

**ONTARIO  
SECURITIES COMMISSION**

**IN THE MATTER OF  
SOLAR INCOME FUND INC., ALLAN GROSSMAN,  
CHARLES MAZZACATO, AND KENNETH KADONOFF**

File No. 2019-35

**MOTION OF SOLAR INCOME FUND INC., ALLAN GROSSMAN,  
CHARLES MAZZACATO, AND KENNETH KADONOFF**

(For an order excluding from admission into evidence the proposed evidence of Staff's expert, Richard Lee, under Rule 28 of the *Ontario Securities Commission Rules of Procedure and Forms*, Rule 8 of the *Ontario Securities Commission Practice Guideline*, section 15 of the *Statutory Powers Procedure Act*, R.S.O. 1990, c.S.22, and pursuant to the Commission's Order in this matter dated August 11, 2020)

**A. ORDER SOUGHT**

The Moving Parties (Respondents), Solar Income Fund Inc. ("**SIF Inc.**"), Allan Grossman, Charles Mazzacato and Kenneth Kadonoff request, with notice to Staff, that the Ontario Securities Commission (the "**Commission**") make the following orders:

- (a) an order that the proposed evidence of Staff's expert, Richard Lee, is inadmissible at the merits hearing in this matter; and
- (b) such further and other relief and orders as counsel may advise and the Commission may deem appropriate.

**B. GROUNDS**

The grounds for the motion are:

1. On September 26, 2019, Staff filed their Statement of Allegations pursuant to Subsection 127(1) and Section 127.1 of the *Securities Act*, R.S.O. 1990, c. S.5.

2. The essence of Staff's allegations as set out in the Statement of Allegations is that SIF Inc. caused proceeds raised in SIF Solar Energy Income & Growth Fund ("**SIF #1**") "*to be used for purposes other than those represented to investors in SIF #1's offering memorandum*". The Statement of Allegations makes the following question the essential question for determination by the Commission: *Did the SIF #1 offering memorandum disclose to investors that funds raised in SIF #1 would be used to make loans?*

3. On August 11, 2020 following the Third Attendance in this matter, the Commission issued an Order ordering, *inter alia*, that:

1. Staff shall serve every Party with the report of its expert witness, by no later than October 16, 2020; and
2. each Party shall file a Motion regarding Staff's expert evidence, if any, by no later than October 30, 2020.

4. On October 6, 2020 Staff served the Moving Parties (Respondents) with the expert report of their proposed expert, Richard Lee, dated September 30, 2020 (the "**Expert Report**").

5. The Expert Report provides notice that Staff propose to have Richard Lee qualified to adduce opinion evidence going to four questions (all defined terms below correspond to defined terms in the Expert Report):

- (a) Question 1: Did the terms of the SIF Capital Debenture and the SIF Capital Acquisition meet or depart from solar power industry norms prevailing at the Material Time, and did the transactions involve commercially reasonable levels of risk for SIF #1. (“**Opinion #1**”)
- (b) Question 2: Did the SIF #2 Loans meet or depart from solar power industry norms prevailing at the Material Time and did the transactions involve commercially reasonable levels of risk for SIF #1. (“**Opinion #2**”)
- (c) Question 3: Did the loans to SIF #1 to High Quality, Whitewater, LP #3 and SIF Inc. which totaled approximately \$2.2 million, meet or depart from solar power industry norms prevailing at the Material Time, and specifically did the transactions involve commercially reasonable levels of risk for SIF #1. (“**Opinion #3**”)
- (d) Question 4: Could the SIF Loans that were made be reasonably understood by a solar energy investor to be investments in “Subsidiaries which will in turn invest in the acquisition, development, financing and operation” of solar energy powered installations as described in the SIF #1 OM. (“**Opinion #4**”)

6. Separate and apart from the question of whether Richard Lee is properly qualified to give Opinions #1, #2 and #3, which is not acknowledged by the Moving Parties/Respondents on this Motion, the proposed Opinions #1, #2 and #3 are not relevant and accordingly do not meet the requirements for admissibility under *R. v. Mohan* [1994] 2 SCR 9 (“*Mohan*”) and other relevant jurisprudence, including decisions of this Commission.

7. Proposed Opinions #1, #2 and #3 go to whether the particular loans in issue met “prevailing industry norms” and whether those loans involved a “commercially reasonable level of risk for SIF #1”—both of which questions are entirely outside the scope of what is

pleaded in Staff's Statement of Allegations. If this evidence is admitted, the case the Respondents will have to meet will extend far beyond whether the use of funds was consistent with the disclosure to investors and will extend to whether the Respondents acted with reasonable or due care in respect of the loans.

8. Proposed Opinions #1, #2 and #3 are, therefore, not relevant to the allegations made in Staff's Statement of Allegations, are highly prejudicial and, if admitted by the Commission, would improperly and impermissibly expand the scope of the merits hearing significantly beyond Staff's allegations set out in the Statement of Allegations.

