Ontario Securities Commission | Commission des valeurs mobilières de l'Ontario | P.O. Box 55, 19th Floor 20 Queen Street West Toronto ON M5H 3S8 | CP 55, 19e étage 20, rue queen ouest Toronto ON M5H 3S8

IN THE MATTER OF THE *SECURITIES ACT*
R.S.O. 1990, c. S.5, AS AMENDED

- AND -

IN THE MATTER OF
XI BIOFUELS INC., BIOMAXX SYSTEMS INC., XIIVA HOLDINGS INC. CARRYING ON BUSINESS AS XIIVA HOLDINGS INC., XI ENERGY COMPANY, XI ENERGY AND XI BIOFUELS, RONALD CROWE AND VERNON SMITH

REASONS AND DECISION

Hearing:	January 5, 7, 8, 9, 12, 13, 14, 15 and 16, 2009, and May 1, 2009	
Decision:	March 31, 2010	
Panel:	Wendell S. Wigle, QC	- Commissioner and Chair of the Panel
	David L. Knight, FCA	- Commissioner
Appearances:	Michelle Vaillancourt	- For Staff of the Ontario Securities Commission
	Mary L. Biggar	- For Ronald Crowe and Vernon Smith
		- No one appeared for XI Biofuels Inc., Biomaxx Systems Inc., or Xiiva Holdings Inc.

TABLE OF CONTENTS

REASONS AND DECISION

I. BACKGROUND

A. Introduction

[1] This was a hearing before the Ontario Securities Commission (the "**Commission**") pursuant to sections 127 and 127.1 of the *Securities Act*, R.S.O. 1990, c. S.5, as amended (the "**Act**") to consider whether it is in the public interest to make an order imposing sanctions on XI Biofuels Inc. ("**XI Biofuels**"), Biomaxx Systems Inc. ("**Biomaxx**"), Xiiva Holdings Inc. carrying on business as Xiiva Holdings Inc., XI Energy Company, XI Energy and XI Biofuels (collectively, "**Xiiva**"), Ronald Crowe ("**Crowe**") and Vernon Smith ("**Smith**") (collectively the "**Respondents**").

[2] This matter arose out of a Notice of Hearing issued by the Commission on October 16, 2008 in relation to a Statement of Allegations issued by Staff of the Commission ("**Staff**") on that date. An Amended Statement of Allegations was issued by Staff on December 30, 2008. Staff alleges that from December 2004 to November 2007 (the "**Material Time**") the Respondents breached subsections 25(1)(a) and 53(1) of the Act, and that their actions were contrary to the public interest and harmful to the integrity of the Ontario capital markets. Staff also alleges that Smith and Crowe (collectively, the "**Individual Respondents**"), in their capacity as directors and/or officers or *de facto* directors and/or officers of Biomaxx, Xiiva, and XI Biofuels (collectively, the "**Corporate Respondents**"), authorized, permitted or acquiesced in the Corporate Respondents' non-compliance with Ontario securities law, contrary to section 129.2 of the Act. Staff also made allegations in relation to subsection 38(3) of the Act which have since been withdrawn.

[3] On November 22, 2007, the Commission issued a Temporary Order, pursuant to subsections 127(1) and (5) of the Act, ordering that all trading by XI Biofuels and Biomaxx cease, that XI Biofuels, Biomaxx, Crowe, and Smith cease trading in all securities, and that the exemptions contained in Ontario securities law do not apply to the Respondents (the "**Biomaxx Temporary Order**").

[4] On November 22, 2007, the Commission issued a Direction, pursuant to subsection 126(1) of the Act, freezing the bank accounts of XI Biofuels at the National Bank of Canada (the "**Freeze Direction**"). The Freeze Direction was subsequently extended by order of the Ontario Superior Court of Justice and remains in effect until 30 days after the Commission makes a final determination in this matter (the "**Freeze Order**").

[5] On December 14, 2007, the Commission issued another Temporary Order, pursuant to subsections 127(1) and (5) of the *Act*, ordering that all trading in securities of Xiiva cease and that exemptions contained in Ontario securities law do not apply to it (the "**Xiiva Temporary Order**").

[6] The Biomaxx Temporary Order and the Xiiva Temporary Order have been extended and remain in effect until 30 days after the Commission issues its decision in the matter (collectively, the "**Temporary Orders**").

[7] On May 21, 2008, the Corporate Respondents were petitioned into bankruptcy by Heritage Transfer Agency, Inc. ("**Heritage**"), the transfer agent for Xiiva and Biomaxx.

Soberman Tessis Inc. was appointed the trustee in bankruptcy for Xiiva, Biomaxx, and XI Biofuels (the "**Trustee**").

B. The Respondents

[8] None of the Respondents is registered under the Act. No prospectus was filed and no receipts were issued to qualify the distribution of Xiiva and Biomaxx securities. The Respondents have not claimed any exemptions under the Act in relation to the distribution and sale of Xiiva and Biomaxx securities.

1. Xiiva

[9] Xiiva was incorporated in Ontario on June 7, 1995 as Ramworks International. The name was changed to SFH Holdings Inc. on April 6, 2001 and then to Xiiva Holdings Inc. on February 20, 2003. Xiiva's corporate registration was cancelled on June 25, 2005 for non-payment of corporate taxes, and revived on September 24, 2007.

[10] Xiiva is quoted on the Pink Sheets under the symbol XIVAF. Xiiva is also quoted on the Xetra Exchange operated by the Deutsche Börse. It has never filed a prospectus or been registered with the Commission.

[11] Xiiva's Corporation Profile Reports list Crowe as the President and a director of Xiiva since September, 2003.

[12] Xiiva's corporate minute book identifies Smith as a director of Xiiva from July 10 to July 19, 2007. From December 2004 to July 2005, and on August 10, 2007, Smith, as a director of Xiiva, signed directions to Heritage to issue shares of Xiiva ("**Treasury Directions**").

[13] "XI Energy" (sometimes called "XI Energy Company"), is a trade name for Xiiva. It is not incorporated. XI Energy maintained its own website.

[14] Crowe and Smith, as directors of Xiiva, signed Treasury Directions instructing Heritage to issue shares of Xiiva "operating as XI Energy". Crowe's signature appears on the share certificates above the title of President and Secretary.

2. XI Biofuels

[15] XI Biofuels is a trade name for Xiiva. It had its own website, and share certificates were issued in the name of Xiiva "operating as XI Biofuels". The company's Corporation Profile Reports indicate that it was incorporated on September 24, 2007, with Crowe as its sole director and officer.

[16] XI Biofuels has never filed a prospectus or been registered with the Commission.

[17] Bank records show that Crowe opened three accounts for XI Biofuels within a few weeks of incorporating the company: a Canadian dollar account and a U.S. dollar account at the National Bank of Canada ("**National**"), and a Canadian dollar account at the Meridian Credit Union ("**Meridian**"), both in Barrie, Ontario.

3. Biomaxx

[18] Biomaxx was incorporated as Edgevision Media Inc. in Ontario on October 22, 2001 and renamed Biomaxx Systems Inc. in September, 2004.

[19] Biomaxx is quoted on the Pink Sheets under the symbol BMXSF. Biomaxx is also quoted on the Xetra Exchange operated by Deutsche Börse. It has never filed a prospectus or been registered with the Commission.

[20] Biomaxx's Corporation Profile Report indicates that Smith has been a director since the company was created, and that Crowe was an officer and director of Biomaxx from May 31, 2005 and was its President from February 10, 2006. In an affidavit, Crowe stated that he resigned from Biomaxx on June 30, 2007.

[21] Biomaxx had a Canadian dollar and a U.S. dollar account at the Canadian Imperial Bank of Commerce ("**CIBC**").

4. Crowe

[22] Crowe is a resident of Barrie, Ontario. He has never been registered with the Commission under the Act.

[23] As noted above, Crowe has been the President and a director of Xiiva since February 2003. He signed directions to Heritage to issue Xiiva shares to investors.

[24] Crowe is the sole director of XI Biofuels.

[25] Crowe was an officer and director of Biomaxx from May 2005, and its President from February 2006. In an affidavit, he stated that he resigned from Biomaxx on June 30, 2007.

5. Smith

[26] Smith is a resident of Barrie, Ontario. He has never been registered with the Commission under the Act.

[27] As noted above, Smith was identified as a director of Xiiva from July 10 to July 19, 2007. He issued Treasury Directions with respect to Xiiva shares and Xiiva "operating as XI Energy" shares from December 2004 to July, 2005, and on August 10, 2007, and signed Treasury Directions as a director of Xiiva.

[28] Smith has been a director of Biomaxx since the company was created in 2001.

C. The Positions of the Parties

1. Staff

[29] In the Amended Statement of Allegations, Staff alleges that from December 2004 to November 2007:

(a) the Respondents traded in securities of Biomaxx and/or Xiiva without being registered to trade in securities contrary to section 25(1)(a) of the Act and contrary to the public interest;

(b) the Respondents traded in securities of Biomaxx and/or Xiiva when a preliminary prospectus and a prospectus had not been filed and receipts had not been issued for either of Biomaxx or Xiiva by the Director, contrary to section 53(1) of the Act and contrary to the public interest;

(c) the Respondents engaged or participated in acts, practices or courses of conduct relating to the distribution of and trading of Biomaxx and/or Xiiva securities that were contrary to the public interest and harmful to the integrity of the Ontario capital markets;

(d) representatives or agents of Xiiva and/or XI Biofuels made representations without the written permission of the Director, with the intention of effecting a trade in securities of Xiiva, that such security would be listed on a stock exchange or quoted on any quotation or trade reporting system, contrary to section 38(3) of the Act and contrary to the public interest;

(e) Smith and Crowe, as directors and/or officers or *de facto* directors and/or officers of Biomaxx, authorized, permitted or acquiesced in Biomaxx's non-compliance with sections 25 and 53 of the Act, set out above, contrary to section 129.2 of the Act; and

(f) Smith and Crowe, as directors and/or officers of Xiiva and XI Biofuels, or *de facto* directors and/or officers of Xiiva and XI Biofuels, authorized, permitted or acquiesced in Xiiva's and XI Biofuels' non-compliance with sections 25, 38 and 53 of the Act, set out above, contrary to section 129.2 of the Act.

[30] Staff withdrew the allegations relating to section 38 of the Act, described in paragraph (d) and (f) above, during the hearing.

