ALBERTA SECURITIES COMMISSION

DECISION

Citation: Sea Sun Capital Corporation, Re, 2009 ABASC 256 **Date: 20090528**

Sea Sun Capital Corporation, Rodney Koch and Graham Millington

Panel:	Stephen Murison Beverley Brennan, FCA Karl Ewoniak, CA
Appearing:	Liam Oddie For Commission Staff
Dates of Hearing:	27 and 28 April 2009
Date of Decision:	28 May 2009

I. INTRODUCTION

[1] Sea Sun Capital Corporation ("Sea Sun"), Rodney Koch ("Koch") and Graham Millington ("Millington") (together, the "Respondents") were alleged to have been involved in an illegal distribution of securities in Alberta, in conjunction with which misrepresentations and prohibited representations were made to investors. It was further alleged that all that conduct was contrary to the public interest. The allegations were set out in a 24 September 2008 notice of hearing issued by staff ("Staff") of the Alberta Securities Commission (the "Commission"). Staff withdrew two portions of the notice of hearing – sections 18.4.1 and 18.4.3, setting out particulars of two alleged misrepresentations or prohibited representations.

[2] A hearing into the merits of the remaining allegations was held in Edmonton on 27 and 28 April 2009. The hearing panel received documentary evidence and heard the testimony of a Staff investigator and three investor witnesses, as well as submissions from Staff counsel. Neither Sea Sun nor Koch was present or represented at the hearing but we were satisfied that Staff had given notification in accordance with a 24 October 2008 order for substitutional service. Although Millington was also not present or represented, he signed a Statement of Admissions and Joint Recommendation as to Sanction (the "Millington Statement") on 24 April 2009, which was entered into evidence at the hearing. His admissions were somewhat narrower than the allegations against him in the notice of hearing, but Staff did not dispute the admissions and did not press allegations beyond what Millington admitted.

[3] This decision sets out our conclusions, and reasons, concerning the merits of the allegations against the Respondents. Stated briefly, we find that Sea Sun and Koch contravened Alberta securities laws and acted contrary to the public interest by engaging in illegal trades and distributions of securities and by making prohibited representations and misleading or untrue statements. We also find – as Millington admitted in the Millington Statement – that Millington contravened Alberta securities laws by making prohibited representations and misleading or untrue statements in a 28 June 2004 information circular (the "Merger Circular"). This, together with his acknowledged failure to ensure proper oversight of Sea Sun's capital-raising activities, was also conduct contrary to the public interest. We made no findings against Millington beyond what he admitted and Staff accepted.

II. BACKGROUND

A. The Respondents

[4] Sea Sun is a corporation incorporated in 1997 in Delaware (and now listed as "void" in that state). According to a Sea Sun filing with the United States Securities and Exchange Commission (the "SEC"), in December 2004, through what was termed a "reverse merger", Sea Sun (previously called Alpha Holdings Inc. ("Alpha"), with Koch its signatory) acquired ownership of an Alberta company ("Sea Sun Alberta", incorporated in 2003 and struck from the corporate registry in 2005). Sea Sun maintained offices in British Columbia (Kelowna) and in Ontario.

[5] Koch was, at the times material to this proceeding, a resident of Alberta or British Columbia. He was the founder, a director and chairman of Sea Sun, and the sole director of Sea Sun Alberta. He was also sole shareholder and director of another Alberta company called Seahorse International Ventures Inc. ("Seahorse"), incorporated in 2000. In an investigative

interview with Staff (portions of the transcript of which were in evidence), Koch indicated that Seahorse began the business ultimately assumed by Sea Sun, and claimed that after 2003 he used Seahorse only for a miscellany of other, unrelated, small buying and selling activity.

[6] Millington, an Ontario resident, was held out as Sea Sun's president and chief executive officer, as well as a director. The evidence, however, persuades us that, in reality – notwithstanding formal titles – Koch, not Millington, acted as the company's senior executive.

[7] None of the Respondents was ever registered to trade under Alberta securities laws. Sea Sun never filed a prospectus or an offering memorandum in Alberta.

[8] The evidence was clear that Sea Sun shares were never, at any time material to the allegations, listed on any exchange or quoted on any quotation and trade reporting system.

B. Sea Sun's Business and Financing

1. The Business

[9] Sea Sun operated a marine tour service business in several countries. It managed a tour package operation in which tourists could book the use of a small watercraft and a guide for marine sightseeing at a particular location. Sea Sun developed the watercraft and had them assembled in Kelowna. Apparently at least one major cruise ship operator referred customers to Sea Sun.

2. Share Transactions

[10] Sea Sun (and before it, Sea Sun Alberta) sold shares to investors, including Alberta residents. It is unclear from the evidence when share sales began and ended, or how much money was raised in total. However – and despite witness testimony casting doubt on whether all investors received share certificates – the evidence as a whole is clear that Alberta investors bought, and were sold, shares in both companies. We summarize below the testimony of three witnesses concerning their investments (we identify them and their fellow investors by initials only, to preserve privacy).

[11] As mentioned, the two companies underwent the reverse merger, under which Sea Sun Alberta shares were exchanged for shares in Alpha, which then changed its name to become Sea Sun. As a result of this transaction the former Sea Sun Alberta shareholders became, collectively, the majority shareholders of Sea Sun. The transaction was structured as a share purchase pursuant to an offer by Alpha. The Alpha offer (which Koch signed) described Alpha as "a Reporting Issuer on the NASDAQ Bulletin Board" and as "a publicly listed shell company". A subsequent filing with the SEC included a list (the "Merger List") of 48 Sea Sun Alberta shareholders as at 29 July 2004, including Koch, Millington and 31 investors with Alberta addresses (among them, directly and indirectly, two of the investor witnesses). The Merger Circular issued to Sea Sun Alberta shareholders, certified as true by Koch and Millington, expressed "[full] support [for] the initiative of becoming, in the aggregate, the controlling shareholders of a U.S.-based public company".

[12] In evidence was a copy of a December 2004 Sea Sun "private placement memorandum" describing a share offering with a termination date of 31 January 2005 (a reference to 31

January 2004 is a clear typographical error). The document appears to contemplate sales only to categories of investors described in various US securities law exemptions. Whether or how it was used is unclear. As indicated, no Sea Sun prospectus or offering memorandum was ever filed in Alberta. Nor did Sea Sun ever file a report of exempt distribution identifying sales of shares made in reliance on prospectus and registration exemptions under Alberta securities laws.

3. "Location Packages"

[13] Sea Sun also sold to investors (including Alberta residents) what it called "Location Packages", described in a marketing brochure (the "Brochure", more than one version of which was in evidence) as "turnkey eco-tour operations". Sea Sun would operate the location on the investor's behalf, and both would share the revenue.

