

COMMONWEALTH OF MASSACHUSETTS
THE TRIAL COURT
SUFFOLK SUPERIOR COURT

Suffolk, ss

COMMONWEALTH OF MASSACHUSETTS,
Plaintiff

V.

NEW VENTURES ASSOCIATES, LLC,
Defendant

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CA # SUCV2006-00790

EXHIBIT "A"

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

SUPERIOR COURT DEPARTMENT
C.A. NO. SUCV2006-0790C

COMMONWEALTH OF
MASSACHUSETTS

Plaintiff,

v.

NEW VENTURES ASSOCIATES, LLC

Defendant.

**AFFIDAVIT
OF
WILLIAM THIBEAULT IN
OPPOSITION TO THE
COMMONWEALTH'S EMERGENCY
MOTION FOR SITE ACCESS AND
REQUEST FOR DEFAULT**

1. I am the Manager of New Ventures Associates, LLC ("New Ventures"). New Ventures purchased the Crow Lane Landfill (the "Landfill") in 2000 for the purpose of closing the illegal, unlined Landfill. The landfill had been operated by a prior owner through 1987, but had never been closed in accordance with the Department of Environmental Protection's (the "Department") regulations. New Ventures did not dispose of solid waste at the Landfill and did not have an affiliation with the prior owner. I am aware that the source of a majority of the municipal waste at the Landfill is the City and that the City entered into an agreement with the prior owner to dispose of sewer sludge including metals in the Landfill in 1986.
2. In addition to New Ventures, I have been affiliated with other separate companies for cleaning up Brownfield sites including contractor yards and automobile junk yards and converting them to clean sites including Stop and Shop in Everett and BJ's Wholesale Club in Revere.
3. Subsequent to New Ventures' purchase of the Landfill, the Department required the execution of an Administrative Consent Order ("2003 ACO") in order to close the

Landfill. The ACO was required because the Landfill was not closed by the prior owner in accordance with the Department's regulations. The Landfill closure footprint is approximately fourteen (14) acres in size. Closure involves placing grading and shaping materials to the final elevation, placing geo-textile material on top of the grading and shaping material, placing an impermeable flexible membrane liner (the "FML") and then 12 inches of loam with seed. It is further defined in Paragraph 10, below.

4. Prior to the execution of the 2003 ACO, the Department's representative informed New Ventures that it must address City issues and receive approval for the operation of the closure from the City. New Ventures contacted then Newburyport Mayor Alan Lavender whose representatives drafted a Host Community Agreement (the "HCA") that established the operational terms of the closure. The City insisted that New Ventures tie the proposed post-closure height of the Landfill to a draft final grading plan in existence at the time that had been drafted by Goldberg Zoino Associates ("GZA").
5. After the HCA was executed in 2002, the Department prepared and executed its 2003 ACO.
6. In connection with the 2003 ACO, New Ventures prepared and submitted a pro forma analysis in accordance with Department policy that identified the anticipated costs for closure of the Landfill and established the approximate air space available for placing cover material on the Landfill to meet the final elevations with the existing footprint. The pro forma did not include extensive leachate collection system costs, the sulfur pretreatment system costs, berm modification costs, the reduction in air space due to increased soil requirements, extensive monitoring, the Jerome Meter, or staffing the facility seven (7) days a week, 24 hours a day that were added in 2005 and 2006,

subsequent to the 2003 ACO. Under the terms of the HCA, the Landfill size could not be expanded without Newburyport City Council and Mayoral approval despite additional costs of closure added to the Landfill closure.

7. As part of the Commonwealth's Solid Waste Master Plan and its policies for the closure of illegal, unlicensed landfills in the Commonwealth and for finding a disposal option for construction and demolition debris, the Department approved the use of construction and demolition debris (the "C&D debris") for grading, shaping and closing landfills. New Ventures was authorized by the Department to bring the Department approved C&D materials to the Landfill beginning in 2003. C&D waste is processed from building materials and rubble from the construction, repair or demolition of buildings, roads or structures and is six (6") inches or less in size. Revenues from accepting the C&D materials are proposed to finance the closure of landfills under the Department's Policy.
8. A copy of the proforma was provided to the Department in 2003.
9. As part of the 2003 ACO, New Ventures posted a Two Million Nine Hundred and Fifty Thousand (\$2,950,000.00) Dollar cash bond required by the Department's regulations for the Landfill closure which is intended as security for closure and post-closure completion. The cash bond is referenced as a Financial Assurance Mechanism (the "FAM"). The terms of the FAM are established in a Standby Trust Agreement through which an independent third party holds the monies. Access to the FAM is governed by the Trust Agreement which is Exhibit D of Mr. Carrigan's Affidavit.
10. I am familiar with the closure requirements of the Landfill from the Department of Environmental Protection (the "Department") and the HCA. Under the terms of the Department's 2003 ACO, closure of the Landfill was scheduled for completion within

