ALBERTA SECURITIES COMMISSION

DECISION

Citation: Sea Sun Capital Corporation, Re, 2009 ABASC 407 **Date: 20090813**

Sea Sun Capital Corporation, Rodney Koch and Graham Millington

Panel:	Stephen Murison Beverley Brennan, FCA Karl Ewoniak, CA
Representation:	Liam Oddie for Commission Staff Jeffrey Thom, QC for Graham Millington
Submissions Period Ended:	31 July 2009
Date of Decision:	13 August 2009

I. INTRODUCTION

[1] Sea Sun Capital Corporation ("Sea Sun") and Rodney Koch ("Koch", the founder, a director and chairman of Sea Sun) illegally traded and distributed securities of Sea Sun – shares and "Location Packages" relating to a marine tourism business operated by the company. They, and Graham Millington ("Millington", who was held out as Sea Sun's president, chief executive officer and a director), also made prohibited representations and misleading or untrue statements, notably to the effect that Sea Sun was or would soon become a public company with its shares quoted or listed on a recognized exchange or other marketplace – which did not happen. By this conduct, Sea Sun, Koch and Millington (together, the "Respondents") breached Alberta securities laws. These breaches, and Millington's admitted failure to ensure proper oversight of Sea Sun's capital-raising activities, were also contrary to the public interest.

[2] The Respondents' misconduct was demonstrated in an April 2009 hearing (the "April Hearing") before this panel of the Alberta Securities Commission (the "Commission"). Our findings – set out in our decision issued on 28 May 2009 (the "May Decision", cited as *Re Sea Sun Capital Corporation*, 2009 ABASC 256) – were based on witness testimony, a Statement of Admissions and Joint Recommendation as to Sanction (the "Millington Statement") signed by Millington, other documentary evidence and submissions by counsel for Commission staff ("Staff").

[3] The May Decision concluded with an invitation for the parties to make submissions on the issue of whether, or what, orders should be made against the Respondents. We received written submissions from counsel for Staff, with which Millington (through his counsel) expressed agreement. Staff and Millington declined the opportunity to make additional oral submissions. As was the case in the April Hearing, we heard and received nothing from Sea Sun or Koch, despite Staff's reasonable steps to inform those Respondents of the proceeding and the May Decision, and those Respondents having been given ample time to respond.

[4] For the reasons given below, we are ordering the following:

- against Sea Sun: a permanent ban on trading by the company and in its securities and exchange contracts; and (jointly with Koch) payment of $60 000 of costs;
- against Koch: 25-year trading, use-of-exemptions and director-and-officer bans; a $225 000 administrative penalty; and the mentioned joint payment of costs; and
- against Millington; a six-year director-and-officer ban; a $25 000 administrative penalty; and payment of $10 000 of costs.

II. THE MISCONDUCT

[5] We summarize here only briefly the activity that gave rise to this proceeding; this decision should be read in light of the May Decision, which sets out in greater detail the factual background and our associated findings.

[6] Although some details remained unclear, this was not a modest venture. The evidence indicated that Sea Sun securities were sold from 2003 to at least 2007, raising millions of dollars. One public filing in the United States indicated that, in 2005 alone, Sea Sun received over

US$3.9 million just from the sale of Location Packages (with further amounts due from those sales).

[7] Each of the investor witnesses who testified made multiple investments in Sea Sun securities (alone or with family or friends), expending considerable sums in the process. They appeared to have lost most or all of their money – tens or hundreds of thousands of dollars each. These losses proved devastating, and ruinous in one case; in each case, the losses were a source of personal distress.

[8] All of the investors had primary, direct contact (in person or by telephone and e-mail) with Koch. Their "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" (May Decision at para. 20).

[9] The Sea Sun securities were not sold under a prospectus, and the Respondents were not registered to trade in securities. The evidence persuaded us that no exemptions were available for at least some of the sales. Thus, Sea Sun shares and Location Packages were traded and distributed illegally.

[10] As stated in the May Decision (at paras. 102-03):

> . . . 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.
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> 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.

