



Ontario
Securities
Commission

Commission des
valeurs mobilières
de l'Ontario

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20 Queen Street West
Toronto ON M5H 3S8

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**IN THE MATTER OF
KUBER MORTGAGE INVESTMENT CORPORATION
and SUTHARSAN KUNARATNAM**

SETTLEMENT AGREEMENT

PART I - INTRODUCTION

1. Beginning in June 2016, Kuber Mortgage Investment Corporation (“**Kuber**”) and Sutharsan Kunaratnam (“**Kunaratnam**”) (collectively, the “**Respondents**”) sold approximately \$26 million worth of preferred shares in Kuber to approximately 200 investors in the exempt market. The Respondents engaged in the business of trading in securities without being registered as a dealer, contrary to subsection 25(1) of the *Securities Act*, RSO 1990, c S.5 (the “**Act**”).

2. Registration is a cornerstone of Ontario securities law. The registration requirement serves an important gate-keeping function by ensuring that only properly qualified and suitable persons are permitted to trade with or on behalf of the public. Issuers in the exempt market that are in the business of trading their own securities, including mortgage investment entities (“**MIEs**”) such as Kuber, must comply with the registration requirements under Ontario securities law.

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

PART II - JOINT SETTLEMENT RECOMMENDATION

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

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

PART III - AGREED FACTS

A. THE RESPONDENTS

6. Kuber is an Ontario corporation based in Toronto. As a MIE, Kuber's primary business is mortgage origination and lending. In order to fund its mortgages, Kuber primarily raises capital from investors in the exempt market and has also obtained debt financing.

7. Kunaratnam is one of the founding directors of Kuber and its Chief Executive Officer. Kunaratnam also provides various mortgage brokerage, management and administrative services to Kuber through his company, Square Capital Management Inc. ("**Square Capital**").

8. Neither Kuber nor Kunaratnam have been registered with the Commission in any capacity.

B. UNREGISTERED TRADING

9. During the period between June 2016 and January 2019, Kuber raised approximately \$26 million through distributions of its preferred shares to approximately 200 investors. Almost all of the distributions were made pursuant to the accredited investor exemption to the prospectus requirement.

10. Beginning in November 2018, Kuber had used a registered exempt market dealer ("**EMD**") from time to time to sell its securities. However, most of the investors in Kuber purchased the preferred shares without the involvement of any registered dealer.

11. Kunaratnam was the individual at Kuber primarily responsible for selling its preferred shares to investors. He engaged in activities in furtherance of the sale of the preferred shares, including by preparing and disseminating promotional materials, soliciting investors, and performing "know your client" ("**KYC**") procedures.

12. The Respondents engaged in the business of trading in securities without being registered as a dealer under Ontario securities law.

13. In response to a request from Staff, Kuber voluntarily agreed in January 2019 to cease trading in securities, except trades of its own securities that were distributed through a registered EMD, including by removing solicitations for investment on its website.

C. OFFERING MEMORANDA

(1) Statements Regarding the Dealer Registration Requirement

14. Kuber disseminated three offering memoranda to prospective investors which contained the following statement concerning its registration status:

Neither the Corporation nor the Manager is registered with the Ontario Securities Commission (“OSC”) as an adviser, dealer or as an investment fund manager and is operating in reliance on the blanket order issued by the OSC on August 17, 2010 that provides relief from these registration requirements and the Corporation’s interpretation of Staff Notice 31-323 *Guidance Relating to Registration Obligations of Mortgage Investment Entities* (“Staff Notice 31-323”). If the Corporation’s interpretation of Staff Notice 31-323 is incorrect or the OSC otherwise requires registration for MICs or MIC managers/administrators, the Corporation will comply with the requirements or seek further relief if appropriate.

15. The Commission’s blanket order dated August 17, 2010¹ (“**Blanket Order**”) did not provide any relief to the requirement to be registered as a dealer. Furthermore, any relief provided by the Blanket Order (and a subsequent order extending the relief²) expired on March 31, 2011.

