



Ontario
Securities
Commission

Commission des
valeurs mobilières
de l'Ontario

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20 Queen Street West
Toronto ON M5H 3S8

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20, rue queen ouest
Toronto ON M5H 3S8

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

SETTLEMENT AGREEMENT

PART I - INTRODUCTION

1. Strong housing prices and low interest rates in traditional investment products such as GICs and annuities have fueled interest in real estate securities in the exempt market over the last decade. As investor interest in these investments has increased, it has become even more critical that mortgage investment entities (**MIEs**) and others offering these investments comply with their obligations under Ontario securities law in order to ensure adequate protection for investors and promote confidence in Ontario's capital markets.

2. Moskowitz Capital Management Inc. (**MCMI**) is a mortgage broker and administrator based in Ontario. During the Material Time, MCMI distributed preferred shares in the MIEs under its management to investors without first obtaining registration as a dealer as required under Ontario securities law. MCMI raised approximately \$32 million from these distributions to 113 investors in the exempt market. In doing so, MCMI admits that it engaged in the business of trading in securities without being registered as a dealer, contrary to subsection 25(1) of the *Securities Act*, RSO 1990, c S.5 (the **Act**).

3. Brian Moskowitz (**Moskowitz**) founded MCMI and has been its directing mind since inception. Moskowitz admits that he authorized and permitted MCMI's unregistered dealing activities and, as a result, breached Ontario securities law pursuant to section 129.2 of the Act.

4. Registration is a cornerstone of Ontario securities law. 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.

5. 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. Staff will continue to take appropriate action against MIEs that fail to comply with their obligations under Ontario securities law.

6. The parties shall jointly file a request that the Commission issue a Notice of Hearing (the **Notice of Hearing**) to announce that it will hold a hearing (**Settlement Hearing**) to consider whether, pursuant to sections 127 and 127.1 of the Act, it is in the public interest for the Commission to make certain orders against MCMi and Moskowitz (the **Respondents**).

PART II - JOINT SETTLEMENT RECOMMENDATION

7. Staff recommend settlement of the proceeding (the **Proceeding**) against the Respondents commenced by the Notice of Hearing, in accordance with the terms and conditions set out in Part VI of this Settlement Agreement. The Respondents consent to the making of an order (the **Order**) substantially in the form attached as Schedule "A" to this Settlement Agreement based on the facts set out herein.

8. For the purposes of the Proceeding, and any other regulatory proceeding commenced by a securities regulatory authority, the Respondents agree with the facts set out in Part III of this Settlement Agreement and the conclusions in Part IV of this Settlement Agreement.

PART III - AGREED FACTS

A. UNREGISTERED TRADING

9. MCMi is a licensed mortgage brokerage and mortgage administrator based in Toronto. Between June 2009 and April 2019 (the **Material Time**), MCMi distributed preferred shares in the MIEs under its management to investors without obtaining dealer registration as required under Ontario securities law.

10. MCMI manages the Moskowitz Capital Mortgage Fund II Inc. (**MCM Fund II**). MCMI originates, structures, underwrites and funds residential and commercial mortgages on behalf of MCM Fund II, in Atlantic Canada, Ontario, Alberta and Saskatchewan. In order to fund these mortgages, MCMI primarily raises capital from investors in the exempt market.

11. During the Material Time, MCMI directly raised approximately \$31.7 million from 113 investors through the distribution of preferred shares of Moskowitz Capital Mortgage Fund Inc. (**MCM Fund I**) and MCM Fund II (together, the **MCM Funds**).¹ These distributions were all made pursuant to the accredited investor exemption from the prospectus requirement under Ontario securities law. These distributions are the subject of this proceeding.

12. MCMI carried on its unregistered capital raising activities with repetition, regularity and continuity, raising an average of approximately \$3.2 million from 11 investors per year through these direct distributions.

13. MCMI provided slide decks to potential investors upon request that included historical performance information of the MCM Funds and testimonials from borrowers and investors, which amounted to solicitations to invest in the MCM Funds. MCMI also included this same information on its website during the Material Time.

14. MCMI has never been registered with the Commission.

15. As a result of the above, MCMI engaged in the business of trading in securities without being registered as a dealer under Ontario securities law.

16. Moskowitz is the President and sole director of MCMI and held these positions throughout the Material Time.

17. As MCMI's President, Moskowitz was responsible for engaging with investors in the MCM Funds and ultimately responsible for the content of MCMI's website and the slide decks provided to potential investors.

18. Moskowitz authorized and permitted MCMI's unregistered dealing activities and as a result is deemed to have breached Ontario securities law pursuant to section 129.2 of the Act.