III. SANCTIONS

A. Sanctioning Principles

[11] Alberta securities laws empower the Commission to order sanctions that it considers to be in the public interest (sections 198 and 199 of the *Securities Act*, R.S.A. 2000, c. S-4 (the "Act")). This authority is exercised prospectively – to protect and prevent, not to punish or remedy (*Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, 2001 SCC 37 at paras. 39-45).

[12] In our assessment of the public interest in the present case we considered, among other things, deterrence, both specific (directed at dissuading a particular respondent from engaging in the same or similar misconduct) and general (directed at discouraging like-minded others from engaging in similar misconduct) – see *Re Cartaway Resources Corp*., 2004 SCC 26 at paras. 52-62; and *Re Podorieszach*, 2004 ABASC 567 at para. 17. We also evaluated what we considered the more pertinent of the factors enumerated by this Commission in *Re Lamoureux*, [2002]

A.S.C.D. No. 125 at para. 11 (affirmed on other grounds 2002 ABCA 253) and, more recently, in *Re Workum and Hennig*, 2008 ABASC 719 at para. 43:

> - the seriousness of the findings against the respondent and the respondent's recognition of that seriousness;
> - characteristics of the respondent, including capital market experience and activity and any prior sanctions;
> - any benefits received by the respondent and any harm to which investors or the capital market generally were exposed by the misconduct found;
> - the risk to investors and the capital market if the respondent were to continue to operate unimpeded in the capital market or if others were to emulate the respondent's conduct;
> - decisions or outcomes in other matters; and
> - any mitigating considerations.

B. Sanctions Sought

[13] Staff sought the following sanctions: against Sea Sun – a permanent ban on securities trading by it; against Koch – 20-year trading, use-of-exemptions and director-and-officer bans and an administrative penalty of "at least" $225 000; and against Millington (with his agreement) – a six-year director-and-officer ban and a $25 000 administrative penalty.

C. Sanctioning Principles and Factors Applied to the Circumstances

[14] We summarize here our analysis of the circumstances of this case in light of the sanctioning principles and key factors.

Seriousness of Misconduct and Recognition of Seriousness

[15] The Respondents' misconduct went to the heart of our securities regulatory system and the responsibilities imposed on persons in positions such as Koch's and Millington's under that system. We reiterate here our comments in the May Decision (at paras. 116-21):

> 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.
>
> 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.
>
> 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.

> 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 [a regulatory filing] filed in 2006 – and the untrue Exemption Declarations obtained from [an investor witness] 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.
>
> 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".
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> . . . The harm that can result from [making prohibited representations concerning a public listing of a security], 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.

[16] Moreover, as the Alberta Court of Appeal stated recently in *Maitland Capital Ltd. v. Alberta (Securities Commission)*, 2009 ABCA 186 at para. 17, the capital markets are "intensely dependent upon trust". The Respondents betrayed that trust.

[17] This was a case of serious misconduct. Each Respondent bore responsibility for it.

[18] The evidence was that Millington's role and responsibility for the misconduct – although not inconsequential – were considerably less significant than Koch's and Sea Sun's. Moreover, we conclude that Millington's participation in the Millington Statement, and his agreement with Staff's position in this phase of the proceeding, demonstrate recognition on his part of the seriousness of his misconduct.

[19] The more significant players – Koch and Sea Sun – made no response to the allegations against them; as noted, they did not participate in either phase of this proceeding. Nothing suggests any recognition by them of the seriousness of their misconduct.

[20] These factors, in our view, argue for sharp, significant sanctions against all Respondents. As among them, the extent of sanction necessary for Millington – while still substantial – is markedly less than that required for his co-Respondents.

Characteristics of Respondents (Capital Market Experience and Activity)

[21] There was little evidence concerning Koch's or Millington's experience or history in the capital market apart from the Sea Sun venture. There was no evidence that either individual has previously been sanctioned. In some cases this might argue for moderation in sanction. We do not consider it so in the present case. The misconduct here went beyond mere inadvertence or inattention to technicalities. As discussed, it went to the heart of the securities regulatory system.

[22] In the circumstances, this factor does not argue for any moderation in sanction.

Harm to Investors or the Capital Market and Benefits Received

[23] All of the investors whose money was solicited by the Respondents were put at risk of loss. They were, as discussed, deprived of the protections they should have been given, and they were told things they should not have been told.

