Ontario Securities Commission | Commission des valeurs mobilières de l'Ontario | 22nd Floor 20 Queen Street West Toronto ON M5H 3S8 | 22e 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 ON SANCTIONS AND COSTS

Hearing:	November 28 and 29, 2013 December 18, 2013 February 11, 2014	
Decision:	June 4, 2014	
Panel:	Mary G. Condon Christopher Portner	- Vice-Chair and Chair of the Panel - Commissioner
Appearances:	Peter-Paul E. DuVernet	- For MRS Sciences Inc. (formerly Morningside Capital Corp.), Americo Derosa, Ronald Sherman, Edward Emmons and Ivan Cavric
	Derek J. Ferris	- For Staff of the Commission

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REASONS AND DECISION ON SANCTIONS AND COSTS

I. HISTORY OF THE PROCEEDING

[1] This was a hearing before the Ontario Securities Commission (the "Commission") pursuant to sections 127 and 127.1 of the *Securities Act*, R.S.O. 1990, c. S.5, as amended (the "Act"), to consider whether it is in the public interest to make an order against MRS Sciences Inc. (formerly Morningside Capital Corp.) ("MRS"), Americo DeRosa ("DeRosa"), Ronald Sherman ("Sherman"), Edward Emmons ("Emmons"), Ivan Cavric ("Cavric") and Primequest Capital Corporation ("Primequest") (collectively, the "Respondents").

[2] This proceeding was commenced by a Notice of Hearing issued by the Secretary of the Commission on November 30, 2007 following the filing of a Statement of Allegations dated November 29, 2007 by Staff of the Commission ("Staff"). On March 25, 2008, Staff filed an Amended Statement of Allegations. On April 14, 2009, Staff filed an Amended Amended Statement of Allegations. An Amended Notice of Hearing was issued by the Secretary on April 15, 2009.

[3] The hearing on the merits in this matter took place on May 7, 8, 11, 13, June 10, 11, 12, 22, 26, September 3, 4, and October 7, 2009 (the "MRS Merits Hearing"), and the decision on the merits was issued on February 2, 2011 (*Re MRS Sciences Inc.* (2011), 34 O.S.C.B. 1547 (the "Merits Decision")).

[4] Following the release of the Merits Decision, a motion hearing was held on November 2, 2011 to address the issue of the composition of the "Sanctions and Costs Panel" (the "2011 Motion"). The Respondents argued that a new Panel that is comprised of Commissioners who were not the members of the Panel for the hearing on the merits (the "MRS Merits Panel") did not have jurisdiction to make a determination on sanctions and costs in this matter. The Commission dismissed the 2011 Motion and issued its Reasons and Decision on the 2011 Motion on December 6, 2011 (*Re MRS Sciences Inc.* (2011) 34 O.S.C.B. 12288 (the "2011 Motion Decision")).

[5] On January 3, 2012, the Respondents filed a Notice of Appeal with respect to the 2011 Motion Decision. On February 24, 2012, the Respondents filed an Application to the Divisional Court for Judicial Review of the 2011 Motion Decision. On December 17, 2012, the Divisional Court heard the Application for Judicial Review and rendered its decision that the Application for Judicial Review was premature and that "[t]he procedural fairness issue is best determined after the sanctions hearing is completed" (*Re MRS Science Inc.* (2012) ONSC 7189 (Div. Ct.) (CanLII) at paras. 2 and 3 (the "Divisional Court Decision")).

[6] Following the Divisional Court Decision, the Commission ordered on September 24, 2013 that the sanctions and costs hearing in this matter would commence on November 28, 2013 (the "Sanctions and Costs Hearing").

[7] The Sanctions and Costs Hearing took place over four hearing days, November 28 and 29, 2013, December 18, 2013 and February 11, 2014. Evidence was led on the first three days of the Sanctions and Costs Hearing. During that time a motion was brought requesting the Panel to

make a determination as to the admissibility of the transcripts of the MRS Merits Hearing. The parties provided oral submissions and case law on this issue. Closing submissions on sanctions and costs were heard on February 11, 2014.

[8] Staff and Counsel for the Respondents attended the Sanctions and Costs Hearing. There was some confusion as to whether Sherman was represented. We address this in our reasons as a preliminary issue. In addition, three of the individual Respondents, Emmons, DeRosa and Cavric, attended portions of the Sanctions and Costs Hearing in person. Staff called one witness, Sherry Lynn Brown, a Senior Forensic Accountant. DeRosa was also cross-examined by Staff on his affidavit dated November 26, 2013.

[9] Staff provided written submissions dated January 17, 2014 and a Book of Authorities. Schedule C to Staff's written submissions contained Staff's Bill of Costs for this matter. On February 7, 2014, Staff filed Reply Submissions and an Affidavit of Yolanda Leung (sworn February 7, 2014), which contained more fulsome information to support Staff's request for costs as required by subrule 18.1(2) of the Commission's *Rules of Procedure* (2012), 35 O.S.C.B. 10071 (the "Rules").

[10] The Respondents provided the "Respondents' Submissions to Staff's Sanctions Submissions" dated February 3, 2014 and a document from Fogler, Rubinoff LLP entitled "Securities Law Update" dated September 24, 2001. In addition, on February 11, 2014, the Respondents provided an additional document entitled "Schedule of References - Respondents' Submissions to Staff's Sanctions Submissions".

[11] These are our Reasons and Decision as to the appropriate sanctions and costs to order against the Respondents.

II. THE MERITS DECISION

[12] The Merits Decision addressed the following issues:

- 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?

- 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?

- 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?

- 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?

- 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?

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

(Merits Decision, *supra* at para. 9)

[13] The MRS Merits Panel made findings against the Respondents of breaches of Ontario securities law and conduct contrary to the public interest. Certain of the allegations against the Respondents were held by the MRS Merits Panel not to have been made out. No findings were made against a sixth respondent, Primequest Capital Corporation, against which Staff had also brought allegations. Specifically, the MRS Merits Panel made the following findings:

- 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;

- 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;

- As officers and directors or *de facto* officers and directors of MRS, DeRosa, Cavric, Sherman and Emmons authorized, permitted or acquiesced in the breaches by MRS of subsections 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 acted contrary to the public interest;

- The MRS Merits Panel was not satisfied that MRS, DeRosa, Cavric, Sherman or Emmons gave a prohibited undertaking as to the future value or price of MRS 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; and

- The MRS Merits Panel was 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.

[14] It is the foregoing conduct and the findings and conclusions of the MRS Merits Panel that we must consider when determining the appropriate sanctions to impose in this matter.

III. SANCTIONS AND COSTS REQUESTED

1. Staff's Position

[15] Staff has requested that the following sanctions be imposed on each of the Respondents as a result of their respective breaches of the Act:

DeRosa

[16] DeRosa breached subsections 25(1) and 53(1) of the Act. Pursuant to section 129.2 of the Act, he is deemed to have not complied with securities law by authorizing, permitting or acquiescing in the misconduct of MRS and he acted contrary to the public interest. As such, Staff submits that the following sanctions are appropriate and in the public interest in respect of DeRosa:

- an order that DeRosa cease trading in securities for a period of 15 years pursuant to clause 2 of subsection 127(1) of the Act;

- an order that any exemptions contained in Ontario securities law do not apply to DeRosa for a period of 15 years pursuant to clause 3 of subsection 127(1) of the Act;

- an order reprimanding DeRosa pursuant to clause 6 of subsection 127(1) of the Act;

- an order that DeRosa resign from all positions that he may hold as a director or officer of an issuer for a period of 15 years pursuant to clause 7 of subsection 127(1) of the Act;

- an order that DeRosa be prohibited for a period of 15 years from becoming or acting as a director or officer of any issuer pursuant to clause 8 of subsection 127(1) of the Act;

- an order requiring DeRosa to pay an administrative penalty of $200,000 pursuant to clause 9 of subsection 127(1) of the Act, to be allocated to or for the benefit of third parties pursuant to subsection 3.4(2)(b) of the Act;

- pursuant to clause 10 of subsection 127(1) of the Act, an order requiring disgorgement to the Commission by DeRosa and Cavric jointly of $319,325.04 obtained as a result of their non-compliance with Ontario securities law, to be allocated to or for the benefit of third parties pursuant to subsection 3.4(2)(b) of the Act; and

- a costs order in the amount of $169,106.79, jointly and severally with the other Respondents, pursuant to section 127.1 of the Act.

Cavric

[17] Cavric breached subsections 25(1) and 53(1) of the Act. Pursuant to section 129.2 of the Act, he is deemed to have not complied with securities law by authorizing, permitting or acquiescing in the misconduct of MRS and he acted contrary to the public interest. As such, Staff submits that the following sanctions are appropriate and in the public interest:

- an order that Cavric cease trading in securities for a period of 15 years pursuant to clause 2 of subsection 127(1) of the Act;
- an order that any exemptions contained in Ontario securities law do not apply to Cavric for a period of 15 years pursuant to clause 3 of subsection 127(1) of the Act;
- an order reprimanding Cavric pursuant to clause 6 of subsection 127(1) of the Act;
- an order that Cavric resign from all positions that he may hold as a director or officer of an issuer pursuant to clause 7 of subsection 127(1) of the Act;
- an order that Cavric be prohibited for a period of 15 years from becoming or acting as a director or officer of any issuer pursuant to clause 8 of subsection 127(1) of the Act;
- an order requiring Cavric to pay an administrative penalty of $200,000 pursuant to clause 9 of subsection 127(1) of the Act, to be allocated to or for the benefit of third parties pursuant to subsection 3.4(2)(b) of the Act;
- pursuant to clause 10 of subsection 127(1) of the Act, an order requiring disgorgement to the Commission by DeRosa and Cavric jointly of $319,325.04 obtained as a result of their non-compliance with Ontario securities law, to be allocated to or for the benefit of third parties pursuant to subsection 3.4(2)(b) of the Act; and
- a costs order in the amount of $169,106.79, jointly and severally with the other Respondents, pursuant to section 127.1 of the Act.

