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Commission des valeurs mobilières de l'Ontario
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IN THE MATTER OF THE *SECURITIES ACT*,
R.S.O. 1990, c. S.5 AS AMENDED

- AND -

IN THE MATTER OF
ANDREA LEE MCCARTHY, BFM INDUSTRIES INC., and
LIQUID GOLD INTERNATIONAL CORP.
(aka LIQUID GOLD INTERNATIONAL INC.)

REASONS AND DECISION ON SANCTIONS AND COSTS
(Subsection 127(1) and Section 127.1 of the *Securities Act*)

Hearing:	March 12, 2014	
Decision:	June 9, 2014	
Panel:	James D. Carnwath, Q.C.	- Commissioner and Chair of the Panel
Appearances:	Jonathon Feasby	- For Staff of the Ontario Securities Commission
	Naomi Lutes	- Counsel for Andrea Lee McCarthy
		- No one appeared on behalf of BFM Industries Ltd. or Liquid Gold International Corp. (aka Liquid Gold International Inc.)

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REASONS AND DECISION ON SANCTIONS AND COSTS

PART I. INTRODUCTION

1. Background

[1] This was a hearing before the Ontario Securities Commission (the "**Commission**") pursuant to subsection 127(1) and section 127.1 of the *Securities Act*, R.S.O. 1990, c. S.5, as amended (the "***Act***") to determine whether it is in the public interest to order sanctions against Andrea Lee McCarthy ("**McCarthy**"), BFM Industries Inc. ("**BFM**"), Liquid Gold International Corp. (aka Liquid Gold International Inc.) ("**Liquid Gold**") (collectively, the "**Respondents**").

[2] On January 27, 2012, the Commission issued a Notice of Hearing pursuant to sections 127 and 127.1 of the *Act* in connection with a Statement of Allegations filed by Enforcement Staff of the Commission ("**Staff**") on January 27, 2012, to consider whether it is in the public interest to make certain orders against Sandy Winick ("**Winick**"), McCarthy, Kolt Curry, Laura Mateyak ("**Mateyak**"), Gregory J. Curry ("**Greg Curry**"), American Heritage Stock Transfer Inc. ("**AHST Ontario**"), American Heritage Stock Transfer, Inc. ("**AHST Nevada**"), BFM, Liquid Gold and Nanotech Industries Inc. ("**Nanotech**") (collectively, the "**Original Respondents**"). On November 2, 2012, Staff filed an Amended Statement of Allegations against the same parties and the Commission issued an Amended Notice of Hearing.

[3] On April 1, 2011, the Commission issued a temporary cease trade order (the "**Temporary Order"**) against BFM, AHST Ontario, AHST Nevada, Denver Gardner Inc., which is an investment bank from Singapore ("**Denver Gardner**"), Winick, McCarthy, Kolt Curry and Mateyak. The Temporary Order was extended and amended from time to time. On March 23, 2012, the Temporary Order was extended until the conclusion of the hearing on the merits, which was scheduled to commence on November 12, 2012, and Denver Gardner was removed as a respondent in the matter. The Temporary Order was subsequently amended on October 29, 2012 to permit McCarthy to sell securities in her Registered Retirement Savings Plan ("**RRSP**"), as defined in the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.), as amended (the "***Income Tax Act***").

[4] On October 17, 2012, the Commission granted Staff's request to convert the oral hearing on the merits to a written hearing, pursuant to Rule 11.5 of the Commission's *Rules of Procedure* (the "***Rules of Procedure***"). Through their respective counsel, Kolt Curry, Mateyak, AHST Ontario, AHST Nevada, McCarthy, BFM and Liquid Gold consented to have the matter proceed as a hearing in writing. Winick, Greg Curry and Nanotech did not object to Staff's request to the matter proceeding as a written hearing, though duly notified by Staff.

[5] On January 11, 2013, Staff filed a motion, pursuant to Rule 3 of the *Rules of Procedure*, seeking to sever the proceeding against the Respondents. On January 21, 2013, on consent of Staff and counsel for the Respondents at the time, the Commission granted an application to sever the matter, as against the Respondents, and adjourned that matter to a date to be fixed by the Office of the Secretary of the Commission in consultation with counsel (*Re Sandy Winick et al.* (2013), 36 O.S.C.B. 1065).

[6] On October 28 and December 10, 2013, Staff and counsel for McCarthy appeared before the Commission for a hearing on the merits with respect to the Respondents (the "**Merits Hearing**"). Staff and counsel for McCarthy made submissions and filed the Affidavit of McCarthy sworn October 23, 2013 (the "**McCarthy Affidavit**") and the "Joint Submission re: Liability of Andrea Lee McCarthy, BFM Industries Inc. and Liquid Gold International Corp. (aka Liquid Gold International Inc.)" (the "**Joint Submission**"). On January 3, 2014, I issued my reasons and decision on the merits with respect to the Respondents (*Re McCarthy* (2014), 37 O.S.C.B. 510 (the "**Merits Decision**")). In the Merits Decision, I accepted that the contents in the McCarthy Affidavit to be accurate and true and I also accepted that the Joint Submission was entered into and agreed to by Staff and McCarthy (Merits Decision, above at para. 6).