[24] Those who did put money into Sea Sun securities have suffered very directly. Two of the investor witnesses received nothing back from their investments; the third obtained a partial repayment, and succeeded in that only after repeated pleas and ultimately forceful demands on Koch. It appears that the rest of their money is lost.

[25] We cannot determine where all the money went. However, the evidence was that Sea Sun investors paid their money to Sea Sun or, in a few instances, to a different company of which Koch was the sole shareholder and director. We are in no doubt that Koch intended, directly and indirectly, to benefit.

[26] This factor argues for significant sanction against all Respondents, more strongly against Koch and Sea Sun.

Risk to Investors and the Capital Market

[27] The circumstances here demonstrate, in our view, that the Respondents continue to pose a risk to individual investors and to the capital market as a whole. Substantial specific deterrence is required to dissuade each of the Respondents from repeating the misconduct. As among them, that need is greatest against Koch and Sea Sun. Millington's lesser role, and his recognition of the seriousness of the misconduct (already discussed), persuade us that he is already less likely to repeat his misconduct than his co-Respondents would be in the absence of significant sanctions.

[28] Substantial general deterrence is also called for. The Respondents raised a large amount of money from many investors, over a prolonged period, contrary to some of the most basic elements of Alberta securities laws. Our sanctions must be such that others, who might otherwise be tempted to emulate the Respondents, perceive that the consequences can be sharp and serious.

Other Decisions

[29] The assessment of appropriate sanction is invariably fact-dependent. For that reason, other decisions based on other facts are seldom of direct assistance.

[30] That said, Staff did point to another case of illegal distribution in Alberta with some factual parallels to the case before us. In that case (*Re Atlas Communications Inc.*, 2007 ABASC 749), the principal was: banned from trading, and from acting as a director or officer, for 20 years; permanently denied the use of exemptions; and ordered to pay a $125 000 administrative penalty. We consider that Koch's conduct here was in important respects more egregious than the conduct at issue in *Atlas*, and therefore consider that Koch’s sanctions – while similar in kind – should be greater in extent.

Mitigating Factors

[31] We discern no evidence of any action by Koch or Sea Sun to mitigate their misconduct or the resulting harm, and therefore no basis on this ground for moderation in the sanction otherwise appropriate for those Respondents.

[32] We are not aware of Millington having mitigated, directly, the financial harm suffered by Sea Sun investors. However, his conduct in signing the Millington Statement, and in accepting the submissions made by Staff, has without question avoided some of the time and expense of a highly contested hearing into Staff's allegations against him. Timely and effective resolution of such matters is itself in the public interest. We therefore consider Millington to have mitigated somewhat his misconduct. This factor favours some moderation in sanction against him.

D. The Appropriate Sanctions

[33] On balance, for the reasons given, we conclude that the public interest requires significant sanctions, providing both specific and general deterrence, against each of the Respondents.

[34] Sea Sun itself, we conclude, must not again have access to investors and the capital market that it has so grievously abused; it must be barred from further trading in securities. We therefore agree with Staff's suggested sanctions in respect of Sea Sun. In addition, though, we believe that investors must be protected from anyone else trading in its securities, and therefore conclude that our orders should include a more general ban on all trading in its securities.

[35] We conclude that both Koch and Millington must face restrictions on their access to the capital market, and that these restrictions must be coupled with direct monetary consequences in the form of administrative penalties. The appropriate restrictions on Millington would focus on his ability to hold positions of responsibility, as a director or officer. In Koch's case, the restrictions should also include bans on trading in or purchasing securities, and on using securities law exemptions. We consider that the extent of sanctions against Koch must be markedly greater than the extent of corresponding sanctions against Millington.

[36] We are satisfied that the package of sanctions sought by Staff against Koch and Millington would, for the most part, appropriately serve the public interest. However, regarding Koch, we consider aspects of his dealings with investors a sufficiently aggravating factor to warrant somewhat longer bans than proposed by Staff. In our view, the public interest would be served were such bans (coupled with Staff's proposed $225 000 administrative penalty) to extend for 25 years.