[14] Location Package pricing varied but, according to witness testimony and marketing materials in evidence, Sea Sun charged from US$120 000 to US$180 000 per location. 60% of the purchase price was payable at the outset, with the balance "financed" by Sea Sun, purportedly to be paid over time (a 24-month period was mentioned) from the investor's share of "net location revenues". Those net revenues – nothing in evidence disclosed exactly how they were to be computed and none of the investor witnesses ever received an accounting – were to be shared between Sea Sun and the Location Package investor in the respective proportions of 60:40 or 70:30 (the terms varied among different versions of the Brochure). These provisions were consistent with provisions of a form of Location Package investment agreement in evidence, although it seemed that not all investors were given such a document to sign. Even the signed copy in evidence appeared incomplete: although a schedule was to identify the location in which the buyer was investing, that was not done.

[15] Also in evidence was a copy of a November 2006 report on Form 45-106F1 signed by Millington and filed with the Commission (the "Location Package Exemption Report"), identifying eight sales of Location Packages to seven Alberta purchasers or groups of purchasers (two sales were attributed to the same purchasing group) from August 2005 to March 2006, and specifying a particular exemption under National Instrument 45-106 *Prospectus and Registration Exemptions* ("NI 45-106") for each sale. The report appeared long after the reported sales, and after Staff began questioning Sea Sun lawyers about the selling activity. Although this does not demonstrate wrongdoing (other than a tardy filing), it also does not assist the Respondents, as discussed below.

[16] At least some Location Package investors were eventually invited to exchange their Location Packages for Sea Sun shares. The terms were not entirely clear or consistent from the evidence: a March 2007 e-mail from Koch to investor BS referred to $1.50 worth of Sea Sun shares – how such value would be assessed was unexplained – being issued in return "for every US dollar paid in" for a Location Package; investor witness KS recalled a dollar-for-dollar exchange giving recognition also to revenues earned.

[17] While it appears from the evidence that Sea Sun did run watercraft tour operations in some locations around the world, there was no evidence of Location Package investors actually receiving money from the operations. There were references in the evidence to Koch informing

investors that they had earned revenue (in amounts specified or unspecified), but an accounting and calculations were not provided.

[18] It is also unclear precisely how much money Sea Sun raised from the sale of Location Packages. The Location Package Exemption Report identified a total of over $1.2 million (the Canadian-currency equivalent of the US-dollar-denominated contracts) from August 2005 to March 2006, but that list was clearly incomplete; two of the investor witnesses testified to purchases not reported on that form. A separate list for August 2005 to April 2006, also furnished to Staff by Sea Sun's lawyers in November 2006, reported sales of "investment contracts" totalling over US$2.6 million; this list is also incomplete – it omits some sales to the investor witnesses. A Sea Sun SEC filing reported over US$3.9 million in cash receipts from sales of Location Packages in 2005 alone, with further amounts due from those sales.

C. Investors

1. Sea Sun Communication with Investors – Generally

[19] The investor witnesses' testimony was consistent on many points. For example, in addition to some of the matters set out below, we note that, until they began asking questions and voicing suspicions, Koch was their contact at Sea Sun for all but purely administrative or clerical matters.

[20] Investor testimony uniformly portrayed Koch as an exceptionally persuasive communicator. The witnesses were convinced that he was supplying an entrée into a viable and profitable business offering quick and significant returns. He convinced each of them to make multiple investments, and to exchange Location Packages for shares. Even after investors began to express concern about their investments, he was able to convince them to stay with Sea Sun – on the basis of such things as rich buyout opportunities or dividends supposedly just around the corner, and the prospect that soon (in mere weeks or months) Sea Sun would go public and their shares would fetch prices far higher than they had paid.

[21] Sea Sun also communicated with prospective investors in writing. The Brochure portrayed an existing, successful business offering quick returns and profit through the purchase of Location Packages. Similar information appeared on the Sea Sun website.

[22] Notably absent was any evidence of typical investor communications in the form of financial statements. As noted, no accounting was provided to the investor witnesses; there were no indications that other investors received such information. Witnesses testified that, when they eventually asked for or demanded some financial statements, Koch deflected them.

[23] Among the enticements offered to existing and prospective Sea Sun shareholders were the prospects of owning shares in a "public company"; quotation or listing of those shares on a recognized marketplace (variously referred to as the "OTCBB", NASDAQ, the American Stock Exchange or AMX [sic], the TSE or TSX, a London exchange, or simply "a major exchange"); and explicit suggestions as to the price at which the shares would trade on listing. A quotation or listing was always supposedly imminent – within weeks or months – but seemed always to be postponed and never actually materialized. The expectation was nonetheless conveyed both orally (by Koch) and in writing. Such written communications included the following:

- the Brochures, and the "www.seasuncapital.com" website, included the following statements:

> Your financial interests will be backed by a publicly traded company . . . [In context, the topic was Location Packages, but the evidence was that the Brochures were also shown to prospective shareholders and the website was obviously available to them]
>
> . . .
>
> . . . Sea Sun is a publicly traded company [or, on the website, "a public company"] . . .

- the Merger Circular included the reference (already quoted) to Sea Sun Alberta shareholders "becoming . . . the controlling shareholders of a U.S.-based public company" and a discussion of the "NASDAQ Bulletin Board" or "OTC", which it described (incorrectly) as "a listed exchange". It was accompanied by a letter from Koch to Sea Sun Alberta shareholders, which included the following statements:

> Now the time has come for the company [at that time, Sea Sun Alberta] to move to public ownership.
>
> . . .
>
> As shareholders most of us assumed when founding Sea Sun [Alberta] that we would go public some day. Investor liquidity and additional capital were significant influencing factors. . . . All in all, going public now is the right decision.

- a business update from Koch to shareholders apparently (it was undated) issued in 2005 which stated:

> We are in the final stages of receiving our public trading status and have just received our trading symbol. We will be trading on the OTCBB under the symbol SSUN.

- e-mail correspondence with investors, including the following exchange between Koch and investor BS in March 2007:

> [BS:] Can you confirm trading dates& [sic] exchange?
>
> [Koch:] I cannot commit to a date until we conclude our valuations which will greatly increase as we close [a new business] deal, the exchange *will be* the London Stock Exchange AIM market. [emphasis added]

[24] These sorts of communications were, in many instances, made in the context of – and in advance of – decisions by investors to exchange their Sea Sun Alberta shares or Location Packages for Sea Sun shares or to purchase Sea Sun shares. In other instances, such communications (particularly oral ones by Koch) seem to have been intended to dissuade unhappy investors from pressing demands for the return of money.

[25] Although Sea Sun had officers (Millington, notably) and employees other than Koch, the evidence was that information essential to the investors was communicated by Koch. The centrality of Koch's role was clear from his oral discussions with investors, and implicit from the Millington Statement. It was also evident from communications from Sea Sun employees to investors. Even in matters as seemingly mundane as the status of their shareholdings or the whereabouts of their share certificates, the evidence shows Koch issuing and signing receipts, and answering questions about certificate delivery. Other individuals associated with Koch clearly deferred to him even on such seemingly mundane matters, as evident in the following excerpts from two e-mails to investors – the first from Alan Schuler ("Schuler"), the second from Scott Jeffrey ("Jeffrey"):

> . . . I am preparing this document [a summary of the particular investor's position and contact information] for Rod's review [in context, the reference was to Koch]. He obviously has this in his records.

