IN THE MATTER OF THE SECURITIES ACT
R.S.O. 1990, c. S.5, AS AMENDED

AND

IN THE MATTER OF
MOMENTAS CORPORATION, HOWARD RASH,
ALEXANDER FUNT, SUZANNE MORRISON
AND MALCOLM ROGERS

REASONS AND DECISION REGARDING SANCTIONS AND COSTS
(Sections 127 and 127.1 of the *Securities Act*)

Hearing:	June 21, 2007	
Decision:	July 12, 2007	
Panel:	Wendell S. Wigle, Q.C. Carol S. Perry	- Commissioner (Chair of the Panel) - Commissioner
Counsel:	Pamela Foy	- For Staff of the Ontario Securities Commission
	Scott Hutchinson	-For Alexander Funt
	Howard Rash	-For himself
	Momentas Corporation	-Unrepresented

REASONS AND DECISION REGARDING SANCTIONS AND COSTS

I. Background

[1] This was a bifurcated 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"). The hearing on the merits was held on May 23-25, 2006, and August 8, 2006, and a decision was rendered on September 5, 2006, whereby the Commission found that Momentas Corporation ("Momentas"), Howard Rash ("Rash") and Alexander Funt ("Funt") (collectively the "Respondents") violated registration requirements under the Act with respect to the sale of Momentas' securities (the "Convertible Debentures").

[2] Following the release of the decision for the hearing on the merits, we held a separate hearing (the "Sanctions and Costs Hearing"), on June 21, 2007, to consider additional evidence and submissions from Staff and the Respondents regarding sanctions and costs.

[3] At a hearing held on March 21, 2007, the Sanctions and Costs Hearing was set down for June 21, 2007. This adjournment was the result of accommodating Rash for health reasons.

[4] The Sanctions and Costs Hearing, held on June 21, 2007, was attended by Rash, who was self-represented, and counsel for Funt. Momentas was unrepresented.

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

II. Decision and Reasons Dated September 5, 2006

[6] The sanctions and costs sought by Staff in this matter apply to the findings made in our Decision and Reasons dated September 5, 2006. To summarize, three main issues were addressed during the hearing on the merits:

> (1) whether Momentas was a market intermediary and [was] engaging in the business of trading securities in Ontario without appropriate registration in violation of the Act;
>
> (2) whether Rash and Funt engaged in conduct which constitutes "trading" in securities without being registered by carrying out acts directly or indirectly in furtherance of trades of Convertible Debentures; and
>
> (3) whether Rash and Funt […] acted in a similar capacity to officers and directors of Momentas and authorized such trades.
>
> (*Re Momentas Corp.* (2006), 29 O.S.C.B. 7408 at para. 6)

[7] Upon considering the evidence, the following findings were made:

(1) Momentas was a market intermediary and it did not benefit from a registration exemption (*Re Momentas Corp.*, *supra* at paras. 64 and 67 to 74);

(2) Momentas, Rash and Funt carried out acts in furtherance of trading the Convertible Debentures (*Re Momentas Corp.*, *supra* at paras. 81 to 83);

(3) As the directing minds of Momentas, Rash and Funt were *de facto* officers and directors of Momentas and, in that capacity, planned and authorized Momentas' breach of the Act (*Re Momentas Corp.*, *supra* at paras. 113 to 116).

[8] It is this conduct that we must consider when determining the appropriate sanctions to apply in this matter.

III. Additional Evidence Adduced at the Sanctions and Costs Hearing

[9] In addition to the evidence led at the hearing on the merits, Staff provided additional evidence regarding sanctions and costs.

[10] In particular, Staff entered into evidence the corporation profile report of Momentas Realty, dated April 1, 2005, and the corporation profile report of Mercantile RX, dated January 7, 2005. Staff adduced this evidence to demonstrate the non-arm's length nature of the relationship between Rash and Funt and these corporations and that Rash and Funt benefited directly from payments Momentas made to these companies.

