



Ontario
Securities
Commission

Commission des
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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
LYNDZ PHARMACEUTICALS INC., JAMES MARKETING LTD.,
MICHAEL EATCH and RICKY MCKENZIE**

REASONS AND DECISION

Hearing: May 31 and June 1, 2010

Decision: May 16, 2011

Panel: Patrick J. LeSage, Q.C. - Commissioner and Chair of the Panel
Sinan O. Akdeniz - Commissioner

Appearance: Jonathon Feasby - For Staff of the Ontario Securities
Commission

Michael Eatch - For himself and Lyndz Pharmaceuticals
Inc.

Rickey McKenzie - For himself and James Marketing Ltd.

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REASONS AND DECISION

I. OVERVIEW

A. History of the Proceeding

[1] This was a hearing before the Ontario Securities Commission (the “**Commission**”) pursuant to section 127 of the *Securities Act*, R.S.O. 1990, c. S.5, as amended (the “**Act**”) to consider whether Lyndz Pharmaceuticals Inc. (“**Lyndz**”), James Marketing Ltd. (“**James Marketing**”), Michael Eatch (“**Eatch**”) and Rickey McKenzie (“**McKenzie**”) (collectively, the “**Respondents**”) breached the Act and acted contrary to the public interest.

[2] On December 4, 2008, the Commission issued a temporary cease trade order (the “**Temporary Order**”) with respect to Lyndz, Lyndz Pharma Ltd. (“**Lyndz UK**”), James Marketing, Eatch and McKenzie. The Commission extended the Temporary Order from time to time, and on September 24, 2009, the Commission removed Lyndz UK as a respondent and extended the Temporary Order until the conclusion of the hearing on the merits.

[3] The proceeding on the merits relating to the Respondents was commenced by a Statement of Allegations filed by Staff of the Commission (“**Staff**”) on September 23, 2009 and a Notice of Hearing issued by the Commission on the same day. Subsequent to the issuance of the Statement of Allegations and the Notice of Hearing, the Commission held pre-hearing conferences on May 6, 7, and 19, 2010. The hearing on the merits took place on May 31 and June 1, 2010, at which Staff and the Respondents appeared and made submissions (the “**Merits Hearing**”).

B. The Respondents

1. The Corporate Respondents

[4] Lyndz is a company incorporated pursuant to the laws of Ontario. During the relevant time, Lyndz’ registered business address was Eatch’s home address.

[5] James Marketing is a corporation incorporated pursuant to the laws of the United Kingdom with its head office registered to an address in London, England.

[6] Lyndz and James Marketing together are referred to as the “**Corporate Respondents**”.

2. The Individual Respondents

[7] Eatch is a resident of Ontario. He is the president, secretary and sole director of Lyndz. He is also the sole director and shareholder of Lyndz UK, a company incorporated pursuant to the laws of the United Kingdom, described below in paragraph 10.

[8] McKenzie is a resident of Aurora, Ontario. He is the sole director and shareholder of James Marketing.

[9] Eatch and McKenzie together are referred to as the “**Individual Respondents**”.

C. Lyndz UK

[10] Lyndz UK is a company incorporated pursuant to the laws of the United Kingdom. It operates from the same address as James Marketing.

D. The Allegations

[11] Staff alleges that Lyndz and Eatch distributed Lyndz securities to Ontario investors from 1999 to 2004, and that all of the Respondents distributed Lyndz securities to investors in the United Kingdom from 2005 to 2008.

[12] Staff’s Statement of Allegations contains two summaries of its allegations, one found in paragraphs 5 to 8 and the other in paragraphs 15 to 20. We note that the scope of Staff’s summary of its allegations as set out in paragraphs 15 to 20 is narrower than that of the summary found in paragraphs 5 to 8. For instance, paragraphs 5 to 8 allege that all of the Respondents engaged in an illegal distribution of Lyndz securities. However, in paragraphs 15 to 20, only Lyndz and Eatch are alleged to have engaged in an illegal distribution.

[13] Staff stated in opening submissions that it is relying on paragraphs 5 to 8 of the Statement of Allegations.

[14] We will assess the allegations in light of paragraphs 5 to 8 of the Statement of Allegations, reproduced below:

The Respondents diverted funds raised through the sale of shares in Lyndz to the personal benefit of Eatch and McKenzie via James Marketing and Lyndz UK contrary to subsection 126.1(b) of the [Act].

The Respondents distributed securities in Lyndz in Ontario without being registered to do so under the Act, without having filed a prospectus and without the benefit of an applicable exemption contrary to [subsection] 53(1) of the Act.

Eatch and Lyndz made statements in shareholder correspondence and marketing materials that were materially misleading or untrue or failed to state facts that were required to be stated to make the statements not misleading, contrary to [subsection] 126.2(1)(a) of the Act. These representations included the claim, with the intention of effecting a trade in the securities of Lyndz, that a person or company would repurchase the outstanding securities of Lyndz, contrary to [subsection] 38(1)(a) of the Act.

Eatch and Lyndz purported to issue shares in Lyndz and conducted themselves as if the corporation was a going concern during a 26 month period when Lyndz was dissolved as an Ontario corporation contrary to [subsections] 126.1(b) and 126.2(1)(a) of the Act.

II. PRELIMINARY ISSUES

A. The Agreed Statements of Facts and Additional Evidence

[15] At the commencement of the Merits Hearing, Staff and the Respondents submitted that they were able to resolve the factual issues in dispute and jointly filed two Agreed Statements of Facts. One of the Agreed Statements of Facts pertains to Eatch and Lyndz; the other pertains to James Marketing and McKenzie. The Agreed Statements of Facts are appended to these reasons as Schedules “A” and “B”.

[16] Staff submitted that, pursuant to the terms of this partial resolution of the matter, Staff would have the right to call *viva voce* evidence from Staff’s forensic accountant, Yvonne Lo (“**Lo**”). In Staff’s submission, the purpose of calling *viva voce* evidence from Lo is to explain Staff’s source and use analysis of bank accounts controlled by the Respondents (“**Staff’s Source and Use Analysis**”), which formed the basis of the parties’ agreement on the amounts raised and disbursed by the Respondents. Accordingly, Staff requested that the Panel proceed on the basis of the Agreed Statements of Facts and *viva voce* evidence from Lo.

