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 ON SANCTIONS AND COSTS
(Sections 127 and 127.1 of the *Securities Act*)

Hearing:	May 26, 2010	
Decision:	November 17, 2010	
Panel:	David L. Knight, FCA	- Commissioner and Chair of the Panel
	Margot C. Howard, CFA	- Commissioner
Appearances:	Yvonne Chisholm 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., Xiiva Holdings Inc. or Biomaxx Systems Inc.

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REASONS AND DECISION

I. BACKGROUND

[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 alleged 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 alleged that Smith and Crowe (together, 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 were withdrawn during the hearing.

[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 ("**National**") (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**").

[8] The matter proceeded by way of a bifurcated merits and sanctions hearing. The hearing on the merits was held on January 5, 7, 8, 9, 12, 13, 14, 15 and 16, 2009 (the "**Hearing on the Merits**") and the Commission's decision on the merits was released on March 31, 2010 (the "**Merits Decision**").

[9] Staff and the Individual Respondents (the "**Parties**") filed and served written submissions on sanctions and costs, and we heard their oral submissions on sanctions and costs on May 26, 2010 (the "**Sanctions and Costs Hearing**"). The Corporate Respondents did not attend or participate in the Sanctions and Costs Hearing.

II. THE MERITS DECISION

[10] Staff called twelve witnesses at the Hearing on the Merits, including two Staff investigators, three Biomaxx investors and three Xiiva investors. The Corporate Respondents did not participate. Smith and Crowe did not testify and they did not call any witnesses. Staff and the Individual Respondents read into the evidence excerpts from affidavits sworn by Crowe and Smith, Staff's cross-examination on the affidavits, and Staff's compelled examination of Crowe and Smith.

[11] The Commission made the following key findings in the Merits Decision:

> (a) 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 did not claim any exemptions under the Act in relation to the distribution and sale of Xiiva and Biomaxx securities and no exemptions were available. (Merits Decision, paragraphs 8 and 151)
>
> (b) Smith, in his capacity as the sole director of Biomaxx, admitted that Biomaxx distributed its securities without complying with s. 53 of the Act and that its representatives traded its securities without being registered pursuant to s. 25 of the Act. Crowe, in his capacity as the sole director of Xiiva, admitted that Xiiva distributed its securities without complying with s. 53 of the Act and that its representatives traded its securities without being registered pursuant to s. 25 of the Act. These admissions were supported by evidence including investor records, treasury directions, shareholder lists and financial statements and other documents the Corporate Respondents provided to the Trustee. (Merits Decision, paragraphs 51-53)
>
> (c) Xiiva and Biomaxx securities were sold through a number of offshore entities, and there was no evidence that Crowe or Smith directly contacted investors to solicit sales. However, the Commission accepted that Crowe and Smith traded in Xiiva and Biomaxx securities, based on the totality of their conduct, considered in context, and in particular, 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. (Merits Decision, paragraphs 53, 79-80)

(d) The Xiiva and Biomaxx websites were intended to "excite the reader" and solicit potential investors by making numerous misleading statements, and at least some of the Xiiva and Biomaxx investors who testified relied on the websites in making their decisions to invest. Though Xiiva and Biomaxx held themselves out to investors as operating a biofuels technology business, their primary business was raising capital and there was little evidence that they were engaged in any business other than raising capital. Smith and Crowe admitted they were involved in the material on the websites. (Merits Decision, paragraphs 110, 113, 120, 129, 142 and 149)

(e) Crowe was an officer and director of Xiiva and XI Biofuels, and he authorized, permitted or acquiesced in the non-compliance by Xiiva and XI Biofuels with Ontario securities law, based on the following findings about his involvement:

- Xiiva's Corporation Profile Reports list Crowe as President and a director of Xiiva since September 2003;
- Crowe's signature appears on the Xiiva "operating as XI Energy" share certificates as President and Secretary of Xiiva;
- XI Biofuels' Corporation Profile Reports list Crowe as the company's sole director and officer;
- Crowe signed Treasury Directions to Heritage directing Heritage to issue share certificates for Xiiva "operating as XI Energy" and Xiiva "operating as XI Biofuels";
- Filomena Nucaro ("**Nucaro**"), Senior Administrative Assistant at Heritage, testified that she would contact Crowe about Xiiva if Smith were unavailable, that Crowe and Smith normally attended at the Heritage office together to pick up Xiiva share certificates, and that Crowe occasionally provided a receipt for them;
- bank records show that Crowe opened bank accounts for XI Biofuels at National and Meridian Credit Union ("**Meridian**"), identifying himself as President of the company;
- Crowe wire transferred most of the investor funds in the Meridian account to a bank account in the Bahamas in October and November 2007; and
- On November 7, 2007, Crowe requested that most of the funds in the National accounts be wire transferred to that same offshore account, but the transfer was not completed and led to the investigation that culminated in the Commission proceeding.

(Merits Decision, paragraphs 99, 186-187)

(f) Crowe was an officer and director or *de facto* officer and director of Biomaxx within the meaning of s. 1(1) of the Act throughout the Material Time, and authorized, permitted or acquiesced in Biomaxx's non-compliance with Ontario securities law, based on the following findings about his involvement:

- 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;
- Crowe signed Biomaxx Treasury Directions during the Material Period; and
- Crowe attended regularly at Heritage, with Smith, to pick up Biomaxx share certificates.

(Merits Decision, paragraphs 188-191)

(g) Smith was an officer and director of Biomaxx, and authorized, permitted or acquiesced in Biomaxx' non-compliance with Ontario securities law, based on the following findings about his involvement:

- Smith was a director of Biomaxx from the time the company was created;
- Smith signed some of the Treasury Directions to Heritage, and his signature appears on the Biomaxx share certificates as President;
- Smith was Nucaro's main contact for Biomaxx, and Smith and Crowe attended regularly at the Heritage office together to pick up Biomaxx share certificates, and Smith sometimes gave a receipt for them;
- Smith and Richard Farley Crowe, who Staff submits is Crowe's son, 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 each had signing authority;
- on July 10, 2007, Smith submitted a banking resolution giving himself sole signing authority as President and Secretary of Biomaxx; and
- on the same day, Smith opened a US dollar bank account at CIBC for Biomaxx, identifying him as President and Secretary with 100% equity ownership, and with sole signing authority.

(Merits Decision, paragraphs 193-194)

(h) Smith was an officer and director or a *de facto* officer and director of Xiiva, within the meaning of s. 1(1) of the Act, throughout the Material Time, and authorized, permitted or acquiesced in Xiiva's non-compliance with Ontario securities law, based on the following findings about his involvement:

- Xiiva's corporate minute book identifies Smith as a director from July 10 to July 19, 2007;
- from December 2004 to July 2005 and on August 10, 2007, Smith signed Treasury Directions to Heritage to issue shares of Xiiva;
- 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 gave a receipt for them.

(Merits Decision, paragraphs 195-196)

[12] The Commission summarized its findings as follows:

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.

(Merits Decision, paragraph 216)

[13] Based on these findings, the Commission concluded 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 paragraphs (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 paragraphs (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.