(2) Information Regarding Related Party Loan Facility

16. Between January 2018 and November 2018, Kuber disseminated an offering memorandum which disclosed in multiple sections that Kuber may obtain debt financing. The offering memorandum did not disclose an unsecured loan between Kuber and a limited partnership (“**Zephyr LP**”) which was controlled by Kunaratnam’s company, Square Capital. A subsequent offering memorandum disclosed the loan and certain aspects of Square Capital’s relationship with Zephyr LP but did not detail Square Capital’s control over Zephyr LP.

D. MITIGATING FACTORS

17. The Respondents cooperated with Staff during its investigation, including by:

- (a) voluntarily providing Staff with information and documents relevant to Staff’s investigation, including documents that had not been requested by Staff; and

¹ *In the Matter of the Securities Legislation of Ontario and In the Matter of Trez Capital Corporation (The Lead Filer) and Other Persons and Companies Conducting Investment Fund Management Activities or Advising in Respect of Mortgage Investment Entities* (2010), 33 OSCB 7355.

² See 33 OSCB 11155.

- (b) voluntarily agreeing to cease all securities trading activities at Kuber that did not involve a registered firm authorized to trade exempt securities, including by removing all solicitations for investment on Kuber's website.

18. Neither Kuber nor Kunaratnam have a prior disciplinary record with any securities regulatory authority, including the Commission.

19. The Respondents have agreed to reach an early resolution of this matter, prior to the commencement of proceedings in this matter.

20. Kunaratnam, on his own initiative, undertook and in January 2020 successfully completed the Partners, Directors & Senior Officers Course offered by the IFSE Institute and the Canadian Securities Course offered by the Canadian Securities Institute.

21. Kunaratnam, also on his own initiative, voluntarily agreed to pay the administrative penalty referred to in paragraph 23(c) below in order to not impact the dividend distributions payable to investors in Kuber.

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

22. By engaging in the conduct described above, the Respondents acknowledge and admit that they:

- (a) engaged in or held themselves out as engaging in the business of trading in securities, without being registered in accordance with Ontario securities law as a dealer, where no exemption to the registration requirement was available, contrary to subsection 25(1) of the Act; and
- (b) in so doing acted in a manner contrary to the public interest.

PART V - TERMS OF SETTLEMENT

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

- (a) this Settlement Agreement be approved;

- (b) each of the Respondents be reprimanded, pursuant to paragraph 6 of subsection 127(1) of the Act;
- (c) the Respondents pay an administrative penalty in the amount of \$400,000, on a joint and several basis, pursuant to paragraph 9 of subsection 127(1) of the Act, which amount be designated for allocation or use by the Commission in accordance with paragraph 3.4(2)(b) of the Act; and
- (d) Kuber pay costs in the amount of \$30,000, pursuant to section 127.1 of the Act.

24. Kunaratnam agrees to pay the administrative penalty set out in paragraph 23(c) above in its entirety by wire transfer to the Commission, through an account held by his company Square Capital, before the commencement of the Settlement Hearing. Kunaratnam will not be reimbursed for or receive a contribution toward this payment from Kuber.

25. Kuber agrees to pay the costs set out in paragraph 23(d) above in its entirety by wire transfer to the Commission before the commencement of the Settlement Hearing.

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

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

- (a) conduct any subsequent trades of securities of Kuber through or to a firm registered under Ontario securities law in a category that permits such trades, or by Kuber directly only if and when registered to conduct such trades;
- (b) amend its most recent offering memorandum by:
 - (i) removing all references to the Blanket Order,