Emmons

[18] Emmons breached subsections 25(1) and 53(1) of the Act. Pursuant to section 129.2 of the Act, he is deemed to have also not complied with securities law by authorizing, permitting or acquiescing in the misconduct of MRS and he acted contrary to the public interest. As such, Staff submit that the following sanctions are appropriate and in the public interest:

- an order that Emmons cease trading in securities for a period of 10 years pursuant to clause 2 of subsection 127(1) of the Act;

- an order that any exemptions contained in Ontario securities law do not apply to Emmons for a period of 10 years pursuant to clause 3 of subsection 127(1) of the Act;

- an order reprimanding Emmons pursuant to clause 6 of subsection 127(1) of the Act;

- an order that Emmons resign from all positions that he may hold as a director or officer of an issuer pursuant to clause 7 of subsection 127(1) of the Act;

- an order that Emmons be prohibited for a period of 10 years from becoming or acting as a director or officer of any issuer pursuant to clause 8 of subsection 127(1) of the Act;

- an order requiring Emmons to pay an administrative penalty of $30,000 pursuant to clause 9 of subsection 127(1) of the Act, to be allocated to or for the benefit of third parties pursuant to subsection 3.4(2)(b) of the Act;

- pursuant to clause 10 of subsection 127(1) of the Act, an order requiring disgorgement to the Commission by Emmons of $41,969.25 obtained as a result of this non-compliance with Ontario securities law to be allocated to or for the benefit of third parties pursuant to subsection 3.4(2)(b) of the Act; and

- a costs order in the amount of $169,106.79, jointly and severally with the other Respondents, pursuant to section 127.1 of the Act.

Sherman

[19] Sherman breached subsections 25(1) and 53(1) of the Act. Pursuant to section 129.2 of the Act, he is deemed to have not complied with securities law by authorizing, permitting or acquiescing in the misconduct of MRS and he acted contrary to the public interest. As such, Staff submits that the following sanctions are appropriate and in the public interest:

- an order that Sherman cease trading in securities for a period of 13 years pursuant to clause 2 of subsection 127(1) of the Act;

- an order that any exemptions contained in Ontario securities law do not apply to Sherman for a period of 13 years pursuant to clause 3 of subsection 127(1) of the Act;

- an order reprimanding Sherman pursuant to clause 6 of subsection 127(1) of the Act;

- an order that Sherman resign from all positions that he may hold as a director or officer of an issuer pursuant to clause 7 of subsection 127(1) of the Act;

- an order that Sherman be prohibited for a period of 13 years from becoming or acting as a director or officer of any issuer pursuant to clause 8 of subsection 127(1) of the Act;

- an order requiring Sherman to pay an administrative penalty of $150,000 pursuant to clause 9 of subsection 127(1) of the Act, to be allocated to or for the benefit of third parties pursuant to section 3.4(2)(b) of the Act;

- pursuant to clause 10 of subsection 127(1) of the Act, an order requiring disgorgement to the Commission by Sherman of $223,500.75 obtained as a result of his non-compliance with Ontario securities laws to be allocated to or for the benefit of third parties pursuant to subsection 3.4(2)(b) of the Act; and

- a costs order in the amount of $169,106.79, jointly and severally with the other Respondents pursuant to section 127.1 of the Act.

MRS

[20] The Commission found that MRS breached subsections 25(1) and 53(1) of the Act and acted contrary to the public interest. Given the illegal distribution of MRS shares, Staff submits that the following sanctions against MRS are appropriate and in the public interest:

- an order that MRS cease trading in securities permanently pursuant to clause 2 of subsection 127(1) of the Act; and

- an order than any exemptions contained in Ontario securities law do not apply to MRS permanently pursuant to clause 3 of subsection 127(1) of the Act.

[21] Initially, as set out above, Staff requested $169,106.79 in costs (jointly and severally from the Respondents); however, on February 11, 2014, Staff amended their costs request and reduced it to $157,037.29, to be paid jointly and severally by the Respondents.

[22] Staff submits that the proposed sanctions: (i) are proportionate to the Respondents' misconduct; (ii) will deter the Respondents and other like-minded persons from engaging in the same or similar conduct in the future by attaching meaningful consequences to the Respondents' actions; and (iii) are justified by the gravity of the Respondents' actions, the findings made by this Commission and the uses made of investor monies.

2. The Respondents' Position

[23] The Respondents take the position that the sanctions sought by Staff are out of proportion to the circumstances.

[24] They emphasize that this is not a massive fraud, nor a continuing "boiler room" operation. Specifically, the Respondents submit at paragraphs 4 and 5 of their written submissions:

> Unlike the cases referred to by Staff, these Respondents didn't just issue shares and disappear or stop. Rather, they built a business, stayed with the business long after the funding activities were over, continued to support shareholders and transitioned the business into the successful merger with Biosource.
>
> Unlike the cases referred to by Staff, the Respondents didn't just issue shares, and pocket or divert the funds. Rather, Mr. DeRosa and Mr. Cavric contributed their services for years, and received almost no compensation. Mr. Emmons provided his services for almost 3 years, and received less than $42,000 from which he paid his expenses. Mr. Sherman provided his services for over 2 years, until he succumbed to illness, and alone received something approximating significant compensation, from which he paid his expenses.

[25] As a result, the Respondents argue that the sanctions requested by Staff are inappropriate and do not take into consideration that the Respondents were involved in a legitimate business venture. In the Respondents' view, their conduct was not so abusive as to merit the sanctions requested by Staff. They emphasize that while non-compliance with the Act may be considered to be serious, the conduct in issue, particularly in comparison to the case law relied upon by Staff, is at the least serious end of the spectrum. Unlike the cases referred to by Staff, the Respondents point out that they did not set out, and did not intend, to defy or ignore the requirements of the Act. Rather, they intended to comply, and attempted to do so, and were guided by their understanding of the standard for compliance with the accredited investor exemption at the time. Their efforts at compliance miscarried, and the standards were found to fall short of what was required, as since clarified by the Commission.

[26] In the circumstances of this case, the Respondents take the position that trading bans and other bans from participating in the capital markets are not warranted. Specifically, as explained at paragraphs 175 and 176 of the Respondents' written submissions:

> In the unique circumstances of this case, there is no need to be prescient. the [*sic*] conduct was not so abusive as in any of the other cases referred to by Staff, and sufficient time has passed as to demonstrate that there is no basis for apprehension of future conduct detrimental to the integrity of the capital markets.
>
> In this case, the process has been the punishment. These Respondents have been subjected to these proceedings for almost eight years now. They have in effect been subject to the scrutiny of the Commission. They have, in effect, already been subjected to severe sanctions.

[27] With respect to monetary sanctions, the Respondents take the position that no disgorgement and no administrative penalty is warranted and there is no need for specific or general deterrence.

[28] With respect to costs, the Respondents take the position that they should not be responsible for costs especially since a number of allegations were dismissed and the Respondents should not be responsible for Staff's failure to prove them.

IV. PRELIMINARY ISSUES

1. Sherman's Representation Status

[29] During the hearing, on December 18, 2013, a question arose as to whether Sherman was represented.

[30] The Rules provide at Rule 1.7.1 that "In any proceeding a party may be self-represented or may be represented by a representative". When a party is represented in a proceeding, there is a requirement that the representative notify the Commission if they are withdrawing as a representative. Specifically, Rule 1.7.4 states:

> **1.7.4. Withdrawal by a Representative – (1)** A representative for a party in a proceeding may withdraw as representative for the party only with leave of the Panel.
>
> **(2)** A notice of motion seeking leave to withdraw as representative must be served on the party and filed, and must state all facts material to a determination of the motion, including a statement of the reasons why leave should be given. The notice must not disclose any solicitor client communication in which solicitor client privilege has not been waived.
>
> **(3)** The notice of motion shall include:
>
> > (a) the client's last known address or the address for service, if different; and
> > (b) the client's telephone number, facsimile number and e-mail address, as applicable, unless the Panel orders otherwise.

[31] Staff submitted that no leave under Rule 1.7.4 was sought in respect of Sherman in this proceeding. As a result, Staff has been proceeding on the basis that Respondents' counsel acts on Sherman's behalf. Counsel for the Respondents submitted that there is no continuity of representation for different hearings.

[32] We note that in this proceeding, counsel represented Sherman during the MRS Merits Hearing and the 2011 Motion hearing. In addition, counsel represented Sherman during the hearing before the Divisional Court.

[33] At the outset of the Sanctions and Costs Hearing, Staff submitted that it was their understanding that counsel for the Respondents represented MRS and all the individual Respondents. During opening submissions on November 28, 2013, counsel for the Respondents did not specify that he was not representing Sherman. In fact, counsel made submissions in his opening remarks directly relating to Sherman (see pages 29 and 30 of the November 28, 2013 Transcript).

[34] As counsel was the representative for Sherman in previous hearings which took place in the proceeding relating to MRS, specifically the MRS Merits Hearing and the 2011 Motion hearing, we would expect that a change in Sherman's representation in the same proceeding would have been communicated to the Commission in conformity with Rule 1.7.4. Therefore, we find that counsel for the Respondents did not formally withdraw as Sherman's counsel in this proceeding.

[35] We note that Sherman did not attend the Sanctions and Costs Hearing in person. The fact that this respondent did not attend in person makes it all the more important that counsel specify from the outset of the hearing that they are not representing an absent respondent and comply with Rule 1.7.4 if there is a change in representation status in a proceeding.

[36] While Sherman did not attend the Sanctions and Costs Hearing, we were informed that Sherman was aware that the Sanction and Costs Hearing was taking place. According to Respondents' counsel:

> Mr. Emmons who spoke to Mr. Sherman, and he spoke to Mr. Sherman before we commenced the sanctions hearing, indicating that we were commencing. I understand from Mr. Emmons that Mr. Sherman has also indicated that periodically he checks the OSC web site where the orders are posted and so on and the dates are posted. Mr. Emmons spoke to him about two weeks ago, and he was aware of today's date.
>
> (Transcript, February 11, 2014 at page 19 lines 5 to 13)

[37] Accordingly, while more clarity about whether or not Sherman was represented would have been preferable, we are satisfied that he had notice of the Sanctions and Costs Hearing and had the opportunity to participate if he so wished.

2. Motion Regarding Use of Merits Hearing Transcripts

A. Introduction

[38] The Sanctions and Costs Hearing commenced on November 28, 2013. As the members of the Sanctions and Costs Panel are not the same panel members as in the MRS Merits Hearing (2011 Motion Decision, *supra* at paras. 4 and 54), the parties took the position that a new evidentiary record must be created before the Sanctions and Costs Panel. As a result, when the Sanctions and Costs Hearing commenced on November 28, 2013, evidence was led before the Sanctions and Costs Panel.

[39] In the context of creating this new evidentiary record before the Sanctions and Costs Panel, a dispute arose with respect to the transcripts of the MRS Merits Hearing (the "Merits Hearing Transcripts"). On November 29, 2013, we heard submissions from Staff and counsel for the Respondents about the admissibility of the Merits Hearing Transcripts.