(Merits Decision, paragraph 217)

III. THE SANCTIONS REQUESTED BY STAFF

[14] Staff submits that the following sanctions are appropriate and in the public interest:

(i) an order that each of the Respondents cease trading in securities permanently pursuant to clause 2 of subsection 127(1) of the Act;

(ii) an order that the acquisition of any securities by each of the Respondents is prohibited permanently pursuant to clause 2.1 of subsection 127(1) of the Act;

(iii) an order that any exemptions contained in Ontario securities law do not apply to each of the Respondents permanently pursuant to clause 3 of subsection 127(1) of the Act;

(iv) an order reprimanding each of the Respondents pursuant to clause 6 of subsection 127(1) of the Act;

(v) an order that each of Smith and Crowe resign all positions that they may hold as a director or officer of any issuer, registrant or investment fund manager pursuant to clauses 7, 8.1 and 8.3 of subsection 127(1) of the Act;

(vi) an order that each of Smith and Crowe be prohibited from becoming or acting as a director or officer of any issuer, registrant or investment fund manager pursuant to clauses 8, 8.2 and 8.4 of subsection 127(1) of the Act;

(vii) an order that the Respondents be prohibited from becoming or acting as a registrant, as an investment fund manager or as a promoter pursuant to clause 8.5 of subsection 127(1) of the Act;

(viii) an order requiring each of the Respondents to pay an administrative penalty of CDN $200,000.00 pursuant to clause 9 of subsection 127(1) of the Act;

(ix) an order making Xiiva, XI Biofuels, Smith and Crowe jointly and severally liable to disgorge to the Commission CDN $231,000.00 plus an amount in Canadian currency sufficient to purchase US $383,170.00 pursuant to clause 10 of subsection 127(1) of the Act, to be designated

pursuant to subsection 3.4(2)(b) of the Act for allocation to or for the benefit of third parties;

(x) an order making Biomaxx, Smith and Crowe jointly and severally liable to disgorge to the Commission an amount in Canadian currency sufficient to purchase US $732,077.00 pursuant to clause 10 of subsection 127(1) of the Act, to be designated pursuant to subsection 3.4(2)(b) of the Act for allocation to or for the benefit of third parties; and

(xi) an order pursuant to section 127.1 of the Act requiring the Respondents to pay, on a joint and several basis, CDN $117,441.51 representing a portion of the costs of the hearing.

IV. ANALYSIS & CONCLUSIONS

A. Effect of the Bankruptcy of the Corporate Respondents

1. Positions of the Parties

(a) The Individual Respondents

[15] The Individual Respondents submit that pursuant to section 69.3 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("***BIA***"), Staff cannot obtain a monetary order against the Corporate Respondents without seeking leave of the bankruptcy court under section 69.4 of the *BIA*. Staff has not done so.

[16] Section 69.3 of the *BIA*, at the Material Time, provided that "on the bankruptcy of any debtor, no creditor has any remedy against the debtor or the debtor's property, or may commence or continue any action, execution or other proceedings, for the recovery of a claim provable in bankruptcy, until the trustee has been discharged."

[17] Section 69.3 is subject to section 69.4 of the *BIA*, which read as follows at the Material Time:

> 69.4 A creditor who is affected by the operation of section 69 to 69.31 or any other person affected by the operation of section 69.31 may apply to the court for a declaration that those sections no longer operate in respect of that creditor or person, and the court may make such a declaration, subject to any qualifications that the court considers proper, if it is satisfied
>
> (a) that the creditor or person is likely to be materially prejudiced by the continued operation of those sections; or
>
> (b) that it is equitable on other grounds to make such a declaration.

[18] The Individual Respondents submit that a monetary order against the Corporate Respondents would interfere with the scheme of priority amongst creditors established under the *BIA*, contrary to the Supreme Court of Canada decision in *Husky Oil* where Gonthier J., after reviewing a "quartet" of prior Supreme Court of Canada decisions, stated that the quartet stands for the following four propositions:

(1) provinces cannot create priorities between creditors or change the scheme of distribution on bankruptcy under s. 136(1) of the [*BIA*];

(2) while provincial legislation may validly affect priorities in a non bankruptcy situation, once bankruptcy has occurred section 136(1) of the [*BIA*] determines the status and priority of the claims specifically dealt with in that section;

(3) if the provinces could create their own priorities or affect priorities under the [*BIA*] this would invite a different scheme of distribution on bankruptcy from province to province, an unacceptable situation; and

(4) the definition of terms such as "secured creditor", if defined under the [*BIA*], must be interpreted in bankruptcy cases as defined by the federal Parliament, not the provincial legislatures;

and set out two additional propositions, as follows:

(5) in determining the relationship between provincial legislation and the [*BIA*], the form of the provincial interest created must not be allowed to triumph over its substance. The provinces are not entitled to do indirectly what they are prohibited from doing directly; and

(6) there need not be any provincial intention to intrude into the exclusive federal sphere of bankruptcy and to conflict with the order of priorities of the [*BIA*] in order to render the provincial law inapplicable. It is sufficient that the effect of provincial legislation is to do so.

(*Husky Oil Operations Ltd. v. Canada (Minister of National Revenue)*, [1995] 3 S.C.R. 453, at paragraphs 32 and 39)

[19] With respect to the effect of the Corporate Respondents' bankruptcy on any disgorgement order, the Individual Respondents also rely on *Serhan Estate v. Johnson & Johnson* (2006, 85 O.R. (3d) 665 (Div. Ct.) ("***Serhan***"), at paragraph 122, where Epstein J. cited with approval the following passage from Maddaugh and McCamus in the *Law of Restitution,* looseleaf (Aurora, On.: Canada Law Book, 2005), at p. 5-32: "although it may be appropriate to recapture profits as a disincentive to wrongdoing, it may not be appropriate to grant a priority over other creditors in the event of an insolvency." Epstein J. also stated: "There is considerable uncertainty surrounding the meaning of disgorgement and its application, starting with whether or not the remedy is restitutionary in nature (*Serhan*, *supra*, at paragraph 110).

[20] The Individual Respondents also submit that having regard to the bankruptcy of the Corporate Respondents, imposing joint and several liability as between the Corporate Respondents and the Individual Respondents would have the effect of imposing additional liability for the conduct of the Corporate Respondents on the Individual Respondents.

(b) Staff

[21] Staff notes that on June 12, 2008, at an earlier appearance in this proceeding, the Commission dismissed the Trustee's motion for an order, under section 69.3 of the *BIA*, that the

Hearing on the Merits be stayed in respect of the Corporate Respondents ((2008), 31 O.S.C.B. 6257).

