

SECURITIES AND EXCHANGE COMMISSION  
Washington D.C.

SECURITIES EXCHANGE ACT OF 1934  
Rel. No. 54991 / December 21, 2006

INVESTMENT ADVISERS ACT OF 1940  
Rel. No. 2574 / December 21, 2006

Admin. Proc. File No. 3-11972

In the Matter of

PHILIP A. LEHMAN  
c/o William B. Fecher, Esq.  
Statman, Harris, Siegel & Eyrich, LLC  
2900 Chemed Center  
255 East Fifth Street  
Cincinnati, OH 45202-2912

ORDER DENYING MOTION FOR RECONSIDERATION

I.

On October 27, 2006, we issued an opinion finding that Philip A. Lehman, former president and sole shareholder of a registered broker-dealer and investment adviser, violated the antifraud provisions of federal securities laws (the "October 27, 2006 Opinion"). 1/ Lehman now seeks reconsideration of the portion of the opinion that found that he had not demonstrated an inability to pay the \$55,000 penalty we imposed. As discussed below, Lehman's motion affords no basis for reconsideration of the October 27, 2006 Opinion.

II.

We review Lehman's motion to reconsider under Rule 470 of our Rules of Practice. 2/ Rule 470 permits us to reconsider our decisions in exceptional cases. 3/ This extraordinary

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1/ Philip A. Lehman, Securities Exchange Act Rel. No. 54660 (Oct. 27, 2006), \_\_ SEC Docket \_\_.

2/ 17 C.F.R. § 201.470.

3/ Reuben D. Peters, Order Denying Motion for Reconsideration, Exchange Act Rel. No. 51237 (Feb. 22, 2005), 84 SEC Docket 3497, 3498 (citing the comment to Rule 470).

remedy is intended to correct manifest errors of law or fact or to permit the presentation of new or newly-discovered evidence. <sup>4/</sup>

The October 27, 2006 Opinion found that Lehman engaged in a fraudulent scheme that purported to make high-yield, riskless-principal investments. The October 27, 2006 Opinion also found that it was in the public interest to bar Lehman from association with any broker, dealer, or investment adviser and to impose a \$55,000 civil money penalty. Lehman claimed an inability to pay the penalty. Based on the record evidence, however, our opinion concluded that Lehman had not demonstrated an inability to pay. Our opinion also held that even if Lehman had demonstrated an inability to pay, his recidivism and our view that his misconduct was egregious warranted no reduction or waiver of the penalty.

The October 27, 2006 Opinion found that Lehman is a member of Cundiff Investments LLC (“Cundiff”), a limited liability company that owns two properties on North Main Street in Dayton, Ohio (“Cundiff Properties”). The opinion also found that, although the record was unclear as to whether Lehman was the sole member of Cundiff during the period at issue, he did not indicate at any time during the proceeding that any of the values associated with Cundiff did not accurately reflect his ownership interest. In his request for reconsideration, Lehman claims that we erred in determining that the net value of the Cundiff Properties should be considered at \$170,400.25. Lehman also claims that the Commission improperly “used Respondent’s failure to list the Cundiff Properties in his Sworn Financial Statements as grounds to reject his testimony as to the value of certain other assets (the Lexington Properties and the Byers Note) as being un-credible.”

A. The October 27, 2006 Opinion found that the value of the Cundiff Properties should be considered at \$170,400.25 based on the figures set forth in evidence that the opinion determined to be adequate and credible. That evidence includes (1) an undated local county property summary that lists the combined tax-assessed value of the Cundiff Properties as an asset worth \$655,690 and (2) two promissory notes, each entered into by Cundiff on April 1, 2002, that are secured by mortgages granting the lender a security interest in the Cundiff Properties and whose original principal amounts equal a liability worth (\$485,289.75). Lehman challenges this finding, and, in support, seeks to adduce additional evidence in the form of a summons, dated August 24, 2006, accompanied by a foreclosure complaint, dated August 23, 2006, that names Cundiff as a defendant. This complaint seeks judgment against Cundiff in the sums of \$2,299,600.47 and \$1,007,082.89 in connection with Cundiff’s alleged default on the mortgage payments associated with each of the two promissory notes. Lehman argues that this evidence demonstrates that the Cundiff Properties “have negative equity in excess of \$3,000,000.00,” and that, “[t]herefore, there is no equity in the Cundiff Properties which could be used to satisfy the assessed civil penalty.”

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<sup>4/</sup> See *id.* (citing *KPMG Peat Marwick LLP*, Order Denying Motion for Reconsideration, 55 S.E.C. 1, 3 n.7 (2001)).

