Ontario Securities Commission | Commission des valeurs mobilières de l'Ontario | P.O. Box 55, 19th Floor 20 Queen Street West Toronto ON M5H 3S8 | CP 55, 19e étage 20, rue queen ouest Toronto ON M5H 3S8

IN THE MATTER OF THE *SECURITIES ACT*
R.S.O. 1990, c.S.5, AS AMENDED

- AND -

IN THE MATTER OF
MRS SCIENCES INC. (FORMERLY MORNINGSIDE CAPITAL CORP.), AMERICO DEROSA, RONALD SHERMAN, EDWARD EMMONS, IVAN CAVRIC AND PRIMEQUEST CAPITAL CORPORATION

REASONS AND DECISION

Hearing:	May 7, 8, 11 and 13, 2009 June 10, 11, 12, 22 and 26, 2009 September 3 and 4, 2009 October 7, 2009	
Decision:	February 2, 2011	
Panel:	Patrick J. LeSage, Q.C. Carol S. Perry	- Commissioner (Chair of the Panel) - Commissioner
Counsel:	Derek Ferris	- for Staff of the Ontario Securities Commission
	Peter-Paul DuVernet	- for MRS Sciences Inc., Americo DeRosa, Ronald Sherman, Edward Emmons, Ivan Cavric, and Primequest Capital Corporation

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REASONS AND DECISION

I. BACKGROUND

A. History

[1] On November 30, 2007, the Ontario Securities Commission (the "**Commission**" or the "**OSC**") issued a Notice of Hearing pursuant to sections 127 and 127.1 of the *Securities Act*, R.S.O. 1990, c. S.5, as amended (the "**Act**") in connection with a Statement of Allegations issued by Staff of the Commission ("**Staff**") on November 29, 2007. An omission in the style of cause on the Statement of Allegations was corrected in an Amended Statement of Allegations issued by Staff on March 25, 2008.

[2] On April 15, 2009, the Commission issued an Amended Notice of Hearing pursuant to sections 127 and 127.1 of the Act in connection with an Amended Amended Statement of Allegations (the "**Statement of Allegations**") issued by Staff of the Commission on April 14, 2009 with respect to MRS Sciences Inc. (formerly Morningside Capital Corp. ("**Morningside**")) ("**MRS**"), Americo DeRosa ("**DeRosa**"), Ronald Sherman ("**Sherman**"), Edward Emmons ("**Emmons**"), Ivan Cavric ("**Cavric**") and Primequest Capital Corporation ("**Primequest**") (collectively, the "**Respondents**"). For the purposes of these reasons, DeRosa, Sherman, Emmons and Cavric are referred to collectively as the "**Individual Respondents**".

[3] Staff alleges that between November 2003 and May 2005 (the "**Relevant Time**") the Respondents sold Morningside or MRS shares to approximately 230 investors in Ontario and other jurisdictions, in approximately 300 trades, at prices of either $0.35 or $0.70 per share. Staff alleges that the illegal distribution raised about CDN $1 million as well as approximately USD $245,000 from foreign investors. Staff alleges that MRS and the Individual Respondents traded in MRS shares in contravention of the registration and prospectus requirements, in circumstances where the accredited investor exemption under OSC Rule 45-501, *Prospectus and Registration Exemptions* (2004), 27 O.S.C.B. 433 ("**OSC Rule 45-501**") (the "**Accredited Investor Exemption**"), on which the Respondents rely, was not available, contrary to subsection 25(1)(a) and subsection 53(1) of the Act, and contrary to the public interest.

[4] Staff also alleges that MRS and the Individual Respondents, with the intention of effecting trades in MRS shares, made prohibited undertakings to investors regarding the future value or price of MRS shares and prohibited representations about future listing of MRS shares, contrary to subsections 38(2) and 38(3) of the Act.

[5] Staff further alleges that the Individual Respondents, as directors or *de facto* directors of MRS, authorized, permitted or acquiesced in MRS's non-compliance with the Act, and are therefore deemed, pursuant to section 129.2 of the Act, not to have complied with the Act, contrary to the public interest.

[6] Finally, Staff alleges that Cavric, Primequest and DeRosa entered into numerous trades in MRS shares between February 17, 2004 and November 2, 2004 inclusive, which were publicly reported by Pink OTC Markets Inc. ("**Pink Sheets**"), when they knew or ought to have known that the trades would result in or contribute to a misleading appearance as to the trading activity in or an artificial price for MRS shares, contrary to section 3.1(a) of *National Instrument 23-101*

– *Trading Rules* (2001), 24 O.S.C.B. 6635, as amended ("**NI 23-101**") and contrary to the public interest.

B. The Parties

[7] On May 7, 2009, Staff and the Respondents entered into an Agreed Statement of Facts (the "**Agreed Statement of Facts**"), the first six paragraphs of which identify the Respondents, as follows:

> 1. MRS Sciences Inc., formerly Morningside Capital Corp., (collectively "MRS") is an Ontario company incorporated on November 1, 2001. MRS was redomiciled to Nevada in or about July 2005 and merged with Biosource Solutions Inc. ("**Biosource**"), a Nevada corporation, as of July 5, 2006. MRS is not and has never been registered in any capacity with the Commission.
>
> 2. DeRosa is the president and chief executive officer of MRS. DeRosa is not and has never been registered in any capacity with the Commission.
>
> 3. Sherman acted as corporate secretary for MRS. Sherman has been registered with the Commission on numerous occasions between January 25, 1962 and November 13, 2001. Sherman was not registered with the Commission in any capacity between November 2003 and May 2005.
>
> 4. Cavric was employed by and/or acted as vice-president and treasurer to MRS. Cavric was formerly registered with the Commission as a securities salesperson from February 3, 1992 to November 17, 2000. Cavric was not registered with the Commission in any capacity between November 2003 and May 2005.
>
> 5. Emmons acted as vice-president for MRS. Emmons was registered with the Commission as a securities salesperson from May 17, 1977 to November 13, 1996. Emmons was not registered with the Commission in any capacity between November 2003 and May 2005.
>
> 6. Primequest is an Ontario company incorporated on June 14, 1996 as Primequest Financial Group Inc. Primequest Financial Group Inc. merged with or was renamed Primequest on May 3, 2002. Cavric is the president, secretary, treasurer and sole director of Primequest.

[8] According to the Agreed Statement of Facts, DeRosa was an officer of MRS and Sherman, Cavric and Emmons were *de facto* officers of MRS. As stated at paragraphs 90 and 208 below, we find that DeRosa was a director of MRS, and that Sherman, Cavric and Emmons were *de facto* directors of MRS.

II. ISSUES

[9] Staff's allegations raise the following issues:

a) Did MRS, DeRosa, Sherman, Emmons and Cavric breach the registration and prospectus requirements of the Act by trading in MRS shares contrary to subsections 25 and 53 of the Act in circumstances where the "accredited investor" exemption was not available under OSC Rule 45-501?

b) Did MRS and its director(s), officers and/or its salespersons give any undertaking relating to the future value or price of MRS shares with the intention of effecting trades in MRS shares, contrary to subsection 38(2) of the Act?

c) Did MRS and its director(s), officers and/or its salespersons make any representation regarding the future listing of MRS shares with the intention of effecting trades in MRS shares, contrary to subsection 38(3) of the Act?

d) Did DeRosa, Cavric, Sherman and/or Emmons, as directors or officers or *de facto* directors or officers of MRS, authorize, permit or acquiesce in breaches of sections 25, 38 and 53 of the Act by MRS and its salespersons contrary to subsection 129.2 of the Act?

e) Did Cavric, DeRosa and/or Primequest trade MRS shares, where they knew or ought to have known that such trades would result in or contribute to a misleading appearance of trading activity in, or an artificial price for, MRS shares contrary to section 3.1(a) of NI 23-101?

f) Was the conduct of MRS, DeRosa, Sherman, Emmons, Cavric and Primequest contrary to the public interest?

III. EVIDENCE

A. Overview

[10] Fifteen witnesses testified at the hearing.

[11] Staff called two Staff investigators and ten investors, including eight investors who are residents of Ontario and two foreign investors. Staff also relied on the Agreed Statement of Facts, as well as an Agreed Statement of Facts for the Evidence of Larry Masci, dated June 10, 2009 (the "**Masci Agreed Statement of Facts**") and an Agreed Statement of Facts for the Evidence of Lisa Cripps, President of the Capital Transfer Agency Inc. ("**Capital Transfer**"), dated June 10, 2009 (the "**Cripps Agreed Statement of Facts**"). Staff also relied on documentary evidence including: section 139 certificates, corporation profile reports, MRS press releases and promotional material sent to investors, subscription agreements, investors' investment cheques, correspondence between investors and the Respondents, treasury directions, share certificates, shareholder lists, banking records, and cheques payable to the Individual Respondents from MRS, as well as audit trail data and dealer information relating to the manipulative trading allegation.

[12] Three of the Individual Respondents (DeRosa, Cavric and Emmons) testified. Sherman did not attend or testify.

B. The Agreed Statement of Facts

[13] In paragraphs 7-10 of the Agreed Statement of Facts, Staff and the Respondents agreed on the following:

> 7. In selling MRS shares to Ontario residents and residents of other jurisdictions, MRS has sought to rely on the exemption for selling securities to accredited investors contained in OSC Rule 45-501 (now National Instrument 45-106).
>
> 8. MRS did not file any Form 45-501F1 – report of exempt distribution with the Commission relating to the distribution of common shares of MRS to investors as required by section 7.5 of OSC Rule 45-501 (now National Instrument 45-106).
>
> 9. MRS sold and offered MRS shares to residents of Ontario.
>
> 10. No prospectus receipt has been issued to qualify the sale of MRS shares.

C. The Investigators

1. Kim Berry

[14] Kim Berry ("**Berry**") is an investigator in Staff's Case Assessment Unit. Berry testified that in March 2005, a complaint was filed with the Commission's contact centre by someone who had received a solicitation to purchase MRS shares. The file was assigned to Berry in April 2005.

[15] Berry reviewed the documents provided by the complainant – a promotional document that talked about MRS and identified DeRosa, Sherman, Cavric and Emmons as being involved with MRS, and a summary of a common share offering. Berry conducted registration checks, and determined that none of DeRosa, Sherman, Cavric and Emmons was registered at the Relevant Time, though Cavric, Sherman and Emmons had been registered previously. Berry also obtained a corporation profile report for MRS, which identified DeRosa as the sole officer and director, and she determined that MRS was not a reporting issuer. Because the complainant stated that MRS was relying on the Accredited Investor Exemption, Berry checked for Exempt Trade Reports, and determined that none had been filed. She also printed out press releases and other content from www.mrssciences.com.

[16] Berry's next step, on April 28, 2005, was to write to DeRosa requesting information about MRS and its business activities share offering. DeRosa left a voice mail for Berry on May 2, 2005, stating that he was putting the information together. On May 9, 2005, Berry received his letter, dated May 3, 2005, along with a package of documents in response to her request.

[17] In the letter, DeRosa identified himself as "[f]ull time Controller, CEO, CFO and

director; responsible for all accounting and income tax matters; paid as a management consultant for payroll purposes." DeRosa also named five other employees. About Cavric, Sherman and Emmons, he said the following:

> Ivan Cavric – Full time. New and ongoing projects manager and director. Treated as a management consultant for payroll purposes.
>
> Ron Sherman – Marketing, promotion and director. Responsible for fund raising to finance new project development. Also responsible for the sales and marketing department. Remuneration is based on a monthly draw of $10,000 plus bonus and he is contracted on a full time basis by MRS Sciences.
>
> Ed Emmons – Marketing, promotion and director. Responsible for raising funds for new project development. Remuneration is based on a monthly draw of $1,500.00 plus bonus and he is contracted on a full time basis by MRS Sciences.

[18] In response to Berry's request for information about how employees selling the common shares are hired, supervised and managed and how they solicit prospective investors, DeRosa stated:

> Employees contracted to sell common shares – These employees are hired on the basis of their background in marketing and public relations and knowledge of the equities markets. They are supervised by the head of sales and marketing; Ron Sherman. They solicit prospective investors by using a network of contracts that they have developed over the years and by referrals from existing and new shareholders.

[19] Berry asked how much money had been raised, to date, through MRS's common share offering in Ontario and in total. DeRosa answered:

> The amount of money raised in Ontario is $174,300; the total amount raised is $733,526 for fiscal years ended 2003 and 2004. The company also had gross revenues of $411,333 and $77,159 in 2003 and 2004 respectively.

[20] Asked to explain "the compensation structure (i.e. fees, commissions, salary etc.)" for MRS salespersons, DeRosa said only that it was "as described" in paragraph 17 above.

