

## 2012 BCSECCOM 250

**Brookmount Explorations Inc., Peter John Flueck and Zafer Erick Sungur**

*Securities Act, RSBC 1996, c. 418*

### Hearing

<b>Panel</b>	Brent W. Aitken Shelley C. Williams Suzanne K. Wiltshire	Vice Chair Commissioner Commissioner
<b>Date of hearing</b>	January 16, 2012	
<b>Date submissions completed</b>	March 28, 2012	
<b>Date of Decision</b>	June 26, 2012	
<b>Appearing</b>		
Graham MacLennan Kristine Mactaggart Wright	For the Executive Director	
Owais Ahmed	For Brookmount Explorations Inc., Peter John Flueck and Zafer Erick Sungur	

### Findings

#### I Introduction

- ¶ 1 This is the liability portion of a hearing under section 161(1) of the *Securities Act*, RSBC 1996, c. 418.
- ¶ 2 On February 4, 2011 the executive director issued a notice of hearing against Brookmount Explorations Inc., Peter John Flueck and Zafer Erick Sungur alleging that, from February 2005 to June 2007:
- Brookmount made misrepresentations contrary to section 50(1)(d) of the Act when it issued news releases that omitted material facts,
  - Brookmount contravened National Instrument 43-101 *Standards of Disclosure for Mineral Projects* when it issued the news releases,
  - Flueck and Sungur authorized, permitted or acquiesced in the Brookmount contraventions and accordingly committed the same contraventions under section 168.2(1) of the Act, and

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- Flueck and Sungur breached a cease-trade order against Brookmount issued by the executive director in June 2007 when they sold Brookmount shares in July and August of 2007.

¶ 3 The respondents say that:

- we do not have jurisdiction to consider the allegations in the notice of hearing because there is no real and substantial connection between the allegations in the notice of hearing and British Columbia or, in the alternative, we should not assert jurisdiction,
- Brookmount did not make misrepresentations contrary to section 50(1)(d) of the Act, and
- Sungur did not authorize, permit or acquiesce in Brookmount's alleged contraventions of the Act and NI 43-101.

### **II Background**

#### **A Evidence of the parties**

¶ 4 At the hearing the executive director called the Commission staff investigator who investigated the matter and no other witnesses. The respondents were represented but did not cross examine the investigator and entered no evidence.

¶ 5 Flueck and Sungur both attended compelled interviews with Commission staff: Sungur on November 23, 2007 and Flueck on February 7, 2008. Both were under oath and represented by the same counsel from a Vancouver law firm. The transcripts of the interviews were admitted as evidence in the hearing. Statements in these findings that we attribute to Flueck or Sungur come from the transcripts of their respective interviews.

#### **B The Respondents**

##### **1. Brookmount**

¶ 6 Brookmount is a Nevada company. During the relevant period its securities were quoted on the US OTC Bulletin Board and Brookmount made filings with the United States Securities and Exchange Commission. There is no evidence that Brookmount was a reporting issuer in British Columbia.

¶ 7 According to Flueck, Brookmount operated solely from an office in Vancouver during the relevant period.

##### **2. Flueck**

¶ 8 Flueck owned a mining property in Peru known as the Mercedes 100 Project. In early 2003 Flueck was approached by two individuals who wanted him to vend in the Mercedes property to Brookmount. The two individuals said they could raise money to develop the Mercedes property.

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- ¶ 9 Flueck and his two partners purchased Brookmount (then a shell) and took the necessary steps to have it listed. Flueck became a Brookmount director and in March 2003 became its president. He held these offices during the relevant period.
- ¶ 10 In January 2005 Flueck vended the Mercedes property into Brookmount. The consideration for the sale was \$20,000 in cash (which went to Flueck) and 5 million Brookmount shares.
- ¶ 11 One of the partners left Brookmount in early 2005. The other partner's involvement terminated about a year later, in early 2006.
- ¶ 12 Flueck says he was a resident of Alberta during the relevant period.
- ¶ 13 Flueck says his role was primarily "fund raising and keeping things in order in South America." Flueck estimates he spent "a good 40 hours a week anyways" raising money for Brookmount.
- ¶ 14 He also says he was the only one "involved on the mining side."