[22] Staff submits that disgorgement is not a restitutionary remedy, but is intended to deprive a respondent of "any amounts obtained" as a result of the respondent's non-compliance with the Act. Staff notes that *Serhan* is not a securities decision. Staff relies instead on the Commission's oral ruling on April 28, 2010, given in response to a similar motion in *Re Gold-Quest*:

> CHAIR: Please be seated. The Panel has discussed the various submissions and the legal authorities. I think our conclusion is, in the circumstances, that the Commission is not currently a creditor with respect to the bankrupt party within section 69 of the Bankruptcy Act. The kinds of financial sanctions or costs that we could order in these circumstances, and I should say there is obviously a discretion and no determination whether we would make any such order, but those amounts are not determinable today.
>
> We do distinguish the Manitoba case [*Manitoba (Securities Commission) v. Werbeniuk*, [2009] B.C.J. No. 211 (B.C.C.A.)] on the basis that they are dealing there with a restitution power and that's a power that we do not have in the Ontario Securities Act and is an issue, a policy issue that is debated as to whether or not there should be such a power.
>
> So, this proceeding is not a claim for recovery of an amount. Any order we would make for sanctions will be subject to the determination of the bankruptcy court as to how that order for financial sanctions or costs will be treated. And, frankly, this Panel has no idea, in the particular circumstances, how the bankruptcy court would treat it but we certainly defer to that court on that question. And we would say to staff that, if we do get to the point where we do exercise a discretion or impose a financial sanction, then staff should certainly take reference to the bankruptcy court and the bankruptcy proceeding before taking any steps to recover against property as a result of that. And at the end of the day that is how we interpret the Bankruptcy Act.
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> (*Re Gold-Quest International, 1725587 Ontario Inc. carrying on business as Health and Harmoney, Harmoney Club Inc., Donald Iain Buchanan, Lisa Buchanan and Sandra Gale*, Hearing Transcript, April 28, 2010, pp. 44-46)

The Commission concluded that it was consistent with the public interest to deal with the issues before the Panel as a securities regulator and leave to a future day and other forums how any order might be treated.

[23] Staff also relies on *Re Thow*, in which a British Columbia Bankruptcy Court held that an administrative penalty imposed by the B.C. Securities Commission after Mr. Thow became bankrupt, but which pertained to his conduct as a mutual fund dealer prior to his bankruptcy, was not a claim provable in bankruptcy. The Court summarized its conclusion as follows:

> The Commission's decision to impose a penalty was discretionary and so Mr. Thow was not liable to the Commission until it exercised its discretion. Thus the

> penalty was not a contingent liability or an "obligation" under s. 121 of the BIA at the date of his bankruptcy.
>
> (*Re Thow*, [2009] B.C.J. No. 1729 (B.C.S.C.))

[24] Staff submits that it is appropriate for the Commission to determine what sanctions are in the public interest in this proceeding, leaving any enforcement issues to the Bankruptcy Court. In addition, Staff notes that enforcement of any monetary order make may also require an application to Superior Court in respect of the Freeze Order.

2. Conclusion on Bankruptcy

[25] We accept the submissions of Staff. We are not persuaded that the *BIA* prevents us from exercising our public interest jurisdiction under sections 127 and 127.1 of the Act without leave of the Bankruptcy Court. We leave questions of enforcement of our order to another forum. In this case, however, we have determined that the public interest is best served by restricting the monetary orders to the Individual Respondents only, in order to avoid depleting the assets that may be available for compensation or restitution to investors who lost money as a result of the Respondents' non-compliance with the Act.

B. The Law on Sanctions

[26] Section 1.1 of the Act states that the Commission's mandate is to provide protection to investors from unfair, improper or fraudulent practices, and to foster fair and efficient capital markets and confidence in capital markets.

[27] As stated in *Re Mithras Management*, the Commission's public interest jurisdiction under section 127 of the Act should be exercised in a protective and preventative manner, consistent with that mandate:

> … the role of this Commission is to protect the public interest by removing from the capital markets – wholly or partially, permanently or temporarily, as the circumstances warrant – those whose conduct in the past leads us to conclude that their conduct in the future may well be detrimental to the integrity of the capital markets. We are not here to punish past conduct; that is the role of the courts, particularly under section 118 [now section 122] of the Act. We are here to restrain, as best as we can, future conduct that is likely to be prejudicial to the public interest in having capital markets that are both fair and efficient. In so doing we must, of necessity, look to past conduct as a guide to what we believe a person's future conduct might reasonably be expected to be; we are not prescient, after all.
>
> (*Re Mithras Management Ltd.* (1990), 13 O.S.C.B. 1600, at p. 5)

[28] In *Asbestos*, the Supreme Court of Canada stated that the Commission's public interest mandate is neither remedial nor punitive; instead, it is protective and preventative, and is intended to prevent future harm to Ontario's capital markets:

> … the purpose of an order under s. 127 is to restrain future conduct that is likely to be prejudicial to the public interest in fair and efficient capital markets. The role of the OSC under s. 127 is to protect the public interest by removing from the

> capital markets those whose past conduct is so abusive as to warrant apprehension of future conduct detrimental to the integrity of the capital markets.
>
> (*Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)* (2001), 199 D.L.R. (4th) 577 (S.C.C.), at paragraphs 42-43)

[29] In *Re Cartaway*, the Supreme Court of Canada held that nothing in the Commission's public interest jurisdiction prevents the Commission from considering general deterrence in making an order under section 127. The Court stated: "To the contrary, it is reasonable to view general deterrence as an appropriate, and perhaps necessary, consideration in making orders that are both protective and preventative." Further, the Court stated that the "weight given to general deterrence will vary from case to case and is a matter within the discretion of the Commission."

> (*Re Cartaway Resources Corp.*, [2004], 1 S.C.R. 672 ("***Re Cartaway***"), at paragraphs 60 and 64)

[30] In *Re Momentas*, the Commission applied *Re Cartaway* and considered "the importance of deterring not only those involved in this matter, but also like-minded people from engaging in similar conduct." The Commission concluded that:

> [i]n order to promote both general and specific deterrence we found it necessary to impose severe sanctions including permanent cease trade order, permanent exclusions from exemptions, and a permanent prohibition from acting as an officer or director of a reporting issuer.
>
> (*Re Momentas Corp.* (2007), 30 O.S.C.B. 6475 ("***Momentas Sanctions and Costs***"), at paragraphs 51-52)

[31] In determining the nature and duration of sanctions, the Commission has considered the following factors:

(a) the seriousness of the allegations;

(b) the respondent's experience in the marketplace;

(c) the level of a respondent's activity in the marketplace;

(d) whether or not there has been a recognition of the seriousness of the improprieties;

(e) whether or not the sanctions imposed may serve to deter not only those involved in the case being considered, but any like-minded people from engaging in similar abuses of the capital markets;

(f) any mitigating factors;

(g) the size of any profit made or loss avoided from the illegal conduct;

(h) the size of any financial sanctions or voluntary payment when considering other factors;

(i) the effect any sanctions or voluntary payment when considering other factors;

(j) the effect any sanction might have on the livelihood of a respondent;

(k) the reputation and prestige of the respondent;

(l) the shame or financial pain that any sanction would reasonably cause to the respondent; and

(m) the remorse of the respondent.