[21] Berry also asked for a detailed description of how MRS has, to date, used the proceeds raised by selling common shares to make acquisitions and increase the company's working capital, with specific dollar amounts. DeRosa gave the following answers along with the described attachments:

> - Options on Strat Petroleum Rozhdestuenskoe Oil Field ("**Strat**") – see attached documents for details $28,000.
>
> - Sagos Capital Corporation investment in Forex Trading venture – see subscription agreement attached $21,000.

- 22.5% joint venture share through our publishing division Merit House Media; Limelight Entertainment [Inc.] ["**Limelight**"] and Anthony Carr – see documentation attached and website developed at ww.astrologyinternational.com also attached - $30,000.

- Advantech Pharmaceuticals Corporation ["**Advantech**"] – 5,000 units of sample Psoriasis cream for test marketing – see invoices and documents attached $8,050.

- Oakwood Natural Solutions investment in all natural environment products development company ["**Oakwood**"] and negotiations and payments to Home Shopping Channel $28,000.

- MRS Sciences Inc. costs to initially defend and then settle and change company name because of alleged trademark infringement by our use of Morningside name $10,000. Documents attached.

[22] Through Berry, Staff introduced the documents provided by DeRosa, which included copies of subscription agreements, press releases, documents relating to MRS's investment activities, and financial statements for Morningside and MRS for the years 2002-2004.

[23] On June 13, 2005, Berry recommended that the matter be referred to the investigation team on the basis that MRS appeared to be engaged in registrable activities.

2. Larry Masci

[24] Staff and the Respondents entered into an Agreed Statement of Facts for the evidence of Larry Masci ("**Masci**"), a Senior Investigator with Staff. Masci was assigned the file in July 2005. The Agreed Statement of Facts describes Masci's investigation, which included:

(a) interviews with MRS investors;

(b) an investor questionnaire sent to 45 MRS shareholders who were residents of Ontario, to which twelve completed responses were received;

(c) a compelled examination of DeRosa pursuant to section 13 of the Act on January 9, 13 and 30, 2006, including DeRosa's production of a number of documents;

(d) a request for documents from Michelle Van Herreweghe, President of Select Fidelity Transfer Services Ltd. ("**Select Fidelity**");

(e) documents obtained from Lisa Cripps, President of Capital Transfer Agency Inc.:

(i) a list of MRS shareholders;

(ii) contact information for MRS shareholders;

(iii) copies of invoices sent to MRS;

(iv) copies of agreements between Capital Transfer and MRS; and

(v) copies of MRS share certificates;

(f) a summons for banking documents from TD Canada Trust;

(g) section 139 certificates for MRS and the Individual Respondents; and

(h) a request of the U.S. Securities and Exchange Commission ("**SEC**") to obtain bank documents for an account in the name of National Detection Clinics.

3. Mehran Shahviri

[25] Mehran Shahviri ("**Shahviri**") is an investigator with Staff's surveillance unit who focuses on market manipulation and insider trading investigations. In the summer of 2008, Shahviri was asked to conduct a trading analysis of trades in Morningside and MRS shares. He testified at length about the results of his analysis. His evidence is described in paragraphs 216-217 below.

D. The Investors

[26] We heard evidence from ten investors.

[27] Two of the investors, Investor A, a resident of the United Kingdom, and Investor B, a resident of Sweden, testified that they acquired MRS shares through one Peter Johansen ("**Johansen**"). The evidence before us is insufficient to clearly understand the relationship, if any, between Mr. Johansen and the Respondents. Therefore we neither summarize the testimony of Investors A and B nor rely on it.

[28] Below is a summary of the testimony, and related documentary evidence, put forth by the remaining eight investors who testified (the "**Eight Investors**"). The Eight Investors purchased shares in Morningside and/or MRS. Morningside shares were converted into MRS shares on or about October 31, 2004.

[29] The Eight Investors purchased MRS shares by signing a subscription agreement provided by MRS (the "**Subscription Agreement**") and returning it with payment to MRS. The first paragraph of the Subscription Agreement sets out the number of shares the purchaser wishes to purchase. The second paragraph states out the price per share. The third paragraph informs that the purchase of MRS shares is subject to acceptance of the agreement by MRS.

[30] The sixth paragraph sets out a number of representations made by the purchaser, including a representation as to the purchaser's status as an accredited investor (the "**Accredited Investor Representation**"), as follows:

6. In consideration of MRS Sciences Inc. accepting this Subscription, the

Purchaser hereby acknowledges and agrees that:

…

g) The Purchaser is an 'accredited investor', as defined below. The enclosed definitions are as per the Ontario Securities Commission Rule 45-501 Exempt Distributions dated and affective [sic] Dec. 1, 2001. With his/her signature the purchase [sic] certifies to the above and that he/she is purchasing as principal for his own account and not for the benefit of any other person.

"Accredited investor" means

(a) a company licensed to do business as an insurance company in any jurisdiction;

(b) a person or company registered under the Act or securities legislation in another jurisdiction as an adviser or dealer, other than a limited market dealer;

(c) an individual who beneficially owns, or who together with a spouse beneficially owns, financial assets having an aggregate realizable value that, before taxes but net of any related liabilities, exceeds $1,000,000;

(d) an individual whose net income before taxes exceeded $200,000 in each of the two most recent years or whose net income before taxes combined with that of a spouse exceeded $300,000 in each of those years and who, in either case, has a reasonable expectation of exceeding the same net income level in the current year

(e) The Purchaser has received such independent legal, accounting and tax advice from its own legal, accounting and tax professional advisors with respect to this investment as he/she/it has determined is necessary.

(f) Any business and financial information respecting Morningside provided to the Purchaser by Morningside or its agents and representatives from time to time is confidential and the Purchaser agrees to maintain the confidentiality of such information.

[31] Seven of the Eight Investors signed the Subscription Agreement as presented. Investor One struck out paragraph 6(g) (the Accredited Investor Representation).

[32] The Subscription Agreement allows MRS to accept the subscription by signing and dating the agreement.

1. Investor One

[33] Investor One is a plant manager in Guelph, Ontario. He is 48 years old, and married with three children. He assessed his investment experience as being relatively low.

[34] In 2004, Investor One's annual salary was between $70,000 and $90,000, with his wife

not earning an income. Investor One's financial assets in 2004 were between $160,000 and $200,000, which includes the approximately $120,000 that he held in a self-directed RRSP account. We find that Investor One was not an Accredited Investor at the Relevant Time.

[35] Investor One had previously invested through Sherman in a company called Otis-Winston. Investor One was first contacted by Sherman in November 2003 with regard to investing in Morningside. The shares were available on a private placement basis by subscription at $0.35 per share.

[36] Investor One recollects Sherman saying the investment in Morningside was RRSP eligible, which Investor One viewed as a necessary requirement for him to invest. Sherman directed him to a website – either the Morningside website or the TD website – that gave a value of approximately $1.10 for the shares. Investor One understood the RRSP tax deduction would be calculated using the $1.10 per share figure, despite the subscription cost being $0.35 per share.

[37] Following the initial phone call with Sherman, Investor One received a package of documents, dated November 13, 2003, describing the investment and containing a copy of the Subscription Agreement. Investor One and Sherman discussed the Accredited Investor Representation, during which Investor One recalls telling Sherman that he did not satisfy the definition of "accredited investor" (the "**Accredited Investor Definition**"); he testified that Sherman said "that it didn't matter". Between November 2003 and March 2004, Sherman called Investor One two or three times. During that same time, Investor One would occasionally look up the MRS stock symbol online. He recalled the value being somewhere in the range of $1.10 to $1.20 per share.

[38] On March 8, 2004 Investor One subscribed for 6,000 MRS shares at a price of $0.35 per share. Investor One testified that he crossed out the Accredited Investor Representation, signed the Subscription Agreement, attached a cheque for $2,100 and sent the package to MRS. The Subscription Agreement was approved by MRS on March 17, 2004, and signed by DeRosa. On March 18, 2004, a share certificate was issued to Investor One for 6,000 shares in MRS.

[39] Investor One testified that the impact of his investment in MRS was the loss of the $2,100 he had invested. Investor One also acknowledged that Biosource documents show him as a shareholder, though he was not previously aware that his MRS shares had been converted into Biosource shares.

2. Investor Two

[40] Investor Two, age 78, lives near Sarnia, Ontario, has a grade 12 education, and retired in 1991 from Imperial Oil. He assessed his investment experience as being relatively low.

[41] Investor Two believed he qualified as an Accredited Investor based on assets, and he signed the Subscription Agreement without modification.

[42] Investor Two has income from four pensions in addition to some farm income, which in 2004 resulted in aggregate income of approximately $53,000. Investor Two also held the following financial assets: a RRIF valued at approximately $103,000, a trading account valued at

approximately $115,000 holding primarily Imperial Oil stock, insurance policies, and approximately $10,000 in cash. Investor Two also owns 50 acres of farmland valued at $249,000, although it is not a financial asset. We find that Investor Two was not an Accredited Investor at the Relevant Time.

[43] In the fall of 2003, Sherman called Investor Two about investing in MRS, and briefly explained the company's business. Investor Two then received a package of materials from MRS, including the First Offering Summary, described in paragraph 162 below, which describes the investment as a "high return venture fund targeting returns of 200% plus" with "little downside risk".

[44] Investor Two does not think that he ever talked to Sherman about the Accredited Investor Exemption, nor does he recall Sherman inquiring about his income or financial assets. Investor Two understood MRS shares to be trading at approximately $2 per share, based on information provided by Sherman, including a printout from the Pink Sheets website, which indicates a "last sale" value of $2, and a print out from the Merrill Lynch website, which indicates a 52 week range of $2.01 to $2.25 per share, though both documents also disclose very low trading volumes. Though Respondents' counsel, in cross-examination, attempted to suggest that Investor Two obtained the printouts from his broker, Investor Two's responses made it clear to us that he believes the printouts came from Sherman.

[45] Investor Two made three investments in MRS – 5,000 shares at $0.35 ($1,750) on October 7, 2003; 10,000 shares at $0.35 ($3,500) on February 14, 2004; and 10,000 shares at $0.35 ($3,500) on October 22, 2004 – 25,000 shares at $0.35 per share for a total cost of $8,750.

[46] Investor Two is aware that his MRS shares have been converted into Biosource shares, which he continues to hold. He also received shares in Oakwood and Strat as stock dividends from MRS. Investor Two testified that he tried to sell his shares at one point, but his broker indicated that there was no reported trading in the shares. He also called Emmons to ask if Emmons could sell his MRS shares, but Emmons said he could not because he was not a stockbroker. Though Investor Two occasionally spoke to Emmons, his primary contact at MRS was Sherman.

3. Investor Three

[47] Investor Three works in construction as a seasonal labourer in Campbellford, Ontario. He was laid off at the Relevant Time, and paid for the investment by borrowing funds on his credit card. He has completed elementary school, does not use a computer, and had no previous investment experience; as he described it, "this was my first and last" investment. Investor Three has two children.

[48] In 2004, Investor Three's income was between $25,000 and $27,000 at the Relevant Time, and his wife earned $19,000-$21,000 as a caregiver. At the Relevant Time, he had no RRSPs, investment accounts, other investments or cash savings. Although it is not a financial asset, Investor Three testified that he owned a house valued at approximately $130,000, with a mortgage of approximately $140,000. We find that Investor Three was not an Accredited Investor at the Relevant Time.

[49] Investor Three testified that Sherman starting phoning him in 2004 about Morningside, but he was not interested at first, and Sherman called him about six times over the next couple of weeks about the potential investment. Investor Three testified that he told Sherman he was unemployed, but Sherman said "don't worry about all that mumbo-jumbo" and told him to sign the Subscription Agreement and send in the cheque (Hearing Transcript, May 11, 2009, p. 111). Sherman told Investor Three that he was running out of time to invest, that the shares were worth $2.10 per share, as shown online, even though they were being offered at $0.35 per share, and that in order to have a vote in the company it was necessary to invest at least $3,500. Investor Three signed and returned the Subscription Agreement, dated February 26, 2004. He purchased 2,000 shares at $0.35 per share for $700. He used his credit card cheques to pay for the investment because he did not have the cash available. Investor Three testified that Sherman sent him the promotional materials after he invested, not before.

[50] A couple of weeks later, Sherman called Investor Three again, offering another investment of $3,500. Investor Three refused because he had been advised by family members that the shares were not listed and he had been advised by his broker that they could not be sold for a year.

[51] In June 2004, he received 133 shares of Oakwood and in February 2005, he received 33 shares of Strat as dividends on his MRS shares.

