



Ontario
Securities
Commission

Commission des
valeurs mobilières
de l'Ontario

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Citation: Moskowitz Capital Management Inc. (Re), 2021 ONSEC 6
Date: 2021-02-22
File No.: 2021-4

**IN THE MATTER OF
MOSKOWITZ CAPITAL MANAGEMENT INC. and
BRIAN MOSKOWITZ**

**REASONS AND DECISION FOR APPROVAL OF A SETTLEMENT
(Sections 127 and 127.1 of the *Securities Act*, RSO 1990, c S.5)**

Hearing: In writing

Decision: February 22, 2021

Panel: Lawrence Haber Commissioner and Chair of the Panel
Cathy Singer Commissioner
Garnet W. Fenn Commissioner

Appearances: Carlo Rossi For Staff of the Commission
Lawrence Ritchie For Moskowitz Capital Management
Inc. and Brian Moskowitz

REASONS AND DECISION

I. OVERVIEW

- [1] Staff of the Ontario Securities Commission (**Staff** of the **Commission**) and Moskowitz Capital Management Inc. (**MCFI**) and Brian Moskowitz (**Moskowitz**) (collectively the **Respondents**) have jointly submitted that it would be in the public interest for us to approve a settlement agreement among the parties dated February 17, 2021 (the **Settlement Agreement**) and to issue the requested order.
- [2] This matter concerns allegations against the Respondents described in the Statement of Allegations dated February 17, 2021 relating to MCFI engaging in the business of trading in securities without being registered as a dealer contrary to subsection 25(1) of the *Securities Act*¹ and to Moskowitz authorizing and permitting MCFI's unregistered dealing activities, which is a deemed breach of Ontario securities law pursuant to section 129.2 of the *Act*.
- [3] After considering the Settlement Agreement and the submissions of the parties, we concluded that it would be in the public interest to approve the Settlement Agreement. These are our reasons.

II. SUMMARY OF THE FACTS

- [4] The underlying facts and the specific breaches of Ontario securities laws are set out in the Settlement Agreement, which has been filed with the Commission and is publicly available. Accordingly, we need not repeat them in detail here.
- [5] In summary, MCFI is a licensed mortgage broker and administrator based in Ontario. Moskowitz founded MCFI and has been its directing mind since inception. The Respondents admit that between June 2009 and April 2019, MCFI distributed preferred shares in mortgage investment entities (**MIE**) under its management to investors without first obtaining registration as a dealer as required under Ontario securities law. MCFI raised approximately \$32 million through the distribution of preferred shares of Moskowitz Capital Mortgage Fund Inc. (**MCFI Fund I**) and Moskowitz Capital Mortgage Fund II Inc. (**MCFI FUND II**) (together, the **MCFI Funds**) to 113 investors in the exempt market.
- [6] In the spring of 2019, MCFI stopped the unregistered dealing activities, removed the statements deemed to be solicitations from its website and self-reported to the Commission. MCFI has since submitted an application for registration as an exempt market dealer to the Commission. Staff has advised the Panel that the Respondents provided substantial cooperation to Staff in its investigation and with respect to the completion of the Settlement Agreement.
- [7] As part of the Settlement Agreement, the parties agreed to the following:
- a. the Respondents will pay an administrative penalty in the amount of \$350,000;
 - b. MCFI will pay costs to the Commission in the amount of \$25,000; and

¹ RSO 1990, c S.5 (the **Act**)

- c. MCFI will comply with the terms of an undertaking to retain an exempt market dealer (**EMD**) to complete a know-your-client (**KYC**) and suitability review for the investors in the MCF Funds, in accordance with the process set forth in Schedule "B" to the Settlement Agreement.
- [8] The Respondents agreed to pay the administrative penalty and costs, in the total amount of \$375,000, in advance of this hearing. Staff confirmed that the Respondents have done so.

