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 EMPIRE CONSULTING INC. and DESMOND CHAMBERS

REASONS AND DECISION
(Sections 127 and 127.1 of the Act)

Sanctions and Costs Hearing:	October 10, 2012	
Decision:	February 28th, 2013	
Panel:	Edward P. Kerwin	- Commissioner
Appearances:	Derek J. Ferris	- For Staff of the Commission
	No one appeared for the Respondents:	- Desmond Chambers - Empire Consulting Inc.

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REASONS FOR DECISION

I. INTRODUCTION

[1] This was a hearing before the Ontario Securities Commission (the "**Commission**") pursuant to sections 127 and 127.1 of the *Securities Act*, R.S.O. 1990, c., S.5, as amended (the "**Act**") to consider whether it was in the public interest to make an order with respect to sanctions and costs against the respondents, Empire Consulting Inc. ("**Empire**") and Desmond Chambers ("**Chambers**") (collectively, the "**Respondents**").

[2] The hearing on the merits was conducted on January 26 and 27, 2012 and March 22, 2012. The Reasons and Decision on the merits was issued on August 16, 2012 and can be found at *Re Empire Consulting Inc. et al.* (2012), 35 OSCB 7775 (the "**Merits Decision**").

[3] After the release of the Merits Decision, a separate hearing was held on October 10, 2012 to consider submissions from Enforcement Staff of the Commission ("**Staff**") regarding sanctions and costs (the "**Sanctions and Costs Hearing**"). The Respondents did not attend the Sanctions and Costs Hearing. The Panel reviewed Staff's correspondence with the Respondents, specifically, e-mail correspondence attaching Staff's submissions and authorities for the Sanctions and Costs Hearing as well as the Merits Decision. The Merits Decision and a Notice of Hearing were also sent to the Respondents by the Office of the Secretary, both of which indicated that the Sanctions and Costs Hearing would be heard on October 10, 2012. The Panel was satisfied that the Respondents received notice of the Sanctions and Costs Hearing and had the opportunity to respond to Staff's submissions and to attend the Sanctions and Costs Hearing if the Respondents chose to do so. The Panel therefore determined that it was entitled to proceed in the Respondents' absence pursuant to section 7(1) of the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22.

[4] These are the reasons and decision as to the appropriate sanctions and costs in this matter. A copy of the sanctions order is attached as Schedule "A" to these reasons (the "**Sanctions Order**").

II. THE MERITS DECISION

[5] In the Merits Decision, the Panel held that the Respondents acted contrary to the public interest and contravened Ontario securities law through the following breaches of the Act:

a) The Respondents traded in securities without being registered to trade in securities in circumstances where no exemptions were available to them in accordance with Ontario securities law, contrary to subsection 25(1)(a) (pre-September 28, 2009) and subsection 25(1) (post-September 28, 2009) of the Act;

b) The Respondents acted as advisors with respect to investing in, buying or selling securities without being registered to do so and where no exemptions were available to them, contrary to subsection 25(1)(c) (pre-September 28, 2009) and subsection 25(3) (post-September 28, 2009) of the Act;

c) The Respondents distributed securities without filing a preliminary prospectus and prospectus and without receiving receipts issued by the Director, contrary to subsection 53(1) of the Act;

d) The Respondents engaged in acts relating to securities that they knew or reasonably ought to have known perpetrated a fraud on investors, contrary to subsection 126.1(b) of the Act; and

e) Chambers, in his capacity as director and officer of Empire, authorized, permitted and acquiesced in Empire's non-compliance with Ontario securities law, contrary to section 129.2 of the Act.

[6] Specifically, the Panel found that the Respondents engaged in the business of trading in securities by way of investment contracts without being registered to do so in contravention of the Act. Chambers' dealings with investors, and the terms of the authorizations signed by the Empire investors to manage all aspects of their investment portfolios, was akin to the provision of services by an advising representative of a portfolio manager with full trading discretion in client accounts. Accordingly, the Respondents engaged in the business of advising without being registered to do so in contravention of the Act. The Panel determined that it was clear that each investment contract entered into with a new investor constituted a trade in a security that had not been previously issued. As a result, the activities of the Respondents constituted a distribution of securities for which no prospectus was filed or receipt obtained, contrary to the Act.