[7] On March 12, 2014, Staff and counsel for McCarthy appeared and made submissions on sanctions and costs (the "**Sanctions and Costs Hearing**"). McCarthy also appeared and testified on her own behalf.

[8] BFM and Liquid Gold did not participate in the Sanctions and Costs Hearing, nor did they make any submissions. McCarthy, a director and/or officer of BFM and Liquid Gold, did not make any submissions on behalf of either BFM or Liquid Gold. In the order that accompanied the Merits Decision dated January 3, 2014, the Commission ordered, *inter alia*, that "upon the failure of any party to attend at the time and place aforesaid, the hearing may proceed in the absence of that party, and such party is not entitled to any further notice of the proceeding." (*Re Andrea Lee McCarthy et al.* (2014), 37 O.S.C.B. 498). I note that the Merits Decision and the orders in this matter have been posted and made available to the public on the Commission's website. I am therefore satisfied that BFM and Liquid Gold received notice of the Sanctions and Costs Hearing and that I may proceed in the absence of these respondents, in accordance with section 7 of the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22, as amended, and Rule 7.1 of the Commission's *Rules of Procedure*.

[9] This matter is related to two other proceedings. First, on May 16, 2013, the Commission accepted an Agreed Statement of Facts for Kolt Curry, Mateyak, AHST Ontario and AHST Nevada (the "**Curry Respondents**"), and found that the Curry Respondents contravened Ontario securities law and acted contrary to the public interest. The Curry Respondents were involved in a scheme involving Nanotech, and were not involved in the misconduct related to the Respondents. The Commission ordered that the matter be severed from the original proceeding and scheduled a sanctions and costs hearing for August 27, 2013. On December 20, 2013, the Commission issued its reasons and decision on sanctions and costs with respect to the Curry Respondents (*Re Curry* (2013), 37 O.S.C.B. 220 (the "**Curry Sanctions and Costs Decision**")). Staff did not request any disgorgement orders against the Curry Respondents, nor did the Commission order any such orders against these respondents.

[10] Regarding the second related proceeding to this matter, on August 7, 2013, the Commission issued its reasons and decision on the merits with respect to the remaining Original Respondents, being Winick and Greg Curry (the "**Winick Respondents**") (*Re Winick* (2013), 36 O.S.C.B. 8202). On December 30, 2013, the Commission issued its reasons and decision on sanctions and costs with respect to the Winick Respondents (*Re Winick* (2013), 37 O.S.C.B. 501 (the "**Winick Sanctions and Costs Decision**")). In the order that accompanied the Winick Sanctions and Costs Decision, the Commission ordered that Winick disgorge to the Commission a total of $359,200 obtained as a result of his non-compliance with Ontario securities law, of

which USD$78,000 was jointly and severally payable with Greg Curry. Greg Curry was ordered to disgorge to the Commission a total of USD$78,000 obtained as a result of his non-compliance with Ontario securities law, which was jointly and severally payable with Winick (*Re Sandy Winick et al.* (2013), 37 O.S.C.B. 485).

2. The Merits Decision

[11] The distribution of BFM securities occurred from June 2009 to December 2010 (the "**BFM Material Time**"). In the Merits Decision, I found that during the BFM Material Time, 28 foreign individual investors purchased previously unissued BFM securities through telephone representatives claiming to work for Denver Gardner, a non-existent investment bank purportedly operating out of Singapore, by wiring funds directly to the bank accounts of BFM (the "**BFM Scheme**"). The investors of BFM wired money totaling over $360,000 to the bank accounts of BFM as payment for their purchase of BFM shares (Merits Decision, above at para. 25).

[12] The distribution of Liquid Gold securities occurred from June 2009 to November 2010 (the "**Liquid Gold Material Time**"). In the Merits Decision, I found that during the Liquid Gold Material Time, Liquid Gold sold previously unissued securities to at least four foreign individual investors through telephone representatives claiming to work for Denver Gardner (the "**Liquid Gold Scheme**"). Investors wired their funds directly to the Liquid Gold bank accounts to pay for their shares. Approximately $85,000 was raised through the sale of Liquid Gold shares (Merits Decision, above at para. 25).

[13] During the BFM Material Time and the Liquid Gold Material Time, McCarthy was involved with both the BFM Scheme and the Liquid Gold Scheme. The McCarthy Affidavit contained comprehensive admissions with respect to McCarthy's misconduct in this matter, and the Joint Submission set out her admitted breaches of Ontario securities laws.