three (3) years. Closure is defined by the Department's regulations at 310 CMR 19.00 and includes placing the DEP approved C&D materials to the elevation approved by the Department, mixing the C&D with soils, constructing stormwater collection basins to collect, manage and treat post-closure stormwater that will no longer infiltrate into the Landfill, installing a landfill gas extraction system to collect, discharge and burn subsurface gases, installing an impermeable and flexible liner (the "FML") as a seal over the landfill materials when the landfill reaches final grade, loaming and seeding the top of the Landfill for final cover and installing post-closure wells to monitor the downgradient areas after the Landfill has been closed.

11. Prior to the commencement of closure, New Ventures, through its environmental consultant, GZA, submitted a Notice of Intent to the Newburyport Conservation Commission (the "NCC") seeking approval of certain work within wetland resource areas and within 100 feet of these resource areas. New Ventures sought approval for the removal of historic solid waste from the wetlands, the construction of the perimeter berm and the construction of three (3) stormwater basins to collect, treat and manage post closure stormwater. Once the Landfill is closed the stormwater will not longer infiltrate into the Landfill and stormwater basins are necessary to handle the rainwater.
12. The NCC, after several public hearings, issued an Order of Conditions approving the activities. It was appealed by several residents to DEP.
13. New Ventures eliminated stormwater basin #3 from the wetlands and redesigned the stormwater basins 1 and 2 to take all post closure landfill stormwater. As a result the Department issued a Superseding Order of Conditions (the "SOC") allowing the work in January 2003.

14. This redesign required New Ventures to enlarge and widen the perimeter berm in order to collect and carry the stormwater to Stormwater Basin 2. The modification did not add to the height of the Landfill.
15. New Ventures commenced the closure in 2003 in compliance with the 2003 ACO and the SOC, New Ventures brought C&D materials to the Landfill and mixed it with soils to bring the contours to the approved grade.
16. The Department later determined that the degradation of C&D materials through exposure to the elements could result in the generation of hydrogen sulfide (the "H₂S") and rotten egg odors. The Department did not prohibit and has not prohibited the use of C&D materials for closure. New Ventures was informed by the Department that further pretreatment of the H₂S was required. The Department required soils to be mixed with C&D materials on a 1 to 1 basis. In October 2004, the Department issued an Order halting the closure an odor control program was developed. New Ventures adopted an odor program that combusted the landfill gas with an approved open flare from 2004 through 2006.
17. In 2005, following receipt of odor complaints filed with the Board of Health, New Ventures retained a Harvard public health consultant to advise New Ventures as to whether exposure to H₂S was a public health threat. The consultant issued a report that concluded that H₂S could result in nuisance odors at very low levels but that the reported levels did not represent a public health threat. A copy of the Report has been filed with the Court in this matter.
18. In 2005 and 2006, New Ventures consulted with the Department, engineers and other Landfill operators to determine how to address the effect of landfill gas emissions

associated with the use of C&D materials for closure. I am aware of at least three (3) other landfill closures that used C&D materials authorized by the Department in southeastern, central and western Massachusetts.

