

**IN THE MATTER OF
THE UNIVERSAL MARKET INTEGRITY RULES**

AND

**IN THE MATTER OF
DAVID BERRY**

NOTICE OF MOTION

(RS Lack of Jurisdiction)

THE RESPONDENT will make a motion to a Hearing Panel at the offices of Market Regulation Services Inc. ("RS") on a date or time to be determined or as soon after as the motion can be heard.

THE MOTION IS FOR:

- a) An order permanently staying the disciplinary proceedings against the respondent, David Berry, for want of jurisdiction; and
- b) Such further and other relief as counsel may advise and this Hearing Panel may deem just.

THE GROUNDS FOR THE MOTION ARE:

- a) On February 20, 2007, RS issued a Notice of Hearing and Statement of Allegations against David Berry alleging breaches of the Universal Market Integrity Rules ("UMIR") and in the alternative, breaches of certain TSX Rules.

- b) If proven true, the allegations, among other things, threaten Berry's very livelihood, may result in the imposition of significant fines, including a fine of up to \$1,000,000, and will irreparably and detrimentally affect Berry's professional reputation.
- c) RS has no jurisdiction to commence proceedings against David Berry.
- d) As at February 20, 2007, Berry was neither a "Participant" as defined in UMIR 1.1, nor an employee of a Participant. In addition, as at February 20, 2007, Berry was not a "Participating organization", an "Approved Person" or a member of the TSX.
- e) UMIR is invalid and cannot be enforced by RS for the following reasons:
 - i) At no time did RS validly enact UMIR in compliance with section 11.1 of RS' corporate By-Law No. 1;
 - ii) At no time did the TSX validly adopt UMIR by resolution or other act of the TSX board; and
 - iii) Even if such adoption did occur by the TSX, it contravened a Memorandum of Understanding between the Ontario Securities Commission and the TSX dated October 23, 1997 (entitled the "Protocol for Commission Oversight of the Toronto Stock Exchange Rules").
- f) In the alternative, UMIR cannot be enforced against Berry by RS as:

- i) At no time did the TSX confer upon RS the rule making authority of the TSX Board to permit RS to enact rules to govern or regulate the business conduct of its members;
 - ii) Even if the TSX were found to have sub-delegated its rule making authority to RS, such sub-delegation was *ultra vires* the TSX board; and
 - iii) UMIR 10.3(4) is *ultra vires* RS.
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- g) RS also has no jurisdiction to enforce the TSX rules referred to in the Notice of Hearing and Statement of Allegations against Berry. Those rules have been repealed.
 - h) Such further and other grounds as counsel may advise.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the motion:

- a) Affidavit of Usman M. Sheikh sworn November 13, 2007 and exhibits attached thereto; and
- b) Such further and other documents as counsel may advise and this Hearing Panel may permit.

November 13, 2007

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David Berry

MARKET REGULATION SERVICES INC.

PROCEEDING COMMENCED AT TORONTO

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