(*Re Belteco Holdings Inc.* (1998), 21 O.S.C.B. 7743 ("***Re Belteco***"), at paragraph 25; *Erikson v. Ontario (Securities Commission)*, [2003] O.J. No. 593 (Div. Ct.), at paragraph 58; and *Re M.C.J.C. Holdings* (2002), 25 O.S.C.B. 1133 ("***Re M.C.J.C.***"), at p. 5)

[32] The weight to be given each factor will vary depending on the facts in each case. In exercising our public interest mandate, we must ensure that the sanctions we order, considered on a global basis, are proportionately appropriate considering the conduct of each respondent in all of the circumstances (*Re Cartaway*, *supra*, at paragraph 64, *Re Belteco*, *supra*, at paragraph 26, *Re M.C.J.C., supra*, at paragraph 10, and *Re Rowan* (2009), 33 O.S.C.B. 91 ("***Re Rowan***"), at paragraph 103).

C. Appropriate Sanctions in this Case

1. Positions of the Parties

(a) Staff

[33] Staff submits that the following factors are particularly relevant to determining the appropriate sanctions in this case:

(i) Seriousness of the Allegations

[34] Staff submits that the allegations, as proven in this case, are extremely serious. Staff notes, in particular, the Commission's finding that the Respondents "structured a sophisticated multi-jurisdictional scheme in order to avoid regulatory oversight" and "sought to benefit from the reputation of Ontario's capital markets". Most of the funds paid by investors never made their way to Xiiva or Biomaxx. As a result of the Respondents' multiple breaches of the Act, investors lost hundreds of thousands of dollars. For example, one Biomaxx investor who testified before the Commission (Investor Five) paid approximately US $600,000 for Biomaxx shares. (Merits Decision, paragraphs 75 and 216)

(ii) The Individual Respondents' Experience in the Marketplace

[35] Staff submits that Smith has previously participated in unlawful conduct similar to the unlawful conduct proven in this case (*Re InstaDial Technologies Corp.*, 2005 ABASC 965 ("***Re InstaDial***"), at paragraphs 7 and 12), and that his involvement in the Xiiva and Biomaxx scheme shows a complete disregard for securities laws.

(iii) The Respondents' Level of Activity in the Marketplace

[36] Staff submits that the unlawful activity in this case was prolonged and widespread. Xiiva and Biomaxx issued shares to individuals for almost three years, from December 2004-November 2007. The Commission found that Xiiva issued 41,000 shares to 12 individual

investors from December 2004 to July 2006 and 204,000 shares to 61 individual investors from July 10, 2007 to November 22, 2007, and that Biomaxx issued approximately 68,828,000 shares to 271 investors from December 2004 to November 27, 2007. (Merits Decision, paragraphs 60-61 and 71)

(iv) The Profit Made or Loss Avoided as a result of the Illegal Conduct

Xiiva

[37] The Commission found that approximately CDN $231,000 (CDN $99,500 in the Meridian account plus CDN $131,500 in the Canadian dollar account at National) and US $59,500 (in the U.S. dollar account at National) in investor funds were deposited into Xiiva's bank accounts. (Merits Decisions, paragraphs 95 and 98)

[38] However, these amounts do not represent the total amounts obtained as a result of the illegal distribution of Xiiva shares. The Commission found that 13 Xiiva investors indicated on their investor questionnaires that they transferred a total of US $240,000 for payment of their Xiiva shares. The Commission heard testimony from Investor Four, who sent his payment to the Bank of America account. (Merits Decision, paragraphs 61 and 161)

[39] After the Freeze Order was obtained, a further US $94,470 was deposited into one of Xiiva's National accounts by a foundation. While this foundation does not appear on the Xiiva treasury lists, documentary evidence indicates that it sent these funds to the National account for the purchase of 18,000 Xiiva shares. (Merits Decision, paragraph 98)

[40] On February 26, 2008, the Board of Directors of Xiiva passed a resolution to effect the return of the funds to six U.S. investors. Consequently, Staff submits that US $10,800 should be deducted from the U.S. dollar amount raised by Xiiva.

[41] As a result, Staff submits that Xiiva raised at least CDN $231,000 and US $393,970, less US $10,800, for a total of US $383,170 from the sale of Xiiva shares. These amounts reflect the sale of Xiiva shares to only 36 of 73 individual investors during the Material Time. The quantum of the proceeds from the sales to the other 37 investors is unknown.

Biomaxx

[42] The Commission found that approximately CDN $275,000 was deposited into Biomaxx's CIBC Canadian dollar account, of which CDN $33,500 came from unknown sources. Approximately CDN $241,500 came from known investors. (Merits Decision, paragraphs 104 and 165)

[43] The Commission found that approximately US $71,000 was deposited into Biomaxx's CIBC U.S. dollar account, of which US $200 came from an unknown source. Approximately US $70,800 came from known investors. (Merits Decision, paragraphs 105 and 166)

[44] However, as the Commission recognized, "there is evidence that the sale of Biomaxx shares raised considerably more than the amounts deposited into the CIBC accounts." (Merits Decision, paragraph 167)

[45] The Commission heard testimony from three investors who purchased Biomaxx shares. Investor Three paid US $7,276, Investor Five paid US $598,195 and Investor Six paid

approximately US $7,000 for their Biomaxx shares. The Commission found that in addition to Investor Five's US $598,195, six other investors paid a total of US $133,882 for Biomaxx shares. The latter amount includes investments of Investors Three and Six. As such, the Commission found that Biomaxx raised at least US $732,077. (Merits Decision, paragraphs 74-76 and 168)

[46] These amounts reflect the sale of shares to only 7 of the 271 individual investors found by the Commission to have been issued shares by Biomaxx during the Material Time. The quantum of the proceeds from the sales to the other 264 investors is unknown. (Merits Decision, paragraph 71)

(v) Staff's Conclusion on the Appropriate Sanctions

[47] Staff also notes that the Respondents have not acknowledged the impropriety of their conduct, and submits that there are no mitigating factors. Staff submits that severe sanctions are appropriate in this case to serve the goals of specific and general deterrence. Staff submits that while each case must be decided on its own facts, Staff's request for stringent sanctions is supported by a number of decisions which Staff submits involve similar conduct (*Re Momentas Corp.* (2006), 29 O.S.C.B. 7408; *Re Momentas Sanctions and Costs*, (2007), 30 O.S.C.B. 6475, at paragraph 62; *Re Ochnik* (2006), 29 O.S.C.B. 3929 ("***Re Ochnik Sanctions and Costs***"), at paragraphs 108-114; *Re Allen* (2005), 28 O.S.C.B. 8541; *Re Allen* (2006), 29 O.S.C.B. 3944 ("***Re Allen Sanctions and Costs***"); *Re Anderson*, 2007 BCSECCOM 198; *Re Anderson*, 2007 BCSECCOM 350, at paragraphs 3-4, 22; *Re Limelight Entertainment Inc.* (2008), 31 O,.S.C.B. 1727, at paragraphs 208-209 and 215-222; and *Re Limelight Entertainment Inc.* (2008), 31 O.S.C.B. 12030 ("***Re Limelight Sanctions and Costs***").

(b) The Individual Respondents

[48] The Individual Respondents submit that this case is distinguishable from the cases relied upon by Staff.