¹ MCM Fund I and MCM Fund II amalgamated on June 30, 2011.

19. During the Material Time, MCMI also raised capital for the MCM Funds from investors through the sale of preferred shares through registered investment dealers and exempt market dealers. Staff has not taken issue with these distributions.

20. In the spring of 2019, MCMI stopped the unregistered dealing activities, removed the statements deemed to be solicitations from its website and self-reported to the Commission. MCMI has since submitted an application for registration as an exempt market dealer to the Commission.

B. MITIGATING FACTORS

21. MCMI and Moskowitz provided substantial cooperation to Staff in its investigation and with respect to the completion of the Settlement Agreement. Most of the investigation in this matter took place during the COVID-19 pandemic and MCMI was proactive and collaborative in ensuring that it produced all relevant information within the timelines requested and provided all assistance requested by Staff during its investigation on a voluntary basis.

22. MCMI self-reported to the Commission and took remedial steps on its own initiative, including:

- (a) MCMI stopped accepting direct investments into MCM Fund II and directed all existing investors seeking to make additional investments into the fund to a registered dealer;
- (b) MCMI removed all information regarding MCM Fund II from its website and stopped responding to direct inquiries from investors about how to invest in the fund;
- (c) In the fall of 2019, MCMI completed an updated know-your-client (**KYC**) and suitability assessment of the investors in the MCM Funds and shared the results of this review and all supporting records with Staff; and
- (d) MCMI made back-filings and paid fees (including late filing fees) to the Commission of approximately \$125,000.

23. MCMI earned management fees from managing the MCM Funds but received no direct compensation from the sale of the preferred shares in the MCM Funds. MCMI paid no commissions or other incentives in connection with the sale of preferred shares in the MCM Funds.

24. All the investors in the MCM Funds appear to have qualified for a prospectus exemption.

25. MCMI and Moskowitz have agreed to reach an early resolution of this matter, prior to the commencement of proceedings.

PART IV - NON-COMPLIANCE WITH ONTARIO SECURITIES LAW AND CONDUCT CONTRARY TO THE PUBLIC INTEREST

26. By engaging in the conduct described above, the Respondents acknowledge and admit the following:

- (a) MCMI engaged in or held itself out as engaging in the business of trading in securities, without being registered in accordance with Ontario securities law as a dealer, where no exemption to the registration requirement was available, contrary to subsection 25(1) of the Act;
- (b) Moskowitz authorized, permitted or acquiesced in MCMI's failure to comply with subsection 25(1) of the Act, contrary to section 129.2 of the Act; and
- (c) in so doing, the Respondents acted in a manner contrary to the public interest.

PART V - RESPONDENTS' POSITION

27. The Respondents request that the Settlement Hearing panel consider the following circumstances. Staff do not object to the Respondents putting forward the circumstances set out below.

- (a) The MCM Funds have had positive investment returns since their inception; and
- (b) MCMI has not received any complaints from investors in the MCM Funds.

PART VI - TERMS OF SETTLEMENT

28. The Respondents agree to the terms of settlement set forth below and consent to the Order, to be made by the Commission pursuant to sections 127 and 127.1 of the Act, the terms of which include that:

- (a) this Settlement Agreement be approved;

- (b) the Respondents pay an administrative penalty in the amount of \$350,000² on a joint and several basis, by wire transfer to the Commission before the commencement of the Settlement Hearing, pursuant to paragraph 9 of subsection 127(1) of the Act, which amount be designated for allocation or use by the Commission in accordance with paragraph 3.4(2)(b) of the Act; and
- (c) MCMI pay costs in the amount of \$25,000 by wire transfer to the Commission before the commencement of the Settlement Hearing, pursuant to section 127.1 of the Act;

29. The Respondents acknowledge that this Settlement Agreement and the Order may form the basis for orders of parallel effect in other jurisdictions in Canada. The securities laws of some other Canadian jurisdictions allow orders made in this matter to take effect in those other jurisdictions automatically, without further notice to the Respondents. The Respondents acknowledge that they should contact the securities regulator of any other jurisdiction in which the Respondents intend to engage in any securities- or derivatives-related activities, prior to undertaking such activities.