### **3. Sungur**

#### ***Qualifications and titles***

- ¶ 15 Sungur has a Bachelor of Commerce degree and an additional year of study towards an MBA.
- ¶ 16 In April 2003 Sungur became a Brookmount director and its Chief Operating Officer, Secretary, and Treasurer. He held these offices during the relevant period. Although he held the latter titles, he saw himself primarily as Brookmount's COO. When asked to identify his last occupation at the time of his interview, he said, "I was the COO of Brookmount."
- ¶ 17 Sungur worked at Brookmount's office, located in Vancouver. He was Brookmount's only employee there.

#### ***Compensation***

- ¶ 18 Sungur was to be paid \$10,000 a month in 2005 (the same as Flueck) although it is not clear whether how much of that, if any, was paid. Flueck says Sungur ultimately resigned because Brookmount did not have the money to pay him (Flueck was not being paid either).

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- ¶ 19 Of the 5 million shares that Brookmount issued to Flueck and his two partners in consideration for the acquisition of the Mercedes property, a quarter of them – 1.25 million – ended up going to Sungur.
- ¶ 20 Flueck’s explanation is that when the first partner left Brookmount, Sungur’s “responsibility increased so we increased his . . . allotment.” He says Sungur “was our chief operating officer. He was appointed as the chief operating officer when he came into the picture.”
- ¶ 21 Sungur says he got the shares for “basically just putting the deal together to roll it into the company.”
- ¶ 22 According to Brookmount’s SEC filings during the year ended November 30, 2006 Brookmount issued 2.63 million shares of common stock “with a fair value of \$462,000 to its directors for the services provided to date”. Sungur says the shares were issued to Flueck and Sungur, and that he received 1,630,000 of them.
- Role and responsibilities***
- ¶ 23 Flueck says the administrative side of Brookmount’s business was handled initially by one of the partners and by Sungur until the partner left, and then “Zaf took that over. . . . Zaf took over [the partner’s] share, basically.”
- ¶ 24 Flueck says Sungur took “care of the accounting, banking, all the office work, basically”.
- ¶ 25 Flueck says that the original two partners’ involvement in Brookmount was terminated for “non performance”. He says the decision to terminate their involvement was made by him and Sungur.
- ¶ 26 Sungur characterized his role as “taking care of day to day administrative operations with the company, excluding mining stuff, because I’m not knowledgeable in mining.” He worked full time. “I did not have any other employment,” he said.
- ¶ 27 In Sungur’s opinion, Brookmount’s auditors were too expensive in his view and he retained new auditors.
- ¶ 28 Sungur cancelled Brookmount’s contracts with its investor relations firm because he was unhappy with the promotional information the firm proposed to disseminate. Sungur retained a new investor relations firm.

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- ¶ 29 At Sungur’s instance, Brookmount terminated the contract with its transfer agent to save money and thereafter acted as its own transfer agent. Sungur kept transfer agent records and sent out share certificates from the Vancouver office.

### *News releases*

- ¶ 30 Flueck and Sungur both say that Sungur was responsible for disseminating the news releases from the Vancouver office.
- ¶ 31 Flueck describes the drafting of news releases as a “joint effort” between him and Sungur. He says Sungur always read the news releases before they were disseminated.
- ¶ 32 Sungur says that if the news releases “related to technical stuff, Peter would write them” and would “show them to me and they would get filed or disseminated.” He says that when he reviewed news releases drafted by Flueck, he “would agree with him or say ‘No, I don’t agree with this,’ or something like that . . . .”
- ¶ 33 When it was put to Sungur in his interview that he “would always be aware that a news release would be disseminated and about the content in it”, he agreed.
- ¶ 34 The 10 news releases in issue in these proceedings indicated they were released from “Vancouver, BC” and nine of them included a reference to Sungur, showing his title as “Chief Operating Officer” as the Brookmount contact for further information.

### *Regulatory filings*

- ¶ 35 Flueck says that Brookmount’s auditors prepared Brookmount’s financial statements and its filings with the SEC.
- ¶ 36 Flueck and Sungur both say that Sungur read Brookmount’s financial statements and SEC filings before they were disseminated and filed.
- ¶ 37 Flueck says that Sungur gave the auditors the content about Brookmount’s mining properties that appeared in its financial statements and SEC filings.

## **C Allegation of Misrepresentation and Contraventions of NI 43-101**

### **1. The Mercedes property**

- ¶ 38 It is clear from the evidence, and is not disputed, that the Mercedes property was key to Brookmount’s business. In the news releases in the evidence before us, the property is described as “key” and Brookmount’s “primary focus”. Brookmount said its “sole mineral property assets” consisted of the Mercedes property (along with, in 2005, some claims in Quebec, then in 2006 and 2007, some claims in British Columbia).