[31] Staff submits that during the Material Time, Xiiva issued treasury shares to over 80 individual investors, and Biomaxx issued treasury shares to over 270 individual investors. No prospectus was filed and no receipts were issued by the Director to qualify the shares. None of the Respondents is registered under the Act. The Respondents have not claimed any exemptions under the Act in relation to the trade and distribution of Xiiva and Biomaxx shares.

[32] Staff submits that Xiiva has not carried on any business other than the business of raising capital, and that while Biomaxx entered into certain letters of intent and/or memoranda of understanding with third parties that appear to be related to its stated biofuels business, Biomaxx's main business was the business of raising capital.

[33] Staff submits that some Xiiva and Biomaxx investors were cold-called by various entities that purported to be based in Europe but appear to be unknown to the appropriate regulators. Staff further submits that most of the proceeds of the trades did not make their way to the issuers or their bank accounts. Further, while some Xiiva investor funds were deposited into bank accounts opened in the name of XI Biofuels, most of these funds in one bank account were transferred to the Bahamas. An attempted offshore transfer of investor funds from another XI Biofuels account led to the Commission's Freeze Direction in November 2007.

[34] Staff further submits that the Respondents acted contrary to the public interest by making a number of misleading statements on the XI Biofuels and Biomaxx websites, including by misrepresenting Xiiva (XI Biofuels) and Biomaxx as biofuels technology companies with offices in Mississauga and New York (XI Biofuels) and Toronto (Biomaxx). In fact, the Respondents were market intermediaries in the primary business of raising capital and they had virtual offices only.

2. The Respondents

[35] The Respondents claim they were engaged in a biofuels technology business, not the business of raising capital. The Respondents claim that in or about 2004, Smith entered into discussions on behalf of Biomaxx with Naim Kosaric ("**Kosaric**"), a Professor Emeritus with the Department of Chemical and Biochemical Engineering at the University of Western Ontario and a well-published internationally recognized expert in the area of biofuels technologies. In November 2004, Biomaxx entered into an agreement with Kosaric's company, Kayplan Engineering Consultants ("**Kayplan**") with respect to Kosaric providing consulting services to Biomaxx relating to the development of new biotechnologies. The agreement was renewed in December 2006.

[36] The Respondents claim that at some point, Biomaxx decided to use Xiiva as a separate entity to commercialize Kosaric's biofuels technology. Further, the Respondents submit that Crowe resigned as a director of Biomaxx in June 2007 to concentrate his energies on Xiiva. Xiiva holds 100 percent of the issued and outstanding shares of XI Biofuels and is the entity that trades. XI Biofuels is also a trade name of Xiiva.

[37] The Respondents claim that Biomaxx and Xiiva prepared proposals or entered into agreements with third parties with respect to proposed biofuel projects in Canada, India, Bosnia, Fiji, Thailand and Australia. The Respondents claim that it was the Commission's Freeze Direction and Temporary Orders that frustrated these arrangements and led to the bankruptcy of the Corporate Respondents. The Respondents submit there is no evidence to support Staff's allegation that the majority of investor funds never made their way to the Corporate Respondents.

[38] The U.S. Securities and Exchange Commission (the "**SEC**") suspended trading in Biomaxx shares for ten days on September 24, 2007, and suspended trading in Xiiva shares for ten days on December 14, 2007. The Respondents submit that there is no evidence that these suspensions related to their conduct. They submit that SEC press releases indicate that the SEC was concerned that Biomaxx and Xiiva shares were being sold by entities related to Gerald and Marie Levine (the "**Levines**"). The Respondents submit there is no evidence of any connection between them and the Levines; they submit there is evidence that Biomaxx and Xiiva are themselves victims.

[39] The Respondents submit that the Xiiva and Biomaxx shares held by Ontario residents are held in the names of the founders and family members. Further, the Respondents submit that shares sold to non-residents were appropriately legended to restrict their sale in the US. Finally, the Respondents submit that the Commission has no jurisdiction in respect of offshore distributions of shares.

II. THE ISSUES

[40] We must decide the following issues:

1. Did the Corporate Respondents engage in trades and distributions?
2. Did the Individual Respondents engage in trades and distributions?
3. Did the Respondents breach sections 25 and 53 of the Act?

4. Did the Individual Respondents authorize, permit or acquiesce in the Corporate Respondents' non-compliance with Ontario securities law, contrary to section 129.2 of the Act?

5. Was the Respondents' conduct contrary to the public interest?

[41] In addition, the Respondents submit that this case involves offshore distributions to which the Act has no constitutional applicability. Accordingly, we must decide the following issue:

6. Does the Commission have jurisdiction in the circumstances of this case?

III. THE EVIDENCE

[42] Staff called nine witnesses at the hearing: Mehran Shahviri and Don Panchuk, Staff investigators; Grace Smith, Manager of Customer Service for National; three Biomaxx investors; three Xiiva investors; Filomena Nucaro ("**Nucaro**"), Senior Administrative Assistant at Heritage; Mozes Wortzman ("**Wortzman**"), owner of Heritage; and John Zaba ("**Zaba**"), the accountant for Xiiva and Biomaxx.

[43] Smith and Crowe did not testify. Staff and the Respondents read into the evidence excerpts from an affidavit by Crowe, cross-examination on the affidavit and compelled examination by Staff, and an affidavit by Smith, cross-examination on the affidavit and compelled examination by Staff.

[44] The Respondents called no witnesses. Counsel for the Trustee advised that no one would be in attendance at the hearing on behalf of the Corporate Respondents. Counsel for Smith and Crowe stated that this was due to a lack of funds as a result of the Freeze Order.

IV. ANALYSIS

A. Did the Corporate Respondents engage in trades and distributions?

1. The Law

[45] Subsection 1(1) of the Act states:

> "distribution", where used in relation to trading in securities, means:
>
> (a) a trade in securities of an issuer that has not been previously issued, ...

[46] Subsection 1(1) of the Act defines "trade" or "trading" as including:

> (a) any sale or disposition of a security for valuable consideration whether the terms of payment be on margin, installment or otherwise, …
>
> (e) any act, advertisement, solicitation, conduct or negotiation directly or indirectly in furtherance of the foregoing.

[47] The Commission has adopted a contextual approach when determining whether or not conduct constitutes an act in furtherance of a trade, as enunciated in *Re Costello* (2003), 26 O.S.C.B. 1617 ("***Re Costello***") at para. 47:

> There is no bright line separating acts, solicitations and conduct indirectly in furtherance of a trade from acts, solicitations and conduct not in furtherance of a

> trade. Whether a particular act is in furtherance of an actual trade is a question of fact that must be answered in the circumstances of each case. A useful guide is whether the activity in question had a sufficiently proximate connection to an actual trade.

[48] Moreover in *Re Momentas Corp.* (2006), 29 O.S.C.B. 7408 ("***Re Momentas***") at para. 77, the Commission stated:

> Such approach requires an examination of the totality of the conduct and the setting in which the acts have occurred, the primary consideration of which is the effects the acts had on those to whom they were directed [citations omitted].

[49] And at paras. 78-80 of the same decision, the Commission stated:

> Further, a final sale is not a necessary element of an act in furtherance of a trade. Accordingly, a final sale need not occur in order for the conduct in issue to constitute trading. Further, the acceptance of funds can equally constitute an act in furtherance of a trade within the meaning of the Act, even where no specific sales have occurred as a result of the conduct.
>
> The inclusion of the word "indirectly" in the definition of acts in furtherance of trade reflects the intention by the Legislature to capture conduct which seeks to avoid registration requirements by doing indirectly that which is prohibited directly.
>
> Examples of activities found in the jurisprudence that have fallen within the definition of a trade as "acts in furtherance" include:
>
> (a) providing potential investors with subscription agreements to execute;
>
> (b) distributing promotional materials concerning potential investments;
>
> (c) issuing and signing share certificates;
>
> (d) preparing and disseminating of materials describing investment programs;
>
> (e) preparing and disseminating of forms of agreements for signature by investors;
>
> (f) conducting information sessions with groups of investors; and
>
> (g) meeting with individual investors. [citations omitted]

[50] For the following reasons, we conclude that the Respondents engaged in acts in furtherance of trades in Xiiva and Biomaxx securities contrary to the Act and contrary to the public interest.

2. Admissions

[51] Smith, in his affidavit dated March 17, 2008, made the following admission in his capacity as the sole director of Biomaxx:

> Biomaxx admits that it conducted a "distribution" of securities without complying with section 53 of the *Securities Act* and its representatives have "traded" in their securities without being registered pursuant to section 25 of the *Securities Act*.

[52] Crowe, in his affidavit dated March 17, 2008, made the following admission in his capacity as the sole director of Xiiva:

> Xiiva admits that it has "distributed" its securities without complying with section 53 of the *Securities Act* and that its representatives have "traded" its securities without being registered pursuant to section 25 of the *Securities Act*.

[53] These admissions are supported by the evidence, including investor evidence, bank records, treasury directions, shareholder lists and financial statements and other documents the Corporate Respondents provided to the Trustee. The evidence indicates that Xiiva and Biomaxx shares were not sold directly but through a number of offshore entities.

3. Trades and Distributions by Xiiva and XI Biofuels

[54] Xiiva investors indicated in answers to questionnaires sent by Staff that they were contacted by entities named Venture Alliance Partners (also known as Venpar) ("**Venpar**"), VC Private Management (also known as VCPM) ("**VCPM**"), Emerging Equity Group ("**EEG**"), Strategic Investment Group ("**SIG**"), Crickmore and Lutz ("**Crickmore**"), and Prestige Asset Management ("**Prestige**").

[55] All of these entities purported to be domiciled in countries other than Canada. Venpar purported to be in Denmark, EEG and SIG purported to be domiciled in Barcelona, and Prestige purported to be domiciled in Luxembourg.

[56] VCPM purported to be operating in Switzerland though it was registered in the British Virgin Islands ("**BVI**"). The Swiss Federal Banking Commission advised Staff that VCPM was not known to them and that the telephone number attributed to VCPM was forwarded out of the country to an unknown location.

[57] Crickmore purported to be domiciled in Luxembourg. The Luxembourg Commission de Surveillance du Secteur Financier advised Staff that Crickmore was not incorporated or registered with the Luxembourg Trade and Company Register, and that the company has neither requested nor been granted the required authorization to offer financial services in or from Luxembourg and is not a regulated entity under Luxembourg law.