[17] The Respondents expressed puzzlement over the need for Lo’s evidence when they have admitted certain facts, and in particular, the amounts raised and disbursed by them, in the Agreed Statements of Facts.

[18] The Panel invited the parties to resolve this issue. After an adjournment to allow discussions between the parties, the parties agreed that, instead of calling *viva voce* evidence from Lo, Staff would file a limited amount of additional documentary evidence in its place. Staff filed transcripts of examinations of Eatch and McKenzie, correspondence between Eatch and McKenzie, Staff’s Source and Use Analysis and copies of different versions of Lyndz’ business plan (the “**Lyndz Business Plan**”) that were given to investors. The evidence will be discussed in detail below in paragraph 39.

[19] Accordingly, the Agreed Statements of Facts and the documentary evidence described in paragraph 18 constitute the entirety of Staff’s evidence.

B. The Partial Agreement between the Parties not a Withdrawal of the Fraud Allegation

[20] Staff completed its case on May 31, 2010. After Staff summarized its position on the Respondents’ alleged illegal distribution and fraudulent conduct in closing, the Respondents expressed their belief that Staff would not be requesting a finding of fraud pursuant to the parties’ partial resolution of the matter. Specifically, the Respondents stated they believed they were no longer facing an allegation of fraud because the

paragraphs relating to fraud were struck out of the Agreed Statements of Facts at a pre-hearing conference.

[21] Staff submitted the parties were aware that what was removed was an acceptance of a characterization of the conduct as “fraud”, which is different from removing the conduct, and that the allegation of fraud would be advanced on the basis of the facts set out in the Agreed Statements of Facts. It would be completely unreasonable, in Staff’s view, for the Respondents to have understood that they were no longer facing an allegation of fraud.

[22] The Panel confirmed with the Respondents that Staff was seeking a finding of fraud against them and provided two options for the Respondents to consider. The Respondents could elect to dispute the allegation of fraud based on the Agreed Statements of Facts and other evidence adduced in this proceeding. In the alternative, if the Respondents took the position that the Agreed Statements of Facts were signed in error and they preferred to proceed to a full merits hearing, the Panel would strike this proceeding and the matter would be heard by a new panel in a contested merits proceeding.

[23] The Panel adjourned the hearing to afford the Respondents an opportunity to carefully consider the two options presented to them. After the adjournment, the Respondents expressed a preference to proceed on the basis of the Agreed Statements of Facts and additional evidence admitted on consent by the parties. The Respondents were then given an opportunity to present their evidence and to make submissions.

III. ISSUES

[24] Staff made submissions on the findings they requested which narrowed the scope of the issues to the following:

- (a) Does the Commission have jurisdiction over the Respondents?
- (b) Did the Respondents distribute securities of Lyndz in Ontario without a prospectus, contrary to subsection 53(1) of the Act?
- (c) Did the Respondents engage or participate in any act, practice or course of conduct relating to securities of Lyndz that they knew or reasonably ought to have known perpetrated a fraud on any person or company, contrary to subsection 126.1(b) of the Act?

IV. THE POSITION OF THE PARTIES

A. Staff

[25] Staff takes the position that the Agreed Statements of Facts admit the essential elements of both an illegal distribution and fraud under the Act.

[26] Staff submits that the Respondents' admissions, contained in the Agreed Statements of Facts, clearly demonstrate that the Respondents engaged in the illegal distribution of Lyndz securities from 1999 to 2008, contrary to subsection 53(1) of the Act.

[27] Staff argues that the Agreed Statements of Facts, supplemented by the additional documentary evidence admitted at the Merits Hearing, also demonstrate that the Respondents engaged in a fraud on the investors in Lyndz and thereby breached subsection 126.1(b) of the Act. Staff submits that the fraud committed by the Respondents can be reduced to the simple idea of selling shares to investors on the basis of a false premise which wrongly deprived investors of their money. Shareholders invested money based on the premise that the money they paid for Lyndz shares would be spent on developing a humanitarian pharmaceutical manufacturing business described in the Lyndz Business Plan and in correspondence the Respondents sent them. However, the premise on which shareholders invested was false. Rather than developing the projects they led investors to believe they were pursuing, the Respondents spent the majority of investors' money on personal expenses, withdrew it in cash or entirely failed to account for it. As a result, the investors were wrongly deprived of their money.

[28] In Staff's submission, the evidence shows that the illegal distribution of Lyndz shares was little more than a personal fundraising project for both Eatch and McKenzie.

B. The Respondents

1. Eatch and Lyndz

[29] Eatch admits to engaging in a distribution of Lyndz securities without a prospectus. However, he submits that the Respondents did not actively solicit investors in the United Kingdom. He submits the investors were strictly friends, relatives and associates. He believed he could sell his shares in a private company to up to fifty shareholders, but the number of shareholders "escalated from there" (Hearing Transcript, May 31, 2010, p. 106). Eatch accepts responsibility for that mismanagement.

[30] Eatch vehemently opposes Staff's characterization of his conduct as fraudulent. He maintains that Lyndz' humanitarian project to engage in manufacturing of pharmaceuticals was legitimate. In closing, he made substantial submissions about the Lyndz Business Plan and the steps that he purportedly took to advance the project. Some of his submissions were:

- He intended to purchase a pharmaceutical plant in British Columbia, but the plant was sold to another after it was burnt down and rebuilt;
- There was another plant which he intended to purchase, but his discussions with the vendor stalled and the vendor ultimately decided against selling the plant; and
- The consultants mentioned in the Lyndz Business Plan are all family friends. Their credentials can be verified;

[31] Eatch does not dispute that he withdrew and spent investor funds. However, he characterizes the withdrawals as either business related or salary paid to him for developing the pharmaceutical project.

[32] Eatch submits he has met with every investor, used his name and telephone number in his dealings with investors, invited investors to his home, and constantly updated investors about what was happening. In his submission, this indicates that he did not engage in fraud.

