

**IN THE MATTER OF
MICHAEL PAUL KRAFT and MICHAEL BRIAN STEIN**

File No. 2021-32

**MOTION
OF THE ONTARIO SECURITIES COMMISSION**

(For an order excluding the proposed opinion evidence of Edward J. Waitzer, proffered as an expert on behalf of the Respondent Michael Paul Kraft, under Rule 28 of the *Capital Markets Tribunal Rules of Procedure and Forms* and Rule 8 of the *Capital Markets Tribunal Practice Guideline*)

A. ORDER SOUGHT

The Moving Party, the Ontario Securities Commission (the **Commission**), requests with notice, that the Tribunal make the following orders:

1. an order confirming that the opinion evidence of the proposed witness Edward J. Waitzer (the **Opinion Witness**) proffered on behalf of the Respondent Michael Paul Kraft (**Kraft**) is presumptively inadmissible at the merits hearing in this matter;
2. an order that any motion seeking to have the evidence of the Opinion Witness admitted by the Tribunal be heard at the outset of the merits hearing, currently scheduled to commence on November 28, 2022 at 10:00 a.m. by videoconference;
3. an order that the proposed evidence of the Opinion Witness is inadmissible at the merits hearing in this matter; and
4. such further and other relief and orders as counsel may advise and the Tribunal may deem appropriate.

B. GROUNDS

The grounds for the motion are:

5. As set out in the Statement of Allegations dated October 13, 2021, Kraft allegedly informed Michael Paul Stein (**Stein**) of material non-public fact(s) or material non-public change(s) with respect to WeedMD Inc. He did so outside of the necessary course of business, before

the material fact or material change had been generally disclosed, contrary to subsection 76(2) of the *Securities Act*, R.S.O. 1990, c. S.5 (the **Act**).

6. One of the anticipated legal issues at the merits hearing is the proper interpretation of subsection 76(2) of the Act. It is anticipated that the Respondent Kraft will argue that any disclosure of material non-public information made to Stein was permitted under the exception in subsection 76(2) which permits selective disclosure that is made “in the necessary course of business”. The proper statutory interpretation of the quoted language will be an issue of law for the merits panel.
7. Counsel for Kraft has indicated an intention to seek leave to adduce opinion evidence from the Opinion Witness which he alleges is relevant to the correct interpretation of subsection 76(2).
8. On May 3, 2022, following an attendance in this matter, the Tribunal issued an Order ordering, *inter alia*, that:
 - (a) each respondent shall serve an expert report, if any, on each other party by 4:30 p.m. on August 19, 2022; and
 - (b) each party shall file a motion, if any, regarding any expert report of either of the respondents, by 4:30 p.m. on September 16, 2022.
9. On August 19, 2022, Kraft, through counsel, served the other parties with the expert report of his proposed Opinion Witness, Edward J. Waitzer, dated August 19, 2022 (the **Expert Report**) and asserts that this evidence falls within the expert exception to the general rule excluding opinion evidence.
10. The Expert Report provides notice that Kraft proposes to have the Opinion Witness qualified to provide his opinion on matters said to be relevant to the issues arising on the merits hearing relating to the allegations made against Kraft.
11. Opinion evidence is presumptively inadmissible, but subject to narrow exceptions including expert evidence on matters requiring specialized knowledge (See, *R. v. Mohan*,

[1994] 2 S.C.R. 9 and *White Burgess Langille Inman v. Abbott and Haliburton Co.*, [2015] 2 S.C.R. 182).

12. Expert opinions are admitted where the proponent of the witness's evidence satisfies the Tribunal that:
 - (a) The opinion evidence is *relevant* to a fact in issue in the proceeding;
 - (b) The opinion evidence is *necessary* to assist the Tribunal to understand the significance of evidence that would otherwise be beyond the Tribunal's understanding;
 - (c) The evidence is not otherwise subject to another exclusionary rule; and
 - (d) The expert is properly qualified as someone who is possessed of knowledge or skill that is otherwise beyond the ken of the Tribunal.
13. The proponent of the evidence of the proposed Opinion Witness cannot demonstrate these preconditions to admissibility.
14. The questions addressed by the Opinion Witness and a summary of his expected testimony in relation to each question are contained in the Expert Report and reproduced below:
 - (a) **Question #1** – Is it out of the ordinary for the chair of a small-cap public issuer, acting as an executive director, to be directly involved in the negotiation of corporate transactions on behalf of the company?

Proposed Opinion #1 – It is not unusual for the executive director of a small-cap public issuer to be directly involved in the negotiation of corporate transactions on behalf of the corporation, particularly where the issuer has limited managerial expertise and may be looking to minimize third party advisory costs and the director has fulfilled such a role historically.

- (b) **Question #2** – Is it inconsistent with good corporate governance practices for an officer or director of a corporation, including a public issuer, to seek advice (whether gratuitous or not) from a knowledgeable third party, where there is a reasonable expectation of confidentiality, even in the absence of a current written agreement with the third party?

