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Commission

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

**- AND -**

**IN THE MATTER OF LOUIS MICHAEL KOVACS**

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**SETTLEMENT AGREEMENT BETWEEN  
STAFF OF THE ONTARIO SECURITIES COMMISSION  
and LOUIS MICHAEL KOVACS**

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**PART I - INTRODUCTION**

1. By Notice of Hearing dated September 16, 2013, the Ontario Securities Commission (the "Commission") announced that it proposed to hold a hearing, commencing on September 19, 2013, to consider whether, pursuant to sections 127 and 127.1 of the *Securities Act*, R.S.O. 1990, c. S.5, as amended (the "Act"), it is in the public interest to make orders, as specified therein, against Louis Michael Kovacs ("Kovacs"). The Notice of Hearing was issued in connection with the allegations as set out in the Statement of Allegations of Staff of the Commission ("Staff") dated September 16, 2013 (the "Statement of Allegations").
2. The Commission is issuing a Notice of Hearing to announce that it will hold a hearing to consider whether, pursuant to section 127 of the Act, it is in the public interest for the Commission to approve this Settlement Agreement between Staff and Kovacs (the "Settlement Agreement"), and to make certain orders in respect of Kovacs.

## **PART II – JOINT SETTLEMENT RECOMMENDATION**

3. Staff agree to recommend settlement of the proceeding initiated by Notice of Hearing against Kovacs in accordance with the terms and conditions set out below. Kovacs consents to the making of an order against him in the form attached as Schedule “A” on the basis of the facts set out below.

## **PART III – AGREED FACTS**

### **A. Background**

4. Kovacs is the President, CEO and a Director of Harvest Portfolio Group Inc. (“HPG”). He is registered in the following categories with HPG:

- (a) Ultimate Designated Person
- (b) Chief Compliance Officer
- (c) Permitted Individual

5. HPG is the Investment Fund Manager for a number of investment funds including Harvest Canadian Income and Growth Fund (“HCF”).

6. HCF is a reporting issuer in Ontario. Kovacs is a Director and Officer of HPG, the manager and trustee to HCF.

7. From approximately May 31, 2010 to June 20, 2012, HCF was a closed-end investment fund with units listed on the Toronto Stock Exchange (“TSX”). After June 20, 2012, it was converted into an open-ended mutual fund.

8. From approximately May 31, 2010 to November 30, 2011 (the “Relevant Period”), HCF had warrants issued and outstanding for trading on the TSX where each warrant entitled the holder to purchase one HCF unit for \$12.00 per unit. The warrants expired on November 30, 2011.

9. A third party acted as the Portfolio Manager for HCF.

(i) *Normal Course Issuer Bid*

10. In July, 2011, HPG announced that HCF intended to purchase up to 295,762 listed trust units of HCF and 299,007 warrants, which represented approximately 10% of the public float of HCF, for cancellation by way of a normal course issuer bid (the “NCIB”). The purchases pursuant to the NCIB were expected to commence on July 25, 2011 and to terminate on June 29, 2012 or such earlier date if HCF completed its purchases or provided notice of termination. The purpose of the NCIB for the units was to provide HCF with a mechanism to decrease the potential spread between the net asset value per unit and the market value of the trust units and to provide enhanced liquidity for the units. The purpose of the NCIB for the warrants was to provide HCF with a mechanism to decrease the dilution of the HCF’s net asset value per unit upon the exercise of the warrants.

11. HPG had the third party Portfolio Manager set up an account at Dundee Securities Limited (“Dundee”) through which the trades for the NCIB were conducted.

12. After the NCIB account was established at Dundee, HPG took over the responsibility of administering the NCIB directly from the third party Portfolio Manager sometime in 2010. In particular, Kovacs assumed sole responsibility of giving trade instructions to Dundee for the NCIB. He was the only person at HPG who gave trading instructions respecting the NCIB to the traders at Dundee responsible for the account.