19. Other landfill closure operators were either publicly held corporations or had the ability to expand the air space at their landfill to recover the additional costs associated with the sulfur treatment process.
20. In May 2005, New Ventures entered into an agreement with the Newburyport Board of Health (the "BOH") regarding the operations of the closure. The agreement established that New Ventures would take certain actions to effect the Landfill closure. At or around that time, New Ventures sealed leachate breakouts at the Landfill. New Ventures agreed with the BOH that it would not accept materials if the H₂S levels reached 80 parts per billion. New Ventures also agreed to purchase and install a Jerome Meter in the neighborhood. The Jerome Meter is a small hand-held monitoring device that measures the level of H₂S in its vicinity with a detectable floor of 1-2 ppb. The Jerome Meter also runs off electricity and registers the levels every five minutes. The machine can be downloaded and is to provide H₂S readings. When complaints are called in to the New Ventures' complaint hot line, New Ventures must respond within one (1) hour and take the H₂S reading at the complaint location. These readings are provided to the Department the next day.
21. At no time have the H₂S levels registered in the neighborhood reached or exceeded 80 parts per billion to my knowledge.
22. In October 2006, New Ventures executed an agreement as a Preliminary Injunction (the "2006 Order") with the Department that modified the terms for the final closure of the

Landfill. Under the 2006 Order, New Ventures accelerated the closure of a portion of the Landfill in 2007 and recommenced the closure.

23. In accordance with the 2006 Order, New Ventures expended considerable monies that were not anticipated in the closure of the Landfill and were not included in the pro forma as part of the 2003 approval. The pro forma did not include a gas blanket extraction system or pretreatment costs associated with treating of landfill gases prior to combustion through the enclosed flare. These costs have exceeded several million dollars.
24. New Ventures, in connection with Wood Waste, Inc., its supplier of C&D material agreed to reduce the amount of gypsum in the C&D material collected by Wood Waste beginning in October 2006. The separation occurs prior to the processing of the C&D materials for disposal at the Landfill. Sheetrock containing gypsum was not allowed for processing at the Wood Waste facility. The Department has not banned the use of C&D materials for landfill grading, shaping or closure purposes.
25. New Ventures performed the following actions in compliance with the 2006 Preliminary Injunction:
 - a. In January 2007 New Ventures purchased and installed a permanent pretreatment system to treat the sulfides from the landfill gases. The pretreatment system consists of multiple gas extraction wells installed below surface, a piping system that collects the gases and brings them to the surface, three (3) pretreatment vessels that use sulfide pretreatment media, a condensation tank, a permanent piping system that connects the pretreatment system and the enclosed flare to the landfill gas collection system, a fully automated enclosed flare to combust the gas at 1600°F and

a thirty (30') foot high stack emission tower for the discharge of the combusted gases. This pretreatment system remains in place.

- b. Entered into a contract with an FML liner company for the accelerated closure of one-half of the Landfill including, Geocomposite and Flexible Membrane Liner ("FML") installation in 2006 and 2007.
- c. Installed additional vertical wells and piping for landfill gas extraction as part of the treatment and combustion system.
- d. Contracted for, designed and installed a horizontal gas collection system for the enclosed portion of the Landfill (more than fifty (50%) percent) in addition to the vertical wells. The horizontal system is no longer a benefit and only a portion is utilized.
- e. Operated the pretreatment system 24 hours a day, seven days a week that includes two or three containment structures with media to filter the sulfides as well as the enclosed flare and stack.
- f. Trained employees to run the pretreatment system and conduct daily and weekly tests for the Department.
- g. Arranged for the purchase of media to treat the sulfides and replaced the pretreatment media in response to the H₂S levels that entered the enclosed flare.
- h. Prepared a quality assurance and quality control plan with a construction sequence for the Department.

- i. Conducted, completed and submitted a Comprehensive Site Assessment (the "CSA") for the Department involving an analysis of the physical features of the site and groundwater conditions.
- j. Constructed gas vent trenches and installed piping for landfill gas extraction.
- k. Arranged for staffing the Landfill seven (7) days a week, twenty-four (24) hours a day when operating, including a complaint hotline. When a complaint is called in, New Ventures responds to the complaint location and takes a reading.
- l. Generally met the Department's performance standard of destroying in excess of 95% of all H₂S being treated through the pretreatment process, and 100% with the combustion.
- m. Constructed a stormwater basin (Basin #2) to collect and treat stormwater from the capped portion of the Landfill. Commenced work on the second stormwater management basin. (Basin #1)
- n. Pumped out leachate collection tanks installed at the perimeter of the Landfill.
- o. Submitted a geotechnical evaluation of the perimeter berm and provided supplemental information.
- p. Placed \$200,000.00 into escrow to guarantee purchase of the H₂S pretreatment system and media.
- q. Capped more than fifty (50%) percent of the Landfill with the FML liner.

