperated with Staff during Staff's investigation and entered into an undertaking in which he agreed to refrain from (i) becoming a director or officer of a reporting issuer; (ii) being an employee, and a director or officer of a registrant; and (iii) engaging directly or indirectly in the solicitation of funds from general public for investment in "securities". As a result of the undertaking, Mendelson has been effectively unable to participate in his chosen field of business in the capital markets since June 2006.

[56] Mendelson was sentenced to two years in jail and served six months of that sentence. As acknowledged in the Agreed Statement of Facts, Mendelson has been engaged in community service for the past 3 years, "teaching business students and other groups about the destructive nature of fear and greed in the business world, using his own story and personal consequences as a powerful model for deterrence from unethical behaviour".

2. Trading and Other Prohibitions

[57] At the outset of the hearing, I noted that some of the sanctions requested by Staff, namely, the prohibition against acquiring securities, the prohibition from becoming or acting as a director or officer of a registrant or investment fund manager and the prohibition from becoming or acting as a registrant, investment fund manager or promoter, are not requested in the Notice of Hearing. However, in view of the fact that the Applicant confirmed that these sanctions were agreed upon as a result of extensive discussions with Staff, I am satisfied that the Applicant received notice of these proposed sanctions.

[58] Based on the factors discussed in paragraphs 48 to 56 above and the consent and agreement of the parties, I find that it is in the public interest to make the following orders:

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

(b) pursuant to clause 2.1 of subsection 127(1) of the Act, Mendelson is prohibited permanently from the acquisition of any securities with the exception that he is permitted to acquire securities in mutual funds through a registered dealer for the account of his Registered Retirement Savings Plan (as defined in the *Income Tax Act* (Canada));

(c) pursuant to clause 3 of subsection 127(1) of the Act, any exemptions contained in Ontario securities law do not apply to Mendelson permanently;

(d) pursuant to clause 6 of subsection 127(1) of the Act, Mendelson is reprimanded;

(e) pursuant to clause 7 of subsection 127(1) of the Act, Mendelson resign any and all positions that he holds as a director or officer of a reporting issuer;

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

(g) pursuant to clause 8.5 of subsection 127(1) of the Act, Mendelson is prohibited permanently from becoming or acting as a registrant, as an investment fund manager or as a promoter.

3. Disgorgement

[59] As set out above, the only issue in dispute at this hearing is the amount of disgorgement, if any, to be ordered against Mendelson.

[60] Clause 10 of subsection 127(1) 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 Commission

in *Limelight Sanctions and* Costs, *supra*, at para. 52 set out a list of relevant factors to be taken into account when determining a disgorgement order:

(a) whether an amount was obtained by a respondent as a result of non-compliance with the Act;

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

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

(d) whether the individuals who suffered losses are likely to be able to obtain redress; and

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

[61] In my view, it is appropriate to order that Mendelson disgorge to the Commission the amount of $320,000. In this case, Mendelson clearly admitted in the Agreed Statement of Facts that he obtained $320,000 as a result of his contraventions of Ontario securities law, which he admitted were contrary to the public interest and which contraventions I consider to be serious for reasons set out in paragraph 48 above. Although investors received from 97% and up to 102% of the funds they invested, in some cases, they did not recover the entire principal amounts that they invested. This is confirmed by Staff in the additional submissions referred to in paragraph 14 above, which state that the investor losses in this case were well in excess of $9.12 million, that is, the sum of the disgorgement ordered against Manor and the proposed disgorgement against Mendelson.

[62] While Mendelson submitted that he had no ability to pay, he failed to provide the Commission with any evidence in support of this claim.

[63] I am mindful that Mendelson was cooperative in Staff's investigation, was sentenced to two years in a federal penitentiary, expressed remorse during the hearing and submitted that he was specifically deterred. However, as set out in *Sabourin Sanctions and Costs*, *supra*, at para. 65, the purpose of the disgorgement remedy is not only to provide specific and general deterrence but also to ensure that respondents do not retain any financial benefit from their breaches of the Act. In these circumstances, particularly in light of Mendelson's admission that he received funds in the amount of $320,000 in contravention of Ontario securities law, the Commission must order that the entire amount be disgorged in order to ensure that he not be permitted to retain any financial benefit from his breaches of the Act and in order to send a message to the public that the Commission does not permit the retention of any funds derived from the contravention of Ontario securities law.

