UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Release No. 1644 / July 18, 1997

ADMINISTRATIVE PROCEEDING
File No. 3-9348

In the Matter of LBS CAPITAL MANAGEMENT, INC., Respondent.

ORDER INSTITUTING PUBLIC PROCEEDINGS PURSUANT TO SECTIONS 203(e) AND 203(k) OF THE INVESTMENT ADVISERS ACT OF 1940, MAKING FINDINGS AND IMPOSING REMEDIAL SANCTIONS AND CEASE-AND-DESIST ORDER

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative and cease-and-desist proceedings be instituted against LBS Capital Management, Inc. (the "Adviser") pursuant to Sections 203(e) and 203(k) of the Investment Advisers Act of 1940 (the "Advisers Act").

In anticipation of the institution of these proceedings, the Adviser has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission or to which the Commission is a party, and without admitting or denying any of the findings contained herein, except as to the jurisdiction of the Commission over it and over the subject matter of these proceedings, which is admitted, the Adviser consents to the entry of this Order Instituting Public Proceedings Pursuant to Sections 203(e) and 203(k) of the Investment Advisers Act of 1940, Making Findings and Imposing Remedial Sanctions and Cease-and-Desist Order (the "Order")by the Commission.

Accordingly, IT IS HEREBY ORDERED that proceedings pursuant to Sections 203(e) and 203(k) of the Advisers Act be, and hereby are, instituted.

II.

On the basis of this Order and the Adviser's Offer, the Commission finds that:

1. The Adviser is a Florida corporation with offices located in Clearwater, Florida. The Adviser has been registered with the Commission as an investment adviser since July 16, 1986. The Adviser is a quantitative money management firm that uses multiple investment management computer systems to select stocks and mutual funds and to generate trading signals. The Adviser has approximately 5,000 clients, two-thirds of whom are retail clients, and manages approximately $600 million in assets.

2. The Adviser advertises its services primarily through mailings to registered representatives and principals of broker-dealer firms. In addition, the Adviser publishes advertisements in trade journals and similar publications, and occasionally disseminates advertisements directly to prospective clients.

3. In 1994, the Adviser generated and developed MAXIMIZER," a mutual fund timing and selection service,/1 by using historical financial data from the period 1983 through 1986. The Adviser then tested the quantitative validity of MAXIMIZER by applying it retroactively to a different period of time, from 1987 through 1993, and thereby derived simulated

performance results for MAXIMIZER for those years./2 The Adviser offered MAXIMIZER only to its retail clients and prospective retail clients beginning in January 1994. The Adviser did not offer MAXIMIZER to any institutional clients or prospective institutional clients.

4. During May through September 1994, the Adviser distributed a printed advertisement to retail broker-dealers, existing retail clients, and to prospective retail clients who requested information about MAXIMIZER. The advertisement contained the "model" or simulated performance results for MAXIMIZER. The advertisement disclosed in a footnote that (a) the results were "pro-forma"; (b) "model" performance was "no guarantee of future results"; (c) MAXIMIZER "went live" in January 1994; and (d) "actual results" were "available upon request."/3

5. Under these particular facts and circumstances, the advertisement was materially misleading because it failed to disclose with sufficient prominence or detail that the advertised performance results of MAXIMIZER did not represent the results of actual trading using client assets but were achieved by means of the retroactive application of a model.

6. In concluding that the advertisement was materially misleading, the Commission also has considered the fact that the advertisement was distributed by the Adviser to retail clients and prospective retail clients without regard for their investment sophistication or acumen. As the Commission previously has stated: In appraising advertisements [by investment advisers] such as those now before us we do not look only to the effect that they might have had on careful and analytical persons. We also look to their possible impact on those unskilled and unsophisticated in investment matters.

   In the Matter of Spear & Staff, Inc., Investment Advisers Act Release No. 188 (March 25, 1965); see also SEC v. C.R. Richmond & Co., 565 F.2d 1101, 1104 (9th Cir. 1977) (an adviser's advertising "must be measured from the viewpoint of a person unskilled and unsophisticated in investment matters"). Thus, although the advertisement disclosed in a footnote that the advertised results were "pro-forma" and that "actual results" were available upon request, that disclosure, under the facts and circumstances of this case, was inadequate to (a) convey that the advertised performance results of MAXIMIZER were achieved by means of the retroactive application of a model, or (b) dispel the misleading suggestion of the advertisement that the advertised performance results represented the results of actual trading. Cf. In the Matter of Jesse Rosenblum, Investment Advisers Act Release No. 913 (May 17, 1984) (an investment adviser's advertisement that contained materially misleading statements was "not cured by the disclaimers buried in the [smaller print] text [of the advertisement]").