> I do apologize for the delay on this [confirmation of the investor's holdings]. Rod is again on the road and he has all your conversion information. I did mention it to him, but he is one very busy individual. We will not forget about this, but I do have to wait until Rod gets back to get the details.

[26] In 2006, in connection with some of the Location Packages, investors were instructed to complete, sign and return to Sea Sun a form attesting to their status for purposes of NI 45-106 exemptions (an "Exemption Declaration"). These forms offered an array of possible investor characteristics (including specific relationships with various individuals associated with a securities issuer, and various financial attributes) that, if applicable, could bring an investor within a category for which an investment could be offered without registration or a prospectus. The evidence was unambiguous here that at least some investors were instructed specifically how to complete their Exemption Declarations, so as to indicate that they fell within an exempt category, without regard – indeed, in the face of indications to the contrary – to the truth.

2. Investor Testimony

[27] We summarize here key aspects of the testimony of the three Alberta-resident investor witnesses, all from central or north-central Alberta.

(a) Investor BS

[28] Investor BS, aged 31, operated her own business. She had some investment experience with registered retirement savings account investing, but did not specify the types of investments she had used. Late in 2005 or early in 2006 BS and her husband learned about Sea Sun and were given Koch’s number by a friend and Sea Sun investor, KA.

[29] BS first spoke with Koch in January 2006. Before investing, she received a Brochure and visited the Sea Sun website to which Koch directed her. In February 2006 BS, her husband and another couple together purchased a Location Package. The total purchase price was US$150 000, of which they paid 60% or US$90 000 immediately, divided evenly between the two couples. The remaining 40% was to be paid from the purchasers' 30% share of "net revenue" from their location. Although BS could not locate her copy of the contract she signed,

she identified it as similar to one in the evidence from another investor (one from whom we did not hear evidence).

[30] Koch told BS, in October 2006, that she and her co-investors had earned some revenue from their Location Package. Koch also discussed with BS the prospect of an exchange listing. According to BS, Koch told her about "troubles that he was having with the U.S. stock exchange, so he was looking at other avenues" to take Sea Sun public, and that it would trade at approximately $8 per share once listed. BS said that numerous requests to Koch for financial information regarding her Location Package and location revenues went unsatisfied; he told her that Sea Sun was reorganizing its accounting and changing accountants, so that it did not produce such financial statements.

[31] Their interchange included the March 2007 e-mail from Koch (already mentioned) in which Koch confirmed an offer to exchange one Sea Sun share for each US$1.50 of the US$90 000 they had paid for their Location Package (60 000 shares); confirmed the availability of another Location Package at a discounted price; specified (without explanation) that they had some $20 000 of "revenue sharing"; stated that a buying group was willing to pay an average of $6 for outstanding Sea Sun shares; stated that a dividend would be paid; and replied to BS's question about listing that "the exchange will be the London Stock Exchange AIM market". BS naturally understood from this that Sea Sun would be going public and that she would be able to sell her shares on that exchange and so get her money back. That, along with the information from Koch about forthcoming dividends, "kind of closed the deal to purchase more shares" and was part of her decision to sell the Location Package for shares. BS concluded that the supposed dividends would recoup the initial investment "and whatever else happened after that would be a bonus".

[32] On that basis, in or before April 2007 BS and her husband exchanged their Location Package for Sea Sun shares, and paid a further US$40 500 to buy additional Sea Sun shares. (Their co-investors also apparently made additional investments.) In total, it appears that BS and her husband paid, at minimum, US$85 500 (and applied additional sums ascribed to their share of location revenues) to end up, by April 2007, with 67 645 Sea Sun shares. Although they never received any share certificates, Koch confirmed their shareholding in a November 2007 letter.

[33] BS testified that, before she made the investments, she never received an offering memorandum or prospectus or, indeed, any documents apart from the Brochure. She stated that Koch never asked about her financial state (including income level or value of assets owned), or mentioned the "accredited investor" qualification. She did not meet the threshold levels for accredited investor status, nor did she personally know Millington (or another Sea Sun director, Wayne Izumi ("Izumi")). Before 2008 (by which time things had turned sour), and apart from evidence of a 2007 telephone call to Jeffrey to arrange for the confirmation of share ownership, BS's dealings concerning her Sea Sun investments were exclusively with Koch. However, she never met Koch in person (dealing with him only by telephone and e-mail), did not know him outside of this investment context and did not consider him a close personal friend. She had no relationship with Koch, Millington or Izumi (outside of the fact of the investments) and her company had no relationship with Sea Sun.

[34] BS received Exemption Declaration forms for herself and her husband in June 2006 (months after their initial investment, but shortly after Staff had begun expressing concern to Sea Sun about the selling of Location Packages). BS and her husband did not complete the declarations at that time, but did after receiving a call from Koch in October 2006. He told BS how to complete the forms (where to insert checkmarks) and "told us [the forms] were required by [the] Securities Commission in order to . . . take the company public, is my understanding". She and her husband each checked the box indicating that they were "a founder of [Sea Sun] or a spouse, parent, grandparent, brother, sister, child, close personal friend or close business associate of a founder of [Sea Sun]". Her testimony, however, made clear that she was no such thing. Nor did she or her husband fall within the category of "accredited investor".

(b) Investor KS

[35] Investor KS, aged 36, worked in the oil and gas industry. He had some investment experience in what seemed to be public companies and what he characterized as "private investments".

[36] KS learned of what was then Sea Sun Alberta and obtained Koch's contact information from a friend in about March 2003. Koch described the investment opportunity to KS and offered to sell him 80 000 shares for US$0.25 per share or US$20 000. Koch provided "some brochures, materials on the boat and potential revenue streams", but no other written material. Apparently during their initial conversation Koch told KS that the business would produce "a major revenue stream" and Koch described "plans to take the company public". KS recollected that this was "[o]riginally just probably taking on the NASDAQ. Start off on Over-the-Counter exchange and then on to NASDAQ from there".

[37] KS was impressed. He and three acquaintances formed a company, each put in US$5000 and they bought 80 000 shares. This predated the reverse merger, and those shares appear in the Merger List as shares in Sea Sun Alberta – to be exchanged for Sea Sun shares.

[38] KS also testified to their acquiring warrants or options for Sea Sun shares in 2005. Seemingly through the exercise of those warrants, they bought another 80 000 shares in the spring of 2005 through their company for some US$30 000. Copies of share certificates (bearing dates in 2005, although that tells us only that the underlying shares were bought on or before the certificate dates) evidence the two blocks of 80 000 in their company's name.

[39] KS and his three co-investors dissolved their company and divided up their Sea Sun shares; a copy of another Sea Sun share certificate in evidence shows KS's portion (40 000 shares) in the name of a different company. Through this company, KS made two more purchases in early 2005, of 20 000 shares each at US$0.80 per share (US$16 000 for each tranche).

[40] KS also testified that he became interested in a Location Package after listening to Koch and receiving a Brochure from him in the summer of 2005. After looking at some information on the internet and visiting Kelowna in July 2005 (where he and two friends met with Koch), he and a friend together (through yet another company) bought a US$120 000 Location Package in

September or October 2005, paying 60% up front (US$36 000 each). The remaining 40% of the price was to "come off the revenue stream until it was paid in full". Although he could not locate a copy, KS remembered signing a purchase contract and identified another purchase contract in evidence as similar to his.