[11] As well, Staff requested to enter into evidence a transcript from the Commission proceeding *In the matter of Discovery Biotech Inc. and Graycliff Resources Inc.*, dated June 26, 2003. This transcript relates to a cease trade order in a separate and unrelated matter, and Staff requested to enter this transcript into evidence because Rash admitted that he was convicted of securities fraud in Switzerland. Rash objected to this evidence on the grounds that his prior testimony in a separate and unrelated matter, which he gave voluntarily, would now be self-incriminating. In all the circumstances, we have decided to disregard that transcript in our determination of this matter.

[12] Lastly, Staff adduced evidence regarding the costs incurred in this matter. For each member of Staff involved, we were provided with a time sheet listing the date, number of hours worked, and details regarding the type of work that was completed by each Staff member. The Respondents did not contest this evidence.

IV. Analysis and Conclusions

(a) Staff's Submissions

(i) Sanctions Requested by Staff

[13] Staff requested that the following sanctions be ordered in this matter:

(1) a permanent cease trade order for the Respondents;

(2) exemptions contained in Ontario securities law permanently do not apply to the Respondents;

(3) Rash and Funt must resign from any positions they hold as an officer or director of any issuer;

(4) Rash and Funt be permanently prohibited from becoming or acting as a director of any issuer;

(5) Rash and Funt jointly disgorge $7,862,000.00;

(6) Rash and Funt each pay an administrative penalty in the amount of $50,000.00;

(7) Rash and Funt be reprimanded; and

(8) Rash and Funt pay the amount of $38,782.00 towards the costs of or related to the hearing incurred by or on behalf of the Commission.

[14] According to Staff, the allegations proved in this matter with respect to unregistered trading are very serious, and aggravating factors exist which necessitate the imposition of Staff's requested sanctions.

(ii) Aggravating Factors

[15] Staff emphasized in both oral and written submissions that Rash and Funt were the controlling minds and management of Momentas because they authorized the issuance of the Convertible Debentures and were ultimately responsible for ensuring compliance with Ontario securities law. For example, Staff refers to the fact that no decisions were made or ratified by any of the formally appointed directors. Rather, all of the business decisions of the corporation were made by Rash and Funt (*Re Momentas Corp., supra* at para. 105). On this basis, Staff submits that Rash and Funt should be held accountable for Momentas' actions and sanctioned appropriately because section 129.2 of the Act permits the Commission to hold individuals acting as officers and directors (including "de facto" officers and directors) liable for breaches of a company. As well, Staff also referred us to a number of cases dealing with the doctrine of "lifting the corporate veil". Although these cases are from a bankruptcy or fraud context, Staff submits that the doctrine of "lifting the corporate veil" exemplifies that officers and directors cannot shield their conduct by acting for an incorporated company.

[16] Staff also pointed out that Funt and Rash were listed as directors and officers of the companies Mercantile RX and Momentas Realty and this is evident from the corporation profiles that were adduced in evidence. Staff submits that these corporation profiles are relevant because Momentas invested funds from the proceeds of the offering of the Convertible Debentures in these companies. At the hearing on the merits of this matter, we found that Momentas invested: (1) $385,000.00 in Mercantile RX; and (2) $400,000.00 in Momentas Realty (*Re Momentas Corp., supra* at para. 60). According to Staff, this is an aggravating factor to consider because these non-arm's length

relationships between Momentas, Rash, Funt, Mercantile RX and Momentas Realty were not disclosed to the investing public in Momentas' offering memorandum nor in Momentas' press releases dated June 29, 2004 and January 27, 2005.

[17] Another aggravating factor that Staff focused on was the lack of disclosure Momentas made to the public regarding the operations of Momentas. Staff pointed out that investors were not informed in the offering memorandum that new investment funds from the offering were being used to pay interest owed to other investors. Staff also submitted that Momentas did not make any investments in fixed income securities to meet its interest obligations as specified in the offering memorandum.