[40] On December 5, 2013, we issued an Order with reasons to follow with respect to the admissibility of the Merits Hearing Transcripts (*Re MRS Sciences Inc.* (2013), 36 O.S.C.B. 11825). We ordered that:

1. Volume 5, containing the transcripts of the evidence portion of the Merits Hearing is admissible;

2. Volume 5 in its entirety is marked as Exhibit 30;

3. Each of the parties shall provide a document indicating the portions of the transcripts, relevant to the determination of sanctions and/or costs, on which they intend to rely, and such documents shall be filed by noon on December 16, 2013;

4. The Sanctions and Costs Hearing shall continue on December 18, 2013 at 10:00 a.m.

[41] In order to provide the parties with instructions regarding the transcripts and to move the hearing forward with as little delay as possible, the order was issued with reasons to follow and we informed the parties that reasons would be included in our Reasons for Sanctions and Costs. We are cognizant of the long procedural history of this matter and we did not want the resumption of the Sanctions and Costs Hearing to be delayed further pending the issuance of our written reasons. In our view, it was in the public interest to issue a decision regarding the Merits Hearing Transcripts as quickly as possible in order to resume the Sanctions and Costs Hearing and complete the evidence portion of the hearing.

[42] These are our reasons for our Order dated December 5, 2013.

B. The Issue

[43] The issue before us is whether the transcripts of the evidence portion of the MRS Merits Hearing are admissible in the Sanctions and Costs Hearing.

[44] The parties agreed that to create the fairest possible hearing, there should be a determination made on this motion prior to the Respondents' Counsel determining whether he should call his clients to testify.

C. Positions of the Parties

i. Staff

[45] Staff took the position that the evidence transcripts from the MRS Merits Hearing should form part of the Sanctions and Costs Hearing record, given that this is a unique situation, in which there is a new Sanctions and Costs Panel. To support their position, Staff filed a "Brief of Authorities of Staff of the Ontario Securities Commission Concerning the Admissibility of Transcripts" and referred us to the relevant excerpts of those cases in their oral submissions.

[46] Staff referred us to the Ontario *Evidence Act*, R.S.O. 1990, C. E.23, as amended, (the 'Evidence Act"), which provides at section 5 that:

Recordings and transcripts of evidence
Recording

5. (1) Despite any Act, regulation or the rules of court, a stenographic reporter, shorthand writer, stenographer or other person who is authorized to record evidence and proceedings in an action in a court or in a proceeding authorized by or under any Act may record the evidence and the proceedings by any form of shorthand or by any device for recording sound of a type approved by the Attorney General.

Admissibility of transcripts

(2) Despite any Act or regulation or the rules of court, a transcript of the whole or a part of any evidence that has or proceedings that have been recorded in accordance with subsection (1) and that has or have been certified in accordance with the Act, regulation or rule of court, if any, applicable thereto and that is otherwise admissible by law is admissible in evidence whether or not the witness or any of the parties to the action or proceeding has approved the method used to record the evidence and the proceedings and whether or not he or she has read or signed the transcript.
…

[47] In addition, Staff submitted that, pursuant to subsection 15(1) of the *Statutory Powers Procedure Act,* R.S.O. 1990, c. S.22 (“SPPA”), as amended, the Merits Hearing Transcripts are admissible. Section 15 of the SPPA states:

Evidence
What is admissible in evidence at a hearing

15. (1) Subject to subsections (2) and (3), a tribunal may admit as evidence at a hearing, whether or not given or proven under oath or affirmation or admissible as evidence in a court,

(a) any oral testimony; and
(b) any document or other thing,

relevant to the subject-matter of the proceeding and may act on such evidence, but the tribunal may exclude anything unduly repetitious.

[48] According to Staff, the Merits Hearing Transcripts are relevant insofar as they were the founding documents and founding evidence upon which the Merits Decision was made.

[49] Staff emphasized that the purpose of providing the Merits Hearing Transcripts is not to re-litigate issues from the MRS Merits Hearing. Instead, the purpose is to refer the Sanctions and Costs Panel to aggravating or mitigating factors mentioned in those transcripts that will impact the imposition of sanctions and costs.

[50] Specifically, Staff explained that the first three volumes of the Merits Hearing Transcripts dealt with eight witnesses who testified. Staff intends to refer the Sanctions and Costs Panel to aggravating factors with respect to the imposition of sanctions that were raised during the testimony of those eight witnesses.

[51] In the fourth volume of the Merits Hearing Transcripts, two witnesses testified by video conference (one from England and one from Sweden). Staff does not intend to rely of the content of that fourth volume as the testimony from those witnesses was not accepted by the MRS Merits Panel. However, in Staff's view this material is still relevant because Staff's Bill of Costs will have to be discounted as a result of the fact that certain portions of the evidence were not accepted or established on a balance of probabilities. Since the Panel will need to make an assessment of what the appropriate reduction of costs is, the Sanctions and Costs Panel needs to understand how the MRS Merits Hearing proceeded. The best way to accomplish this, in Staff's view, is for the Sanctions and Costs Panel to have access to the Merits Hearing Transcripts.

[52] Further, Staff pointed out that volumes 5 to 8 of the Merits Hearing Transcripts dealt with the allegation of market manipulation, an allegation for which the MRS Merits Panel did not find sufficient evidence. As a result, Staff submitted that they will reduce their Bill of Costs accordingly and take out a portion of Staff's time, including a portion of hearing time. As a result, these three volumes of the Merits Hearing Transcripts are important to allow an assessment of the amount of time spent on this issue which will affect the quantum of costs.

[53] A portion of volume 8 and the totality of volumes 9, 10 and 11 of the Merits Hearing Transcripts deal with the evidence of the Respondents. According to Staff, statements made by the Respondents in these transcripts are relevant to the sanctioning factors listed in the case law (*Re M.C.J.C. Holdings*, (2002), 25 O.S.C.B. 1133 at 1136 and *Re Belteco Holdings Inc.* (1998), 21 O.S.C.B. 7743 at 7746).

[54] In particular, Staff submitted that the transcripts contain testimony relevant to the Respondents' activity and experience in the marketplace as well as mitigating factors.

[55] Moreover, Staff pointed out that the parties agreed to provide the Sanctions and Costs Panel with a number of exhibits that were before the MRS Merits Panel. These exhibits were discussed by witnesses and it would be helpful for the Sanctions and Costs Panel to access the Merits Hearing Transcripts where those exhibits are discussed in order to have a full factual foundation.

[56] Overall, Staff emphasized that providing the Sanctions and Costs Panel with the evidence transcripts from the MRS Merits Hearing will make for a fairer sanctions hearing, and that *prima facie* the transcripts should be available and should be before the Sanctions and Costs Panel as part of the evidentiary record. These transcripts will assist Staff to put forward aggravating factors relevant to sanctions and costs and assist the Respondents to put forward mitigating factors relevant to sanctions and costs.

ii. Respondents

[57] The Respondents submitted that a decision made by the Sanctions and Costs Panel cannot be informed by the transcripts of the MRS Merits Hearing.

[58] First, the Respondents point out that the Merits Decision in this matter did not make any findings on market manipulation (MRS Merits Decision, *supra* at para. 233). Therefore, any transcripts where evidence about market manipulation was led should not be put before the Sanctions and Costs Panel. According to the Respondents, the transcripts referring to evidence about market manipulation are irrelevant since no market manipulation findings were made. Further, the Respondents submit that there would be a prejudicial effect if the entire transcript from the MRS Merits Hearing is simply filed.

[59] Second, the Respondents took issue with Staff's position that the Merits Hearing Transcripts were necessary to provide evidence about what investors were told about the company. According to the Respondents, this is prejudicial because that was not an issue at the MRS Merits Hearing. There was no allegation in the Notice of Hearing or Statement of Allegations about misleading representations, about misleading press releases, or about anything that investors were told. There was also no allegation about the underlying business. The Respondents emphasized that it is important that the Sanctions and Costs Hearing be confined to its purpose which is to consider appropriate sanctions for the conduct that was found to have occurred, not for conduct that was not in issue at the MRS Merits Hearing, and not for conduct with respect to which the MRS Merits Panel made no findings.

[60] The Respondents submitted that it is unfair to them to import the Merits Hearing Transcripts that were generated in a different context (the MRS Merits Hearing) for some new and different purpose now (the Sanctions and Costs Hearing). They took the position that if all the Merits Hearing Transcripts are before the Sanctions and Costs Panel, then effectively it is re-opening the MRS Merits Hearing.

[61] The Respondents emphasized in oral argument that:

> …the concern from the Respondents' standpoint is Staff is now going off in a new direction trying to use the transcript in circumstances where there wasn't an issue at the time, where there wasn't cross-examination about the issue. They want to now make arguments from evidence that was given that wasn't dealt with in the merits decision. And really the starting point, in my respectful submission, for this tribunal is the merits decision. That's what this is about. That's where it begins from. And now we can adduce evidence as you found in your ruling to deal with the factors that are going to be considered by this panel. That's what we're doing here. We're not revisiting the merits hearing. We're not going in a different direction or urging different results based upon evidence that, as it happens, was given at the merits hearing.
>
> (Transcript, November 29, 2013 at page 51 line 24 to page 52 line 14)

[62] With respect to Staff's position that the Merits Hearing Transcripts are needed to assist with the assessment of costs, the Respondents stated that:

> But in arguing costs, you don't need to have the transcript in evidence for the truth of its contents. All that's going to be pertinent to cost is how much time was spent, what did it ultimately signify; that you get from the merits decision. And I don't think we're going to have any dispute about how much time was spent; that doesn't make the transcript an exhibit. What it does is make the transcript an artifact that you consider as reflecting time spent or whatever the case may be.
>
> (Transcript, November 29, 2013 at page 61 lines 11 to 19)

[63] The Respondents did not file any materials or case law to support their position. However, they took the position that the criminal cases referred to by Staff are not relevant. In their view, the criminal context is quite different as there is a specific statutory provision for a different decision-maker to continue on a hearing mid-trial or to deal with sentencing, subject to rulings as to fairness.

