Re Cuthbertson

IN THE MATTER OF:

The Dealer Member Rules of the Investment Industry Regulatory Organization of Canada (IIROC)

and

The By-Laws of the Investment Dealers Association of Canada (IDA)

and

Daniel Lindsay Cuthbertson

2012 IIROC 24

Investment Industry Regulatory Organization of Canada
Hearing Panel (Alberta District Council)

Heard: May 1, 2012
Decision: May 2, 2012

Hearing Panel:
D. Brian Foster, Q.C. (Chair), Peter McWilliams, Don Milligan
Appearance:
Tayen Godfrey, Enforcement Counsel for the Investment Industry Regulatory Organization of Canada
John Blair, Q.C., Counsel for the Respondent
Daniel Lindsay Cuthbertson

Decision

I. INTRODUCTION

¶ 1 This Hearing Panel (the "Panel") was appointed to conduct a Settlement Hearing pursuant to Dealer Member Rule 20, Section 20.36. The Settlement Hearing proceeded on May 1, 2012. At the Settlement Hearing the Panel was provided with a settlement agreement executed by the Respondent (the "Settlement Agreement").

¶ 2 At the conclusion of the Hearing and after hearing submissions by IIROC's counsel and counsel for the Respondent and after reviewing the terms of the Settlement Agreement, the Panel accepted the Settlement Agreement.

¶ 3 Below are the reasons for doing so.

II. THE SETTLEMENT AGREEMENT

¶ 4 The Settlement Agreement is annexed to this Decision. It contains:

a) a statement by the Respondent admitting the following contraventions of IIROC Rules, Guidelines, IDA By-laws, Regulations or Policies:

7. The Respondent admits that:

a) Between September and December 2008, he executed seven (7) unauthorized trades, contrary to Dealer Member Rule 29.1;

b) Between September and November of 2008, he parked stocks purchased for a retail client in the firm's average price account and institutional accounts and then misrepresented the true nature of those stock positions to his firm's Chief Compliance Officer ("CCO"), contrary to Dealer Member Rule 29.1;

c) On October 6, 2008, he executed an off-marketplace trade without approval from Regulation Services and above the market price, contrary to Dealer Member Rule 29.1.

b) a statement of the facts agreed to between Staff and the Respondent;

c) the agreement of Staff and the Respondent to the following sanctions:

8. Staff and the Respondent agree to the following terms of settlement:

a) A fine to IIROC in the sum of $35,000;

b) A period of suspension from registration in any category with IIROC for 18 months;

c) Successful completion of the Conduct and Practices Handbook examination; and

d) Upon his re-approval in any registered capacity with IIROC, a six month period of close supervision.

9. The Respondent agrees to pay costs to IIROC in the sum of $5,000.00.

¶ 5 The authority granted pursuant to Rule 20.36 allows this Panel to either accept the Settlement Agreement or reject the Settlement Agreement. When considering whether to accept or reject a Settlement Agreement, a hearing panel should not interfere lightly in a negotiated settlement. As stated in the decision in *Re: Milewski* [1999] I.D.A.C. No. 17:

> A District Council considering a Settlement Agreement will tend not to alter a penalty that it considers to be within a reasonable range, taking into account the settlement process and the fact that the parties have agreed. It will not reject a settlement unless it views the penalty as clearly falling outside a reasonable range of appropriateness.

¶ 6 The *Re: Milewski* decision has been applied in a number of cases, including *Re: Gaudet*, [2010] IIROC No. 29. Further, this Panel accepts the following statement found in *Re: Graydon Elliot Capital Corp.*, [2007] I.D.A.C.D. No. 43:

> The Panel accepts that its role under the By-laws in reviewing a Settlement Agreement is not the same as its role considering a penalty following a hearing on the merits. As has been said in a number of cases, in considering a Settlement Agreement, the Panel should not simply substitute its discretion to that of Staff in negotiating the settlement. The Panel must be cognizant of the importance of the settlement process, and it should not interfere lightly in a negotiated settlement. We acknowledge that the settlement process is one of negotiation and compromise and the penalty imposed may be somewhat different than one imposed following a hearing where similar findings are made and the Panel determines the penalty.

¶ 7 This Panel is of the unanimous view that the public interest concerns of IIROC, and the sanction objectives of general and specific deterrent, will be achieved by the agreed penalties which the Panel finds are within a reasonable range of appropriateness.

III. ANALYSIS

¶ 8 The Panel has reviewed the facts agreed to in the Settlement Agreement, and has heard the submissions of IIROC counsel and of counsel for the Respondent. We were referred to the IIROC Dealer Member Disciplinary Sanction Guidelines, General Principles and the Specific Sanction Guidelines 3.7 (Unauthorized Trading - Dealer Member Rule 29.1) and 5.5 (Misrepresentations - Dealer Member Rule 29.1).

¶ 9 The Panel considered the General Principles set out in the Guidelines, including whether the proposed penalty reflects measures necessary in this specific case to accomplish the goals set out in the General Principles, and the use of sanctions as a general deterrence. Below we set out some of the matters considered in the sanctions as "Key Considerations."