[41] Although Koch told KS that his Location Package "was doing better than . . . everybody else's. It was doing very well", Koch (and Sea Sun) provided no specific financial or accounting information. KS asked to "see something on the books or know where we're at", but Koch "always had some excuse", such as communication problems or paperwork issues. According to KS, "you'd ask [Koch] about it, and he'd just go on to the next topic and just avoided it altogether".

[42] KS testified that Koch approached him in the spring of 2006, proposing "to give us shares in compensation for our [Location Package]". KS described his understanding of the buyback as follows: "for every dollar you put in [for a Location Package] you got a share in return [a different ratio than that offered to BS]; and any revenues that the business generated was – you'd receive over and above. Every dollar that your business made you, you would receive shares in kind". KS and his friend agreed to Koch's proposal, although they apparently never received a certificate for the Sea Sun shares they were due. In the context of these discussions, Koch told KS that "the company would go public. [Koch] said the potential for money would be greater having shares than it would be from the revenues coming from the locations, the future appreciation of the share price would be much better than anything [we] could make on the boats". According to KS, Koch also said that the shares would "probably trade on a major exchange, come on at $6 and probably be trading at $20 within, you know, a couple months". KS stated that there were "many occasions" when Koch made similar statements about Sea Sun being listed on an exchange: "[Koch] said we'd be trading on the [AMEX] at one point. He was very confident of that. Also indicated New York or the TSX, and at the tail end of everything, it was the London we'd be trading on". KS testified that the information about "going public" or being listed on an exchange was "100 percent of the reason I purchased shares".

[43] KS bought yet more Sea Sun shares, some at US$0.80 and others at US$1 per share, in January 2006 and March and April 2007. His cheques for the first two of those three purchases were made payable to Seahorse – KS stated that Koch directed him to do that, but KS could not remember Koch's explanation – the third cheque was payable to Sea Sun. Although he received no share certificates for any of these purchases, KS was clear that he was buying Sea Sun shares.

[44] In total, from 2003 to 2007, KS paid over US$120 000 for shares, plus US$36 000 for his share of a Location Package later exchanged for additional Sea Sun shares.

[45] KS testified that Koch – his exclusive contact at Sea Sun – had not given him any other documents apart from the Brochure (and a Location Package subscription agreement) and, certainly, no prospectus or offering memorandum. Nor did Koch ever ask KS about his financial state (including income level or value of assets owned) or mention the term "accredited investor". KS did not qualify as an accredited investor; nor was he related to Millington or Izumi, know them or have any business dealings with them. His contact with Koch was limited

to brief telephone conversations and encounters during Kelowna visits. Other than as investors, KS's companies had no relationship with Sea Sun.

(c) Investor BM

[46] Investor BM, aged 52, operated retail businesses and had some slight investment experience. He evidently thought that the profitable sale of a retail business in April 2003 would enable him both to make sizeable investments with Koch and build a new retail business of his own.

[47] BM heard about Sea Sun from an enthusiastic personal acquaintance. He watched a Sea Sun video (not in evidence). They together drove to Kamloops, British Columbia for a first meeting with Koch in the summer of 2003 (BM was initially unsure of the year but his later testimony and documentary evidence show it to have been 2003). Koch spoke persuasively of the Sea Sun business which, he told BM, was "just getting ready to go public" on NASDAQ, "within a month, maybe two months".

[48] Within days or weeks after the initial meeting, BM bought 200 000 shares at US$0.50 (US$100 000 in total). He did not recall having received or reviewed any written material on Sea Sun at that point. A few months later, at Koch's invitation, he bought another 225 000 shares at the same price, apparently shares owned by Koch's lawyer. After the reverse merger BM ended up with a total of 425 000 shares of Sea Sun, for which share certificates were in evidence.

[49] BM and Koch remained in frequent contact – they spoke up to several times per week. At some point, BM read a Brochure about Location Packages. Koch told him that locations were operating in Australia and the Caribbean and generating revenues far in excess even of what the Brochures suggested. BM got all his information from the Brochures and from Koch. During a trip to Kelowna, BM saw the facilities where Sea Sun boats were being built and fitted out; he recalled seeing a big operation with 200 boats. On another trip there he tried a boat out on a nearby lake (with Koch, Jeffrey and Schuler).

[50] Enthusiastic, BM considered that a Location Package investment "sells itself". He ended up buying three Location Packages in the period October 2005 to January 2006, and contemplated buying a fourth. He was offered a discount price – US$100 000 per package, for which he paid US$60 000 each with the balance "financed".

[51] Although BM was, at the time, building a new retail business that would require substantial cash infusions from time to time, he went ahead with the Location Package investments in the expectation of quick and certain returns: "he [Koch] was promising income in 30 days" and "he said the income was proven, so it wasn't like it was an 'if'". Moreover, Koch had assured him that he could get his money back any time he needed it:

> And when I bought my shares, the understanding was, is that he [Koch] told me that any time that I needed the money for my stores back or anything like that . . . he had all kinds of investors to purchase those shares back and/or he would purchase those shares back at any time.

> And that was also the same deal we made on the [Location] [P]ackages He assured me -- because the [Location P]ackages I wasn't going to get into. The timing wasn't good because I was building . . . my fourth store, and I needed that money in that store.

[52] BM funded at least some of his 2005 and 2006 Location Package investments using the proceeds of a loan from a financial institution that were intended to pay for inventory for his retail business. Koch, he said, "was pushing me", asking whether BM really needed that inventory financing right away. Koch "talked me into buying these [Location P]ackages and said that his cash flow would replenish that in time to pay for the inventory I needed".

[53] BM invested over US$390 000 in Sea Sun – US$212 500 for shares plus US$180 000 for three Location Packages.

[54] Koch told BM to direct payment for at least some of his investments (Location Packages and perhaps also his earlier share purchases) to Seahorse. BM did not recall what reason Koch gave.

[55] At some point, Koch had BM provide information for Koch to open an offshore bank account for BM, supposedly in connection with all the income that his investments would generate. BM never saw anything indicating that there was such an account.

[56] BM was in the process of buying a fourth Location Package in April 2006, but did not complete it. Instead, he pressed Koch to return some of the money BM had already invested to provide desperately needed cash for BM's business and appease his financial institution, but despite repeated assurances from Koch no money was forthcoming. BM's financial institution foreclosed in June 2006 and he lost his stores.

[57] BM continued to press Koch – who by then was apparently reluctant to receive or return BM's calls. However, BM confronted Koch in September 2006 and again demanded his money. Koch wrote him a cheque for US$120 000 – purportedly from the mystery offshore account. Koch did not explain why the money had not been forthcoming earlier, in time to avert the loss of BM's business. This payment did not save BM from filing for bankruptcy in November 2006.