[49] In particular, the Individual Respondents rely on the Commission's finding that "Xiiva and Biomaxx shares were not sold directly but through a number of offshore entities" (Merits Decision, at paragraph 53). The Commission stated:

> 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.
>
> (Merits Decision, at paragraph 181)

[50] Further, the Individual Respondents submit that there is no evidence that they benefitted from the offshore transfer of investor funds from Xiiva's bank account at Meridian (Merits Decision, paragraph 176) or that they have benefitted from or been enriched by any undisclosed assets not accounted for in the Financial Statements of Xiiva and Biomaxx.

[51] The Individual Respondents also submit that there is no evidence that they received money raised by Xiiva from the sale of its securities, and that the only evidence of their receipt

of money raised by Biomaxx is of CDN $16,507 received by Crowe and CDN $58,412 received by Smith (Merits Decision, paragraph 148).

[52] The Individual Respondents submit that the principal way they stood to benefit from their non-compliance with the Act was as shareholders. They submit that the bankruptcies of Xiiva and Biomaxx resulted not from the conduct of the Individual Respondents but from the Commission's Freeze Order and Temporary Orders. The result was a total loss of shareholder value and substantial financial loss to the Individual Respondents.

[53] Further, though the Commission found that "the weight of the evidence, taken as a whole, establishes that Biomaxx was primarily in the business of raising capital", the Individual Respondents note that the Commission accepted that "Biomaxx entered into memoranda of understanding and letters of intent with various third parties" (Merits Decision, paragraphs 147 and 149). The Individual Respondents submit that Investor Five's "due diligence" provided support for the Commission's finding. The Individual Respondents submit that the Commission's concern appears to have been that neither Xiiva nor Biomaxx had yet to earn any revenue. However, they submit that many junior/development companies do not generate revenue, but trade as speculative investments based on news of anticipated future revenues, including revenues expected to be generated from agreements with third parties.

[54] The Individual Respondents submit that the purpose of an administrative penalty is primarily deterrent, not penal, and further, that the sanctions ought to be proportionate to the conduct of the Respondents (*Re Rowan, supra*, at paragraphs 56 and 103). They submit that having regard to "the lack of clarity with respect to the extra-jurisdictional application of securities legislation to off-shore distributions", "the lack of benefit" to them as a result of their non-compliance with the Act, and the financial loss they suffered as shareholders of Xiiva and Biomaxx, an administrative penalty would be penal in this case.

[55] Finally, the Individual Respondents submit that the "substantial" delay between the first Temporary Order, issued on November 22, 2007, and the Merits Decision, released on March 31, 2010, should be considered as a mitigating factor.

2. Conclusion on Sanctions

(a) General Considerations

[56] Overall, the sanctions we impose must protect investors and Ontario capital markets by barring or restricting the Respondents from participating in those markets in the future and by sending a clear message to the Respondents and to others participating in our capital markets that the type of misconduct identified in this matter will not be tolerated.

[57] In considering the factors referred to in paragraphs 27-31 above, we find the following considerations to be the most relevant in this matter:

- The allegations, as proven, are very serious. By engaging in illegal trading and distributions contrary to sections 25(1)(a) and 53(1) of the Act, the Respondents deprived investors of important protections set out in the registration and prospectus provisions of the Act.

- Smith had been sanctioned in Alberta for similar misconduct in 2005. He was ordered to cease trading in any security and not use any exemption under Alberta securities law for five years, to not serve as a director or officer of an issuer in Alberta for five years, and to pay a CDN $25,000 administrative penalty. Nevertheless, he traded in Xiiva and Biomaxx shares without filing a prospectus and without registration. His conduct shows a complete disregard of securities law. We are skeptical that Crowe would not have known of Smith's prior involvement in *Re InstaDial*.

- The Xiiva and Biomaxx websites contained misleading information that was intended to solicit investments. Investors thought they were investing in an Ontario biofuels technology company. "In fact, the Respondents were market intermediaries in the primary business of raising capital and they had virtual offices only." (Merits Decision, paragraph 34)

- As a result of the Respondents' misconduct, investors lost hundreds of thousands of dollars. The Commission found that approximately CDN $231,000 and US $59,500 raised in the illegal distribution of Xiiva shares was deposited into Xiiva's bank accounts at Meridian and National, and that approximately CDN $241,500 and US $70,800 raised in the illegal distribution of Biomaxx shares was deposited into Biomaxx's bank accounts at CIBC. There is evidence that the actual proceeds were much higher.

- The Commission found that the Respondents "structured a sophisticated multi-jurisdictional scheme in order to avoid regulatory oversight." By perpetrating their unlawful scheme in several jurisdictions, the Respondents prevented the Commission from seizing the majority of funds for the protection of investors.

- The Commission found that "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."

- The Commission found that "[t]he Respondents sought to benefit from the reputation of Ontario's capital markets" and their conduct "negatively impacts upon the reputation and integrity of Ontario's capital markets."

- There are no mitigating factors.

[58] Considering the above circumstances, we consider that the most important sanctioning factors in this matter are removing the Respondents from the capital markets and specific and general deterrence.

(b) Trading and Other Prohibitions

[59] Staff seeks an order that the Respondents be permanently banned, without carve-out or exception, from trading or acquiring securities and that any exemption contained in Ontario securities law be permanently not available to them, pursuant to clauses 2, 2.1 and 3 of subsection 127(1) of the Act.

[60] We accept that the public interest requires that the Respondents be permanently barred from trading or acquiring securities, and any exemptions available in Ontario securities law do not apply permanently to any of the Respondents, subject to the following carve-out.

[61] We find it is appropriate to permit the Individual Respondents to trade and acquire securities for the account of their respective registered retirement savings plans, registered retirement income plans, registered education savings plans or tax-free savings accounts (as defined in the *Income Tax Act (Canada)*) in which they or their respective spouses have sole legal and beneficial ownership, provided that: (i) the securities are listed and posted for trading on the Toronto Stock Exchange, the New York Stock Exchange or NASDAQ (or their successor exchanges) or are issued by a mutual fund that is a reporting issuer; (ii) the Individual Respondents do not own legally or beneficially (in the aggregate, together with their respective spouses) more than one percent of the outstanding securities of the class or series of the class in question; (iii) the Individual Respondents carry out any permitted trading through a registered dealer and through trading accounts opened in their respective names only (and they must close any trading accounts that are not in their respective names only); and (iv) the Individual Respondents must give a copy of the Merits Decision, the Sanctions and Costs Decision and the Sanctions and Costs Order to any registered dealer through which they trade in advance of any trading.

(c) Director and Officer Bans

[62] Staff seeks an order that the Individual Respondents shall resign all positions they may hold as a director or officer of any issuer, registrant or investment manager, pursuant to clauses 7, 8.1 and 8.3 of section 127(1) of the Act; are permanently prohibited from becoming or acting as a director or officer of any issuer, registrant or investment fund manager pursuant to clauses 8, 8.2 and 8.4 of subsection 127(1) of the Act; and are permanently prohibited from becoming or acting as a registrant, as an investment fund manager or as a promoter, pursuant to clause 8.5 of subsection 127(1) of the Act.

[63] Considering the seriousness of the Individual Respondents' misconduct in their roles as directors and/or officers or *de facto* directors and/or officers of the Corporate Respondents, we find that the Individual Respondents must be permanently barred from any position of responsibility, trust or control in the capital markets.