[58] Three Xiiva investors testified, all of whom received Xiiva "operating as XI Biofuels" share certificates.

[59] Investor One, a resident of the Netherlands, testified that he was contacted by a representative of VCPM who identified himself as Eric Larsson ("**Larsson**") and said he was calling from Switzerland. Investor One had previously purchased shares in a company called the DK Group through VCPM, and Larsson offered to buy them back if he made an investment in XI Biofuels. Investor One agreed and returned his DK Group shares in exchange for a discount on his purchase of the XI Biofuels shares. He paid $7,500 USD for 2,000 shares of XI Biofuels, which he was told would otherwise have cost $11,500 USD at the cost of $5.75 USD per share. Larsson told him he could easily sell his shares for $6.25 USD each. On Larsson's instructions,

Investor One directed his payment to the XI Biofuels National account, and it was credited to the account on November 14, 2007. Investor One received a form of subscription agreement after he paid for the shares. When he received a share certificate in the name of Xiiva "operating as XI Biofuels", he called Larsson, who told him not to worry.

[60] Investor Two, a resident of South Africa, testified that he was cold-called by a representative of Venpar who identified himself as Richard Walker ("**Walker**"). He was not provided with a prospectus or offering circular, but received an email from Walker, which stated that XI Biofuels was listed on the "NASDAQ Exchange under the ticker symbol XIVAF.PK". The email included the same pro forma financial statements published on XI Biofuels' website. Investor Two paid $2,625 USD for 500 XI Biofuels shares at a cost of $5.25 USD each. On Venpar's instructions, he directed his payment to XI Biofuels' Meridian account, and it was credited to the account on October 11, 2007. Investor Two received a Xiiva "operating as XI Biofuels" share certificate by mail, the envelope of which bears a Canada Post stamp and a Mississauga return address for XI Biofuels. He then received a form of subscription agreement after receiving his share certificate.

[61] Investor Four, a resident of the United Kingdom, testified that he received an unsolicited telephone call from a representative of SIG who identified himself as Ed Connelly ("**Connelly**"). Connelly said he was calling from Barcelona, Spain. Investor Four stated that he was told that XI Biofuels was on the "American Stock Exchange" in New York. Investor Four purchased a total of 6,000 shares in two transactions, and paid a total of $23,800 USD for them. On SIG's direction, he sent his payment to a Bank of America account in New York held by International Escrow Services ("**IES**"). Investor Four testified that he never received a prospectus. He received Xiiva "operating as XI Biofuels" share certificates from an entity named Global Escrow Services, with an address in Toronto.

[62] In total, Xiiva issued approximately 7,877,000 shares from treasury from March, 2003 to November, 2007.

[63] Of that number, approximately 3,100,000 Xiiva shares were issued to a series of offshore companies from June 11, 2007 to November 16, 2007: Hogarth Ltd. ("**Hogarth**"), Transocean Securities Ltd. ("**Transocean**") and Pro Capital Asset Management and Trust LLC ("**PCAMT**").

[64] Hogarth has an address in Belize, and received approximately 936,000 shares. Of that number, approximately 882,000 shares were redistributed to individual investors between June 25, 2007 and November 23, 2007, either directly or through Aura Trading Ltd. ("**Aura**"), a company with the same address in Belize as Hogarth.

[65] Transocean, which is domiciled in the BVI, received approximately 500,000 Xiiva shares, approximately 158,000 of which were redistributed to individual investors between July 20, 2007 and December 12, 2007.

[66] PCAMT, which has an address in Costa Rica, received approximately 500,000 Xiiva shares. MMTC & CO., and Secure Capital Partners Inc. ("**Secure**"), which share the same Costa Rica address as PCAMT, received 650,000 and 500,000 shares respectively.

[67] From December 2004 to July 2006, 41,000 **Xiiva "operating as XI Energy"** shares were distributed to twelve individual investors as a result of six Treasury Directions to Heritage signed

by Smith or Crowe. The Treasury Directions show London or Barcelona addresses for all but one of the investors. An internet search indicates that the Barcelona address has been the subject of regulatory warnings concerning various companies using the address.

[68] From July 10, 2007 to November 22, 2007, approximately 204,000 **Xiiva "operating as XI Biofuels"** shares were distributed to 61 individual investors, as a result of Treasury Directions to Heritage signed by Smith or Crowe.

[69] Investors who purchased Xiiva treasury shares from XI Biofuels, Venpar or VCPM were instructed to wire transfer funds to the XI Biofuels account at National or Meridian.

[70] We find that Xiiva and XI Biofuels engaged in trades and distributions of securities.

4. Trades and Distributions by Biomaxx

[71] Between December 14, 2004 and November 27, 2007, Biomaxx issued approximately 68,828,000 shares, including a two for one dividend or three for one split declared in February 2007. During this period, Biomaxx shares were issued to 271 investors.

[72] Biomaxx issued a total of 642,000 shares to PCAMT in three transactions on January 28, 2005, February 21, 2005 and May 12, 2005. All the Biomaxx investors contacted by Staff, including the three Biomaxx investors who testified, stated they purchased their shares through PCAMT, which they were told was domiciled in Cyprus, and wire transferred their payments to a bank account in Cyprus held in the name of PCAMT.

[73] Three Biomaxx investors testified.

[74] Investor Three, a resident of Australia, testified that he was repeatedly cold-called by a representative of PCAMT who identified himself as Jamie Adams ("**Adams**") and said he was calling from Cyprus. Investor Three testified that Adams called him at "all hours of the night" and then contacted him by email. He purchased 4,000 Biomaxx shares, at a price of $1.80 USD per share, for a total of $7,276.44 USD.

[75] Investor Five, another resident of Australia, testified that he was initially called by a PCAMT representative who identified himself as Mark Bennett ("**Bennett**"), though he later dealt with other people at PCAMT, including Scott Meadows ("**Meadows**"). Investor Five testified that Bennett contacted him regularly to tell him that PCAMT had acquired a "parcel of shares at usually a discount to the market price". Investor Five purchased a total of 219,000 Biomaxx shares over eight separate transactions, paying approximately $600,000 USD for the shares.

[76] Investor Six testified that she was contacted by Meadows in regard to Biomaxx. She purchased a total of 2,000 shares of Biomaxx in two transactions at a cost of approximately $7,000 USD. She also received a dividend of 4,000 shares after she purchased the initial 2,000 shares of Biomaxx, giving her a total of 6,000 shares in the company.

[77] Hogarth received 1,000,000 treasury shares on January 15, 2007, and 2,000,000 dividend shares on February 19, 2007, for a total of 3,000,000 shares. Approximately 2,380,000 of those shares were redistributed to individual investors, either directly or through Aura or Transocean. Hogarth also redistributed shares, through Aura, to PCAMT.

[78] We find that Biomaxx engaged in trades and distributions of securities.

B. Did the Individual Respondents engage in trades and distributions?

[79] Staff acknowledges that there is no evidence that Crowe or Smith directly contacted investors to solicit sales. Staff alleges that Crowe and Smith engaged in acts "directly or indirectly in furtherance of" trades in Xiiva, XI Biofuels and Biomaxx securities, and that these trades were distributions because the securities had not been previously issued.

[80] We accept that Crowe and Smith traded in Xiiva, XI Biofuels and Biomaxx securities, based on the totality of their conduct, considered in context. We place particular weight on the evidence that they signed Treasury Directions and share certificates, opened bank accounts in the names of the Corporate Respondents, deposited investor funds into the accounts, and created and maintained the Corporate Respondents' websites.

1. Treasury Directions and Share Certificates

[81] Staff submits that Smith and Crowe, as the directing minds of Xiiva and Biomaxx, signed Treasury Directions to Heritage, signed share certificates, and attended at Heritage to pick up and acknowledge receipt of share certificates. We find there is ample evidence to support these allegations.

(a) Xiiva

[82] Crowe was the President and a director of Xiiva from September 2003, and Smith was a director of Xiiva from July 10 to July 19, 2007. Crowe's signature appears on all of the share certificates as President and Secretary of Xiiva. Crowe regularly signed Treasury Directions authorizing Heritage to issue shares and certifying that "the Company [had] received the full consideration therefor".

[83] Smith also signed Treasury Directions, as director, with similar representations on behalf of Xiiva, from December 2004 to July 2005 and on August 10, 2007.

[84] In his compelled examination, Crowe testified that Smith would tell him when Xiiva shares were sold.

[85] Nucaro testified that Smith was her main contact for Xiiva, but she would speak to Crowe if Smith was unavailable. She testified that Xiiva's Treasury Directions were usually received by fax, and that Smith and Crowe normally attend together at the Heritage office once or twice a month, but less often near the end of 2007, to pick up the share certificates. Staff entered into evidence copies of some of the Treasury Directions on which Smith, or, on a few occasions, Crowe, signed a handwritten note to indicate that the share certificates had been received from Heritage.

[86] We find that Smith and Crowe, as the directing minds of Xiiva, signed Treasury Directions to Heritage authorizing the issuance of Xiiva shares and attended at Heritage to pick up and acknowledge receipt of the share certificates. In addition, Crowe's signature appears on all of the Xiiva share certificates as President of Xiiva.

(b) Biomaxx

[87] Smith has been a director of Biomaxx since 2001, when the company was created. Crowe was an officer and director of Biomaxx from May 2005, and served as its President from February 2006, until, according to his affidavit, he resigned on June 30, 2007.

[88] Treasury Directions to Heritage were signed by Smith, Crowe, or Richard Farley Crowe, another director, whom Staff alleges is Crowe's son. The Biomaxx share certificates were signed by Smith as President.

[89] Nucaro testified that Smith was her main contact for Biomaxx, but Smith and Crowe attended regularly to pick up share certificates. Staff entered into evidence copies of some of the Treasury Directions on which Smith signed a handwritten note to indicate that the share certificates had been received from Heritage.

[90] We find that Smith and Crowe, as the directing minds of Biomaxx, signed Treasury Directions to Heritage authorizing the issuance of Biomaxx shares and attended at Heritage to pick up the share certificates. Smith acknowledged receipt of the share certificates, and his signature appears on the share certificates as President of Biomaxx.

(c) Conclusion on Treasury Directions and Share Certificates

[91] Issuing and signing share certificates have been found to fall within the definition of "acts in furtherance of a trade" (*Del Bianco v. Alberta (Securities Commission)*, [2004] A.J. No. 1222 (Alta. C.A.), at para. 9; *Re Momentas*, *supra*, at para. 80).