[52] Investor Three testified he later sold 500 MRS shares for $.02 per share. Later, about a year before the hearing, he attempted to sell his remaining 1,500 MRS shares without success, and has since "walked away" from the investment

4. Investor Four

[53] Investor Four is in his early fifties, single and lives in North York, Ontario. He described his level of investment experience as intermediate.

[54] In 2004, Investor Four was an Information Technology Manager with a financial institution earning $100,000 to $110,000 per year. He held the following financial assets at the Relevant Time: an RRSP valued at $610,000, a trading account valued at $120,000, and $30,000 in cash, for a total of $760,000. Investor Four also held a life insurance policy with a surrender value of $85,000, stamps and coins valued at $75,000 and an art collection valued at $100,000. He also owned a house valued at $425,000, but that is not a financial asset.

[55] Staff submits that a stamp and coin collection and art collection are not sufficiently liquid to qualify as financial assets. The Respondents submit that there is no basis for excluding them. OSC Rule 45-501 defines "financial assets" as follows:

> "financial assets" means cash, securities, or any contract of insurance or deposit or evidence thereof that is not a security for the purposes of the Act.

[56] We find that Investor Four's stamp and coin collection and art collection are not "financial assets". His net financial assets when he purchased the MRS shares totalled approximately $845,000, short of the $1,000,000 "bright-line" threshold established by the Accredited Investor Definition. We find that Investor Four was not an Accredited Investor at the

Relevant Time.

[57] However, Investor Four honestly believed he was an Accredited Investor and told Sherman that he had assets valued at greater than $1,000,000 for the purpose of qualifying as an Accredited Investor. He explained that he included his stamp and coin collection and art collection in the total. He testified that Sherman asked no specific questions about his net income or net financial assets.

[58] Sherman first contacted Investor Four about Morningside in early 2004. Sherman discussed the investment opportunity and the company's business, in particular its investment in psoriasis treatment, which was of interest to Investor Four, and environmentally friendly products. In March 2004, Investor Four received some promotional material about Morningside, Oakwood and Biogenerics, as well as a Subscription Agreement. Investor Four reviewed the material, and conducted superficial internet searches. He also checked the price of MRS shares on the Pink Sheets and through TD Canada Trust, using the MRS stock symbol, which had been provided by Sherman.

[59] After initially agreeing to buy 30,000 shares at $0.35 per share, Investor Four subsequently decided instead to purchase 50,000 shares for a total cost of $17,500. Investor Four amended the Subscription Agreement accordingly and signed it on April 20, 2004. DeRosa signed the Subscription Agreement, indicating MRS's acceptance of it, on May 13, 2004. Investor Four received a share certificate along with a covering letter signed by DeRosa, dated May 10, 2004.

[60] In June 2004, Investor Four received a stock dividend for Oakwood (one share for every 15 MRS shares). Sherman also contacted him to talk to him about Oakwood, Strat and Biogenerics. In February 2005, Investor Four received a stock dividend in Strat (one share of Strat for every two MRS shares).

[61] Investor Four testified that he presently holds 200,000 Biosource shares as a result of the conversion of his MRS shares to Biosource shares and a subsequent stock split. The last time Investor Four checked the price of his Biosource shares, the quote was $0.50 but there was no reported trading volume in the shares.

[62] Investor Four also purchased $7,500 worth of Biogenerics shares through Sherman in 2005. In the fall of that year, Investor Four attended at the MRS office to discuss lifting the sales restrictions on his Biogenerics shares; he understood that Sherman was ill but met Emmons at that time. He dealt with Emmons thereafter, and they talked about the Biosource merger and about investment opportunities in Biogenerics and something called CTR Consulting, but Investor Four did not invest. Investor Four testified that he asked Emmons specifically about the psoriasis treatment, and Emmons told him MRS had decided not to pursue it because of some patent issues.

5. Investor Five

[63] Investor Five, age 68, is married and lives in Mississauga, Ontario. He finished high school and three years of accounting courses. Investor Five testified that his level of investment experience was very low, and that his RRSP is managed with the assistance of an advisor with

whom he meets quarterly.

[64] Investor Five retired as a manager of financial systems for a large company in 2005. In 2004, when he purchased MRS shares, he had an income of $55,000. Investor Five's main financial asset in 2004 was an RRSP worth approximately $140,000. Investor Five also owned his condo, a non-financial asset, which was then valued at $190,000. We find that Investor Five was not an Accredited Investor at the Relevant Time.

[65] Investor Five testified that before purchasing MRS shares, he had made a number of investments with Sherman and Emmons, who were then at Arlington Securities ("**Arlington**"), between 1998 and 2000. In aggregate the cost of these investments was in the range of $25,000 to $30,000.

[66] Investor Five received a phone call from Sherman in October 2003. Sherman discussed an investment opportunity in Morningside and told Investor Five that he thought investing in Morningside might help recover some of the losses from his prior investments through Sherman. Investor Five testified that Sherman's call "…was a legitimate attempt to help me. It sounded reasonable that he wanted to help so I invested in Morningside Capital". Investor Five testified that Sherman neither explained the Accredited Investor Definition nor enquired about Investor Five's assets and income.

[67] After the phone call, Investor Five received an information package and Subscription Agreement. He acknowledged that he reviewed the Subscription Agreement and signed it, but testified that although the Accredited Investor Definition is set out in the Subscription Agreement, he "wasn't sure what it all meant".

[68] Investor Five purchased 5,000 Morningside shares at $0.35 per share, at a cost of $1,750, in December 2003. In July 2004, he bought another 5,000 MRS shares from Sherman at the same price. In February 2005, Investor Five received a stock dividend of 385 Strat shares. In July 2006, Investor Five's MRS shares were converted to Biosource shares as a result of MRS's merger with Biosource.

[69] Sherman continued to call Investor Five every once in a while about additional investment opportunities, including a private placement in Biogenerics, and in June 2005, Investor five invested $2,500 in Biogenerics through Sherman. After that, he told Sherman he was about to retire and would not be making further investments.

6. Investor Six

[70] Investor Six, age 68, is a retired farmer with a high school education. He is married and lives near St. Marys, Ontario. He described his level of investment experience as low, although he testified he has been investing for the past 40 years.

[71] In 2004, Investor Six had an income of $75,000 from investments and farm revenue, and his financial assets totalled $785,000: a Nesbitt Burns RRSP account valued at $100,000, a Nesbitt Burns trading account valued at $500,000, a Scotia Bank RRSP valued at $175,000, and 10,000 in cash. We find that Investor Six was not an Accredited Investor at the Relevant Time.

[72] Investor Six was first contacted by Sherman, who phoned him in 2003 about MRS. He had had no prior dealings with Sherman, though he had invested over the phone previously. Sherman discussed the company and the products that MRS was selling. Investor Six testified that Sherman discussed the Accredited Investor Exemption with him. Investor Six testified: "I felt I had assets exceeding $1 million". When calculating the value of his assets, Investor Six testified that he included his farmland, valued in the range of $500,000 to $600,000, but real property is not a "financial asset" for purposes of the Accredited Investor Definition.

[73] Although Investor Six testified that Sherman probably wanted him to invest $5,000, on December 20, 2003, Investor Six signed and dated the Subscription Agreement for 10,000 shares at $0.35 per share at a cost of $3,500. He testified he did not read the Accredited Investor Definition set out in the Subscription Agreement.

[74] Investor Six later received a dividend of Oakwood and Strat shares. He continues to hold these shares and the Biosource shares he received as a result of the merger and conversion of his MRS shares. Investor Six has not checked Biosource trading activity recently. He attempted to sell his shares but nobody wanted to deal with them.

[75] In 2006 or 2007, Investor Six testified that he invested again with Sherman in a company called Biogenerics.

[76] Investor Six dealt mainly with Sherman, and spoke to him about ten times. Investor Six understood Sherman to be a salesperson, "doing what every other broker does". Investor Six also spoke to Emmons on the phone, though he never bought shares from him.

7. Investor Seven

[77] Investor Seven is a 61-year old machine operator with an elementary school education. He is married with two children, and lives in Etobicoke, Ontario. He described his level of investment experience as low.

[78] In 2004, when he purchased Morningside shares, Investor Seven had an income of $50,000 to $60,000; his wife was not employed. His financial assets were valued at between $30,000 and $34,000, comprising a self-managed trading account at TD with a value of between $20,000 and $24,000, and approximately $10,000 in cash. His home had a value of $150,000 to $200,000, but does not qualify as a financial asset. We find that Investor Seven was not an Accredited Investor at the Relevant Time.

[79] Investor Seven testified that Emmons phoned him and told him that MRS was doing research on psoriasis and asked if he was interested in investing. Investor Seven was interested because he knows someone who suffers from psoriasis and knew that a cure would relieve suffering and be a good investment. He asked Emmons to send him some information, and Emmons sent an information package and Subscription Agreement.

[80] Investor Seven decided to buy 10,000 shares, which Emmons described as a good entry level, at $0.35 per share. He sent MRS the signed Subscription Agreement, dated March 26, 2004, along with a cheque for $3,500. By letter dated April 6, 2004, MRS sent Investor Seven a share certificate, dated April 2, 2004, and DeRosa's signed acceptance of the Subscription

Agreement, dated April 6, 2004. Investor Seven testified that neither Emmons nor anyone else from MRS discussed the Accredited Investor Definition with him. He testified that Emmons was the only person at MRS that he dealt with, though business cards of Emmons and Sherman were attached with materials he received from MRS. It was also Emmons who, after Investor Seven made his investment, directed him to a U.S. web site where he could check the price of MRS shares.

[81] Investor Seven received a stock dividend of 667 Oakwood shares in June 2004 and 385 Strat shares in February 2005. He was unable to sell the Biosource shares he received as a result of the merger and continues to hold them.

[82] In around August of 2006, after receiving a letter from Staff, Investor Seven phoned Emmons to ask about what was going on. Investor Seven testified that Emmons told him he did not have to worry about the letter and did not have to provide Staff with the information requested.

8. Investor Eight

[83] Investor Eight is 90 years old, and lived in Toronto, Ontario at the relevant time. He has a B.Com. and considers his investment knowledge as "above average". He testified that he had been investing since 1947.

[84] Investor Eight retired in 1985 from a large organization as Chief Financial Officer with an income of $65,000, and has a retirement income of about $54,000 from two pensions and some investments. At the Relevant Time, Investor Eight had financial assets in an investment account valued at approximately $400,000, though they have since declined in value. Investor Eight also owns his house, which was valued at approximately $400,000 at the Relevant Time, but it does not qualify as a financial asset. We find that Investor Eight was not an Accredited Investor at the Relevant Time.

[85] Investor Eight was contacted at home by phone, but does not recall the name of the caller. The caller told Investor Eight about MRS and its products, and said that a block of 10,000 shares had been set aside for him at $0.35 per share. Investor Eight initially testified that he did not receive any documents about Morningside until after he invested, but in cross-examination, agreed he had requested and received a package after getting the sales calls. Investor Eight testified that there was no discussion about his income or assets. Investor Eight testified that he was not familiar with the Accredited Investor Definition, though he "scanned" and signed the Subscription Agreement. On June 14, 2004, Investor Eight submitted a Subscription Agreement and a cheque for $3,500 to purchase 10,000 shares at $0.35 per share. MRS signed and dated the Subscription Agreement on June 22, 2004 and issued a share certificate, dated June 18, 2004.

[86] Investor Eight became concerned about the investment 4-6 weeks after he invested. Investor Eight called MRS, and was told the individual he had dealt with previously was out of town, but that DeRosa was available. Investor Eight spoke to DeRosa and the person who answered the phone at MRS six or seven times after making his investment in MRS.

[87] Investor Eight's MRS shares were later converted to Biosource shares. He also received Oakwood and Strat shares as dividends on his MRS shares, but he testified he never tried to

deposit them into a securities account.

[88] In 2005, Investor Eight wrote off his $3,500 investment in MRS as a capital loss for tax purposes.

E. The Respondents

1. DeRosa

(a) Registration and Background

[89] DeRosa, who has a B.A. in Economics and Business Administration, had a business called DeRosa Accounting Services. He described himself as an accountant, but acknowledged he does not have any accounting designation. At no time has he been registered with the Commission.

(b) Role at MRS

[90] DeRosa testified that he incorporated Morningside to offer administrative and accounting services. He was its sole officer and director. He acknowledged that he knew Cavric from when he was a registrant at Richardson Greenshields, and it was Cavric who introduced him to Emmons and Sherman, who were salespersons at Arlington. He and Cavric and Emmons were also involved in another private placement for Alliance Explorations, later Rox Resources. DeRosa also provided accounting services to Otis-Winston, with which Cavric and Emmons were involved.

[91] DeRosa testified that Cavric approached him about the psoriasis cream (developed through Canada Custom Packaging and Advantech) and they decided to use Morningside to market it. DeRosa testified that he and Cavric provided funding initially; however subsequently they determined it was necessary to raise funds from investors.