[58] BM recalled Koch telling him about new business ideas and plans; buyers lined up to buy their shares (at $3 per share, then at $6 per share); imminent dividends ($2 per share in May 2007, to be followed by a further $6 per share in June 2007); and "[m]any times" about an exchange listing which, toward the end, was to be on the TSE and the London Stock Exchange, with a "strike date" for the London listing of 24 October (presumably 2006, consistent with what BS had been told). BM also recalled Koch telling him that Sea Sun shares had a value, or potential future value, of $160 to $300 per share, based on information from a well-known accounting firm, and that they would open on the London exchange at $15 (far above the US$0.50 at which BM had bought).

[59] None of these post-investment promises was documented. BM (and other shareholders, he said) pressed for financial statements, but Koch said he would not spend shareholders' money for that.

[60] The prospect of a listing, or "going public", was key to BM. He testified:

> . . . if we weren't going public with this thing, I would never even have looked at it. I would have had no interest in it whatsoever. It was definitely the going public that got me involved. I would never have made the trip down to meet him if it wasn't about going public. You know, I'm not -- it's just not, to me to go in and finance somebody's private little deal . . .

[61] BM therefore had "huge concerns" when he heard, from another investor who had inquired about the delayed-but-supposedly-still-imminent London listing, that Jeffrey had told that investor – at a time when Koch was still talking up a listing – "that they had no intention on [sic] going public and that they were not going on any exchange because they had no intention, and hadn't for quite a while, of going public at all".

[62] BM was clear that he dealt, throughout, exclusively with Koch. BM never met Millington or Izumi. BM said he was never asked to sign anything. There was, he said, no discussion of qualification requirements for investment, or BM's qualifications in particular – although BM's testimony did suggest that Koch would have gleaned quite early in their talks some impression of BM's financial circumstances.

(d) Common Features of Investor Testimony

[63] We found each of the investor witnesses credible, and we believed and accepted their testimony.

[64] Each of the witnesses, alone or with family or friends, made multiple investments in Sea Sun (buying both shares and Location Packages), expending considerable sums in the process.

[65] Although they all first heard of Sea Sun from personal acquaintances, all soon came into direct contact (in person or by telephone and e-mail) with Koch. None of them knew Millington or Izumi. Apart from the odd e-mailed communication concerning matters of an administrative nature, Koch was their exclusive contact at Sea Sun (before things went sour). Their information about the Sea Sun business, plans and prospects – and about Sea Sun shares and Location Packages – came entirely from Koch, from Brochures, or from corporate communications signed or sent by Koch. (There was mention also of a video; it was not in evidence and there was, in any event, no indication that a video itself prompted any investment decision.)

[66] These investors (and others) invested their money and added to their investments. None of those who testified ever saw any return (apart from the one payment that BM eventually managed to extract from Koch). Despite disappointing investors' expectations, it seems that Koch managed to allay concerns (or, at least, defer some demands for repayment) with repeated promises until, eventually, he became increasingly unavailable.

[67] Long after investments were made, some investors (BS and her husband among them) were asked to complete and return a form declaring them to be close friends of or otherwise connected to individuals themselves close to Sea Sun (thus supposedly demonstrating the availability of a prospectus or registration exemption). There was no evidence of prospective investors being told about, or screened for, prospectus and registration exemptions before they

bought. We consider below the investor testimony and other evidence relevant to such exemptions.

[68] The investor witnesses appear to have lost all (or, in BM's case, most) of the money they invested with Sea Sun. The financial losses were sizeable, totalling tens or hundreds of thousands of dollars each. They proved ruinous in one case, and for each of them a source of personal distress.

III. ANALYSIS

A. Investors Were Offered Securities

[69] We begin our analysis by considering the nature of what was being offered and sold to investors.

[70] A share is unquestionably a "security". It is explicitly included in the definition in section 1(ggg)(v) of the *Securities Act*, R.S.A. 2000, c. S-4 (the "Act").

[71] As to the Location Packages, Staff contended that they were "investment contracts", another category of "security" under section 1(ggg)(xiv) of the Act. Sea Sun acknowledged as much when it filed the Location Package Exemption Report, identifying them as "securities" and specifically as investment contracts.

[72] Although the Act does not define "investment contract", the term has been the subject of extensive jurisprudence – originally from the US but now including a considerable body of case law in Canada and in Alberta. The leading Canadian case is *Pacific Coast Coin Exchange of Canada Ltd. v. Ontario (Securities Commission)*, [1978] 2 S.C.R. 112; affirming (1975), 8 O.R. (2d) 257 (C.A.); affirming (1975), 7 O.R. (2d) 395 (H.C.). The majority of the court in *Pacific Coast* emphasized that substance, not form, was critical and referred to two US decisions, each of which set out a test for determining whether a particular instrument is an investment contract (*SEC v. W.J. Howey Co.*, 328 U.S. 293 (1946); and *State of Hawaii v. Hawaii Market Center, Inc.*, 485 P.2d 105 (1971)). This Commission followed *Pacific Coast* and referred to and applied (with refinements) both US-sourced tests in *Re Land Development Company Inc.*, 2002 LNABASC 208.

[73] In what began as the "*Howey* test", the decision-maker examines the circumstances to determine whether there has been an investment of money (i) in a common enterprise; and (ii) so that "the efforts made by those other than the investors are the undeniably significant ones" from which the expected profits would be earned (*Pacific Coast* at 129). (Although several decisions treat "investment of money" as a third, independent branch of the *Howey* test, we think that unnecessary. In any event, there was no question in the present case that the investors were invited to, and did, make "investments of money" when they bought Location Packages.)

[74] As to the first branch of the test, it is clear in Canadian jurisprudence that the "common enterprise" requirement is met by "vertical commonality" (a relationship between the particular investor and the promoter); "horizontal commonality" (a relationship among investors, such as a pooling of revenues) is not required (*Pacific Coast* at 129-30; US jurisprudence was historically more reluctant to embrace both forms of commonality). Here, the evidence clearly demonstrates

vertical commonality: investors did not buy a collection of watercraft as much as a managed stream of income to be derived from rentals of those watercraft through Sea Sun and its guiding mind, Koch. There was some suggestion from one investor witness of a pooling of revenues among locations, which would suggest horizontal commonality, but we need not decide that point.

[75] Turning to the second branch of the test, Location Package investors clearly were not involved in the management or operation of the Location Packages. This was an important selling point, according to the Brochures. It was not even clear that investors paid much attention to the selection of locations. We are in no doubt that the "efforts" of Sea Sun were the "undeniably significant" efforts from which the Location Package investors hoped to see a profit on their investments. We do not find it necessary here to explore either what Staff termed the *Williamson* test (from *Williamson v. Tucker*, 645 F.2d 404 (5th Cir. 1981)) – because that test relates (as this Commission set out in *Land Development*) to a joint venture or general partnership – nor what has been termed the *Hawaii* test, to which Staff counsel briefly alluded.

[76] As both branches of the *Howey* test are met, we find that the Location Packages were investment contracts and, therefore, also "securities" under the Act.

B. "Trades" and "Distributions"

[77] The Act defines "trade" (section 1(jjj)) broadly to include:

> (i) any sale or disposition of a security for valuable consideration . . . ;
> . . .
> (vi) any act, advertisement, solicitation, conduct or negotiation made directly or indirectly in furtherance [thereof] . . . ;

[78] Certain trades also constitute a "distribution" (section 1(p)); these include "a trade in securities of an issuer that have not been previously issued".

