

IN THE MATTER OF
The *Securities Act*
S.N.B. 2004, c. S-5.5 as amended

- and -

IN THE MATTER OF

**MEISNER INC. S.A., carrying on business as
"MEISNER CORPORATION" and "MEISNER INCORPORATED"
and Jorge Vizcarra (also known as George Dizcarra)
("Respondents")**

REASONS FOR DECISION

Dates of Hearing: 27 July 2007 and 2 August 2007
Dates of Orders: 27 July 2007 and 2 August 2007
Date of Reasons for Decision: 22 October 2007

Panel:

David T. Hashey, Q.C., Panel Chair
Hugh J. Flemming, Q.C., Panel Member

Counsel:

Jake van der Laan

For Staff of the New Brunswick
Securities Commission

IN THE MATTER OF

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("Respondents")**

REASONS FOR DECISION

1. BACKGROUND

a. Overview of proceedings

[1] This matter involves allegations that the Respondents solicited and attempted to effect trades in securities in New Brunswick and to New Brunswick residents, without having been registered with the New Brunswick Securities Commission ("Commission"), and that these acts are contrary to the public interest.

[2] An *ex parte* hearing in this matter was held on 27 July 2007, at which time the Panel issued a Temporary Cease Trade Order ("TCTO") against the Respondents. The TCTO was based on evidence presented by Staff through an Affidavit of Senior Investigator Ed Leblanc, sworn 26 July 2007 ("Affidavit"), that representatives of the Respondent Meisner Inc. S.A. ("Meisner") had been soliciting Canadian residents to open investment accounts with respect to gasoline and oil options in several provinces including New Brunswick. Evidence was also presented that the Respondent Jorge Vizcarra ("Vizcarra") was a directing mind of Meisner.

[3] A Notice of Hearing was issued on 30 July 2007, indicating that a hearing would be held on 2 August 2007, and that Staff would be seeking a permanent Order against the Respondents to cease all trading in securities by the Respondents, and that any exemptions in New Brunswick securities law do not apply. Staff were also seeking hearing and investigation costs.

[4] The Notice of Hearing, supporting Affidavit and TCTO were served on the Respondents via email on 30 July 2007 and via fax on 1 August 2007. An Affidavit of

Service sworn 1 August 2007 (“Affidavit of Service”) was presented at the 2 August 2007 hearing. The Panel was satisfied that the Respondents received notice of the hearing; however, none of the Respondents appeared before the Commission on 2 August 2007.

[5] The Affidavit and Affidavit of Service were the only evidence presented by Staff at the 2 August 2007 hearing. There was no oral testimony, and the Respondents filed no materials. The Affidavit contained evidence that Mr. LeBlanc obtained through his investigation of Meisner, including information obtained from speaking directly with a New Brunswick resident (“L.T.”) who had been solicited by a representative of Meisner, and from cooperation with enforcement Staff from other Canadian securities regulators. The Affidavit also contained evidence obtained from Meisner’s website and other internet resources.

2. THE FACTS

a. The Respondents

[6] Meisner is an entity carrying on business from Costa Rica, who holds itself out as an independent Broker in currency and commodity options. Meisner maintains a website at <http://tradingmx.com>. The website provides a Canadian fax number for Meisner, but there is no physical address or office location provided.

[7] This domain name was registered in May of 2007 by a Jorge Vizcarra (“Vizcarra”) from Costa Rica. Vizcarra is an individual with a long history of involvement with companies who have been the subject of orders and investigations from securities regulators in both Canada and the United States.

[8] A Mr. George Dizcarra (“Dizcarra”) was affiliated with Arial Trading LLC (“Arial”); the New Brunswick investor, L.T., who had been cold called regarding Meisner had also been solicited by and provided money to Arial Trading LLC. L.T. advised that the sales pitch given by Meisner’s representative was the same pitch he received from Arial’s representative. He was solicited to invest in gas and oil options.

[9] Arial and Dizcarra were the subjects of a Cease Trade Order of the Saskatchewan Financial Services Commission ("SFSC") issued in March of this year. The website for Arial went offline shortly after the issuance of this order.

[10] Staff's investigation also revealed that Vizcarra was affiliated with a company known as Liberty Financial Trading Corp Inc. ("Liberty"), which was permanently banned from trading by a Florida Court, fined \$6 million dollars and ordered to pay restitution of almost \$10 million dollars in relation to aggressive telephone solicitations for commodity option trading accounts from 2002 to 2004.

[11] The Panel is satisfied that Vizcarra is a directing mind of Meisner, and that Vizcarra and Dizcarra are the same person.

[12] Neither Meisner nor Vizcarra (under the name Vizcarra or Dizcarra) are or have ever been registered with the Commission in any capacity.

b. Investigation

[13] Staff became aware of Meisner's solicitation of L.T. during its investigation into another entity, Saxon Financial Services Ltd. ("Saxon"). Saxon and others, including a clearing agency called MerchantMarx which will be discussed below, were permanently cease traded by the Commission by an Order dated 27 July 2007. Saxon's activities involved the solicitation of trades in gasoline futures. Saxon and MerchantMarx were also cease traded by SFSC in July 2007.

[14] Meisner and Saxon used the same clearing entity, MerchantMarx. The websites used by Arial, MerchantMarx and Saxon are all hosted on the same server. Meisner used the same account opening documentation that was used by Saxon.

c. Meisner's Activities

[15] Meisner solicited at least one New Brunswick resident – and solicited individuals in several other provinces including Alberta and Ontario – to open trading accounts with

Meisner for the purpose of effecting trades in various investment vehicles, including commodity options.

[16] The New Brunswick resident, L.T., advised that the Meisner representative who contacted him was persistent and aggressive, wanting him to invest in gas and oil options. The Meisner representative was making predictions about large returns, and refused to take no for an answer. Though he had previously invested in Arial, L.T. did not invest in Meisner.