[33] Eatch further submits that the investors in Lyndz do not view his project as fraudulent. He maintains that over 95 percent of Lyndz' shareholders in the United Kingdom are "still 100 percent behind [him] and they don't want their money back and they just want to see the project go to fruition" (Hearing Transcript, May 31, 2010, p. 107). He expressed his readiness to return to the development of his pharmaceutical business and humanitarian project after the conclusion of this proceeding.

2. McKenzie and James Marketing

[34] In his Agreed Statement of Facts, McKenzie acknowledges that he engaged in acts in furtherance of distributing Lyndz securities. Nonetheless, at the Merits Hearing, McKenzie stated that he had "never called a client, never sold a client, solicited a client in any manner or fashion" (Hearing Transcript, June 1, 2010, p. 47).

[35] As with Eatch, McKenzie strongly protests Staff's allegation of fraud against him. McKenzie maintains that Eatch and Lyndz were pursuing a legitimate humanitarian enterprise and that the project was designed to serve the needs of the third world.

[36] McKenzie takes the position that the investment scheme was not fraudulent because he would not have purchased shares in a fraudulent company. He takes the view that he could not have engaged in fraud because the shareholders are content with their investments.

[37] McKenzie insists that his involvement in the distribution was very limited. He describes his role as confined to that of a collector, a passive conduit for the flow of investor funds. As well, he emphasizes that he had no input to the materials that were sent to investors. While he received money that came from investor funds, he maintains that he only received 10 percent of the funds invested in Lyndz as a commission for facilitating Lyndz' distribution.

V. EVIDENCE

A. Evidence Tendered at the Hearing

1. Staff's Evidence

[38] As discussed in paragraphs 15 to 19 above, the evidence admitted in this hearing includes two Agreed Statements of Facts. The Agreed Statements of Facts are appended to these reasons as Schedules "A" and "B".

[39] On consent of the parties, certain documentary evidence was filed. These documents are:

- Transcripts and exhibits of compelled examinations of Eatch;
- Transcript and exhibits of compelled examination of McKenzie;
- A letter from Eatch to McKenzie setting out the proposed division of funds between them;
- An invoice and an email from Eatch to McKenzie confirming receipt of £129,000 of investor funds in cash in the years 2006 to 2007; and
- Staff's Source and Use Analysis of bank accounts relating to the Respondents.

[40] The Panel also admitted as evidence various versions of the Lyndz Business Plan which are substantially the same as the versions found in the exhibits of the compelled examinations of the Individual Respondents referred to in paragraph 39 above.

[41] Staff submits that where the evidence in these documents is inconsistent with the Agreed Statements of Facts, the Agreed Statements of Facts prevail. We agree with Staff's submissions on that point.

[42] As noted above, the Respondents consented to the admission of the documentary evidence noted in paragraph 39. They did not dispute the admissions in the compelled examinations which, on consent, became evidence, nor did they contest that they were the parties to the correspondence listed above. They provided no basis for us to question the accuracy of Staff's Source and Use Analysis.

2. The Respondents' Evidence

[43] Lyndz and Eatch introduced as evidence a fax copy of a letter from Fred Stonham ("Stonham") purporting to document the views of Lyndz shareholders (the "Stonham Letter"). This letter states that Stonham has been in contact with investors and that they support Eatch. Eatch made substantial submissions regarding the Lyndz Business Plan and the steps that he purportedly took to achieve the objectives set out in the Lyndz Business Plan, but otherwise did not call any evidence.

[44] McKenzie called Eatch as a witness and examined him briefly, only regarding the Stonham Letter and Eatch's view of whether fraud has occurred. McKenzie did not testify and led no other evidence.

B. Summary of Findings

[45] Based on the Agreed Statements of Facts and the evidence tendered at the Merits Hearing described above, we find that this case involves an investment scheme in which the Respondents distributed securities to investors based on the premise that their funds would be invested in the development of Lyndz' proposed pharmaceutical business and

humanitarian projects in developing nations. That premise was misleading and false and as a result of the Respondents' activities, Lyndz' investors were deprived of their funds. Investor funds were diverted by the Respondents to their personal benefit rather than being invested in a pharmaceutical business.

1. The Investment Scheme

(a) 1999-2004

[46] From 1999 to 2004, Lyndz securities were distributed to residents of Ontario and other provinces through at least 47 transactions. At least 14 of the 47 transactions, including transactions with Ontario investors, were made in exchange for funds totalling over \$400,000. The remainder of those transfers of securities were made as gifts to friends and family of Eatch who had assisted him with his business.

(b) 2005-2008

[47] From 2005 to 2008, Lyndz securities were distributed from Ontario to more than 70 residents of the United Kingdom through over 150 transactions. Lyndz investors in the United Kingdom paid between \$0.15 and \$0.33 per share. Approximately \$1,700,000 was raised during this period.

2. The Role of Lyndz and Eatch

[48] Eatch is the directing mind of both Lyndz and Lyndz UK.

(a) 1999-2004

[49] From 1999 to 2004, Lyndz and Eatch distributed Lyndz shares to residents of Ontario and other provinces through at least 47 transactions. The over \$400,000 raised from this distribution was used for payments to Eatch's partner, Eatch's personal expenses, and some for Lyndz' business expenses. A precise accounting of the disposition of these funds is not available.

(b) 2005-2008

[50] From 2005 to 2008, Lyndz and Eatch distributed Lyndz' shares from Ontario to more than 70 residents of the United Kingdom through over 150 transactions. Specifically, Lyndz and Eatch engaged in numerous acts in furtherance of that distribution, including the following:

- Eatch prepared the Lyndz Business Plan to be distributed to investors;
- Eatch sent correspondence to prospective investors on Lyndz letterhead soliciting them to invest in the shares of Lyndz;

- Eatch, with McKenzie's permission, sent correspondence to prospective investors on James Marketing letterhead soliciting them to invest in the shares of Lyndz;
- Eatch, with McKenzie's permission, used James Marketing's email account to invoice Lyndz' investors on the letterhead of James Marketing and instruct them to make payments to James Marketing;
- Eatch personally sent share certificates to a majority of Lyndz' investors;
- Eatch personally telephoned, met with and corresponded with investors in connection with their purchase of Lyndz securities; and
- Eatch maintained a bank account in the United Kingdom in the name of Lyndz UK for the purpose of receiving funds from James Marketing that had been deposited with James Marketing by Lyndz investors in exchange for shares in Lyndz (the "**Lyndz UK Account**").