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### **2. The Mercedes property reports**

- ¶ 39 Brookmount had four reports relating to the Mercedes property:
- a September 1997 report prepared by Adrian G. Mann
  - a March 2004 project economic evaluation report prepared by Paul Sterling
  - a March 2004 geological report prepared by Guillermo Salazar
  - a 2005 business plan and production report prepared by Thomas Foster
- ¶ 40 Some of these reports refer to earlier reports on the Mercedes property by Howard Coates. These reports consist of an early unsigned report, a detailed report, and a letter report. None of them is in evidence and Brookmount had in its possession only the letter report. We refer to these three reports collectively as the Coates report.
- ¶ 41 Coates concluded that the property had no certifiable reserves.

#### ***The Mann report and the Sterling evaluation***

- ¶ 42 The Mann report relied heavily on the Coates report information, citing Coates' estimates of mineral grades and reserves. It noted Coates' conclusion that the property had no certifiable reserves.
- ¶ 43 Mann determined reserve estimates including proven and probable reserves of gold, silver, lead and zinc, and unspecified possible reserves. Mann's estimates were significantly lower than Coates' in all categories.
- ¶ 44 The Sterling evaluation contains economic projections based on the reserves in the Mann report.

#### ***The Salazar report***

- ¶ 45 Flueck retained Salazar to prepare a report compliant with NI 43-101 because he intended to seek financing in Alberta. The report was dated in March 2004 and, according to Sungur, Salazar provided Brookmount a draft of the report in that timeframe. Salazar delivered the final report in June or July 2004.
- ¶ 46 Flueck and Sungur read the report. In his interview, Flueck said, "To be honest with you, I was very disappointed with the report."
- ¶ 47 This is not surprising. The Salazar report threw cold water on the Coates and Mann reports. Salazar said neither the unspecified possible reserves in the Mann report nor the mineral estimates in the Coates report complied with Canadian Institute of Mining (CIM) standards, or with the requirements of NI 43-101 and that he did not endorse Coates' estimate of resources. Salazar said there were

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major discrepancies between the surveying systems Salazar used and those used by Mann, and that no resource calculations could be made for the Mercedes property without resolving the survey data problems.

### *The Foster report*

- ¶ 48 Flueck says he was introduced to Foster “as a fellow who could help us get our reporting up to date in such a way that we’d be able to get the funding.” The Foster report contained some highly promotional statements. Foster suggested that Coates' predictions of possible reserves were understated and that the Mercedes property had the potential for 5.8 million ounces of gold, substantially higher than both Coates’ and Mann’s estimates. Flueck explained that this was Foster’s “own feeling all along, that that’s what the potential of the property was.”
- ¶ 49 Foster noted that, unlike geologists, he was not burdened by the need to comply with international standards. He acknowledged the numbers in the Coates report were estimates only, characterized its own mineral reserve estimate as “not proven” and “only a logical estimate”. Foster said, “The truth is that nobody knows what the total reserves are, or how long the mine will last.”

### **3. Brookmount's SEC filings**

- ¶ 50 In Brookmount's February 2005 Form 8-K filing with the SEC, it said, “The Mercedes property is without known reserves. Our proposed programs are exploratory in nature.”
- ¶ 51 In Brookmount’s February 2006 Form 10-KSB filing, it said, referring to the Coates report and its estimates of mineralization and its reserve calculations, “we do not have sufficient information that would be necessary to determine if these figures are accurate or were calculated in accordance mining standards.” It also stated, using full-capital font: “The mineral properties in which we have an interest, the Brookmount claims and the Mercedes property, have no reserves.”
- ¶ 52 Flueck says it was his “impression” that these statements were “disclaimers put in by the auditor.”

### **4. Brookmount’s news releases**

- ¶ 53 There are 10 news releases in evidence, including a same-day restatement of one of them. The following paragraphs summarize the misrepresentations alleged by the executive director.

#### *Release dated February 17, 2005*

- ¶ 54 The release:

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- describes the Mercedes property as “a truly world class resource with tremendous potential” (in his interview Flueck said, “that was my description”)
- says “the potential of the property is underlined by its encouraging reserve levels that include 21,500 tons of proven reserves, 480,000 tons of potential and prospective reserves and 1,950,000 tons of possible reserves, all at unspecified grades”
- states reserve value in ounces per ton for gold, silver, and zinc

¶ 55 Flueck says the reserve figures in the news releases were figures he took from the Mann report and that he based the reserve values on individual samplings and assays he had done in the past. The figures Flueck used from the Mann reported were those that Mann had cited from the Coates report. Mann did not agree with those figures and they were more bullish than Mann’s figures.

