IN THE MATTER OF

THE SECURITIES ACT
S.N.B. 2004, c. S-5.5

- and -

IN THE MATTER OF

TYCOON ENERGY INC., MATTHEW NERBONNE and DAVID HAVENOR
(RESPONDENTS)

REASONS FOR DECISION

Date of Hearing:	5 January 2011
Date of Orders:	22 December 2010 and 5 January 2011
Date of Reasons for Decision:	12 April 2011

Panel:

Denise A. LeBlanc, Q.C., Panel Chair

David G. Barry, Q.C., Panel Member

Céline Trifts, Panel Member

Counsel:

Jake van der Laan & Mark McElman	For Staff of the New Brunswick Securities Commission

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REASONS FOR DECISION

1. BACKGROUND

[1] On December 17, 2010, Staff of the Commission ("Staff") filed a Statement of Allegations and supporting Affidavit of Commission Senior Investigator Ed LeBlanc (Affidavit) seeking an *ex parte* cease trade order. Staff alleged that the Respondents, without being registered with the Commission, solicited at least one New Brunswick resident to trade in a security. Staff submitted that it was in the in the public interest for the Commission to issue a temporary order against the Respondents pursuant to section 84 of the *Securities Act*.

[2] 22 December 2010, the New Brunswick Securities Commission (Commission) issued a temporary *ex parte* cease trade order sought by Staff (Temporary Order) against the Respondents pursuant to section 184(5) of the *Securities Act*.

[3] The Temporary Order was issued based on evidence presented in the Affidavit regarding violations of the *Securities Act* by the Respondents. The Commission, upon reviewing this evidence, held that it was in the public interest to make the Temporary Order, and that the length of time required to hold a hearing could be prejudicial to the public interest. In accordance with subsection 184(5) of the *Securities Act*, the Temporary Order expired on 6 January 2011.

[4] Through the Temporary Order, a hearing in this matter was scheduled for 5 January 2011. Staff, in the Temporary Order and attached Statement of Allegations, indicated that they would be seeking a permanent order that the Respondents cease all trading in securities, and that any exemptions in New Brunswick securities law do not apply to the Respondents.

[5] On 4 January 2011, Staff filed an Affidavit of Service deposed by Jake van der Laan, Director of Enforcement for the Commission, detailing service upon the Respondents of the Temporary Order, Statement of Allegations, Affidavit and a pre-hearing submission of Staff of the Commission. These documents were properly served via email and facsimile on 22 December 2010, and via courier on 23 December 2011.

[6] Despite receiving notice, the Respondents did not appear at the 5 January 2011 hearing, and did not file a response. Counsel for the Respondents contacted Staff on 4 January 2011 and indicated that the Respondents would not be filing a response, and that the Respondents did not object to the requested order but would prefer to proceed by way of a consent order.

[7] During the course of the January 5, 2011 hearing, the evidence relied upon by Staff was the Affidavit and Affidavit of Service. The Respondents filed no evidence; however the Respondents' counsel, through Staff counsel Mr. McElman, presented a consent order – signed by the Parties – for the Commission's consideration.

2. FACTS

[8] The respondent Tycoon Energy Inc. (Tycoon) is a corporation incorporated in the state of Texas; the respondent Nerbonne is the founder, President and CEO of Tycoon, while the respondent Havenor is a Director of Tycoon.

[9] In the Affidavit, Commission Senior Investigator Ed LeBlanc (Investigator) states that on November 11, 2010 he was solicited by the respondent Havenor, representing Tycoon, to invest in Tycoon. The Investigator was advised by Havenor that he could easily get back returns equal to his initial investment within a year. The Investigator, in response to questions from Havenor, advised Havenor that he did not fit within the definition of an "accredited investor" as set out in National Instrument 45-106 *Prospectus and Registration Exemptions* (NI 45-106); however, Havenor continued his solicitation.

[10] The Investigator requested information in writing on the proposed investment. On 1 December, after repeated calls from Havenor inquiring as to whether or not he had received a package, the Investigator received a package of information from Tycoon. This package contained details on an investment opportunity in an interest in an oil lease or claim; more specifically it contained a Plains Ranch Well No. 1 Joint Venture Memorandum, Plains Ranch Confidential Private Placement Memorandum, and Plains Ranch Well No. 1 Joint Venture Subscription Documents (Joint Venture Documents). A business card in the package identified the respondent Havenor as a Director for Tycoon.