[7] With respect to the allegations of fraud, the Panel held that both the *actus reus* and *mens rea* elements of the allegations were proven. In finding that the *mens rea* element was proven, the Panel concluded as follows:

> The Respondents knew that their investors were risking their personal savings and, in most cases, their only asset, their principal residence, in the hopes of being debt free and making an easier life for themselves. The Respondents knew, by the design of the DES program, that this risk was in place and that any mismanagement of investor funds could result in significant deprivation to them. The Respondents' actions can only be described as reckless or, at best, willfully blind to the consequences of their actions. In either case, the two prongs for the *mens rea* element of fraud are clearly met, namely subjective knowledge of the prohibited act and knowledge that such act could cause deprivation to Empire's investors.
>
> Applying the principles set out above, this Panel concludes that the Respondents are guilty of committing fraud as set out in subsection 126.1(b) of the Act. (Merits Decision*, supra,* at paragraphs 88 and 89)

[8] The Panel's overarching conclusions with respect to the evidence presented by Staff at the Merits Hearing was as follows:

> The Panel finds that the evidence presented at the Merits Hearing was convincing and uncontroverted. Most persuasive was the investors' evidence describing their individual experience with Chambers and Empire, which was consistent with one

> another and with the books and records that Staff were able to obtain and examine. We further note that the investors' evidence, the books and records of Empire, and the TD Bank records were consistent with Nelson's account of the business of Empire and the way in which Chambers conducted himself as principal of Empire.
>
> The Panel notes that although Staff indicated that they had been able to trace a figure of approximately $1.6 million received from 33 investors, as stated in the Amended Statement of Allegations, that had been deposited into the Empire bank accounts, the evidence at the Merits Hearing identified for the Panel only $1,493,108 that can specifically be traced to 26 investors. (Merits Decision, *supra* at paras. 36 and 37)

[9] The panel concluded that Chambers was involved in all aspects of Empire:

> Chambers essentially *was* Empire. He was the mastermind behind the DES program -- "DES" being an abbreviation of his name, "Desmond," as well as the acronym for the "Debt Elimination Strategy" program. Chambers was in charge of marketing the DES program offered by Empire, met with potential investors personally, facilitated the movement of their funds from the equity in their homes to Empire's bank account, and he was the sole signatory of the Empire bank accounts. Chambers used some of the Empire investor funds to pay for personal expenses and to pay other investors' returns on their investments. For the foregoing reasons, it is apparent that Chambers authorized, permitted, and acquiesced in all aspects of Empire's business. (Merits, *supra* at para. 92)

[10] The Respondents' behaviour warrants sanctions for the purpose of both specific and general deterrence in order to protect investors from unfair, improper and fraudulent practices and to foster confidence in capital markets.

III. SANCTIONS

A. Sanctions Requested by Staff

[11] In the Notice of Hearing in this matter dated May 26, 2011, Staff indicated that they are seeking an order pursuant to sections 127 and 127.1 of the Act that:

a) trading in any securities by the Respondents cease permanently or for such period as is specified by the Commission;

b) the acquisition of any securities by the Respondents is prohibited permanently or for such period as is specified by the Commission;

c) any exemptions contained in Ontario securities law do not apply to the Respondents permanently or for such period as is specified by the Commission;

d) each of the Respondents disgorge to the Commission any amounts obtained as a result of non-compliance by that Respondent with Ontario securities law;

e) the Respondents be reprimanded;

f) Chambers resign one or more positions that he holds as a director or officer of any issuer, registrant, or investment fund manager;

g) Chambers be prohibited from becoming or acting as a director or officer of any issuer, registrant, and investment fund manager;

h) Chambers be prohibited from becoming or acting as a registrant, as an investment fund manager and as a promoter;

i) the Respondents each pay an administrative penalty of not more than $1 million for each failure by that Respondent to comply with Ontario securities law; and

j) the Respondents be ordered to pay the costs of the Commission investigation and the hearing.