This is not new evidence that appropriately may be submitted as part of a motion for reconsideration. <sup>5/</sup> Rather, it is evidence that was available to Lehman before the October 27, 2006 Opinion issued, but that Lehman presented to us only after our opinion issued. We will not adduce, or incorporate into our opinion, this new evidence, which comes too late. There are fairness as well as efficiency concerns that would be implicated were we to accept the material at this point. <sup>6/</sup> For example, counsel for the Division of Enforcement has not had the opportunity to address the contents of the summons and foreclosure complaint.

Even if we did grant the motion to adduce, the evidence is inconsequential. The summons and foreclosure complaint provide no basis to conclude that the Cundiff Properties have negative equity. Lehman has not provided any indication as to whether any determination has been made with respect to the status of the complaint (e.g., whether Lehman is contesting the case or whether a judgment has been rendered). Nor is there any indication that the plaintiffs filing the complaint have the right to recover against Lehman personally in the event that a foreclosure sale of the Cundiff Properties does not satisfy the judgment amount. A lack of personal liability would reduce the impact of the Cundiff Properties on Lehman's net worth to zero, not a negative amount. The October 27, 2006 Opinion found that Lehman's net worth is at least \$274,007.25 based, in part, on the finding that the net value of the Cundiff Properties should be considered at \$170,400.25. Subtraction of the net value of the Cundiff Properties from Lehman's net worth would leave a net worth of \$103,607. This amount still substantially exceeds the amount of the penalty.

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<sup>5/</sup> See Feeley & Willcox Asset Mgmt. Corp., Order Denying Motion for Reconsideration, Securities Act Rel. No. 8303 (Oct. 9, 2003), 81 SEC Docket 919, 924-925 & n.18 (“On a motion for reconsideration, we accept, as do the federal courts, only that evidence the movant could not have known about or adduced before entry of the order subject to the motion for reconsideration. See, e.g., Caisse Nationale de Credit Agricole v. CBI Industries, Inc., 90 F.3d 1264, 1269 (7th Cir. 1996) (moving party must establish that evidence was not only newly discovered or unknown to it, but also that it could not have been reasonably discovered and produced during pendency of matter); see also 12 James Wm. Moore et al., Moore’s Federal Practice § 59.30[4] (3d ed. 2000), cited in Carroll v. Nakatani, 342 F.3d 934 (9th Cir. 2003) (specifying federal practice with respect to acceptance of newly discovered evidence on motion for reconsideration).”).

<sup>6/</sup> Id. at 925 & n.21 (citing Rule 470(b), which requires that no responses to a motion for reconsideration shall be filed unless requested by the Commission, and noting that had respondents submitted the material before the Commission concluded deliberations, Division counsel would have been afforded the opportunity to address the admissibility and significance of the proffered information).

In any event, the October 27, 2006 Opinion found that Lehman's recidivism and the egregiousness of his misconduct warranted no reduction in the amount of the penalty even if he had demonstrated an inability to pay. <sup>7/</sup> Thus, even if we accept Lehman's assertions about the negative value of Cundiff, such assertions provide no basis for reconsideration.

B. Lehman argues that his failure to list the Cundiff Properties in his 2005 sworn financial statement "should not have been used as a basis to reject Respondent's testimony" regarding the value of the Lexington Avenue Properties and the Byers Note. <sup>8/</sup> The October 27, 2006 Opinion makes no such attribution to Lehman's failure to include the Cundiff Properties in his 2005 sworn financial statement. The October 27, 2006 Opinion did consider and reject Lehman's argument that his testimony, standing alone, was sufficient to establish the value of the Lexington Avenue Properties and the Byers Note. Our opinion found that Lehman's testimony about the value of the Lexington Avenue Properties and the Byers Note was contradicted by adequate, credible evidence, some of which Lehman himself provided. To the extent that Lehman's argument could be construed as an attempt to re-argue the credibility of his testimony regarding the value of the Lexington Avenue Properties and the Byers Note, it is well established that a respondent may not use motions for reconsideration to reiterate arguments previously made. <sup>9/</sup>

Accordingly, IT IS ORDERED that the motion for reconsideration filed by Philip A. Lehman be, and it hereby is, DENIED.

By the Commission.

Nancy M. Morris  
Secretary

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<sup>7/</sup> Philip A. Lehman, \_\_ SEC Docket at \_\_.

<sup>8/</sup> The October 27, 2006 Opinion found that Lehman owns two buildings on Lexington Avenue in Dayton, Ohio (the "Lexington Avenue Properties") and that Lehman, doing business as Byers Acquisition Group, Inc. ("Byers"), is the creditor with respect to a promissory note ("Byers Note").

<sup>9/</sup> See The Rockies Fund, Inc., Order Denying Motion for Reconsideration, Exchange Act Rel. No. 49788 (June 1, 2004), 82 SEC Docket 3764, 3766 (citing Feeley & Willcox Asset Mngmt. Corp., 81 SEC Docket at 921 & n.8 (quoting KPMG, 55 S.E.C. at 3 n.7)).