[51] In all of the documents and correspondence sent to Lyndz' shareholders by Lyndz and Eatch, Lyndz is purported to be developing a business of manufacturing and distributing pharmaceuticals and bringing affordable pharmaceuticals to the third world as a "humanitarian project". For example, Eatch prepared the Lyndz Business Plan, various versions of which were distributed by him and his company to Lyndz investors. The Lyndz Business Plan contains the following information about the company:

- Lyndz was planning an acquisition of a pharmaceutical production facility in British Columbia;
- Lyndz was planning to build a pharmaceutical plant with the assistance of John Buttner, "an architect and an Austrian registered engineer with more than 30 years of experience in the design, construction and project management of industrial and commercial buildings";
- Lyndz supported efforts to prevent and treat diseases and conditions in the developing world;
- Lyndz anticipated three different phases of financing over time; and
- A number of individuals were involved in Lyndz in management and consulting roles;

[52] Lyndz and Eatch led investors to believe that the funds they exchanged for shares in Lyndz would be invested in the development of Lyndz' proposed pharmaceutical business and humanitarian projects in impoverished nations. However, this representation was false. There is no credible evidence that Lyndz had any legitimate underlying business or legitimate business purpose.

3. The Role of James Marketing and McKenzie

[53] McKenzie is the directing mind of James Marketing.

[54] We pause to note that paragraph 31 of the Agreed Statement of Facts of James Marketing and McKenzie relates to McKenzie's prior conviction for participating in a criminal investment fraud. That fact is irrelevant to our consideration on the merits and will be disregarded.

(a) 1999-2004

[55] Neither James Marketing nor McKenzie was involved in the distribution of Lyndz securities in this time period.

(b) 2005-2008

[56] From 2005 to 2008, James Marketing and McKenzie distributed Lyndz shares from Ontario to more than 70 residents of the United Kingdom through over 150 transactions.

[57] James Marketing and McKenzie engaged in numerous acts in furtherance of that distribution, including the following:

- McKenzie knowingly allowed Eatch to send correspondence to prospective investors on James Marketing letterhead soliciting them to invest in Lyndz;
- McKenzie gave Eatch access to James Marketing's email account for the purpose of allowing Eatch to invoice Lyndz' investors on the letterhead of James Marketing and instruct them to make payments to James Marketing;
- McKenzie personally sent share certificates to some Lyndz' investors;
- McKenzie personally telephoned, met with and corresponded with investors in connection with their purchase of Lyndz securities;
- James Marketing received funds totalling approximately \$1,700,000 from the distribution of Lyndz' shares; and
- McKenzie maintained a bank account in the United Kingdom in the name of James Marketing (the "**James Marketing UK Account**") for the purpose of receiving funds from Lyndz investors.

[58] In all documents and correspondence sent to Lyndz' shareholders by James Marketing and McKenzie, Lyndz is purported to be developing a business of manufacturing and distributing pharmaceuticals and bringing affordable pharmaceuticals to the third world as a "humanitarian project".

[59] James Marketing and McKenzie led investors to believe that the funds they exchanged for shares in Lyndz would be invested in the development of Lyndz'

proposed pharmaceutical business and humanitarian projects in impoverished nations. However, this representation was false. Lyndz had no underlying business or legitimate business purpose. McKenzie, because of his involvement in the receipt and the application of the funds, knew or ought to have known Lyndz had no legitimate business purpose or engagement.

4. Disbursement of Investor Funds raised from 2005 to 2008

[60] Pursuant to an agreement entered into between Eatch and McKenzie (the “**Agreement**”), investor funds would first be deposited into the James Marketing UK Account, and then they would be divided between the Individual Respondents, Eatch and McKenzie, in accordance with the terms of the Agreement. As the Agreement stipulates, James Marketing acted as the conduit for investor funds raised from the distribution of Lyndz’ securities and received approximately \$1,700,000 of investor funds.

[61] The Agreement further provides that 30% of the investor funds would be transferred into an account held by Eatch in the name of Lyndz UK and 60% would be provided to Eatch directly in cash. The Agreement also provides that for “facilitating” the redistribution of the funds paid by Lyndz’ investors, McKenzie was entitled to retain 10% of the funds deposited into the accounts of James Marketing.

[62] However, the actual division of funds between the Individual Respondents deviated from the terms of the Agreement:

- Eatch received approximately \$655,000 of investor funds in the following manner. James Marketing transferred \$380,000 to the Lyndz UK Account and \$25,000 to an account of Eatch’s spouse. McKenzie withdrew approximately \$500,000 from the James Marketing UK Account in cash and transferred at least 50%, or \$250,000, to Eatch; and
- McKenzie received the remainder of investor funds in the James Marketing UK Account, which totalled approximately \$700,000.

[63] Of the \$655,000 of investor funds Eatch received, Eatch disposed of approximately half, or \$327,500, on personal expenses unrelated to the business of Lyndz. The other \$327,500 remains unaccounted for. For example:

- Eatch received a significant amount of investor funds in the form of cash. As discussed in paragraph 62, Eatch received approximately \$250,000 from McKenzie in cash. Of the \$380,000 of investor funds that McKenzie transferred to the Lyndz UK Account, Eatch withdrew approximately \$220,000 from that account in cash. In total, Eatch received over \$470,000 in cash. A significant portion of this amount is unaccounted for, although we do know that Eatch spent over \$51,000 at an oyster bar called AW Shucks Seafood in Aurora, Ontario;

- Eatch spent approximately \$26,000 on travel expenses unrelated to the business of Lyndz;
- Eatch spent approximately \$21,000 on retail expenditures unrelated to the business of Lyndz, including money spent at the Arts Music Store, DOT Patio and Home, K Shoes of England, the LCBO, and Sears; and
- Eatch's spouse received approximately \$36,000 of investor funds. Of that \$36,000, approximately \$25,000 was transferred to her from the James Marketing UK Account and approximately \$11,000 was from the Lyndz UK Account.