[92] We accept that Crowe and Smith engaged in acts in furtherance of trades by signing the Xiiva and Biomaxx Treasury Directions to Heritage, signing the share certificates, attending at Heritage to pick up the share certificates and providing a receipt for them.

2. Bank Accounts

[93] Staff submits that Crowe opened the Xiiva (XI Biofuels) bank accounts and Smith opened the Biomaxx bank accounts into which investor funds were deposited. Further, Staff alleges that Crowe was responsible for the transfer and attempted transfer of Xiiva funds to offshore accounts. We find that there is ample evidence to support these allegations.

(a) Xiiva

[94] On September 25, 2007, Crowe opened a bank account for XI Biofuels at Meridian. On the account application form, which is signed by Crowe as President, Crowe is listed as the only principal for XI Biofuels and its sole owner.

[95] We find that approximately $99,500 from XI Biofuels investors was deposited into the Meridian account in October and November 2007. There is no other source of funds for this account.

[96] Of that amount, Meridian's records show that Crowe wire transferred approximately $85,000 to the Sentinel Bank & Trust Ltd. in the Bahamas ("**Sentinel**") in favour of Timber Trace Investments ("**Timber Trace**"), which purports to be a "premier investor relations company" in three transactions on October 23, November 6 and November 21, 2007.

Approximately $8,800 was withdrawn in cash, and the remainder went for exchange fees and other minor business expenses.

[97] Crowe also opened two bank accounts for XI Biofuels at National. A Canadian dollar account was opened on October 17, 2007 and a U.S. dollar account was opened on October 31, 2007. Both account application forms were signed by Crowe as President.

[98] We find that in October and November 2007, approximately $131,500 was deposited into the Canadian dollar account at National from investors who purchased Xiiva "operating as XI Biofuels" shares. Approximately $59,500 USD was deposited into the U.S. dollar account at National from individual investors who purchased Xiiva "operating as XI Biofuels" shares. Approximately $94,500 USD was deposited into the U.S. dollar account from an entity called "the Subaraschi Foundation" on November 30, 2007, after the Commission issued the First Temporary Order and the Freeze Order. There are no other sources of funds for these accounts, except for a $1,000 deposit from an unknown source.

[99] Grace Smith testified that on November 7, 2007, Crowe requested that $8,863.54 from the Canadian dollar account and $70,250 USD from the U.S. dollar account be wired to Sentinel in favour of Timber Trace. The balance of the Canadian dollar account was $12,635.16 at the time and the balance of the U.S. dollar account was $81,083.59, with a hold on $10,800 of the balance. National did not allow the transfers to be completed, but contacted the RCMP, who contacted Staff on November 16, 2007. The Commission's Freeze Direction was issued on November 22, 2007.

[100] We find that Crowe, as President of XI Biofuels, opened three bank accounts for XI Biofuels into which funds were deposited from Xiiva and Xiiva "operating as XI Biofuels" investors. We also find that Crowe was responsible for the offshore transfer of funds from the Meridian account and attempted to transfer funds from the National accounts.

(b) Biomaxx

[101] On April 20, 2005, Smith and Richard Farley Crowe opened a Canadian dollar bank account at CIBC for Biomaxx. In the account application form, Richard Farley Crowe is listed as President and Smith as Secretary of Biomaxx, each with 50% equity ownership. The application form is signed by both individuals, and both are given signing authority.

[102] On July 10, 2007, Smith submitted a banking resolution giving himself sole signing authority as President and Secretary of Biomaxx.

[103] On the same day, Smith opened a U.S. dollar bank account at CIBC for Biomaxx. The account application form is signed by Smith, identifies him as President and Secretary of Biomaxx with 100% equity ownership, and gives him sole signing authority.

[104] We find that approximately $275,000 from investors was deposited into the Canadian dollar account. Of that amount, approximately $232,000 was deposited by PCAMT between July 16, 2006 and November 1, 2007 through approximately 25 transactions. In addition, three deposits totaling $9,000 came from Ontario investors, and seven other deposits totaling approximately $33,500 came from unknown sources.

[105] We find that approximately $71,000 USD from investors was deposited into the U.S. dollar account. Of that amount, apart from a $200 deposit from an unknown source, the remainder came from five deposits from PCAMT between July 10, 2007 and September 14, 2007.

[106] We find that Smith, as President of Biomaxx, opened two bank accounts for Biomaxx into which funds were deposited from Biomaxx investors.

(c) Conclusion on Bank Accounts and Investor Funds

[107] Accepting and depositing investor funds are acts in furtherance of trades (*Re Lett* (2004), 27 O.S.C.B. 3215 ("***Re Lett***"), at paras. 48-64; *Re Allen* (2005), 28 O.S.C.B. 8541 ("***Re Allen***"), at para. 85; *Re Limelight Entertainment Inc.* (2008), 31 O.S.C.B. 1727 ("***Re Limelight***"), at paras. 131 and 133).

[108] We find that Crowe and Smith engaged in acts in furtherance of trades in Xiiva and Biomaxx shares by opening the bank accounts for the Corporate Respondents for which they had signing authority and depositing investor funds into those accounts.

3. Websites

[109] Crowe and Smith admitted they were involved in creating and maintaining the Xiiva and Biomaxx websites. Staff submits that by doing so, they engaged in acts in furtherance of trades.

(a) Xiiva

[110] During cross-examination on his affidavit, Crowe admitted he had been involved in the material on the Xiiva website.

[111] Aside from general background information on the company, the XI Biofuels website included an "Investor Info" section which set out the company's future plans to "design, develop and construct 12 small scale biomass-to-ethanol plants in the next 5 years totaling 180 million gallons in production and approximately $252 million in gross revenue by 2011 with earnings in excess of $80 million", as well as pro forma financial statements for the years 2007 to 2011.

[112] The XI Biofuels website also included a "Current News" section which contained a series of press releases issued by the company. Each of the press releases started with a reference to XI Biofuels' trade name on the Pink Sheets, "XI Biofuels (Other OTC: XIVAF)". In addition, each of the press releases directed the reader to contact the "Investor Relations Department" for further information.

(b) Biomaxx

[113] During his compelled examination, Smith stated that he was the sole decision maker for Biomaxx, that he had control over the content of the Biomaxx website, which was designed by a web developer, and that he created the Biomaxx press releases that appeared on the website.

[114] The Biomaxx website included a "News" section that contained a number of press releases, all of which started with a reference to Biomaxx's trade name and symbol on the Pink Sheets, "Biomaxx Systems Inc. (Other OTC: BMXSF)". Each of the press releases also directed the reader to contact "Investor Relations" for further information, and provided an email address

for that purpose. The website also included an "Investors" section, which contained a phone number and email address for the Investor Relations department.

(c) Conclusion on Websites

[115] We are satisfied that Crowe was involved in the content on the XI Biofuels (Xiiva) website and that Smith created the press releases on the Biomaxx website.

[116] Staff submits that setting up a website that offers securities to investors over the internet constitutes an act in furtherance of a trade (*First Federal Capital (Canada) Corp.* (2004), 27 O.S.C.B. 1603 ("***Re First Federal***"), at para. 45).

[117] Further, Staff submits that a website need not specifically offer securities for its creation and maintenance to constitute an act in furtherance of a trade. Where a website is designed to "excite the reader" about the company's prospects, the website is considered an "advertisement or solicitation" for investment (*Re American Technology Exploration Corp.* (1998), 1998 LNBCSC 1 (B.C. Securities Commission) ("***Re AETC***"), at p. 7).

[118] We note, as well, that in *Re First Global Ventures, S.A.* (2007), 30 O.S.C.B. 10473 ("***Re First Global***"), the Commission relied on *Re First Federal* and *Re AETC* in holding that "setting up a website that offers securities and information about securities to investors over the Internet constitutes an act in furtherance of a trade" (at para. 127).

[119] In *Re Costello*, the Commission stated that a "useful guide" to whether an activity is an act in furtherance of a trade "is whether the activity in question had a sufficiently proximate connection to an actual trade" (*Re Costello*, *supra*, at para. 47). In *Re Momentas*, the Commission stated that the primary consideration in determining whether conduct is an "act in furtherance of a trade" is the effect of the conduct on investors and potential investors (*Re Momentas*, *supra*, at para. 77).

[120] In this case, two of the Xiiva investor witness testified that they reviewed the XI Biofuels website before making their purchases, and two of the Biomaxx investor witnesses testified that they reviewed the Biomaxx website before making their purchases. We find that the XI Biofuels and Biomaxx websites were intended to "excite the reader" and solicit potential investors by numerous misleading statements, and that at least some Xiiva and Biomaxx investors relied on the websites in making their decisions to invest. In the circumstances of this case, we find that the websites had a "proximate connection" to a trade, and accordingly, that Crowe and Smith engaged in acts in furtherance of a trade by creating and maintaining the websites.

4. Conclusion

[121] Considering the conduct of the Individual Respondents in its entirety and in context, we find that Smith and Crowe engaged in acts in furtherance of trades, including signing Treasury Directions to Heritage, signing share certificates, attending at Heritage to pick up share certificates, opening bank accounts and depositing investor funds into them, and creating and maintaining the XI Biofuels and Biomaxx websites.

C. Are Registration and Prospectus Exemptions available to the Respondents?

[122] Staff having established that the Respondents traded shares without registration and distributed shares without qualifying them under a prospectus, the onus shifts to the Respondents

to prove that an exemption from those requirements was available to them in the circumstances (*Re Limelight*, *supra*, at para. 142).

[123] Section 2.3 of National Instrument 45-106, *Prospectus and Registration Exemptions*, ((2005) 28 O.S.C.B. (Supp-4) 3, (2006), 29 O.S.C.B. 75, and (2007), 30 O.S.C.B. 10522 ("**NI 45-106**")) provides an exemption from the prospectus and registration requirements if the purchaser purchases the security as principal and is an "accredited investor", which is defined in section 1.1 of NI 45-106 to include:

> (j) an individual who, either alone or with a spouse, beneficially owns, directly or indirectly, financial assets having an aggregate realizable value that before taxes, but net of any related liabilities, exceeds $1,000,000,
>
> (k) an individual whose net income before taxes exceeded $200,000 in each of the 2 most recent calendar years or whose net income before taxes combined with that of a spouse exceeded $300,000 in each of the 2 most recent calendar years and who, in either case, reasonably expects to exceed that net income level in the current calendar year,
>
> (l) an individual who, either alone or with a spouse, has net assets of at least $5,000,000,

[124] The Respondents did not expressly claim the benefit of the accredited investor exemption, and did not lead any evidence to support such a claim, though some questions were asked of the investor witnesses relating to the exemption. Based on the evidence received, we find that at least two of the three Xiiva investors who testified and two of the three Biomaxx investors who testified were not accredited investors.

