

THIS DECISION IS UNDER APPEAL.

ALBERTA SECURITIES COMMISSION

DECISION

Citation: Kustom Design Financial Services Inc., Re, 2010 ABASC 179 Date: 20100422

**Kustom Design Financial Services Inc., Kustom Design Group Inc.,
Hightide Management Inc., Synergy Group (2000) Inc.,
Michael Edward Lepitre, Mark Adrian Jones and Leonard Jonathan Zielke**

Panel: Glenda A. Campbell, QC
Beverley A. Brennan, FCA
Kenneth B. Potter, QC

Appearing: Tom McCartney
for Commission Staff

Michael Edward Lepitre and Mark Adrian Jones
for Kustom Design Financial Services Inc.,
Kustom Design Group Inc., Hightide
Management Inc. and themselves

Alistair Crawley and Anna K. Markiewicz
for Synergy Group (2000) Inc.

Dates of Hearing: 5-8 and 19 October 2009; and 5 January 2010

Date of Decision: 22 April 2010

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I. INTRODUCTION

[1] In an amended notice of hearing dated 1 October 2009 (the "Notice of Hearing"), staff ("Staff") of the Alberta Securities Commission (the "Commission") allege that seven respondents (the "Respondents") – Kustom Design Financial Services Inc. ("Kustom Financial"), Kustom Design Group Inc. ("Kustom Group"), Hightide Management Inc. ("Hightide"), Synergy Group (2000) Inc. ("Synergy"), Michael Edward Lepitre ("Lepitre"), Mark Adrian Jones ("Jones") and Leonard Jonathan Zielke ("Zielke") – contravened Alberta securities laws and engaged in conduct contrary to the public interest by trading and distributing securities without registration and a prospectus and, also, in the case of Kustom Financial, Lepitre and Jones, by acting as advisors without registration.

[2] Earlier, on 28 June 2007, the Commission issued an interim order against Kustom Financial, Kustom Group and Hightide (collectively, the "Kustom Companies") and Lepitre, directing that all trading in securities of the Kustom Companies cease, that they cease trading in all securities and that all exemptions contained in Alberta securities laws do not apply to them. The Commission subsequently extended that order, as modified, until the hearing in the matter is concluded and a decision rendered, or until otherwise ordered.

[3] The hearing into the merits of the allegations (the "Merits Hearing") began on 5 October 2009. All Respondents but Zielke participated in the Merits Hearing; Lepitre and Jones participated for themselves and apparently for the Kustom Companies, and Synergy was represented by counsel. We received documentary evidence and heard testimony from two Staff investigators, nine Alberta investors or purchasers (for privacy reasons, we identify investor and purchaser witnesses by their initials) and an officer of Synergy. Neither Lepitre nor Jones testified or called witnesses, and no one testified on behalf of or for the Kustom Companies. We received written submissions from Staff on 2 November 2009 and from all Respondents but Zielke on 30 November 2009, and we received written reply submissions from Staff on 7 December 2009. We heard oral submissions from Staff, Synergy and Lepitre on 5 January 2010.

[4] Our decision and reasons on the merits of the allegations against the Respondents follow. Stated briefly, we find that:

- contrary to sections 75(1)(a) and 110(1) of the *Securities Act*, R.S.A. 2000, c. S-4 (the "Act"):
 - Kustom Financial, Lepitre and Jones illegally traded in and distributed securities of the Kustom Companies;
 - Kustom Group illegally traded in and distributed securities of Kustom Group;
 - Hightide illegally traded in and distributed securities of Hightide; and
 - Synergy, Kustom Financial, Lepitre, Jones and Zielke illegally traded in and distributed securities issued in conjunction with Synergy's "Alternative Tax Strategy Program";

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- contrary to section 75(1)(b), Kustom Financial and Lepitre acted as advisors without being registered to do so; and
- in so doing, the Respondents engaged in conduct contrary to the public interest.

II. PRELIMINARY MATTER

A. Evidentiary Standard

[5] The appropriate standard of proof in Commission enforcement proceedings is the balance of probabilities civil standard. That standard of proof was recently clarified by the Supreme Court of Canada in *F.H. v. McDougall*, 2008 SCC 53 (at paras. 40, 45-46):

... I think it is time to say, once and for all in Canada, that there is only one civil standard of proof at common law and that is proof on a balance of probabilities. Of course, context is all important and a judge should not be unmindful, where appropriate, of inherent probabilities or improbabilities or the seriousness of the allegations or consequences. ...

...

To suggest that depending upon the seriousness, the evidence in the civil case must be scrutinized with greater care implies that in less serious cases the evidence need not be scrutinized with such care. I think it is inappropriate to say that there are legally recognized different levels of scrutiny of the evidence depending upon the seriousness of the case. There is only one legal rule and that is that in all cases, evidence must be scrutinized with care by the trial judge.

... evidence must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test. ...

[6] Thus, we are to determine whether Staff proved, on a balance of probabilities, the allegations made against the Respondents in the Notice of Hearing.

B. Evidentiary Basis for Findings

[7] In making our findings, we rely on the testimony given before us and on the documents admitted into evidence. The latter included documents relating to investments or purchases (entered into evidence through either a Staff investigator or investor or purchaser witnesses), corporate registry records and excerpts from transcripts of four interviews of Lepitre, Jones, Gary Akins ("Akins") and Enrique (also known as Chico) Toscano ("Toscano") conducted under oath or affirmation by Staff investigators. Thus, while Staff, in their written submissions, referred us to portions of these transcripts not admitted into evidence, we do not consider or rely on any such portions in making our findings.

[8] We find the evidence to be sufficiently clear, convincing and cogent to support our findings and conclusions as discussed below.

III. FACTUAL BACKGROUND

[9] We summarize the factual background relevant to our decision, derived from the testimony heard and the documentary evidence received.

A. Respondents and Other Entities

[10] Lepitre and Jones are residents of Calgary, Alberta. Neither Lepitre nor Jones has ever been registered to trade in securities, and neither is registered to act as an advisor, in Alberta.