[92] DeRosa also testified about MRS's other investments, in Strat, Sagos Capital Corporation (foreign exchange), Merit House Media (magazines), Limelight (books of a psychic, Anthony Carr) and Oakwood Natural Solutions, which developed into Biosource, which manufactures a line of all-natural cleaning products. Eventually, MRS merged with Biosource, and MRS shares were exchanged for Biosource shares.

[93] DeRosa also testified about MRS's two name changes. Morningside became MRS in August 2004 because of a dispute about the Respondents' use of the Morningside name. MRS was redomiciled to Nevada in 2005, becoming MRS Nevada, to get exposure to the larger US market and because of the merger with Biosource, after which MRS became dormant.

[94] DeRosa testified that he was in charge of accounting and other day-to-day operations at MRS, while Cavric looked after product and business development, and Sherman and Emmons would do the "corporate relations" work. He and Cavric prepared the website content and the press releases.

[95] DeRosa testified that the Individual Respondents were all made directors, "because we

didn't feel anybody needed to be baby-sat, so by making them a director of the company, it put a responsibility in each of us to do our duties and to kind of be responsible to each other."

[96] Initially DeRosa was the sole signing authority for MRS's bank account. Subsequently, in November 2004, Joanne Laprise ("**Laprise**") an administrative employee of Associated Financial Corporation ("**Associated**") was added as a signatory to the account. DeRosa testified that he is the President of Associated, that he and Cavric are directors, and that Associated took over the administrative (back office) support for MRS. DeRosa acknowledged that he prepared MRS's unaudited financial statements under Associated letterhead; no audited financial statements were prepared.

(c) The Private Placement Offerings

[97] DeRosa and Cavric were primarily responsible for preparing material sent to investors, such as the preliminary package of materials and subsequent press releases and correspondence, and also set up a website.

[98] The lists of prospective investors were put together collectively at MRS. Some of the names came to MRS with Sherman, while others were identified by looking through business directories for leads. The first step would be to send prospective investors a package of materials describing MRS, along with a Subscription Agreement (the "**Investor Package**"). Most prospective investors were then initially contacted by telephone by an MRS qualifier. DeRosa testified that prospective investors would receive a follow up phone call, and Sherman or Emmons would speak to interested investors. DeRosa acknowledged that he "prepared most of" the script that was to be used by Sherman and Emmons. He testified that Sherman and Emmons were selling MRS's "products and services", but denied that they were selling shares.

[99] Presented with the First Offering Summary, DeRosa testified he did not remember this document being prepared or sent out to prospective investors, and this was "not something that we would have put out" because it targets returns of 200 percent plus with little downside risk. He acknowledged that he and Cavric would have prepared the Second Offering Summary, but denied that the minimum investment was reduced from $3,500 to $700 to make an MRS investment more affordable. He testified that the decision to increase the subscription price for MRS shares from $0.35 to $0.70 per share "had to do with not going out to new investors and diluting the existing investor shares." He could not explain why some investors continued to pay $0.35 per share.

[100] DeRosa testified that compliance with the Accredited Investor Exemption was discussed at one of the initial meetings of the directors, and that Cavric provided him with a package of law firm publications about the Accredited Investor Exemption. DeRosa understood that for an investor to qualify as an Accredited Investor, it was necessary for that investor to meet certain minimum net income or minimum net worth requirements.

[101] DeRosa testified that he prepared a Subscription Agreement that included information about the Accredited Investor Exemption and required the investor to represent that he or she was an Accredited Investor, as defined. DeRosa testified that when he reviewed a signed Subscription Agreement, he "considered that he [the investor] had read it over and that he

understood what he was signing and that I relied on his signature that he was accredited." However, apart from checking that the investor had indicated he or she was an Accredited Investor on the Subscription Agreement, MRS did not ask specific questions about an investor's net income or net financial assets and did not require any certification from investors as to their net income or financial assets. DeRosa testified he did not know what had happened with Investor One's Subscription Agreement, and suggested this was an oversight. He testified that there were Subscription Agreements that were rejected after a follow-up call because of a concern about whether the investor was an Accredited Investor.

[102] A prospective investor's signed Subscription Agreement would be reviewed by DeRosa, and if it was approved, the investor's cheque would be deposited into MRS's account. Once the cheque cleared, either DeRosa or Cavric would issue a treasury direction on behalf of MRS. Upon receipt of the share certificate from the transfer agent, MRS would send the investor a package of documents which included a signed copy of the Subscription Agreement, a copy of the cheque, an MRS share certificate, and a covering letter.

[103] DeRosa testified that MRS had an arrangement with Fastcorp, a division of Heritage Trust ("**Heritage**"), MRS's transfer agency, to file Exempt Distribution Reports with the Commission. When MRS left Heritage, they found out that Heritage had not filed the reports. They then retained a lawyer to file the reports and found out they had not been filed only when they were contacted by Staff. DeRosa acknowledged that he and Cavric incorporated Select Fidelity, MRS's second transfer agent, and that it operated out of MRS's Toronto offices. Presented with the share certificates sent to Investor Two, which were signed by Laprise, DeRosa testified that Laprise did administrative work for MRS, and was an employee of Associated, which was a client of Select Fidelity; he reluctantly conceded she was an authorized officer of Select Fidelity.

(d) Remuneration

[104] DeRosa testified hat he was in charge of managing MRS's cash flow. He described the process as follows:

> Basically what I would do is when the cash came in at the end of the week, I would put back into the expenses, I would pay the suppliers, I would make funds available for whatever projects were going on and then I would take whatever was left as per our agreement and break it up between the subcontractors, as it were, and that's basically the way I did it.
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> (Hearing Transcript, June 26, 2009, p. 138)

[105] DeRosa testified that Sherman and Emmons were to be paid fixed salaries, not commissions. He testified that MRS paycheques included investors' names on the memo line in order to track the source of the funds; he acknowledged that investor funds were used to pay the Respondents and other MRS employees. Although the amounts of Sherman's and Emmons' paycheques appear to represent 20 to 25 percent of the amounts invested by the investors named on the paycheques, DeRosa denied that Sherman and Emmons were paid on a commission basis. He testified that the amounts paid were erratic because of MRS's inconsistent cash flow.

Presented with the evidence that none of the Eight Investors was told that 25 percent of the money invested was being paid to the person who offered the investment to them, DeRosa testified he did not know what was said to investors because the qualifiers worked from home and Sherman and Emmons worked in Toronto.

[106] DeRosa testified that Emmons started at $1,500 per month, but this was increased to $2,500 per month, dependent on cash flow. Sherman was to be paid more than Emmons ($10,000 per month) because he was the office manager, responsible for more projects, and had a client list from his work at Arlington. DeRosa reluctantly acknowledged that Sherman was also paid for his leads (client list), as evidenced by cheque for $1,078.87, dated April 15, 2004. Finally, directors' fees of $1,000 per meeting were also to be paid, subject to the availability of cash.

[107] In a document he provided to Staff during the investigation (the "**Supplementary Schedule of Requirements**"), DeRosa stated that Sherman received $192,000 in 2004 and $26,300 in 2005, for a total remuneration of $218,300, and that Emmons received $48,340 in 2004 and $8,270 in 2005, for a total remuneration of $56,610. At the hearing, DeRosa testified that Sherman received "in the neighbourhood of" $290,000 over the three years, out of the $952,000 raised by MRS from investors. In addition to cash compensation, DeRosa testified that DeRosa and Cavric were each issued 5 million shares of MRS, and Emmons and Sherman were each issued 1 million shares.

2. Cavric

(a) Registration and Background

[108] Cavric was registered with the Commission as a securities salesperson from February 3, 1992 to November 17, 2000, but was not registered in any capacity at the Relevant Time. His background is in the securities industry and he considers himself to be a sophisticated investor and a professional trader.

(b) Role at MRS

[109] Cavric testified that DeRosa incorporated MRS, which was his administrative services company. He and DeRosa decided to develop the psoriasis cream, which Cavric first learned about the psoriasis cream through Otis-Winston, of which he was still a major shareholder. Cavric and DeRosa provided some financing personally, then decided to offer a private placement to Accredited Investors. Cavric also developed the Strat venture and others.

[110] Cavric testified that he was in charge of research and product development, and directed Otis-Winston as well as Biogenerics, Advantech and other pharmaceutical companies. DeRosa was in charge of day-to-day operations and cash flow, but would often discuss cash flow management with Cavric. Cavric's focus was on research, product development and marketing, and he tried to stay away from day-to-day operations. Cavric also testified that he was involved in putting together information sent to investors.

[111] According to Cavric, Emmons and Sherman, who were former registrants and worked together at Arlington, were responsible for "shareholder communication". He agreed with Staff's

suggestion that he had introduced them to Fred Kimber, president of Otis-Winston, and brought them into Alliance Explorations, another business in which he was involved, because they "had an expertise and a client list that would be useful in raising capital for the company", adding that they also had "communication skills".

[112] Cavric was also responsible for the MRS website, and hired someone to design it. He testified that the reason for having MRS quoted on the Pink Sheets, having a link to the Pink Sheets website on the MRS website and sending Pink Sheets information to prospective investors was to facilitate their research on MRS, and not to encourage sales based on the price of the shares as reported on the Pink Sheets.

[113] Cavric acknowledged that he, with DeRosa, signed the master share certificate that was used by the transfer agent when sending out share certificates to investors, and he signed treasury directions when DeRosa was unavailable. He owned the Welland office, which was Primequest's office and also the back office for MRS. Cavric worked at the Welland office, not the Toronto office where Emmons and Sherman worked. Cavric also acknowledged that Select Fidelity, MRS's second transfer agent, at one time operated out of MRS's Toronto office and later operated out of another office in Welland that he owned.

[114] Cavric testified that the Individual Respondents were all directors of MRS and were all responsible for compliance.

(c) The Private Placement Offering

[115] Though Cavric testified that he "believed" he was vice-president of Morningside in November 2003, when the first subscriptions were made, he testified that he had not seen the First Offering Summary before the hearing, did not know who created it and had never discussed it with Sherman or Emmons. He described its stated target of a return of "200 percent plus" with "little downside risk" as "ridiculous", and suggested that it was sent out by someone other than Morningside, though it bears the return address of MRS's Toronto office and Investor Two testified he received it from MRS.

[116] Cavric testified that before preparing the Subscription Agreement, he spoke to a lawyer, who explained the Accredited Investor Exemption, and read several law firm publications about it, for example, a corporate finance bulletin by a major Toronto law firm in November 2001, which, under the heading "Seller's Due Diligence", states:

> The OSC expects that sellers will exercise reasonable diligence for the purposes of determining the availability of the exemption used by the seller in any particular circumstances. In the companion policy to the New Rule, the OSC indicates that it will normally be satisfied that a seller has exercised reasonable diligence in relying on a particular exemption if the seller has obtained statutory declarations or written certifications from the purchasers, unless the seller has knowledge that the facts set out in the declarations or certifications are incorrect.

[117] Cavric understood that the Subscription Agreement would have to include the Accredited Investor Definition and an explanation of the risks of the investment. He testified that he worked

with DeRosa to develop the Subscription Agreement on that basis. Cavric testified that he believed MRS complied with OSC Rule 45-501 by including the Accredited Investor Definition in the Subscription Agreement and identifying the risks involved in the investment.

[118] Describing the sales process, Cavric testified that in addition to the contact lists that Sherman brought with him, Cavric and DeRosa would go through business directories to find individuals they believed would have a high net worth. Cavric was unable to recall the name of any business directory that they used or whether they paid a fee for doing so.

[119] Once a prospective investor expressed interest, MRS would send out offering information and a Subscription Agreement. A follow-up call would be made, and Cavric testified that this call was to follow a script which he acknowledged preparing along with DeRosa. The script provides a very brief description of MRS. Cavric acknowledged that it asks no questions about the prospective investor's net income or net financial assets; he explained that this was because the Accredited Investor Definition and the risks of the investment were explained in the Investor Package and the purpose of the call was to find out if the prospective investor had read the Investor Package or had any questions. The script ends with the MRS representative asking the prospective investor for a fax number, in order to provide the individual with documents related to the MRS investment opportunity.

[120] Cavric testified that if a Subscription Agreement was returned unsigned or with missing information, MRS would follow up, and if the investor indicated he or she was not an Accredited Investor, MRS would return the Subscription Agreement along with the cheque. If MRS accepted the subscription, the original Subscription Agreement, along with the share certificate and a copy of the cheque would be returned to the investor. Cavric was not aware of any subscription being accepted from an investor who was not an Accredited Investor.