26. New Ventures expended more than Three Million (\$3,000,000.00) Dollars in excess of the projected costs at that time without requesting access to the FAM.
27. In July 2007, New Ventures was issued a Notice of Responsibility (the "NOR") letter by the Department that alleged that the Landfill should be regulated as a hazardous waste site under M.G.L., c.21E, and that I am personally liable for hazardous waste found or disposed, at the site. The Department refused to meet with New Ventures to discuss its NOR allegations.
28. The NOR letter was part of the Department's strategy in 2007 to take over the Landfill closure. No hazardous waste has been deposited at the Landfill by New Ventures. All materials used in connection with the closure have been approved by the Department. Any hazardous wastes placed at the site took place when the private operator was receiving municipal waste.
29. In August 2007, New Ventures agreed to a Stipulation (the "2007 Order") with the City of Newburyport Board of Health issued by the Essex Superior Court that required New Ventures to perform four (4) actions. (Essex Superior Court, Civil Action No. ESCV2007-01255) New Ventures is in compliance with this Order.
30. On or about September 20, Superior Court Justice McLaughlin issued an Order denying the Department's request to enter the Landfill and take action under M.G.L., c. 21E. Justice McLaughlin required New Ventures to take certain actions toward closure. New Ventures has taken these steps to the extent practicable and feasible.
31. In compliance with the Judge's Order, New Ventures submitted an Immediate Response Action (the "IRA") Plan under M.G.L., c. 21E to the Department that incorporated the following actions to take place. The IRA was complied with.

- a. Take steps to place temporary cap of clay-like soils to a depth of one (1') foot over Phase 1A of the Landfill.
 - b. Continue to patch and maintain the FML layer and to take steps to weld the seams.
 - c. The submission of a proposed plan proposing three new extraction wells to complete the gas system loop to the Department for its approval.
32. New Ventures prepared the design of the new subsurface wells and installed the wells in 2008. The pretreatment gas collection system is now looped without any gaps.
33. In April and May 2008, New Ventures meet with the Commonwealth to address the Commonwealth's concern with the composition of the perimeter berm and the closure of the Landfill.
34. In connection with the construction of the perimeter berm that holds the Landfill, the berm was expanded beyond the berm area as shown on the draft closure plan that was incorporated in the 2002 HCA. The berm was expanded to add to the stability of the Landfill.
35. The modification did not increase the height of the Landfill.
36. In April 2009, the City of Newburyport Board of Health issued an Order to complete the closure which had been on hold since 2007. The Board considered the open Landfill to be a public health threat.
37. Under this Order, Landfill closure was intended during 2010.
38. Under this Order closure involves the following:
 - a. Bring the Landfill to final grade.
 - b. Place the FML over the remaining forty (40%) percent of the Landfill.

- c. Place twelve (12") inches of loam and seed on the entire Landfill cover.
39. The C&D materials that were used for grading and shaping were authorized by the Department.
 40. The Department has banned many materials from solid waste disposal and closure, but not C&D materials.
 41. I am aware and have personal knowledge that the facilities that transfer solid waste are authorized to take in C&D materials as DEP authorized cover for Landfills.
 42. In April 2009, New Ventures entered into an agreement with the Department that was filed with this Court that set the schedule for the closure of the remaining 40% of the Landfill.
 43. In accordance with the Settlement Agreement dated April 30, 2009, New Ventures has performed the following tasks in a timely manner:
 - a. Completed the field work for the geotechnical investigation of the perimeter berm along Phase I of the Landfill.
 - b. Met with the Department's technical consultants to review the geotechnical results of the perimeter berm.
 - c. Submitted a geotechnical report by its geotechnical consultant that established the requirements for the berm meeting the agreed upon safety standard of 1.3 in the April 2009 Settlement Agreement.
 - d. Fabricated three (3) new replacement containers to hold the Landfill gas pretreatment media which were installed and operate continuously to treat the gases prior to combustion.
 - e. Completed construction of the geo-textile layer covering the C&D materials.