[64] McKenzie disposed of the remainder of investor funds in the James Marketing UK Account, or approximately \$700,000, on matters unrelated to Lyndz' business. For example:

- McKenzie spent approximately \$142,000 on retail expenditures unrelated to Lyndz' business, including money spent at the Apple Store, Banana Republic, the LCBO, Rogers Video and Shoppers Drug Mart;
- McKenzie spent approximately \$100,000 on accommodations unrelated to Lyndz' business;
- McKenzie spent approximately \$95,000 on travel expenses unrelated to Lyndz' business; and
- McKenzie transferred over \$77,000 to his spouse.

[65] In summary, investor funds flowed through the James Marketing UK Account, most of which were ultimately received by either Eatch or McKenzie. Eatch received a total of approximately \$655,000 and McKenzie received approximately \$700,000.

[66] Nearly all of the investor funds were either spent on matters unrelated to the business of Lyndz or unaccounted for. Specifically, Eatch spent approximately \$327,500 on personal expenses unrelated to the business of Lyndz and was unable to account for the other \$327,500 that he received. McKenzie disposed of approximately \$700,000 on matters unrelated to business of Lyndz.

VI. ANALYSIS

A. Does the Commission have Jurisdiction over the Respondents?

[67] The majority of investors who purchased Lyndz securities from 2005 to 2008 were located outside of Ontario, primarily in the United Kingdom. However, the Agreed Statements of Facts acknowledge that a large majority of the share certificates and items of correspondence sent to Lyndz' investors were sent by Eatch and McKenzie from Ontario, that a large majority of the instructions to financial institutions to transfer funds were issued from Ontario, and that a large majority of the investor funds withdrawn in

cash were withdrawn in Ontario. Based on the evidence, we find that there is a significant if not overwhelming nexus to Ontario to give the Commission jurisdiction over the Respondents.

B. Did the Respondents distribute Lyndz securities without a prospectus, contrary to subsection 53(1) of the Act?

[68] Subsection 53(1) sets out the prospectus requirement under the Act:

53. (1) Prospectus required – No person or company shall trade in a security on his, her or its own account or on behalf of any other person or company if the trade would be a distribution of the security, unless a preliminary prospectus and a prospectus have been filed and receipts have been issued for them by the Director.

[69] The allegation of a violation of subsection 53(1) of the Act by the Respondents was not a contentious issue before the Panel. In the Agreed Statements of Facts, the Respondents acknowledge that they distributed Lyndz securities without a prospectus.

1. Lyndz and Eatch

[70] Eatch admits on behalf of both himself and Lyndz, of which he was the directing mind, that they distributed Lyndz securities to Ontario investors from 1999 to 2004 which raised approximately \$400,000, and to investors in the United Kingdom from 2005 to 2008 which raised approximately \$1,700,000. Eatch further admits that, in relation to the period from 2005 to 2008, he and Lyndz engaged in specific acts in furtherance of distributing Lyndz securities. Lyndz and Eatch met or spoke with investors in connection with their purchases of Lyndz shares, sent documents and correspondence to investors, invoiced investors, sent share certificates to investors and maintained a bank account to receive investor funds.

[71] We received no evidence to support an exemption under the Act which would allow Lyndz and Eatch to distribute Lyndz securities without a prospectus being filed and a receipt issued by the Director.

[72] We find that Lyndz and Eatch engaged in a distribution of Lyndz securities without being qualified by a prospectus and without a prospectus exemption being available, contrary to subsection 53(1) of the Act.

2. James Marketing and McKenzie

[73] McKenzie made admissions on his own behalf and on behalf of James Marketing, for which he was the directing mind, that they participated in a distribution of Lyndz securities from 2005 to 2008 which raised approximately \$1,700,000. McKenzie admits that he and his company engaged in acts in furtherance of distributing Lyndz shares by sending share certificates, met or spoke with investors in connection with their purchases of Lyndz shares and opening and maintaining an account for the purpose of receiving investor funds. Further, in his capacity as a director of James Marketing, McKenzie

authorized Lyndz and Eatch to use James Marketing's letterhead and email account to communicate with investors in relation to the distribution of Lyndz securities.

[74] We received no evidence to support an exemption under the Act which would allow James Marketing and McKenzie to distribute Lyndz securities without a prospectus being filed and a receipt issued by the Director.

[75] We find that James Marketing and McKenzie engaged in a distribution of Lyndz securities without being qualified by a prospectus and without a prospectus exemption being available, contrary to subsection 53(1) of the Act.

C. Did the Respondents engage in an act, practice or course of conduct relating to Lyndz securities which they knew or reasonably ought to have known perpetrated a fraud, contrary subsection 126.1(b) of the Act?

[76] Subsection 126.1(b) of the Act is the fraud provision:

126.1 Fraud and market manipulation – A person or company shall not, directly or indirectly, engage or participate in any act, practice or course of conduct relating to securities or derivatives of securities that the person or company knows or reasonably ought to know,

...

(b) perpetrates a fraud on any person or company.

[77] It is well established in the Commission's jurisprudence that the elements of fraud under subsection 126.1(b) of the Act are:

1. The prohibited act, be it an act of deceit, a falsehood or some other fraudulent means; and
2. Deprivation caused by the prohibited act, which may consist in actual loss or the placing of the victim's pecuniary interests at risk.
3. Subjective knowledge of the prohibited act; and
4. Subjective knowledge that the prohibited act could have as a consequence the deprivation of another (which deprivation may consist in knowledge that the victim's pecuniary interests are put at risk.)

[78] The mental element of the fraud provision has been described in the British Columbia Court of Appeal's analysis in *Anderson v. British Columbia (Securities Commission)*, 2004 BCCA 7 (the Supreme Court of Canada denied leave to appeal the *Anderson* decision ([2004] S.C.C.A. No. 81). The fraud provision of the British Columbia *Securities Act*, R.S.B.C. 1996, c. 418 has identical operative language as section 126.1 of the Act. The British Columbia Court of Appeal said:

...[the fraud provision of the BC Act] does not dispense with proof of fraud, including proof of a guilty mind...[the fraud provision of the BC Act] simply widens the prohibition against participation in transactions to include participants who know or ought to know that a fraud is being perpetrated by *others*, as well as those who participate in perpetrating the fraud. It does not eliminate proof of fraud, including proof of subjective knowledge of the facts constituting the dishonest act, by someone involved in the transactions.