9. The proposed Opinion #4 is also inadmissible because it does not meet the necessity requirement for admissibility under *Mohan*, and other relevant jurisprudence, including decisions of this Commission. Opinion #4 is an opinion as to an "ultimate question or issue" for determination by the Commission and falls squarely within the Commission's expertise as a specialized tribunal. Opinion #4 also veers inappropriately into questions of law and matters of interpretation. The Commission has the necessary expertise to draw its own conclusions as to the objective views of a reasonable investor resulting from a review of the disclosure in an offering memorandum.

10. Despite the Moving Parties (Respondents) having brought this Motion in accordance with the Commission's Order dated August 11, 2020, Staff bear the burden of establishing the admissibility of the proposed expert evidence.

11. Rule 28 of the *Ontario Securities Commission Rules of Procedure and Forms*, Rule 8 of the *Ontario Securities Commission Practice Guideline*, and section 15 of the *Statutory Powers Procedure Act*, R.S.O. 1990, c.S.22

**C. EVIDENCE**

12. The Moving Parties intend to rely on the following evidence for the motion:

- (a) the Statement of Allegations dated September 26, 2019;
- (b) the Order of the Commission dated August 11, 2020;
- (c) the transcript of the Third Attendance before the Commission on August 11, 2020;
- (d) the expert report of Staff's proposed expert, Richard Lee, dated September 30, 2020;
- (e) the letter from Polley Faith to Respondents' counsel dated October 6, 2020;  
and
- (f) such further and other materials as counsel may advise and the Commission may permit.

October 30, 2020

**DAVIES WARD PHILLIPS & VINEBERG LLP**  
155 Wellington Street West  
Toronto ON  
M5V 3J7

**Andrea L. Burke (LSO# 37761L)**  
aburke@dwpv.com  
**Chantelle Cseh (LSO# 60620Q)**  
ccseh@dwpv.com

Tel.: 416.863.0900  
Fax: 416 863 0871

Lawyers for the Respondent/Moving Party,  
Charles Mazzacato

**TYR LLP**

160 John Street  
Suite 500  
Toronto, ON  
M5V 2E5

**James W.E. Doris (LSO# 33236P)**

[jdoris@tyrllp.com](mailto:jdoris@tyrllp.com)

**Sean R. Campbell (LSO #49514J)**

[scampbell@tyrllp.com](mailto:scampbell@tyrllp.com)

Tel.: 647.475.5669

Lawyers for the Respondents/Moving Parties,  
Allan Grossman and Solar Income Fund Inc.

**LENCZNER SLAGHT ROYCE SMITH  
GRIFFIN LLP**

130 Adelaide Street West  
Suite 2600  
Toronto ON  
M5H 3P5

**Eli Lederman (LSO# 47189L)**

[elederman@litigate.com](mailto:elederman@litigate.com)

**Brian Kolenda (LSO# 60153N)**

[bkolenda@litigate.com](mailto:bkolenda@litigate.com)

Tel.: 416.865.2897

Fax: 416.567.0331

Lawyers for the Respondent/Moving Party,  
Kenneth Kadonoff

**TO: ONTARIO SECURITIES COMMISSION**  
22nd Floor  
20 Queen Street West  
Toronto ON M5H 3S8

**Derek Ferris (LSO# 31473H)**  
dferris@osc.gov.on.ca

Tel.: 416.593.8111  
Fax: 416.593.2319

**AND TO: POLLEY FAITH LLP**  
1300-80 Richmond Street West  
Toronto, ON M5H 2A4

**Andrew Faith (LSO# 47795H)**  
afaith@polleyfaith.com

Tel.: 416.365.1600  
Fax: 416.365.1601

Lawyers for Staff

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**DAVIES WARD PHILLIPS &  
VINEBERG LLP**  
155 Wellington Street West  
Toronto ON M5V 3J7

**Andrea L. Burke**  
(LSO# 37761L)  
aburke@dwpv.com  
**Chantelle Cseh**  
(LSO# 60620Q)  
ccseh@dwpv.com

Tel.: 416.863.0900  
Fax: 416 863 0871

Lawyers for the  
Respondent/Moving Party,  
Charles Mazzacato

**TYR LLP**  
160 John Street  
Suite 500  
Toronto, ON  
M5V 2E5

**James W.E. Doris**  
(LSO# 33236P)  
jdoris@tyrllp.com

**Sean R. Campbell**  
(LSO #49514J)  
scampbell@tyrllp.com

Tel.: 647.475.5669

Lawyers for the  
Respondents/Moving Parties,  
Allan Grossman and Solar  
Income Fund Inc

**LENCZNER SLAGHT ROYCE  
SMITH GRIFFIN LLP**  
130 Adelaide Street West  
Suite 2600  
Toronto ON  
M5H 3P5

**Eli Lederman**  
(LSO# 47189L)  
elederman@litigate.com

**Brian Kolenda**  
(LSO# 60153N)  
bkolenda@litigate.com

Tel.: 416.865.2897  
Fax: 416.567.0331

Lawyers for the  
Respondent/Moving  
Kenneth Kadonoff Party,