30. MCMI has given an undertaking (the **Undertaking**) to the Commission in the form attached as Schedule “B” to this Settlement Agreement to do the following:

- (a) conduct any trades of securities of MCM Fund II through or to a firm registered under Ontario securities law in a category that permits such trades, or by MCMI directly only if and when registered to conduct such trades;
- (b) retain an exempt market dealer (**EMD**) to:
 - (i) conduct a review of the adequacy of the KYC and suitability documentation obtained by MCMI with respect to its current existing investors who did not purchase securities of the MCM Funds through a registered dealer, to be completed within four months from the date of the Settlement Hearing;
 - (ii) to the extent required by the EMD after reviewing MCMI’s existing KYC and suitability information, obtain any additional KYC and

² This amount reflects the parties’ joint position on the approximate cost MCMI avoided in connection with the unregistered trading set out in Part III and a 30% discount applied in acknowledgement of the mitigating factors set out in paragraphs 21-25 including MCMI’s self-reporting and substantial cooperation during Staff’s investigation.

suitability information as may be required by the EMD to complete its suitability assessment;

- (iii) conduct a suitability analysis in accordance with sections 13.2 and 13.3 of National Instrument 31-103 *Registration Requirements, Exemptions and Ongoing Registrant Obligations* (**NI 31-103**) for a random sample of 20 current existing investors, selected by the EMD, who did not purchase securities of the MCM Fund through a registered dealer, to be completed within four months from the date of the Settlement Hearing;
 - (iv) if five or more of the 20 investors are identified by the EMD to have made unsuitable investments in the MCM Funds pursuant to paragraph 30(b)(iii) above, conduct suitability analysis in accordance with sections 13.2 and 13.3 of NI 31-103 for all current existing investors who did not purchase securities of the MCM Fund through a registered dealer; and
 - (v) report the results of the review to MCMI and Staff.
- (c) once an EMD has been retained pursuant to paragraph 30(b) above, MCMI shall immediately provide Staff with a written authorization granting Staff free and unfettered access to communicate with the EMD with respect to this retainer; and
 - (d) redeem the preferred shares held by all investors identified by the EMD to have made an unsuitable investment in the MCM Funds pursuant to paragraph 30(b) above at the issue price of \$10 per preferred share, unless the investor(s) informs MCMI in writing that they wish to retain their investments and provided the EMD has first informed the investor in writing of the EMD's opinion that the preferred shares are not a suitable investment for them and the reasons for that opinion in accordance with subsection 13.3(2) of NI 31-103.

31. This Settlement Agreement, as well as any failure to satisfy the terms of the Settlement Agreement, including the Undertaking, may be considered as a factor relevant to suitability for registration in any application for registration by any of the Respondents or affiliated companies.

PART VII - FURTHER PROCEEDINGS

32. If the Commission approves this Settlement Agreement, Staff will not commence or continue any proceeding against the Respondents under Ontario securities law in relation to the facts set out in Part III of this Settlement Agreement, unless one or all of the Respondents fail to comply with any term in this Settlement Agreement (including the Undertaking), in which case Staff may bring proceedings under Ontario securities law against that or those Respondents that may be based on, among other things, the facts set out in Part III of this Settlement Agreement as well as the breach of this Settlement Agreement.

33. The Respondents acknowledge that, if the Commission approves this Settlement Agreement and any of the Respondents fail to comply with any term in it, Staff or the Commission, as the case may be, is entitled to bring any proceedings necessary to enforce compliance with the terms of the Settlement Agreement.

34. The Respondents waive any defences to a proceeding referenced in paragraph 32 or 33 that are based on the limitation period in the Act, provided that no such proceeding shall be commenced later than six years from the date of the occurrence of the last failure to comply with this Settlement Agreement.

PART VIII - PROCEDURE FOR APPROVAL OF SETTLEMENT

35. The parties will seek approval of this Settlement Agreement at the Settlement Hearing before the Commission, which shall be held on a date determined by the Secretary to the Commission in accordance with this Settlement Agreement and the Commission's *Rules of Procedure* (2019), 42 O.S.C.B. 9714.

36. The parties confirm that this Settlement Agreement sets forth all of the agreed facts that will be submitted at the Settlement Hearing, unless the parties agree that additional facts should be submitted at the Settlement Hearing.

37. If the Commission approves this Settlement Agreement:

- (a) the Respondents irrevocably waive all rights to a full hearing, judicial review or appeal of this matter under the Act; and

- (b) neither Staff nor the Respondents will make any public statement that is inconsistent with this Settlement Agreement or with any additional agreed facts submitted at the Settlement Hearing.

38. Whether or not the Commission approves this Settlement Agreement, the Respondents will not use, in any proceeding, this Settlement Agreement or the negotiation or process of approval of this Settlement Agreement as the basis for any attack on the Commission's jurisdiction, alleged bias, alleged unfairness or any other remedies or challenges that may be available.