[79] For a corporation, it is sufficient to show that its directing mind or minds knew that the corporation perpetrated a fraud.

1. Lyndz and Eatch

(a) 1999-2004

[80] The fraud provision of the Act was proclaimed into force on December 31, 2005. It cannot apply to the distribution of Lyndz securities from 1999 to 2004.

(b) 2005-2008

[81] Lyndz and Eatch led investors to believe that the funds they exchanged for shares in Lyndz would be invested in the development of Lyndz' proposed pharmaceutical business and humanitarian projects in impoverished nations. In all of the documents and correspondence that Lyndz and Eatch prepared and sent to Lyndz shareholders, including the Lyndz Business Plan, Lyndz is purported to be developing a business of manufacturing and distributing pharmaceuticals as well as bringing affordable pharmaceuticals to the third world as a "humanitarian project".

[82] The evidence shows that the representations about the nature of Lyndz' business made by Lyndz and Eatch were sometimes false, sometimes misleading and sometimes both. In the Agreed Statement of Facts of Eatch and Lyndz, it is acknowledged that Lyndz never had any active business except for what is described in the Agreed Statement of Facts. Having reviewed the Agreed Statement of Facts, we conclude that the only business described therein is the distribution of Lyndz' shares. Lyndz does not have any assets, employees or physical location. It has no legitimate underlying business or business purpose. Although Eatch claimed that Lyndz is a legitimate business and described some of the steps that he purportedly took to develop Lyndz' pharmaceutical business in his submissions, there is no credible evidence before the Panel to support those submissions.

[83] Moreover, contrary to what Lyndz and Eatch claimed about the company, few if any funds were invested in the development of Lyndz' pharmaceutical business or humanitarian projects. Eatch and Lyndz engaged in unauthorized diversion of investor funds and disposed of a vast majority of funds for purposes unrelated to Lyndz' business. For example, as described in paragraph 63, Eatch withdrew over \$470,000 in cash, a significant portion of which was unaccounted for. Staff's Source and Use Analysis also shows that a significant amount of investor funds was spent on personal expenses, including over \$51,000 spent at a restaurant named AW Shucks Seafood. The

unauthorized diversion of investor funds was further supported by Eatch's admission that he spent approximately half of the \$655,000 of investor funds, or \$327,500, that he received from McKenzie on personal expenses and was unable to account for the other half.

[84] Lyndz and Eatch failed to exercise control over how McKenzie disposed of the remainder of investor funds in the James Marketing UK Account which totalled approximately \$700,000.

[85] Given that almost all of the investor funds were either spent on expenses unrelated to Lyndz' business or unaccounted for, we conclude that Lyndz investors were deprived of the funds they invested in Lyndz as a result of the misrepresentation and unauthorized diversion of investor funds.

[86] Eatch misrepresented the nature of Lyndz' business when he sent documents and correspondence that he prepared to investors and disposed of a significant portion of investor funds for purposes unrelated to Lyndz' business. We conclude that Eatch knew of the dishonest act and the deprivation of Lyndz investors that flowed therein. Eatch, therefore, contravened subsection 126.1(b) of the Act.

[87] Eatch is the directing mind of Lyndz. His knowledge is attributable to Lyndz. Lyndz therefore also contravened subsection 126.1(b) of the Act.

[88] Based on the evidence, we find that Lyndz and Eatch knowingly perpetrated a fraud, contrary to subsection 126.1(b) of the Act.

2. James Marketing and McKenzie

[89] James Marketing and McKenzie contributed to the misrepresentations perpetrated by Lyndz and Eatch about the nature of Lyndz' business. They knowingly allowed Eatch to use James Marketing's letterhead and email account to correspond with investors in connection with their purchases of Lyndz shares. The correspondence sent by Eatch on James Marketing's letterhead or through James Marketing's email account represents Lyndz as developing a business of manufacturing and distributing pharmaceuticals and bringing affordable pharmaceuticals to the third world as a "humanitarian project". This led investors to believe that the funds they exchanged for shares in Lyndz would be invested in the development of Lyndz' proposed pharmaceutical business and humanitarian projects in impoverished nations.

[90] However, as discussed above, these representations were false. Lyndz had never developed a pharmaceutical business, nor is there any credible evidence that investor funds were applied to the development of such business. Instead, almost all investor funds were either spent on matters unrelated to the business of Lyndz or are unaccounted for.

[91] In his Agreed Statement of Facts, McKenzie admits that he has never known Lyndz to have an active business. Having received \$700,000 of investor funds and disposed of

them, McKenzie knew or ought to have known of the dishonest act and the deprivation of Lyndz investors that would result.

[92] McKenzie is the directing mind of James Marketing. His knowledge is attributable to James Marketing. Accordingly, we find that James Marketing knew or ought to have known about the dishonest act and the deprivation of investors that would result.

[93] Based on the evidence, we find that James Marketing and McKenzie participated in fraudulent misconduct, contrary to subsection 126.1(b) of the Act.

VII. CONCLUSION

[94] For the reasons stated above, we find that:

- (i) Lyndz, James Marketing, Eatch and McKenzie distributed Lyndz securities without a preliminary prospectus and a prospectus having been filed and received by the Director, contrary to subsection 53(1) of the Act; and
- (ii) Lyndz, James Marketing, Eatch and McKenzie perpetrated a fraud on Lyndz investors, contrary to subsection 126.1(b) of the Act.

[95] The parties are directed to contact the Office of the Secretary within 10 days to set a date for a sanctions and costs hearing, failing which a date will be set by the Office of the Secretary.

Dated at Toronto at this 16th day of May, 2011.

“Patrick J. LeSage”

“Sinan O. Akdeniz”

Patrick J. LeSage, Q.C.

Sinan O. Akdeniz

SCHEDULE “A”



Ontario
Securities
Commission
3S8

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valeurs mobilières
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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 LYNDZ PHARMACEUTICALS INC., JAMES MARKETING LTD., MICHAEL EATCH and RICKEY MCKENZIE

AGREED STATEMENT OF FACTS OF MICHAEL EATCH and LYNDZ PHARMACEUTICALS INC.