- (ii) stating that Kuber is not registered as a dealer and trades its securities through a firm registered under Ontario securities law in a category that permits such trades,
 - (iii) stating that Kuber would be required to be registered in the appropriate dealer category under Ontario securities law if it does not trade through a dealer registered in a category that permits such a trade, and
 - (iv) detailing Square Capital's control over the general partner of Zephyr LP;
- (c) retain an EMD to:
- (i) conduct a review of the adequacy of the KYC and suitability documentation obtained by Kuber with respect to its current existing investors who did not purchase Kuber's preferred shares through a registered dealer, to be completed within four months from the date of the Settlement Hearing,
 - (ii) obtain such additional KYC and suitability information as required for a suitability assessment where the EMD deems that the existing documentation at Kuber is inadequate pursuant to paragraph 27(c)(i) above,
 - (iii) conduct suitability analysis in accordance with sections 13.2 and 13.3 of National Instrument 31-103 *Registration Requirements, Exemptions and Ongoing Registrant Obligations* ("NI 31-103") for a random sample of 20 current existing investors, selected by the EMD, who did not purchase Kuber's preferred shares through a registered dealer, to be completed within four months from the date of the Settlement Hearing, and
 - (iv) if 5 or more of the 20 investors are identified by the EMD to have made unsuitable investments in Kuber pursuant to paragraph 27(c)(iii) above, conduct suitability analysis in accordance with sections 13.2 and 13.3 of NI 31-103 for all current existing investors who did not purchase Kuber's preferred shares through a registered dealer, to be completed within a time period proposed by the EMD which is not unacceptable to Staff;

- (d) once an EMD has been retained pursuant to paragraph 27(c) above, Kuber shall immediately provide Staff with a written authorization granting Staff free and unfettered access to communicate with the EMD; and
- (e) redeem the preferred shares held by all investors identified by the EMD to have made an unsuitable investment in Kuber pursuant to paragraph 27(c) above at the issue price of \$10 per preferred share, unless the investors instruct the EMD that they wish to retain their investments in accordance with subsection 13.3(2) of NI 31-103.

28. But for the mitigating factors set out in Part III.D of this Settlement Agreement and the Undertaking, Staff would have requested additional sanctions against the Respondents.

29. This Settlement Agreement, as well as any failure to satisfy the terms of the Settlement Agreement, may be considered as a factor relevant to suitability for registration in any future application for registration by the Respondents.

PART VI - FURTHER PROCEEDINGS

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

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

32. The Respondents waive any defences to a proceeding referenced in paragraph 30 or 31 that are based on the limitation period in the Act, provided that no such proceeding shall be commenced later than six years from the date of the occurrence of the last failure to comply with this Settlement Agreement.

PART VII - PROCEDURE FOR APPROVAL OF SETTLEMENT

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

34. Kunaratnam will attend the Settlement Hearing in person.

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

36. If the Commission approves this Settlement Agreement:

- (a) the Respondents irrevocably waive all rights to a full hearing, judicial review or appeal of this matter under the Act; and
- (b) neither Staff nor the Respondents will make any public statement that is inconsistent with this Settlement Agreement or with any additional agreed facts submitted at the Settlement Hearing.

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

PART VIII - DISCLOSURE OF SETTLEMENT AGREEMENT

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

- (a) this Settlement Agreement and all discussions and negotiations between Staff and the Respondents before the Settlement Hearing will be without prejudice to Staff and the Respondents; and
- (b) Staff and the Respondents will each be entitled to all available proceedings, remedies and challenges, including proceeding to a hearing on the merits of the allegations contained

in the Statement of Allegations in respect of the Proceeding. Any such proceedings, remedies and challenges will not be affected by this Settlement Agreement, or by any discussions or negotiations relating to this Settlement Agreement.

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

PART IX - EXECUTION OF SETTLEMENT AGREEMENT

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

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

DATED at Toronto, Ontario this 6th day of March, 2020.

“Usman M. Sheikh”

Witness (print name): Usman M. Sheikh

“Sutharsan Kunaratnam”

SUTHARSAN KUNARATNAM

**KUBER MORTGAGE INVESTMENT
CORPORATION**

By: *“Ranier De Lambert”*

Name: Ranier De Lambert
Title: COO

DATED at Toronto, Ontario this 3rd day of March, 2020.