### ***Release dated April 21, 2005***

- ¶ 56 The release:
- says, regarding the Mercedes property, “With 21,500 tons of proven reserves, 480,000 tons of potential and prospective reserves and 1,950,000 tons of possible reserves, the property is virtually ready for an immediate drilling program”
  - repeats the reserve values from the February 17 news release

### ***Release dated December 14, 2005***

¶ 57 The release discloses, based on an update of the Sterling evaluation to reflect increases in mineral prices, that the Mercedes property projected revenue “has been increased from its original level of US\$59 million to US\$98 million.”

### ***Release dated January 9, 2006***

- ¶ 58 The release announces completion of a private placement of \$400,000 for a drilling program recommended by Salazar. The news release says the program was intended “to place more reserves into the proven category”, language that would imply Brookmount already had reserves in that category. That implication was not supported by the Salazar report. Salazar recommended a program to survey the Mercedes property’s to confirm its boundaries, to do some assaying of already-mined material, to drill 16 holes to test various ore bodies, and to confirm the property’s geological interpretation.
- ¶ 59 The news release also discloses reserve estimates based on one ounce of gold equivalent per ton for the reserve estimates. Flueck manufactured the reserve estimate by applying grade information from the Mann report to tonnage estimates



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from Coates. He did not discuss the validity of this approach with Mann or any other expert.

### ***Release dated January 27, 2006***

- ¶ 60 The release repeats from the January 9 news release Flueck’s manufactured reserve estimate and the company’s intention “to place more ore reserves into the proven category.” It also repeats from the December 14 news release the project revenue estimate of US\$98 million.

### ***Releases dated February 14 and March 14, 2006***

- ¶ 61 The releases repeat the project revenue estimate of US\$98 million.

### ***Release dated August 14, 2006***

- ¶ 62 The release:
- describes the Foster report as “an original and creative Mine Plan that will make Mercedes a showcase operation, in efficiency and production costs per ton”
  - states (based on the Foster report) that the Mercedes property had six mines, gold reserves were over 5.8 million ounces, with silver, zinc and lead also present, mining costs were projected at \$114 per ton, and that the property had a mine life of 36 years
- ¶ 63 This release Flueck wrote on his own, and he says no one else from Brookmount read it before it was disseminated.

### ***Release dated June 18, 2007***

- ¶ 64 The release:
- states that “work to date” on the Mercedes property “gives estimation of a potential inferred resource in excess of 5MM oz equivalent” in gold, silver, zinc and lead
  - says that Brookmount “expects to announce shortly the completion of funding to begin 1<sup>st</sup> stage developments in order to bring the Mercedes 100 project to production of 1500 tons/day”

### ***How Flueck derived the numbers in Brookmount’s news releases***

- ¶ 65 None of the releases mentions Coates’ conclusion that the property had no certifiable reserves nor Salazar’s assessment of the estimates in the Coates and Mann reports. None of the releases reconciles the statements made in the releases with Brookmount’s SEC filings. The releases based on the Foster report did not disclose how Foster reached his conclusions.

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- ¶ 66 In fact, Flueck chose the most favourable numbers available from the four reports. When he was asked whether he “deliberately chose to put in the Coates numbers he responded, “It could be yes.”
- ¶ 67 Asked whether Brookmount ever used the Salazar report as a reference for its news releases, Flueck said it did not, because “I felt the Mann report was more in line with what was actually there than what the Salazar report indicated.”
- ¶ 68 Flueck said he “obviously wanted to give the – present the best possible picture.” He said, “There was – the varying reports done by Coates or . . . Mann, Salazar . . . and we referred to the best of the three, I guess.”
- ¶ 69 Asked why, he said, “Why? To put out a good news release or press release, I guess.”

### 5. NI 43-101

- ¶ 70 The executive director also alleges that Brookmount contravened NI 43-101 when it published its news releases because the disclosures in the news releases were not supported by the technical requirements of that instrument. Those contraventions include, among other things, Brookmount’s failure:
- to file a technical report,
  - to ensure that disclosure of a scientific or technical nature was based on information prepared by or under the supervision of a qualified person, and
  - to include in the disclosure data verification information, exploration information, and mineral resource and reserve information.