[12] By written submissions, Staff requested that the Respondents be ordered to pay an administrative penalty of $300,000 on a joint and several basis. Staff also requested that the Respondents be ordered to disgorge to the Commission $812,506 on a joint and several basis. Staff asked that both the administrative penalty and disgorgement amounts be allocated to or for the benefit of third parties pursuant to subsection 3.4(2)(b) of the Act. Staff requested that the costs incurred in the investigation and hearing in the amount of $235,502.15 be ordered to be paid by the Respondents on a joint and several basis.

[13] At the Sanctions and Costs Hearing, Staff changed the amount of the requested disgorgement order. The original request in their written submissions of $812,506 was based upon the total amounts received from investors of $1,493,108 less the amounts returned to investors of $680,602, as indicated in the Empire records. Staff acknowledged that the returned sum did not take into consideration the $10,000 cash payment that one of the investor witnesses at the Merits Hearing said he received from Chambers. Further, the returned sum included amounts that were paid by Chambers to three Empire investors as profit and as such exceeded their principal investments. According to the evidence submitted at the Merits Hearing, a total sum of $57,049 was paid to those three investors, above and beyond their original investment. Staff suggested that all of these payments be taken into consideration for a total disgorgement request of $859,555.

B. The Law on Sanctions

[14] The Commission is a regulatory body that focuses on the protection of societal interests and not punishment of an individual's moral faults. The purpose of an order under section 127 of the Act is "to restrain future conduct that is likely to be prejudicial to the public interest in fair and efficient capital markets," and the role of the Commission under section 127 of the Act is "to protect the public 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 ("***Asbestos***")). The Commission has wide

discretion when intervening in activities related to the Ontario capital markets when it is in the public interest to do so: *Asbestos*, *supra* at para. 39.

[15] The Commission has identified factors that should be taken into consideration when determining what sanctions are appropriate in a particular matter. This Panel has considered some of those factors, including:

a) The seriousness of the misconduct and the breaches of the Act;

b) The Respondents' experience in the marketplace;

c) The level of the Respondents' activity in the marketplace;

d) Whether or not there has been any recognition by the Respondents 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 (or loss avoided) form the illegal conduct;

g) The size of any voluntary payment;

h) The effect any sanctions may have on the livelihood of the Respondents;

i) The effect any sanctions may have on the ability of the Respondents to participate without check in the capital markets;

j) The remorse of the Respondents;

k) The shame or financial pain that any sanction would reasonably cause to the Respondents; and

l) Any mitigating factors.

(*Re M.C.J.C. Holdings Inc.* (2002), 25 OSCB 1133 at para. 26 and *Re Belteco Holdings Inc.* (1998), 21 OSCB 7743 at p. 7746-7747)

[16] Although the Respondents chose not to participate in the Sanctions and Costs Hearing, this Panel has taken Chambers' e-mails, which were entered as exhibits in the Merits Hearing and that express his remorse and financial restraints, into consideration in reaching a decision.

C. Analysis of the Sanction Factors Applicable in this Case

(a) Seriousness of Misconduct and Harm Done

[17] The Respondents were found to have perpetrated a fraud on investors. An act of fraud is one of the most serious securities regulatory violations. The evidence at the Merits Hearing

satisfied the Panel that Chambers was actively engaged in giving advice with respect to debt elimination and the creation, management and direction of investment portfolios without having any qualifications or registrations to do so. Chambers personally met with the investors and promoted Empire as a safe investment vehicle. He persuaded investors to increase their existing debt by increasing their mortgages in order to have funds to offer the Respondents for investments. Investors were led to believe that their principal investments were guaranteed and that their portfolios were increasing in value notwithstanding that these portfolios were almost entirely unprofitable. The Respondents exploited the weaknesses of modest, hard-working individuals who trusted and relied upon false representations to their detriment. This misconduct by the Respondents is extremely serious and resulted in irreversible financial harm to the Empire investors.

(b) Level of the Individual Respondents' Activity in the Marketplace

[18] The Respondents received at least $1,493,108 from 26 identifiable investors in Ontario. The evidence at the Merits Hearing demonstrated that the Respondents created and disseminated marketing materials and exploited not only their own contacts but the contacts of their existing investors. The Respondents gave their investors a false sense of security and in some cases enticed them to invest more funds than originally planned. At all times, the Respondents knew that Empire was operating at a loss but continued to disseminate marketing materials in order to seek out new investor funds. The Respondents' high level of fraudulent activity in the marketplace demonstrates a need to restrain any future market participation.