[125] In any event, even if the Respondents had proven that purchasers of Xiiva and Biomaxx shares were accredited investors, we find that Xiiva and Biomaxx are "market intermediaries" and therefore, pursuant to section 3.9 of NI 45-106, as it read at the Material Time, the accredited investor exemption is not available to the Respondents.

[126] At the Material Time, "market intermediary" was defined in subsection 204(1) of O. Reg. 1015, R.R.O. 1990, as amended ("**Regulation 1015**") to include "a person or company that engages or holds himself, herself or itself out as engaging in Ontario in the business of trading in securities as principal or agent, other than trading in securities purchased by the person or company for his, her or its own account for investment only and not with a view to resale or distribution, . . . "

[127] In *Re Momentas*, the Commission held that an issuer may be a market intermediary, if a "significant part" of its business is selling its own securities, even if the issuer is involved in more than one business (*Re Momentas*, *supra*, at paras. 56-57). In determining the "business purpose" of an issuer, the Commission considered the source of its revenue, the composition of its workforce, and the nature of its expenditures (*Re Momentas*, *supra*, at paras. 57-63). The Commission stated:

> . . . a key consideration for us is the degree to which management's activities and the proceeds of the offering were allocated to the raising of capital as opposed to being invested in the company's stated business activities.

(*Re Momentas*, *supra*, at para. 54)

[128] In *Re Lett*, the Commission held that the respondents were market intermediaries because "a substantial part" of their time was spent on the high yield program, and investors deposited and the respondents accepted monies for the purpose of the high yield program (*Re Lett*, *supra*, at para. 68; see also *Re Allen*, *supra*, at paras. 78-83).

[129] In this case, Xiiva and Biomaxx held themselves out to investors as operating a biofuels technology business, but there is little evidence to support that claim. For the following reasons, we find that the primary business of the Corporate Respondents was the business of raising capital.

(a) Xiiva

[130] XI Biofuels and XI Energy are trade names for Xiiva.

[131] The following statement is found on the "Investor Info" page of the XI Biofuels website:

> XI Biofuels is in the process of designing and building a small scale, modular, fully automated micro bio refineries [sic] specializing in the production of quality ethanol from waste wood products. We will build our first plant in a Canadian province that has a large supply of abandoned wood waste.
>
> XI Biofuels' goal for 2007 is to design, build and operate our first small, inexpensive high-value fuel production facility that specializes in the production of ethanol from wood waste. While other companies are building large scale expensive mega factories to produce ethanol we believe that small footprint production facilities will prove to be more economical, more innovative and can be located closer to the feedstock source.
>
> **XI Biofuels' future plans** are to design, develop and construct 12 small scale biomass-to-ethanol plants in the next 5 years totaling 180 million gallons in production and approximately $252 million in gross revenue by 2011 with earnings in excess of $80 million. [emphasis in original]

[132] We were presented with no evidence that XI Biofuels was in fact in the "process of designing and building" a refinery, or that there was any reasonable basis for its stated future plan to "develop and construct 12 small scale biomass-to-ethanol plants in the next 5 years totaling 180 million gallons in production and approximately $252 million in gross revenue by 2011".

[133] XI Energy stated the following on the "About the Company" page of its website:

> XI Energy provides environmental consulting services in the fields of Bio Technology, Bio Fuels and Renewable energy with international consultants and agents in most major world wide markets. The key to the success of XI Energy is the ability to leverage a network of experienced professionals each with distinct specializations in the key areas of biotechnology and bioenergy.

[134] And the following statement is found on the "Investor Relations" page of the XI Energy website, under the heading Management and Advisors:

> The Management and Professional advisors have extensive knowledge in the areas of biotechnology, biochemistry, finance and professional consulting. The primaries have diverse backgrounds and extensive practical experience. The key to the success of the company is the employment of qualified consultants in the areas of science and technology, environmental consulting, and management consulting. XI Energy has also build [sic] and will continue to develop an advisory council comprised of industry advocates and experienced professionals.

[135] We were presented with no evidence that XI Energy had in fact provided "environmental consulting services", that it had "international consultants and agents in most major world wide markets", or that it had built an "advisory council comprised of industry advocates and experienced professionals". Though he signed at least one Treasury Direction authorizing Heritage to issue Xiiva "operating as XI Energy" share certificates and his signature appears on all the Xiiva "operating as XI Energy" share certificates entered into evidence, Crowe stated, during his compelled examination, that he could not remember what the business of XI Energy was.

[136] Xiiva operated out of virtual offices. Staff's investigation showed that the street address given on the XI Energy and XI Biofuels websites – Suite 401, 50 Burnhamthorpe Road West, Mississauga – is the address for MacKenzie Business Centre, a provider of temporary office facilities, mail and phone services, with which XI Biofuels had an account.

[137] Further, Staff presented evidence that the U.S. address given on the XI Biofuels website – 44 Wall Street, 12th floor, New York City – is the address of Prime Office Centers, another virtual office, and that a US investor was directed to send payment for XI Biofuels shares to another U.S. address – 1001 Avenue of the Americas, New York City, a virtual office operated by Corporate Suites.

[138] The Trustee's Report to the Bankruptcy Court, which included all the documents provided by the Corporate Respondents, was entered into evidence (the "**Trustee's Binders**"). The Statements of Affairs and unaudited financial statements included in the Trustee's Binders provide no evidence that Xiiva or XI Biofuels or XI Energy earned any revenue or that they entered into any contracts with third parties for the purchase or provision of goods and services, except for opening the bank accounts. The only expenses on Xiiva's financial statements included in the Trustee's Binders are office expenses, management fees, and transfer agent's fees and expenses.

[139] As noted at para. 96, above, approximately $85,000 of the $99,500 on deposit in XI Biofuels' Meridian account was wire-transferred to what purported to be an investor relations company in the Bahamas in October and November 2007. The remainder went for exchange fees, fees for Heritage and other minor business expenses, or was withdrawn in cash.

[140] At Crowe's request, Zaba prepared a financial statement for Xiiva for the year ended June 30, 2008. It lists an expense of $90,541 for "marketing expenses" relating to the Meridian account, and Zaba testified that this was based on information provided by Crowe. Zaba stated that he did not know why the company was incurring such a large marketing expense, or what it was marketing.

[141] Prior to the Freeze Direction, the only debits on the Canadian dollar account at National were two small cheques for business expenses and a transfer of $67,440 to the U.S. dollar account. There were no debits on the U.S. dollar account.

[142] There is no evidence that Xiiva (XI Biofuels) conducted any business activities relating to biofuels technology. Based on the evidence, including evidence about Xiiva's use of virtual offices and the disposition of investor funds, we find that Xiiva was in the business of raising capital and was not in the biofuels technology business.

(b) Biomaxx

[143] In most of the Biomaxx press releases available on its website, the following statement appears, describing the business of the company:

> BioMaxx Systems is a biotechnology consulting company that focuses on the development of innovative technology solutions to address our dependence on fossil fuels. The company develops technologies to produce clean fuels such as Ethanol and Hydrogen and promotes clean, efficient alternatives that reduce harmful carbon dioxide emissions and Green House Gases.
>
> BioMaxx Systems Inc. provides professional consulting services in the fields of biotechnology, bio-fuels, renewable energy and related specializations. BioMaxx will leverage the knowledge of our experienced professionals and consultants with distinct specializations in the key areas of biotechnology and bio-energy. BioMaxx Systems Inc. is a Canadian company with international reach, covering most global markets.

[144] We were presented with little evidence that Biomaxx was developing "technologies to produce clean fuels", that it had provided any "professional consulting services", that it had multiple "experienced professionals and consultants", or that it had an "international reach covering most global markets".

[145] Based on various Biomaxx financial documents that are included in the Trustee's Binders, it appears that Biomaxx retained Kosaric as its "principal and independent consultant" though an agreement with Kayplan in November, 2004 and that the contract was extended, as amended, in December, 2006. There is evidence that Biomaxx paid Kayplan $80,260 for Kosaric's services.

[146] We also accept that in June and August, 2007, Biomaxx purchased equipment from Buffalo Biodiesel Inc. ("**Buffalo Biodiesel**") in two separate transactions totaling $63,000. Roughly the same amount was listed on Biomaxx's September, 2007 financial statement as a capital asset, described as a "biodiesel plant under construction", but this actually related to purchased equipment, some of which was refurbished. We received no evidence that Biomaxx undertook any capital projects. In fact, Staff presented evidence that the address given on the Biomaxx website – Suite 1801, 1 Yonge Street, Toronto – is a virtual office operated by Telsec Business Centres Inc.

[147] We also accept that Biomaxx entered into memoranda of understanding and letters of intent with various third parties. However, there is no evidence that these arrangements generated any revenue for Biomaxx. In fact, there is no evidence that Biomaxx earned any

revenue whatsoever. Zaba prepared unaudited financial statements for Biomaxx for the year ended December 31, 2006 and for the nine-month period ended September 30, 2007, both of which listed Biomaxx's gross revenue as zero.

[148] Nor are Biomaxx's business expenses consistent with a biofuels technology business. Based on the bank records, Biomaxx's funds were disbursed to Kayplan ($80,260); Buffalo Biodiesel ($63,000); Smith ($58,412); Crowe ($16,507); Richard Crowe ($8,200); FedEx ($24,999) and UPS ($1,602) for courier services; travel ($21,884); unexplained ATM withdrawals ($19,041); Heritage ($11,000, plus another $11,604.30 owed at the time of the bankruptcy); and other expenses totaling $23,348. The unaudited financial statements list automotive expenses, business meals, consulting fees, courier fees, management fees, marketing expenses, memberships, office expenses, professional fees, telecommunication, transfer agent fees and expenses and travel expenses.

[149] Although the evidence with respect to Kosaric, Buffalo Biodiesel and arrangements with third parties is consistent with the Respondents' claim that Biomaxx was engaged in developing biofuels technology, we find that the weight of the evidence, taken as a whole, establishes that Biomaxx was primarily in the business of raising capital.