PART IX - DISCLOSURE OF SETTLEMENT AGREEMENT

39. If the Commission does not make the Order or an order substantially in the form attached as Schedule "A" to this Settlement Agreement:

- (a) this Settlement Agreement and all discussions and negotiations between Staff and the Respondents before the Settlement Hearing will be without prejudice to Staff and the Respondents; and
- (b) Staff and the Respondents will each be entitled to all available proceedings, remedies and challenges, including proceeding to a hearing on the merits of the allegations contained in the Statement of Allegations in respect of the Proceeding. Any such proceedings, remedies and challenges will not be affected by this Settlement Agreement, or by any discussions or negotiations relating to this Settlement Agreement.

40. The parties will keep the terms of this Settlement Agreement confidential until the Settlement Hearing, unless they agree in writing not to do so or unless otherwise required by law.

PART X - EXECUTION OF SETTLEMENT AGREEMENT

41. This Settlement Agreement may be signed in one or more counterparts which together constitute a binding agreement.

42. A facsimile copy or other electronic copy of any signature will be as effective as an original signature.

DATED at Toronto, Ontario this 17 day of February, 2021.

“Disha Puri”

Witness: DISHA PURI

“Brian Moskowitz”

BRIAN MOSKOWITZ

MOSKOWITZ CAPITAL MANAGEMENT INC.

By: “Brian Moskowitz”

Name: Brian Moskowitz

Title: President

DATED at Toronto, Ontario this 17 day of February, 2021.

ONTARIO SECURITIES COMMISSION

By: “Jeff Kehoe”

Name: Jeff Kehoe

Title: Director, Enforcement Branch

SCHEDULE "A"



Ontario
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20 Queen Street West
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**IN THE MATTER OF
MOSKOWITZ CAPITAL MANAGEMENT INC.
and BRIAN MOSKOWITZ**

File No. _____

(Name(s) of Commissioner(s) comprising the panel)

[*Day and date Order made*]

ORDER
**(Sections 127 and 127.1 of the
Securities Act, RSO 1990, c S.5)**

WHEREAS the Ontario Securities Commission (the **Commission**) held a hearing in writing to consider the approval of a settlement agreement dated [date] (the **Settlement Agreement**) between the respondents Moskowitz Capital Management Inc. (**MCMI**) and Brian Moskowitz (**Moskowitz**) (collectively, the **Respondents**) and Staff (**Staff**) of the Commission (**Commission**);.

AND WHEREAS MCMI has given an undertaking to the Commission, in the form attached as Annex I to this Order (the **Undertaking**);

ON READING the Joint Application for a Settlement Hearing, including the Statement of Allegations dated [date] and the Settlement Agreement, and on receiving the submissions of the representatives of each of the parties, and on considering the Undertaking;

IT IS ORDERED THAT:

1. the Settlement Agreement is approved;
2. the Respondents shall pay an administrative penalty in the amount of \$350,000, on a joint and several basis, pursuant to paragraph 9 of subsection 127(1) of the *Securities Act*, RSO 1990,

c S.5 (the Act), which amount is designated for allocation or use by the Commission in accordance with paragraph 3.4(2)(b) of the Act; and

3. MCMI shall pay costs to the Commission in the amount of \$25,000, pursuant to section 127.1 of the Act;

[Chair of the Panel]

[Commissioner]

[Commissioner]

ANNEX I

UNDERTAKING OF MOSKOWITZ CAPITAL MANAGEMENT INC.

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

UNDERTAKING TO THE ONTARIO SECURITIES COMMISSION

1. This Undertaking is given in connection with the settlement agreement dated February 17, 2021 (the **Settlement Agreement**) between Moskowitz Capital Management Inc. (**MCMI**) and Brian Moskowitz (**Moskowitz** (collectively, the **Respondents**) and Staff (“**Staff**”) of the Ontario Securities Commission (the “**Commission**”). All terms shall have the same meanings in this Undertaking as in the Settlement Agreement.

2. MCMI undertakes to do the following:

- (a) conduct any trades of securities of MCM Fund II through or to a firm registered under Ontario securities law in a category that permits such trades, or by MCMI directly only if and when registered to conduct such trades;
- (b) retain an exempt market dealer (**EMD**) to:
 - (i) conduct a review of the adequacy of the know-your-client (**KYC**) and suitability documentation obtained by MCMI with respect to its current existing investors who did not purchase securities of the MCM Funds through a registered dealer, to be completed within four months from the date of the Settlement Hearing;
 - (ii) to the extent required by the EMD after reviewing MCMI’s existing KYC and suitability information, obtain any additional KYC and suitability information as may be required by the EMD to complete its suitability assessment;
 - (iii) conduct a suitability analysis in accordance with sections 13.2 and 13.3 of National Instrument 31-103 *Registration Requirements, Exemptions and Ongoing Registrant Obligations* (**NI 31-103**) for a random sample of 20 current existing investors, selected by the EMD, who did not purchase

securities of the MCM Fund through a registered dealer, to be completed within four months from the date of the Settlement Hearing;