(d) Disgorgement

[64] The Commission's disgorgement power is found in clause 10 of subsection 127(1) of the Act, which states:

> 127(1) The Commission may make one or more of the following orders if in its opinion it is in the public interest to make the order or orders:
>
> . . .
>
> 10. If a person or company has not complied with Ontario securities law, an order requiring the person or company to disgorge to the Commission any amounts obtained as a result of the non-compliance.

[65] In *Limelight Sanctions and Costs*, the Commission made the following comments about the disgorgement remedy:

> We note that paragraph 10 of subsection 127(1) of the Act provides that disgorgement can be ordered with respect to "any amounts obtained" as a result of non-compliance with the Act. Thus, the legal question is not whether a respondent "profited" from the illegal activity but whether the respondent "obtained amounts" as a result of that activity. In our view, this distinction is made in the Act to make clear that all money illegally obtained from investors can be ordered to be disgorged, not just the "profit" made as a result of the activity. This approach also avoids the Commission having to determine how "profit" should be calculated in any particular circumstance. Establishing how much a respondent obtained as a result of his or her misconduct is a much more straightforward test. In our view, where there is a breach of Ontario securities law that involves the widespread and illegal distribution of securities to members of the public, it is appropriate that a respondent disgorge all the funds that were obtained from investors as a result of that illegal activity. In our view, such a disgorgement order is authorized under paragraph 10 of subsection 127(1) of the Act.
>
> In *Allen* [*Re Allen Sanctions and Costs*], the respondent submitted that he did not make the full amount attributed to him in profits because of the very substantial costs of the offering and the 20% commissions paid to salespersons. It appeared to be the respondent's submission that any order to disgorge amounts obtained should have regard only to "net" amounts obtained as opposed to "gross" amounts. On this issue, the Commission stated:
>
> > It is Staff's submission that the wording of the legislation permits the panel to order disgorgement of the gross amount obtained. Further, Staff submitted that the legislation should not be read so as to restrict any disgorgement order to the net amount obtained as to do so would reduce the deterrent effect of the disgorgement sanction. (*Allen*, *supra* at paragraph 36)
>
> The Commission concluded by stating that "we agree with Staff's submission on the interpretation of subsection 127(1) clause 10 of the Act" (*Allen*, *supra* at paragraph 37).
>
> That analysis and conclusion in *Allen* is consistent with the approach we have discussed above.
>
> In our view, the Commission should consider the following issues and factors when contemplating a disgorgement order in circumstances such as these:
>
> > (a) whether an amount was obtained by a respondent as a result of non-compliance with the Act;
> >
> > (b) the seriousness of the misconduct and the breaches of the Act and whether investors were seriously harmed;

> (c) whether the amount that a respondent obtained as a result of non-compliance with the Act is reasonably ascertainable;
>
> (d) whether the individuals who suffered losses are likely to be able to obtain redress; and
>
> (e) the deterrent effect of a disgorgement order on the respondents and other market participants.
>
> These factors are not exhaustive; . . . .
>
> Staff has the onus to prove on a balance of probabilities the amount obtained by a respondent as a result of his or her non-compliance with the Act. Subject to that onus, we agree that any risk of uncertainty in calculating disgorgement should fall on the wrongdoer whose non-compliance with the Act gave rise to the uncertainty.
>
> In our view, no one should profit from his or her breach of the Act.
>
> (*Limelight Sanctions and Costs*, *supra*, paragraphs 49-54)

[66] In *Limelight Sanctions and Costs*, the Commission ordered Limelight, the Corporate Respondent, and DaSilva and Campbell, its directing minds, to disgorge the entire proceeds of the scheme – CDN $2,747,089.45 – for allocation to or for the benefit of third parties in accordance with subsection 3.4(2)(b) of the Act.

[67] Staff notes that in *Momentas Sanctions and Costs*, Staff sought an order that Rash and Funt, the directing minds of Momentas, jointly disgorge the total proceeds of the scheme – CDN $7,862,000. However, the Commission ordered each to disgorge what he had taken as management draws; Rash was ordered to disgorge CDN $1,300,000 and Funt was ordered to disgorge CDN $1,260,000, both amounts to be allocated to or for the benefit of third parties in accordance with subsection 3.4(2)(b) of the Act.

[68] In this case, Staff seeks an order that Xiiva, XI Biofuels Inc., Smith and Crowe jointly and severally disgorge to the Commission CDN $231,000 plus an amount in Canadian currency sufficient to purchase US $383,170, and that Biomaxx, Smith and Crowe jointly and severally disgorge to the Commission an amount in Canadian currency sufficient to purchase US $732,077, all amounts to be allocated to or for the benefit of third parties in accordance with subsection 3.4(2)(b) of the Act.

[69] Staff submits, in applying the *Limelight* factors, that:

> (a) these are the minimum amounts that were obtained as a result of the Respondents' unlawful activity, and indeed there was evidence that these amounts do not represent the entire proceeds of the scheme;
>
> (b) investors were seriously harmed by the Respondents' conduct (Merits Decision, paragraphs 129, 142, 149, and 157);
>
> (c) the amounts obtained as a result of the non-compliance with the Act are reasonably ascertainable;

(d) the investors who lost money are unlikely to recover any of their investment, considering that a large amount of money is unaccounted for in the corporate accounts and the companies are now bankrupt (Merits Decision, paragraphs 160-163 and 167); and

(e) the disgorgement orders sought would achieve the goals of specific deterrence.

[70] In our view, the evidence of amounts obtained as a result of non-compliance with Ontario securities law falls into three "tiers".

[71] The first tier is amounts obtained by the Individual Respondents directly by withdrawal from the Corporate Respondents' bank accounts. Smith received CDN $58,412 and Crowe received CDN $16,507 from the Biomaxx bank accounts (Merits Decision, paragraph 148). There was little evidence of funds paid out of the Xiiva bank accounts to either of the Individual Respondents. We have no hesitation in ordering Smith to disgorge the amount of CDN $58,412 and Crowe to disgorge the amount of CDN $16,507 which were obtained as a result of their non-compliance with the Act.

[72] The second tier is investor funds paid into the Corporate Respondents' bank accounts. For the reasons given above, we are not prepared to make a disgorgement order against the Corporate Respondents. Applying the *Limelight Sanctions and Costs* factors, the most important consideration is that the investors who suffered losses may be able to obtain redress from the Corporate Respondents through the bankruptcy process. In order to avoid depleting the assets that may be available for repayment to investors who lost money as a result of the Respondents' non-compliance with the Act, we have determined that the public interest is best served by restricting the monetary orders in this case to the Individual Respondents only.

[73] In addition, we include in our disgorgement order against the Individual Respondents the investor funds – in the amount of approximately CDN $85,000 – that were deposited into Xiiva's Meridian account in October and November 2007 and wire transferred to an account in the Bahamas almost immediately thereafter, at Crowe's direction. We find that Crowe obtained these funds and then ordered Meridian to transfer them offshore for reasons that were not adequately explained to the Commission (Merits Decision, paragraphs 170-176). Crowe was a director and officer of Xiiva and Smith was a director and officer or *de facto* director and officer of Xiiva throughout the Material Time (Merits Decision, paragraphs 186-187 and 195-196). Accordingly Smith and Crowe will be jointly and severally liable to disgorge the amount of CDN $85,000 which was obtained as a result of their non-compliance with the Act.