(c) Specific and General Deterrence

[19] The Respondents took advantage of market participants by inducing them to invest with Empire based on false representations that that the DES program would return 2% to 6% on their investments per month and would enable investors to pay off their mortgages within 5 to 7 years. In doing so, the Respondents entirely disregarded Ontario's securities laws and the reasons that such laws are in place. The Respondents' actions represent the kind of investment scam that this Commission seeks to keep out of the marketplace. The Respondents have been proven to be a potential risk for causing further harm to investors in the future and as such there is clearly a need for specific deterrence in this matter in order to protect the public interest.

[20] In addition to taking specific deterrence into consideration, this Commission is mindful that the sanctions imposed in section 127 orders may have a general deterrent effect. The Supreme Court of Canada has recognized the Commission's ability to consider general deterrence in making an order that is both protective and preventative (*Re Cartaway Resources Corp.* 2004 SCC 26 at paragraph 60). In light of the specific facts of this case, and the view of the Supreme Court of Canada with respect to general deterrence, this Panel believes that both specific and general deterrence are warranted. As a result, this Panel is of the opinion that the Respondents should lose their privilege to participate in the Ontario capital markets.

(d) Mitigation

[21] There are two mitigating factors that have been taken into consideration in reaching a decision on sanctions and costs. Chambers has made an attempt to communicate his remorse by apologizing in e-mail correspondence to the Empire investors for the loss of their funds. The authenticity of Chambers' apology, however, is offset by his refusal to attend these proceedings

and take responsibility for his actions. His e-mail correspondence, although apologetic, nonetheless blames the actions of others for his own conduct. This Commission is wary of these kinds of qualified apologies.

[22] A second mitigating factor that has been taken into consideration in this hearing is the demonstrated return of $690,602 to the Empire investors. We note, as Staff pointed out during the course of the Sanctions and Costs Hearing, that $57,049 of these funds was paid as profit, in excess of some of the principal investments. There was no clear reason established as to why some investors received such profits. Accordingly, this Panel has taken the returned funds, as well as the unexplained profits, into consideration in determining that only $633,553 of the principal funds was returned to Empire investors. This Panel has taken this returned amount into consideration and subtracted it from the overall $1,493,108 received from the 26 investors in determining the sum ordered to be disgorged by the Respondents to the Commission.

D. Sanctions Imposed

(a) Prohibitions on Participation in Capital Markets

[23] In light of all of the considerations enumerated above, it is appropriate to order that the Respondents cease trading and acquiring securities permanently and that any exemptions in Ontario securities law are permanently unavailable. A permanent ban on Chambers is particularly necessary given that he was the directing mind of Empire and therefore the mastermind behind of all of Empire's activities.

[24] The Respondents should be reprimanded and Chambers should resign any positions that he holds as director or officer of any issuer, registrant, or investment fund manager, and be prohibited from becoming or acting as a director or officer of any issuer, registrant, or investment fund manager in the future.

[25] Chambers also should be prohibited from becoming or acting as a registrant, as an investment fund manager or as a promoter.

[26] These sanctioned prohibitions on participation on the capital markets provide both general and specific deterrence to ensure similar conduct does not take place in the future.

(b) Disgorgement

[27] Paragraph 10 of subsection 127(1) of the Act provides that the Commission may make an order requiring the Respondents to disgorge to the Commission any amounts obtained as a result of their non-compliance with the Act. This Commission has held that the objective of the disgorgement remedy is to deprive a wrongdoer of ill-gotten gains. The question is not whether the Respondents profited from their illegal conduct but whether amounts were obtained as a result of their conduct: *Re Limelight Entertainment Inc. et al,* (2008), 31 OSCB 12030 at paragraphs 47- 49. Although it is within the Commission's power to require the Respondents to disgorge the entire amount of funds raised from the Empire investors, this Panel has factored into its decision the mitigating return of $633,553 of principal funds to investors. A joint and several disgorgement order for the balance of the funds in the amount of $859,555 to be allocated in accordance with section 3.4(2)(b) of the Act as the Commission in its absolute discretion shall decide is an effective specific and general deterrent.