### D Allegation of Breaches of the Cease-Trade Order

- ¶ 71 In June 2007 the executive director issued an order under section 164(1) that all trading in the securities of Brookmount cease.
- ¶ 72 In July and August 2007, a company owned and controlled by Flueck sold 92,500 shares of Brookmount for gross proceeds of \$6,325 and in July 2007 Sungur sold 58,500 shares for gross proceeds of \$4,045. Flueck and Sungur made their trades through accounts at the Vancouver office of an investment dealer registered in British Columbia.
- ¶ 73 Trading records show that Flueck and Sungur placed their orders in July, despite their testimony in their interviews that they placed the orders in June prior to the issuance of the cease-trade order. Both communicated with their brokers in July about the status of their sell orders.

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### III Issues

- ¶ 74 The respondents say that we do not have jurisdiction to consider the allegations in the notice of hearing because there is no real and substantial connection between those allegations and British Columbia or, in the alternative, we should not assert jurisdiction.
- ¶ 75 The executive director alleges that Brookmount made misrepresentations, contrary to section 50(1)(d) of the Act when it issued news releases that omitted material facts. The respondents made no submissions about whether Brookmount made misrepresentations. They say only that Brookmount did not contravene section 50(1)(d) because Brookmount, in making the impugned representations, did not do so while engaging in investor relations activities or with the intention of effecting a trade in a security.
- ¶ 76 The executive director alleges that Brookmount contravened NI 43-101 when it issued the news releases. The respondents made no submissions about this allegation.
- ¶ 77 The executive director alleges that Flueck and Sungur authorized, permitted or acquiesced in the Brookmount contraventions and accordingly committed the same contraventions under section 168.2(1) of the Act. Sungur says that he did not do so. Flueck made no submissions about this allegation.
- ¶ 78 The executive director alleges that Flueck and Sungur breached a cease-trade order against Brookmount issued by the executive director in June 2007 when they sold Brookmount shares in July and August of 2007. Neither Flueck nor Sungur made submissions about this allegation.

### IV Analysis and Findings

#### A Role of Sungur

- ¶ 79 We start with Sungur's role in the company because it is relevant both to the respondents' argument on jurisdiction and to Sungur's argument about his liability under section 168.2(1) for Brookmount's contraventions.
- ¶ 80 It is clearly in the respondents' interest to diminish Sungur's role. If Sungur had no executive responsibilities, their argument about jurisdiction would be strengthened, at least on their theory of the basis of our jurisdiction. Sungur's defence against the allegation based on section 168.2(1) would also be stronger.
- ¶ 81 In their submissions, the respondents characterize Sungur's role as essentially clerical – merely administrative, they say – mostly bookkeeping and going to the bank.

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- ¶ 82 However, the evidence shows that Sungur had significant responsibilities that went well beyond the clerical.
- ¶ 83 Not only was Sungur a Brookmount director, he held a panoply of officer titles: Chief Operating Officer, Secretary, and Treasurer. These were not empty titles.
- ¶ 84 He and Flueck made the decision to terminate Flueck’s two original partners’ involvement in Brookmount.
- ¶ 85 His role in disseminating news releases was not merely clerical. Flueck said that the issuance of news releases was “a joint effort”. Sungur had a significant role in reviewing them for their substantive content. He would tell Flueck when he did not agree with the content. For a small mining company engaged in almost continuous financing efforts this is no small matter. It is hard to overstate the importance of news releases. They are an important part of communicating information that is accurate and not misleading and that, when the news is good, will excite interest in the company.
- ¶ 86 Sungur also had authority over the company’s auditors, which he exercised when he dismissed the incumbent firm and appointed another. He also cancelled the contract with the company’s investor relations firm.
- ¶ 87 He also decided to terminate the contract with Brookmount’s transfer agent and assumed the responsibility of managing the transfer agent function in-house.
- ¶ 88 Sungur also accepted the titles at Brookmount that he was given. Sungur had a Bachelor of Commerce and one year’s credit towards an MBA. He would have known the significance of those titles. There is no evidence that he objected to his titles because they connoted more responsibility than he actually had, either when appointed or after having acted in those capacities for about four years.
- ¶ 89 This Commission has held in many decisions that a person who accepts appointment as a director or officer will be held accountable for the responsibilities that go with those offices (even if the person is unsophisticated or appointed only for convenience).
- ¶ 90 Also worth noting is that Flueck’s role, although executive in nature, was limited to capital raising, keeping tabs on activities on the Mercedes property, and, in conjunction with Sungur, drafting news releases about the company’s business. Flueck says that capital raising alone consumed about 40 hours a week of his time during the relevant period. It follows that all of the other executive functions for the company rested with Sungur – there was nobody else.