3. ANALYSIS AND DECISION

a. Jurisdiction and mandate of the Commission

[17] It is the Commission's mandate to protect New Brunswick investors and the integrity of New Brunswick's capital markets. The primary aim of the *Securities Act* is the protection of the public with respect to acts or conduct, particularly the solicitation of trades and the sale of securities within the province.

[18] In order for the Commission to have jurisdiction, the investment solicited and sold must be a "security", as defined in the *Act*. The definition of "security" is as follows:

"security" includes

(a) a document, record, instrument or writing commonly known as a security,

(b) a document or record constituting evidence of title to, or an interest in, the capital, assets, property, profits, earnings or royalties of any person,

(c) a document or record constituting evidence of an interest in an association of legatees or heirs,

(d) a document or record constituting evidence of an option, subscription or other interest in or to a security,

(e) a bond, debenture, note or other evidence of indebtedness, share, stock, unit, unit certificate, participation certificate, certificate of share or interest, preorganization certificate or subscription other than a contract of insurance issued by an insurance company licensed under the *Insurance Act* or an evidence of deposit issued by a bank listed in Schedule I, II or III of the *Bank Act* (Canada), by a credit union as defined in the *Credit Unions Act* or by a loan company or trust company licensed under the *Loan and Trust Companies Act*,

(f) an agreement under which the interest of the purchaser is valued for purposes of conversion or surrender by reference to the value of a proportionate interest in a specified portfolio of assets, except a contract issued by an insurance company licensed under the *Insurance Act* which provides for payment at maturity of an amount not less than $\frac{3}{4}$ of the premiums paid by the purchaser for a benefit payable at maturity,

(g)an agreement providing that money received will be repaid or treated as a subscription to shares, stock, units or interests at the option of the recipient or of any person,

(h)a certificate of share or interest in a trust, estate or association,

(i)a profit-sharing agreement or certificate,

(j)a certificate of interest in an oil, natural gas or mining lease, claim or royalty voting trust certificate,

(k)an oil or natural gas royalty or lease or a fractional or other interest in either,

(l)a collateral trust certificate,

(m)an income or annuity contract not issued by an insurance company licensed under the *Insurance Act*,

(n)an investment contract,

(o)a document or record constituting evidence of an interest in a scholarship or educational plan or trust, and

(p)a document, record, instrument or writing prescribed by regulation, whether any of the above relate to an issuer or proposed issuer.

[19] The Respondents in this matter were aggressively promoting the trading in gas and oil options, promising large returns. The Panel finds that these commodity options are a “security” within the meaning of the *Act*.

[20] This finding is supported by the interpretation of the meaning of an “investment contract” found in the leading case of *Howey, SEC v. W.J. Howey Co.* (1946) 328 U.S. 293, and further enumerated in the case of *State Commissioner of Securities v. Hawaii Market Center Inc.* (1971), 485 P.2d 105 (Supreme Court of Hawaii).

[21] Further, the OSC in *Re London Commodity Options* [April, 1977 O.S.C.B. 80] and the Ontario Superior Court in *Re O.S.C. and British Canadian Commodity Options Ltd.*, (1979), CarswellOnt 870 (H.C.) have confirmed that commodity futures options are investment contracts.

b. Acting Contrary to the Public Interest

[22] The Commission’s public interest jurisdiction under section 184 of the *Act* is animated by the purposes of the *Act*, namely to provide protection to investors from

unfair, improper or fraudulent practices and to foster fair and efficient capital markets and confidence in capital markets.

[23] As stated in *Re Mithras Management Ltd.* (1990), 13 O.S.C.B. 1600 (Ont. Securities Comm.), the Commission's public interest jurisdiction is protective and preventative and is intended to be exercised to prevent likely future harm to capital markets.

[24] The Respondents were promoting the trading in gas and oil options – investment contracts under the *Act* – and were aggressively soliciting Canadians, including at least one New Brunswick resident. These acts constitute acts in furtherance of a trade; as the Respondents are not and were never registered with the Commission, this is a contravention of section 45 of the *Act*.

[25] Meisner's scheme closely resembles that of several entities cease traded in jurisdictions across Canada and the United States; Vizcarra was involved in several of these schemes. These connections, the Respondents' contravention of the *Act* and Vizcarra's history all highlight the Respondents' threat to both investors in New Brunswick and to New Brunswick's capital markets.

[26] The Commission finds it imperative that this Order be issued to ensure that future solicitations by the Respondents and the harm arising from these solicitations be avoided.

[27] The above constitute the Panel's Reasons for their Decision and resulting Order in this matter, issued on 2 August 2007. In this Order the Respondents were ordered to cease their solicitations, and it was ordered that exemptions in New Brunswick securities law do not apply to the Respondents.

d. Costs

[28] Local Rule 11-501 *Fees* specifies an hourly fee of \$50 per hour for investigation time and a fee of \$2,000 per day, or any part thereof, for hearings. Staff submitted a request for costs for 10 hours of investigation time for Staff's preparation time for the

hearing. Along with costs for two (2) hearing days, the total amount requested is \$4,500.00.

[29] The Panel is satisfied that this request is fair in the circumstances, and total costs in the amount of \$4,500 are assessed jointly and severally against each of the Respondents.

Dated at the City of Saint John this 22 day of October, 2007.

" original signed by"

David T. Hashey, Q.C., Panel Chair

" original signed by"

Hugh J. Flemming, Q.C., Panel Member

New Brunswick Securities Commission
Suite 300, 85 Charlotte Street
Saint John, New Brunswick E2L 2J2
Tel: 506-658-3060
Fax: 506-658-3059