[79] The evidence is clear, and we find, that investments were solicited from Albertans in both Sea Sun shares and Location Packages that had not been previously issued. Some investors so solicited bought such securities. Those solicitations and sales of Sea Sun shares constituted trades and distributions within the meaning of the quoted definitions.

[80] Sea Sun also solicited the exchange of Sea Sun Alberta shares for shares in Sea Sun, as part of the reverse merger, and at least some buyers of Location Packages exchanged those for Sea Sun shares. In both cases, the investors were at the time presumably under the impression that what they were surrendering to Sea Sun had value, and it constituted consideration for the Sea Sun shares. These transactions, too, involved trades and distributions.

[81] Accordingly, we find the activity on which the allegations are based involved both trades and distributions in securities.

C. Distribution and Prospectus Requirements

1. General Requirements

[82] Section 75 of the Act prohibits trading in securities without registration for that purpose or an available registration exemption. Section 110 of the Act prohibits a distribution of securities without either the filing and receipting of a prospectus or an available prospectus exemption.

[83] As noted, none of the Respondents was registered under Alberta securities laws and Sea Sun filed no prospectus in Alberta.

2. Availability of Exemptions

[84] The legality of the trading and distribution thus depends on the availability of exemptions. The onus of demonstrating the availability of an exemption rests on the person or company who purports to rely on the exemption (for example, see *Re Bartel*, 2008 ABASC 141 at para. 109). It does not suffice to demonstrate that a portion of a purportedly exempt trade or distribution complied with an available exemption, if another portion did not. For example, if a purported exempt distribution involves sales to five buyers but one of the sales does not qualify for an exemption, the Act may still be contravened.

[85] The only evidence of registration and prospectus exemptions having been relied upon in connection with trades and distributions of Sea Sun securities lies in the "Location Package Exemption Report" filed by Sea Sun in November 2006. As mentioned, this identifies seven Alberta purchasers or purchaser groups who bought "Eco-Tour Location Agreements" – clearly, Location Packages – in the period August 2005 to March 2006. The August 2005 sale of a Location Package to KS (and his friend, through their joint company) appears on the list; none of the Location Package purchases by BS or BM appears. Nor do any share sales, to anyone.

[86] The Location Package Exemption Report specifies a particular exemption under NI 45-106 as having been relied upon for each of the eight disclosed sales: in five cases, section 2.3 of NI 45-106 – an exemption for sales to an "accredited investor"; in one case, section 2.5(d) – an exemption for a sale to "a close personal friend of a" specified person (a "director, executive officer or control person of the issuer, or of an affiliate of the issuer"); and, in two cases (including the sale to KS), section 2.5(h) – an exemption for a sale, in essence, to an entity controlled by persons who themselves fall within the "close personal friend" category, who are near relatives of a specified person of the issuer or an affiliate, or who themselves are a specified person of the issuer or an affiliate (or who fit within certain other close family, friendship or business relationships).

[87] KS's testimony – which we accepted – demonstrated that the exemption under section 2.5(1)(h) of NI 45-106 was unavailable for the sale to him. No other purported exemption was put forward. This alone suffices to prove an illegal trade and distribution.

[88] The evidence, however, warrants further analysis. We referred above to the October 2006 Exemption Declarations signed by BS and her husband, on Koch's instructions. BS was told by Koch not only to complete and return the forms but also how they were to be completed – so as to indicate that BS and her husband fit within the close relatives, "close personal friend"

or "close business associate" categories, even though (as BS testified) that was inaccurate. Her testimony, which we accept, was that there was no serious discussion into which, if any, of the various possible exempt categories she or her husband might fit, merely a bald instruction to report themselves as noted. (Since Koch himself gave the instructions, this was not merely a case of his omitting factual inquiry – he knew the truth.) The fact that she and her husband signed the untrue declarations is regrettable but it does nothing to convert an illegal trade into a legal one. Nor, in the circumstances, could Koch or Sea Sun be said to have been duped into relying on an inaccuracy, given that it originated with Koch, the guiding mind of Sea Sun. The timing suggests that the whole after-the-fact exercise might have been prompted by Staff's expressions of concern about Sea Sun's selling of Location Packages or securities generally. Be that as it may, because of the manner in which Sea Sun procured Exemption Declarations from BS and her husband, we conclude that their declarations do not assist the Respondents.

[89] We note another entry in the Location Package Exemption Report, naming co-investors MJ and CJ and claiming the NI 45-106 section 2.5(d) "close personal friend" exemption for the sale of a Location Package to them. Also in evidence was a copy of an Exemption Declaration signed by CJ. CJ did not testify and we do not know her circumstances. The evidence available does, however, warrant some analysis of the sale to her and MJ, and casts doubt on the reliability of her Exemption Declaration.

[90] Specifically, an e-mail in evidence shows Schuler explicitly instructing MJ and her husband to fill out Exemption Declarations to state that they were each a "close personal friend" of Schuler. We do not know whether CJ really was (or was not) a close friend of Schuler, and hence we cannot determine whether her declaration reflected her belief or was merely a dutiful response to an instruction. However, the very fact of that explicit instruction is reminiscent of what BS received from Koch – which, we know, produced an inaccurate declaration. Beyond that, there was evidence that Schuler himself was not a director, executive officer or control person of Sea Sun. This lack of proper qualification would have been known to anyone conversant with the identity of Sea Sun's directors, executive officers and control persons. Thus, even if the friendship part of CJ's declaration happened to be true, that did not necessarily bring the sale to her within the exemption claimed; the evidence suggests that it could not do so.

[91] In short, in the case of one of seven of the purchasing groups (KS's) named in the Location Package Exemption Report the specified exemption was clearly unavailable, and it was probably unavailable for a second group (CJ's). Sea Sun and Koch were not present at the hearing, so put forward no alternative exemptions as having been available for those sales of Location Packages; nor did Millington, in the Millington Statement. Nobody asserted to us that exemptions were available for any of the Location Package sales not mentioned on the Location Package Exemption Report (including the unreported sale to BS; or for any sales of Sea Sun shares. Given the onus borne by those purporting to trade and distribute in reliance on an exemption, we might at this point conclude that Staff's allegations of illegal distribution are proved.

[92] That said, we are mindful of our responsibility to act in the public interest. We consider it appropriate here to examine the evidence carefully and completely, despite the lack of assertions favourable to the Respondents.

[93] Having done so, we conclude that there is evidence that some, but not all, of the distributions discussed may have qualified for prospectus and registration exemptions.

[94] First, the exchange of Sea Sun Alberta shares for Sea Sun shares – cast, as it was, as a written offer to all Sea Sun Alberta shareholders – might have qualified for an exemption available for qualifying take-over bids made to all securityholders of a target company. This cannot be said of the exchanges of Location Packages for Sea Sun shares, in the absence of clear evidence that they were a response to an offer made by Sea Sun, at the same time and on identical terms, to all of the affected investors.