D. Analysis

[64] In our view, it is appropriate for the Sanctions and Costs Panel to have access to the evidence transcripts from the MRS Merits Hearing. This view was also articulated by the Commission in the 2011 Motion Decision:

> We do not find any unfairness or perceived unfairness to the Respondents in holding the sanctions and costs hearing before a Panel constituted differently from the MRS Merits Panel. As we noted in our analysis with respect to the arguments on jurisdiction, it is not open to the sanctions and costs Panel to reconsider the merits decision because it is presiding over a separate hearing. <u>The transcript of the merits hearing will be available to the sanctions and costs Panel and the Panel will have the benefit of the written reasons in the MRS Merits Decision.</u>
>
> (2011 Motion Decision, *supra* at para. 72 [emphasis added])

[65] Pursuant to subsection 15(1) of the SPPA, a tribunal is permitted to admit any document or other thing relevant to the subject-matter, and this encompasses the evidence transcripts from the MRS Merits Hearing. In our view, such transcripts are relevant because there is content in those transcripts that sheds some light on the applicability of the sanctioning factors set out in *Re M.C.J.C. Holdings*, *supra* and *Re Belteco Holdings Inc.*, *supra*.

[66] We also note that, in the criminal context, the sentencing judge has access to the transcripts from the trial. Specifically, as explained in the decision *R. v. Wilson* (2004), BCSC 1233 at paragraphs 5 and 6:

> <u>This issue is somewhat complicated because I did not hear the evidence myself and must rely solely on my review of the transcripts.</u> Madam Justice Quijano fell ill after the trial and before sentencing. She is unable to conduct the sentencing

> hearing. It fell to me under s. 669.2(2) of the *Criminal Code* to conduct the sentencing hearing and now to impose sentence.
>
> I reviewed the transcripts of the evidence before hearing submissions on sentencing and, after hearing submissions, have partially reviewed them again. Before setting out my findings of fact for the purpose of sentencing, I wish to set out the principles that govern when there is a dispute about the jury's findings or about unresolved evidentiary issues. [emphasis added]

[67] In addition, in *R. Skalbania* [1997] 3 S.C.R. 995, the Supreme Court stated at paragraph 15 that:

> In our view, there is no merit in this submission. Section 686(4)(b)(ii) provides that the case be remitted to the "trial court", not the "trial judge". Section 669.2 confirms this. The constitutionality of these provisions in relation to whether a particular judge can pass sentence was not challenged. Any other system would be unworkable. We note, without prejudice to any outstanding proceedings in relation to sentence, that transcripts of the trial were available and the hearing occupied three days. [emphasis added]

[68] Therefore, in the criminal context, when a different judge is dealing with sentencing, it has been recognized that trial transcripts are relevant to the sentencing process.

[69] Even though the Commission is a regulatory tribunal and not a criminal court, access to the transcripts provides the new panel imposing sanctions and costs with a full factual foundation to understand the conduct in the matter which will allow for the imposition of appropriate and proportionate sanctions.

[70] Evidence from the transcripts may be relevant to factors to be considered at sanctions, such as aggravating and mitigating circumstances. Evidence with respect to such circumstances needs to be before a panel imposing sanctions in order for that panel to craft appropriate and proportionate sanctions. Further, we accept Staff's submission that the transcripts will be helpful with respect to a decision to impose costs as they provide a sense of how much time was spent on the various issues raised in the MRS Merits Hearing.

[71] Having access to the Merits Hearing Transcripts is simply a fairer process for everybody. It is fairer to Staff. It is fairer to the Respondents. It is fairer to the panel as the decision-maker to have the Merits Hearing Transcripts form part of the record for the Sanctions and Costs Hearing.

[72] It is important to reiterate that any sanctions imposed by the Commission must be based on findings made in the Merits Decision. The Merits Hearing Transcripts are not to be used to re-litigate issues on the merits. As stated in paragraph 44 of the 2011 Motion Decision:

> In our view, as long as both parties are provided with the opportunity to lead evidence and make submissions at the sanctions hearing, the requirement of the maxim of *audi alteram partem* will be satisfied. A corollary to this is that a sanctions Panel should not reopen issues that have been disposed of by the merits

> Panel that heard the relevant evidence as to the merits of Staff's allegations. [emphasis added]

[73] The Merits Hearing Transcripts are to be used to provide evidence as to the factors to consider in sanctions, as set out in *Re M.C.J.C. Holdings*, *supra* and *Re Belteco Holdings Inc.*, *supra*. It is recognized that during a sanctions hearing there will be:

> … adequate opportunity to all parties to provide evidence relevant to sanctions and costs. In *Sussman Mortgage Funding Inc. v. Ontario (Superintendent of Financial Services*), [2005] O.J. No. 4806 at para. 3, the Ontario Court of Appeal found that the panel making the determination as to penalty would base it on the earlier reasons of the tribunal, but could hear additional evidence relevant to penalty:
>
> > The assessment of penalty will proceed before a differently constituted Tribunal. Penalty will be determined based on the findings made by the Tribunal in its reasons of August 8, 2002, in so far as those findings describe Sussman's conduct. *The Tribunal is at liberty to hear any evidence relevant to penalty, including evidence of events that arose after August 8, 2002*. [emphasis added in original]
>
> (2011 Motion Decision, *supra* at para. 75)

[74] In addition, as stated in the case *R. v. Amara* (2010) ONSC 251 (Sup. Ct.) (CanLII) at para. 22, "Where there is a dispute with respect to any fact that is relevant to the determination of sentence, the party wishing to rely on a relevant fact, […] has the burden of proving it."

[75] Therefore, evidence may be led before a Sanctions and Costs Panel to prove facts relevant to the determination of sanctions and/or costs.

[76] At the Sanctions and Costs Hearing, the role of the Panel is to consider evidence only relevant to the determination of sanctions and/or costs. It is the responsibility of each party to make its case as to appropriate sanctions and costs, and provide evidence and submissions as to the appropriate sanctioning and costs factors the Sanctions and Costs Panel should consider. This can be facilitated by referring the Panel to the relevant excerpts of the Merits Hearing Transcripts which may contain such evidence.

[77] In the present case, the Merits Hearing Transcripts comprise 11 volumes from the evidence portion of the MRS Merits Hearing. In our Order, we required the parties to provide us with a document indicating the portions of the transcripts relevant to the determination of sanctions and/or costs on which they intend to rely. The Sanctions and Costs Panel's review of the Merits Hearing Transcripts filed should not be a fishing expedition. The parties must specify each excerpt from the Merits Hearing Transcripts on which they intend to rely that is relevant to the determination of sanctions and/or costs.

[78] We note that Staff also made submissions about the admissibility of compelled transcripts and the Commission's case law relating to compelled testimony. The Merits Hearing Transcripts

are not compelled transcripts obtained under the Commission's investigative powers in the Act. As such we find that those cases referred to us by Staff are not applicable to the circumstances before us.

E. Conclusion

[79] For the foregoing reasons, we find that it is in the public interest to admit the transcripts of the evidence portion of the MRS Merits Hearing. To facilitate our review of such transcripts, the parties were required to specifically refer us to the portions of the transcripts on which they sought to rely that are relevant to the determination of sanctions and/or costs.

V. THE LAW ON SANCTIONS

[80] Pursuant to section 1.1 of the Act, the Commission has the mandate to: (i) provide protection to investors from unfair, improper or fraudulent practices; and (ii) foster fair and efficient capital markets and confidence in capital markets. As stated by the Supreme Court of Canada in *Committee for Equal Treatment of Asbestos Minority Shareholders v. Ontario Securities Commission*, [2001] 2 S.C.R. 132 ("*Asbestos*"), the Commission's public interest mandate is neither remedial nor punitive; instead, it is protective and preventive, and it is intended to prevent future harm to Ontario's capital markets (at para. 42). Specifically:

> … the above interpretation is consistent with the scheme of enforcement in the Act. The enforcement techniques in the Act span a broad spectrum from purely regulatory or administrative sanctions to serious criminal penalties. <u>The administrative sanctions are the most frequently used sanctions and are grouped together in s. 127 as "Orders in the public interest". Such orders are not punitive:</u> *Re Albino* (1991), 14 O.S.C.B. 365. Rather, the purpose of an order under s. 127 is to restrain future conduct that is likely to be prejudicial to the public interest in fair and efficient capital markets. <u>The role of the OSC under s. 127 is to protect the public interest by removing from the capital markets those whose past conduct is so abusive as to warrant apprehension of future conduct detrimental to the integrity of the capital markets:</u> *Re Mithras Management Ltd.* (1990), 13 O.S.C.B. 1600. In contradistinction, it is for the courts to punish or remedy past conduct under ss. 122 and 128 of the Act respectively: see D. Johnston and K. Doyle Rockwell, *Canadian Securities Regulation* (2nd ed. 1998), at pp. 209-11.
>
> …
>
> … pursuant to s. 127(1), the OSC has the jurisdiction and a broad discretion to intervene in Ontario capital markets if it is in the public interest to do so. … In exercising its discretion, the OSC should consider the protection of investors and the efficiency of, and public confidence in, capital markets generally. In addition, s. 127(1) is a regulatory provision. The sanctions under the section are preventive in nature and prospective in orientation.
>
> (*Asbestos, supra* at paras. 43 and 45 [emphasis added])

[81] In determining the appropriate sanctions to order in this matter, it is important to keep in mind the Commission's preventive and protective mandate set out in section 1.1 of the Act, and to consider the specific circumstances in this case in order to ensure that the sanctions are proportionately appropriate to both the Respondents' conduct and the range of sanctions ordered in similar cases (*Re M.C.J.C. Holdings*, (2002), 25 O.S.C.B. 1133 at 1134).

[82] The case law sets out the following non-exhaustive list of factors that are important to consider when imposing sanctions:

(a) the seriousness of the allegations proved;

(b) the respondent's experience in the marketplace;

(c) the level of a respondent's activity in the marketplace;

(d) whether or not there has been a recognition of the seriousness of the improprieties;

(e) the need to deter a respondent, and other like-minded individuals, from engaging in similar abuses of the capital markets in the future;

(f) whether the violations are isolated or recurrent;

(g) the size of any profit gained or loss avoided from the illegal conduct;

(h) any mitigating factors, including the remorse of the respondent;

(i) the effect any sanction might have on the livelihood of the respondent;

(j) the effect any sanction might have on the ability of a respondent to participate without check in the capital markets;

(k) whether a particular sanction will have an impact on the respondent and be effective;

(l) the size of any financial sanctions or voluntary payment when considering other factors.

(*Re M.C.J.C. Holdings*, *supra* at 1136 and *Re Belteco Holdings Inc., supra* at 7746)

[83] The applicability and importance of each factor will vary according to the facts and circumstances of the case.