[18] An important aggravating factor that Staff also focused on was the fact that Rash and Funt never disclosed their management draws from Momentas. Rash and Funt took as management draws approximately $1,300,000.00 and $1,260,000.00 respectively from the total proceeds of $7,862,000.00 raised from the sale of the Convertible Debentures.

[19] Staff also brought our attention to the fact that while selling the Convertible Debentures, Momentas purportedly relied upon an exemption for selling securities to accredited investors contained in *O.S.C. Rule 45-501 – Ontario Prospectus and Registration Requirements* ("Rule 45-501"), and that this was misleading to investors.

[20] Furthermore, Staff submitted that regardless of the aggravating factors present, the breaches of the Act in this case are very serious and investors lost a significant amount of funds, and this alone justifies the imposition of severe sanctions in order to deter similar conduct like this from occurring in the future.

[21] Staff also made reference to "fraud" in both oral and written submissions when discussing the Respondents' conduct in this matter. Both Rash and counsel for Funt objected to this on the grounds that fraud was not mentioned in the original Statement of Allegations in this matter and was not brought up during the hearing on the merits in this matter. We note that allegations of fraud were not a part of this proceeding. This was a proceeding dealing with whether market intermediaries were selling securities in violation of the Act (i.e. by not being properly registered or by not qualifying for an exemption). In addition, fraud is not mentioned anywhere in our decision for the hearing on the merits in this matter. As a result, we did not take into consideration any of Staff's submissions relating to fraud.

(b) Funt's Submissions

[22] During submissions, counsel for Funt raised a number of mitigating factors, which in his view should be considered when determining the severity of the sanctions to be applied to Funt. Specifically, counsel for Funt took the position that lesser sanctions should be imposed on Funt because: (1) Funt was not the "real decision maker"; (2) ambiguity surrounding the state of the law on the issue of a market intermediary existed; and (3) at all times during the hearing, Funt's conduct was efficient and economical and contributed to the timely conduct of this proceeding.

[23] To support the position that Funt was not the "real decision maker" behind the activities of Momentas, counsel for Funt referred us to the findings made during the hearing on the merits. Specifically, reference was made to the following paragraph:

> *With respect to Funt, we find that his day to day role and responsibilities were essentially that of a sales manager at Momentas.* The evidence of Morrison is that Funt primarily supervised and monitored the qualifiers and salespeople – that is the only area of Momentas' operations where Funt is indicated to have exercised any form of control independent of Rash or others. However, *even in the role as sales manager, Funt's responsibility was limited* to monitoring qualifiers and salespeople to ensure that they followed a script that was prepared by Rash. Other responsibilities as sales manager were as followed: (i) the qualifiers were trained and supervised by a qualifying manager, who in turn reported to Funt, (ii) both Rash and Funt were involved in hiring qualifiers and salesmen, (iii) both Rash and Funt provided training to salespeople, (iv) the salespeople reported to both Rash and Funt, and (v) both Rash and Funt determined the compensation to be paid to qualifiers and salespeople. [Emphasis added] (*Re Momentas Corp*., *supra* at para. 109)

[24] According to Counsel for Funt, this paragraph demonstrates that Funt was not the real decision maker and that Funt only held a junior position as a sales person. Further, counsel for Funt emphasized that Rash was the real decision maker behind the activities of Momentas and this is evident from the findings set out in paragraph 108 of the decision of the hearing on the merits in this matter, which states that "Morrison described Rash as the person who is "basically in charge" and is the "main decision maker"." (*Re Momentas Corp*., *supra* at para. 108)

[25] In addition, counsel for Funt explained that due to Funt's age and health issues, he was unable to be significantly involved with the activities of Momentas. In particular, reference was made to the fact that Funt was 72 to 73 years old during the time that the breaches of securities law took place in 2004. As well, during 2004, Funt had undergone hip surgery and was unable to actively participate in the activities of Momentas at this time. Counsel for Funt also emphasized the fact that Funt is an elderly man and has no intention to return to business and work in the capital markets, thus, he poses no risk to the capital markets and this should be taken into account in the sanctions imposed.