1. For this proceeding, and any other regulatory proceeding commenced by a securities regulatory authority in Canada, the Respondent agrees with the facts as set out in this Agreed Statement of Facts.

A. Background

2. Lyndz Pharmaceuticals Inc. (“Lyndz”) is a company incorporated pursuant to the laws of Ontario.
3. Michael Eatch (“Eatch”) is a resident of Ontario. He is the president, secretary and sole director of Lyndz. During the relevant time, Lyndz’ registered business address was Eatch’s home.
4. Eatch has never been registered with the Ontario Securities Commission (the “Commission”).
5. Lyndz has never had any active business, except what is described in this Agreed Statement of Facts.
6. Lyndz is not a reporting issuer in Ontario and has not filed a prospectus. Its common shares are not listed on any exchange.

7. Eatch is also the sole director and shareholder of Lyndz Pharma Ltd. ("Lyndz UK"), a company incorporated pursuant to the laws of the UK, operating out of the same address as James Marketing Ltd ("James Marketing").

8. Lyndz UK has never had an active business.

9. The Respondent, McKenzie, is a resident of Aurora, Ontario, and the sole director and shareholder of James Marketing.

10. McKenzie has never been registered with the Commission.

11. James Marketing, is a corporation incorporated pursuant to the laws of the UK with its head office registered to an address in London, England.

12. James Marketing has never had any active business except what is described in this Agreed Statement of Facts.

13. James Marketing has never been registered with the Commission.

14. In all documents and correspondence sent to Lyndz' shareholders by Eatch, Lyndz, McKenzie and James Marketing, Lyndz is purported to be developing a business of manufacturing and distributing pharmaceuticals and bringing affordable pharmaceuticals to the third world as a "humanitarian project".

B. Role Played by Eatch and Lyndz in the Sale of Lyndz Securities to Ontario Investors

15. In at least 47 transactions from 1999 through 2004 Eatch and Lyndz distributed Lyndz shares to residents of Ontario and other provinces.

16. At least 14 of the 47 distributions, including distributions to Ontario investors, were made in exchange for funds totalling over \$400,000 CDN.

17. The remainder of these 47 distributions were made as gifts to friends and family of Mr. Eatch who had assisted him with his business.

18. The over \$400,000 CDN raised as part of this distribution was disposed of on Lyndz business, payments to Mr. Eatch's partner and personal expenses of Michael Eatch. A precise accounting of the disposition of these funds is not available.

C. Roles Played by Eatch, Lyndz and Lyndz UK in the Sale of Lyndz Securities to UK Investors

19. On over 150 occasions from 2005 through 2008, Eatch, McKenzie, James Marketing and Lyndz distributed Lyndz shares from Ontario to more than 70 residents of the UK.

20. Eatch and Lyndz committed numerous acts in furtherance of these distributions of Lyndz securities. These acts included the following:

- a. Eatch sent correspondence to prospective investors on Lyndz letterhead soliciting them to invest in the shares of Lyndz;
- b. Eatch, with McKenzie's permission, sent correspondence to prospective investors on James Marketing letterhead soliciting them to invest in the shares of Lyndz;
- c. Eatch, with McKenzie's permission, used James Marketing's email account to invoice Lyndz' investors on the letterhead of James Marketing and instruct them to make payments to James Marketing;
- d. Eatch personally sent share certificates to a majority of Lyndz' investors;
- e. Eatch personally telephoned, met with and corresponded with investors in connection with their purchase of Lyndz securities; and,
- f. Eatch maintained a bank account in the UK in the name of Lyndz Pharma for the purpose of receiving funds from James Marketing that had been deposited with James marketing by Lyndz investors in exchange for shares in Lyndz.

21. James Marketing received funds totalling approximately \$1,700,000 CDN¹ from the distribution of Lyndz' shares.

22. Eatch and McKenzie made an agreement to divide the funds McKenzie received in the accounts of James Marketing between themselves according to an agreement that Eatch confirmed in writing and sent to McKenzie (the "Agreement").

23. Pursuant to the Agreement, McKenzie was to instruct his bank to transfer 30% of the investor funds to an account held by Eatch in the name of Lyndz UK and provide 60% of the funds to Eatch directly in cash. The Agreement also provided that for "facilitating" the redistribution of the funds paid by Lyndz' investors as described above, McKenzie was entitled to retain 10% of the funds deposited into the accounts of James Marketing.

24. In fact, McKenzie transferred approximately \$380,000 CDN from the account of James Marketing to the account of Lyndz UK, and \$25,000 CDN to account of the spouse of Michael Eatch.

25. McKenzie withdrew approximately \$500,000 CDN in cash from the James Marketing account. There is no precise accounting of these funds, but at least 50% was transferred to Eatch.

¹ All funds were originally received in British Pounds and have been converted on the basis of an average exchange rate during the relevant period.

26. McKenzie disposed of the remainder of the investor funds in the James Marketing account, which totalled approximately \$700,000 CDN, on matters unrelated to the business of Lyndz, including a gratuitous transfer of approximately \$75,000 CDN to his spouse.

27. Eatch spent approximately half of the funds he received from McKenzie on personal expenses unrelated to the business of Lyndz. The other 50% of those funds remains unaccounted for.

28. Eatch, McKenzie, Lyndz and James Marketing led investors to believe that the funds they exchanged for shares in Lyndz would be invested in the development of Lyndz' proposed pharmaceutical business and humanitarian projects in impoverished nations.

29. A large majority of the share certificates and items of correspondence sent to Lyndz' investors by McKenzie and Eatch were sent from Ontario.

30. A large majority of the instructions to financial institutions to transfer funds were issued from Ontario.

31. A large majority of the investor funds withdrawn in cash were withdrawn in Ontario.

32. Lyndz UK investors paid between \$0.15 and \$0.33 per share.

33. As an officer and director of Lyndz and Lyndz UK, Eatch was at all times either directly responsible for the conduct of those companies or authorized, permitted or acquiesced in that conduct.

Dated this 19th day of May, 2010

Michael Eatch

Michael Eatch on behalf of
Lyndz Pharmaceuticals Inc.