[150] Accordingly, we conclude that the Respondents were "market intermediaries" and cannot rely on the accredited investor exemption.

[151] We find that the Respondents contravened s. 25(1)(a) of the Act by trading Xiiva and Biomaxx shares without registration, and contravened s. 53(1) of the Act by distributing those shares without qualifying them under a prospectus, in circumstances where a registration and prospectus exemption was not available.

D. Did the Respondents act contrary to the public interest?

[152] Staff alleges that the Respondents' conduct was contrary to the public interest and harmful to the integrity of Ontario's capital markets.

[153] We agree. We find that the Respondents acted contrary to the public interest by engaging in illegal trades and distributions of shares contrary to the Act, as stated at para. 151, above.

[154] We also find that the Respondents acted contrary to the public interest by (i) making false or misleading statements on the XI Biofuels and Biomaxx websites; (ii) failing to account for the disposition of investor funds, most of which never made their way to the Corporate Respondents or their bank accounts; and (iii) transferring and attempting to transfer investor funds offshore.

[155] Each allegation is discussed in detail below.

1. False or Misleading Statements

[156] In *First Global*, the Commission reaffirmed the importance of disclosure in protecting investors and the capital markets:

> The efficient functioning of the capital markets relies on investors making informed choices based on accurate information. Indeed, this is also one of the purposes of the Act pursuant to section 1.1, "to foster fair and efficient capital markets and confidence in capital markets." When investors base their choices on

> false and/or misleading information this harms the capital markets because investors can lose money and the public will lose confidence in the proper functioning of the capital markets. Transparency and efficiency in the markets is diminished when inaccurate information is disseminated in the market place.
>
> (*First Global, supra*, at para. 182. See also *Re Koonar* (2002), 25 O.S.C.B. 2691.)

[157] For the reasons given at paras. 130-149, above, we find that the XI Biofuels, XI Energy and Biomaxx websites contained numerous false or misleading statements, contrary to the public interest, including by misrepresenting Xiiva (XI Biofuels) and Biomaxx as biofuels technology companies with offices in Mississauga and New York (XI Biofuels) and Toronto (Biomaxx). Investors relied on these misrepresentations in making their investments. In fact, the Respondents were market intermediaries in the primary business of raising capital who were operating out of virtual offices, and there is no evidence investor funds were committed to the development of a biofuels technology business.

2. Disposition of Investor Funds

[158] Staff submits that most of the investor funds received in exchange for shares in Xiiva or Biomaxx are not accounted for in the Corporate Respondents' known bank accounts.

(a) Xiiva

[159] During his compelled examination, Crowe stated that the Meridian and National accounts, which are held in the name of XI Biofuels, are Xiiva's only bank accounts. Nor was any other information included in the Trustee's Binders. Crowe opened the Meridian account in September 2007 and the National accounts in October 2007.

[160] Staff presented evidence that of the 7,877,223 shares issued from treasury, only 27,200 were paid for by remittances to the National and Meridian accounts, leaving approximately 7,800,923 shares unaccounted for.

[161] Between July 10, 2007 and November, 2007, when the Freeze Direction was issued, Xiiva issued 203,896 shares to 61 individual investors. However, deposits into the Meridian and National accounts represent payments from only 23 investors for 76,300 shares. No funds for the other 127,596 shares issued to 38 individual investors during this period were deposited. Of those 38 investors, 13 indicated on their investor questionnaires that they were directed by SIG, EEG, or Crickmore to make payments to a Bank of America account, and that they transferred a total of $240,000 USD to the account. We received no evidence as to the disposition of funds from the remaining 25 individual investors.

[162] In addition, we received no evidence as to the disposition of the funds received from 12 individual investors for 41,000 shares of Xiiva "operating as XI Energy" from December, 2004 to July, 2006.

[163] Finally, as stated at para. 63, above, approximately 3,100,000 Xiiva shares were issued to offshore entities, some of whom re-distributed shares to individual investors. No proceeds from the distributions to Hogarth, Transocean, MMTC, PCAMT or Secure were deposited into Xiiva's known accounts.

(b) Biomaxx

[164] During his compelled examination, Smith stated that Biomaxx deposited investor funds into its bank account at CIBC. As stated at paras. 88 and 101, above, Smith and Richard Farley Crowe opened a Canadian dollar account at CIBC in April 2005, and Smith opened a U.S. dollar account at CIBC on July 10, 2007, both in the name of Biomaxx.

[165] As stated at para. 104, above, approximately $275,000 was deposited into the Canadian dollar account, of which approximately $230,000 is attributable to 25 transactions through PCAMT from July 14, 2006 to November 1, 2007. Another seven deposits totaling approximately $23,000 came from unknown sources, and three deposits totaling $9,000 came directly from three Ontario investors.

[166] Apart from a deposit of $200 from unknown sources, the approximately $71,000 deposited into the CIBC U.S. dollar account came from PCAMT in five transactions from July 10, 2007 to September 14, 2007.

[167] However, there is evidence that the sale of Biomaxx shares raised considerably more than the amounts deposited into the CIBC accounts.

[168] For example, Investor Five paid PCAMT a total of $598,195 USD for Biomaxx treasury shares, and information collected from six other investors by Staff indicates that they paid a total of $133,882 USD to PCAMT in exchange for Biomaxx treasury shares. These amounts, alone, exceed the total amount deposited by PCAMT into the CIBC accounts.

[169] Further, there are no funds credited to the CIBC accounts that are attributable to Hogarth, Aura or Transocean, which redistributed Biomaxx shares to the public.

3. Offshore Transfers

[170] As stated at para. 96, above, Meridian's records show that of the approximately $99,500 deposited into XI Biofuels' Meridian account, approximately $85,000 was wire transferred to a bank in the Bahamas in October and November 2007. Meridian's records show that the wire transfers were completed shortly after investor remittances were received.

[171] As stated in para. 99, above, in November 2007, Crowe also attempted to wire transfer, to the same Bahamas account, $8,863.54 of the $12,635.16 that was then on deposit in XI Biofuels' Canadian dollar account at National, and $70,250 USD of the $81,083.59 USD that was then on deposit in XI Biofuels' U.S. dollar account at National, with a hold on $10,800 USD of that amount for cheques deposited. As stated, National refused the request and began an investigation which eventually led to the Commission's Freeze Direction, issued on November 22, 2007. At that time, the Canadian dollar account at National held approximately $63,000 and the U.S. dollar account held approximately $224,000 USD.

[172] In his affidavit dated March 17, 2008, Crowe stated that he attempted to transfer the funds in the National accounts to pay business expenses owed to Timber Trace. In his compelled examination, he stated that the money in the Meridian account was transferred to the Bahamas because Timber Trace "was owed money".

[173] In his compelled examination, Crowe stated that he was not aware of any written agreement between Timber Trace and XI Biofuels or Xiiva. The Trustee's Binders do not

include any invoices or other documents to explain the transfers and attempted transfers, and Timber Trace is not listed as a creditor in the Statement of Affairs of Xiiva or XI Biofuels.

[174] As stated, Xiiva's financial statements for the year ended June 30, 2008 list an expense of $90,541 for "marketing expenses" relating to the Meridian account. Zaba testified that this was based on information provided by Crowe. Zaba stated that he did not know why the company was incurring such a large marketing expense, or what it was marketing.

[175] Documents provided to Staff by the Securities Commission of the Bahamas show that the funds that were wired from the Meridian account to Timber Trace were converted to USD and withdrawn from the Sentinel account shortly afterwards. Staff was unable to obtain information about the beneficial ownership of Timber Trace.

[176] We do not find Crowe's explanation for the offshore transfers to be credible, because it was not supported by any evidence as to the nature and amounts of these expenses. We note that the transfers from the Meridian account accounted for most of the investor funds held in that account, and the attempted transfer from the National accounts would have had the same result if it had been completed. We are not satisfied that the offshore transfers and attempted transfer have been explained, and accordingly we conclude that this conduct was contrary to the public interest.

(c) Discussion and Conclusion

[177] The Respondents submit that discrepancies in the evidence as to the numbers of issued and outstanding shares and the proceeds received for them are the result of confusion or errors in their records or those of Heritage.

[178] The Respondents also submit that while the proceeds of sales of Xiiva shares by Venpar and VCPM/VC Private Management were remitted to Xiiva's bank accounts, the proceeds of sales by SIG, EEG and Crickmore were not remitted to Xiiva's bank accounts, but were remitted to two Bank of America accounts held in the name of IES. The Respondents note that the SEC Litigation Release concerning the Levines sets out the SEC's allegation that the Levines are involved in "the ongoing fraudulent sale of the shares of several thinly-capitalized issuers traded in the grey market", including Xiiva and Biomaxx. The Respondents also submit that some of the Xiiva investors who purchased shares had previously bought shares in entities that are related to the Levines, according to the SEC. The Respondents submit that there is no evidence of any connection between IES and the Respondents.

[179] Staff submits that the offshore entities were agents of the Respondents and alleges that the conduct of the offshore entities was contrary to the public interest.

[180] We are satisfied that there is some relationship between Biomaxx and PCAMT, based on (i) the evidence of two Biomaxx investor witnesses that when they contacted Biomaxx to ask about the status of PCAMT, they received a letter from Ralph Bayer ("**Bayer**") stating that PCAMT was acting for Biomaxx in the context of a private placement, that the representative dealing with the investor was an employee of PCAMT and that PCAMT shared Biomaxx's vision of integrity and professionalism; and (ii) Smith's statement, during his compelled examination, that Bayer had been an employee of Biomaxx for a time. The third Biomaxx

investor witness testified that she had made similar enquiries of Biomaxx and received an email response from Biomaxx stating that PCAMT "bought and sold shares for them".

[181] Based on the limited evidence we received about the role of the offshore entities in the distribution of Xiiva and Biomaxx securities and disposition of investor funds, we do not find it necessary to determine whether the offshore entities acted as the agents of the Respondents. We received ample evidence that the Respondents, through their own conduct, contravened the Act and acted contrary to the public interest.

E. Did the Individual Respondents authorize, permit or acquiesce in the Corporate Respondents' non-compliance with Ontario securities law, contrary to s. 129.2 of the Act?