[121] Cavric was aware that it was necessary to submit an Exempt Distribution Report for every trade that relied on the Accredited Investor Exemption. Cavric testified that he instructed Fastcorp, a division of Heritage, pay for and file the Exempt Distribution Reports with the Commission. Cavric testified that when it was determined that this had not been done, MRS pulled the account from Heritage, as of November 27, 2003, and transferred MRS's shareholder records to Select Fidelity. However, Cavric acknowledged that MRS only had 3 investors when they changed transfer agents, each of whom had invested $3,500, and that MRS continued to offer and sell MRS shares without filing Exempt Distribution Reports thereafter, when Select Fidelity acted as its transfer agent; all the shares had been issued by the time Capital became MRS's transfer agent.

[122] According to Cavric, MRS also engaged a lawyer and provided the lawyer with all the information necessary to make the Commission filings, and Cavric became aware that the lawyer had not filed the documents only when MRS received correspondence from the Commission.

[123] Cavric testified that the decision to decrease the minimum investment required – from $3,500 to $700 – was to develop credibility with reluctant investors, with a view to seeking an additional investment from the investor in the future. He denied that the change was intended to make the investment more affordable, presumably not an issue for Accredited Investors, and stated that it was intended to make the investment more competitive, though he was unable to

identify where the competition for private placement money came from.

[124] Cavric testified the decision to increase MRS's subscription offering price from $0.35 to $0.70 per share was made at a board meeting, though he could not recall the exact conversation. He acknowledged that the change did not correspond with any growth in MRS's business. He was willing to defer to DeRosa, who testified that the price increase was intended to improve cash flow, but he could not recall the discussion himself.

(d) Remuneration

[125] Cavric denied that the Respondents were paid compensation for selling shares. He testified that he and DeRosa decided on the formula for reimbursing Emmons and Sherman and that compensation was capped at 25 percent of the cash flow at the time. Cavric testified that initially, each of the Individual Respondents was to be paid $60,000 per year by MRS, but that did not happen because of cash flow problems. Instead, Emmons received $1,500 per month. Cavric testified that he received no direct compensation, though he acknowledged that MRS was paying Associated, which was his company, for administrative services. Cavric was unable to provide details on the nature or amount of these expenses, but acknowledged that he left the administrative work to DeRosa. In addition, Cavric was issued 5 million MRS shares in January 6, 2003, pursuant to the same treasury direction that issued 5 million shares to DeRosa, 1 million shares to each of Emmons and Sherman, and 850,000 shares to each of Laprise and Jennifer Bassi.

3. Emmons

(a) Registration and Background

[126] Emmons was registered with the Commission as a securities salesperson from 1977 to 2001, when his sponsoring dealer, Arlington, closed. His registration has been in abeyance since then, but he has worked as an "investor relations consultant", providing information to investors and prospective investors about private placements and the Accredited Investor Exemption. He was not registered in any capacity at the Relevant Time. Emmons met Sherman while they were both working as registered representatives at Durham Securities, Glendale Securities and Arlington. He also met Cavric at Arlington. He met DeRosa when he worked as an investor relations consultant at Alliance Explorations and Otis-Winston in 2002.

(b) Role at MRS

[127] Emmons testified that he became a director of MRS to ensure that the private placement was conducted properly. On cross-examination about his agreement that he "acted as Vice-President of MRS", he stated that he had "no objection" to this title, which he described as "honourary".

[128] Emmons was reluctant to admit knowing about MRS's business arrangements or products, including that, for example, that National Detection Clinics was incorporated by DeRosa and Cavric in June 2005, that Cavric had signing authority for Oakwood, or that DeRosa was President of Associated. He acknowledged knowing that Limelight, with which MRS had entered into a joint venture, had "run afoul of the regulatory bodies" but when it was suggested

to him that Limelight was a boiler room shut down by the Commission, Emmons answered that he did not know. He acknowledged that he and Sherman had done similar work with Biogenerics, a wholly owned subsidiary of MRS.

[129] Emmons testified that DeRosa and Cavric looked after the business and product side, and he and Sherman had the role of "investor relations" or "communicating the private placement". He also testified that he and Sherman were the only ones in the Toronto office, though DeRosa, Laprise or anyone else could drop in; there were no qualifiers and no marketing staff or salespersons in the office . Presented with DeRosa's letter, which stated that Sherman supervised the marketing employees, Emmons stated that while Sherman was at the top of the food chain, he (Emmons) was the only one working with Sherman, as far as he knew. Presented with cheques marked "Q" made payable to certain named individuals, Emmons would not acknowledge that these were qualifiers for MRS.

[130] On cross-examination, Emmons was reluctant to concede that Laprise, who signed his share certificate on behalf of Select Fidelity, had been issued 850,000 Morningside shares at the same time shares had been issued to him, or that he had met Laprise and had seen her at MRS's offices in Toronto working as a clerk, and she may have worked in the Welland office, though he claimed he did not know what her title was. He acknowledged that starting in November 2004, she signed the cheques he received as compensation from MRS, and that she took over payroll administration at that time. He testified that he did not know and had never considered whether there was an arm's length relationship between MRS and Select Fidelity. Nor was he aware of the reason for MRS moving from Heritage to Select Fidelity and then to Capital Transfer.

(c) The Private Placement Offerings

[131] Investor Seven testified that it was Emmons who called him initially about MRS and Emmons remained his contact after he made his investment. Emmons acknowledged that he spoke with Investor Seven, though he claimed that he explained the Accredited Investor Exemption, which Investor Seven denied. Emmons also recalled speaking with Investor Four and Investor Six and cannot recall whether he spoke with Investor Two, but these discussions happened after the investors made their investments.

[132] Emmons denied selling any MRS securities. He testified that DeRosa gave him a list of people to contact, and he and Sherman, having been in the industry previously, also identified some names. In cross-examination, he testified that he did not bring "that many" names with him, but recognized some of the names on Sherman's contact lists. When contacting prospective investors he would explain that the investment was only open to Accredited Investors, and he would explain what that term meant. He testified that if the prospective investor had not yet received the Subscription Agreement, which explained the Accredited Investor Exemption, he would ensure they got it, but he did not personally mail them out. He would not enquire about the prospective investor's income or assets because he understood that the Accredited Investor Exemption, which he described as "relatively new" at the Relevant Time, put the onus on the investor to determine whether he or she satisfied the Accredited Investor Definition:

> … my understanding was that you present the document to the prospective investor and give him ample opportunity to peruse it and decide whether or not it

> was something that he was – well, number one, whether or not he was accredited, number 2, whether he wished to participate.
>
> […]
>
> At that point in time my understanding was beyond disclosure of the risk involved, the requirements, what an accredited investor meant, that the onus was on the investor to make a true statement and then, of course, as I say, beyond discussing or beyond disclosure, there was no onus on me as I saw it to guide or advice or discuss further than the disclosure.
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> (Hearing Transcript, June 22, 2009, pp. 104-105)

[133] Emmons testified that he discussed the risks with investors, including the risk that they could lose all their money; he added that the risks were also described in the Subscription Agreement. He testified that he also told investors that the shares were subject to a one-year resale restriction and that while the shares were quoted on the Pink Sheets, there was no volume and no guarantee a market would develop. He denied putting pressure or imposing time limits on any prospective investor. He denied using a script.

[134] When investors submitted their Subscription Agreements and cheques, Emmons would forward them to DeRosa who, as Controller, would decide whether to accept or reject a particular subscription. It was also the Controller's responsibility to file an Exempt Trade Report.

[135] Emmons testified that prospective investors would have the stock symbol, which would allow them to find MRS trading data published by Pink Sheets. In addition, Emmons was aware that the MRS website had a section entitled, "Quotes & Charts", which provided trading data published by Pink Sheets. Emmons also testified that a print out from the Merrill Lynch website, providing trading data regarding MRS shares published by Pink Sheets, was disseminated to investors. However, with respect to MRS trading data, Emmons also testified that regardless of "[w]hether they sent out or whether they were made aware through a link from the website…it was part of my responsibility to communicate the fact that that did not represent a market" (Hearing Transcript, June 22, 2009, p. 187).

[136] Emmons testified that he understood MRS was required to file forms periodically with the Commission, given the company's reliance on the Accredited Investor Exemption. However, Emmons testified that compliance with the Commission's filing requirements was not his responsibility. Emmons testified that he had assumed that the filing was being looked after by MRS and specifically by DeRosa in his capacity as controller.

(d) Remuneration

[137] Emmons denied that he was paid a commission or was paid based on a percentage of sales. He testified that he was supposed to receive $2,500 per month, but whether he received the full amount depended on whether there was "enough capital at that time", and payment was sporadic. He testified that he also received a $1,000 fee for directors meetings, subject to the availability of funds.

[138] Staff provided copies of eighteen cancelled MRS cheques that were payable to Emmons. In addition to one cheque for $1,000, dated March 3, 2004, with the words "dir. fees" [director's fees] in the memo line, and five cheques for $750 dated February 24, 2004, March 15, 2004, April 19, 2004 and May 14, 2004, twelve cheques in varying amounts were dated from June to November 2004, each with the names of one or more investors in the memo line. In cross-examination, Staff presented Emmons with copies of the cheques, noting that the amounts appear to represent a commission of 5 percent or 20 percent of the amount invested by the investors named in the memo line. Emmons continued to insist there were no commissions. He testified that the amounts were decided by DeRosa and reflected the amount that was available for distribution at the time. Staff also presented Emmons with DaRosa's statement in his letter referred to at paragraph 17 above, that Emmons was paid $1,500 per month plus bonus; Emmons explained that if the bonus were $1,000 per month (on top of the $750 bi-monthly payment), that would be consistent with his understanding.

[139] In addition to the cash remuneration, Emmons acknowledged that 1 million MRS shares were issued to him in January 2003, as compensation, though he testified he never received the shares or saw a share certificate. He acknowledged that this aligned his interests with that of investors and enabled him to tell prospective investors that he was an MRS shareholder. He was not aware that he owned about 5.1 percent of the company.

[140] In response to Staff's question about the total amounts he received for his services from 2004 through 2005, Emmons testified that the figure of $48,000, which he had seen in a document included in Staff's disclosure (presumably the Supplementary Schedule of Requirements), would not necessarily reflect compensation only, since there were also occasional expenses for which he might be reimbursed. The Supplementary Schedule of Requirements indicates that Emmons received $48,340 in 2004 and $8,270 in 2005, for a total remuneration of $56,610. Emmons neither agreed nor disagreed with Staff's suggestion to him that he received $41,969 from MRS.

IV. ANALYSIS

A. Standard of proof

[141] It is well established that Staff must prove its case on a balance of probabilities. As the Commission stated in *Re Limelight Entertainment Inc.* (2008), 31 O.S.C.B. 1727 ("***Limelight***") at para. 126, ". . . we conclude that Staff must prove its case, on a balance of probabilities, based on clear, convincing and cogent evidence."

[142] In *F.H. v. McDougall*, [2008] 3 S.C.R. 41 ("***McDougall***"), the Supreme Court of Canada reaffirmed that "there is only one civil standard of proof at common law and that is proof on a balance of probabilities", which requires the trier of fact to decide "whether it is more likely than not that the event occurred" (*McDougall*, *supra*, at paras. 40 and 44). The Court noted, "the evidence must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test" (*McDougall*, *supra*, at para. 46).

B. Subsections 25(1)(a) and 53(1) of the Act

1. The Law

(a) Subsection 25(1)(a) of the Act: Trading without Registration

[143] Section 25(1)(a) of the Act prohibits a person or company from trading in securities "unless the person or company is registered as a dealer, or is registered as a salesperson or as a partner or as an officer of a registered dealer and is acting on behalf of the dealer."

[144] The registration requirement "is an essential element of the regulatory framework with the purpose of achieving the regulatory objectives of the Act. Registration serves an important gate-keeping mechanism ensuring that only properly qualified and suitable individuals are permitted to be registrants and to trade with or on behalf of the public. Through the registration process, the Commission attempts to ensure that those who trade in securities meet the applicable proficiency requirements, are of good character, satisfy the appropriate ethical standards and comply with the Act" (*Limelight*, *supra*, at para. 135).

[145] Subsection 1(1) of the Act defines "trade" or "trading" to include:

> (a) any sale or disposition of a security for valuable consideration, whether the terms of payment be on margin, instalment or otherwise;
>
> . . . .
>
> (e) any act, advertisement, solicitation, conduct or negotiation directly or indirectly in furtherance of any of the foregoing;

[146] In determining whether a respondent has engaged in acts in furtherance of a trade, the Commission has adopted a contextual approach, which "requires an examination of the totality of the conduct and the setting in which the acts have occurred, the primary consideration of which is the effects the acts had on those to whom they were directed" (*Re Momentas Corp.* (2006), 29 O.S.C.B. 7408 ("***Momentas***"), at para. 77).