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- ¶ 91 Sungur's compensation arrangements are consistent with the level of responsibility he had in the company. He got one of the original partner's share of the 5 million shares issued by Brookmount on the acquisition. His cash compensation was the same as Flueck's. He and Flueck shared a later issuance of shares as compensation for services rendered. This is not a compensation pattern consistent with merely clerical responsibilities.
- ¶ 92 We find that Sungur was not merely an officer of Brookmount by title, but a *de facto* officer. His responsibilities included executive functions consistent with his titles. He was also a director, and for much of the relevant period he and Flueck were Brookmount's only directors.

### **B Jurisdiction**

- ¶ 93 The test for determining whether the Commission has jurisdiction is whether the subject matter of the notice of hearing has a real and substantial connection with British Columbia: *Torudag* 2009 BCSECCOM 9, para. 27.
- ¶ 94 The respondents say that Brookmount has only two connections to British Columbia: it has an office in Vancouver, and Sungur, a British Columbia resident, worked at that office. They say, however, that these connections are not real and substantial.
- ¶ 95 We disagree.
- ¶ 96 Brookmount does not merely have *an* office in Vancouver – the Vancouver office is Brookmount's *only* office. That Brookmount, a publicly-traded company, had only one office, an office located in British Columbia, established a real and substantial connection between Brookmount, and its directors and officers, and British Columbia.
- ¶ 97 We have also found that Sungur's executive responsibilities were consistent with the officer titles he held. Sungur carried out those responsibilities at Brookmount's Vancouver office, including the issuance of the impugned news releases. This also established a real and substantial connection between Brookmount and British Columbia.
- ¶ 98 There is also a third real and substantial connection to British Columbia. Brookmount issued the news releases here. The statements in the news releases were therefore made here. If they were misrepresentations, that means Brookmount contravened the Act here.
- ¶ 99 The respondents say that even if we find, as we have, that there was a real and substantial connection between the allegations against the respondents and British

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Columbia, we ought not to exercise that jurisdiction. They say it has not been established “that the Commission must assert its jurisdiction in order to protect and promote the public interest by fostering (i) a securities market that is fair and warrants public confidence and/or (ii) a dynamic and competitive securities industry that provides investment opportunities and access to capital.”

¶ 100 The allegations in the notice of hearing are serious: misrepresentation, failure to comply with NI 43-101, and trading shares in contravention of a cease-trade order. We have found that there was a real and substantial connection between Brookmount, and its directors and officers, and British Columbia because its only office is in Vancouver, executive functions were carried out at that office, and the news releases were issued in British Columbia. Because of that real and substantial connection, the misconduct alleged, if proven, would erode public confidence in British Columbia's securities market.

¶ 101 Accordingly, it is necessary for the exercise of our public interest mandate that we take the jurisdiction we have found as a result of the respondents' real and substantial connection to British Columbia.

### **C Alleged Misrepresentation and Contravention of NI 43-101**

¶ 102 Section 50(1)(d) says:

“50(1) A person, while engaging in investor relations activities or with the intention of effecting a trade in a security, must not . . .

(d) make a statement that the person knows, or ought reasonably to know, is a misrepresentation”

¶ 103 Section 1(1) defines “misrepresentation”, “material fact”, and “investor relations activities”:

“ ‘misrepresentation’ means

(a) an untrue statement of a material fact, or

(b) an omission to state a material fact that is

(i) required to be stated, or

(ii) necessary to prevent a statement that is made from being false or misleading in the circumstances in which it was made”

“ ‘material fact’ means, when used in relation to securities issued or proposed to be issued, a fact that would reasonably be expected to have a significant effect on the market price or value of the securities”

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“ ‘investor relations activities’ means any activities or oral or written communications, by or on behalf of an issuer or security holder of the issuer, that promote or reasonably could be expected to promote the purchase or sale of securities of the issuer, but does not include

...