[64] Accordingly, I order that Mendelson disgorge to the Commission the amount of $320,000, which is designated for allocation or for use by the Commission pursuant to subsection 3.4(2)(b) of the Act.

4. Other Sanctions proposed by Mendelson

[65] Mendelson proposed that he perform a term of community service as an alternative to an order of disgorgement. As the Commission held in *Maitland Sanctions and Costs*, *supra*, at para. 72, the Commission lacks the statutory authority to impose an order requiring a respondent to perform community service.

IV. ORDER

[66] For the reasons above, I find that it is in the public interest to order the following sanctions, which are proportionate to Mendelson's conduct, reflect the seriousness of his non-compliance with Ontario securities law and will deter him and other like-minded people from engaging in similar misconduct.

[67] I will issue a separate order giving effect to the decision on sanctions, as follows:

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

(b) pursuant to clause 2.1 of subsection 127(1) of the Act, Mendelson is prohibited permanently from the acquisition of any securities with the exception that he is permitted to acquire securities in mutual funds through a registered dealer for the account of his Registered Retirement Savings Plan (as defined in the *Income Tax Act* (Canada));

(c) pursuant to clause 3 of subsection 127(1) of the Act, any exemptions contained in Ontario securities law do not apply to Mendelson permanently;

(d) pursuant to clause 6 of subsection 127(1) of the Act, Mendelson is reprimanded;

(e) pursuant to clause 7 of subsection 127(1) of the Act, Mendelson resign any and all positions that he holds as a director or officer of a reporting issuer;

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

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

(h) pursuant to clause 10 of subsection 127(1) of the Act, Mendelson disgorge to the Commission the amount of $320,000 obtained as a result of his non-compliance

with Ontario securities law, which is designated for allocation or for use by the Commission pursuant to subsection 3.4(2)(b) of the Act.

DATED at Toronto on this 29th day of November, 2012.

"*Edward P. Kerwin*"

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Edward P. Kerwin

SCHEUDLE "A"

Agreed Statement Of Facts

A. Overview

1. Michael Mendelson has entered a plea of guilty to one count of fraud contrary to section 380 of the *Criminal Code of Canada* in the Ontario Court of Justice in connection with the sale of twelve series of investment products to members of the public by the Portus companies. Approximately 26,000 investors, the majority Canadian, invested approximately $750 million in Portus products. During the time period covered by the charge, Boaz Manor and Michael Mendelson were close business partners and the directing minds of the Portus companies. They talked about decisions made by the Portus companies but Mendelson did not always know all the details.

2. In the case of each Portus investment product referred to in the charge, members of the public were induced to invest on the basis of dishonest representations, which resulted in members of the public being at risk for substantial amounts of money.

B. The Corporate Structure

3. Portus received its first $1.2 million in "seed money" in equal amounts from Manor and Mendelson through Bringood Investment Ltd, a company owned by Manor's sister-in-law.

4. Paradigm Alternative Asset Management Inc, later to be known as Portus Alternative Asset Management Inc. ("PAAM") was incorporated on January 10, 2003. Boaz Manor controlled PAAM. It was registered as an investment counsellor and portfolio manager or their equivalent under the securities legislation of each of the territories and provinces in Canada, with the exception of Quebec. PAAM was also registered as a limited market dealer under the *Ontario Securities Act*. PAAM developed investment products that Portus marketed to investors. Funds received from the investors

flowed into PAAM, and were solely controlled by Manor and Mendelson signed cheques on behalf of PAAM at Manor's direction.. PAAM was also made up of numerous Canadian and offshore "satellite companies".

5. Paradigm Asset Management Inc., later to become Portus Asset Management Inc. (PAM), was incorporated on January 8, 2003. PAM was controlled by Michael Mendelson and engaged in marketing and record keeping for the Portus investment funds. Neither PAM nor Mendelson ever managed or directed any money on behalf of investors.

C. Portus Investment Products

6. Between February 2003 and May 2003, PAAM marketed investments in what it termed its Market Neutral Preservation Fund ("MNPF"). Units of MNPF were sold to "accredited investors" as defined by the *Ontario Securities Act*. These were individuals with substantial financial assets. MNPF appeared in its offering memorandum to be properly set up as a "hedge fund".