[147] In *Re Costello*, the Commission stated:

> There is no bright line separating acts, solicitations and conduct indirectly in furtherance of a trade from acts, solicitations and conduct not in furtherance of a trade. Whether a particular act is in furtherance of an actual trade is a question of fact that must be answered in the circumstances of each case. A useful guide is whether the activity in question had a sufficiently proximate connection to an actual trade.
>
> (*Re Costello* (2003), 26 O.S.C.B. 1617*,* at para. 47)

[148] The Commission in *Momentas* listed examples of activities found to have been "acts in furtherance" of a trade, including:

(a) providing potential investors with subscription agreements to execute;

(b) distributing promotional materials concerning potential investments;

(c) issuing and signing share certificates;

(d) preparing and disseminating materials describing investment programs;

(e) preparing and disseminating forms of agreements for signature by investors;

(f) conducting information sessions with groups of investors; and

(g) meeting with individual investors.

(*Momentas*, *supra*, at para. 80)

[149] Receiving investor funds has also been found to be an act in furtherance of a trade (*Re Allen* (2005), 28 O.S.C.B. 8541, at para. 85; *Momentas*, *supra* at paras. 78, 87-88; *Limelight*, *supra*, at para. 133).

(b) Subsection 53(1) of the Act: Distribution without Prospectus

[150] Subsection 53(1) of the Act states:

> **53(1) Prospectus required —** No person or company shall trade in a security on his, her or its own account or on behalf of any other person or company where such trade would be a distribution of such security, unless a preliminary prospectus and a prospectus have been filed and receipts therefor obtained from the Director.

[151] In paragraph (a) of subsection 1(1) of the Act, "distribution" is defined to mean "a trade in securities of an issuer that have not been previously issued".

(c) OSC Rule 45-501: The Accredited Investor Exemption

[152] The Respondents rely on the Accredited Investor Exemption pursuant to section 2.3 of OSC Rule 45-501, which states:

> **Exemption for a Trade to an Accredited Investor –** Sections 25 and 53 of the Act do not apply to a trade in a security if the purchaser is an accredited investor and purchases as principal.

[153] "Accredited investor" is defined at section 1.1 of OSC Rule 45-501. The relevant part of the definition is as follows:

"accredited investor" means

…

(m) an individual who beneficially owns, or who together with a spouse beneficially own, financial assets having an aggregate realizable value that, before taxes but net of any related liabilities, exceeds $1,000,000;

(n) an individual whose net income before taxes exceeded $200,000 in each of the two most recent years or whose net income before taxes combined with that of a spouse exceeded $300,000 in each of those years and who, in either case, has a reasonable expectation of exceeding the same net income level in the current year

[154] In this case, the Respondents submit that the Accredited Investor Exemption was available to them at all times because, even if Staff proves that some MRS investors were not Accredited Investors, the Respondents made reasonable efforts to comply with OSC Rule 45-501 and its Companion Policy.

2. Findings and Conclusions on Subsections 25(1)(a) and 53(1) of the Act

[155] In the Agreed Statement of Facts, the Respondents agree that none of MRS and the Individual Respondents was registered with the Commission in any capacity at the Relevant Time, and that no prospectus receipt was issued to qualify the sale of MRS shares.

[156] The Respondents also agree, in the Agreed Statement of Facts, that MRS sold and offered MRS shares to residents of Ontario and other jurisdictions.

[157] We find that there is ample evidence that the Respondents engaged in unregistered trading and an illegal distribution of MRS shares, and therefore that they contravened subsections 25(1) and 53(1) of the Act, unless they establish that the Accredited Investor Exemption was available to them.

[158] We find that the Accredited Investor Exemption was not available and that the Respondents did not exercise reasonable diligence to ensure that investors qualified as Accredited Investors.

[159] Our reasons are as follows:

(a) MRS

[160] The MRS Shareholder Report, dated June 8, 2005, indicates that 19,496,343 shares have been issued to 231 shareholders. This is also the number given in the Cripps Agreed Statement of Facts, based on Capital Transfer's shareholder records and the records Capital Transfer received from Select Fidelity when it became transfer agent for MRS.

[161] The Subscription Agreements evidence the sale of 2,144,553 MRS shares, which raised $838,760 from approximately 210 individual investors in approximately 300 trades between November 2003 and May 2005.

[162] The evidence indicates that MRS shares were sold to the public in three private placements. In the first private placement offering (the "**First Offering**"), MRS shares were sold

at $0.35 per share, with a minimum purchase of 10,000 shares ($3,500). The Summary of Private Placement Offering (the "**First Offering Summary**") provided to investors indicated that the company sought to raise $1.05 million from the sale of 3 million MRS shares, that it would use the proceeds to invest in "select penny stocks", and that it targeted "returns of 200 percent plus" through a "High Return Venture Fund" "with little downside risk".

[163] The second private placement offering (the "**Second Offering**") sought to raise $1.75 million from the sale of 5 million Morningside shares at $0.35 per share, with a closing date of October 31, 2004. The minimum subscription amount was now reduced to $700. Morningside was said to be "an emerging growth Generic drug development firm", working on a new psoriasis treatment and a product related to early cancer treatment.

[164] The third private placement offering (the "**Third Offering**") sought to raise $3.5 million from the sale of 5 million shares at $0.70 per share, with a minimum investment of $1,400, though we heard evidence that despite the stated share price, some investors purchased shares in the Third Offering at $0.35 per share. In addition to the psoriasis treatment product, MRS was now said to be investing in Strat to allow it to acquire an interest in a Russian oil field. The Third Offering was initially set to close on October 31, 2004, but this was later extended a year to October 31, 2005.

[165] We accept that MRS offered and sold shares directly to investors. As the trades were trades in securities that had not previously been issued, they were therefore distributions, as defined in section 1.1 of the Act. MRS was not registered with the Commission at the Relevant Time and no prospectus was filed and a receipt issued by the Director to qualify the distribution.

(b) DeRosa

[166] DeRosa had little direct contact with investors. However, as noted at paragraphs 146-149 above, the Act provides a broad definition of "trade" and "trading" that includes "acts in furtherance of a trade" and does not require direct investor contact. We find that DeRosa engaged in a series of acts in furtherance of trades in MRS shares to investors. In particular:

- DeRosa acknowledged that he and Cavric decided to raise funds for MRS using the Accredited Investor Exemption, and that he prepared the Subscription Agreement;

- DeRosa acknowledged that he and Cavric prepared a script to be used by Sherman and Emmons when contacting prospective investors;

- DeRosa's name appears as the signatory for MRS's press releases and other promotional material, and he acknowledged that he and Cavric prepared the press releases and promotional material;

- DeRosa acknowledged that it was his role to review Subscription Agreements and his signature appears on some of the Subscription Agreements that were returned to investors indicating MRS's acceptance of the subscription;

- DeRosa acknowledged that he signed treasury directions authorizing the transfer agent to issue share certificates in the names of investors;

- DeRosa's signature appears on many of the share certificates sent to MRS investors;

- DeRosa acknowledged that he and Cavric decided on the compensation for Sherman and Emmons;

- DeRosa signed the MRS cheques that we find were commission payments to MRS qualifiers and salespersons; and

- DeRosa had signing authority on the MRS bank account.

[167] We also note that Investor Three and Investor Eight testified that they called the MRS office and spoke to DeRosa after they invested, when they became concerned about their investments.

[168] Considering DeRosa's conduct in its entirety, we find that he engaged in acts in furtherance of trades in MRS shares.

(c) Cavric

[169] There is substantial evidence Cavric was closely involved in MRS's fund raising, though he had limited direct contact with investors. We find that Cavric engaged in many acts in furtherance of trades in MRS shares. In particular:

- Cavric acknowledged that he approached DeRosa with the idea of using MRS to market the psoriasis cream, a venture he had been involved with at Otis-Winston, and that they decided to raise funds for MRS using the Accredited Investor Exemption;

- Cavric acknowledged that he and DeRosa prepared documents describing MRS's business for distribution to investors, and that he was responsible for the MRS website;

- Cavric acknowledged that he hired Sherman and Emmons, who were former registrants, because of their experience as securities salespersons;

- Cavric acknowledged that he had discussions with Sherman and Emmons about MRS's share subscription process;

- Cavric acknowledged that he had discussions with DeRosa about the Accredited Investor Exemption and the process to be followed in reviewing the Subscription Agreements submitted by investors;

- Cavric incorporated Select Fidelity, MRS's transfer agent during the Relevant Time, which operated out of MRS's offices;

- Cavric acknowledged that he signed treasury directions authorizing the transfer agent

to issue MRS share certificates in the name of investors when DeRosa was not available; and

- Cavric acknowledged that he signed many of the share certificates corresponding to MRS shares distributed to investors; and

- Cavric acknowledged that he and DeRosa decided on the allocation of MRS funds to Sherman and Emmons and other MRS qualifiers or salespersons.

[170] Considering Cavric's conduct in its entirety, we find that he engaged in acts in furtherance of trades in MRS shares.

(d) Emmons

[171] Emmons denied that he offered and sold MRS securities, and described his role as "investor relations" or "communicating the product placement". We reject this as utterly implausible. We find that Emmons engaged in acts in furtherance of trades MRS securities. In particular:

- It was Emmons who called Investor Seven about an investment opportunity relating to psoriasis cream, and Emmons was Investor Seven's contact throughout;

- Emmons acknowledged that he brought a list of leads to MRS;

- Emmons acknowledged that he explained the private placement to prospective investors and solicited expressions of interest from them, sent promotional material and Subscription Agreements to prospective investors, explained how the Subscription Agreement and investment cheque should be completed, and contacted existing MRS shareholders to determine whether they wanted to invest more money in MRS; and

- Emmons received investors' Subscription Agreements and cheques, on behalf of MRS, which he forwarded to DeRosa.

[172] We also note, as stated in paragraph 131 above, that Investor Two, Investor Four and Investor Six recall speaking with Emmons after they made their investments; Emmons acknowledged that he spoke with Investor Four and Investor Six but cannot recall speaking to Investor Two.

[173] We find that Emmons's compensation from MRS included a commission component. As discussed at paragraphs 106-107 and paragraph 140 above, the evidence indicates that Emmons received at least $41,969 for his role in soliciting investors to invest in MRS.

[174] Considering Emmons's conduct in its entirety, we find that he offered and sold MRS shares to investors.

(e) Sherman

[175] In the Agreed Statement of Facts, the Respondents agreed that Sherman was not

registered with the Commission in any capacity at the Relevant Time.

[176] Sherman did not testify.

[177] There is ample evidence that Sherman sold MRS shares. Staff appended to its written submissions a chart summarizing the evidence of the Eight Investors about their purchases of MRS shares. In their closing submissions, the Respondents appended a copy of Staff's chart that includes the Respondents' comments and challenges to specific testimony. Even if we disregard evidence from the Eight Investors that was specifically challenged by the Respondents, we heard consistent and credible evidence from Investor One, Investor Two, Investor Three and Investor Four that Sherman:

- cold-called investors to solicit investments in Morningside;
- told some investors that Morningside shares were trading at a price much higher than the $0.35 per share private placement price;
- when an initial call was unsuccessful, made repeated calls to at least one investor, Investor Three, and told him he was running out of time to invest;
- sent or caused to be sent promotional material and Subscription Agreements to prospective investors; and
- told an investor who told him he was not an Accredited Investor that this did not matter (Investor One); told another investor, who told him he was unemployed, not to worry about "all that mumbo-jumbo" (Investor Three); and in another case (Investor Two), he failed to make any enquiries about the investor's Accredited Investor status.

[178] The evidence of Cavric and Emmons that Sherman brought MRS a list of leads is corroborated by the April 14, 2004 cheque for $1,087.78 with "reimburse re leads" in the memo line. Investor names appear on many MRS cheques that are made payable to Sherman. As discussed at paragraphs 106-107, above, the evidence indicates that Sherman received at least $218,300 from MRS for his role in soliciting investors to invest in MRS.

[179] We find that Sherman offered and sold MRS shares to numerous investors, and indeed he was the main securities salesperson at MRS.

(f) Conclusion on Trades and Acts in Furtherance of Trades

[180] Despite the insistence of DeRosa, Cavric and Emmons that no one at MRS was selling securities, we find that Emmons and Sherman were MRS salespersons and that other individuals who were not named as respondents in this matter also acted as qualifiers and salespersons for MRS. We find that Emmons and Sherman and the other MRS salespersons and qualifiers were paid on a commission basis, usually in the range of 20-25 percent of the amounts invested by the investors who were named on the memo line of MRS paycheques. It was clear from the evidence, including the evidence of the Eight Investors, that Emmons and Sherman were very experienced and successful securities salesmen.

