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

- AND -

OMEGA SECURITIES INC.

File No.: 2017-64

MOTION

OF OMEGA SECURITIES INC.

(For further and better disclosure
Under Rule 27(1) of the Commission's Rules of Procedure
and section 5.4 of the *Statutory Powers Procedure Act*, RSO 1990, c S.22)

A. ORDER SOUGHT

The Moving Party, Omega Securities Inc. ("**OSI**"), requests with notice that the Ontario Securities Commission make the following order(s):

1. An Order requiring Staff of the Commission to produce all documents or other information in its possession or control created or sent on or after July 28, 2017 in accordance with the standard in *R v Stinchcombe*, [1991] 3 SCR 326 [**Stinchcombe**];
2. An Order requiring Staff to deliver a privilege log identifying the documents producible on the *Stinchcombe* standard that Staff refuses to produce on the basis of privilege, and the type of privilege asserted in respect of each document; and
3. Such further and other relief as counsel may advise and the Commission may deem appropriate.

B. GROUNDS

a. The Temporary Order Application

1. On November 13, 2017, Staff brought an application pursuant to subsections 127(1) and (5) of the *Securities Act*, RSO 1990, c S.5 (the "**Act**"), seeking an order that the registration of OSI be suspended and that trading in any securities by OSI cease for an indefinite period of time on the

basis of alleged "serious and ongoing potential breaches of Ontario securities law being committed by the Respondent."

2. The temporary order application was scheduled to be heard less than four days later, on November 17, 2017.
3. The temporary order application was heard from November 17 through November 21, 2017. On November 23, 2017, the Panel denied Staff's requests for a suspension of OSI's registration and cease-trade order against OSI, but subjected OSI's registration to certain terms and conditions, which were largely proposed by OSI at the hearing.

b. The Enforcement Proceedings

4. On November 16, 2017, Staff also commenced the present enforcement proceedings against OSI by issuing a Statement of Allegations that also sought an indefinite suspension of OSI's registration and cease-trade order against OSI, as well as administrative penalties of up to \$1 million for each failure by OSI to comply with Ontario securities law.
5. The Statement of Allegations has never been amended and continues to allege four distinct deficiencies in OSI's trading platform:
 - i. inaccurate identification of brokers participating in "mid-point peg transactions";
 - ii. time stamp deficiencies;
 - iii. content discrepancies across OSI's data feeds; and
 - iv. dissemination of data to persons or companies prior to TMX IP.
6. The first deficiency was resolved in June 2016. The third and fourth alleged deficiencies were raised by Staff for the first time by letter dated November 8, 2017, only five days before Staff brought the temporary order application.
7. At the First Appearance in this matter on November 29, 2017, the Commission set dates for the Second Appearance, and ordered that Staff disclose to the Respondent all non-privileged documents and things in the possession or control of Staff that are relevant to the hearing by no later than December 29, 2017.
8. The temporary order has been repeatedly extended and the Second Appearance repeatedly adjourned on consent of the parties.

c. Staff's Disclosure Ends Abruptly in July 2017

9. On December 20, 2017, Staff delivered its initial disclosure to the Respondent.
10. The only documents contained in the disclosure set with dates on or after July 28, 2017 were:
 - a. Staff's notes of meetings that occurred well before July 28, 2017, with electronic document creation dates after July 28, 2017;
 - b. Staff's notes from a meeting with Omega on November 13, 2017; and
 - c. emails exchanged between Staff and Omega in December 2017, following the temporary order hearing.
11. On March 28, 2018, OSI advised Staff that it had reviewed the disclosure and identified several notable deficiencies and omissions, including most notably that Staff had not made disclosure of documents created or sent after July 28, 2017, in the critical period leading up to Staff's application for the temporary order.
12. On April 13, 2018, Staff provided a second tranche of disclosure in this matter, which appears to have corrected the deficiencies and omissions with the disclosure identified by OSI, except that it did not include any documents responsive to OSI's request for production of relevant documents created or sent on or after July 28, 2017. Staff responded that all other documents created or sent after July 28, 2017 were subject to privilege.
13. On subsequent requests by OSI for clarification as to the significance of the July 28, 2017 cut-off date for disclosure and for details of Staff's privilege claims, Staff has responded only that the undisclosed documents are subject to either solicitor-client or litigation privilege, and that in any event, many of the documents are internal analysis, commentary, opinion, or discussions by Staff that are not relevant or helpful to a Respondent in making full answer and defence.

d. Staff's Disclosure Obligations

14. In an enforcement proceeding under section 127(1), Staff is required to:
 - a. provide to the Respondent copies of all non-privileged documents in Staff's possession that are relevant to an allegation; and
 - b. identify to the Respondent all other things in Staff's possession that are relevant to an allegation.

15. Staff has the obligation to make broad disclosure of all relevant information to the Respondent on the *Stinchcombe* standard. This low standard of relevance favours disclosure, such that little information will be exempt from Staff's duty to disclose, and Staff must err on the side of inclusion.
16. The withholding of information that is relevant to the Respondent's defence can only be justified on the basis of privilege, including solicitor-client privilege in respect of documents relating to the seeking of legal advice, and litigation privilege in respect of documents created for the dominant purpose of anticipated or actual litigation with the Respondent.
17. Staff's assertion of privilege or irrelevance in respect of all documents created or sent in the three and a half month period leading up to the temporary order application is inconsistent with the urgent basis on which that application was brought in November 2017.
18. It is inconceivable that all documents created in the three and a half months before the temporary order application was brought on three and a half days' notice did not include any fruits of the investigation, and were only communications in respect of legal advice or work product created for the dominant purpose of litigation.
19. In particular, two of the four deficiencies alleged by Staff against the Respondent were raised for the first time on November 8, 2017, five days prior to the temporary order application, and were never raised by Staff with the Respondent in the course of the investigation prior to July 28, 2017, nor are they addressed in any of the disclosure provided to date. Disclosure of the fruits of Staff's investigation between July 28, 2017 and November 8, 2017, is critical to the Respondent's ability to make full answer and defence in respect of these allegations.
20. In addition, Staff has not provided any particulars of the documents over which it has claimed privilege. The blanket claim of privilege made by Staff, coupled with the refusal to provide any details to substantiate that privilege claim, raise important concerns regarding Staff's exercise of its discretion to withhold relevant and otherwise producible information on the basis of privilege – both before and after July 28, 2017. Indeed, there are very few documents in Staff's disclosure from the period from May 2017 onwards.
21. Rule 27(1) of the Commission's Rules of Procedure.
22. Section 5.4 of the *Statutory Powers Procedure Act*, RSO 1990, c S.22.
23. Such further and other grounds as counsel may advise and the Commission may permit.

C. EVIDENCE

The Moving Party intends to rely on the following evidence for the motion:

1. Affidavit of Sean Debotte, sworn November 16, 2017.
2. Affidavit of Doris Loo, sworn July 20, 2018.
3. The two disclosure packages provided by Staff on December 20, 2017 and April 13, 2018, which may be made available to the Commission if necessary in a form to be addressed.
4. Such other material as counsel may advise.

DATED this 20th day of July, 2018.

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