7. PAAM then restructured its investment strategy in order to make its financial services available to all investors. It did this by offering to manage the assets of clients of third party investment dealers on a discretionary basis. Investment advisors working for registered dealers referred their clients to PAAM and received referral fees and trailer fees in consideration. Investors referred to PAAM entered into a managed account agreement wherein PAAM was given authority to invest and reinvest their assets on a discretionary basis.

8. The managed account agreement and the offering memorandum for the relevant "Trust Series" disclosed the fees which were payable to PAAM for its services. The managed account agreement indicated that PAAM would be entitled to an annual management fee ranging from 1.9% to 2.25% of the market value of the assets in an investor's account. It also indicated that PAAM would be entitled to a performance fee of

18% of the growth in the market value of the assets in an investor's account. The offering memorandum disclosed similar fees to PAAM but based the payment of such fees on the net asset value of the relevant Trust Series.

9. PAAM represented that it would exercise its discretionary authority by investing 100% of the investor's funds in a principal protected note guaranteed by a major bank – Societe Generale of France. The money invested was to go into the note and Societe Generale promised the investment note would be linked to the returns of a hedge fund of funds whose managers invested the money. The bank notes participated in the gains of this linked hedge fund of funds so that at the end of the note's term the investor was guaranteed a minimum of the return of the principal plus whatever was made by the linked hedge fund of funds.

10. The terms of the managed account agreements were amended as new Trust Series were set up. While the level of disclosure increased, the managed account agreements and offering memoranda continued to represent to the investors that:

1) their funds would be fully invested;
2) the principal would be protected; and
3) there was an opportunity for profit through the portion of the funds invested in the hedge fund.

11. Investors were also told that the structure of the Trust Series included a complex "swap" agreement utilizing allegedly arms-length counter parties named Premiers Derives Paris Inc. ("PDP") and BNote Management Inc. ("BNote"). It was represented that the use of these offshore counter parties would result in beneficial tax treatment of the investments.

12. Contrary to representations made to PAAM investors:

1) Canadian Equities were not purchased except for MNPF;
2) BancNote Trust Series III through XII(a), were not validly constituted;

3) the option agreements with the counter parties were not valid; and

4) the counter parties were not arms-length but instead were entities created and controlled by Boaz Manor with a view to creating the illusion of legitimacy for the Trust structures.

13. Moreover, PAAM did not actively manage clients' individual accounts and did not provide any advice to investors. With the exception of funds that were improperly used as set out below, funds were pooled and invested directly into the Trusts. The only investments made by the Trusts were the purchase of the principal protected notes from Societe Generale.

14. In July 2003 Portus began offering the BancNote Trust Series and, subsequently, the BancLife Trust Series. The investor funds for all these Trust Series were deposited by PAAM/Manor into one of two co-mingled bank accounts maintained by PAAM at the Royal Bank of Canada in Toronto. The funds then flowed into separate bank accounts at the Royal Bank set up for each of the Trust Series, starting with what was known as a "custodian" account.

15. From October 2003 to March 2004 Manor maintained accounts in various names at Lines Overseas Management, a brokerage house in Bermuda. Most of the funds received by PAAM in respect of BancNote Trust Series II, III, IV, V and portions of VI and VI (a) flowed from PAAM's accounts at Royal Bank to the Bank of Butterfield in Bermuda. These funds were recorded in the brokerage account of PAAM at Lines Overseas Management. The brokerage account statements show that shares in Canadian public companies were purchased and sold. In reality the funds simply moved between the four separate accounts in the names of PAAM, PDP, BNote and BNote Limited (another offshore company affiliated with Manor) and then were transferred back to accounts held by PAAM in the name of each of the Trusts at Royal Bank in Toronto. Manor then transferred the funds from these accounts to an account in the name of PAM at RBC Dominion Securities in Toronto and they were used to purchase the notes from Societe Generale.

