



Ontario
Securities
Commission

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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
MAJESTIC SUPPLY CO. INC.,
SUNCASTLE DEVELOPMENTS CORPORATION,
HERBERT ADAMS, STEVE BISHOP,
MARY KRICFALUSI, KEVIN LOMAN AND
CBK ENTERPRISES INC.**

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

Hearing: October 30, 2015

Decision: February 12, 2016

Panel: Edward P. Kerwin - Chair of the Panel
- Commissioner

Appearances: Derek Ferris - For Staff of the Commission
Kevin Richard - For Kevin Loman
Martin Mendelzon

TABLE OF CONTENTS

I. Introduction..... 1

II. History of the Proceeding..... 1

III. The Divisional Court Decision 2

IV. Postions of the Parties 2

 A. Staff 2

 B. Respondent..... 3

V. The Law on Sanctions 3

VI. Analysis 5

 A. Specific Sanctions Factors 5

 B. Appropriate Sanctions 5

VII. Conclusion..... 8

REASONS AND DECISION

I. INTRODUCTION

- [1] This was a hearing before the Ontario Securities Commission (the "Commission") pursuant to section 127 of the *Securities Act* (the "Act")¹ for a fresh determination of certain sanctions ordered against Kevin Loman ("Loman"), which were remitted back to the Commission by the Divisional Court of the Ontario Superior Court of Justice (the "Divisional Court").
- [2] For the reasons articulated below, I find that Loman shall be subject to certain prohibitions for eight years from the date of this decision and its corresponding order.

II. HISTORY OF THE PROCEEDING

- [3] On February 21, 2013, the Commission issued its Reasons and Decision with respect to the merits (the "Merits Decision"), which found that Loman and others engaged in conduct in breach of the Act.²
- [4] On November 29, 2013, the Commission issued its Reasons and Decision with respect to sanctions and costs (the "Sanctions Decision") and ordered sanctions and costs against Loman and others.³
- [5] Loman appealed the Merits Decision and the Sanctions Decision to the Divisional Court.
- [6] On June 25, 2015, the Divisional Court dismissed the appeal in respect of the Merits Decision but allowed the appeal with respect to certain of the sanctions imposed against Loman, which sanctions were remitted back to the Commission for a fresh determination (the "Divisional Court Decision").⁴
- [7] On August 25 and October 5, 2015, the parties exchanged and filed written sanctions submissions in respect of this hearing.
- [8] On October 30, 2015, the parties appeared before the Commission, made oral submissions regarding the appropriateness of certain sanctions to be ordered against Loman and took differing views on which of the sanctions were remitted back to the Commission by the Divisional Court. On that date, the parties requested a short adjournment of this matter in order to seek clarification from the Divisional Court with respect to the scope of the sanctions remitted.
- [9] On January 12, 2016, the Divisional Court issued supplementary reasons, which enumerated the provisions of the Commission's sanctions order that are remitted for a fresh determination (the "Supplementary Reasons").⁵ On that date, the parties advised the Commission that they had no further written or oral submissions to make.

¹ R.S.O. 1990, c. S.5, as amended.

² *Re Majestic Supply Co. Inc. et al.* (2013), 36 O.S.C.B. 2104.

³ *Re Majestic Supply Co. Inc. et al.* (2013), 36 O.S.C.B. 11642.

⁴ *Loman v. Ontario Securities Commission*, 2015 ONSC 4083.

⁵ *Loman v. Ontario Securities Commission*, 2016 ONSC 135.