[14] Based on the admissions in the McCarthy Affidavit, I made the following findings in the Merits Decision:

> (a) During the BFM Material Time, McCarthy and BFM traded securities, engaged in or held themselves out as engaging in the business of trading in securities without being registered to do so in circumstances in which no exemption was available, contrary to subsection 25(1)(a) of the *Act*, as that section existed prior to September 28, 2009, and contrary to subsection 25(1) of the *Act*, on or after September 28, 2009, and contrary to the public interest;
>
> (b) During the Liquid Gold Material Time, McCarthy and Liquid Gold traded securities, engaged in or held themselves out as engaging in the business of trading in securities without being registered to do so in circumstances in which no exemption was available, contrary to subsection 25(1)(a) of the *Act*, as that section existed prior to September 28, 2009, and contrary to subsection 25(1) of the *Act*, on or after September 28, 2009, and contrary to the public interest;

(c) During the BFM Material Time, McCarthy and BFM engaged in a distribution of BFM securities without a preliminary prospectus and a prospectus having been filed and receipts having been issued for them by the Director and without an exemption from the prospectus requirements, contrary to subsection 53(1) of the *Act* and contrary to the public interest;

(d) During the Liquid Gold Material Time, McCarthy and Liquid Gold engaged in a distribution of Liquid Gold securities without a preliminary prospectus and a prospectus having been filed and receipts having been issued for them by the Director and without an exemption from the prospectus requirements, contrary to subsection 53(1) of the *Act* and contrary to the public interest;

(e) During the BFM Material Time, BFM, directly or indirectly, engaged or participated in acts, practices or courses of conduct relating to securities of BFM that it knew or reasonably ought to have known perpetrated a fraud on any person or company, contrary to subsection 126.1(b) of the *Act* and contrary to the public interest;

(f) During the Liquid Gold Material Time, Liquid Gold, directly or indirectly, engaged or participated in acts, practices or courses of conduct relating to securities of Liquid Gold that it knew or reasonably ought to have known perpetrated a fraud on any person or company, contrary to subsection 126.1(b) of the *Act* and contrary to the public interest; and

(g) McCarthy, being a director and/or officer of BFM and Liquid Gold, authorized, permitted or acquiesced in the non-compliance of Ontario securities law of BFM and Liquid Gold, and is therefore deemed under section 129.2 to have contravened Ontario securities law and acted contrary to the public interest.

(Merits Decision, above at para. 38)

PART II. SUBMISSIONS OF THE PARTIES

1. Staff's Submissions

[15] Staff submits in its written submissions that the following sanctions are appropriate and in the public interest:

(a) an order pursuant to clause 2 of subsection 127(1) of the *Act* that trading in securities by McCarthy cease for a period of 15 years, except that, once McCarthy has fully satisfied the conditions in clauses (k) and (l), below, she may trade securities for the account of any [RRSP] or Registered Education Savings Plan ("**RESP**"), both as defined in the [*Income Tax Act*], in which she has sole legal and beneficial ownership;

(b) an order pursuant to clause 2 of subsection 127(1) of the *Act* that trading in securities by BFM and Liquid Gold cease permanently;

(c) an order pursuant to clause 2.1 of subsection 127(1) of the *Act* that acquisition of any securities by McCarthy is prohibited for a period of 15 years, except that, once McCarthy has fully satisfied the conditions in clauses (k) and (l), below, she may acquire securities for the account of any RRSP or RESP in which she has sole legal and beneficial ownership;

(d) an order pursuant to clause 2.1 of subsection 127(1) of the *Act* that acquisition of any securities by BFM and Liquid Gold is prohibited permanently;

(e) an order pursuant to clause 3 of subsection 127(1) of the *Act* that any exemptions in Ontario securities law do not apply to McCarthy for a period of 15 years;

(f) an order pursuant to clause 3 of subsection 127(1) of the *Act* that any exemptions in Ontario securities law do not apply to BFM or Liquid Gold permanently;

(g) an order pursuant to clause 6 of subsection 127(1) of the *Act* that McCarthy be reprimanded;

(h) an order pursuant to clause 7 of subsection 127(1) of the *Act* that McCarthy resign any position that she holds as a director or officer of an issuer;

(i) an order pursuant to clause 8 of subsection 127(1) of the *Act* that McCarthy be prohibited from becoming or acting as an officer or director of any issuer for a period of 15 years;

(j) an order pursuant to clause 8.5 of subsection 127(1) of the *Act* that McCarthy be prohibited from becoming or acting as a registrant, an investment fund manager or as a promoter for a period of 15 years;

(k) an order pursuant to clause 9 of subsection 127(1) of the *Act* that McCarthy pay an administrative penalty of $50,000 to be designated for allocation to or for the benefit of third parties in accordance with subsection 3.4(2)(b)(i) of the *Act*;

(l) an order pursuant to clause 10 of subsection 127(1) of the *Act* that McCarthy disgorge to the Commission a total of $93,700 jointly and severally with BFM and Winick, to be designated for allocation to or for the benefit of third parties in accordance with subsection 3.4(2)(b)(i) of the *Act*;

(m) an order pursuant to clause 10 of subsection 127(1) of the *Act* that McCarthy disgorge to the Commission a total of $8,525.55 jointly and severally with Liquid Gold and Winick, to be designated for allocation to or for the benefit of third parties in accordance with subsection 3.4(2)(b)(i) of the *Act*;

(n) an order pursuant to clause 10 of subsection 127(1) of the *Act* that BFM disgorge to the Commission a total of $365,000 jointly and severally with Winick, to be designated for allocation to or for the benefit of third parties in accordance with subsection 3.4(2)(b)(i) of the *Act*; and

(o) an order pursuant to clause 10 of subsection 127(1) of the *Act* that Liquid Gold disgorge to the Commission a total of $85,000 jointly and severally with Winick, to be designated for allocation to or for the benefit of third parties in accordance with subsection 3.4(2)(b)(i) of the *Act*.