- f. Completed construction of the Final FML cap upon the remaining portion of the Landfill with the exception of the haul road necessary to bring loam and seed to the top of the Landfill.
 - g. Emptied leachate tanks.
 - h. Constructed the stormwater controls for the remaining part of the Landfill, including Detention Basin #1 to collect the stormwater from the south side of the Landfill and a piping system to convey the stormwater to the wetlands in accordance with the plans.
 - i. Operated the Landfill with personnel on a 24 hour per day/7 day per week basis including daily monitoring of the pre-treatment system and H₂S levels.
 - j. Presented a berm modification design that meets the Department's 1.3 safety standard.
 - k. Maintained the pretreatment system.
 - l. Maintained the complaint hot line including follow up readings.
44. In my opinion the Landfill closure is at approximately ninety percent.
45. All that is remaining to be performed is for 1) FMR repair; 2) berm completion; 3) complete the FML capping; 4) loam and seed of the Landfill cap; 5) post-closure monitoring.
46. The 2.7 million dollars in the FAM exceeds the cost of the repair, closure and post-closure requirements.
47. In New Ventures' experience the level of H₂S has dropped dramatically following the capping of the Landfill. Since the exposure to moisture and interaction is ended with the capping of the Landfill, the amount of H₂S generated is reduced by almost one-half

immediately and will continue to reduce. This experience is consistent with the landfills that have reduced levels of H₂S after capping.

48. New Ventures has access to sufficient amounts of pretreatment media for post-closure purposes. The media containers are emptied on a less frequent basis.
49. On or about Thursday night and Friday morning, February 25 and 26, the northeast region of Massachusetts was hit hard by a storm. The storm produced hurricane-like winds exceeding 50 miles per hour. The storm left the northern portion of the state without power for several days. Southern New Hampshire lost power in more than 1/3 of its homes for days. The winds ripped a portion of the FML (10%) on the top of the Landfill. The FML that was ripped twisted in a ball. It remains on the Landfill.
50. I have inspected the damage to the FML from the hurricane-like winds of Thursday night/Friday morning, February 26, 2010. The damage was limited to less than 10 percent of the FML. In addition, several wells were damaged. New Ventures' personnel were on site during and after the storm and took immediate steps to secure the material and to seal any openings created. No C&D materials were exposed as they are covered by a geo-textile fabric. No new complaints of H₂S odors have been received as a result of the FML damage. No higher readings of H₂S in the neighborhood have been detected or recorded.
51. New Ventures determined that based upon the weight of the FML material and its need to replace the torn FML with new FML that must be welded as part of the repair that it needs a professional installer to complete the work.
52. New Ventures received an estimate for repairs from the installer and was reminded that repairs are not to take place when temperatures are below freezing. In addition, the repair

will require the creation of an access way to get to the damaged area with its equipment.

This work must be supervised so as to not damage the surrounding FML. The estimate is based upon the number laborers that New Ventures will make available for the repair.

53. I contacted Richard Chalpin, the Director of the Northeast Region, directly and discussed funding the FML repair. Mr. Chalpin stated that the Commonwealth would consider taking monies from the FAM to pay for the repairs if New Ventures shared financial information. I stated to Mr. Chalpin that, due to a pending lawsuit, I wanted to confirm that financial information is not a public record.
54. On or about March 5, 2010, counsel to New Ventures sent a letter to the Department stating his opinion that the financial records of New Ventures are not public records. Despite telephone calls and e-mails, the Department had not responded to our request.
55. To my knowledge there are no odor complaints or higher readings substantiated in the neighborhood associated with the FML damages. None were attached to the Commonwealth's Affidavits.
56. I have requested the Department consider funding certain future costs out of the FAM.
57. There is presently \$2,731,659.36 in the FAM for the limited tasks of FML repair, berm completion, FML installation for the access road and loaming and seeding.
58. I am aware of the statements/affidavit of Richard Chalpin regarding New Ventures' request for the use of FAM monies to fund certain costs and respond as follows:
 - a. The use of FAM monies to accelerate the closure of the Landfill with FML, to accelerate the work necessary to construct the stormwater basin and to conduct drilling was based upon an agreement with the Department. There was no threat by New Ventures that it would not conduct the work and no requirement that

financial records be submitted as part of the agreement to fund the work out of the FAM.