(ii) *Kovacs’ Personal Account*

13. During the Relevant Period, Kovacs held a trading account with RBC Direct Investing Inc. (“RBC-DI”). This was an order execution account in which Kovacs entered his own orders on-line which were automatically processed and routed to the TSX.

(iii) *TSX Rules and Policy respecting NCIBs*

14. According to TSX Sec. 629 Special Rules Applicable to NCIB and Policy 5.6, it is inappropriate for an issuer making an NCIB to abnormally influence the market price of its shares. Therefore, purchases made by issuers pursuant to a NCIB must not be transacted at a price which is higher than the last independent trade of a board lot of the class of shares which is

the subject of the NCIB. An independent trade does not include a trade directly or indirectly for the account or under the direction of an insider of the issuer. As a result, HCF could not make purchases through the NCIB at a price which was higher than the last independently established sale price.

**B. Kovacs Trading in RBC-DI and HCF Trading in the NCIB**

15. Between August, 2011 and November, 2011 ('the Analysis Period'), there were repeated occasions when Kovacs entered bids and purchased units of HCF in his RBC-DI account which may have facilitated the NCIB purchases through the execution of two identified scenarios:

Passive Facilitation Scenario:

- (a) Kovacs entered price-improving bids (usually one board lot) which narrowed the spread (particularly when there was no activity in the opening) which facilitated trading in general which was beneficial for the NCIB buying;
- (b) usually, within a short period of time, the NCIB buy orders entered the market and traded at the price level established through Kovacs' passive facilitation.

Active Facilitation

- (a) Kovacs transacted at a price at which the NCIB could buy volume from other offerors. When a sell order with volume entered the market at a price which was higher than the last independent trade of a board lot, Kovacs purchased a board lot from the new offer, thereby setting a new price at which the NCIB could trade but leaving volume;
- (b) Dundee then purchased for the NCIB the remaining order volume at the zero plus price set by Kovacs' trade.

16. Kovacs did not disclose to Dundee his trading of HCF in his personal account at RBC-DI which facilitated the NCIB purchases.

17. Kovacs did not disclose his insider status to RBC-DI. As such, any orders entered for his account were not correctly identified as insider.

18. During the Relevant Time, Kovacs failed to file insider trading reports disclosing his trades as required by the Act.

### **C. Respondent's Position**

#### **(a) Respondent's Conduct Inadvertent**

19. The Respondent states that his facilitation of the NCIB trades was inadvertent. He was unaware of the TSX rules which require NCIB trading to take place at the price of the last independent trade and prohibit an insider's trade from being considered as an independent trade. Kovacs states that the correlation between the NCIB trading and his personal trading was the result of habit and convenience. On many of the days that Kovacs made trades in his personal account, he was travelling outside the office on behalf of the fund. On those occasions, it was convenient for Kovacs and it became his habit to make purchases of a small number of units of HCF and then issue the trade instructions for the NCIB to the traders at Dundee.

20. The Respondent acknowledges that he failed to disclose his insider status to RBC-DI and to file his insider trading reports.

21. As a registrant, Kovacs acknowledges that he acted contrary to the public interest in facilitating the NCIB trading and contrary to Ontario securities law in failing to file his insider trading reports.

#### **(b) Remedial Steps Taken by HPG**

22. Kovacs' conduct in facilitating the NCIB trading was inadvertent and changes were made to prevent similar conduct at HPG. In order to ensure this conduct is not repeated, Kovacs has taken the following remedial steps to rectify any deficiencies in compliance procedures at HPG:

- (i) the HPG Code of Ethics and Employee Handbook has been updated to include specific requirements regarding reporting of trades by insiders;

- (ii) a NCIB policy for HPG has been drafted and shall be implemented; and
- (iii) Kovacs on behalf of HPG has hired a new Chief Compliance Officer who will assume responsibility for compliance responsibilities at HPG and will also be responsible for issuing directions with respect to NCIB trades upon execution of this Settlement Agreement

#### **PART IV - CONDUCT CONTRARY TO ONTARIO SECURITIES LAW AND CONTRARY TO THE PUBLIC INTEREST**

23. By engaging in the conduct described above, Kovacs admits and acknowledges that he acted contrary to the public interest by facilitating the NCIB through trading in his personal account with RBC-DI and that he acted contrary to Ontario securities law by failing to file his insider trading reports in breach of subsection 107(1) of the Act.