ONTARIO SECURITIES COMMISSION

By: *“Jeff Kehoe”*

Name: Jeff Kehoe
Title: Director, Enforcement Branch

SCHEDULE “A”



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**IN THE MATTER OF
KUBER MORTGAGE INVESTMENT CORPORATION
AND SUTHARSAN KUNARATNAM**

File No. _____

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

[*Day and date Order made*]

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

WHEREAS on [date], the Ontario Securities Commission (the “**Commission**”) held a hearing at the offices of the Commission, located at 20 Queen Street West, 17th Floor, Toronto, Ontario to consider the request made jointly by Kuber Mortgage Investment Corporation (“**Kuber**”) and Sutharsan Kunaratnam (“**Kunaratnam**”) (collectively, the “**Respondents**”) and Staff of the Commission (“**Staff**”) for approval of a settlement agreement dated [date] (the “**Settlement Agreement**”).

AND WHEREAS Kuber has given an undertaking to the Commission, in the form attached as Annex I to this Order (the “**Undertaking**”).

ON READING the Statement of Allegations dated [date] and the Settlement Agreement and on hearing the submissions of the representatives of each of the parties, appearing in person, and on considering the Undertaking,

IT IS ORDERED THAT:

- (a) the Settlement Agreement is approved;
- (b) each of the Respondents is reprimanded, pursuant to paragraph 6 of subsection 127(1) of the *Securities Act*, RSO 1990, c S.5 (the “**Act**”);

- (c) the Respondents shall pay an administrative penalty in the amount of \$400,000, on a joint and several basis, pursuant to paragraph 9 of subsection 127(1) of the Act, which amount is designated for allocation or use by the Commission in accordance with paragraph 3.4(2)(b) of the Act; and
- (d) Kuber shall pay costs in the amount of \$30,000, pursuant to section 127.1 of the Act.

[Chair of the Panel]

[Commissioner]

[Commissioner]

ANNEX I

UNDERTAKING OF KUBER MORTGAGE INVESTMENT CORPORATION

**IN THE MATTER OF
KUBER MORTGAGE INVESTMENT CORPORATION
and SUTHARSAN KUNARATNAM**

UNDERTAKING TO THE ONTARIO SECURITIES COMMISSION

1. This Undertaking is given in connection with the settlement agreement dated **[date]** (the “**Settlement Agreement**”) between Kuber Mortgage Investment Corporation (“**Kuber**”), Sutharsan Kunaratnam (“**Kunaratnam**”) and Staff (“**Staff**”) of the Ontario Securities Commission (the “**Commission**”). All terms shall have the same meanings in this Undertaking as in the Settlement Agreement.

2. Kuber undertakes to the Commission to:

- (a) conduct any subsequent trades of securities of Kuber through or to a firm registered under Ontario securities law in a category that permits such trade, or by Kuber directly only if and when registered to conduct such trades;
- (b) amend its most recent offering memorandum by:
 - (i) removing all references to the Blanket Order,
 - (ii) stating that Kuber is not registered as a dealer and trades its securities through a firm registered under Ontario securities law in a category that permits such trades,
 - (iii) stating that Kuber would be required to be registered in the appropriate dealer category under Ontario securities law if it does not trade through a dealer registered in a category that permits such a trade, and
 - (iv) detailing Square Capital’s control over the general partner of Zephyr LP;

- (c) retain an EMD to:
 - (i) conduct a review of the adequacy of the KYC and suitability documentation obtained by Kuber with respect to its current existing investors who did not purchase Kuber's preferred shares through a registered dealer, to be completed within four months from the date of the Settlement Hearing,
 - (ii) obtain such additional KYC and suitability information as required for a suitability assessment where the EMD deems that the existing documentation at Kuber is inadequate pursuant to paragraph 2(c)(i) above,
 - (iii) conduct suitability analysis in accordance with sections 13.2 and 13.3 of NI 31-103 for a random sample of 20 current existing investors, selected by the EMD, who did not purchase Kuber's preferred shares through a registered dealer, to be completed within four months from the date of the Settlement Hearing, and
 - (iv) if 5 or more of the 20 investors are identified by the EMD to have made unsuitable investments in Kuber pursuant to paragraph 2(c)(iii) above, conduct suitability analysis in accordance with sections 13.2 and 13.3 of NI 31-103 for all current existing investors who did not purchase Kuber's preferred shares through a registered dealer, to be completed within a time period proposed by the EMD which is not unacceptable to Staff;
- (d) once an EMD has been retained pursuant to paragraph 2(c) above, Kuber shall immediately provide Staff with a written authorization granting Staff free and unfettered access to communicate with the EMD; and
- (e) redeem the preferred shares held by all investors identified by the EMD to have made an unsuitable investment in Kuber pursuant to paragraph 2(c) above at the issue price of \$10 per preferred share, unless the investors instruct the EMD that they wish to retain their investments in accordance with subsection 13.3(2) of NI 31-103.