Staff of the Ontario Securities
Commission

SCHEDULE “B”



Ontario
Securities
Commission
3S8

Commission des
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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 LYNDZ PHARMACEUTICALS INC., JAMES MARKETING LTD., MICHAEL EATCH and RICKEY MCKENZIE

AGREED STATEMENT OF FACTS OF JAMES MARKETING LTD. and RICKEY MCKENZIE

1. For this proceeding, and any other regulatory proceeding commenced by a securities regulatory authority in Canada, the Respondent agrees with the facts as set out in this Agreed Statement of Facts.

A. Background

2. The Respondent, McKenzie, is a resident of Aurora, Ontario, and the sole director and shareholder of James Marketing.

3. McKenzie has never been registered with the Ontario Securities Commission (the “Commission”).

4. The Respondent, James Marketing Ltd. (“James Marketing”), is a corporation incorporated pursuant to the laws of the UK with its head office registered to an address in London, England.

5. James Marketing has never had any active business except what is described in this Agreed Statement of Facts.

6. James Marketing has never been registered with the Commission.

7. Lyndz Pharmaceuticals Inc. (“Lyndz”) is a company incorporated pursuant to the laws of Ontario.

8. Michael Eatch (“Eatch”) is a resident of Ontario. He is the president, secretary and sole director of Lyndz. During the relevant time, Lyndz’ registered business address was Eatch’s home.

9. Eatch has never been registered with the Commission.

10. In all documents and correspondence sent to Lyndz’ shareholders by Eatch, Lyndz, McKenzie and James Marketing, Lyndz is purported to be developing a business of manufacturing and distributing pharmaceuticals and bringing affordable pharmaceuticals to the third world as a “humanitarian project”.

11. McKenzie has never known Lyndz to have an active business.

12. Lyndz is not a reporting issuer in Ontario and has not filed a prospectus. Its common shares are not listed on any exchange.

13. Eatch is also the sole director and shareholder of Lyndz Pharma Ltd. (“Lyndz UK”), a company incorporated pursuant to the laws of the UK, operating out of the same address as James Marketing.

14. McKenzie has never known Lyndz UK to have an active business.

B. Roles Played by McKenzie and James Marketing in the Sale of Lyndz Securities

15. On over 150 occasions from 2005 through 2008, Eatch, McKenzie, James Marketing and Lyndz distributed Lyndz shares from Ontario to more than 70 residents of the UK.

16. McKenzie and James Marketing committed numerous acts in furtherance of these distributions of Lyndz’ securities. These acts included the following:

- a. McKenzie knowingly allowed Eatch to send correspondence to prospective investors on James Marketing letterhead soliciting them to invest in the shares of Lyndz;
- b. McKenzie gave Eatch access to James Marketing’s email account for the purpose of allowing Eatch to invoice Lyndz’ investors on the letterhead of James Marketing and instruct them to make payments to James Marketing;
- c. McKenzie personally sent share certificates to some Lyndz’ investors;
- d. McKenzie personally telephoned, met with and corresponded with investors in connection with their purchase of Lyndz securities;
- e. James Marketing received funds totalling approximately \$1,700,000

CDN¹ from the distribution of Lyndz' shares; and,

- f. McKenzie maintained bank accounts in the UK in the name of James Marketing for the purpose of receiving funds from Lyndz investors.

17. McKenzie and Eatch made an agreement to divide the funds McKenzie received in the accounts of James Marketing between themselves according to an agreement that Eatch confirmed in writing and sent to McKenzie (the “Agreement”).

18. Pursuant to the Agreement, McKenzie was to instruct his bank to transfer 30% of the investor funds to an account held by Eatch in the name of Lyndz UK and provide 60% of the funds to Eatch directly in cash. The Agreement also provided that for “facilitating” the redistribution of the funds paid by Lyndz’ investors as described above, McKenzie was entitled to retain 10% of the funds deposited into the accounts of James Marketing.

19. In fact, McKenzie transferred approximately \$380,000 CDN from the account of James Marketing to the account of Lyndz UK, and \$25,000 CDN to account of the spouse of Michael Eatch.

20. McKenzie withdrew approximately \$500,000 CDN in cash from the James Marketing account. There is no precise accounting of these funds, but at least 50% was transferred to Eatch.

21. McKenzie disposed of the remainder of the investor funds in the James Marketing account, which totalled approximately \$700,000 CDN, on matters unrelated to the business of Lyndz, including a gratuitous transfer of approximately \$75,000 CDN to his spouse.

22. Eatch spent approximately half of the funds he received from McKenzie on personal expenses unrelated to the business of Lyndz. The other 50% of those funds remains unaccounted for.

23. Eatch, McKenzie, Lyndz and James Marketing led investors to believe that the funds they exchanged for shares in Lyndz would be invested in the development of Lyndz’ proposed pharmaceutical business and humanitarian projects in impoverished nations.

24. A large majority of the share certificates and items of correspondence sent to Lyndz’ investors by McKenzie and Eatch were sent from Ontario.

25. A large majority of the instructions to financial institutions to transfer funds were issued from Ontario.

26. A large majority of the investor funds withdrawn in cash were withdrawn in

¹ All funds were originally received in British Pounds and have been converted on the basis of an average exchange rate during the relevant period.

Ontario.

27. McKenzie was aware that Eatch had also distributed Lyndz shares to Ontario residents but McKenzie did not receive investor funds arising from those distributions.

28. In December 2005, McKenzie purchased 500,000 shares in the name of James Marketing. McKenzie paid Eatch \$0.03 per share, for a total of \$15,000.

29. Lyndz UK investors paid between \$0.15 and \$0.33 per share.

30. As an officer, the sole director and the sole shareholder of James Marketing, McKenzie was at all times either directly responsible for the conduct of James Marketing or authorized, permitted or acquiesced in that conduct.

C. Prior Participation in Criminal Investment Fraud

31. In 2001, McKenzie was convicted of fraud over \$5000 and conspiracy to commit an indictable offence under the *Criminal Code*, and received a total sentence of two years less a day. The offences for which McKenzie was incarcerated concerned the telemarketing of a fraudulent gemstone investment from Ontario to Canadian investors, including Ontario residents.

Dated, the 19th day of May, 2010.

Rickey McKenzie

Rickey McKenzie on behalf of
James Marketing Ltd.

Staff of the
Ontario Securities
Commission