#### **PART V - TERMS OF SETTLEMENT**

24. Kovacs agrees to the terms of settlement listed below.
25. The Commission will make an order, pursuant to subsection 127(1), subsection 127(2) and section 127.1 of the Act, that:
- (a) the Settlement Agreement is approved;
  - (b) a term and condition shall be imposed on Kovacs' registration that all of his personal trades be pre-cleared by the Chief Compliance Officer of Harvest Portfolio Group, who shall be a person other than Kovacs, for a period of one year following the date of approval of the Settlement Agreement;
  - (c) for his failure to file insider trading reports contrary to Ontario securities law, Kovacs shall pay an administrative penalty in the amount of \$10,000 to the Commission which amount will be designated for allocation or use by the Commission in accordance with section 3.4(2)(b) of the Act; and
  - (d) Kovacs shall pay the costs of the Commission's investigation in the amount of \$5,000;

## **PART VI - STAFF COMMITMENT**

26. For his conduct contrary to the public interest in facilitating the NCIB trading contrary to the Rules and Policies of the TSX, Kovacs undertakes to make a voluntary payment in the amount of \$15,000 to the Commission which is designated for allocation or use by the Commission in accordance with section 3.4(2)(b) of the Act.

27. Kovacs agrees to make any payments agreed to or ordered above by certified cheque or bank draft payable to the Ontario Securities Commission upon the Commission approving the Settlement Agreement.

28. Kovacs shall satisfy the payments agreed to or ordered above personally and shall not be reimbursed for, or receive a contribution toward, the payments from any other person or company.

29. If this Settlement Agreement is approved by the Commission, Staff will not initiate any other proceeding under the Act against Kovacs in relation to the facts set out in Part III herein, subject to the provisions of paragraph 30 below.

30. If this Settlement Agreement is approved by the Commission, and at any subsequent time Kovacs fails to honour the terms of the Settlement Agreement, Staff reserve the right to bring proceedings under Ontario securities law against Kovacs based on, but not limited to, the facts set out in Part III herein as well as the breach of the Settlement Agreement.

## **PART VII - PROCEDURE FOR APPROVAL OF SETTLEMENT**

31. Approval of this Settlement Agreement will be sought at a hearing of the Commission scheduled on a date to be determined by the Secretary to the Commission, or such other date as may be agreed to by Staff and Kovacs for the scheduling of the hearing to consider the Settlement Agreement.

32. Staff and Kovacs agree that this Settlement Agreement will constitute the entirety of the agreed facts to be submitted at the settlement hearing regarding their conduct, unless the parties agree that further facts should be submitted at the settlement hearing.

33. If this Settlement Agreement is approved by the Commission, Kovacs agrees to waive all rights to a full hearing, judicial review or appeal of this matter under the Act.

34. If this Settlement Agreement is approved by the Commission, none of the parties shall make any public statement that is inconsistent with this Settlement Agreement or inconsistent with any additional agreed facts submitted at the settlement hearing.

35. Whether or not this Settlement Agreement is approved by the Commission, Kovacs agrees that he will not, in any proceeding, refer to or rely upon this Settlement Agreement or the settlement negotiations as the basis of any attack on the Commission's jurisdiction, alleged bias or appearance of bias, alleged unfairness or any other remedies or challenges that may otherwise be available.

#### **PART VIII – DISCLOSURE OF SETTLEMENT AGREEMENT**

36. If, for any reason whatsoever, this Settlement Agreement is not approved by the Commission or the order attached as Schedule "A" is not made by the Commission:

- (a) this Settlement Agreement and its terms, including all settlement negotiations between Staff and Kovacs leading up to its presentation at the settlement hearing, shall be without prejudice to Staff and Kovacs; and
- (b) Staff and Kovacs shall be entitled to all available proceedings, remedies and challenges, including proceeding to a hearing on the merits of the allegations in the Notice of Hearing and Statement of Allegations of Staff, unaffected by the Settlement Agreement or the settlement discussions/negotiations.