- b. The MOA with the Department and the amendment to the FAM in October 2009 is consistent with the above-referenced agreement. There is no reference to any lack of funds available or refusal of New Ventures to pay for this work in the amendment. Rather, the amendment specifically references the purpose of accelerating the closure and that there is no default. (Chalpin, Exhibit 1, p.1.; Carrigan Exhibit I, p. 2)
- c. On February 4, 2010, Mr. Chalpin informed me by email that in order to access the FAM for the repair of the blower for the enclosed flare, that New Ventures needed to state that it did not have revenue to pay for this task. (Chalpin, Exhibit 3) New Ventures complied. There was no request for financial information in connection with access to these monies for the blower.
- d. On February 4, 2010, DEP counsel informed New Ventures' counsel that if it wanted to access monies for future closure and O&M purposes, that financial information was required as well as an updated pro forma. (Chalpin, Exhibit 7)
- e. On March 2, 2010, Mr. Chalpin sent an email, in response to my request to access monies to fix the FML damaged by hurricane-like winds, that New Ventures must submit financial records. (Chalpin, Exhibit 5)
- f. As part of that response, New Ventures' counsel submitted a letter dated March 5, 2010 seeking confirmation that New Ventures' tax records were confidential. (Chalpin, Exhibit 8) No response has been received for the past three (3) weeks.

g. The pro forma referenced by Mr. Chalpin in his affidavit is not reliable for several reasons. First, as noted in the document, it was a draft document, because it was an estimate prior to installation of the pre-treatment system in 2006. Second, the document was drafted with the bulk of the post-closure estimate set aside for Landfill gas and operation. Third, following the installation of the pre-treatment system, costs are considerably less than anticipated because the media is less expensive and because the volume of media required for the Landfill gas pre-treatment process is less than anticipated once the Landfill is capped. The concentration of H₂S in the Landfill gas has dropped by almost eighty (80%) percent in the area capped. This is consistent with the experience of other landfills that used C&D materials for grading and shaping.

h. Monitoring and maintenance costs will be in the range of Thirty Thousand (\$30,000.00) Dollars per year for thirty (30) years or One Million (\$1,000,000.00) Dollars.

i. New Ventures has not stated that it will abandon the Landfill closure.

j. New Ventures is prepared to oversee the repair of the FML which is critical as the work will require the installer to avoid damage to the remainder of the intact FML.

59. If the Department takes over the FML repair tasks, the costs will exceed the costs that New Ventures will expend and New Ventures will be harmed financially and will be exposed to potential liability.

60. If the Department takes over the task of closure, including berm completion, the costs will be greater than New Ventures will expend and New Ventures will be harmed financially and will be exposed to liability.
61. As part of day-to-day operations, New Ventures has repaired breakout areas with asphalt grinding as sealants, has adjusted the FML and its seal has regulated the gas extraction wells to pull gas from the Landfill for treatment purposes and operates the pretreatment and combustion process on a 24/7 basis. In addition, New Ventures has continued to man the Landfill continuously and has pumped the leachate collection system, except Tank 4.
62. I have not been made aware of, reviewed, or seen, any medical evidence that any odors have been reported or verified after the FML damage or that there have been any injuries to public health. Counsel to New Ventures requested this information through a Freedom of Information Act request two (2) months ago that has not been responded to by the Department.
63. There is no evidence of an emergency or public health threat as a result of the FML damage.
64. New Ventures has complied with the Department's Orders and the Board of Health Orders when issued and has taken steps to abate the odor potential air pollution through closure of the Landfill and operation of the pre-treatment process.
65. New Ventures is in the process of updating its pro forma as part of the process for completing the closure of the Landfill. Due to the reduced cost of media, the post-closure costs have been reduced. The post-closure FAM is not under-funded.
66. At no time has New Ventures abandoned the closure of the Landfill or stated it would abandon the closure.

67. I have personally telephoned Mr. Chalpin and Mr. Carrigan during the past three (3) weeks to follow up correspondence and discuss closure and have requested a meeting with the Department. The telephone calls have not been returned.
68. Out of frustration, I contacted and met with the Mayor of Newburyport to facilitate the communication with the Department regarding closure of the facility and repairs to the FML.
69. Apparently the Department instructed the Mayor not to speak to me about the matter.
70. I have not been served with a Default Notice under the FAM Trust.

Signed under the pains and penalties of perjury this 29th day of March, 2010.

NEW VENTURES ASSOCIATES, LLC

By: _____
Name: WILLIAM THIBEAULT
Its: Manager