IV. COSTS

[37] Staff sought orders that substantially all of what they claimed as costs incurred in the investigation and hearing be paid by the Respondents – a total of $80 000, allocated as to $10 000 to Millington and as to $70 000 (jointly and severally) to Sea Sun and Koch.

[38] An order (made under section 202 of the Act) that a respondent pay costs of an investigation and hearing is not a sanction. It is, rather, a means of recovery of certain costs otherwise borne indirectly by other market participants whose fees fund the Commission's

operations. A measure of cost recovery from a respondent found to have engaged in misconduct is, generally, appropriate. In assessing whether, and to what extent, that is so in a particular case, we look primarily to the efficient resolution of enforcement proceedings (*Workum and Hennig* at paras. 192-93, 252) and respondents' respective contributions to that end.

[39] We turn now to the costs claimed. Staff provided us with a list of "Investigation & Hearing Costs" totalling approximately $81 000, divided roughly equally between the investigation and the hearing. Staff also provided some supporting documentation for the costs claimed.

[40] Sections 191.1 and 191.2 of the *Alberta Securities Commission Rules (General)*, which set parameters for the costs recoverable, distinguish between investigation and hearing costs. Staff did not appear to have established a clear and consistent demarcation between the two but, in the circumstances here, this did not affect the result. However, we did make certain adjustments. Specifically, from the claimed investigation costs we subtracted two disbursements totalling $290.08 that appeared inadvertently to have been duplicated. In respect of hearing costs we reduced by nine hours, or $450, the claim for 23 hours of attendance by a Staff investigator witness (the April Hearing itself did not exceed approximately 14 hours in duration). We also subtracted $683.28 of travel-related costs for his attendance at the April Hearing, considering that the costs would not have been incurred had the hearing venue been in Calgary, and that the choice of venue is within the Commission's discretion.

[41] We consider that this case warrants orders for the recovery of a substantial portion of the costs thus adjusted. We turn now to the allocation of the costs among the Respondents.

[42] Given that Sea Sun's and Koch's roles in the activity giving rise to this proceeding were considerably greater than Millington's, it is reasonable to infer that the investigation (and its costs) had a corresponding focus. Moreover, we discern that Millington made a real contribution (notably, through the Millington Statement) both to the uncovering of the facts of the case and to the efficient resolution of the allegations against him. By contrast, Koch and Sea Sun made no contribution to the proceeding. While their non-participation could not be said to have unduly complicated the matter, nor it did not obviate the need for investigation and a full hearing.

[43] For these reasons, we consider it appropriate to order that Sea Sun and Koch pay (jointly and severally) $60 000 of the costs of the investigation and hearing, and that Millington pay (as suggested) $10 000.

V. ORDERS

[44] For the reasons given, we make the following orders in the public interest:

Against Sea Sun

- Under sections 198(1)(a) and (b) of the Act, all trading in or purchasing of securities and exchange contracts of Sea Sun must cease, and Sea Sun must cease trading in or purchasing all securities and exchange contracts – in each case, permanently.

Against Koch

- Under sections 198(1)(b) and (c) of the Act, Koch must cease trading in or purchasing all securities and exchange contracts, and all of the exemptions contained in Alberta securities laws do not apply to him – in each case for 25 years.
- Under sections 198(1)(d) and (e) of the Act, Koch must resign from all positions that he holds as a director or officer of any issuer, and he is prohibited from becoming or acting as a director or officer (or both) of any issuer for 25 years.
- Under section 199 of the Act, Koch must pay an administrative penalty of $225 000.

Against Millington

- Under sections 198(1)(d) and (e) of the Act, Millington must resign from all positions that he holds as a director or officer of any issuer, and he is prohibited from becoming or acting as a director or officer (or both) of any issuer for six years.
- Under section 199 of the Act, Millington must pay an administrative penalty of $25 000.

[45] We also order, under section 202 of the Act, that the Respondents pay a total of $70 000 of the costs of the investigation and hearing, allocated as follows:

- Sea Sun and Koch must, jointly and severally, pay $60 000; and
- Millington must pay $10 000.

[46] This proceeding is concluded.

13 August 2009

For the Commission:

"original signed by"
Stephen Murison

"original signed by"
Beverley Brennan, FCA

"original signed by"
Karl Ewoniak, CA