[74] The third tier is funds raised by Xiiva and Biomaxx that could not be traced to the Corporate Respondents' bank accounts. We are not satisfied that the amounts obtained are reasonably ascertainable, and therefore we do not find it appropriate to order disgorgement of such amounts.

[75] Accordingly, pursuant to clause 10 of subsection 127(1) of the Act, Smith will be ordered to disgorge CDN $58,412 to the Commission; Crowe will be ordered to disgorge CDN $16,507 to the Commission; and Smith and Crowe, on a joint and several basis, will be ordered to disgorge CDN $85,000 to the Commission, pursuant to clause 10 of subsection 127(1) of the

Act, all of which amounts are to be designated, pursuant to section 3.4(2)(b) of the Act, for allocation to or for the benefit of third parties.

(e) Administrative Penalty

[76] Pursuant to clause 9 of subsection 127(1) of the Act, the Commission may impose an administrative penalty of up to CDN $1 million for each failure to comply with the Act. Staff requests an administrative penalty of CDN $200,000 against each of the Respondents.

[77] We find that the public interest requires that we order the Individual Respondents to pay an administrative penalty in the full amount requested by Staff, in light of the factors described at paragraph 57 above. As stated in paragraph 72 above, we have determined that the public interest is best served by restricting the monetary orders in this case to the Individual Respondents only, to avoid depleting the assets that may be available for repayment to investors who lost money as a result of the Respondents' non-compliance with the Act.

[78] Accordingly, each of Smith and Crowe will be ordered to pay the Commission an administrative penalty of CDN $200,000 pursuant to clause 9 of subsection 127(1) of the Act, to be designated for allocation to or for the benefit of third parties pursuant to subsection 3.4(2)(b) of the Act.

(f) Reprimand

[79] These reasons and the sanctions imposed by our Order reflect our condemnation of the Respondents' misconduct. As stated in paragraph 57 above, the allegations, as proven, are very serious. By engaging in illegal trading and distributions contrary to subsections 25(1)(a) and 53(1) of the Act, the Respondents deprived a large number of investors of important protections set out in the registration and prospectus provisions of the Act, and investors lost their investments as a result of the Respondents' misconduct. Approximately CDN $231,000 and US $59,500 raised in the illegal distribution of Xiiva shares was deposited into Xiiva's bank accounts at Meridian and National, and approximately CDN $241,500 and US $70,800 raised in the illegal distribution of Biomaxx shares was deposited into Biomaxx's bank accounts at CIBC. There is evidence that the actual proceeds were much higher.

[80] Moreover, this was not a case of inadvertent or negligent contraventions of the Act. Smith had been sanctioned in Alberta for similar misconduct in 2005. He was ordered to cease trading in any security and not use any exemption under Alberta securities law for five years, to not serve as a director or officer of an issuer in Alberta for five years, and to pay a CDN $25,000 administrative penalty. Nevertheless, he traded in Xiiva and Biomaxx shares without filing a prospectus and without registration. His conduct shows a complete and knowing disregard of securities law. Given that Smith and Crowe were directors and officers or *de facto* directors and officers of the Corporate Respondents, we are skeptical that Crowe would not have known of Smith's prior involvement in *Re InstaDial*.

[81] The Respondents structured a sophisticated multi-jurisdictional scheme in order to avoid regulatory oversight. By perpetrating their unlawful scheme in several jurisdictions, the Respondents prevented the Commission from seizing the majority of funds for the protection of investors. 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, failing to do so only because National began an investigation leading to the Commission's Freeze Order.

[82] The Xiiva and Biomaxx websites contained misleading information that was intended to solicit investments. Investors thought they were investing in an Ontario biofuels technology company. In this way, the Respondents took advantage of investors' interest in sustainable energy technology and benefitted from the reputation of Ontario's capital markets.

[83] Their conduct was egregious and abusive of the capital markets.

[84] The Respondents are hereby reprimanded.

V. COSTS

[85] Section 127.1 of the Act gives the Commission discretion to order a person or company to pay the costs of the investigation (s. 127.1(1)) and the hearing (s. 127.1(2)) if the Commission is satisfied that the person or company has not complied with the Act or has not acted in the public interest.

A. Staff's Request for Costs

[86] In this proceeding, Staff seeks an order, pursuant to subsection 127.1(2) of the Act, for payment of its hearing costs of CDN $117,441.51 to be paid by the Respondents on a joint and several basis. Staff does not seek costs in relation to the investigation. Staff provided a Bill of Costs setting out its costs incurred for fees (CDN $113,478.75) and disbursements (CDN $3,962.76). (All dollar amounts in paragraphs 87 and 88 are expressed in Canadian dollars.)

[87] Staff's Bill of Costs reflects time spent by a Senior Litigation Counsel and a Senior Investigator from October 16, 2008, when the Notice of Hearing was issued, to May 1, 2009, when closing submissions were made; time sheets were provided. Staff notes that the Senior Litigation Counsel was called to the bar in 1995 and had carriage of and primary responsibility for the litigation in this matter, and that the Senior Investigator joined the Enforcement Branch of the Commission in September 2007. The Bill of Costs excludes the time spent to prepare for and attend the Sanctions and Costs Hearing, and any time spent by another investigator, students-at-law, law clerks and assistants. Staff seeks fees at the approved hourly rate, as follows:

Senior Litigation Counsel	329.75 hours	$205 per hour	$45,880.00
Senior Investigator	248.00 hours	$185 per hour	$67,598.75
Total Fees			$113,478.75

[88] Staff claims $3,962.76 for disbursements, including process serving expenses ($331.99), witness fees ($206.00), videoconference bookings ($3,223.95) and a hotel booking ($200.92) for overseas witnesses; receipts were provided.

[89] Staff submits that in considering a request for a costs order, the Commission has identified a number of factors, including:

(a) the importance of early notice of an intention to seek costs;

(b) the seriousness of the allegations and the conduct of the parties;

(c) the presence or absence of abuse of process by any respondent;

(d) the greater investigative/hearing costs that the specific conduct of a respondent tends to require in the case; and

(e) the reasonableness of the costs requested by Staff.

(*Re Ochnik, supra*, at paragraph 29)

[90] Staff submits that its request for costs is proportionate and reasonable in all of the circumstances.

B. The Individual Respondents' Submissions

[91] The Individual Respondents submit that many of the costs incurred by Staff were avoidable.

[92] On March 17, 2008, Smith, in his capacity as the sole director of Biomaxx, admitted that Biomaxx conducted a distribution of securities without complying with section 53 of the *Act* and that its representatives traded in Biomaxx securities without being registered pursuant to section 25 of the Act, and Crowe, in his capacity as the sole director of Xiiva, admitted that Xiiva conducted a distribution of securities without complying with section 53 of the *Act* and that its representatives traded in Xiiva securities without being registered pursuant to section 25 of the Act. (Merits Decision, paragraphs 51-52). Further, the Individual Respondents did not rely on any registration and prospectus exemptions under the Act (Merits Decision, paragraph 8).