16. In or about March 2004 investor funds stopped flowing through Lines Overseas Management. Funds in respect of BancNote Trust Series VIII, VIII (a), X and X (a) and a portion of Series VI and VI (a) were transferred by Manor between a number of bank accounts in the name of PAAM and PAM at Royal Bank in Toronto. Most of the funds were then transferred by Manor from these accounts to an account in the name of PAM at RBC Dominion Securities in Toronto and were used to purchase the notes from Societe Generale.

17. Manor and Mendelson agreed to use investor funds to operate and support the Portus companies. Mendelson believed this was to be on a short-term basis. Contrary to the representations made to investors and without their knowledge, Manor and Mendelson misappropriated approximately $94 million of the principal invested by clients (approximately 13.3% net of redemptions) and used the money for the ongoing operations of the companies (e.g. to pay management fees, performance fees, referral fees, trailer fees and salaries). Mendelson indicates it was his general understanding that this $ 94 million (13.3% of total funds) was obtained pursuant to a financing arrangement where PAAM's annual management fees approximating 2.6% per year were assigned to the structure's counterparty, in exchange for the present value of five years worth of fees paid up front. This totaled $94 million over Portus' life, which equated to both 13.3% total, and 2.6% per year for the five-year term. The vast majority of notes carry a five-year term. Mendelson realized this use of existing investor funds meant that Portus was not sustainable without reducing the operating costs of the companies or the infusion of new funds from investors.

18. Of the approximately $94 million of investor funds misappropriated by Portus, Manor transferred more than approximately $52 million to various offshore entities and then to Basel Trust in the Jersey Islands. Basel Trust then entered into a series of fiduciary agreements with Bank Hapoalim in Switzerland whereby Bank Hapoalim loaned the funds held by Basel Trust to Portus. Approximately $13 million was also transferred to Bank Hapoalim in Switzerland and loaned back to BancNote Corp. (a

Portus company). This had the effect of making it look like external financing had been obtained from Bank Hapoalim for the operation of the business when the financing actually came from investor money.

19. Manor then transferred the balance of more than $41 million of misappropriated investor funds directly to BancNote Corp. and used it for the operation of the Portus companies.

D. Legal Advice From Groia & Company

20. In March 2004 PAAM and PAM hired the Toronto law firm of Groia & Company to provide legal advice on the structure and investments of the Portus companies. Groia & Company in turn hired the services of accountants Kroll, Lindquist Avery ("Kroll"). A report prepared by Kroll noted the following issues:

1) Client money was used to fund operations;
2) There was co-mingling of funds at several levels;
3) There were doubts over the authenticity of some of the documents supporting transactions;
4) There was a lack of transparency and information on certain key transactions regarding Edinburgh Estates (a fund referred to by Manor as a Portus investment that did not actually exist), Bank Hapoalim, Bancnote Corp., and the Societe Generale;
5) Funds used for "repayment" of Edinburgh Estates transactions in the Market Neutral Preservation Fund flowed through a bank account of BancNote Trust Series VI; and
6) The source of Hapoalim financing may have been investor funds.

21. On July 27, 2004, Manor and Mendelson admitted that funds directed to Edinburgh Estates that Kroll was unable to account for, were the discounted amount of the principal protected notes purchased (averaging 13.3% as discussed above) and had "circled back" to pay operating expenses for PAM. During the meeting, Mr. Groia

advised Manor and Mendelson that they needed to do the following five things immediately:

1) Retain senior counsel at a top tier law firm on behalf of PAAM and PAM and provide true, full and complete disclosure respecting the structure and affairs of PAAM;
2) Manor and Mendelson needed to speak to their own counsel respecting the disclosure of the use of the Edinburgh Estates funds and the fact that Groia & Company had resigned and could no longer act for PAAM or PAM;
3) The Ontario Securities Commission would view it as the obligation of Manor and Mendelson as capital market participants to disclose all of the problems and issues raised to date;
4) PAAM and PAM should stop taking new investor funds immediately; and,
5) Groia could not act for PAAM, PAM, Manor or Mendelson.

22. Manor and Mendelson were also advised that any further action taken by them would be risky and may result in further criminal law problems or may aggravate their situation and the current problems identified.

23. After September 2004 and receiving this advice, Portus received in excess of $258 million (net of redemptions) from investments into BancNote Trust Series X, X (a), XII, XII (a) and BancLife Trust Series I and II (additional funds were also taken in preexisting Trusts and Trusts set up after September 2004 but for which funds were still being pooled at the time of the Ontario Securities Commission's Order).