(c) Administrative Penalties

[28] This Panel believes that it is in the public interest to impose a $300,000 administrative penalty on the Respondents on a joint and several basis, to be allocated in accordance with section 3.4(2)(b) of the Act for the following reasons:

a) Chambers was the controlling mind of Empire and as such he authorized, permitted and acquiesced in the contravention of Ontario securities law by Empire;

b) Chambers was the sole signatory on the Empire bank accounts, and as such had full control over the deposit and application of Empire investor funds;

c) The Respondents' acts not only deprived investors of funds but also induced investors to increase their debt obligations through deception and misleading statements about the profitability of Empire;

d) The Respondents' conduct repeatedly breached multiple sections of the Act and was conduct contrary to the public interest.

[29] Given the Respondents' fraudulent conduct involving receipt of at least $1,493,108 from 26 identifiable investors and Chambers' exclusive control and application of the Empire investor funds, an administrative penalty in the amount of $300,000 to be paid on a joint and several basis is necessary to protect the public.

IV. COSTS

[30] Pursuant to section 127.1(1) and (2) of the Act, the Commission has the discretion to order the Respondents to pay the costs of an investigation and hearing if it is satisfied that the Respondents have not complied with the Act or have not acted in the public interest. This Panel is satisfied that the request for an order that the Respondents pay the costs of the investigation and hearing in this matter is warranted. This matter was complicated by the fact that Chambers took up residence in Jamaica and did not provide his new address to Staff. As a result, resources in the investigation were allocated to contacting the Jamaican authorities in order to ensure that Chambers had proper notice of this proceeding. In light of all of this, as well as the other facts proven at the Merits Hearing, it is appropriate to order the Respondents to pay the Commission's costs in respect of the investigation and the hearing in this matter in the amount of $235,502.15 on a joint and several basis.

V. CONCLUSION

[31] This panel's decision on sanctions and costs is proportionate to the activities of the Respondents in this matter in breach of the Act and contrary to the public interest and will assist in deterring both the Respondents and like-minded people from engaging in future conduct that violates securities laws. Accordingly, this Sanctions and Costs Order provides as follows:

a) Trading in any securities by the Respondents shall cease permanently pursuant to clause 2 of subsection 127(1) of the Act;

b) The acquisition of any securities by the Respondents is prohibited permanently pursuant to clause 2.1 of subsection 127(1) of the Act;

c) Any exemptions contained in Ontario securities law shall not apply to the Respondents permanently pursuant to clause 3 of subsection 127(1) of the Act;

d) The Respondents are reprimanded pursuant to clause 6 of subsection 127(1) of the Act;

e) Chambers shall resign any position that he holds as a director or officer of any issuer, registrant, or investment fund manager pursuant to clauses 7, 8.1 and 8.3 of subsection 127(1) of the Act;

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

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

h) Having determined that the Respondents have failed to comply with the securities laws of Ontario, the Respondents shall pay an administrative penalty of $300,000 on a joint and several basis pursuant to clause 9 of subsection 127(1) of the Act;

i) Having determined that the Respondents have failed to comply with the securities laws of Ontario, the Respondents shall disgorge to the Commission on a joint and several basis the sum of $859,555 obtained as a result of their non-compliance with the Act pursuant to clause 10 of subsection 127(1) of the Act;

j) All amounts received by the Commission in respect of the administrative penalty ordered in paragraph (h) above and the disgorgement amounts ordered in paragraph (i) above are to be allocated in accordance with subsection 3.4(2)(b) of the Act as the Commission in its absolute discretion shall decide; and

k) Having determined that the Respondents have failed to comply with the securities laws of Ontario, and that the Respondents have not acted in the public interest, the Respondents shall pay the costs of the Commission's investigation and hearing in the amount of $235,502.15 on a joint and several basis pursuant to section 127.1 of the Act.

Dated at Toronto this 28th day of February, 2013.

"Edward P. Kerwin"
Edward P. Kerwin