(g) The Accredited Investor Exemption

[181] As stated in paragraphs 34, 42, 48, 56, 64, 71, 78 and 84 above, we find that none of the Eight Investors was an Accredited Investor at the Relevant Time.

[182] However, the Respondents note that three of the Eight Investors – Investor Two, Investor Four and Investor Six – believed they were Accredited Investors, and that Investor Two and Investor Four had signed or seen Accredited Investor certifications like the Accredited Investor Representation before.

[183] The Respondents submit that they complied with their obligations under OSC Rule 45-501 by providing investors with the Subscription Agreement, which included the Accredited Investor Definition.

[184] Staff submits that it is not enough for the Respondents to make the Accredited Investor Definition available to an investor, or to rely on an investor's certification that he or she is an Accredited Investor. Staff submits that the Respondents must prove that they took reasonable steps to ascertain whether an investor is an Accredited Investor and had a reasonable basis for believing that the investor met the net income or net financial asset thresholds of the Accredited Investor Definition. Staff submits that due diligence requires a serious factual inquiry in good faith, which includes a duty to inquire behind the boilerplate language of a Subscription Agreement.

[185] The issue is addressed in *Companion Policy 45-501CP – To Ontario Securities Commission Rule 45-501 Exempt Distributions* (2004), 27 O.S.C.B. 449 ("***45-501CP***"), at section 3.1, as follows:

> **PART 3 CERTIFICATION OF FACTUAL MATTERS**
>
> **3.1 Seller's Due Diligence –** It is the seller's responsibility to ensure that its trades in securities are made in compliance with applicable securities laws. In the case of a seller's reliance upon exemptions from the prospectus and registration requirements, the Commission expects that the seller will exercise reasonable diligence for the purposes of determining the availability of the exemption used in any particular circumstances. The Commission will normally be satisfied that a seller has exercised reasonable diligence in relying upon a particular exemption if the seller has obtained statutory declarations or written certifications from the purchasers, unless the seller has knowledge that any facts set out in the declarations or certifications are incorrect. In circumstances where a seller has recently obtained a statutory declaration or a written certification from a purchaser with whom a further trade is being made on an exempt basis, the seller may continue to rely upon the recently obtained statutory declaration or certification unless the seller has reason to believe that the statutory declaration or certification is no longer valid in the circumstances.

[186] The Respondents place significant reliance on the third sentence of section 3.1:

> The Commission will normally be satisfied that a seller has exercised reasonable

> diligence in relying upon a particular exemption if the seller has obtained statutory declarations or written certifications from the purchasers, unless the seller has knowledge that any facts set out in the declarations or certifications are incorrect.

[187] The Respondents submit that they relied on articles prepared by law firms about the Accredited Investor Exemption, which was new at the Relevant Time.

[188] OSC Rule 45-501 came into force on November 30, 2001. On September 14, 2005 *National Instrument 45-106 – Prospectus and Registration Exemptions* (2005), 28 O.S.C.B. (Supp-4) 3 ("**NI 45-106**"), which replaced OSC Rule 45-501, took effect. The Respondents submit that section 1.9 of the Companion Policy to NI 45-106 has no application to this proceeding because NI 45-106 was not in force at the Relevant Time. We agree that s. 1.9 of NI 45-106CP can have no bearing on our interpretation of section 3.1 of 45-501CP. We accept the guidance provided in section 3.1 of 45-501CP.

[189] In our view, it is clear from section 3.1 of 45-501CP that compliance with an exemption is and remains the responsibility of the seller, and where a seller chooses to rely upon an exemption, "the Commission expects the seller will exercise reasonable diligence for the purposes of determining the availability of the exemption used in any particular circumstances". A seller cannot rely on an investor's representation or certification that he or she is an Accredited Investor without first explaining the Accredited Investor Definition, satisfying themselves of the investor's understanding of the net income or net financial assets thresholds and asking whether the investor meets the thresholds. The onus remains on the seller to determine whether the Accredited Investor Exemption is available.

[190] We are not satisfied the Respondents made the necessary efforts to ensure that MRS investors qualified as Accredited Investors, other than requesting them to sign a Subscription Agreement. In fact, some of the specific evidence we accept is quite to the contrary.

[191] Four of the Eight Investors testified that Sherman (Investor Two and Investor Five), Emmons (Investor Seven) and the unidentified salesperson who phoned Investor Eight on behalf of MRS made no effort at all to explain the Accredited Investor Definition or to enquire about net income or net financial assets in order to determine whether the Accredited Investor Exemption applied. Nor did the script drafted by DeRosa and Cavric and used by MRS qualifiers and salespersons include any explanation of the Accredited Investor Exemption or any questions about a prospective investor's net income or net financial assets. DeRosa, Cavric and Emmons did not challenge this evidence, but testified they relied on the investor's signature on the Subscription Agreement and did not believe OSC Rule 45-501 required them to look behind an Accredited Investor Representation.

[192] The two clearest examples of the Respondents' approach to the Accredited Investor Exemption relate to Investor One and Investor Three. As stated in paragraph 37 above, when Investor One told Sherman that he did not qualify as an Accredited Investor, Sherman told him it did not matter. Investor One crossed off the Accredited Investor Representation on his Subscription Agreement to make it clear he did not qualify. Though Investor One acknowledged, on cross-examination, that he had decided he wanted to purchase the shares whether he was an

Accredited Investor or not, he went on to explain that this was because Sherman had said "it didn't matter". Similarly, Investor Three testified that when he told Sherman he was unemployed, Sherman told him not to worry about "all that mumbo jumbo" but just to sign the Subscription Agreement and send the cheque.

[193] Sherman did not testify at the hearing. When DeRosa was questioned about Investor One, he suggested that the acceptance of this investment was a result of an oversight. At best, DeRosa's explanation indicates a lack of attention to the responsibility that he had to satisfy himself that the investor was an Accredited Investor. We find that Sherman not only failed to exercise reasonable diligence in this case; he sold MRS shares to Investor One in the certain knowledge that the Accredited Investor Exemption did not apply. Similarly, DeRosa, when he signed his acceptance of the Subscription Agreement on behalf of MRS, knew that Investor One was not an Accredited Investor. In our view, the overwhelming weight of the evidence indicates that whether an investor qualified as an Accredited Investor was of little concern to the Respondents, as long as the Subscription Agreement was returned along with the cheque.

[194] We are satisfied that issuers are required to take reasonable steps to ascertain whether an investor is an Accredited Investor, and that issuers must have a reasonable basis for believing that the investor meets the net income or net financial assets threshold before completing the trade. Due diligence demands that the issuer conduct a reasonable factual inquiry in good faith before accepting a prospective subscription, which includes a duty to inquire behind the boilerplate language of the subscription agreement.

[195] On any interpretation of OSC Rule 45-501CP, we are not satisfied that the Respondents exercised reasonable diligence to ensure that investors were Accredited Investors. Indeed, we find that the Respondents offered and sold MRS shares without any regard as to whether the investor was an Accredited Investor and in some cases, with the knowledge that the investor was not an Accredited Investor.

[196] Moreover, the Respondents acknowledge that they failed to file Exempt Distribution Reports, which are required where a seller relies on an exemption. We do not accept the testimony of DeRosa and Cavric that they instructed Heritage to file these reports, a claim for which no documentary evidence was given. We find it significant that no reports were filed after MRS left Heritage and moved its business to Select Fidelity, a non-arm's length business. The Exempt Distribution Report requires disclosure of commissions paid in the reported sales, and this information was within the knowledge of MRS, not its transfer agent or lawyer.

[197] We find that the Accredited Investor Exemption was not available to the Respondents. We find that the Respondents, by engaging in an illegal distribution without registration or a qualified prospectus in circumstances where no registration and prospectus exemption was available, contravened subsections 25(1)(a) and 53(1) of the Act.

C. Subsection 38(2) of the Act: Prohibited Undertakings as to Future Value or Price

[198] Subsection 38(2) of the Act states:

> **38(2) Future Value –** No person or company, with the intention of effecting a trade in a security, shall give any undertaking, written or oral, relating to the

future value or price of such security.

[199] Staff submits that the evidence of Investor A and Investor B establishes that MRS breached subsection 38(2) of the Act. Staff further submits that Investor One, Investor Two and Investor Three testified they believed MRS shares were trading at 1.10 to $2.25 per share and that this is evidence that they were misled as to the future price of MRS shares.

[200] We are not persuaded the Respondents are responsible for statements made by Johansen to Investor A or Investor B, for the reasons given in paragraph 27 above. We accept that Sherman told Investor Three that MRS shares, which were being offered at $0.35 per share, had a trading value of $2.10 per share at that time; that he told Investor One the shares were trading at $1.10 per share though they were being offered at $0.35 per share; and that Investor Two believed the shares were trading at approximately $2 per share, based on the Pink Sheets materials Sherman had sent him.

[201] We accept that "something less than a legally enforceable obligation can be an 'undertaking' within the meaning of subsection 38(2), depending on the circumstances", and that the Commission "should not take an overly technical approach to the interpretation of subsection 38(2)" but "should consider all of the surrounding circumstances and the Commission's regulatory objectives in interpreting the meaning of that section" (*Re Limelight,* at para. 164). In the circumstances of this case, we are not persuaded that the Respondents' representations to investors about the value of MRS shares amounted to "undertakings", and therefore we are not satisfied the Respondents breached subsection 38(2) of the Act.

D. Subsection 38(3) of the Act: Prohibited Representation as to Future Listing

[202] Subsection 38(3) of the Act states:

> **38(3) Listing –** Subject to the regulations, no person or company, with the intention of effecting a trade in a security, shall, except with the written permission of the Director, make any representation, written or oral, that such security will be listed on any stock exchange or quoted on any quotation and trade reporting system, or that application has been or will be made to list such security upon any stock exchange or quote such security on any quotation and trade reporting system, unless,
>
> > (a) application has been made to list or quote the securities being traded, and securities of the same issuer are currently listed on any stock exchange or quoted on any quotation and trade reporting system; or
> >
> > (b) the stock exchange or quotation and trade reporting system has granted approval to the listing or quoting of the securities, conditional or otherwise, or has consented to, or indicated that it does not object to the representation.

[203] Staff relies especially on the evidence of Investor A and Investor B for this allegation. As stated above at paragraph 200, we are not persuaded the Respondents are responsible for

statements made by Johansen to Investor A or Investor B. Staff also relies on the statement in the Morningside Company Overview that "The company will seek to become public by way of an amalgamation or filing of a IPO in order to maximize the value for it's [sic] shareholder base". We are not persuaded this very general reference to an amalgamation or public offering is sufficient to make out the allegation. We find that Staff has not met its burden of proving that the Respondents breached subsection 38(3) of the Act.

E. Deemed non-compliance of officers and/or directors of MRS

[204] Section 129.2 of the Act states:

> **129.2 Directors and officers —** For the purposes of this Act, if a company or a person other than an individual has not complied with Ontario securities law, a director or officer of the company or person who authorized, permitted or acquiesced in the non-compliance shall be deemed to also have not complied with Ontario securities law, whether or not any proceeding has been commenced against the company or person under Ontario securities law or any order has been made against the company or person under section 127.

[205] The definition of "director" in subsection 1(1) of the Act is as follows:

> "director" means a director of a company or an individual performing a similar function or occupying a similar position for any person;

[206] We have found that MRS breached subsection 25(1)(a) and subsection 53(1) of the Act.

[207] Staff alleges that DeRosa, as a director of MRS, and Cavric, Sherman and Emmons, as *de facto* directors of MRS, authorized, permitted or acquiesced in MRS's breaches of the Act.

[208] DeRosa identified himself, Cavric, Sherman and Emmons as the directors of MRS in his January 13, 2006 letter to Staff. Cavric and Emmons also testified that the four Individual Respondents were all directors and attended meetings of the board of directors. Cheques for directors' fees were made payable to Emmons and Sherman. We accept that Cavric, Sherman and Emmons were *de facto* directors of MRS.

[209] In addition to their personal breaches of subsections 25(1)(a) and 53(1) of the Act, we find that DeRosa, as a director, and Cavric, Sherman and Emmons, as *de facto* directors, authorized, permitted or acquiesced in MRS's contraventions of subsections 25(1)(a) and 53(1), and are therefore are deemed, pursuant to section 129.2 of the Act, to have not complied with Ontario securities law.

F. Misleading trading of MRS shares

[210] Staff alleges that Cavric, DeRosa and Primequest knew or ought to have known that the trades at issue in these proceedings would or may result in or contribute to a misleading appearance as to: (i) the volume of MRS shares traded; and/or (ii) an artificial price for MRS shares.