[84] Deterrence is another important factor for the Commission to consider when determining appropriate sanctions. In *Re Cartaway Resources Corp.*, [2004] 1 S.C.R. 672 ("*Cartaway*"), the Supreme Court of Canada explained that deterrence is "…an appropriate, and perhaps necessary,

consideration in making orders that are both protective and preventive" (at para. 60). Further, the Supreme Court emphasized that deterrence may be specific to the respondent or general so as to deter the public at large:

> Deterrent penalties work on two levels. They may target society generally, including potential wrongdoers, in an effort to demonstrate the negative consequences of wrongdoing. They may also target the individual wrongdoer in an attempt to show the unprofitability of repeated wrongdoing. The first is general deterrence; the second is specific or individual deterrence: see C. C. Ruby, *Sentencing* (5th ed. 1999). In both cases deterrence is prospective in orientation and aims at preventing future conduct.
>
> (*Cartaway*, *supra* at para. 52)

[85] The Commission has also recognized the importance of deterrence in *Re Momentas Corp.* (2007) 30 O.S.C.B. 6475 ("*Momentas*"):

> [i]n order to promote both general and specific deterrence we found it necessary to impose severe sanctions including permanent cease trade orders, permanent exclusions from exemptions, and a permanent prohibition from acting as an officer or director of a reporting issuer.
>
> (*Momentas, supra* at para. 51-52)

[86] As stated above, the sanctions imposed must be protective and preventive. The role of the Commission is to impose sanctions that will protect investors and the capital markets from exposure to similar conduct in the future. As articulated by the Commission in *Re Mithras Management Inc.* (1990), 13 O.S.C.B. 1600:

> … the role of this Commission is to protect the public interest by removing from the capital markets -- wholly or partially, permanently or temporarily, as the circumstances may warrant -- those whose conduct in the past leads us to conclude that their conduct in the future may well be detrimental to the integrity of those capital markets. We are not here to punish past conduct; that is the role of the courts, particularly under section 118 [now 122] of the Act. We are here to restrain, as best we can, future conduct that is likely to be prejudicial to the public interest in having capital markets that are both fair and efficient. In so doing we must, of necessity, look to past conduct as a guide to what we believe a person's future conduct might reasonably be expected to be; we are not prescient, after all.
>
> (*Mithras*, *supra* at 1610 and 1611)

VI. APPROPRIATE SANCTIONS IN THIS CASE

1. Specific Sanctioning Factors Applicable in this Matter

[87] In both written and oral submissions, the Respondents emphasized that the Sanctions and Costs Panel should not take into account arguments by Staff that relate to matters that were not:

(i) raised by Staff's allegations, (ii) in issue at the MRS Merits Hearing, and (iii) the subject of findings by the MRS Merits Panel.

[88] As stated above, any sanctions imposed by the Commission must be based on findings made in the Merits Decision. In considering the sanctioning factors set out in the case law above, the findings in the Merits Decision and the evidence adduced before us at the Sanctions and Costs Hearing, the following specific factors and circumstances are relevant in this matter:

(a) <u>The Seriousness of the Allegations:</u> The Respondents breached a number of key provisions of the Act, namely, the registration and prospectus requirements. Individually and collectively, these are serious breaches. The registration requirements in the Act serve an important role in protecting investors and ensuring that the public deals with individuals who meet the necessary proficiency requirements and who engage in honest and responsible conduct. In addition, the prospectus requirement ensures that investors receive disclosure about the products in which they are investing. In this case, the Respondents engaged in unregistered trading and an illegal distribution of securities without a prospectus (Merits Decision, *supra* at paras. 155 to 158). In particular, the Merits Decision emphasized that such breaches are contrary to the public interest at paragraph 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, <u>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.</u> [emphasis added]

(b) <u>The Respondents' experience in the marketplace:</u> The Commission has held that a breach of Ontario securities law by a registrant is serious because the offender is aware of the importance of securities law to the capital markets (*Re Rowan* (2010), 33 O.S.C.B. 91 at para. 145). Each of Cavric, Emmons and Sherman were previously registered with the Commission. As set out in the Agreed Statement of Facts dated May 7, 2009 and the Merits Decision at paragraph 7:

- Sherman was registered with the Commission on numerous occasions between January 25, 1962 and November 13, 2001 but was not registered with the Commission in any capacity between November 2003 and May 2005;

- Cavric was registered with the Commission as a securities salesperson from February 3, 1992 to November 17, 2000 but was not registered with the Commission in any capacity between November 2003 and May 2005; and

- Emmons acted as a vice-president of MRS. He was registered with the Commission as a securities salesperson from May 17, 1977 to November 13, 1996 but was not registered with the Commission in any capacity between November 2003 and May 2005.

As former registrants, these individuals were expected to have a high level of awareness of securities law requirements and the importance of those requirements to the functioning of the capital markets. They were well positioned to understand the regulatory regime, including the importance of the registration and prospectus requirements, and the impact of their actions on investors. This is an important consideration to take into account when imposing sanctions on Cavric, Emmons and Sherman.

(c) Whether or Not There has been a Recognition of the Seriousness of the Improprieties: As set out in paragraph 13 of the Merits Decision and in paragraphs 7 to 10 of the Agreed Statement of Facts, the Respondents admitted that they engaged in the following conduct:

> 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.

In addition, in their written submissions on sanctions and costs, at paragraph 7, the Respondents submitted that:

> …they attempted to, and attempted to comply, and were guided by the understanding of the standard for compliance with the Accredited Investor at the time. Their efforts at compliance miscarried, and the standards were found to fall short of what the exemption required, since clarified by the Commission.

While we note that the Respondents do acknowledge their misconduct which breached the Act, submissions were also made at the Sanctions and Costs Hearing that attempted to minimize the seriousness of these breaches of the Act. In particular, the Respondents submitted that this was not a fraud case and that the

misconduct that occurred in this case falls on the less serious side of the spectrum. Nevertheless, as discussed above in paragraph (a), repeated breaches of the Act relating to unregistered trading and illegal distributions are taken very seriously by the Commission because they deny investors the protections provided by the Act.

(d) Deterrence: As set out above in paragraphs 84 and 85 of our Reasons and Decision, deterrence is an important factor to consider, particularly in this case, as Cavric, Emmons and Sherman were former registrants who should have possessed a high level of awareness of securities law requirements and the importance of those requirements to the capital markets, yet they still engaged in conduct which breached securities law. General deterrence is also important to consider when imposing sanctions because the Commission wants to ensure that all market participants understand the consequences of unacceptable behaviour. Specifically, deterrence plays an important role as a protective mechanism in our capital markets to ensure that conduct harmful to investors is not repeated in the future.

(e) The Size of any Profit Made or Loss Avoided from the Illegal Conduct: A large number of investors were affected by the conduct of the Respondents in this matter. As set out in the Merits Decision at paragraphs 160 and 161:

> 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.
>
> 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.

(f) Whether the Violations are Isolated or Recurring: We note that the Respondents' conduct was not an isolated event; the solicitation of investors was prolonged and widespread. The Respondents' misconduct took place over a period of 19 months from October 2003 to May 2005 through three private placement offerings (see paragraphs 162 to 164 of the Merits Decision). In the first private placement offering, MRS shares were sold at $0.35 per share, with a minimum purchase of 10,000 shares ($3,500). Investors were informed that MRS sought to raise $1.05 million and 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". The second private placement offering sought to raise $1.75 million from the sale of five million shares at $0.35 per share. The offering document described the company as "an emerging growth Generic drug development firm [*sic*]", working on a new psoriasis treatment and a product related to early cancer treatment. The third private placement offering sought to

raise $3.5 million from the sale of five million shares at $0.70 per share, with a minimum investment of $1,400. In addition to the psoriasis treatment product, MRS was now said to be investing in another company to allow it to acquire an interest in a Russian oil field.

(g) The Effect any Sanction may have on the Ability of the Respondents to Participate in the Capital Markets: The Divisional Court of Ontario has held that "[p]articipation in the capital markets is a privilege, not a right" (*Erikson v. Ontario (Securities Commission)* (2003), 26 O.S.C.B. 1622 (Div. Ct.) at paras. 55 and 56). In our view, the right to participate in the capital markets should be restricted when individuals who are in a position to know better breach multiple sections of the Act.

2. Trading and Director and Officer Prohibitions

Staff's Position on Trading and Director and Officer Prohibitions

[89] Staff requested that MRS be permanently cease traded and requested that the individual Respondents be subject to a trading prohibition as well as prohibitions from acting as an officer and director of an issuer, for the following durations:

- DeRosa 15 years
- Cavric 15 years
- Emmons 10 years
- Sherman 13 years

[90] Staff explained that they are requesting longer timeframes for DeRosa and Cavric as they were integral to setting up and organizing MRS's activities, they ran the operation and they had higher level responsibilities in MRS.

[91] Sherman and Emmons were both salespersons for MRS. Although both Sherman and Emmons were involved in selling MRS securities to investors who were not accredited, the Merits Decision found that Sherman was the "main securities salesperson at MRS" (Merits Decision, *supra* at para. 179). As a result, Staff is seeking a longer period of prohibition for Sherman as compared to Emmons.

[92] With respect to the trading prohibition, Staff did not object to a trading carve-out that would allow the individual Respondents to engage in limited trading for personal purposes in registered accounts, on the condition that any such carve-out would only become effective once all monetary sanctions and costs are paid.

Respondents' Position on Trading and Director and Officer Prohibitions

[93] The Respondents take the position that trading bans and officer and director bans are not warranted in this case. They point out that Staff has never, at any time, since the conduct complained of came to an end in 1995, seen any need to seek a temporary cease trade order, and

there has been none. Accordingly, there is no need to impose a cease trade order now. In addition, the Respondents submit that nine years have passed since the events in this matter took place without any further allegation of conduct detrimental to the capital markets. Therefore, there is no need for specific deterrence. To support this argument, the Respondents referred us to *Law Society of Upper Canada v. Joseph Peter Paul Groia,* 2013 ONLSAP 0041, in which a Law Society of Upper Canada Appeal Panel acknowledged that the passage of time without a recurrence of misconduct is a mitigating factor (at paras. 342 and 343). The Appeal Panel reduced the sanction by half because substantial time had passed without the respondent repeating the misconduct.

[94] The Respondents also point out, that in 1996, MRS was re-domiciled to Nevada and merged with Biosource. As there has never been a cease trade order imposed on MRS shares, the holders of these shares have been able to exchange, and have exchanged, their share certificates for Biosource shares. According to the Respondents, to impose a permanent cease trade order on MRS shares now would serve only to unjustifiably penalize and impede those who, through inattention or lack of awareness, have not yet exchanged their shares.