[182] As stated above, we find that the Corporate Respondents (Xiiva, XI Biofuels and Biomaxx) and the Individual Respondents (Smith and Crowe) contravened s. 25(1)(a) of the Act by engaging in acts in furtherance of trades in Xiiva and Biomaxx shares without being registered, and contravened s. 53(1) of the Act by distributing Xiiva and Biomaxx shares when a preliminary prospectus and prospectus had not been filed and receipted, in circumstances where an exemption from the registration and distribution requirements was not available.

[183] In addition, Staff alleges that Smith and Crowe, as directors and/or officers or *de facto* directors and/or officers of Xiiva, XI Biofuels and Biomaxx, authorized, permitted or acquiesced in the Corporate Respondents' non-compliance with Ontario securities law, contrary to section 129.2 of the Act, which is as follows:

> **129.2 Directors and officers** – For the purpose of this Act, if a company or a person other than an individual has not complied with Ontario securities law, a director or officer of the company or person who authorized, permitted or acquiesced in the non-compliance shall be deemed to also have not complied with Ontario securities law, whether or not any proceeding has been commenced against the company or person under Ontario securities law or any order has been made against the company or person under section 127.

[184] Our findings are as follows.

1. Crowe

[185] We find that Crowe authorized, permitted or acquiesced in the non-compliance by Xiiva and Biomaxx with Ontario securities law.

(a) Xiiva

[186] Crowe was the principal of Xiiva and XI Biofuels. We made the following findings about his involvement:

- Xiiva's Corporation Profile Reports list Crowe as President and a director of Xiiva since September 2003 (para. 11, above).

- Crowe's signature appears on the Xiiva "operating as XI Energy" share certificates as President and Secretary of Xiiva (14, above).

- XI Biofuels' Corporation Profile Reports list Crowe as the company's sole director and officer (para. 15, above).

- Crowe signed Treasury Directions to Heritage directing Heritage to issue share certificates for Xiiva "operating as XI Energy" and Xiiva "operating as XI Biofuels" (paras. 67-68, above).

- Nucaro testified that Smith was her main contact for Xiiva, but that she would speak to Crowe if Smith were unavailable. Smith and Crowe normally attended at the Heritage office together to pick up Xiiva share certificates, and although it was usually Smith who provided a receipt for them, Crowe did so on some occasions (para. 85, above).

- Bank records show that Crowe opened bank accounts for XI Biofuels at National and Meridian, identifying himself as President of the company (paras. 17, 94 and 97, above).

- Crowe wire transferred most of the investor funds in the Meridian account to the Timber Trace account in the Bahamas in October and November 2007 (para. 96, above).

- On November 7, 2007, Crowe requested that most of the funds in the National accounts be wire transferred to Timber Trace (para. 99, above).

[187] Accordingly, we find that Crowe, as a director and officer of Xiiva and XI Biofuels, authorized, permitted or acquiesced in Xiiva's and XI Biofuels' non-compliance with Ontario securities law and is therefore deemed to also have not complied with Ontario securities law.

(b) Biomaxx

[188] As stated at para. 20, above, Biomaxx's Corporation Profile Report identifies Crowe as an officer and director of Biomaxx from May 2005, and its President from February 2006. In his affidavit, Crowe stated that he resigned from Biomaxx on June 30, 2007.

[189] We find that during the Material Time, Crowe was a *de facto* director and officer of Biomaxx, within the meaning of s. 1(1) of the Act, which defines "director" and "officer". "Director" is defined to mean "a director of a company or an individual performing a similar function or occupying a similar position for any person". "Officer", with respect to an issuer or registrant, is defined to mean:

> (a) a chair or vice-chair of the board of directors, a chief executive officer, a chief operating officer, a chief financial officer, a president, a vice-president, a secretary, an assistant secretary, a treasurer, an assistant treasurer and a general manager,
>
> (b) every individual who is designated as an officer under a by-law or similar authority of the registrant or issuer, and
>
> (c) every individual who performs functions similar to those normally performed by an individual referred to in clause (a) or (b);

[190] As stated above, we find that Crowe:

- was an officer and director of Biomaxx from May 2005, and served as its President from February 2006 until, according to his affidavit, he resigned on June 30, 2007 (para. 87, above);

- signed Biomaxx Treasury Directions during the Material Period (para. 88, above); and

- attended regularly at Heritage, with Smith, to pick up Biomaxx share certificates (para. 90, above).

[191] We find that Crowe was a *de facto* director and officer of Biomaxx, and that he authorized, permitted or acquiesced in Biomaxx's non-compliance with Ontario securities law and is therefore deemed to also have not complied with Ontario securities law.

2. Smith

[192] We find that Smith authorized, permitted or acquiesced in the non-compliance by Biomaxx and Xiiva with Ontario securities law.

(a) Biomaxx

[193] As stated above, we made the following findings about Smith's involvement in Biomaxx:

- Smith has been a director of Biomaxx since the company was created (paras. 20 and 28, above).

- Smith signed some of the Treasury Directions to Heritage, and his signature appears on the Biomaxx share certificates as President (para. 88, above).

- Smith was Nucaro's main contact for Biomaxx. Smith and Crowe attended regularly at the Heritage office together to pick up Biomaxx share certificates, and Smith sometimes made a handwritten note on the Treasury Directions to indicate that the share certificates had been received (para. 89, above).

- Smith and Richard Farley Crowe opened a Canadian dollar account for Biomaxx at CIBC, identifying Smith as Secretary and Richard Farley Crowe as President of the company, each with 50% equity ownership. Both signed the application form and both were given signing authority. On July 10, 2007, Smith submitted a banking resolution giving himself sole signing authority as President and Secretary of Biomaxx (paras. 101-102, above).

- On the same day, Smith opened a US dollar bank account at CIBC for Biomaxx. The application form identified him as President and Secretary with 100% equity ownership, and gave him sole signing authority (para. 103, above).

[194] We find that Smith, as a director and officer of Biomaxx, authorized, permitted or acquiesced in Biomaxx's non-compliance with Ontario securities law and is therefore deemed to also have not complied with Ontario securities law.

(b) Xiiva

[195] We make the following findings about Smith's conduct in relation to Xiiva:

- Xiiva's corporate minute book identifies Smith as a director from July 10 to July 19, 2007 (para. 12, above).

- From December 2004 to July 2005 and on August 10, 2007, Smith signed Treasury Directions to Heritage to issue shares of Xiiva (paras. 12 and 83, above).

- Smith was Nucaro's main contact for Xiiva. Smith and Crowe normally attended at the Heritage office together to pick up Xiiva share certificates, and it was usually Smith who made a handwritten note on the Treasury Directions to indicate that the share certificates had been received (para. 85, above).

[196] Though Smith was identified as a director of Xiiva for only one week during the Material Time, we find that Smith was a *de facto* director and officer of Xiiva throughout the Material Time. We find that Smith, as a director and officer or *de facto* director and officer of Xiiva and XI Biofuels, authorized, permitted or acquiesced in Xiiva's and XI Biofuels' non-compliance with Ontario securities law and is therefore deemed to also have not complied with Ontario securities law.

F. The Commission's Jurisdiction

1. Background

[197] At an earlier stage in this proceeding, the Respondents brought a constitutional motion before the Commission on the basis that the Act has no application to offshore distributions and therefore the Commission had no authority to issue a section 11 order or to compel the Respondents' evidence under section 13 of the Act. That motion was withdrawn in June 2008.

[198] The Respondents took the same position before Madam Justice Hoy, in response to the Commission's application, under subsection 126(5) of the Act, to continue the Freeze Direction ordered by the Commission on November 22, 2007, which was continued on consent by order of Justice Siegel, dated November 29, 2007. Justice Hoy continued the Freeze Order. In her endorsement, dated February 29, 2008, she made the following statement:

> The funds in the Ontario accounts are or strongly appear to be the proceeds of trades in securities of Xiiva Holdings Inc. ("Xiiva"), also an Ontario corporation. The directing minds of Xiiva are residents of Ontario, and they gave instructions, from Ontario to an Ontario transfer agent regarding the issuance of Xiiva shares.
>
> . . . .
>
> It is conceded that ss. 53 (prospectus requirement) and 25(1) (the registration requirement) of the Act were not complied with. Xiiva and its principals argue that they were not required to, because the investors were not residents of Ontario. The OSC relies, *inter alia*, on Gregory & Co. v. Quebec Securities Commission, [1961] S.C.R. [584], in support of its position that it nonetheless has jurisdiction to regulate Xiiva's activities.
>
> In this factual context, the OSC has at a minimum a *prima facie* case that Xiiva has breached ss. 53 and 25(1), and the OSC has jurisdiction to regulate Xiiva's activities. . . .

[199] The Respondents raised the issue again in closing written submissions during the hearing on the merits. Notice of Constitutional Question was provided to the Attorney General of Ontario and the Attorney General of Canada, and the Attorneys General advised, as they had when the issue was raised previously before the Commission, that they did not intend to participate in the hearing of the constitutional issue.

[200] Accordingly, we agreed to hear the issue as part of the parties' oral argument.

[201] In the Notice of Constitutional Question, the Individual Respondents identified the question in the following way:

> Whether the facts give rise to a sufficient nexus to the Province of Ontario such that the application of the Securities Act is properly within property and civil rights in the Province of Ontario or whether the application of the Securities Act is more properly characterized as an attempt to regulate extra-provincial, indeed, international activity beyond the jurisdiction of the Province of Ontario.

2. Positions of the Parties

[202] The Respondents submit that the Act has no application in this case. They note that the provinces have enacted securities legislation under their authority, pursuant to subsection 92(1) of the *Constitution Act, 1867*, to legislate in relation to "Property and Civil Rights in the Province". They submit that there is no evidence that shares in Biomaxx or Xiiva came to rest in Ontario, except for shares issued to the founders and their families. Further, Smith stated, in his affidavit, that he did not believe that Biomaxx was required to comply with subsections 25(1) and 53(1) of the Act because Biomaxx did not participate in the capital markets of Ontario, and Crowe made the same statement about Xiiva in his affidavit. Finally, the Respondents submit that lack of clarity with respect to the extra-jurisdictional application of the Act to offshore distributions does not allow market participants to have the certainty by which they can plan their business operations to be legally compliant.

[203] Staff submits that the Respondents have structured their affairs in a sophisticated multi-jurisdictional fashion (involving at least Ontario, the U.S., the Bahamas and Cyprus) with a view to avoiding regulatory oversight. Staff submits the case law is clear that the Commission has jurisdiction in these circumstances.