III. THE DIVISIONAL COURT DECISION

- [10] The Divisional Court determined that the Commission erred by misapprehending the facts relating to sanctions imposed by the Alberta Securities Commission ("ASC") on Loman.⁶ Loman entered into a settlement agreement with the ASC in 2009, whereby he agreed to three-year bans.⁷ The Divisional Court concluded that the Commission attached considerable weight to the "previous ban" imposed by the ASC.⁸ The ASC sanctions were not imposed until 2009, after the unregistered trading by Loman in Majestic Supply Co. Inc. ("Majestic") shares took place in 2006 and 2007 and, therefore, the Divisional Court concluded that the ASC sanctions could not have deterred Loman.⁹ As a result, the Divisional Court remitted the matter back to the Commission and set aside the 10-year prohibitions on trading, the 10-year prohibitions on being an officer or director, and the administrative penalty of \$75,000.¹⁰
- [11] The Supplementary Reasons amended the Divisional Court Decision so as to enumerate the sanctions remitted, by setting aside the ten-year bans imposed upon Loman with respect to:
- (a) trading in securities;
 - (b) the acquisition of securities;
 - (c) the application of exemptions contained in Ontario securities law;
 - (d) becoming or acting as an officer or a director of any issuer, registrant or investment fund manager; and
 - (e) becoming or acting as a registrant, an investment fund manager or as a promoter.¹¹

IV. POSITIONS OF THE PARTIES

A. Staff

- [12] Staff's position is that notwithstanding the factual error in the Sanctions Decision, the sanctions imposed against Loman – the ten-year bans and the \$75,000 administrative penalty – are reasonable, appropriate and should be confirmed.
- [13] Staff relies on its original sanctions submissions, submitted to the Commission on March 9, 2013, for the purpose of this remitted sanctions hearing, in which Staff had requested the same prohibitions for a 12-year period and a \$100,000 administrative penalty. Nevertheless, Staff clarified that it is not seeking a lengthier penalty than was previously ordered by the Commission.
- [14] Staff also submits that I ought to consider a co-respondent's conduct, Ms. Kricfalusi, and the role she played in the distribution of shares, for which the Commission ordered 8-year bans and a \$50,000 administrative penalty. Staff argues that Loman's involvement as a salesperson who sold in excess of a

⁶ *Supra* note 4 at para. 11.

⁷ *Re Essen Capital Inc.*, 2009 ABASC 530.

⁸ *Supra* note 4 at para. 13.

⁹ *Supra* note 4 at para. 15.

¹⁰ *Supra* note 4 at para. 17.

¹¹ *Supra* note 5 at para. 3.

million dollars of securities is distinguishable from Kricfalusi's and demonstrates Loman was a more significant player who ought to be sanctioned in a manner that is both proportional and reasonable.

B. Respondent

- [15] Loman's counsel submits that the sanctions imposed on Loman should be reduced to a three-year trading ban, a three-year director and officer ban, a three-year registrant, investment fund manager and promoter ban and a \$25,000 administrative penalty. Counsel takes the position that any decision by the Commission that the sanctions against Loman should not be reduced would effectively be ignoring and attempting to override the decision of the Divisional Court.
- [16] Counsel for Loman submits that sanctions ought to be proportional and distinguishes Loman's conduct from those of other respondents in the same matter, Messers. Adams and Bishop, who were part of the management of Majestic and made prohibited representations and against whom the Commission ordered 20-year and 15-year bans and \$300,000 and \$100,000 administrative penalties, respectively.
- [17] Counsel also notes that Loman has already served approximately 19 months of the bans imposed by the Sanctions Decision. Loman's counsel submits that the three-year bans proposed would take effect from the date of the Commission's decision and order.

V. THE LAW ON SANCTIONS

- [18] I am guided by the purposes of the Act in determining the sanctions that should be imposed upon Loman. Section 1.1 of the Act sets out those purposes: (i) to provide protection to investors from unfair, improper or fraudulent practices; and (ii) to foster fair and efficient capital markets and confidence in those markets.
- [19] An order imposing sanctions under section 127 of the Act is intended to be protective and preventative. The purpose is to restrain future conduct that is likely to be prejudicial to the public interest in fair and efficient capital markets. As stated by the Supreme Court of Canada:
- ... [t]he 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.¹²
- [20] In determining the appropriate sanctions, I am mindful that the sanctions must be proportionate to both the particular circumstances of the case and the conduct of Loman.¹³ To that end, it is important to consider the range of sanctions ordered in similar cases.
- [21] The Commission has previously considered the following non-exhaustive list of factors in determining the appropriate sanctions:

¹² *Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, [2001] 2 S.C.R. 132, at para. 43.