[95] The Respondents submit that lengthy bans are not appropriate in this case as the individual Respondents are of mature years. Specifically, Emmons is at retirement age and Sherman is 74 years old. In addition, as the individual Respondents are nearing or past retirement age, carve-outs should be provided to allow them to receive their retirement income. However, when asked about the specific terms of the carve-out to be considered, the Respondents were not able to provide a detailed proposal.

Conclusions on Trading Prohibitions

[96] We find that it is appropriate to cease trade MRS permanently and to impose a cease trade order on the individual Respondents for a period of 10 years.

[97] There were three MRS offerings and each one was found to be an illegal distribution. This is repetitive misconduct. Since MRS shares were never distributed in compliance with Ontario securities law in the first place, MRS shares should not circulate and trade freely. It follows that current MRS shares should not be traded. The Respondents argued that current MRS shareholders would be prejudiced by such an order. In our view, permitting shares distributed illegally to be traded freely would undermine the integrity of the statutory scheme and is not an appropriate remedy for those shareholders.

[98] With respect to the individual Respondents, we find it appropriate to impose a 10 year trading prohibition in conjunction with the other sanctions to be discussed below. In light of submissions made about the individual Respondents' ages, a 10-year trading prohibition will remove them from the capital markets for a significant period of time and will provide adequate specific deterrence to impress upon them the seriousness of their actions.

[99] We do not find it appropriate to provide any trading carve-outs to the individual Respondents. While we acknowledge that the Respondents are nearing or past retirement age, we were not provided with adequate submissions about the accounts to which the carve-outs would apply or the conditions under which a carve-out would operate. In our view, when requesting a

trading carve-out, the onus is on the requesting party to provide the Commission with detailed information about the affected accounts and the securities held in them so that the Commission can make an informed decision about the form of carve-out that is appropriate in the circumstances.

Conclusions on Officer and Director Prohibitions

[100] We find that it is appropriate to impose on all of the individual Respondents a 10-year prohibition on acting as a director and officer of any issuer.

[101] As set out in paragraphs 208 and 209 of the Merits Decision:

> 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.
>
> 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. [emphasis added]

[102] While in positions of control at MRS as directors or *de facto* directors, the individual Respondents engaged in conduct that breached Ontario securities law and caused harm to investors. We find it appropriate to prohibit such individuals from acting as officers and directors of issuers in the future to prevent the occurrence of similar abuses.

[103] We find it appropriate to impose a prohibition on acting as an officer or director of any issuer for 10 years. In considering the submissions made about the individual Respondents' ages, a 10-year prohibition on acting as an officer and director will remove the individual Respondents from the capital markets for a significant period of time and will prevent the individual Respondents from directing issuers in such a way as to put investors at risk of harm.

3. Administrative Penalties

[104] Paragraph 9 of subsection 127(1) of the Act provides that a person or company that has not complied with Ontario securities law can be ordered to "pay an administrative penalty of not more than $1 million for each failure to comply".

[105] The Commission has held that an administrative penalty should be of a magnitude sufficient to ensure effective specific and general deterrence. The goals of specific and general deterrence are most effectively met by administrative penalties that are proportional to each respondent's culpability in the matter. Important considerations in determining an administrative

penalty may include: the scope and seriousness of a respondent's misconduct; whether there were multiple and/or repeated breaches of the Act; whether the respondent realized any profit as a result of his or her misconduct; the amount of money raised from investors; the harm caused to investors; and the level of administrative penalties imposed in other cases (*Re Goldpoint Resources Corporation et al* (2013), 36 O.S.C.B. 1464 at para. 75; and *Limelight,* (2008), 31 O.S.C.B. 12030 ("*Limelight*") at paras. 71 and 78).

[106] In *Limelight,* the Commission considered the administrative penalty sanction. The Commission stated that the purpose of the administrative penalty is to "deter the particular respondents from engaging in the same or similar conduct in the future, and to send a clear deterrent message to other participants that the conduct in question will not be tolerated in Ontario capital markets"(at para. 67).

[107] The Commission observed that paragraph 9 of subsection 127(1) of the Act empowered the Commission to impose an administrative penalty of not more than $1 million in connection with each failure to comply with the Act. The Commission found that "as a matter of principle, a respondent who commits multiple breaches of the Act should know that continuing breaches of the Act will have consequences in terms of the sanctions ultimately imposed" (*Sabourin,* (2010), 33 O.S.C.B. 5299 ("*Sabourin*") at para. 75). The Commission noted that in imposing administrative penalties, it must consider the specific conduct of each respondent and the level of administrative penalties that the Commission has imposed in other similar cases.

Staff's Position on Administrative Penalty

[108] In this case, Staff seeks an administrative penalty of $200,000 against each of DeRosa and Cavric and a $150,000 administrative penalty against Sherman, each of whom were found to have breached the Act. Each of these Respondents were directors or *de facto* directors of MRS and at the centre of MRS's activities soliciting investors.

[109] Staff seeks an administrative penalty of $30,000 against Emmons in order to keep the amount of the administrative penalty proportional to the level of activity engaged in by Emmons.

[110] Staff submits that the administrative penalties sought reflect the multiple breaches perpetrated by the Respondents and will serve the necessary deterrent purpose. Staff also requests that any administrative penalties ordered under paragraph 9 of subsection 127(1) be designated by the Commission to or for the benefit of third parties under subsection 3.4(2)(b) of the Act.

[111] Staff referred us to case law from the Commission in which administrative penalties have been imposed to provide us with a reference point for the appropriate quantum of administrative penalties in this case. Staff also referred us to *Limelight* which sets out the principle that an administrative penalty must be more than a mere "cost of doing business" for those who breach multiple provisions of the Act (*Limelight, supra* at para. 78).

Respondents' Position on Administrative Penalty

[112] The Respondents take the position that no administrative penalty is warranted in this case and that the amounts requested by Staff are disproportionate to the Respondents' conduct.

[113] In addition, the Respondents argue that the case law relied on by Staff relates to fact scenarios which dealt with more serious breaches of the Act such as fraud, and are therefore not on point. In the Respondents' view, if the Commission were to impose administrative penalties in the range of the cases referred to by Staff such as *Sabourin, supra, Ochnik* (2006), 29 O.S.C.B. 3929*, Momentas*, *supra, XI Biofuels* (2010), 33 O.S.C.B. 10963 and *MP Global* (2012), 35 O.S.C.B. 9001, this would be disproportionate, punitive and inappropriate.

Conclusions on Administrative Penalty

[114] We find that it is appropriate to order the following administrative penalties as requested by Staff:

- DeRosa $200,000
- Cavric $200,000
- Sherman $150,000
- Emmons $30,000

[115] In our view, there are a number of aggravating factors present in this case which support the imposition of these administrative penalties, as a result of the breaches of the Act found by the MRS Merits Panel.

[116] First, as set out in paragraph 88(f) above, the conduct in this matter took place over a prolonged period of time. It spanned 19 months from October 2003 to May 2005, and included three private placements. This was not an isolated event, which is an important aggravating factor to consider. As set out in *Sabourin, supra* at para. 75, continuing misconduct and multiple breaches of the Act will have consequences in terms of the sanctions ultimately imposed in order to deter future conduct.

[117] Another aggravating factor which applies to all of the Respondents is the fact that adequate efforts were not taken to ascertain whether investors were accredited investors. Specifically, as set out in paragraph 195 of the Merits Decision:

> 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.

[118] This concern is compounded by the fact that Cavric, Emmons and Sherman were all former registrants and as such were expected to possess a high level of awareness of securities law requirements and the importance of those requirements to the protection of investors.

[119] We also considered the conduct and role of each Respondent in this matter when determining an appropriate administrative penalty.

[120] DeRosa's conduct is summarized at paragraph 166 of the Merits Decision as follows:

- 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 on 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 [the MRS Merits Panel found] were commission payments to MRS qualifiers and salespersons; and

- DeRosa had signing authority on the MRS bank account.

[121] As a director, DeRosa was intimately involved in MRS's conduct. As such, the quantum of the administrative penalty imposed on him should reflect the level of his involvement in MRS, which conducted a series of illegal distributions without providing adequate disclosure to investors.

[122] Cavric's conduct is summarized at paragraph 169 of the Merits Decision as follows:

- 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;

- 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.

[123] As a director, Cavric was also intimately involved in MRS's conduct, especially relating to MRS's fundraising (Merits Decision, *supra* at para. 169). As such, the quantum of the administrative penalty imposed on him should reflect the level of his involvement in MRS, which conducted a series of illegal distributions without providing adequate disclosure to investors.

[124] Sherman and Emmons were found to be *de facto* directors of MRS (Merits Decision, *supra* at para. 209) and the Merits Decision also found that both were involved in selling MRS securities to investors (Merits Decision, *supra* at para. 174 and 179).

[125] Emmons' conduct is summarized at paragraph 171 of the Merits Decision as follows:

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

[126] Sherman's conduct is summarized at paragraph 177 and 178 of the Merits Decision as follows:

- 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;

- 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; and

- there was evidence from Cavric and Emmons that Sherman brought MRS a list of leads that 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.

[127] While both Sherman and Emmons were involved in selling MRS securities to investors who were not accredited, the Merits Decision did find that Sherman was the "main securities salesperson at MRS" (Merits Decision, *supra* at para. 179). As a result, a higher administrative penalty is appropriate for Sherman as compared to Emmons.

[128] In addition, we reviewed the case law regarding administrative penalties imposed in other matters. We note that in many cases involving unregistered trading and illegal distributions, the Commission has awarded significant administrative penalties in order to have the intended deterrent effect (see for example: *Re Energy Syndications Inc. et al* (2013), 36 O.S.C.B. 11595; *Re MBS Group (Canada) Ltd et al* (2013), 36 O.S.C.B. 3915; *Re Mohinder Ahluwalia* (2013), 36 O.S.C.B. 617) and *Re MP Global Financial Ltd. et al* (2012), 35 O.S.C.B. 9061).

[129] In imposing an administrative penalty, the Commission must consider the level of administrative penalties imposed in other similar cases in which comparable harm was done to investors (*Limelight, supra* at para. 71). In the case before us, $838,760 was raised from approximately 210 individual investors. We have considered the cases referred to us by Staff and the Respondents. We find that the administrative penalty amounts requested by Staff in this case

are consistent with the orders imposed in other Commission cases dealing with similar misconduct and are proportional to the circumstances and conduct of each Respondent.