III. LAW AND ANALYSIS

- [9] The Commission's role at a settlement hearing is to determine whether the terms of the settlement fall within a range of reasonable outcomes and whether the approval of the settlement is in the public interest.²
- [10] The Settlement Agreement is the result of lengthy negotiations between Staff and the Respondents, who were ably represented by counsel. The Commission respects the negotiation process and accords significant deference to the resolution reached by the parties.³
- [11] Settlements serve the public interest in resolving regulatory proceedings promptly, efficiently and with certainty. Settlements avoid the significant resources that would be incurred in a contested proceeding and promote timely statements regarding regulatory requirements and standards to all capital market participants.
- [12] We have reviewed the Settlement Agreement in detail and considered the submissions of counsel for the parties. We also conducted a confidential settlement conference with counsel for the parties during which we reviewed the proposed settlement agreement, asked questions of counsel and heard their submissions.
- [13] In assessing whether it is in the public interest to approve the settlement, we considered various mitigating factors and determined that the sanctions as set out in the Settlement Agreement were within a range of reasonable outcomes.
- [14] The breaches of Ontario securities law in this matter are serious and occurred over a lengthy time period. The requirements that MIEs and those offering the securities of MIEs comply with their obligations under Ontario securities law is critical to ensuring adequate protection of investors and promoting confidence in Ontario's capital markets.
- [15] Registration is a cornerstone of Ontario's securities regulatory regime. The registration requirement serves an important gate-keeping function by ensuring that only properly qualified and suitable persons are permitted to engage in the business of trading securities with the public. Registrants under the *Act* are subject to a robust regulatory regime that requires applicants to submit to a detailed application process for registration as well as to ongoing oversight by the Commission and other important safeguards designed to protect investors.

² *Research in Motion Limited (Re)*, 2009 ONSEC 19, (2009) 32 OSCB 4434 (**Research in Motion**) at paras 45-46

³ *Katanga Mining Limited (Re)*, 2018 ONSEC 59, (2018) 41 OSCB 9987 at para 18; *Research in Motion* at para 45

- [16] The Canadian Securities Administrators (**CSA**) released CSA Staff Notice 31-323 Guidance Relating to the Registration Obligations of Mortgage Investment Entities in 2011 to clarify the registration requirements that apply to MIEs in each of the CSA Jurisdictions. Since that time, the Commission has continued to communicate these requirements to the industry including through news releases, industry outreach and enforcement actions.
- [17] We also considered the following mitigating factors to be particularly relevant:
- a. the Respondents provided substantial cooperation to Staff in its investigation and the resolution of this matter;
 - b. MCFI self-reported to the Commission and took remedial steps on its own initiative, including
 - i. MCFI stopped accepting direct investments into MCFI Fund II and directed all existing investors seeking to make additional investments into the fund to a registered dealer;
 - ii. MCFI removed all information regarding MCFI Fund II from its website and stopped responding to direct inquiries from investors about how to invest in the fund;
 - iii. in the fall of 2019, MCFI completed an updated KYC and suitability assessment of the investors in the MCFI Funds and shared the results of this review and all supporting records with Staff; and
 - iv. MCFI made back-filings and paid fees (including late filing fees) to the Commission of approximately \$125,000;
 - c. MCFI earned management fees from managing the MCFI Funds but received no direct compensation from the sale of the preferred shares in the MCFI Funds and MCFI paid no commissions or other incentives in connection with the sale of preferred shares in the MCFI Funds;
 - d. All the investors in the MCFI Funds appear to have qualified for a prospectus exemption; and
 - e. The Respondents have agreed to reach an early resolution of this matter, prior to the commencement of proceedings.
- [18] In addition, we noted the Respondents' position set out in the Settlement Agreement that:
- a. the MCFI Funds have had positive investment returns since their inception; and
 - b. MCFI has not received any complaints from investors in the MCFI Funds

IV. CONCLUSION

- [19] In our view, the terms of the Settlement Agreement fall within a range of reasonable dispositions in the circumstances and will have a significant deterrent effect on the Respondents and others from carrying on business in the Ontario capital market without proper authorization.
- [20] In our view the administrative penalty appropriately reflects the principles applicable to sanctions, including the importance of fostering investor protection and confidence in the market, recognition of the seriousness of the misconduct

and the need for specific and general deterrence. In addition, the review to be conducted by the Respondents will ensure ongoing robust internal controls and compliance systems designed to avoid future contraventions of Ontario securities laws. This should be further enhanced, if MCFI obtains registration as an EMD, which it is in the process of seeking.

[21] For these reasons, we conclude that the Settlement Agreement is in the public interest. We approve the Settlement Agreement on the terms proposed by the parties and will issue an order substantially in the form requested.

Dated at Toronto this 22nd day of February 2021.

“Lawrence Haber”
Lawrence Haber

“Cathy Singer”
Cathy Singer

“Garnet W. Fenn”
Garnet W. Fenn