[95] Nothing indicates to us that any of the sales of Sea Sun shares to KS (and his co-investors) or to BS (and her co-investors) qualified for an exemption. Apart from the "close friends" and "accredited investor" exemptions (neither applicable, according to their testimony), we also considered the "minimum purchase" exemption under sections 86(1)(e) and 131(1)(d) of the Act as they read before 16 June 2003, under sections 66.2 and 122.2 of the *Alberta Securities Commission Rules (General)* as they read from that date to 14 September 2005; and under section 2.10 of NI 45-106 after 14 September 2005. All of the sales to BS and KS fell below the applicable threshold (it rose from C$97 000 to C$150 000 on 14 September 2005, and deferred or "financed" instalments did not qualify).

[96] Finally, we considered BM. He testified that he came to have frequent and continuing contact with Koch. We think it plausible that at some point he could be said to have become a "close personal friend" or "close business associate" of Koch, within the meaning of NI 45-106. As such, and with Koch being the founder and a director of Sea Sun, the corresponding prospectus and registration exemption might have been available for BM's second purchase of shares and his purchases of Location Packages.

[97] However, the same exemption could not have been available for BM's initial US$100 000 purchase of shares, because it happened soon after BM and Koch first met in Kamloops in the summer of 2003. We note, though, that the purchase exceeded in value the C$97 000 threshold for the "minimum purchase" exemption in effect before 14 September 2005, and we therefore considered the possible availability of that exemption. The exemption was subject to an important condition: it required delivery of an offering memorandum (the "OM Requirement") if, for a distribution begun before 16 June 2003, there were an advertisement for the securities in print or broadcast media or, for a distribution begun after that date, the issuer gave the purchaser a document (other than certain publicly-filed disclosure not applicable here) "purporting to describe the business and affairs of the issuer and prepared for review by prospective purchasers to assist in making an investment decision" (a "Business Description"). Determining whether either trigger applied (and hence whether an offering memorandum had to be provided) turns, first, on what information was disseminated and, second, on when the distribution to BM occurred.

[98] Although BM received a Brochure and saw a video, neither would seem to have been the sort of advertisement that would have triggered the OM Requirement. However, even though the Brochures seemed primarily directed at touting the investment merits of Location Packages, we

think that they contained enough description of the touted business (operated by Sea Sun Alberta, then by Sea Sun) to constitute a Business Description, which would have triggered the OM Requirement for a distribution begun after 16 June 2003.

[99] We know that the first distribution to BM was completed in the "summer" of 2003, a season that begins after 16 June. While that opens the possibility that the OM Requirement had been triggered but not complied with – rendering the $97 000 exemption unavailable – the evidence does not suffice for a conclusive determination. Such a determination depends on when Koch began that distribution – when he started soliciting BM's initial investment. We cannot be certain whether that happened before or after the 16 June 2003 transition date.

[100] In the result, assessing (rather generously) all the evidence, one might plausibly conclude that there were exemptions available for the sales to BM – albeit, none put forward by any of the Respondents. Even the possibility that some sales were made legally does not salvage those – such as to BS and KS – for which we find no exemption available.

3. Conclusion on Illegal Trades and Distributions

[101] The Respondents have not discharged the burden of demonstrating that there was an available exemption for the distributions of Sea Sun shares and Location Packages. There was no evidence that they made any effort to assess the availability of exemptions before those securities were sold. Moreover, even the most charitable interpretation of the evidence – supporting the possibility that some of the trades and distributions might have been exempt – still leads us to conclude that others were made without an available prospectus and registration exemption. We therefore conclude that Sea Sun shares and Location Packages were traded and distributed illegally.

[102] Given that conclusion, we must determine whether the Respondents bore responsibility for the illegal distributions. Sea Sun received at least some of the proceeds. Koch was at the centre of all the activity. Indeed, as noted, the evidence persuades us that throughout the relevant period Koch acted in fact as Sea Sun's senior executive. He was certainly very active in furthering and effecting the sales of Sea Sun securities. The responsibility of Sea Sun and Koch for the trades and distributions – and, therefore, for ensuring that they were conducted legally – is clear.

[103] Despite our conclusion that Koch was, de facto, Sea Sun's senior executive, it was Millington who held the chief executive officer title. With it came serious responsibilities, including responsibility for ensuring that Sea Sun's capital-raising was conducted legally. In this (as he admitted) he clearly failed.

[104] We find that Sea Sun and Koch both breached the registration and prospectus requirements. They each engaged in illegal trades and distributions. Those allegations by Staff are proved. We further find that, as he admitted in the Millington Statement, Millington "failed to take appropriate steps to ensure that . . . the securities were being sold in compliance with the Act".

D. Alleged Prohibited Representations and Misrepresentations

1. Statutory Provisions

[105] The Act prohibits the making of certain representations concerning the listing or quotation of securities. The prohibition itself has undergone modification over the years, but its substance and purpose is unchanged: traders must not lure investors into an investment decision by dangling the prospect of the liquidity seemingly implicit in the listing or quotation of a security on a marketplace – in simple terms, the ability to "cash out" of the investment by selling into a ready market. In part, the prohibition recognizes that a listing is seldom assured – as has been seen, Sea Sun never obtained a listing or quotation for its shares – and a security without a marketplace can be very difficult to sell. All three investor witnesses attested to the importance they ascribed to a future listing or quotation before investing in Sea Sun shares.

2. Prohibited Representations

[106] There was abundant evidence of Sea Sun investors being invited and encouraged to believe that Sea Sun shares would be quoted on a quotation and trade reporting system – NASDAQ, or the "over-the-counter" (OTC) bulletin board – or listed on a well-known exchange (such as the TSE or London Stock Exchange, or the latter's "AIM" affiliate). The recollections of the investor witnesses as to oral statements to that effect were too clear and too consistent to be doubted – particularly given the corroborative documentary evidence. While reference was often made to the broader notion of Sea Sun "going public", in context, that could only have meant a quotation or listing on a marketplace such as those mentioned. Even where written statements on this topic were accompanied by cautionary words – describing plans or expectations, or commenting to the effect that no date could be guaranteed – the reasonable reader would not have doubted that the plan was to list (or quote), and on a particular marketplace (although its identity kept changing).

[107] We conclude that investors, including the witnesses, believed Koch – enough to buy Sea Sun shares or to exchange other securities for Sea Sun shares (even when expected returns had not materialized).

[108] We find that representations of the nature prohibited by the Act were made to Sea Sun investors by Sea Sun, by Koch and by Millington (as he admitted in the Millington Statement, referring specifically to the Merger Circular). We further find that the prohibited representations were made, in part, with the intention of effecting a trade – persuading investors to buy, or exchange other securities for, Sea Sun shares.

[109] This allegation is proved.

3. Misleading or Untrue Statements

[110] Staff alleged that the Respondents made misleading or untrue statements. Staff cited section 92(4.1) of the Act, which currently bars persons and companies from making such a statement if they know or ought reasonably to know that it is "misleading or untrue" or omits a fact "necessary to make the statement not misleading", and that it "would reasonably be expected to have a significant effect on the . . . value of a security" (essentially, paraphrasing the definition of "misrepresentation" in section 1(ii) of the Act). After the withdrawal of certain particulars in the notice of hearing, the specific examples put forward all involved statements related in some

way to the idea that Sea Sun was or would soon be a public company and obtain a quotation or listing.