¹³ *Re M.C.J.C. Holdings Inc.*, (2002) 25 O.S.C.B. 1133 at 1134.

- 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 a 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 case being considered but any like-minded people from engaging in similar abuses of the capital markets;
- f. The size of any profit made or loss avoided from the illegal conduct;
- g. The size of any financial sanction or voluntary payment when considering other factors;
- h. The reputation and prestige of the respondent;
- i. The shame or financial pain that any sanction would reasonably cause to the respondent;
- j. The effect any sanction might have on the livelihood of the respondent;
- k. The restraint any sanction may have on the ability of a respondent to participate without check in the capital markets; and
- l. Any mitigating factors, including the remorse of the respondent.¹⁴

[22] Deterrence is an important factor that the Commission may consider when determining appropriate sanctions. In *Cartaway*, the Supreme Court of Canada stated that: "...it is reasonable to view general deterrence as an appropriate, and perhaps necessary, consideration in making orders that are both protective and preventative".¹⁵

[23] The Commission has held that an administrative penalty "may not act as a sufficient deterrent if its magnitude is inadequate compared with the benefit obtained by non-compliance".¹⁶ The panel in *Limelight* stated:

The purpose of an administrative penalty is to deter the particular respondents from engaging in the same or similar conduct in the future and to send a clear deterrent message to other market participants that the conduct in question will not be tolerated in Ontario capital markets.¹⁷

[24] While there is no formula for determining an administrative penalty, factors to be considered in determining an appropriate administrative penalty include: the scope and seriousness of the misconduct; whether there were multiple and/or repeated breaches of the Act; whether the respondent realized a profit as a result of the misconduct; the amount of money raised from investors; and the level of administrative penalties imposed in other cases.¹⁸

¹⁴ *Re Belteco Holdings Inc.*, (1998) 21 O.S.C.B. 7743 at 7746; *Ibid.* at 1136.

¹⁵ *Re Cartaway Resources Corp.*, [2004] 1 S.C.R. 672 at para. 60.

¹⁶ *Re Rowan* (2009), 33 O.S.C.B. 91 ("Rowan") at para. 74.

¹⁷ *Re Limelight Entertainment Inc.* (2008), 31 O.S.C.B. 12030 ("*Limelight*") at para. 67.

¹⁸ *Supra* note 16 at para. 67; *Ibid.* at paras. 71 and 78.

VI. ANALYSIS

A. Specific Sanctions Factors

- [25] The Commission found that Loman traded in Majestic securities and/or engaged in acts in furtherance of trades in Majestic securities without having been registered under the Act to do so, contrary to former subsection 25(1)(a) of the Act, and engaged in an illegal distribution of securities contrary to subsection 53(1) of the Act, all of which was found to be contrary to the public interest.¹⁹ As stated in the original sanctions decision, registration is a cornerstone of securities law which serves as a gate-keeping function to ensure only properly qualified individuals are permitted to trade with, or on behalf of, the public. In addition, the prospectus fulfills an important disclosure requirement to ensure that investors have the opportunity to make informed decisions.
- [26] Loman was a salesperson of Majestic shares who received commissions of \$145,250 as a result of his non-compliance with the Act and specifically in respect of sales of Majestic shares to Alberta investors.²⁰ Loman caused serious harm to those investors.
- [27] Loman was registered with the ASC, as a mutual fund salesperson from 2003 to 2005.²¹ I note that Loman made no submissions to indicate that he intends to pursue a career as a registrant going forward. However, as a former registrant, Loman ought to have known the registration requirements of Ontario securities law, yet he still traded in or acted in furtherance of trades of securities to the public, which caused serious harm to investors. Loman's market experience is an aggravating factor.
- [28] Given the seriousness of the conduct, it is important that Loman and like-minded individuals engaging in such conduct be deterred from doing so in the future by imposing appropriate sanctions, which reflect the harm done to investors. I find that specific deterrence is necessary for Loman in this case. However, I am attuned to the fact that, like in *Morgan Dragon*, Loman was not a proponent of a scheme or a principal of Majestic.²² On the other hand, Loman did sell and profited from the sale of securities in contravention of the Act.
- [29] I accept that Loman's position as an investor in Majestic is a mitigating factor for him. However, despite the submission of counsel that Loman was sharing information with friends or acquaintances, I still do not agree that the nature of Loman's relationships with the Alberta investors is a mitigating factor in his favour. Those relationships do not minimize his responsibility for acting in contravention of the Act.

