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BY EMAIL AND COURIER

Mr. John Stevenson
Secretary
Ontario Securities Commission
20 Queen Street West
19th Floor, Box 55
Toronto, Ontario M5H 3S8

Dear Mr. Stevenson:

OSC STAFF NOTICE 15-704

Comments on the Proposed Enforcement Initiatives for a New No Contest Settlement Program and No-Enforcement Action Agreements

We are writing in respect of OSC Staff Notice 15-704 and to comment on Staff's proposed enforcement initiatives pertaining to the adoption of a new "no contest" settlement program and No-Enforcement Action Agreements.

A. NO CONTEST SETTLEMENTS

For the reasons set out below, we support and endorse the November 29, 2011 submission made by Ms Berman and others in respect of this issue. We believe that adding no contest settlements as an alternative available to the Commission, Staff and respondents as a means of resolving enforcement matters would be beneficial and in the public interest. We also believe that the objections raised by some to no contest settlements have been overstated.

1. BENEFITS ASSOCIATED WITH NO CONTEST SETTLEMENTS

As counsel who represent respondents (and occasionally Staff) in proceedings before the OSC, we have no doubt that in many cases respondents have serious and entirely legitimate concerns about entering into settlements with Staff that contain admissions that may then be misused against them in civil litigation, including class actions. Although settlement agreements with Staff virtually always contain a provision that expressly limits the use of admissions made in these agreements to the OSC proceeding in which the agreement in question is entered into only, the efficacy of this limitation is uncertain, including in civil or administrative proceedings commenced outside of Canada. As a result

of the concerns that arise from making admissions in the context of an OSC settlement, and the reluctance and caution that respondents typically exercise before entering into such a settlement, there is also no doubt that the resolution of a number of enforcement matters has been significantly delayed adding to the prolonged costs to both the Commission and respondents.

Providing Staff and respondents with the ability to enter into a no contest settlement will result in cases being resolved much earlier than they otherwise would, and at a much lower cost. This is in the public interest for a number of reasons. *First*, it will result in mutually acceptable sanctions intended to protect the public interest (in the view of Staff and the Commission) being imposed in a more timely manner and much closer in time to the conduct that is alleged to have been unlawful or contrary to the public interest. This is important having regard to the well-established principle that the Commission's role in exercising its public interest jurisdiction in enforcement matters is not to punish past conduct but rather to restrain future conduct that is likely to be prejudicial to the public interest. More timely sanctions should also increase public confidence in the Commission's ability to regulate market behaviour, given that justice delayed is often perceived to be justice denied.

Second, facilitating an early resolution of enforcement matters through no contest settlements will also benefit parties by significantly reducing the costs that would be incurred in litigating a proceeding before the Commission. *Third*, if the proposed no contest regime is adopted this will almost certainly have the effect of freeing up and enabling Staff of the OSC to pursue a greater number of cases, resulting in an even greater level of enforcement activity. This too is in the public interest.

2. CRITICISMS OF NO CONTEST SETTLEMENTS

There has been a great deal of commentary in the media recently by those opposed to the use of no contest settlements as a further means of resolving enforcement matters. The most vocal opponents of the proposed policy include members of the plaintiffs class action bar, who have an obvious economic interest in preserving their alleged ability to take advantage of OSC settlements in civil proceedings pertaining to matters that overlap with enforcement proceedings before the Commission or concern similar facts or circumstances. We believe that the concerns raised are misplaced or have been overstated.

(i) Impact on Class Actions

By way of example, one concern that has been raised is that the absence of admissions in OSC settlements will make it more difficult for class actions to be prosecuted successfully in Canada. This concern appears to be misplaced for a number of reasons, not the least of which has been adverted to above. As previously mentioned, in our experience virtually all settlement agreements currently entered into with Staff contain comprehensive "Exclusive Use" provisions which state explicitly that admissions made in those

agreements are made for the purpose of the OSC proceeding in which the agreement is entered into only. The intent of these provisions is to prohibit the use of those admissions in any other proceedings including, of course, class actions. Members of the plaintiffs class action bar who oppose no contest settlements appear to have overlooked the existence of these Exclusive Use provisions, or perhaps seek to find ways to circumvent them in future class actions. In either event, their stated concerns ring hollow.