[16] Staff does not seek any costs against the Respondents. Staff has considered McCarthy's cooperation during the proceeding and investigation, along with her agreement with respect to the facts in this matter.

[17] In Staff's written submissions, Staff has indicated that Staff and counsel for McCarthy agreed that Canadian and U.S. dollar funds may be treated as equivalent and valued as Canadian funds. Accordingly, I have valued all relevant U.S. dollar amounts as Canadian dollar amounts in this decision.

2. The Respondents' Evidence and Submissions

[18] In her written submissions, McCarthy stated that she does not contest Staff's request for the trading bans requested at subparagraphs 15(a), (c), (e), (g), (h), (i) and (j). However, McCarthy submits that she should be permitted to deal with an RESP prior to the complete payment of any sanctions imposed against her, in order to allow her to plan for her daughter's future education.

[19] In her written submissions, McCarthy also submits that she should be required to disgorge an amount in the range of $20,000 for her violations of securities law with respect to BFM. She submits that she should not be ordered to disgorge any amounts in connection to Liquid Gold, and that she should further be ordered to pay a nominal administrative penalty of $5,000. At the Sanctions and Costs Hearing, counsel for McCarthy submitted that the appropriate and reasonable amount for McCarthy to disgorge would be the amounts related solely to the accounts over which McCarthy had exclusive control, namely the account for a company she controlled called Lee Freed Holdings and her personal chequing account. The total amount in these accounts is $23,300.

[20] McCarthy has in her possession a number of money orders totaling $30,000, which had been purchased with funds from the bank accounts of Liquid Gold. These funds were provided by McCarthy to her counsel to be held in trust for payment to the Commission as part of any order of the Commission in this proceeding.

[21] McCarthy provided evidence by testifying at the Sanctions and Costs Hearing. She began her evidence by confirming the contents of the McCarthy Affidavit, which formed the basis of my findings in the Merits Hearing.

[22] Since the date that the McCarthy Affidavit was sworn, McCarthy sold her home in Stoney Creek, Ontario. The transaction closed on March 11, 2014, the day before the Sanctions and Costs Hearing. The net proceeds were approximately $210,000 divided 50/50 between

McCarthy and her father as joint owners. The closing documents of the sale of McCarthy's home were filed as Exhibit 1 at the Sanctions and Costs Hearing.

[23] McCarthy confirmed that she has lived in Stoney Creek for the past 10 years. She completed high school in Hamilton, Ontario and attended the University of Ottawa for two years, but did not obtain a degree. She then worked for a retail store, the Gap, and subsequently worked at Bell Canada from 1998 to 2003 in the billing and collections department.

[24] In 2003, McCarthy left Bell Canada to work with her then husband who started a new company called the Flight Network. She originally set up the office and, as the company grew, McCarthy had more responsibility completing administrative tasks. She left the company in 2008 and did not work thereafter, having entered into a romantic relationship with Winick, whom she met while working for the Flight Network. She said that when she first met Winick, she did not understand what his business was or his financial situation.

[25] McCarthy then testified that Winick asked McCarthy to list herself as a director of BFM. She stated that she set up the website of BFM and later outsourced the technical work needed for the website to a company in India.

[26] McCarthy was not paid a salary for the services performed by her at Winick's direction, but explained that Winick supported her "akin to the way a husband would support a wife" (Transcript, Sanctions and Costs Hearing, p. 22, ll. 13-14). As she put it, she "had to be available to do things for him. [She] had to be available to travel to see him. There was no question that [she] would get a job; that wasn't something to be done" (Transcript, Sanctions and Costs Hearing, p. 22, ll. 19-21). She stated that she had to be available at a moment's notice to carry out Winick's instructions.

[27] During the BFM Material Time and the Liquid Gold Material Time, McCarthy had a personal VISA, a personal CIBC credit card, a personal line of credit with CIBC, a personal account with the Bank of Montreal and a joint American Express account with Winick. McCarthy and Winick also had a joint chequing account with TD Bank. She explained that the joint chequing account with Winick was used to permit Winick to deposit money and pay bills. When asked why she had a joint account with Winick, rather than maintaining a separate bank account, McCarthy explained that this was a natural progression of their relationship. In effect, McCarthy said that she did most of the banking out of the joint account at Winick's instructions. McCarthy testified that for all bank accounts, Winick would give her a list of things that needed to be paid and would indicate when and how much to pay.