B. Appropriate Sanctions

- [30] In determining the appropriate sanctions, I have remained cognizant of Loman's role and conduct in selling Majestic securities. I have also taken into account the

¹⁹ *Supra* note 2 at para. 223.

²⁰ *Supra* note 2 at para. 160.

²¹ *Supra* note 2 at para. 15.

²² *Re Morgan Dragon Development Corp.* (2014), 37 OSCB 8511 ("Morgan Dragon") at para. 29.

Merits Decision findings of contraventions of the Act, which differ between certain of the respondents involved in the same matter, the submissions of the parties, the evidence and the sanctioning factors considered above.

- [31] Loman's conduct warrants the imposition of certain trading, acquisition and exemption prohibitions that are commensurate with his conduct. Participation in the capital markets is a privilege and respondents who wish to re-enter the market should take responsibility for their conduct and recognize the seriousness of their improprieties.²³ I am mindful that the Commission has ordered permanent cease trade bans, acquisition bans and exemption application bans in circumstances where respondents were found to have engaged in unregistered trading, in the absence of findings of fraud.²⁴
- [32] Loman was a Majestic securities salesperson who was found to have breached subsections 25(1)(a) and 53(1) of the Act and acted contrary to the public interest for his acts in furtherance of trading Majestic shares.²⁵ Despite being an investor himself, Loman had direct contact with the Alberta investors and received commissions on sales of Majestic shares to a number of those investors.²⁶ While Loman was not involved in a management capacity with Majestic like the other individual Respondents, he was a former registrant with the ASC, unlike other individual Respondents other than Bishop, and should be held to a higher standard because of his experience as a registrant. I find it appropriate for Loman to be ordered to cease trading in securities, be prohibited from acquiring securities and that exemptions contained in Ontario securities law not apply to Loman for a period of eight years.
- [33] I previously disagreed and currently disagree with the length of Staff's proposed trading, acquisition and exemption sanctions for Loman. In *Limelight* the salesman, Daniels, received 10-year prohibitions with respect to trading and removal of exemptions, subject to a carve-out for RRSPs.²⁷ I find that more proportionate prohibitions on trading, acquisition and exemption in the case Loman would be orders for eight years from the date of this decision and the corresponding order. In coming to my conclusion, I have taken into account the period of 19 months during which Loman was already subject to such bans and the fact that Loman's position as an investor is a mitigating factor for him.
- [34] In my view, Loman should not be granted any exception for personal trading because he cannot be trusted to participate in Ontario's capital markets even in a limited capacity.
- [35] Also, given Loman's misconduct, he should not be immediately entitled to become or act as a registrant, investment fund manager or as a promoter. Loman was a former registrant with the ASC. To protect the public, I find that it is appropriate to impose market prohibitions on Loman for eight years.
- [36] I note that permanent director and officer bans, coupled with permanent trading, acquisition and exemption prohibitions, were found to be appropriate in *Ochnik*.

²³ *Erikson v. Ontario (Securities Commission)*, [2003] OJ No. 593 at paras. 55-56.

²⁴ *Re Maple Leaf Investment Fund Corp. et al.* (2012), 35 O.S.C.B. 3075 ("*Maple Leaf*") at paras. 8 and 55.

²⁵ *Supra* note 2 at paras. 161-162 and 223.

²⁶ *Supra* note 2 at para. 160.

²⁷ *Supra* note 17 at para. 42.