1. The Law

[211] Section 3.1 of NI 23-101, which became effective on November 2, 2001 and was amended effective January 3, 2004, prohibits trades that a person or company knows, or ought reasonably to know, results in or contributes to a misleading appearance of trading volume or price:

> **3.1 Manipulation and Fraud — (1)** A person or company shall not, directly or indirectly, engage in, or participate in any transaction or series of transactions, or method of trading relating to a trade in or acquisition of a security or any act, practice or course of conduct, if the person or company knows, or ought reasonably to know, that the transaction or series of transactions, or method of trading or act, practice or course of conduct
>
> (a) results in or contributes to a misleading appearance of trading activity in, or an artificial price for, a security or a derivative of that security

[212] We note that the Act was amended, effective January 1, 2006, to include a market manipulation provision (section 126.1(a)). As this provision was not in effect during the Relevant Time, section 3.1 of NI 23-101 is the applicable law.

2. The Parties' Submissions

(a) Staff

[213] Staff submits that investors are entitled to assume that posted prices reflect *bona fide* transactions in a market free from improper influence. If posted prices do not reflect genuine, arm's length trading activity, investors who make decisions in reliance on posted prices may be harmed and public confidence in the capital markets may be undermined (*Re Delage* (2009), 32 O.S.C.B. 1239, at para. 33; *Re Atlantic Trust Management Group*, 1995 LNBCSC (B.C.S.C.) at p. 17; *Re Cycomm International Inc.* (1994), 17 O.S.C.B. 21 ("***Re Cycomm***"), at p. 4).

[214] The fact that an impugned trade is an "actual purchase" (as opposed to a "sham purchase" that does not actually occur) is irrelevant, if the trade misleads members of the public in order to induce them to become investors (*Scott v. Brown, Doering, McNab & Co.*, [1982] 2 Q.B. 724 at pp. 728-729; *Sebastien v. Golden Capital Securities Ltd.*, [2006] B.C.J. No. 506 (B.C.S.C) at paras. 28-30).

[215] It is necessary to consider the conduct of the alleged manipulator(s) as a whole. Some trading may not seem manipulative when viewed in isolation, but is clearly so when considered in the totality of the manipulator's conduct; a broad contextual approach is required. (*Re Fatir Hussain Siddiqi*, 2005 BCSECCOM 416 (B.C.S.C.) at para. 118)

[216] Staff relies on Shahviri's evidence. Shahviri obtained information from the SEC and from Canadian brokerage firms about the trading in Morningside and MRS shares on the Pink Sheets in the period January 1, 2003-December 31, 2004. He also obtained trading information available

through Bloomberg during the same period. His analysis was based on the presumption that the trades shown on Bloomberg represented the trading activity that was seen by the public and could impact investment decisions by existing and prospective MRS investors.

[217] Staff submits that Shahviri's evidence shows that Primequest, Cavric and/or DeRosa were responsible for the vast majority of MRS trades executed on the Pink Sheets and reported to the public media. In particular, Staff relies on the "Trades Executed on the Public Market (Pink OTC Markets Inc.)" Chart (the "**Trades Chart**") prepared by Shahviri, which covered the period February 17, 2004 to April 19, 2005 and showed DeRosa, Cavric or Primequest being on either the buy side or the sell side of 40 of the 60 trades listed. Staff also relies on the "Percentage of Public Trading Volume Accounted for by Primequest, Cavric and DeRosa" Chart prepared by Shahviri which covered the period February 17, 2004 to December 7, 2004 and showed the "public" volume trading data as disseminated by Bloomberg and calculations of the percentage involvement of Primequest, Cavric and DeRosa in the buying and selling volumes for each of the 22 days listed.

[218] Staff submits that Primequest, Cavric and DeRosa engaged in a pattern of trading on the Pink Sheets in order to create a misleading appearance of trading activity in MRS shares or an artificially high price for MRS shares, thereby encouraging investors to buy MRS shares in private placements. Staff submits that as a result of trading by Primequest, Cavric and DeRosa, MRS trades were reported on the Pink Sheets at prices ranging from $1.00 to $2.25 per share, about three times higher than the $0.35 to $0.70 price of the MRS shares sold by way of private placement to investors. Staff submits the Pink Sheets trades were used to mislead investors into believing that MRS shares had a value between $1.00 and $2.25 per share.

[219] Staff notes that Cavric and DeRosa did not deny that they were parties to the trades in MRS shares attributed to them. They explained that they placed Good Till Cancelled ("**GTC**") orders which they could not recall in order to see how the system worked and to maintain MRS's trading symbol and CUSIP number. Staff submits that their explanations are not credible, and that MRS and its salespersons used the Pink Sheets trading information to promote MRS to investors.

(b) The Respondents

[220] The Respondents submit that in order to make out its allegation of manipulative trading, Staff must prove that the Respondents knew or ought to have known that their trading activity would result in or contribute to a misleading appearance of trading activity in, or an artificial price for MRS shares.

[221] DeRosa testified that he deposited MRS shares with his broker and made a number of trades "just to see how the system would work". He made GTC orders and "didn't really pay much attention" when he was advised a couple of times that his orders had been executed. He testified that it was not his intention to create a misleading appearance with respect to the price or trading volume of MRS shares. In his view, the relevant information, including the very low volume of trading, was available to anyone who looked at the Pink Sheets website.

[222] Cavric acknowledged that the Trades Chart indicates that between February and

November 2004, he was involved in 37 trades, either personally or through his company, Primequest. He testified that he submitted GTC orders to buy or sell MRS shares on the Pink Sheets. He denied trading in MRS shares in order to provide price support, and testified that he placed the orders using an arbitrary price in order to maintain MRS's symbol with Pink Sheets. Cavric testified that it was necessary for there to be offers to buy and sell MRS shares so that the market maker would continue to support MRS shares, which in turn was necessary for Pink Sheets to continue to quote MRS.

[223] The Respondents submit that Staff's case relies entirely on Shahviri's evidence, which is flawed and incomplete and does not demonstrate manipulative trading. For example, the Respondents submit that the Trades Chart does not show all the trades executed on the Pink Sheets because Shahviri deleted information in an attempt to reconcile the information Staff received from the SEC to the information shown on Bloomberg. This reduced the overall volume of trading against which to compare the volume of the Respondents' trades.

[224] The Respondents submit that Shahviri's evidence is not consistent with how the Pink Sheets operates. They submit that the Pink Sheets is not an exchange, does not execute orders, is not responsible for posting orders and does not purport to do so. Further, the Respondents submit that there is nothing improper in placing GTC orders, and this was done to support the market-maker that was required so that the Pink Sheets would continue to carry the MRS symbol.

[225] The Respondents also submit that Shahviri confirmed that for every trade that he had attributed to Primequest, Cavic or DeRosa, there was at least one real, independent, unrelated intermediate trade by brokers or market participants trading for their own account.

[226] The Respondents also argue that since they did not exercise control over which trades were publicly reported, it is not possible for Staff to prove that the Respondents knew, or ought reasonably to have known, that the trades would result in or contribute to a misleading appearance.

[227] The Respondents submit that this case does not exhibit the indicia of manipulative trading – for example, high closing, wash sales and matched sales – as discussed, for example, in *Re Cycomm*, *supra*, at pp. 3-4.

3. Findings and Conclusion

[228] As there is no dispute that DeRosa, Cavric and Primequest effected the MRS trades attributed to them in the Trades Chart, the issue is whether they knew or reasonably ought to have known that the trades would result in or contribute to a misleading appearance of trading activity in, or artificial price, for MRS shares. DeRosa, Cavric and Primequest made trades during the Relevant Time at significant premiums to the private placement offering prices.

[229] DeRosa, Emmons and Cavric acknowledged that the MRS website contained a section titled "Quotes & Charts" which provided a link to the Pink Sheets website and direct access to MRS trading prices and volumes.

[230] Some investors were aware of the prices at which MRS was shown to be traded on the Pink Sheets. For example, Investor One testified that Sherman told him the shares were trading

at $1.10 per share, and directed him to either the Morningside or the TD website; he believes this happened before he made his investment, and he checked the Morningside or TD website every few weeks or every month between November 2003, when Sherman first contacted him, and March 2004, when he made his first purchase of MRS shares. Investor Two testified that he believes the Pink Sheets and Merrill Lynch print-outs in his file came from Sherman. Investor Four testified that Sherman gave him the Morningside stock symbol, which he used to check the price of MRS shares on the TD Canada Trust and Pink Sheets websites before he invested. Investor Seven testified that after he made his investment, Emmons directed him to a U.S. website where he could check the price of Morningside shares. We accept that DeRosa and Cavric knew that the trading information that was available by a link to the Pink Sheets from the MRS website could be accessed by existing and prospective investors.

[231] We question the testimony of Cavric and DeRosa that they were unaware of each other's trading activity because, amongst other things, their denials are inconsistent with their testimony that the reason they traded was to maintain the Pink Sheets symbol and CUSIP number and thereby secure ready access for investors to financial information, press releases and corporate profile information. We note that Cavric was an experienced trader who had prior experience with the Pink Sheets and it was Cavric who registered MRS with the Pink Sheets.

[232] However, though the evidence presented by Staff is suggestive of a pattern of manipulative trading, we are not satisfied, on a balance of probabilities, that Primequest, Cavric and DeRosa knew or ought to have known that their conduct would result in or contribute to a misleading appearance of trading volume or an artificial price.

[233] We come to this conclusion in part, at least, because Staff's analysis of MRS trading relies on incomplete data. The Trades Chart and Percentage of Trading Volume Chart on which Staff heavily relies were prepared by selecting from several incomplete sources of data. Shahviri acknowledged that there were gaps in the data and the difficulty of tracing Pink Sheets trading. We find that Staff's knowledge of the Pink Sheets was lacking and that Staff's evidence lacked specifics and detail on material points. As a result of these gaps in the evidence, Staff's analysis was not sufficiently concise and compelling as to its accuracy and conclusions. The explanation offered by DeRosa and Cavric – that the trades were necessary to maintain the MRS symbol and as a requirement of the Pink Sheets market maker – was not rebutted by Staff.

[234] We have serious reservations about the use and potential abuse of the Pink Sheets market in private placement offerings, particularly when sold to less sophisticated investors. In our view, this was a borderline case. However, Staff bears the onus of proving that it is more likely than not that the Respondents knew or ought to have known that their trades would result or contribute to a misleading appearance of trading activity or an artificial price. We cannot find, based on the less than cohesive analysis by Staff, that Primequest, Cavric and DeRosa engaged in manipulative trading in MRS shares.

G. Conduct contrary to the public interest

[235] We find that by issuing MRS shares to unsophisticated investors who fell far short of qualifying for the Accredited Investor Exemption and by failing to exercise reasonable diligence to ensure that only Accredited Investors subscribed, the Respondents denied investors the

protection the registration and prospectus requirements are intended to provide. We find that the Respondents' conduct was contrary to the public interest.

H. Conclusions

[236] Accordingly, for the reasons given above, we make the following findings:

> (i) MRS, DeRosa, Cavric, Sherman and Emmons traded in MRS shares without registration and without a registration exemption being available, contrary to subsection 25(1)(a) of the Act and contrary to the public interest;
>
> (ii) MRS, DeRosa, Cavric, Sherman and Emmons distributed securities when a prospectus receipt had not been issued to qualify the distribution, and without a prospectus exemption being available, contrary to subsection 53(1) of the Act and contrary to the public interest; and
>
> (iii) As officers and directors or *de facto* officers and directors of MRS, DeRosa, Cavric, Sherman and Emmons authorized, permitted or acquiesced in MRS's breaches of subsection 25(1)(a) and 53(1) of the Act, and are therefore deemed to have breached subsections 25(1)(a) and 53(1) of the Act pursuant to section 129.2 of the *Act* and contrary to the public interest.

[237] We are not satisfied that MRS, DeRosa, Cavric, Sherman or Emmons gave a prohibited undertaking as to the future value or price of shares, contrary to subsection 38(2) of the Act, or made a prohibited representation as to the future listing of MRS shares on an exchange, contrary to subsection 38(3) of the Act.

[238] We are also not satisfied that Primequest, Cavric and DeRosa knew or ought to have known that the trades in MRS shares, directly or indirectly, had the effect of creating or contributing to a misleading appearance of trading activity in or an artificial price for MRS shares, contrary to section 3.1 of NI 23-101.

[239] Staff and the Respondents shall contact the Office of the Secretary to the Commission within ten days to schedule a sanctions and costs hearing.

DATED at Toronto, Ontario this 2nd day of February, 2011.

"Patrick J. LeSage" *"Carol S. Perry"*

Patrick J. LeSage, Q.C. Carol S. Perry