E. Regulatory Action

24. On February 2, 2005 the Ontario Securities Commission (the "Commission") issued a temporary order precluding Portus from opening any new client accounts or from accepting any new funds or assets from investors. The Commission took this action because PAAM had contravened securities regulations regarding the maintenance of

proper books and records, the delivery of client account statements and the discharge of "know your client" and investment suitability requirements. On February 10, 2005 the Commission issued a second temporary order precluding redemptions or withdrawals by investors and precluding Boaz Manor from trading in the principal protected notes issued by Societe Generale. The Commission applied for a court order appointing a Receiver and the order was issued on March 4, 2005.

25. In February 2005, after the Commission was well into their investigation of Portus, under Manor's direction and to Mendelson knowledge electronic files and email accounts were deleted, servers were re-formatted, the hard drives of approximately 60 desktops and 30 laptops were reformatted, and voluminous paper files were destroyed.

F. Mendelson cooperated with Staff's investigation

26. On June 13, 2006, Mendelson signed an undertaking with the Commission in which he agreed to refrain from:

1) becoming a director or officer of a reporting issuer,
2) being an employee, director or officer of a registrant; and,
3) engaging directly or indirectly in the solicitation of funds from the general public for investment in "securities"

27. As a result of signing the undertaking, Mendelson has been effectively unable to participate in his chosen field of business in the capital markets since June of 2006.

28. Investors in Portus received at least 97% and up to 102% of the funds invested. This was primarily the result of fact that in all of the domestic structures, investor funds were invested in guaranteed notes with Societe General.

29. Mendelson has been engaged in community service for the past 3 years, teaching business students and other groups about the destructive nature of fear and greed in the business world, using his own story and personal consequences as a powerful model for deterrence from unethical behavior.

G. Recovery On Investor Claims[1]

30. Investors in Portus received at least 97% and up to 102% of the funds invested. This was primarily the result of the fact that in all of the domestic investment structures, investor funds were invested in guaranteed notes with Soc Gen. The funds returned to investors also included the return of referral and brokerage fees from registered brokers and dealers who sold units in the Portus investment structures.

H. Dishonest Benefits – compensation

31. In January 2005 and March 2005 Mendelson authorized payments to himself over and above his salary in the amount of $320,000.00 both before and after the commencement of the Commission investigation. This conduct was contrary to Ontario securities law and contrary to the public interest.

I. Breaches of the Ontario Securities Act by Mendelson

32. Mendelson agrees that between and including January 10, 2003 and March 5, 2005 (the "Material Time"), by engaging in the conduct as set out above, Mendelson admits and acknowledges that he contravened Ontario securities law during the Material Time in the following ways:

1) by engaging in the conduct described herein, Mendelson's actions were contrary to sections 2.1(1) and 2.1(2) of OSC Rule 31-505 respectively;
2) as a consequence of his position of seniority and responsibility at Portus, Mendelson authorized, permitted or acquiesced in Portus' failure to exercise its powers and discharge its duties as a Fund Manager in the best interests of the mutual funds and, in connection therewith, failed to

[1] For complete reports and analysis of funds seized by KPMG Inc, Trustee in Bankruptcy & Court-Appointed Receiver for Portus, please refer to www.portusgroup.ca.

exercise the degree of care, diligence and skill expected of a reasonably prudent Fund Manager in the circumstances, contrary to section 116(1) of the Act; and,

3) by authorizing payments to himself over and above his salary in the amount of $320,000.00 both before and after the commencement of the Staff's investigation into Mendelson and Portus.

33. Mendelson admits and acknowledges that he acted contrary to the public interest by contravening Ontario securities law as set out in sub-paragraphs 32 (1) to (3).

34. This Agreed Statement of Facts may be signed in one or more counterparts which together will constitute a complete Agreed Statement of Facts.

35. A facsimile copy of any signature will be as effective as an original signature.

Dated this 16th day of October, 2012

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Michael Mendelson

Dated this 16th day of October, 2012

STAFF OF THE ONTARIO SECURITIES COMMISSION

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Tom Atkinson

Director, Enforcement Branch