In that matter, a respondent had violated sections 25 and 53, but also engaged in misleading and deceptive behaviour.²⁸ Similar sanctions were ordered against the respondent who breached section 25 in *Maple Leaf*.²⁹

- [37] Loman engaged in conduct for the purpose of trading or acting in furtherance of unregistered trading in securities and he received funds through his company, Essen Inc., as a vehicle for payment of commissions due to him from sales of Majestic shares.³⁰ The use of Loman's position to further conduct contrary to the Act and contrary to the public interest guides me in my decision that he should be prohibited for a period of eight years from becoming or acting as an officer or director of any issuer, registrant or investment fund manager. However, having heard and considered the submissions of Loman's counsel, I am prepared to allow that Loman be granted a carve-out to act as a director or officer of an issuer that:
- (a) is wholly owned by one or more of himself or members of his immediate family;
 - (b) does not issue or propose to issue securities or exchange contracts to the public; and
 - (c) does not, directly or indirectly, trade in or distribute, advise in respect of trades or distributions of, or promote the purchase or sale of, securities or exchange contracts of any issuer.
- [38] In my view, the imposition of director and officer bans, even subject to the carve-out, will ensure that Loman will not be placed in a position of control or trust with respect to issuers, registrants or investment fund managers in the near future. These orders serve to ensure general and specific deterrence for Loman and like-minded individuals.
- [39] In *Maple Leaf*, the Commission ordered a respondent who engaged in unregistered trading and unregistered advising to pay an administrative penalty of \$200,000.³¹ In *Morgan Dragon*, respondent salespersons were ordered by the Commission to pay administrative penalties of \$30,000 and \$15,000 commensurate with their conduct.³²
- [40] The scope and seriousness of Loman's misconduct warrants a strong deterrent message. As a salesperson, Loman violated several key provisions of the Act, but he was not intimately involved in Majestic's management nor found to have made prohibited representations with respect to future listing of Majestic shares as Bishop was, for instance.³³ Nevertheless, Loman engaged in multiple and repeated breaches of the Act and realized a profit of at least \$145,250 as commissions from sales of Majestic shares. For these reasons, I consider an administrative penalty of \$60,000 to be more appropriately linked to Loman's misconduct in this case and proportional.

²⁸ *Re Ochnik*, 29 O.S.C.B. 3929 at paras.92 and 108-113.

²⁹ *Supra* note 24.

³⁰ *Supra* note 2 at paras. 15, 83, 93 and 160.

³¹ *Supra* note 24.

³² *Supra* note 22 at para. 62.

³³ *Supra* note 2 at para. 223.

VII. CONCLUSION

- [41] For the reasons stated above, I find that it is in the public interest to order the following, and will issue a separate order to that effect:
- (a) pursuant to clause 2 of subsection 127(1) of the Act, that Loman shall cease trading in securities for a period of 8 years;
 - (b) pursuant to clause 2.1 of subsection 127(1) of the Act, that Loman shall be prohibited from acquiring securities for a period of 8 years;
 - (c) pursuant to clause 3 of subsection 127(1) of the Act, that any exemptions contained in Ontario securities law do not apply to Loman for a period of 8 years;
 - (d) pursuant to clauses 8, 8.2 and 8.4 of subsection 127(1) of the Act, that Loman is prohibited for a period of 8 years from becoming or acting as an officer or director of any issuer, registrant or investment fund manager, except that Loman may act as a director or officer of an issuer that:
 - i. is wholly owned by one or more of himself or members of his immediate family;
 - ii. does not issue or propose to issue securities or exchange contracts to the public; and
 - iii. does not, directly or indirectly, trade in or distribute, advise in respect of trades or distributions of, or promote the purchase or sale of, securities or exchange contracts of any issuer;
 - (e) pursuant to clause 8.5 of subsection 127(1) of the Act, that Loman is prohibited for a period of 8 years from becoming or acting as a registrant, investment fund manager or as a promoter; and
 - (f) pursuant to clause 9 of subsection 127(1) of the Act, that Loman shall pay \$60,000 as an administrative penalty, designated for allocation or for use by the Commission in accordance with subsection 3.4(2)(b) of the Act;

Dated at Toronto this 12th day of February, 2016.

"Edward P. Kerwin"

Edward P. Kerwin