- (iv) if five or more of the 20 investors are identified by the EMD to have made unsuitable investments in the MCM Funds pursuant to paragraph 2(b)(iii) above, conduct suitability analysis in accordance with sections 13.2 and 13.3 of NI 31-103 for all current existing investors who did not purchase securities of the MCM Fund through a registered dealer; and
 - (v) report the results of the review to MCMI and Staff.
- (c) once an EMD has been retained pursuant to paragraph 2(b) above, MCMI shall immediately provide Staff with a written authorization granting Staff free and unfettered access to communicate with the EMD with respect to this retainer; and
- (d) redeem the preferred shares held by all investors identified by the EMD to have made an unsuitable investment in the MCM Funds pursuant to paragraph 2(b) above at the issue price of \$10 per preferred share, unless the investor(s) informs MCMI in writing that they wish to retain their investments and provided the EMD has first informed the investor in writing of the EMD's opinion that the preferred shares are not a suitable investment for them and the reasons for that opinion in accordance with subsection 13.3(2) of NI 31-103.

DATED at Toronto, Ontario this 17 day of February, 2021.

MOSKOWITZ CAPITAL MANAGEMENT INC.

By: "Brian Moskowitz"
Name: Brian Moskowitz
Title: President

SCHEDULE “B”

UNDERTAKING OF MOSKOWITZ CAPITAL MANAGEMENT INC.

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

UNDERTAKING TO THE ONTARIO SECURITIES COMMISSION

1. This Undertaking is given in connection with the settlement agreement dated February 17, 2021 (the **Settlement Agreement**) between Moskowitz Capital Management Inc. (**MCMI**) and Brian Moskowitz (**Moskowitz** (collectively, the **Respondents**) and Staff (“**Staff**”) of the Ontario Securities Commission (the “**Commission**”). All terms shall have the same meanings in this Undertaking as in the Settlement Agreement.

2. MCMI undertakes to do the following:

- (a) conduct any trades of securities of MCM Fund II through or to a firm registered under Ontario securities law in a category that permits such trades, or by MCMI directly only if and when registered to conduct such trades;
- (b) retain an exempt market dealer (**EMD**) to:
 - (i) conduct a review of the adequacy of the know-your-client (**KYC**) and suitability documentation obtained by MCMI with respect to its current existing investors who did not purchase securities of the MCM Funds through a registered dealer, to be completed within four months from the date of the Settlement Hearing;
 - (ii) to the extent required by the EMD after reviewing MCMI’s existing KYC and suitability information, obtain any additional KYC and suitability information as may be required by the EMD to complete its suitability assessment;
 - (iii) conduct a suitability analysis in accordance with sections 13.2 and 13.3 of National Instrument 31-103 *Registration Requirements, Exemptions and Ongoing Registrant Obligations* (**NI 31-103**) for a random sample of 20 current existing investors, selected by the EMD, who did not purchase

securities of the MCM Fund through a registered dealer, to be completed within four months from the date of the Settlement Hearing;

- (iv) if five or more of the 20 investors are identified by the EMD to have made unsuitable investments in the MCM Funds pursuant to paragraph 2(b)(iii) above, conduct suitability analysis in accordance with sections 13.2 and 13.3 of NI 31-103 for all current existing investors who did not purchase securities of the MCM Fund through a registered dealer; and
 - (v) report the results of the review to MCMI and Staff.
- (c) once an EMD has been retained pursuant to paragraph 2(b) above, MCMI shall immediately provide Staff with a written authorization granting Staff free and unfettered access to communicate with the EMD with respect to this retainer; and
- (d) redeem the preferred shares held by all investors identified by the EMD to have made an unsuitable investment in the MCM Funds pursuant to paragraph 2(b) above at the issue price of \$10 per preferred share, unless the investor(s) informs MCMI in writing that they wish to retain their investments and provided the EMD has first informed the investor in writing of the EMD's opinion that the preferred shares are not a suitable investment for them and the reasons for that opinion in accordance with subsection 13.3(2) of NI 31-103.

DATED at Toronto, Ontario this 17 day of February, 2021.

MOSKOWITZ CAPITAL MANAGEMENT INC.

By: “Brian Moskowitz”
Name: Brian Moskowitz
Title: President