[130] Considering the totality of the sanctions we are imposing, the number of investors affected, the amount of funds raised and the aggravating factors present in this case, we find that the administrative penalty amounts requested by Staff will serve the necessary specific and general deterrent purposes and are proportionate to the conduct of each individual Respondent.

4. Disgorgement

[131] Paragraph 10 of subsection 127(1) of the Act provides that a person or company that has not complied with Ontario securities law can be ordered to disgorge to the Commission "any amounts obtained" as a result of the non-compliance.

[132] The Commission has previously held that "all money illegally obtained from investors can be ordered to be disgorged, not just the 'profit' made as a result of the activity". As explained in *Limelight*, *supra* at paragraph 49:

> We note that paragraph 10 of subsection 127(1) of the Act provides that disgorgement can be ordered with respect to "any amounts obtained" as a result of non-compliance with the Act. Thus, the legal question is not whether a respondent "profited" from the illegal activity but whether the respondent "obtained amounts" as a result of that activity. In our view, this distinction is made in the Act to make clear that all money illegally obtained from investors can be ordered to be disgorged, not just the "profit" made as a result of the activity. This approach also avoids the Commission having to determine how "profit" should be calculated in any particular circumstance. Establishing how much a respondent obtained as a result of his or her misconduct is a much more straightforward test. In our view, where there is a breach of Ontario securities law that involves the widespread and illegal distribution of securities to members of the public, it is appropriate that a respondent disgorge all the funds that were obtained from investors as a result of that illegal activity. In our view, such a disgorgement order is authorized under paragraph 10 of subsection 127(1) of the Act.

[133] The *Limelight* case sets out a non-exhaustive list of disgorgement factors to consider at paragraph 52, which include:

(a) whether an amount was obtained by a respondent as a result of non-compliance with the Act;

(b) the seriousness of the misconduct and the breaches of the Act and whether investors were seriously harmed;

(c) whether the amount that a respondent obtained as a result of non-compliance with the Act is reasonably ascertainable;

(d) whether the individuals who suffered losses are likely to be able to obtain redress; and

(e) the deterrent effect of a disgorgement order on the respondents and other market participants.

[134] The *Limelight* case also states that Staff has the onus of proving on a balance of probabilities the amount obtained by a respondent as a result of his or her noncompliance with the Act. Subject to that onus, any risk of uncertainty in calculating disgorgement should fall on the wrongdoer whose non-compliance with the Act gave rise to the uncertainty (*Limelight*, *supra* at para. 53).

[135] Further, in *Re Sabourin,* the Commission emphasized that:

> In our view, a disgorgement order is appropriate in these circumstances because it ensures that none of the Respondents will benefit from their breaches of the Act and because such an order will deter them and others from similar misconduct. In our view, it is appropriate that a disgorgement order in these circumstances relate to the full amount that we determined in the Merits Decision to have been obtained by each of the Respondents from investors.
>
> (*Re Sabourin, supra* at paras. 69 and 71)

Staff's Position on Disgorgement

[136] Staff takes the position that, in this case, the disgorgement orders should coincide with the amounts received by the Respondents or by companies controlled by the Respondents. As a result, Staff seeks disgorgement of the following amounts:

- Emmons $41,969.25
- Sherman $223,500.75
- Cavric/DeRosa (jointly) $319,325.04

[137] Staff is seeking disgorgement jointly from Cavric and DeRosa in the amount of $319,325.04 because they submit that this represents the amount of commissions or management fees paid by MRS and received indirectly by Cavric and DeRosa through payments made to companies which they controlled (Select Fidelity Transfer Services Ltd. ("Select") and Associated Financial Corporation ("Associated")) as a result of the illegal sale of MRS shares to the public.

[138] During the Sanctions and Costs Hearing, Staff's investigator testified at some length about the method used by Staff to calculate these amounts.

[139] According to Staff, three of the *Limelight* disgorgement factors are particularly relevant to this case. First, all of the funds at issue were obtained as a result of the Respondents' unlawful activity. Second, the amounts obtained as a result of the

non-compliance with the Act are ascertainable from MRS's bank records. Third, the disgorgement orders sought would achieve the goals of specific and general deterrence.

[140] In addition, Staff submits that investor monies in this case were used for purposes which were not disclosed to investors. As such, the disgorgement approach taken in *Limelight* should be applied as a result of which, the Commission should order disgorgement from MRS's principals of the total amounts raised from investors.

Respondents' Position on Disgorgement

[141] The Respondents take the position that disgorgement is inappropriate in this case.

[142] With respect to Cavric and DeRosa, the Respondents submit that it is problematic to seek the disgorgement of funds that were ultimately paid to Select and Associated. It was submitted that amounts paid to Select and Associated were for services provided by those entities. For example, the Respondents submit that DeRosa provided financial services that were essential to the operation of MRS, and received only nominal, recorded and fully disclosed payments for these services. Further, the Respondents point out that Select and Associated were not named as respondents in this proceeding.

[143] In addition, the Respondents take issue with Staff's calculations of disgorgement amounts for all the Respondents. They take the position that Staff grouped payments to the Respondents from MRS so as to create the impression that the payments amounted to a percentage of the funds raised from investors (20 to 25%) and thereby constituted a commission payment. The Respondents submitted that such calculations are improper as not all the cheques were paid out to the Respondents for the purpose for commissions. The Respondents pointed out while cross-examining Staff's investigator that, while some cheques were commission payments and referenced the names of investors in the subject line, other cheques did not make reference to any investor names. Therefore, it is inappropriate to assume that those are commission payments. Other cheques made out to the Respondents reference other legitimate purposes in the subject lines such as director fees, management fees, accounting services and board fees.

[144] The Respondents also submit that it is not possible to ascertain with any precision any amounts obtained as a result of non-compliance, given that the majority of the investors were accredited.

[145] As a result, the Respondents submit that there is some uncertainty surrounding the calculation of the disgorgement amounts, as the amounts cannot be accurately ascertained, and therefore, a disgorgement order should not be made.

Conclusions on Disgorgement

[146] We find that it is inappropriate to order disgorgement in this case. We agree with the Respondents that there is too much uncertainty concerning the amounts obtained by the Respondents as a result of their non-compliance with Ontario securities law.

[147] We note that the MRS Merits Panel found that 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 subject line of MRS paycheques. However, when we reviewed the cheques in evidence before us, not all of them referenced investor names in the subject line. Some of them were illegible while others listed business expenses such as moving, rent, labels, transfer agency services and so on. As a result, it is not possible for us to ascertain the exact amounts paid out as commissions.

[148] With respect to the Respondents' submission that there were actually accredited investors who participated in MRS's offerings, we had no evidence of this before us at the Sanctions and Costs Hearing, and we note that the Merits Decision does not include any findings that certain investors were accredited.

[149] However, in light of the uncertainties relating to the cheques and the difficulties of ascertaining the exact amounts of commissions paid, we find that this is not an appropriate case to order disgorgement. We acknowledge that Staff's investigator attempted diligently to reconcile the amounts and sources of funds moving in and out of MRS's bank accounts, but in light of uncertainties regarding the source and use of those funds and in the absence of definitive findings on these issues in the Merits Decision, we do not find these efforts persuasive.

VII. COSTS

[150] Pursuant to section 127.1 of the Act, the Commission has the discretion to order a person or company to pay the costs of an investigation and hearing if the Commission is satisfied that the person or company has not complied with the Act or has not acted in the public interest. Rule 18.2 of the Rules sets out a number of factors a Panel may consider in exercising its discretion to order costs.

[151] A costs order pursuant to section 127.1 of the Act is not a sanction. An order of costs is a method of recovering the costs of a hearing or investigation from persons or companies who have breached Ontario securities law or acted contrary to the public interest. It is recognized that a costs order will not necessarily recover the entirety of the costs incurred by the Commission, but the Legislature has deemed it appropriate that a respondent contribute to the costs of a hearing where there has been a finding that the respondent has contravened Ontario securities law.

Staff's Position on Costs

[152] As set out above, initially Staff requested $169,106.79 in costs. However, on February 11, 2014, Staff amended their costs request and reduced it to $157,037.29. Staff explained that this reduction was due to a change in the number of hours claimed for Staff's litigator Derek Ferris, whose hours during the period of February 23, 2006 to November 30, 2008 were reduced from 192.50 hours to 142.50 hours. According to Staff, the Amended Bill of Costs now accurately sets out the case assessment, investigation and litigation hours and the disbursements incurred in this matter.

[153] At the hearing on February 11, 2014, Staff filed an Affidavit of Yolanda Leung, which included the Amended Bill of Costs. This specified Staff's total costs incurred and costs sought by Staff. Also included were timesheets setting out the number of hours and the categories of

tasks performed by each individual on Staff's team, as well as documentation supporting Staff's disbursements.

[154] The following table sets out the total costs incurred by Staff in this matter:

TOTAL COSTS INCURRED			
Staff	**Total Hours**	**Rate ($)**	**Total Costs($)**
Case Assessment (April 11, 2005 to July 7, 2005)			
Kim Berry	66.00	175	11,550.00
Investigation (July 8, 2005 to February 22, 2006)			
Larry Masci	166.50	185	30,802.50
Shauna Flynn	39.25	205	8,046.25
Litigation (February 23, 2006 to October 7, 2009)			
Derek Ferris	347.25	205	71,186.25
Larry Masci	222.25	185	41,116.25
Rima Pilipavicius	169.00	185	31,265.00
Mehran Shahviri	80.50	185	14,892.50
Kim Berry	32.75	175	5,731.25
Litigation (October 8, 2009 to December 18, 2013)			
Sherry Brown	215.25	185	39,821.25
		Total	254,411.25
		Total Disbursements	13,003.43
		TOTAL COSTS	267,414.68

[155] Staff submitted that in preparing the Amended Bill of Costs, a very conservative approach was taken for costs sought by Staff. The following table sets out the costs sought by Staff:

COSTS SOUGHT			
Staff	**Total Hours**	**Rate ($)**	**Total Costs($)**
Investigation (July 8, 2005 to February 22, 2006)			
Larry Masci	166.50	185	30,802.50
Litigation (February 23, 2006 to November 30, 2008)			
Derek Ferris	142.50	205	29,212.50
Larry Masci	83.75	185	15,493.75
Litigation (May 1, 2009 to October 7, 2009			
Derek Ferris	148.50	205	30,442.50
Larry Masci	90.00	185	16,650.00
Litigation (October 8, 2009 to December 18, 2013)			
Sherry Brown	215.25	185	30,821.25
		Total	146,725.00
		Total Disbursements	10,312.29
		TOTAL COSTS	157,037.29

[156] Staff explained that the reduction of costs from $267,414.68 to $157,037.29 takes into account that Staff is not seeking costs related to the period of time from February 2008 to May 2008. This is the period covering Staff's work relating to the unproven allegations that Cavric, Primequest and DeRosa engaged in market manipulation. Staff further explained that they only used the hours incurred by Derek Ferris and Larry Masci up to November 30, 2008 during the litigation phase, which amount to $64,223.75. They billed two-thirds of their time associated with the MRS Merits Hearing and the period leading up to the MRS Merits Hearing so as to exclude time associated with the market manipulation claim. The two-third ratio is based on Staff's assertion that one-third of the evidence called during the hearing on the merits related to the market manipulation allegation.