DATED at **[city]**, Ontario this **[date]** day of **[month]**, 2020.

**KUBER MORTGAGE INVESTMENT
CORPORATION**

By: _____

Name:

Title:

SCHEDULE “B”

UNDERTAKING OF KUBER MORTGAGE INVESTMENT CORPORATION

**IN THE MATTER OF
KUBER MORTGAGE INVESTMENT CORPORATION
and SUTHARSAN KUNARATNAM**

UNDERTAKING TO THE ONTARIO SECURITIES COMMISSION

1. This Undertaking is given in connection with the settlement agreement dated **[date]** (the “**Settlement Agreement**”) between Kuber Mortgage Investment Corporation (“**Kuber**”), Sutharsan Kunaratnam (“**Kunaratnam**”) and Staff (“**Staff**”) of the Ontario Securities Commission (the “**Commission**”). All terms shall have the same meanings in this Undertaking as in the Settlement Agreement.

2. Kuber undertakes to the Commission to:

- (a) conduct any subsequent trades of securities of Kuber through or to a firm registered under Ontario securities law in a category that permits such trade, or by Kuber directly only if and when registered to conduct such trades;
- (b) amend its most recent offering memorandum by:
 - (i) removing all references to the Blanket Order,
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 - (iii) stating that Kuber would be required to be registered in the appropriate dealer category under Ontario securities law if it does not trade through a dealer registered in a category that permits such a trade, and
 - (iv) detailing Square Capital’s control over the general partner of Zephyr LP;

- (c) retain an EMD to:
 - (i) conduct a review of the adequacy of the KYC and suitability documentation obtained by Kuber with respect to its current existing investors who did not purchase Kuber's preferred shares through a registered dealer, to be completed within four months from the date of the Settlement Hearing,
 - (ii) obtain such additional KYC and suitability information as required for a suitability assessment where the EMD deems that the existing documentation at Kuber is inadequate pursuant to paragraph 2(c)(i) above,
 - (iii) conduct suitability analysis in accordance with sections 13.2 and 13.3 of NI 31-103 for a random sample of 20 current existing investors, selected by the EMD, who did not purchase Kuber's preferred shares through a registered dealer, to be completed within four months from the date of the Settlement Hearing, and
 - (iv) if 5 or more of the 20 investors are identified by the EMD to have made unsuitable investments in Kuber pursuant to paragraph 2(c)(iii) above, conduct suitability analysis in accordance with sections 13.2 and 13.3 of NI 31-103 for all current existing investors who did not purchase Kuber's preferred shares through a registered dealer, to be completed within a time period proposed by the EMD which is not unacceptable to Staff;
- (d) once an EMD has been retained pursuant to paragraph 2(c) above, Kuber shall immediately provide Staff with a written authorization granting Staff free and unfettered access to communicate with the EMD; and
- (e) redeem the preferred shares held by all investors identified by the EMD to have made an unsuitable investment in Kuber pursuant to paragraph 2(c) above at the issue price of \$10 per preferred share, unless the investors instruct the EMD that they wish to retain their investments in accordance with subsection 13.3(2) of NI 31-103.

DATED at Toronto, Ontario this 6th day of March, 2020.

**KUBER MORTGAGE INVESTMENT
CORPORATION**

By: *“Ranier De Lambert”*

Name: Ranier De Lambert

Title: COO