Proposed Opinion #2 – It is consistent with the statutory duty of care owed by directors and officers under corporate law and with good corporate governance practices for a director or officer of a corporation, including a public issuer, to seek advice from a knowledgeable third party and, applying critical judgment, to rely on such advice, provided that there is a legitimate purpose for seeking such advice, the director or officer is acting in good faith, and there are sufficient safeguards against the misuse of material non-public information (**MNPI**). Such safeguards may include the reasonable expectation of confidentiality flowing from a written agreement, historical practice, and/or professional relationships and obligations, among other things.

- (c) **Question #3** – From a corporate governance perspective, and having regard for public issuer disclosure best practices, what considerations apply to a director or officer, acting in good faith, when seeking advice from a professional resource in connection with a transaction?

Proposed Opinion #3 – Subject to the foregoing, a corporate director or officer seeking advice from a third-party professional in connection with a transaction should be satisfied that in seeking such advice the third-party professional has relevant knowledge or experience such that the disclosure of MNPI to the third-party professional is made in the necessary course of business within the meaning of section 76(2) of the Act (the **NCOB Exception**). The proper application of the NCOB Exception hinges on the reasonableness of selective disclosure in the circumstances, having regard for the nature of the disclosure and the context in which it takes place,

market expectations, the relationship between the insider and the third party, and indicators of good or bad faith, among other things.

- (d) **Question #4** – What (if any) practical implications arise from a corporate governance perspective if a regulatory authority, after inquiry, were to impose its interpretation of whether such communications were “necessary” in the circumstances within the meaning of securities legislation, even though the director or officer acted in good faith and honestly believed that the advice sought would be helpful to them in the fulfillment of their duties?

Proposed Opinion #4 – The NCOB Exception is intended to operate as a relief from unduly restrictive or impractical prohibitions on information disclosure. Retrospectively evaluating the necessity of selective disclosures which are made by corporate directors or officers acting in good faith and for legitimate business purposes would put securities law in conflict with corporate law and unduly compromise the ability of directors and officers to discharge their duties under corporate law without fear of running afoul of an objective test of “necessity” within the meaning of section 78(2) [*sic*] of the Act. Such a chilling effect would also discourage qualified and informed candidates from agreeing to serve as directors of public issuers.

15. In addition, the proposed “Expert Report” authored by the Opinion Witness provides notice that the witness intends to opine on whether Kraft in particular acted reasonably and prudently in making selective disclosure of MNPI to Stein and (presuming the interpretation of the statute he advocates is accepted) whether Kraft’s conduct fell within the NCOB Exception under subsection 76(2) of the Act (**Proposed Opinion #5**).
16. The proper interpretation of the Tribunal’s core governing statute is an issue of law well within the expertise of the Tribunal and not a matter for opinion evidence.
17. The operations of the market and standard corporate governance are matters well within the expertise of the Tribunal and not a matter for opinion evidence.

18. There is an exclusionary rule which makes evidence of this type inadmissible where its sole function is to advance a particular interpretation of a statute, particularly a statute over which the Tribunal has a presumed and real expertise.
19. The proposed evidence of the Opinion Witness is made up solely of his personal interpretation of the law and his anecdotal experience as an advisor to boards of directors and as a board member.
20. Proposed Opinions #1 to #5 do not meet the requirement of necessity under *Mohan* and other relevant jurisprudence and, therefore, are inadmissible at the merits hearing. These proposed opinions: (a) fall squarely within the expertise of the Tribunal; (b) veer inappropriately into questions of law and matters of interpretation; and (c) only reflect the personal views and anecdotal experience of Mr. Waitzer. In addition, Proposed Opinions #3, #4 and #5 are opinions on an ultimate question or issue to be determined by the Tribunal.
21. Furthermore, in providing the proposed opinions, the Opinion Witness primarily relies upon corporate statutes and the business judgment rule, which are not relevant to the determination of Kraft's legal obligations under subsection 76(2) of the Act. Admission of the proposed opinions would be unduly prejudicial and improperly expand the scope of the merits hearing.
22. Despite the Commission having made this Motion in accordance with the Tribunal's Order dated May 3, 2022, Kraft bears the burden of establishing the admissibility of the proposed opinion evidence.
23. The Commission reserves the right to adduce responding expert opinion evidence in the event the Tribunal admits any proposed evidence of the Opinion Witness.
24. Rule 28 of the *Capital Markets Tribunal Rules of Procedure and Forms* and Rule 8 of the *Capital Markets Tribunal Practice Guideline*.

C. EVIDENCE

The Commission intends to rely on the following evidence for the motion:

25. the Statement of Allegations dated October 13, 2021;
26. the Order of the Tribunal dated May 3, 2022;
27. the transcript of the attendance before the Tribunal on May 3, 2022;
28. the Expert Report;
29. an email from counsel for Kraft dated August 19, 2022 enclosing the Expert Report; and
30. such further and other materials as counsel may advise and the Tribunal may permit.

DATED this 16th day of September, 2022.

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