

**IN THE MATTER OF
CORMARK SECURITIES INC., WILLIAM JEFFREY KENNEDY,
MARC JUDAH BISTRICER, and SALINE INVESTMENTS LTD.**

NOTICE OF MOTION OF MARC JUDAH BISTRICER

THE RESPONDENT, Marc Judah Bistricer, requests with notice that the Tribunal make the following orders:

- (a) An order directing Staff of the Commission to disclose the Requested Documents (as defined below) to the Respondents; and
- (b) Such further and other relief as counsel may request and the Tribunal may permit.

THE GROUNDS FOR THE MOTION ARE:

- (a) On December 7, 2020, the Ontario Securities Commission (the “Commission”) issued an order pursuant to s. 11 of the *Securities Act* in this matter, authorizing Staff of the Commission (“Staff”) to investigate and inquire into certain matters relating to short selling in advance of public offerings and private placements. The original s. 11 order was amended from time to time to add and/or remove Staff members from the investigation and to expand the scope of the matters being investigated (together, the “S. 11 Orders”);
- (b) Staff issued the Statement of Allegations on November 9, 2022. Therein, Staff alleges, *inter alia*, that transactions that took place in March 2017 in the market, with disclosure, were “abusive” and “illegal”;
- (c) Staff provided the first disclosure set on or about November 16, 2022 and the second and third disclosure sets on or about February 7, 2023;
- (d) On February 16, 2023, counsel for Mr. Bistricer wrote to Staff and asked whether Staff had disclosed all documents in Staff’s possession in relation to the S. 11 Orders, in particular all documents gathered in relation to Staff’s investigation

into certain matters relating to short selling in advance of public offerings and private placements;

- (e) Staff replied on February 17, 2023 and confirmed that there are documents in Staff's possession in relation to the S. 11 Orders that had not been disclosed. Staff advised that Staff had not disclosed the documents "because they are not relevant to the allegations";
- (f) In terms of disclosure obligations under Rule 27 of the Tribunal's *Rules of Procedure and Forms*, relevance includes not only material which Staff may rely upon, but also material which could assist in advancing a defence or making tactical decisions;
- (g) Disclosure should also be made of information which is relevant to issues which might be properly raised by the respondents. Staff is required to reasonably anticipate defences or issues that might properly be raised;
- (h) Counsel for Mr. Bistricher wrote to Staff on February 21, 2023 and requested disclosure of all documents in Staff's possession which pertain to any transactions that have similarities to the transactions at issue in this matter, which would include the short sales, private placement and/or the securities lending agreement (the "Requested Documents"). Counsel for Mr. Bistricher further requested that Staff advise approximately the number of Requested Documents in Staff's possession and the approximate amount of time it would take to disclose those documents;
- (i) The Requested Documents are relevant as, *inter alia*, they relate to other transactions that are similar in nature to the transactions that Staff has alleged are abusive and illegal. Staff ought to have been aware that an issue to be raised by some or all of the respondents is that the transactions alleged to be abusive and illegal are commonplace in the Ontario capital markets and are neither abusive nor illegal. It will be an issue as to whether transactions such as, *inter alia*, private placements and securities lending agreements, which occur commonly,

could ever be considered abusive;

- (j) Former counsel for Mr. Bistricher and Saline Investments Ltd., Ed Waitzer, advised Staff in April 2021 that the transactions are “a relatively typical hedging transaction”. Staff ought to have been aware that an issue to be raised in the hearing would be the commonalities between the transactions described in the allegations and other transactions which occur regularly in the Ontario capital markets;
- (k) The Requested Documents were already gathered by Staff as part of its investigation of this matter;
- (l) Staff responded on February 22, 2023 and advised that Staff’s position remains that the Requested Documents are irrelevant and refused to provide information concerning the number of Requested Documents in Staff’s possession or a timeline for production thereof;
- (m) Rules 27 and 28 of the Tribunal’s *Rules of Procedure and Forms*; and
- (n) Such further and other grounds as counsel may advise.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the motion:

- (a) The Statement of Allegations of Staff of the Commission dated November 9, 2022;
- (b) The affidavit of Stephanie Cox, sworn February 23, 2023; and
- (c) Such further and other materials as counsel may advise and the Commission may permit.

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