[28] McCarthy completed her testimony by confirming that she has no assets and no savings accounts. She also stated that she cashed in her RRSP to pay her legal bills and she does not have any other investments. Moreover, as a result of the publicity surrounding this matter, McCarthy testified that she was asked to close her accounts at CIBC. CIBC closed her bank accounts and demanded immediate payment of all her outstanding loans. McCarthy stated that she was compelled to sell her home to make payments on her outstanding lines of credit and credit cards.

[29] McCarthy confirmed that she has no desire to be a market participant or be involved in the capital markets in any capacity in the future.

[30] In cross-examination, McCarthy stated that she was not in a position to allocate how much of the funds in the joint accounts she held with Winick were spent on her own expenses versus those of Winick and his family. However, she testified that her living expenses were relatively small compared to those of Winick and his family. That completed her cross-examination. There was no reply.

[31] As previously mentioned, BFM and Liquid Gold did not attend the Sanctions and Costs Hearing, nor did they provide any written submissions. McCarthy takes no position with respect to BFM and Liquid Gold, other than to stress that their activities were directed by Winick, whose instructions she followed.

PART III. THE APPLICABLE LAW

[32] In making an order in the public interest under subsection 127 of the *Act*, the Commission's jurisdiction should be exercised in a protective and preventive manner as described in *Re Mithras Management Ltd.*:

> …the role of this Commission is to protect the public interest be removing from the capital market -- 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 the capital markets. We are not here to punish past conduct; that is the role of the courts, particularly under section 118 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 1610-1611)

[33] This view was endorsed by the Supreme Court of Canada in the following terms:

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

[34] In determining the nature and duration of sanctions, the Commission has considered the following factors:

(a) the seriousness of the allegations proved;

(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 a recognition of the seriousness of the improprieties;

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

(f) whether the violations are isolated or recurrent;

(g) the size of any profit made (or loss avoided) from the illegal conduct;

(h) the size of any financial sanction or voluntary payment when considered with other factors;

(i) the effect any sanction might have on the livelihood of the respondent;

(j) the restraint any sanction may have on the ability of the respondent to participate without check in the capital markets;

(k) the reputation and prestige of the respondent;

(l) the shame, or financial pain, that any sanction would reasonably cause to the respondent;

(m) the remorse of the respondent; and

(n) any mitigating factors.

(*Re Belteco Holdings Inc.* (1998), 21 O.S.C.B. 7743 at 7746; *Erikson v. Ontario (Securities Commission),* [2003] O.J. No. 593 (Div. Ct.); *Re M.C.J.C. Holdings Inc.* (2002), 25 O.S.C.B. 1133 at 1135-1136)

[35] The Supreme Court of Canada has held that it is appropriate for the Commission to consider general deterrence in crafting sanctions which are designed to preserve the public interest. The Court stated that the "weight given to general deterrence will vary from case to case and is a matter within the discretion of the Commission" (*Re Cartaway Resources Corp.*, [2004] 1 S.C.R. 672 at paras. 60 and 64).

[36] In terms of disgorgement, pursuant to paragraph 10 of subsection 127(1) of the *Act*, the Commission may order a person or company who has not complied with Ontario securities law to disgorge to the Commission "any amounts obtained as a result of the non-compliance" with Ontario securities law. This Commission has described the purpose of the disgorgement remedy as follows:

> …the objective of the disgorgement remedy is to deprive a wrongdoer of ill-gotten gains, reflecting the view that it would be inappropriate for those who contravene Ontario securities law to be able to retain any illegally obtained profits.
>
> […]

> …the legal question is not whether a respondent "profited" from the illegal activity but whether the respondent "obtained amounts" as a result of that activity. In our view, this distinction is made in the *Act* to make clear that all money illegally obtained from investors can be ordered to be disgorged, not just the "profit" made as a result of the activity.
>
> (*Re Limelight Entertainment Inc.* (2008), 31 O.S.C.B. 12030 ("***Re Limelight***") at paras. 47 and 49)

[37] In *Re Limelight*, the Commission held that it should consider the following non-exhaustive list of factors when contemplating a disgorgement order, in addition to the general factors for sanctioning:

> (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.
>
> (*Re Limelight*, above at para. 52)

[38] Staff has the onus of proving, on a balance of probabilities, the amounts obtained by a respondent as a result of its non-compliance with the *Act*.

PART IV. ANALYSIS

1. BFM and Liquid Gold

(a) Market Bans

[39] I find that the non-monetary sanctions sought by Staff against BFM and Liquid Gold are entirely appropriate. Approximately $445,000 was fraudulently obtained from investors through the BFM Scheme and the Liquid Gold Scheme (Merits Decision, above at para. 25). Applying the principles set out in subparagraphs 32 to 35, above, I order that permanent trading, acquisition and exemption application bans shall be imposed against BFM and Liquid Gold.