[11] The Plains Ranch Well No. 1 Joint Venture Memorandum identifies the offering by Tycoon as a security. The Plains Ranch Well No. 1 materials also touted returns between 111% and 447% per annum.

[12] On December 6, 2010, the Investigator had a further call from Havenor. The Investigator advised Havenor that he was going to record the call, which Havenor agreed to. During this call, Havenor highlighted the potential for a 447% return per

annum on the investment, and he told the Investigator that all Tycoon directors are paid a percentage, based on the amount of money they raise for the venture.

[13] The Investigator also reviewed the information contained on Tycoon's website, and noted that Tycoon listed eight directors. Among the Tycoon Directors was listed the respondent Matthew Nerbonne, who is also Tycoon's CEO. The Investigator researched Nerbonne's background, and found that on February 18, 2010, Nerbonne had been named in a Cease and Deisist Order issued by the Alabama Securities Commission; on November 12, 2006, Nerbonne was named in a Summary Order to Cease and Desist issued by the Pennsylvania Securities Commission and was subsequently barred from representing an issuer offering or selling securities in Pennsylvania for 10 years; on September 14, 2007, Nerbonne was named in a Desist and Refrain Order issued by the State of California, Business, Transportation and Housing Agency, Department of Corporations; and in 1982, Nerbonne was indicted by a federal grand jury on 23 counts of mail and wire fraud. None of the materials sent to the Investigator by Tycoon disclosed Nerbonne's history.

[14] None of the Respondents are or ever have been registered with the Commission to trade securities in the province, and no prospectus has been filed with respect to the investment.

3. ANALYSIS AND DECISION

a. Jurisdiction and mandate of the Commission

[15] It is the Commission's mandate to protect New Brunswick investors, to foster fair and efficient capital markets and to foster confidence in New Brunswick's capital markets.

[16] This Commission stated in ***First Alliance Management Inc. and Ted Freeman***[1] that in order to acquire jurisdiction over the Respondents the evidence must demonstrate that the product being promoted is indeed a "security" as defined in the *Act*. The Joint Venture Documents set out an investment opportunity in a "joint venture" or partnership

[1] 11 December 2008

in oil wells. The Plains Ranch Well No. 1 Joint Venture Memorandum identifies the offering by Tycoon as a security, and contains several statements to this effect. The investment was clearly promoted to the Investigator as a security.

[17] The definition of "security" in section 1(1) of the *Act* includes in subparagraph (*a*) a document, record, instrument or writing commonly known as a security. It is our view that an interest or units in a joint venture or partnership is commonly understood to be a security. If that is not sufficient, subparagraphs (*b*), (*e*), (*i*), (*j*), (*k*) or (*n*) of the definition may well apply. Based on the nature of the investment opportunity promoted along with the fact that the investment was clearly promoted as a security, the Commission finds that the investment described in the Joint Venture Documents falls within the definition of a security.

b. Order under section 184

[18] Staff are seeking an order pursuant to section 184 of the *Act* that the Respondents cease trading in all securities, and that any exemptions in New Brunswick securities law do not apply to the Respondents. The Commission may make an order under section 184 if the Commission finds that it in the public interest to do so.

[19] The Commission discussed its public interest jurisdiction in the ***Meisner Inc. et al.***[2] and ***First Alliance Management Inc. and Ted Freedman*** decisions:

> [22] The Commission's public interest jurisdiction under section 184 of the *Act* is animated by the purposes of the *Act*, namely to provide protection to investors from unfair, improper or fraudulent practices and to foster fair and efficient capital markets and confidence in capital markets.
>
> [23] As stated in *Re Mithras Management Ltd.* (1990), 13 O.S.C.B. 1600 (Ont. Securities Comm.), the Commission's public interest

[2] 22 October 2007

> jurisdiction is protective and preventative and is intended to be exercised to prevent likely future harm to capital markets.

[20] It is expected, as the Commission stated in the ***Intercontinental Trading Group S.A.* et al.**[3] decision, which also involved cold-calling, "that the Commission consider the treatment of investors as well as the effect of the impugned activities upon the capital markets and the public's confidence therein."

c. Grounds for acting in the public interest

[21] Staff submit that the Commission has several grounds upon which to grant the requested order in the public interest under section 184. Specifically, Staff submit that the Respondents did not comply with the registration and prospectus requirements of the *Act*, and that they made misrepresentations in violation of the *Act*.