[26] Moreover, counsel for Funt pointed out that Funt relied on Rash and deferred to him on many issues since Rash was a lawyer. According to counsel for Funt, this demonstrates that Funt did not make all the decisions and that Rash was the ultimate decision maker.

[27] However, we disagree with the position that Funt did not have decision making power, and that Funt was merely a junior salesperson. We rely on the findings from the decision for the hearing on the merits in this matter which establish that Funt was very involved in the decision making process for Momentas. At paragraph 110 of the decision we described in detail Funt's decision making responsibilities as follows:

> However, the evidence discloses that Funt was also involved in decision-making with respect to other aspects of Momentas' operations. For example, Morrison's evidence is that Funt was "involved" with Rash in making the following decisions: (i) the decision to appoint Morrison as a director, (ii) the decision to compensate Morrison with share capital, (iv) the decision to hire Kostantakos, (v) the decision to approve the "management draws" to Rash and Funt. (*Re Momentas Corp., supra* at para. 110)

[28] The above cited paragraph demonstrates that Funt participated in a number of significant decisions regarding Momentas. Furthermore, the evidence presented at the hearing on the merits of this matter established that most of Momentas' business decisions were made by the consensus of Funt and Rash and that they were both the most familiar with the overall business of Momentas (*Re Momentas Corp., supra* at para. 111). Essentially, "[…] the evidence discloses that Funt discussed matters regarding the operation of Momentas with Rash and was involved in the decision-making process of Momentas" (*Re Momentas Corp., supra* at para. 112).

[29] Counsel for Funt also argued before us that lesser sanctions should be imposed in this case because the law dealing with market intermediaries was not well settled and established prior to this proceeding. Essentially, counsel for Funt submits that the decision of the hearing on the merits was a test decision that addressed and settled an important issue regarding the status of a market intermediary which is a matter of public interest and this is an important precedent for other participants in the capital markets. As a result, Funt should not bear the burden of having to pay for this decision. In addition, at all times Funt's participation contributed to the efficient and timely resolution of this matter. Nothing was done to draw the proceeding out or to delay it.

[30] Counsel for Funt did not object to the amount of costs sought by Staff in this matter.

(c) Rash's Submissions

[31] During the Sanctions and Costs Hearing, Rash made oral submissions regarding mitigating factors that should be considered in the determination of appropriate sanctions in this matter.

[32] First of all, Rash submitted that he was not the only person making decisions on the behalf of Momentas. Rash explained that decisions were made on a consensus basis between himself and Funt, and that this fact was accepted in the decision on the hearing on the merits in this matter (*Re Momentas Corp., supra* at para. 111). Rash also pointed out that he retained a law firm for legal advice and work relating to the Convertible Debentures. Therefore, Rash submits that he alone was not responsible for all the actions and decisions of Momentas.

[33] Secondly, Rash submitted that the fact the law regarding market intermediaries was not settled and established should also be considered in the determination of

appropriate sanctions. In this respect Rash's submissions were similar to those made by Funt's counsel. Specifically, Rash pointed out that at the time the conduct in question took place, it was not known that both employer and employee are deemed to be market intermediaries and that this position was not enunciated in the applicable law at the time.

[34] Thirdly, Rash takes the position, that Momentas did have a valid business purpose and this purpose was disclosed to investors in the DVD package that was sent out to investors. Rash explained that in his view, the reason that Momentas was unable to achieve its business goals was the fact that Commission proceedings had been commenced against Momentas and this affected Momentas' ability to carry out its business plan.

[35] Fourthly, Rash pointed out that although sanctions have not been imposed yet, he has already been affected by the Commission's decision in this matter. Rash explained that the Commission's decision for the hearing of the merits in this matter was publicized in the media. As a result, Rash's friends, family and colleagues are all aware of these proceedings. Furthermore, as a result of this public decision, Rash submitted that his reputation has been damaged irreparably and this has affected his ability to make a living.