3. Analysis and Conclusion

[204] We reject the Respondents' position. We note that the Respondents are unable to cite a single case in support of their position that the Act does not apply to their conduct in this case. We find that there is ample authority for Staff's submission that the Commission has jurisdiction where respondents engaged in acts in furtherance of a trade in Ontario, though the securities were distributed to investors outside of Ontario.

[205] In *Gregory & Company Inc. v. Quebec (Securities Commission)*, [1961] S.C.R. 584 ("***Gregory***"), the corporate respondent argued that it was not subject to the jurisdiction of the Quebec Securities Commission. Although the respondent had its head office in Montreal, mailed promotional materials and telephoned investors from Montreal, and directed investors to mail payment cheques to Montreal, where it maintained its bank account, the investors resided outside Quebec. The Supreme Court of Canada stated that on these facts "one can only conclude" that

the respondent carried on the business of trading in securities and acting as investment counsel in Quebec:

> The fact that the securities traded by [the] appellant would be for the account of customers outside of the province or that its weekly bulletins would be mailed to clients outside of the province, does not, as decided in the Courts below, support the submission that [the] appellant was not trading in securities or acting as investment counsel, in the province, within the meaning and for the purposes of the Act Respecting Securities.
>
> The paramount object of the Act is to ensure that persons who, in the province, carry on the business of trading in securities or acting as investment counsel, shall be honest and of good repute and, in this way, to protect the public, **in the province or elsewhere**, from being defrauded as a result of certain activities initiated in the province by persons therein carrying on such a business. . . .
>
> (*Gregory, supra*, at p. 4 (QL)) [emphasis added]

[206] In *R. v. W. McKenzie Securities Ltd. et al* (1966), 56 D.L.R. 56, leave to appeal to the Supreme Court of Canada denied, [1966] S.C.R. ix ("***McKenzie Securities***"), the issue was whether the accused individuals, who operated out of Toronto and solicited a resident of Manitoba to buy securities, could be convicted of unlawfully trading without being registered, contrary to the Securities Act of Manitoba. The Manitoba Court of Appeal, in upholding the convictions, concluded that the provincial legislation did not impinge on the federal trade and commerce power:

> . . . . The Securities Act of Manitoba is not designed to reach out beyond the provincial borders and to restrain conduct carried on in other parts of Canada or elsewhere. Its operation is effective within Manitoba, and nowhere else. For a person to become subject to its restraint, he must trade in securities in Manitoba. This is not to say that a non-resident of Manitoba can never become subject to the controls of the statute. If the activities of such a non-resident can fairly and properly be construed as constituting trading with the Province, then they fall within the purview of the Act.
>
> (*McKenzie Securities*, *supra*, at p. 63)

[207] In *R. v. Libman*, [1985] 2 S.C.R. 178 ("***Libman***"), the Supreme Court of Canada held that the accused could be charged with fraud and conspiracy to commit fraud under the *Criminal Code*, R.S.C. 1985, c. C-46, as amended, though some elements of the offences occurred outside of Canada. Libman and his employees allegedly telephoned U.S. residents and attempted to sell them shares in two Costa Rican gold mining companies. Promotional materials were mailed out from Costa Rica or Panama, investors were told to send their money to offices in Costa Rica or Panama, and Libman met with associates in Costa Rica and Panama to receive his share of the proceeds. However, the "boiler room" was located in Toronto and some of the proceeds were wired back to Toronto.

[208] In the following passage, the Court in *Libman* noted that in *McKenzie Securities*, the Manitoba Court of Appeal had "underlined that an offence could occur in more than one place":

> Although offences are local, the nature of some offences is such that they can properly be described as occurring in more than one place. This is peculiarly the case where a transaction is carried on by mail from one territorial jurisdiction to another, or indeed by telephone from one such jurisdiction to another. This has been recognized by the common law for centuries.
>
> (*McKenzie Securities*, *supra*, at para. 22, cited in *Libman*, *supra*, at para. 53)

[209] Recently, the Ontario Court of Appeal followed the *Libman* analysis in *R. v. Stucky*, [2009] O.J. No. 600. In that case, the accused was charged, under subsection 52(1) of the *Competition Act*, R.S.C. 1985, c. C-34, as amended, with making false or misleading representations "to the public". The accused operated a direct mail business in Ontario that sold lottery tickets and merchandise only to persons outside of Canada. The Court held the phrase "to the public" in subsection 52(1) was not restricted to "the Canadian public".

[210] We accept Staff's submission that the Court's reasoning in *Libman* applies in this case.

[211] Staff also relies on two Commission cases, *Re Lett* and *Re Allen*.

[212] In *Re Lett*, the Commission found that the respondents had acted in furtherance of trades and that those acts occurred in Ontario, although there was no evidence that the trades involved investors in Ontario::

> The Respondents were all based in the Toronto area, had bank accounts in the Toronto area, carried on business in the Toronto area. Most, if not all, of the documents referred to in the Agreed Statement of Facts and in the six volumes of documents composing the Joint Hearing Brief consist of documents that were either sent by the Respondents from the Toronto area or addressed to them in the Toronto area.
>
> (*Re Lett*, *supra*, at para. 66)

[213] In *Re Allen*, the Commission dealt with the issue in the following way:

> In this case, sales of securities of Andromeda were made by the Respondents to investors in Ontario and in Alberta. A substantial portion of the activities surrounding the sales of these securities by the Respondents took place in Ontario. The issuer is located in Welland, Ontario. The Respondent's offices and operations were based in Toronto, Ontario. The promotional materials were mailed from Toronto. The phone calls made by the Respondents were made from their Toronto offices and cheques in payment for the purchase of Andromeda securities were also sent to this location.
>
> The Commission has jurisdiction over a trade in securities, notwithstanding that the purchaser is in a different province, provided that some substantial aspect of the transaction occurred within Ontario. In *Gregory & Co. Inc. v. Quebec Securities Commission*, [1961] S.C.R. 584, at para. 10, the Supreme Court of Canada concluded that the fact that the offices and operations of the vendor were in Montreal was sufficient to give the Quebec Securities Commission jurisdiction over sales to extra-provincial purchasers.

(*Re Allen*, supra, at paras. 20 and 21)

[214] We accept Staff's submission that there is "ample connection to Ontario" in this case. The registered offices of the Corporate Respondents are in Ontario, and Crowe and Smith, the directing minds of the Corporate Respondents, are residents of Ontario. Heritage, the transfer agent for Xiiva and Biomaxx, is located in Ontario. Crowe and Smith issued Treasury Directions in Ontario, instructing Heritage to issue Xiiva and Biomaxx shares, and Crowe and Smith regularly picked up the share certificates at Heritage's offices in Toronto. Funds for the purchase of some Xiiva treasury shares were deposited into Ontario bank accounts at National and Meridian. Funds for the purchase of some or all of Biomaxx's treasury shares were sent to a bank account in Cyprus to the benefit of PCAMT. PCAMT frequently wired funds from Cyprus to Biomaxx's bank accounts at CIBC in Ontario. On these facts, we conclude that the Respondents' conduct has a sufficient and substantial connection to Ontario and that the Act applies to it.

[215] Finally, the Respondents rely on Interpretation Note 1 to Former Commission Policy 1.5, "Distribution of Securities outside of Ontario" (the "**Interpretation Note**") in support of their submission that "securities regulators have understood that they have very limited ability to regulate the distribution of securities outside of their respective borders". In dismissing this submission, it is sufficient to refer to the following excerpt, which we find to be pertinent to the case before us:

> **5. The Integrity of the Ontario Capital Markets and the Jurisdiction of the OSC**
>
> Needless to say, the Commission will not hesitate to intervene, to the extent of its powers, in distributions of securities outside of Ontario which negatively impact upon the integrity of Ontario capital markets.
>
> Where the Commission becomes aware of distributions abroad by Ontario issuers that bring the reputation of Ontario's capital markets into disrepute, the Commission is of the view that it has the jurisdiction, for the due administration of the Act and in order to preserve the integrity of the Ontario capital markets, to exercise its cease trade powers or to take other appropriate action against issuers, underwriters and other participants so distributing abroad.

[216] We accept Staff's submission that the Respondents in this case structured a sophisticated multi-jurisdictional scheme in order to avoid regulatory oversight. We find that the Respondents sought to benefit from the reputation of Ontario's capital markets, and that many investors outside of Ontario thought they were investing in an Ontario biofuels technology company. In fact, most of the funds paid by the investors never made their way to Xiiva or Biomaxx. Of the investor funds that were deposited into Xiiva's bank accounts in Ontario, the funds deposited into the Meridian account were transferred offshore almost immediately, and Crowe attempted to transfer the funds deposited into the National account. We find that the Respondents' conduct negatively impacts upon the reputation and integrity of Ontario's capital markets, and that the Commission has the authority and responsibility to intervene.

V. CONCLUSION

[217] We conclude that:

(a) the Respondents traded in securities of Xiiva and Biomaxx without being registered to trade in securities and without any registration exemption being available, contrary to s. 25(1)(a) of the Act and contrary to the public interest;

(b) the Respondents distributed securities of Xiiva and Biomaxx when a preliminary prospectus and a prospectus had not been filed and receipts had not been issued by the Director, and without any prospectus exemption being available, contrary to s. 53(1) of the Act and contrary to the public interest;

(c) Smith and Crowe, as directors and/or officers or *de facto* directors and/or officers of the Corporate Respondents, authorized, permitted or acquiesced in the contraventions of s. 25(1)(a) and s. 53(1) of the Act by the Corporate Respondents set out in paras. (a) and (b) above, contrary to s. 129.2 of the Act and contrary to the public interest; and

(d) the Respondents engaged in conduct that is contrary to the public interest and harmful to the integrity of the Ontario capital markets by contravening s. 25(1)(a), s. 53(1) and s. 129.2 of the Act, as set out above in paras. (a), (b) and (c), and by making false or misleading statements to investors on the XI Biofuels, XI Energy and Biomaxx websites, failing to account for the disposition of investor funds, most of which never made their way to the Corporate Respondents, and transferring or attempting to transfer Xiiva investor funds offshore.

[218] The parties are required to contact the Office of the Secretary to the Commission within ten days of the release of this decision to arrange a date for a hearing on Sanctions and Costs.

DATED in Toronto this 31st day of March, 2010.

"Wendell S. Wigle"	*"David L. Knight"*
Wendell S. Wigle, QC	David L. Knight, FCA