(b) Disgorgement

[40] With regards to the disgorgement orders against BFM and Liquid Gold, Staff submitted in its written submissions that BFM should disgorge to the Commission a total of $365,000 jointly and severally with Winick, to be designated for the allocation to or for the benefit of third

parties in accordance with subsection 3.4(2)(b)(i) of the *Act*, and that Liquid Gold should disgorge to the Commission a total of $85,000 jointly and severally with Winick, to be designated for allocation to or for the benefit of third parties in accordance with subsection 3.4(2)(b)(i) of the *Act*. At the Sanctions and Costs Hearing, I asked how BFM and Liquid Gold could be required to pay any disgorgement orders jointly and severally with Winick, a respondent in a separate proceeding.

[41] In support of its requested joint and several disgorgement orders, Staff relied on *Re Sulja Bros. Building Supplies Ltd.* (2011), 34 O.S.C.B. 7515 ("***Re Sulja Bros.***"). In *Re Sulja Bros.*, the Panel dealt with sanctions and costs orders against three groups of respondents. Each of the three groups of respondents was subject to a separate merits hearing. However, a single sanctions and costs hearing was held for the three proceedings, and a single joint and several disgorgement order was made against four respondents who were parties in two of the three proceedings.

[42] The circumstances in this case differ from those in *Re Sulja Bros.* For instance, three separate sanctions and costs hearings have been held against the Respondents, the Winick Respondents and the Curry Respondents. Additionally, prior to the Sanctions and Costs Hearing, the Commission issued the Winick Sanctions and Costs Decision and the Curry Sanctions and Costs Decision. I note that Staff has not indicated that it has initiated an application to revoke or vary the Winick Sanctions and Costs Decision, pursuant to section 144 of the *Act*. Any joint and several disgorgement orders made in this matter would therefore unilaterally impose conditions on Winick, against whom sanctions and costs have already been ordered. With respect, I disagree with the conclusion in *Re Sulja Bros.*, if it stands for the proposition that a disgorgement order can be made on a joint and several basis against respondents in separate proceedings.

[43] Ultimately, I find that it is not appropriate to order any disgorgement orders against BFM or Liquid Gold. The Respondents in this matter and the Winick Respondents were involved in substantially the same misconduct that involved similar amounts of funds, including: (a) $360,000, which was wired by investors to the bank accounts of BFM as payment for their purchase of BFM shares; and (b) approximately $85,000, which was raised from investors through the sale of Liquid Gold shares (Merits Decision, above at para. 25; Winick Sanctions and Costs Decision, above at paras. 12 and 17). As previously mentioned in paragraph 10, above, the Commission ordered Winick to disgorge a total of $359,200 obtained as a result of his non-compliance with Ontario securities law, of which USD$78,000 was jointly and severally payable with Greg Curry, and Greg Curry was ordered to disgorge to the Commission a total of USD$78,000 obtained as a result of his non-compliance with Ontario securities law, which was jointly and severally payable with Winick.

[44] Staff has not provided sufficient evidence to prove that its requested disgorgement orders against BFM and Liquid Gold exclude the amounts that the Commission previously ordered Winick and Greg Curry to disgorge. Staff also has not provided any evidence to support a finding that BFM and Liquid Gold should be treated separately from their directing mind, Winick, and should therefore be subject to separate disgorgement orders. Without the provision of such evidence, the amounts available for any disgorgement orders against BFM and Liquid Gold cannot be reasonably ascertained (*Re Limelight*, above at para. 52). Any disgorgement orders made against these respondents could therefore run the risk of double counting the amounts included in the disgorgement orders made against the Winick Respondents. In the

circumstances of this case, where the amounts obtained are not reasonably ascertainable, I find that it is not appropriate nor in the public interest to make any disgorgement orders against BFM or Liquid Gold.

2. McCarthy

(a) Market Bans

[45] McCarthy takes no issue with respect to the non-monetary sanctions sought by Staff, as set out in subparagraphs 15(e), (g), (h), (i) and (j), above. I find that these sanctions meet the needs of specific and general deterrence. I therefore order that any exemptions in Ontario shall not apply to McCarthy for a period of 15 years, McCarthy shall be reprimanded, McCarthy shall resign any position that she holds as a director or officer of an issuer, McCarthy shall be prohibited for 15 years from becoming or acting as an officer or director of any issuer and McCarthy shall be prohibited for 15 years from becoming or acting as a registrant, as an investment fund manager or as a promoter.

[46] As mentioned in subparagraph 15(a) and (c), above, Staff seeks orders prohibiting McCarthy from trading or acquiring any securities for a period of 15 years. Staff qualifies these requested sanctions by providing that once McCarthy has satisfied any disgorgement or administrative penalty orders, she may trade and acquire securities for the account of any RRSP or RESP in which she has sole legal and beneficial ownership. I find that it is in the public interest to issue 15-year trading and acquisition bans against McCarthy, except that McCarthy is permitted to trade and acquire securities for the account of her RRSP and any RESP, of which she is the subscriber and her daughter is the beneficiary, provided that the administrative penalty payment, as discussed below, has been paid in full. If any amount remains unpaid, McCarthy shall cease trading and acquiring any securities until the expiry of the aforementioned period of 15 years, without exception.