[36] Rash did not dispute the costs requested by Staff. When asked about this by the Panel, Rash admitted that he found that the amount of costs sought by Staff were reasonable in the circumstances.

(d) Relevant Considerations for Imposing Sanctions

[37] Staff, Rash and counsel for Funt all provided informative submissions regarding appropriate sanctions in this matter. In considering these submissions, we must look to the relevant considerations for imposing sanctions that have been established by this Commission.

[38] First of all, section 1.1 of the Act specifies that the Commission's mandate is to:

> (1) provide protection to investors from unfair, improper or fraudulent practices; and
>
> (2) foster fair and efficient capital markets and confidence in capital markets.

[39] Evidently, one of the paramount objectives of the Act is to protect the public (*Gregory & Co. v. Quebec (Securities Commission)*, [1961] S.C.R. 584 at para. 11). This has also been affirmed in *Mithras Management Ltd*. (1990), 13 O.S.C.B. 1600 ("*Mithras*"), where the Commission stated that:

> […] the role of this Commission is to protect the public interest by removing from the capital markets -- wholly or partially, permanently or temporarily, as the circumstances may warrant -- those whose conduct in the past leads us to conclude that their conduct in the future may well be detrimental to the integrity of those capital markets. We are not here to punish past conduct; that is the role of the courts, particularly under

> section 118 of the Act. We are here to restrain, as best we can, future conduct that is likely to be prejudicial to the public interest in having capital markets that are both fair and efficient. In so doing we must, of necessity, look to past conduct as a guide to what we believe a person's future conduct might reasonably be expected to be; we are not prescient, after all. (*Mithras*, *supra* at 1610 and 1611)

[40] Essentially, "we have a duty to take steps to make sure that manipulative or other improper practices in the financial marketplace are not tolerated" (*Re M.C.J.C. Holdings Inc.* (2002), 25 O.S.C.B. 1133 at para. 13) and this can be accomplished by ensuring that the appropriate sanctions are imposed to deter similar conduct from occurring in the future.

[41] In determining the appropriate sanctions for this matter, we must consider the specific circumstances in this case and ensure that the sanctions are proportionate (*Re M.C.J.C. Holdings*, *supra* at para 26). In addition, *Re Belteco Holdings Inc.* (1998), 21 O.S.C.B. 7743 provides a list of non-exhaustive factors to consider when imposing sanctions. These factors include:

> (1) the seriousness of the allegations;
>
> (2) the respondent's experience in the marketplace;
>
> (3) the level of a respondent's activity in the marketplace;
>
> (4) whether or not there has been a recognition of the seriousness of the improprieties
>
> (5) 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; and
>
> (6) any mitigating factors.
>
> (*Re Belteco Holdings Inc.*, *supra* at 7746)

[42] Additional factors to consider were also set out in *Re M.C.J.C. Holdings Inc.*:

> (1) The size of any profit or loss avoided from the illegal conduct;
>
> (2) The size of any financial sanctions or voluntary payment when considering other factors;
>
> (3) The effect any sanction might have on the ability of a respondent to participate without check in the capital markets;
>
> (4) The reputation and prestige of the respondent; and

(5) The shame or financial pain that any sanction would reasonably cause to the respondent and the remorse of that respondent.