[93] The Individual Respondents also submit that this "is a case without precedent. The Individual Respondents legitimately tested whether this Commission would or could assume jurisdiction with respect to the distribution of the shares of Xiiva and Biomaxx to investors who resided outside of Canada."

[94] Finally, the Individual Respondents submit that the Commission should consider the "substantial" delay between the first Temporary Order, issued on November 22, 2007, and the decision on the merits, released on March 31, 2010, noting that the Hearing on the Merits was held in January 2009 and closing submissions made on May 1, 2009.

C. Conclusion on Costs

[95] We have reviewed the documentation provided by Staff in support of its request for costs, and we are satisfied that the request is reasonable in the circumstances.

[96] We do not accept that the Individual Respondents "legitimately tested" the Commission's jurisdiction over offshore distributions. In our view, it is clear from the Merits Decision that the Commission found no basis for the position taken by the Individual Respondents. We note, in particular, the following paragraphs:

> 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. (Merits Decision, paragraph 204)
>
> . . . .
>
> 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.
>
> (Merits Decision, paragraph 216)

[97] The Individual Respondents' challenge to the Commission's jurisdiction resulted in significant delays in this proceeding. The Individual Respondents brought a constitutional motion at an earlier stage of the proceeding, but, after several adjournments to allow for provision of Notice of Constitutional Question, the motion was withdrawn in June 2008 (Merits Decision, paragraph 197).

[98] The Individual Respondents took the same position before Madam Justice Hoy, in response to the Commission's application for continuation of the Freeze Order. Justice Hoy, relying on *Gregory & Company Inc. v. Quebec (Securities Commission)*, [1961] S.C.R. 584 ("***Gregory***"), the leading case, held that the Commission had "at minimum a *prima facie* case that Xiiva has breached ss. 53 and 25(1), and the OSC has jurisdiction to regulate Xiiva's activities . . . ." (Merits Decision, paragraph 198).

[99] The Individual Respondents raised the issue yet again in closing submissions in the Hearing on the Merits (Merits Decision, paragraph 39, 199). In rejecting their argument, the Commission relied on *Gregory*, amongst other cases (Merits Decision, paragraph 205).

[100] Nor do we accept that the Individual Respondents' admissions described at paragraph 93 above would have allowed Staff to reduce its costs by more than a trivial amount. Staff's allegations in this matter went beyond illegal trading and distribution contrary to subsections 25(1)(a) and 53(1) of the Act. Staff also alleged and the Panel found "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." (Merits Decision, paragraph 154) The Individual Respondents did not admit these allegations, and generally challenged Staff's evidence throughout the Hearing on the Merits. For example, the Individual Respondents

continued to claim that "they were engaged in a biofuels technology business, not the business of raising capital"; that "the Xiiva and Biomaxx shares held by Ontario residents are held in the names of the founders and family members"; that "shares sold to non-residents were appropriately legended to restrict their sale in the US"; and that the Corporate Respondents' bankruptcy resulted from the actions of the Commission, not the actions of the Respondents (Merits Decision, paragraphs 35, 37 and 39).

[101] We find that Staff's request for costs is proportionate and reasonable in the circumstances.

[102] For the reasons given at paragraphs 72 and 77 above, we do not find it appropriate to make a costs order against the Corporate Respondents. An order will go for payment of costs of CDN $117,441.51 by the Individual Respondents on a joint and several basis.

VI. CONCLUSION ON SANCTIONS AND COSTS

[103] Accordingly, for the reasons given, we will make the following order:

1. each of the Respondents shall cease trading in securities permanently, pursuant to clause 2 of subsection 127(1) of the Act, except that Smith and Crowe are permitted to trade securities for the account of their respective registered retirement savings plans, registered retirement income plans, registered education savings plans or tax-free savings accounts (as defined in the *Income Tax Act (Canada)*) in which they or their respective spouses have sole legal and beneficial ownership, provided that:

    (i) the securities are listed and posted for trading on the Toronto Stock Exchange, the New York Stock Exchange or NASDAQ (or their successor exchanges) or are issued by a mutual fund that is a reporting issuer;

    (ii) the Individual Respondents do not own legally or beneficially (in the aggregate, together with their respective spouses) more than one percent of the outstanding securities of the class or series of the class in question;

    (iii) the Individual Respondents carry out any permitted trading through a registered dealer and through trading accounts opened in their respective names only (and they must close any trading accounts that are not in their respective names only); and

    (iv) the Individual Respondents give a copy of the Merits Decision, the Sanctions and Costs Decision and the Sanctions and Costs Order to any registered dealer through which they will trade in advance of any trading;

2. each of the Respondents is prohibited permanently from acquiring any securities, pursuant to clause 2.1 of subsection 127(1) of the Act, except that Smith and Crowe are permitted to acquire securities to allow the trading in securities permitted by and in accordance with paragraph 1 of this Order;

3. any exemptions contained in Ontario securities law do not apply to each of the Respondents permanently, pursuant to clause 3 of subsection 127(1) of the Act;

4. the Respondents are reprimanded, pursuant to clause 6 of subsection 127(1) of the Act;

5. Smith and Crowe shall resign all positions that they may hold as a director or officer of any issuer, registrant or investment fund manager, pursuant to clauses 7, 8.1 and 8.3 of subsection 127(1) of the Act;

6. each of Smith and Crowe is permanently prohibited from becoming or acting as a director or officer of any issuer, registrant or investment fund manager, pursuant to clauses 8, 8.2 and 8.4 of subsection 127(1) of the Act;

7. each of the Respondents is permanently prohibited from becoming or acting as a registrant, as an investment fund manager or as a promoter, pursuant to clause 8.5 of subsection 127(1) of the Act;

8. each of Smith and Crowe shall pay an administrative penalty of CDN $200,000, pursuant to clause 9 of subsection 127(1) of the Act, to be designated pursuant to section 3.4(2)(b) of the Act, for allocation to or for the benefit of third parties;

9. Smith shall disgorge to the Commission funds in the amount of CDN $58,412, pursuant to clause 10 of subsection 127(1) of the Act, to be designated pursuant to section 3.4(2)(b) of the Act. for allocation to or for the benefit of third parties;

10. Crowe shall disgorge to the Commission CDN $16,507, pursuant to clause 10 of subsection 127(1) of the Act, to be designated pursuant to section 3.4(2)(b) of the Act, for allocation to or for the benefit of third parties;

11. Smith and Crowe shall, on a joint and several basis, disgorge to the Commission CDN $85,000, pursuant to clause 10 of subsection 127(1) of the Act, to be designated pursuant to section 3.4(2)(b) of the Act, for allocation to or for the benefit of third parties; and

12. Smith and Crowe shall pay, on a joint and several basis, CDN $117,441.51 in costs to the Commission, pursuant to subsection 127.1(2) of the Act.

DATED in Toronto, Ontario this 17th day of November, 2010.

"David L. Knight"

David L. Knight, FCA

"Margot C. Howard"

Margot C. Howard, CFA