[157] In addition, Staff's costs sought only relate to the following Staff members:

- Derek Ferris, Senior Litigation Counsel, who has been with the Enforcement Branch of the Commission since January, 2006. He had carriage of and primary responsibility for the litigation in respect of this matter;

- Larry Masci, an Investigator, who had been with the Enforcement Branch since 1987 and left the Commission in 2012, who was the primary investigator; and

- Sherry Brown, a senior forensic accountant, who has been with the Enforcement Branch since 2003, who prepared a use of funds and commission analysis and testified at the sanctions hearing.

[158] As in previous Commission cases, Staff's Bill of Costs uses the hourly rates approved by the Commission, and excludes any time spent by case assessment investigators, students-at-law and/or law clerks.

[159] On this basis, Staff submitted that DeRosa, Cavric, Sherman and Emmons should be ordered to pay costs of $157,037.29, on a joint and several basis, and that this request is both proportionate and reasonable in the circumstances.

Respondents' Position on Costs

[160] The Respondents take the position that they should not pay any costs in this matter.

[161] The Respondents point to the following factors which, in their view, support no costs being awarded or a reduction in costs:

- there was never any suggestion of any failure by any of the Respondents to comply with any procedural order or direction;

- the proceeding was complex only in relation to the market manipulation allegations against the Respondents that were ultimately dismissed. According to the Respondents, Staff should be responsible for those complexities, and should

be responsible for the failure to prove those allegations. The Respondents were put to considerable expense, which although not recoverable against the Commission, should be taken into account in their favour;

- Staff's conduct contributed to the costs of the investigation and the proceeding by leading technical evidence regarding the market manipulation allegation which was ultimately dismissed, and imposed a requirement to respond to this evidence. The Respondents point out that in the Merits Decision, it was found at paragraph 233 that:

> 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.

- the Respondents contributed in every way to a shorter, more efficient and more effective hearing, for example by entering into agreed statements of fact;

- the Respondents participated in a responsible, informed and well prepared manner and cooperated with Staff during the investigation and hearing.

[162] In addition to the above factors, the Respondents take the position that Staff's Bill of Costs was lacking in detail, Staff's summary of costs provides unsegregated amounts of time where it is impossible to parse how all of Staff's time was spent. Nor was there any way to assess how Staff calculated their disbursements.

[163] Further, the Respondents submitted that while Staff is proposing to discount certain costs by a third to account for Staff's unsuccessful attempt to prove the market manipulation allegation, the discount should be greater than a third.

Conclusions on Costs

[164] We have reviewed Staff's documents in support of their costs request and while Staff's original Bill of Costs was lacking in detail, we find that the Amended Bill of Costs which was provided to us on February 11, 2014 contained sufficient detail to comply with subrule 18.1(2) of the Rules. The Amended Bill of Costs included detailed dockets for all Staff team members working on this case and supporting documents for all disbursements incurred.

[165] In the circumstances, we find that it is appropriate to order that the Respondents pay costs, jointly and severally, in the amount of $126,216.04.

[166] Since certain allegations were not proven by Staff, we find that it is appropriate that Staff discounted their request for costs and disbursements to exclude work pertaining to the unproven allegations regarding market manipulation. While the Respondents argued that a

reduction greater than one third is warranted, we were not provided with any specific submissions as to where additional reductions should be made and the specific rationale for additional reductions. As such, we find that the calculations followed by Staff to reduce costs are appropriate in this case.

[167] We have also discounted Staff's original costs request of $157,037.29 by $30,821.25, which represents the costs sought in relation to the work done by Staff's investigator, Sherry Brown. We discounted the costs associated with Sherry Brown's work as we did not accept all of her evidence regarding the source and use of funds.

[168] We also note that Staff took a conservative approach in calculating costs. They claimed costs for the lead litigator and investigator with respect to the MRS Merits Hearing and the accountant who testified at the Sanctions and Costs Hearing (whose costs we have ultimately excluded). Staff did not seek costs for other members of Staff's team who worked on this case.

[169] Therefore, we find it appropriate that the Respondents pay costs, jointly and severally, in the amount of $126,216.04. Section 127.1 of the Act enables us to impose costs where respondents have not complied with Ontario securities law. In this case, the Respondents did not comply with Ontario securities law in that they engaged in unregistered trading and illegal distributions.

VIII. DECISION ON SANCTIONS AND COSTS

[170] We consider that it is important in this case to: (i) impose sanctions that reflect the seriousness of the securities law violations that occurred in this matter; and (ii) impose sanctions that not only deter the Respondents but also like-minded people from engaging in future conduct that violates securities law.

[171] We will issue a separate order giving effect to our decision on sanctions and costs, as follows:

1. With respect to DeRosa:

   (a) pursuant to clause 2 of subsection 127(1) of the Act, DeRosa shall cease trading in securities for a period of 10 years;

   (b) pursuant to clause 3 of subsection 127(1) of the Act, exemptions contained in Ontario securities law shall not apply to DeRosa for a period of 10 years;

   (c) pursuant to clause 6 of subsection 127(1) of the Act, DeRosa is reprimanded;

   (d) pursuant to clause 7 of subsection 127(1) of the Act, DeRosa shall resign from all positions that he may hold as a director or officer of an issuer;

(e) pursuant to clause 8 of subsection 127(1) of the Act, DeRosa is prohibited from becoming or acting as a director or officer of any issuer for a period of 10 years;

(f) pursuant to clause 9 of subsection 127(1) of the Act, DeRosa shall pay an administrative penalty of $200,000 for his failure to comply with Ontario securities law, which amount is designated for allocation or use by the Commission pursuant to subsections 3.4(2)(b)(i) or (ii) of the Act;

(g) pursuant to section 127.1 of the Act, DeRosa shall pay costs in the amount of $126,216.04, jointly and severally with Sherman, Emmons and Cavric.

2. With respect to Cavric:

(a) pursuant to clause 2 of subsection 127(1) of the Act, Cavric shall cease trading in securities for a period of 10 years;

(b) pursuant to clause 3 of subsection 127(1) of the Act, exemptions contained in Ontario securities law shall not apply to Cavric for a period of 10 years;

(c) pursuant to clause 6 of subsection 127(1) of the Act, Cavric is reprimanded;

(d) pursuant to clause 7 of subsection 127(1) of the Act, Cavric shall resign from all positions that he may hold as a director or officer of an issuer;

(e) pursuant to clause 8 of subsection 127(1) of the Act, Cavric is prohibited from becoming or acting as a director or officer of any issuer for a period of 10 years;

(f) pursuant to clause 9 of subsection 127(1) of the Act, Cavric shall pay an administrative penalty of $200,000 for his failure to comply with Ontario securities law, which amount is designated for allocation or use by the Commission pursuant to subsections 3.4(2)(b)(i) or (ii) of the Act;

(g) pursuant to section 127.1 of the Act, Cavric shall pay costs in the amount of $126,216.04, jointly and severally with DeRosa, Emmons and Sherman.

3. With respect to Emmons:

   (a) pursuant to clause 2 of subsection 127(1) of the Act, Emmons shall cease trading in securities for a period of 10 years;

   (b) pursuant to clause 3 of subsection 127(1) of the Act, an order that any exemptions contained in Ontario securities law shall not apply to Emmons for a period of 10 years;

   (c) pursuant to clause 6 of subsection 127(1) of the Act, Emmons is reprimanded;

   (d) pursuant to clause 7 of subsection 127(1) of the Act, Emmons shall resign from all positions that he may hold as a director or officer of an issuer;

   (e) pursuant to clause 8 of subsection 127(1) of the Act, Emmons is prohibited for a period of 10 years from becoming or acting as a director or officer of any issuer;

   (f) pursuant to clause 9 of subsection 127(1) of the Act, Emmons shall pay an administrative penalty of $30,000, which amount is designated for allocation or use by the Commission pursuant to subsections 3.4(2)(b)(i) or (ii) of the Act;

   (g) pursuant to section 127.1 of the Act, Emmons shall pay costs in the amount of $126,216.04, jointly and severally with DeRosa, Cavric and Sherman.

4. With respect to Sherman:

   (a) pursuant to clause 2 of subsection 127(1) of the Act, Sherman shall cease trading in securities for a period of 10 years;

   (b) pursuant to clause 3 of subsection 127(1) of the Act, exemptions contained in Ontario securities law shall not apply to Sherman for a period of 10 years;

   (c) pursuant to clause 6 of subsection 127(1) of the Act, Sherman is reprimanded;

   (d) pursuant to clause 7 of subsection 127(1) of the Act, Sherman shall resign from all positions that he may hold as a director or officer of an issuer;

(e) pursuant to clause 8 of subsection 127(1) of the Act, Sherman is prohibited from becoming or acting as a director or officer of any issuer for a period of 10 years;

(f) pursuant to clause 9 of subsection 127(1) of the Act, Sherman shall pay an administrative penalty of $150,000, which amount is designated for allocation or use by the Commission pursuant to subsections 3.4(2)(b)(i) or (ii) of the Act;

(g) pursuant to section 127.1 of the Act, Sherman shall pay costs in the amount of $126,216.04, jointly and severally with DeRosa, Cavric and Emmons.

5. With respect to MRS:

(a) pursuant to clause 2 of subsection 127(1) of the Act, MRS shall cease trading in securities permanently; and

(b) pursuant to clause 3 of subsection 127(1) of the Act, exemptions contained in Ontario securities law shall not apply to MRS permanently.

DATED at Toronto this 4th day of June, 2014.

"Mary G. Condon"	*"Christopher Portner"*
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