(*Re M.C.J. Holdings Inc.*, *supra* at para. 26)

(e) Appropriate Sanctions and Costs in this Case

[43] After considering the appropriate factors for imposing sanctions set out in the case-law, we find that in this matter it is appropriate to order the following sanctions:

(1) that pursuant to paragraph 2 of subsection 127(1) of the Act, the Respondents permanently cease trading in securities;

(2) that pursuant to paragraph 3 of subsection 127(1) of the Act, any exemptions contained in Ontario securities law permanently do not apply to the Respondents;

(3) that pursuant to paragraph 7 of subsection 127(1) of the Act, that Rash and Funt resign from any positions they hold as an officer or director of any issuer;

(4) that pursuant to paragraph 8 of subsection 127(1) of the Act, Rash and Funt be permanently prohibited from becoming or acting as a director of any issuer;

(5) that pursuant to paragraph 10 of subsection 127(1) of the Act, Rash disgorge $1,300,000.00 to be allocated by the Commission to or for the benefit of third parties under section 3.4(2)(b) of the Act;

(6) that pursuant to paragraph 10 of subsection 127(1) of the Act, Funt disgorge $1,260,000.00 to be allocated by the Commission to or for the benefit of third parties under section 3.4(2)(b) of the Act;

(7) that pursuant to paragraph 9 of subsection 127(1) of the Act, Rash and Funt pay an administrative penalty in the amount of $50,000 each for failure to comply with Ontario securities law, to be allocated by the Commission to or for the benefit of third parties under section 3.4(2)(b) of the Act;

(8) that pursuant to paragraph 6 of subsection 127(1) of the Act, Rash and Funt be reprimanded; and

(9) that pursuant to subsection 127.1(1) of the Act, Rash and Funt pay the amount of $38,782.00 towards costs of or related to the hearing incurred by or on behalf of the Commission.

[44] First of all, we considered the amount of money raised by Momentas and the management draws that Rash and Funt received as a result of their activities with Momentas. Our findings regarding financial gains are set out in our decision for the hearing on the merits in this matter. With respect to Momentas, we found:

> […] the evidence shows that *Momentas Corporation raised $7,862,000 from approximately 250 Canadian investors from the sale of its Convertible Debentures* using an in-house sales team whose efforts were devoted strictly to selling securities of Momentas through a cold-call system of telephone solicitation. [Emphasis added] (*Re Momentas Corp*., *supra* at para. 52)

[45] With respect to the management draws by Rash and Funt, we found:

> […] Rash and Funt received together $2,560,000 as management draws, the direct source of which was the proceeds from the sale of the Convertible Debentures. *Rash received a management draw of $1.3-million and Funt received a management draw of $1.26 million.* [Emphasis added] (*Re Momentas Corp*., *supra* at para. 59)

[46] It is apparent that in this case investors lost a significant amount of money. For this reason, we find that it is important for Rash and Funt to at least disgorge the management draws they received from the proceeds of the offering of the Convertible Debentures. Accordingly, we order Rash to disgorge $1,300,000.00 and we order Funt to disgorge $1,260,000.00 because the source of these funds came from the proceeds of the offering of the Convertible Debentures.

[47] Rash and Funt can be held accountable to disgorge these management draws, pursuant to section 129.2 of the Act.

[48] In our decision for the hearing on the merits in this matter, we interpreted section 129.2 of the Act, as well as the definition of a "director" and "de facto director/officer" in paragraphs 97 to 112 of the decision. We concluded that section 129.2 of the Act applies to "de facto" officers and directors and we found based on the evidence that both Rash and Funt acted as "de facto" directors and are thus liable for Momentas' breach of the Act (*Re Momentas Corp*., *supra* at para. 122). On this basis, we find that Rash and Funt must disgorge the amounts received as management draws.

[49] On the issue of holding officers and directors liable, Staff also referred us to case-law regarding the doctrine of "lifting the corporate veil". Since section 129.2 of the Act grants the Commission the statutory authority to hold directors and officers liable we do not find it necessary to address these cases and their applicability to Commission proceedings at this time. Section 129.2 of the Act alone provides the Commission with the authority to find directors and/or officers liable when a company has violated securities law.