(b) activities or communications necessary to comply with the requirements of . . . this Act or the regulations”

- ¶ 104 Brookmount’s news releases omitted numerous material facts that were necessary to prevent these statements in the news releases from being false or misleading:
- the stated reserve levels, and the statement that the company’s intention was “to place more reserves into the proven category”, implying that Brookmount already had proven reserves
  - the stated projected revenue of US\$98 million
  - the stated gold-equivalent reserves of over 5 million ounces, and the suggestion that the company was on the verge of production
- ¶ 105 All of Brookmount’s statements about reserves were without foundation. Flueck concocted a mosaic of the most favourable estimates from the Coates and Mann reports and ignored the Salazar report. The August 14, 2006 news release was based on the Foster report, which was a fantasy. Essentially, Foster just made it all up.
- ¶ 106 The statements in the news releases also directly contradict the company’s 2005 SEC filing stating that the “Mercedes property is without known reserves” and its 2006 SEC filing that all of the properties in which it then had an interest, including Mercedes, “have no reserves.” In the 2006 SEC filing Brookmount also said it did not have the information necessary to determine whether its estimates of mineralization and its reserve calculations were “accurate or were calculated in accordance with mining standards.”
- ¶ 107 By omitting from the news releases the information about the Coates, Mann and Salazar reports and the information from its SEC filings, and by including information from the Foster report, Brookmount made statements in the news releases that were not merely misleading, but false.
- ¶ 108 That the Mercedes property was clearly Brookmount’s most significant property, if indeed not its only significant one, is not in dispute. There can be no doubt that information about the reserves, mineralization, project revenue and mine life

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would all be facts that would reasonably be expected to have a significant effect on the market price or value of Brookmount's securities.

- ¶ 109 We find that the statements in the news releases were untrue statements of material facts, and the omissions were material facts necessary to make the untrue statements in the news releases not false. We find that the news releases contained misrepresentations.
- ¶ 110 These misrepresentations would not contravene section 50(1)(d) unless Brookmount made the misrepresentations "while engaging in investor relations activities or with the intention of effecting a trade in a security."
- ¶ 111 The executive director says that Brookmount, in making its misrepresentations, Brookmount was engaging in investor relations activities. The definition of "investor relations activities" includes "any . . . written communications, by or on behalf of an issuer . . . that promote or reasonably could be expected to promote the purchase or sale of securities of the issuer." That language clearly encompasses the issuance of press releases, especially those with the promotional flavour of Brookmount's.
- ¶ 112 The respondents say that Brookmount's news releases are not captured by this definition, because of the exception that investor relations activities does not include communications necessary to comply with the requirements of the Act. We have found that Brookmount's news releases were misrepresentations. In light of that finding, any suggestion that the news releases were issued to comply with the Act would be ridiculous.
- ¶ 113 We find that Brookmount contravened section 50(1)(d) when it issued news releases containing misrepresentations and, in doing so, was engaging in investor relations activities.

### **D Alleged Contraventions of NI 43-101**

- ¶ 114 The executive director alleged that Brookmount contravened NI 43-101 when it issued news releases containing information contrary to the requirements of that instrument.
- ¶ 115 The respondents made no submissions about this allegation.
- ¶ 116 The respondents did not contest the allegation that Brookmount contravened NI 43-101 as alleged. We have reviewed the evidence and find that Brookmount contravened NI 43-101 as alleged.



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¶ 117 Had Brookmount complied with NI 43-101, the misrepresentations in the news releases could not, of course, have occurred. However, the executive director says, rightly, that this case is fundamentally about misrepresentation. In our opinion, the nature and extent of Brookmount's misrepresentations are sufficiently serious that any sanctions we impose as a result will be no more severe were we to make any of the further findings we could about Brookmount's contraventions of NI 43-101.

### **E Alleged Contraventions by Flueck and Sungur Based on section 168.2(1)**

¶ 118 Section 168.2(1) says:

“168.2 (1) If a person, other than an individual, contravenes a provision of this Act or of the regulations, or fails to comply with a decision, an employee, officer, director or agent of the person who authorizes, permits or acquiesces in the contravention or non-compliance also contravenes the provision or fails to comply with the decision, as the case may be.”

¶ 119 Flueck made no submissions about this allegation.

¶ 120 Sungur says he did not authorize, permit or acquiesce in Brookmount's contraventions of section 50(1)(d) and NI 43-101.

¶ 121 Flueck knew that the news releases were false. He read the reports and had to have known that the representations in the news releases about reserves and mineralization were not supported by the reports. He knew that he manufactured the reserve estimate based on one ounce of gold equivalent per ton. He admitted he was disappointed with the Salazar report. He knew that Foster was not using international standards and was making up numbers.

¶ 122 In his interview, Flueck was asked whether he had any concerns about signing an SEC filing that was inconsistent with Brookmount's news releases. Flueck responded, “No, I didn't – didn't really consider that it would be a problem.”