It is important to understand that Exclusive Use provisions are by no means empty "boilerplate". Indeed, we have made it clear on several occasions during attendances before Hearing Panels at the OSC for the purpose of seeking approval of proposed settlements that the respondents we represented in those proceedings were only prepared to admit that their conduct was contrary to the public interest, or contravened a provision of the Act or of a Rule or Regulation under the Act, for the limited purpose of obtaining approval of an agreed upon settlement. We have made it equally clear that our clients would contest vigorously the various allegations made against them by Staff if the agreed upon settlement was not approved and a contested hearing became necessary. In this regard it is also important to recognize that many respondents that settle with Staff have very different views than Staff may have concerning the underlying merits of the claims or allegations made against them, including when agreed upon settlements are reached. The reality is that respondents settle enforcement proceedings for a host of reasons that may have little to do with an acceptance by them of wrongdoing, including to avoid the expense, inconvenience, risks and reputational harm associated with a contested hearing.

We believe the experience in the United States, which has utilized no contest settlements for many years and yet has a very active and robust securities class action practice, demonstrates that no contest settlements do not affect adversely the ability of plaintiffs to prosecute securities class actions.

Moreover, we do not believe that the Commission, in exercising its public interest mandate, should seek to tilt the playing field between plaintiffs and defendants in civil proceedings that the Commission is not a party to and plays no role in. In our view, it is not too much to ask parties who commence securities class actions to prove their cases using the ample discovery rights that are available to them under the *Rules of Civil Procedure* without "piggybacking" on admissions made for the sole and exclusive purpose of resolving enforcement proceedings before the Commission on a mutually acceptable basis. We note that it is not uncommon in other kinds of proceedings for there to be restrictions on the derivative use of evidence gathered and findings made in those regulatory proceedings. Moreover, the vast majority of civil proceedings are settled, rather than tried on a contested basis, and almost all civil settlements involve the exchange of releases in which liability and wrongdoing are not admitted, but rather are expressly denied.

(ii) Impact on Contested Enforcement Cases

Another concern has been raised that, if adopted, no contest settlements would become the norm and fully contested hearings would be rendered obsolete. This concern is also overstated. The fact is that, even without no contest settlements, the vast majority of enforcement matters are resolved prior to fully contested hearings. Indeed, the benefits of settlements in enforcement cases are well accepted by the Commission. Although no contest settlements may have some impact on the number of enforcement matters that are resolved by settlement rather than by contested hearing, there will always be cases in which the parties cannot settle even in a no contest regime. One need look no further than the experience in the United States to understand that this is true. The early settlement of some enforcement cases on a no contest basis will allow other cases that cannot be settled to proceed to contested hearings on a more expeditious and efficient basis. We also note that if the proposed regime is implemented, Staff and the Commission will both retain the discretion to limit or control the use of no contest settlements given that Staff will be able to refuse to accept a no contest settlement in particular cases, and the Commission will be empowered to reject no contest settlements put forward by the parties for approval in appropriate circumstances.

3. PROPOSED LIMITATIONS ON NO CONTEST SETTLEMENTS

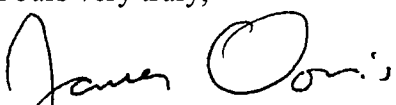
For all of these reasons, we believe that it would be in the public interest to allow parties to resolve enforcement proceedings before the Commission on a no contest basis. Given the benefits described above, we do not believe that the availability of this option should be limited to cases that meet the proposed criteria set out in the Staff Notice 15-704. We see no reason why an alternative of this nature that provides parties with additional flexibility to resolve a matter should be confined in the manner currently proposed by Staff. While it is understandable that Staff may be reluctant to enter into no contest settlements in certain kinds of cases, Staff should not, as a matter of policy, preclude themselves from considering a no contest settlement in cases that do not satisfy Staff's enumerated criteria. In our view, a commendable and progressive initiative of this nature can and should be utilized in a constructive and sensible manner that is not constrained in the fashion currently proposed.

B. NO-ENFORCEMENT ACTION AGREEMENTS

We are also of the view that the proposed formalization of No-Enforcement Action Agreements is an important and beneficial initiative. In appropriate circumstances the entering into of such Agreements will provide market participants with a clear and documented understanding of the benefits of co-operation, particularly in cases involving joint-actor misconduct where the incentive for coming forward with information must be clearly expressed and understood by all parties.

We hope that these submissions will be of assistance to Staff and the Commission in deciding whether to adopt or modify the proposed approach, and would be pleased to elaborate upon these submissions if it would be helpful to do so.

Yours very truly,



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