[50] In the circumstances, we also find it necessary to impose an administrative penalty of $50,000.00 on both Rash and Funt. Staff provided us with cases regarding appropriate ranges of administrative penalties, such as the *Settlement Between Staff of the Ontario Securities Commission and Robert Griffiths* (2006), 29 O.S.C.B. 9529 (administrative penalty of $150,000.00 imposed), *Settlement Between Staff of the Ontario Securities Commission and John Bennett* (2006), 29 O.S.C.B. 9537 (administrative

penalty of $250,000.00 imposed), and *Re Eron Mortgage Corp* (200) LNBCSC 34 (administrative penalty of $100,000.00 imposed). We note that in these three cases, very large administrative penalties were imposed on the respondents. However, in this case we do not find it necessary to impose an administrative penalty such a large sum because Rash and Funt have already been ordered to disgorge $1,300,000.00 and $1,260,000.00 respectively. As a result, we find that imposing an administrative penalty of $50,000.00 on both Rash and Funt is sufficient in the circumstances considering that both Rash and Funt are subject to a large disgorgement sanction.

[51] In determining the appropriate sanctions in this matter, we also considered the importance of deterring not only those involved in this matter, but also like-minded people from engaging in similar conduct. The importance of deterrence was recognized in *Re Cartaway Resources Corp*., [2004] 1 S.C.R. 672. The Supreme Court stressed that:

> Deterrent penalties work on two levels. They may target society generally, including potential wrongdoers, in an effort to demonstrate the negative consequences of wrongdoing. They may also target the individual wrongdoer in an attempt to show the unprofitability of repeated wrongdoing. The first is general deterrence; the second is specific or individual deterrence. (*Re Cartaway Resources Corp*., *supra* at para. 52)

[52] In order to promote both general and specific deterrence we found it necessary to impose severe sanctions including permanent cease trade orders, permanent exclusions from exemptions, and a permanent prohibition from acting as an officer or director of a reporting issuer.

[53] With respect to removing the Respondents from participating in the capital markets by imposing cease trade orders, the Supreme Court has recognized that in some cases it is necessary to remove certain individuals from participating in the capital markets in order to protect the public. It was stated in *Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, [2001] 2 S.C.R. 132 ("*Asbestos*"), that:

> […] the purpose of an order under s. 127 is to restrain future conduct that is likely to be prejudicial to the public interest in fair and efficient capital markets. The role of the OSC under s. 127 is to protect the public interest by *removing from the capital markets those whose past conduct is so abusive as to warrant apprehension of future conduct detrimental to the integrity of the capital markets* […]. [Emphasis added] (*Asbestos*, *supra* at para. 43)

[54] The passage cited above emphasizes that it is necessary to prohibit certain individuals from participating in the capital markets especially when these individuals have exhibited conduct that breaches securities law and harms investors. In this matter, Rash and Funt committed serious breaches of the Act and their actions harmed the investing public, which is evident from the fact that Momentas raised a total of $7,862,200 from approximately 250 Canadian investors.

[55] As a result of the magnitude of the monetary amounts involved, we find it necessary to remove the Respondents from the capital markets by imposing a permanent cease trade order on them. We also find it necessary to exclude the Respondents permanently from any exemptions under the Act. We also note that the Commission has imposed permanent cease trade orders and permanent exclusion from exemptions in previous cases where it was found that the respondent violating securities law was the "directing mind" behind the conduct at issue (*Re Ochnik*, (2006), 29 O.S.C.B. 3929 at para. 109). Since it was found during the hearing on the merits in this matter that Rash and Funt were the directing minds of Momentas (*Re Momentas Corp.*, *supra* at para. 116), we are of the view that the imposition of permanent cease trade orders and permanent exclusions from exemptions are consistent with sanctions previously imposed by this Commission.