¶ 123 Flueck drafted the news releases and clearly authorized, permitted and acquiesced in Brookmount's contravention of section 50(1)(d) and, as a result, of NI 43-101.

¶ 124 We have found that Sungur had responsibilities with Brookmount that were consistent with his titles. He was also a director.

¶ 125 Sungur had also have known that the news releases were untrue. The evidence is clear that he was familiar with the content of both the news releases and the SEC filings. The news releases were a blatant contradiction of the SEC filings,

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yet there is no evidence he challenged Flueck on the point or took any steps to remedy the news releases. He simply issued them as usual.

- ¶ 126 His explanations in his interview on this point were weak and not credible. Asked if he could explain how Brookmount could, on the same day, disclose in a news release that the Mercedes property had probable, potential and proven reserves, and disclose in an SEC filing that its properties had no known reserves, Sungur said, “No, I cannot tell you that, because I didn’t do the press release.” When it was put to him that he had read the news release, he said “Yes, I did.”
- ¶ 127 When asked what his understanding was of the statement in the Salazar report that “Mr. Coates concluded that there were no certifiable reserves in the properties”, he answered, “I don’t know.”
- ¶ 128 When asked what his understanding was of the statement in the Salazar report that “Coates’ estimate of resources is not compliant with NI 43-101 and is not endorsed by the writer,” Sungur answered “I don’t know.”
- ¶ 129 We accept that Sungur did not have expertise in mining, but no technical knowledge of mining was necessary to spot the glaring inconsistencies between, on the one hand, what the technical reports were saying and what Brookmount was saying in its own SEC filings (which Sungur reviewed), and on the other hand what Brookmount was saying in its news releases (which Sungur also reviewed).
- ¶ 130 The only expertise required of Sungur was the ability to read and to apply common sense to what he was reading. There is no evidence that Sungur lacked the ability to do either and accordingly we do not accept his explanations.
- ¶ 131 Had Sungur been only an officer reporting to Flueck, he would, at a minimum, have permitted and acquiesced in Brookmount’s contraventions. However, he was not merely an officer reporting to Flueck. He was also a director of Brookmount. As such, his issuance of the news releases when he had to have known that they were misrepresentations, amounts to an implicit authorization.
- ¶ 132 We find that Sungur authorized, permitted and acquiesced in Brookmount’s contraventions of section 50(1)(d) and NI 43-101.
- ¶ 133 We find that Flueck and Sungur contravened, under section 168.2(1), section 50(1)(d) and NI 43-101.

### **F Alleged Breaches of Cease-Trade Order**

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- ¶ 134 The executive director alleges that Flueck and Sungur breached the executive director's June 2007 cease-trade order against shares of Brookmount when they sold Brookmount shares in July 2007.
- ¶ 135 Neither Flueck nor Sungur made submissions about this allegation.
- ¶ 136 As described above, the evidence includes trading records that confirm the sale by Flueck of 92,500 Brookmount shares in July and August 2007 and the sale by Sungur of 58,500 Brookmount shares in July 2007.
- ¶ 137 We find that Flueck and Sungur breached the executive director's June 2007 cease-trade order when they sold Brookmount shares in July and August 2007.

### V Summary of Findings

- ¶ 138 We find that:
- Brookmount made misrepresentations, contrary to section 50(1)(d), when it omitted material facts from news releases it issued between February 2005 and June 18, 2007 and contravened NI 43-101 when it issued those news releases;
  - Flueck and Sungur authorized, permitted or acquiesced in, Brookmount's contraventions of section 50(1)(d) and NI 43-101 and accordingly contravened those requirements under section 168.2(1);
  - Flueck and Sungur breached the June 2007 cease-trade order made by the executive director against Brookmount securities when they sold Brookmount shares in July and August 2007.

### VI Submissions on Sanction

- ¶ 139 We direct the parties to make their submissions on sanctions as follows:

By July 31                      The executive director delivers submissions to the respondents and to the secretary to the Commission

By August 17                    The respondents deliver response submissions to the executive director and to the secretary to the Commission

Any party seeking an oral hearing on the issue of sanctions so advises the secretary to the Commission

By August 31                    The executive director delivers reply submissions (if any) to the respondents and to the secretary to the Commission

- ¶ 140 June 26, 2012

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### ¶ 141 For the Commission

Brent W. Aitken  
Vice Chair

Shelley C. Williams  
Commissioner

Suzanne K. Wiltshire  
Commissioner