[111] As discussed, many such statements were made. Since Koch and Millington were both speaking for Sea Sun, and Koch was the guiding mind of the company, all three Respondents bear responsibility for these communications.

[112] The communications were demonstrably inaccurate. In addition, Koch's and Sea Sun's repeated statements about going public were (apart from being prohibited under the Act, as we have found) too optimistic and promotional. They lacked balance, failing to inform those on the receiving end about the relevant risks and contingencies, and ignoring the repeated failures. On this topic of going public – obviously important to a reasonable investor's decision to acquire, dispose of or retain a security – the Respondents clearly gave investors a false and misleading impression of the facts.

[113] However, section 92(4.1) of the Act was breached only if those false and misleading impressions amounted to misrepresentations, in the sense of being reasonably expected to affect significantly the value of the Sea Sun securities.

[114] It is obvious that the difference between a security that one can resell in a marketplace (an investment offering liquidity) and one for which there is no market (illiquid) will often be a factor in the value a prospective investor or a current owner places on it. Liquidity itself is, typically, an attraction that can be expected to fetch value in the capital market. In this case, we know for a fact that Sea Sun investors ascribed considerable value to the prospect of liquidity for Sea Sun shares. The "going public" buzz made the difference, for at least some investors, between investing and not investing. At least some would not have bought at all without the false expectation. In that sense, expectations about going public meant the difference between investors assigning value to Sea Sun shares (and paying money to buy them) versus assigning no value (and declining to buy) if they understood that the company would not go public. We are in no doubt that the statements made about going public would reasonably have been expected to have a significant effect on the value of Sea Sun shares. It is unnecessary to quantify the effect.

[115] We therefore find that Sea Sun and Koch breached section 92(4.1) of the Act. That allegation is proved. As for Millington, his admissions in the Millington Statement were confined to the Merger Circular, and Staff did not press the issue of his broader responsibility. Accordingly we find (consistent with his admissions) that Millington made misleading or untrue statements, contrary to the Act.

E. Conduct Contrary to the Public Interest

1. Illegal Trading and Distribution

[116] The registration requirement is designed to protect investors in a securities trade by giving them the benefit of the involvement, in that trade, of a registrant knowledgeable about the investors, the capital market and the securities being traded, and responsible for assisting investors in making trades consistent with their financial circumstances, investment objectives and risk tolerances.

[117] The prospectus requirement is designed to enable investors to make informed investment decisions by giving them extensive and reliable information about the issuer of a security and the security itself, information pertinent to an assessment of investment merits and risks.

[118] These are basic, fundamental protections and central to our system of securities regulation. Exemptions from the registration and prospectus requirements are important and useful. They are designed to apply where the nature of a transaction, the individual circumstances of the investor, or the investor's relationship to a key player in the transaction, coupled in some cases with a requirement for alternative information disclosure, are thought to obviate the need for the basic protections. The abuse of such exemptions jeopardizes investors and the integrity of the capital market as a whole.

[119] The illegal trading and distributions by Sea Sun and Koch – their contraventions of the prospectus and registration requirements – reflected a profound, repeated and prolonged disregard for, or deliberate skirting of, these fundamental elements of securities laws. The misleading Location Package Exemption Report filed in 2006 – and the untrue Exemption Declarations obtained from BS and her husband – compounded the wrong. The conduct of each of Sea Sun and Koch was clearly and seriously contrary to the public interest, and we so find.

[120] We also find, as Millington stated in the Millington Statement, that "his failure to conduct appropriate due diligence to ensure proper oversight of . . . Sea Sun's capital raising activities, constituted conduct contrary to the public interest".

2. Prohibited Representations and Misrepresentations

[121] The policy purpose of the listing-representation prohibition was discussed above. The harm that can result from such representations, and from misleading or false statements or misrepresentations generally, is obvious: the prohibited or distorted information can lead to flawed investment decisions and investor losses, which in turn can jeopardize investor confidence and the reputation and integrity of the capital market generally. These were reasonably foreseeable consequences of the prohibited representations and misrepresentations in this case.

[122] Each of the Respondents bore responsibility for this (in Millington's case, with regard specifically to the Merger Circular). We therefore find that in this, also, Millington (as he admitted in the Millington Statement), Sea Sun and Koch acted contrary to the public interest.

IV. CONCLUSION

A. Findings Summarized

[123] Over the course of several years (at least from 2003 to 2007) Sea Sun raised millions of dollars from investors, including Albertans, through trades and distributions of securities without registration or a prospectus. No registration or prospectus exemptions were available for at least some of this activity. This was illegal activity by Sea Sun and Koch, and conduct contrary to the public interest on the part of all three Respondents.

[124] The investors were enticed into trades in Sea Sun securities in part by repeated prohibited, or misleading and untrue, statements (written and oral) that Sea Sun was, or would

soon become, a quoted or listed public company, something that in fact never happened. This involved breaches of the Act and conduct contrary to the public interest on the part of all three Respondents.

[125] It appears that the misconduct in this case has resulted in investors losing some, or all, of the money they invested. The effect on those who testified has been serious, even devastating.

[126] This concludes the first part of this proceeding.

B. Sanctions Phase of Hearing: Timeline

[127] This proceeding will now move into a second phase, in which we consider whether it is in the public interest to order sanctions or the payment of costs against any or all of the Respondents.

[128] We direct that Staff provide to the panel (through the Commission Registrar) and to the other parties any written submissions that Staff wish to make on this topic, on or before **Friday 19 June 2009.** Each Respondent may reply in writing to Staff's submissions. All such written submissions by a Respondent must be provided to the panel (through the Registrar), to Staff and to each other Respondent, on or before **Friday 10 July 2009**. Staff will be entitled to reply in writing to any such written submissions by a Respondent, that reply to be provided to the panel and to each Respondent, on or before **Friday 24 July 2009**.

[129] The panel will hear from such of the parties as wish to appear in person – to make supplementary oral submissions on the topic of sanctions or costs orders, or to respond to questions from the panel – during the second week of August 2009. A party wishing to make such an appearance must advise the Registrar by 16:00 on **Friday 31 July 2009**, indicating (i) whether they propose to call witnesses, (ii) the amount of hearing time they expect to require, and (iii) their preferences as to personal or telephone attendance, hearing location (Edmonton or Calgary) and hearing date (or dates) during that week. The panel will then inform all parties as to whether an in-person session will be held and, if so, confirm the time and location.

[130] The existence of the Millington Statement confirms that Staff has the ability to communicate with Millington. Regarding Koch and Sea Sun, the panel directs Staff to update their information relevant to notification of those two Respondents and then to apply promptly to the Registrar for directions from a panel concerning the manner of informing those two Respondents of this decision and the above timeline.

28 May 2009

For the Commission:

"original signed by"
Stephen Murison

"original signed by"
Beverley Brennan, FCA

"original signed by"
Karl Ewoniak, CA