(b) Disgorgement

[47] Staff seeks an order that McCarthy disgorge to the Commission a total of $93,700 jointly and severally with BFM and Winick, to be designated for the benefit of third parties. Staff also seeks an order that McCarthy disgorge to the Commission $8,525.55 jointly and severally with Liquid Gold and Winick, to be designated for the benefit of third parties

[48] For the reasons set out in paragraphs 41 and 42, above, there will be no joint and several orders made in this matter that include Winick. I also find that the amounts that McCarthy obtained as a result of her non-compliance with the *Act* are not reasonably ascertainable on two grounds.

[49] First, for the same reasons discussed in paragraphs 43 and 44, above, I find that Staff has not provided sufficient evidence to demonstrate that its requested disgorgement orders against McCarthy exclude the amounts that the Commission previously ordered against the Winick Respondents.

[50] Second, Staff has not provided sufficient evidence to support its calculations for its requested disgorgement orders against McCarthy, which total $102,225.55. At the Sanctions and Costs Hearing, Staff filed Exhibit 2 ("**Ex. 2**"), an analysis of the funds that Staff submits were

directly received by McCarthy from the bank accounts of BFM and Liquid Gold.[1] Regarding the funds withdrawn as cash and the funds that were transferred to the accounts jointly held by Winick and McCarthy, Staff attributed 50% of such withdrawals and transfers to McCarthy. However, Staff did not present any evidence to show how it determined this percentage allocation. Based on McCarthy's testimony at the Sanctions and Costs Hearing and her written submissions, I find that a lower percentage allocation to her of the joint accounts and the cash withdrawals is more reasonable. Winick had an expensive lifestyle and received the lion's share of the benefits of the funds in the BFM and Liquid Gold bank accounts. Although I find that a lower percentage allocation than 50% would be more reasonable, on the evidence presented, I cannot determine the appropriate percentage allocation to apply to the joint accounts or the cash withdrawals. The amounts obtained by McCarthy are not reasonably ascertainable (*Re Limelight*, above at para. 52).

[51] I do not find that it is in the public interest to make any disgorgement orders against McCarthy.

(c) Administrative Penalty

[52] Staff seeks an order that McCarthy pay to the Commission an administrative penalty of $50,000. Staff cites several cases which, Staff submits, support the penalty Staff seeks. I do not accept this submission. The respondents in the cases cited by Staff were actively engaged in selling securities and/or had experience in the capital markets. McCarthy's situation is more akin to that of Mateyak, in that both carried out instructions from persons with whom they were in a spousal relationship.

[53] When I review the factors to be taken into account in mitigation, I note the following:

- McCarthy's cooperation with Staff was complete, voluntary and assisted in Staff's pursuit of the Winick Respondents;
- McCarthy has no experience in the any securities-related activities, except investing in the account of her personal RRSP;
- McCarthy has expressed remorse over her activities;
- McCarthy participated in a voluntary interview with Staff on May 18, 2011;
- McCarthy had in her possession a number of money orders totaling $30,000 of investors' funds, which had been purchased with funds from the bank accounts of Liquid Gold. These funds were provided by McCarthy to her counsel and will be treated as a voluntary payment;
- McCarthy cashed in her RRSP to pay her legal fees;
- McCarthy was required to sell the house she jointly owned with her father, in order to meet her financial obligations;

[1] A copy of Ex. 2 is annexed hereto and marked as Appendix "A".

- McCarthy retains no financial benefit from her involvement in this matter; and
- McCarthy has no assets and is of limited financial means.

[54] McCarthy is not blameless in this matter. She acknowledges that she should have been more alert to the activities of Winick. Considering the mitigating factors listed in paragraph 53, above, I find that it is in the public interest to order McCarthy to pay an administrative penalty of $10,000 to the Commission.

[55] In its written submissions, Staff submitted that its requested administrative penalty against McCarthy be "designated for allocation to or for the benefit of third parties in accordance with subsection 3.4(2)(b)(i) of the *Act*". I find no reason to eliminate subsection 3.4(2)(b)(ii) of the *Act* from consideration. I raised this issue with Staff at the Sanctions and Costs Hearing, and Staff had no objections to any order made in accordance with subsection 3.4(2)(b) of the *Act*. I therefore order McCarthy to pay an administrative penalty of $10,000 to the Commission, to be designated for allocation or for use by the Commission in accordance with subsection 3.4(2)(b) of the *Act*.

PART V. CONCLUSION

[56] For the reasons above, I conclude that it is in the public interest to make the order set out below. In my view, the sanctions imposed will deter the Respondents and other like-minded individuals from engaging in similar misconduct in the capital markets in the future and the sanctions are proportionate to the circumstances and conduct of each Respondent in this matter.