[56] As well, since the conduct of breaching securities law occurred while Rash and Funt acted as "de facto" directors of Momentas, we find that it is also necessary to permanently prohibit Rash and Funt from acting as officers or directors of any issuer. Prohibiting an individual from acting as an officer or director is also an effective sanction because:

> […] the authority to prohibit a person who is engaged in conduct which is abusive of the capital markets from acting as a director, officer or promoter of a reporting issuer, *is a more direct way of ensuring the Commission's primary mandate to protect the public interest and foster confidence and integrity of the capital markets.* [Emphasis added] (*Re Belteco Holdings Inc.*, *supra* at para. 22)

[57] Furthermore, we also find it necessary to reprimand both Rash and Funt for their conduct. As explained in *Re Donnini* (2002), 25 O.S.C.B. 6225, a reprimand serves to "[…] send the message that a respondent's conduct has been unacceptable" (*Re Donnini*, *supra* at para. 216). Since such a significant amount of money was lost by the investing public, we have determined that a reprimand is required to demonstrate that the Commission denounces this type of behaviour that harms the investing public.

[58] The combination of all of the imposed sanctions not only deter the Respondents in this matter from engaging in similar future conduct, but the severity of these sanctions will also deter like-minded individuals from engaging in similar conduct. Deterring future conduct by sending a powerful message with sanctions enables the Commission to carry out its mandate to protect the public from future harm.

[59] With respect to costs, Rash and counsel for Funt did not object to the amounts requested by Staff. We also note that Staff provided a very detailed record of all the costs incurred. The time sheets provided listed the number of hours for each employee working on this file. In addition, the time sheets specified the type of work each employee participated in (i.e. preparing proceeding documents, research and document gathering, correspondence, disclosure, preparing reports …etc.). We find that Staff's disclosure of costs was transparent and allowed the Respondents to test the validity of the

costs claim. We also note that when asked about the quantum of costs requested, Rash and counsel for Funt did not take issue with the quantum of $38,782.00.

[60] Further, we find that the amount of costs requested by Staff, in this case was very reasonable. Staff only requested costs for the Litigation and Investigation Counsel assigned to this case. Moreover, Staff only requested costs for the work done in connection with the preparation and attendance at the hearing.

VI. Decision on Sanctions and Costs

[61] We consider that it is important in this case to: (1) impose sanctions that reflect the seriousness of the securities law violations that occurred in this matter; and (2) impose sanctions that not only deter the Respondents but also like-minded people from engaging in future conduct that violates securities law.

[62] For these reasons, we are of the opinion that it is in the public interest to order:

(1) that pursuant to paragraph 2 of subsection 127(1) of the Act, the Respondents permanently cease trading in securities;

(2) that pursuant to paragraph 3 of subsection 127(1) of the Act, any exemptions contained in Ontario securities law permanently do not apply to the Respondents;

(3) that pursuant to paragraph 7 of subsection 127(1) of the Act, that Rash and Funt resign from any positions they hold as an officer or director of any issuer;

(4) that pursuant to paragraph 8 of subsection 127(1) of the Act, Rash and Funt be permanently prohibited from becoming or acting as a director of any issuer;

(5) that pursuant to paragraph 10 of subsection 127(1) of the Act, Rash disgorge $1,300,000.00 to be allocated by the Commission to or for the benefit of third parties under section 3.4(2)(b) of the Act;

(6) that pursuant to paragraph 10 of subsection 127(1) of the Act, Funt disgorge $1,260,000.00 to be allocated by the Commission to or for the benefit of third parties under section 3.4(2)(b) of the Act;

(7) that pursuant to paragraph 9 of subsection 127(1) of the Act, Rash and Funt pay an administrative penalty in the amount of $50,000 each for failure to comply with Ontario securities law, to be allocated by the Commission to or for the benefit of third parties under section 3.4(2)(b) of the Act;

(8) that pursuant to paragraph 6 of subsection 127(1) of the Act, Rash and Funt be and are hereby reprimanded; and

(9) that pursuant to subsection 127.1(1) of the Act, Rash and Funt pay the amount of $38,782.00 towards costs of or related to the hearing incurred by or on behalf of the Commission.

Dated at Toronto, this 12th day of July, 2007.

"Wendell S. Wigle" *"Carol S. Perry"*

Wendell S. Wigle Carol S. Perry