[22] The requirements set out in section 45 of the *Act are*:

> 45 Except where exempted under the regulations, a person shall not
>
> (*a*) trade in a security or an exchange contract,
>
> (*b*) act as an adviser,
>
> (*c*) act as an investment fund manager, or
>
> (*d*) act as an underwriter,
>
> unless the person is registered, in accordance with the regulations, in the category that the regulations prescribe for the activity.

[23] The Respondents – none of whom are registered in New Brunswick – cold-called the Investigator, a New Brunswick resident, actively promoted the Tycoon investment opportunity and solicited the Investigator's investment in the opportunity. The definition of "trade" in the *Act* includes "an act, advertisement, solicitation, conduct or negotiation directly or indirectly in furtherance of" a trade. The Respondents' solicitation and promotion activities clearly fall within the definition of "trade".

[3] 23 December 2009

[24] Under paragraph 45(a) of the *Act*, the Respondents are not to trade in a security without being registered unless they are exempted under the regulations. Exemptions to the registration requirement are set out in National Instrument 31-103 *Registration Requirements and Exemptions*. NI 31-103 provides that, in New Brunswick, a person or company is exempt from the dealer registration requirement if the person or company (a) is not engaged in the business of trading in securities or exchange contracts as a principal or agent, and (b) does not hold himself, herself or itself out as engaging in the business of trading.

[24] The Commission finds that the evidence clearly establishes that the Respondents were in the business of trading. Havenor told the Investigator that the Directors of Tycoon were paid based on the amounts of new investments they solicited. Nerbonne – a current director, CEO and directing mind of Tycoon – has a lengthy history of being in the business of trading in securities. The Repondents – including Tycoon itself – were clearly engaged in promotional activities, including the creation of promotional materials and pursuing cold calls. They clearly intended to issue or sell (trade in) a security in New Brunswick.

[25] Issuers of securities in New Brunswick are subject to the prospectus requirement, set out in section 71 of the *Act*:

> 71(1) Unless exempted under this Act or the regulations, no person shall trade in a security on the person's own account or on behalf of any other person where the trade would be a distribution of the security unless
>
> (*a*) a preliminary prospectus and a prospectus that are in the form prescribed by regulation have been filed with the Executive Director in relation to the security, and
>
> (*b*) the Executive Director has issued receipts for the preliminary prospectus and prospectus.

[26] Despite providing documentation to the Investigator which indicates that their proposed issuance of a security constitutes a distribution under section 71, the

Respondents have not filed a prospectus with the Commission, With respect to exemptions from the section 71 prospectus requirement, these are set out in NI 45-106. One of these is the "accredited investor" exemption, which the Respondents – based on the promotional materials provided to the Investigator by the Respondents – appeared to rely on. However, despite being advised by the Investigator that he was not in fact an accredited investor, the respondent Havenor continued to solicit the Investigator's investment. Based on the evidence presented, the Commission finds that the respondent Tycoon acted in violation of section 71.

[27] The final ground put forth by Staff as grounds for the Commission issuing an order under section 184 is that the Respondents made representations in violation of several sections of the *Securities Act*, specifically representations relating to the future value or price of a security (contrary to subsection 58(2)), and misrepresentations by omission by failing to disclose the prior regulatory sanctions imposed on the respondent Nerbonne (contrary to subsection 58(4)). Based on the evidence presented by Staff, specifically the Plains Ranch Well No. 1 materials which touted returns between 111% and 447% per annum, and the Plains Ranch Confidential Private Placement Memorandum which did not fully disclose Nerbonne's prior regulatory sanctions, the Commission finds that the Respondents did make misrepresentations to the Investigator in violation of the *Act*.

d. Decision

[28] Based on the Respondents' actions and the above-noted violations, the Commission finds that there are ample grounds in this case to issue an order in the public interest under section 184 of the *Act.* A permanent order cease trading the Respondents and denying them exemptions is – based on the evidence – appropriate in the circumstances. The Respondents' activities pose a significant risk both to investors and investor confidence in New Brunswick.

[29] Though the Respondents, through counsel, presented a consent order for consideration, the Commission finds it appropriate to issue an order in the normal course based on the evidence submitted to the Commission. The Respondents chose

not to appear or respond to Staff's evidence. They clearly acted in violation of the *Act;* and the Commission is acting in the public interest by issuing the order.

[30] The above constitute the Commission's Reasons for their Decision and resulting Orders in this matter, issued on 22 December 2010 and 5 January 2011.

Dated this 12th day of April 2011.

"original signed by"

Denise A. LeBlanc, Q.C., Panel Chair

"original signed by"

David G. Barry, Q.C., Panel Member

"original signed by"

Céline Trifts, Panel Member

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