37. The terms of this Settlement Agreement will be treated as confidential by all parties hereto until approved by the Commission. Any obligations of confidentiality shall terminate upon approval of this Settlement Agreement by the Commission. The terms of the Settlement Agreement will be treated as confidential forever if the Settlement Agreement is not approved for any reason whatsoever by the Commission, except with the written consent of Staff and Kovacs or as may be required by law.

**PART IX - EXECUTION OF SETTLEMENT AGREEMENT**

38. This Settlement Agreement may be signed on one or more counterparts which together will constitute a binding agreement.

39. A facsimile copy of any signature will be as effective as an original signature.

Signed in the presence of:

*“Mary Medeiros”*

*“Michael Kovacs”*

\_\_\_\_\_  
Witness

\_\_\_\_\_  
Michael Kovacs

Dated this “16<sup>th</sup>” day of September, 2013

STAFF OF THE ONTARIO SECURITIES COMMISSION

*“Tom Atkinson”*

\_\_\_\_\_  
Tom Atkinson  
Director, Enforcement Branch

Dated this “16<sup>th</sup>” day of September, 2013.



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**Schedule "A"**

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

**- and -**

**IN THE MATTER OF LOUIS MICHAEL KOVACS**

**ORDER  
(Subsections 127(1) and 127(2) and Section 127.1)**

**WHEREAS** on September 16, 2013, the Ontario Securities Commission (the "Commission") issued a Notice of Hearing pursuant to sections 127 and 127.1 (the "Notice of Hearing") of the *Securities Act*, R.S.O. 1990, c. S.5, as amended (the "Act") and Staff of the Commission ("Staff") filed a statement of allegation dated September 16, 2013 (the "Statement of Allegations") in respect of Louis Michael Kovacs ("Kovacs");

**AND WHEREAS** Kovacs entered into a Settlement Agreement with Staff dated September 16, 2013 (the "Settlement Agreement") in which Kovacs and Staff agreed to a proposed settlement of the proceeding commenced by the Notice of Hearing, subject to the approval of the Commission;

**AND WHEREAS** the Commission has reviewed the Notice of Hearing, the Statement of Allegations and the Settlement Agreement and has heard submissions from Staff and counsel for Kovacs;

**AND WHEREAS** Kovacs has entered into an undertaking as part of the Settlement Agreement whereby he shall make a voluntary payment to the Commission in the amount of \$15,000, which will be designated for allocation or for use by the Commission in accordance with subsection 3.4(2)(b) of the Act;

**AND WHEREAS** Kovacs has provided to Staff certified cheques in full payment of all monetary amounts provided and described in this Order including the above-described voluntary payments;

**AND WHEREAS** the Commission is of the opinion that it is in the public interest to make this Order;

**IT IS HEREBY ORDERED THAT:**

- (a) the Settlement Agreement is approved;
- (b) pursuant to subsection 127(2) of the Act, a term and condition shall be imposed on Kovacs' registration that all of his personal trades be pre-cleared by the Chief Compliance Officer of Harvest Portfolio Group, who shall be a person other than Kovacs, for a period of one year following the date of approval of the Settlement Agreement;
- (c) the voluntary payment of \$15,000 made to the Commission by Kovacs is designated for allocation or use by the Commission in accordance with section 3.4(2)(b) of the Act;
- (d) pursuant to paragraph 9 of subsection 127(1) of the Act, Kovacs shall pay an administrative penalty in the amount of \$10,000 to the Commission which is designated for allocation or use by the Commission in accordance with section 3.4(2)(b) of the Act; and

- (e) pursuant to section 127.1 of the Act, Kovacs shall pay the costs of the Commission's investigation in the amount of \$5,000.

**DATED AT TORONTO** this            day of September, 2013.

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Edward Kerwin