7. By reason of the foregoing, the Adviser willfully violated, committed, or caused the violation of Section 206(4) of the Advisers Act and Rule 206(4)-1(a)(5) thereunder, in that, by use of the mails or any means or instrumentality of interstate commerce, directly or indirectly, the Adviser engaged in acts, practices, or courses of business which were fraudulent, deceptive or manipulative by, directly or indirectly, publishing, circulating, or distributing an advertisement which was misleading.

III.

On the basis of the foregoing, the Commission deems it appropriate and in the public interest to impose the sanctions and cease and desist order specified in the Offer submitted by the Adviser, and to order the Adviser to comply with its undertakings contained in the Offer. In determining to accept the Adviser's Offer, the Commission considered remedial acts undertaken and to be undertaken by the Adviser and cooperation afforded the Commission staff.

ACCORDINGLY, IT IS HEREBY ORDERED THAT:

1. Pursuant to Section 203(k) of the Advisers Act, the Adviser shall cease and desist from committing or causing any violation or future violation of Section 206(4) of the Advisers Act and Rule 206(4)-1(a)(5) thereunder;

2. Pursuant to Section 203(i) of the Advisers Act, the Adviser shall, within fifteen (15) days from the entry of this Order, pay a civil money penalty in the amount of twenty-five thousand dollars ($25,000) to the United States Treasury. Such payment shall be: (a) made by United States postal money order, certified check, bank cashier's check, or bank money order; (b) made payable to the "Securities and Exchange Commission," (c) mailed to the Comptroller, Securities and Exchange Commission, Mail Stop 0-3, 450 Fifth Street, N.W., Washington, D.C. 20549; and (d) submitted under cover letter that specifies LBS Capital Management, Inc. as the Respondent in these proceedings, the file number of these proceedings, a copy of which cover letter and money order or check shall be sent to Russell C. Weigel III, Branch Chief, Securities and Exchange Commission, Southeast Regional Office, 1401 Brickell Avenue, Suite 200, Miami, Florida 33131;

3. The Adviser shall comply with its undertaking to retain an independent consultant or attorney familiar with the Advisers Act ("Consultant"), who is not unacceptable to the staff of the Commission, to review, for a period of two years following the entry of this Order, all of the Adviser's performance advertisements, prior to their publication, circulation or distribution, for compliance with the Advisers Act;

4. The Adviser shall comply with its undertaking to obtain from the Consultant, within 60 days from the date of this Order, such recommendations for the implementation, modification or retention of such practices and procedures as the Consultant shall deem appropriate to ensure future compliance with the provisions of Section 206(4) of the Advisers Act and Rule 206(4)-1(a)(5) thereunder; and

5. The Adviser shall comply with its undertaking to implement and maintain all such practices and procedures recommended by the Consultant, provided that if the Adviser thereafter determines to modify such practices and procedures, it may do so only if the Consultant first determines that such modifications are designed to ensure the Adviser's compliance with Section 206(4) of the Advisers Act and Rule 206(4)-1(a)(5) thereunder.

By the Commission.

Jonathan G. Katz
Secretary

ENDNOTES

1/ In MAXIMIZER, the Adviser invests its clients' monies in three of 17 unaffiliated, no-load equity mutual funds based on timing signals received from the Adviser's market timing model called "OMNI." Generally, when OMNI registers a "sell" signal, the fund shares are redeemed and the proceeds are reinvested into a money market fund; when OMNI registers a "buy" signal, client monies are reinvested equally in three equity mutual funds.

2/ This process is known as "out-of-sample" testing. In such a test, a quantitatively derived model is created using historical data from a sample period of time (also known as the "in-sample" period). The model is then applied retroactively to a subsequent period of time (the "out-of-sample" period) to determine the quantitative validity of the model and to derive simulated performance results.

3/ The advertisement stated that the performance results of MAXIMIZER were "calculated on a time-weighted basis with reinvestment of dividends and capital gains plus returns from cash."