[57] I will issue a separate order giving effect to my decision on sanctions and costs as follows:

(a) pursuant to clause 2 of subsection 127(1) of the *Act*, trading in any securities by McCarthy shall cease for a period of 15 years;

(b) pursuant to clause 2 of subsection 127(1) of the *Act*, trading in any securities by BFM and Liquid Gold shall cease permanently;

(c) pursuant to clause 2.1 of subsection 127(1) of the *Act*, the acquisition of any securities by McCarthy shall be prohibited for a period of 15 years;

(d) pursuant to clause 2.1 of subsection 127(1) of the *Act*, the acquisition of any securities by BFM and Liquid Gold shall be prohibited permanently;

(e) pursuant to clause 3 of subsection 127(1) of the *Act*, any exemptions contained in Ontario securities law shall not apply to McCarthy for a period of 15 years;

(f) pursuant to clause 3 of subsection 127(1) of the *Act*, any exemptions contained in Ontario securities law shall not apply to BFM or Liquid Gold permanently;

(g) pursuant to clause 6 of subsection 127(1) of the *Act*, McCarthy shall be reprimanded;

(h) pursuant to clause 7 of subsection 127(1) of the *Act*, McCarthy shall resign any position that she holds as a director or officer of any issuer;

(i) pursuant to clause 8 of subsection 127(1) of the *Act*, McCarthy shall be prohibited from becoming or acting as a director or officer of any issuer for a period of 15 years;

(j) pursuant to clause 8.5 of subsection 127(1) of the *Act*, McCarthy shall be prohibited from becoming or acting as a registrant, as an investment fund manager or as a promoter for a period of 15 years;

(k) pursuant to clause 9 of subsection 127(1) of the *Act*, McCarthy shall pay an administrative penalty of $10,000 for her failure to comply with Ontario securities law, to be designated for allocation or use by the Commission in accordance with subsection 3.4(2)(b) of the *Act*; and

(l) as an exception to the provisions of subparagraphs 57(a) and (c), above, McCarthy is permitted to: trade and acquire securities for the account of her RRSP, as defined in the *Income Tax Act*, and any RESP, as defined in the *Income Tax Act* and of which she is the subscriber and her daughter is the beneficiary, provided that the administrative penalty payment set out in 57(k), above, has been paid in full. If the amount remains unpaid, McCarthy shall cease trading and acquiring securities until the expiry of the aforementioned period of 15 years, without exception.

[58] I dismiss Staff's requests for disgorgement orders against the Respondents.

DATED at Toronto this 9th day of June, 2014.

"James D. Carnwath"

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James D. Carnwath, Q.C.

Appendix "A"

A. BFM Accounts:

	Personal Benefit	Joint Cash Withdrawals[2]	Joint Bank Accounts with Winick[3]	**TOTAL**
Cash Amounts Obtained		$16,750 See note (ii)		$16,750
Non-Cash Amounts Obtained	$23,300 See note (i)		$53,650 See note (iii)	$76,950
				$93,700

B. Liquid Gold Accounts:[4]

	Personal Benefit	Joint Cash Withdrawals[5]	Joint Bank Accounts with Winick	**TOTAL**
Cash Amounts Obtained		$1,130.25 See note (v)		$1,130.25
Non-Cash Amounts Obtained	$7,395.30 See note (iv)			$7,395.30
				$8,525.55

(i) This amount was generated from the sum of the following amounts set out in the McCarthy Affidavit: $4,700[6] + $18,600[7] = $23,300

(ii) This amount was generated from the sum of the following amounts set out in the McCarthy Affidavit: $21,000[8] + 12,500[9] = 33,500 ÷ 2 = $16,750

(iii) This amount was generated from the sum of the following amounts set out in the McCarthy Affidavit: $24,500[10] + $54,800[11] + $28,000[12] = $107,300 ÷ 2 = $53,650

(iv) This amount was generated from the sum of the following amounts set out in the McCarthy Affidavit: $66,100[13] + $60,000[14] + $50,000[15] + $48,000[16] = $224,100 x 0.033 = $7,395.30

(v) This amount was generated from the sum of the following amounts set out in the McCarthy Affidavit: $68,500[17] x 0.033 ÷ 2 = $1,130.25

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[2] Staff have attributed 50% of the cash withdrawn from joint McCarthy/Winick accounts to McCarthy.

[3] Where funds have been deposited to an account or credit card held jointly by McCarthy and Winick, Staff have attributed 50% of the total amount to McCarthy.

[4] The Liquid Gold Investor Funds comprised only 3.3% of the funds in the Liquid Gold Accounts. Accordingly, Staff have attributed a *pro-rata* reduction to McCarthy's liability by a factor of 0.033.

[5] See note 2.

[6] McCarthy Affidavit at para 42(f).

[7] McCarthy Affidavit at para 43(a).

[8] McCarthy Affidavit at para 42(c).

[9] McCarthy Affidavit at para 43(e).

[10] McCarthy Affidavit at para 42(b).

[11] McCarthy Affidavit at para 43(a).

[12] McCarthy Affidavit at para 43(b).

[13] McCarthy Affidavit at para 57(d).

[14] McCarthy Affidavit at para 57(e).

[15] McCarthy Affidavit at para 57(g).

[16] McCarthy Affidavit at para 58(e).

[17] McCarthy Affidavit at para 57(c).