3.1 Harm to Clients, Employer and/or the Securities Market

While the transactions were limited in number and took place over a four month period of time from September to December, 2008, the client losses, as described in paragraph 12 of the Settlement Agreement, were approximately $418,000.00. The Panel was advised that there was no issue with respect to suitability of the investments and the losses did not flow from a lack of suitability. While there was unauthorized trading, it appears that the clients were aware that unauthorized trading could occur in the account, even though this was not a discretionary account. We have no evidence of any negative impact of the misconduct on the client's life resulting from the Respondent's misconduct. There was an impact on the Dealer Member firm in that the Dealer Member firm paid out to the client losses of $418,000.00. A mitigating factor in relation to the client losses is that the Respondent has agreed to pay to the Dealer Member firm $154,041.83 with payments made over time. The Respondent has continued to make timely restitution in accordance with the terms of his agreement with the Dealer Member firm and there is currently approximately $60,000.00 owed in relation to that agreement.

3.2 Blameworthiness

The conduct of the Respondent was intentional. He traded without specific instructions. He parked stocks purchased for a retail client in the firm's average price account and institutional accounts and then misrepresented to the Chief Compliance Officer ("CCO") the true nature of the stock positions. Misrepresentations were made to the CCO on at least three occasions. It is the concealment of the true nature of the trades and the misrepresentations that elevate the seriousness of the allegations and the blameworthiness of the Respondent. Mitigating these aspects is the fact that after IIROC commenced its investigation, there was full cooperation from the Respondent. We were advised by counsel for the Respondent that this situation could be characterized as one that was not a concerted plan but instead was a situation that "spun out of control" and the Respondent has given full cooperation and is very remorseful. Additionally, the Respondent was young at the time of these activities. These are mitigating factors that should be taken into account.

3.4 Enrichment

The Respondent was not enriched from his activities. He has also agreed to a sanction that provides for a significant penalty, a payment of costs and he agreed to pay his Dealer Member firm a significant sum toward compensation for the client losses.

3.5 Prior Disciplinary Record

There is no prior disciplinary history for the Respondent.

3.6 Acceptance of Responsibilities, Acknowledgment of Misconduct and Remorse

As stated above, the Respondent has accepted responsibility for his actions and has agreed to pay significant sums both as a penalty and as compensation for the client losses. The Respondent has as a result of his actions learned a very expensive lesson. To his credit, he has accepted responsibility for his misconduct and has expressed remorse.

3.7 Credit for Cooperation

As stated above, the Respondent has provided full cooperation.

3.8 Voluntary Rehabilitative Efforts

The Respondent is entitled to a mitigating credit for his agreement to make restitution to the clients. The restitution paid by him is not an insignificant sum.

3.10 Planning and Organization

There was a degree of some planning in the misconduct but this was not a complex scheme.

3.14 Significant Economic Loss to the Client and/or Dealer Member Firm

There were significant losses to the client, and the majority of those losses have been absorbed by the Dealer Member firm. While these are aggravating factors, there is also a mitigating factor in that the Respondent has agreed to pay a portion of those losses.

IV. CONCLUSION

¶ 10 The mitigating factors in this case bear repeating. The Respondent was young. He did not devise a plan to take advantage of his clients for his own personal gain. There is no issue of suitability in relation to the trades. He has paid a significant sum to his Dealer Member firm to compensate for the client losses. This has been a difficult and expensive lesson and the Respondent, by taking these mitigating steps, has shown that he appreciates the seriousness of his misconduct and accepts responsibility for his actions.

¶ 11 Having heard the submissions of IIROC counsel and of counsel for the Respondent, and having reviewed the decisions referred to in Appendix "A" to this Decision, and having reviewed the IIROC Sanction Guidelines, this Panel finds that the terms of the Settlement Agreement are consistent with the objectives and considerations set out in Guidelines. The penalties will address the public interest concerns that are to be considered when setting penalties. The penalties also provide a significant general deterrent and a specific deterrent to the Respondent that address prevention of a repetition of the conduct of the type under consideration. The provision of an 18 month period of suspension from registration in any category with IIROC is warranted as is the fine of $35,000.00 and the requirement for successful completion of the Conduct and Practices Handbook examination and a period of close supervision should the Respondent again work in the industry. The penalty provisions of the Settlement Agreement do not fall outside a reasonable range of appropriateness.

DATED at the City of Calgary, in the Province of Alberta, this 2nd day of May, 2012.

Chair - D. Brian Foster, Q.C.

Industry Member - Mr. Peter McWilliams

Industry Member -Mr. Don Milligan

APPENDIX "A" - List of Cases Referred to at the Hearing

A. Shamseer [2007] IIROC, No. 2

B. Symonds [2007] IIROC, No. 17

C. Jannetta [2010] IIROC, No. 23

D. McCrea [2000] IIROC, No. 1

E. Gaudet [2010] IIROC, No. 29

F. Furevick [2007] No. 30

SETTLEMENT AGREEMENT

I. INTRODUCTION

1. IIROC Enforcement Staff and the Respondent, Daniel Cuthbertson (the "Respondent"), consent and agree to the settlement of this matter by way of this settlement agreement ("the Settlement Agreement").

2. The Enforcement Department of IIROC has conducted an investigation ("the Investigation") into the conduct of the Respondent. The Respondent fully cooperated with the Investigation.

3. On June 1, 2008, IIROC consolidated the regulatory and enforcement functions of the Investment Dealers Association of Canada and Market Regulation Services Inc. Pursuant to the Administrative and Regulatory Services Agreement between IDA and IIROC, effective June 1, 2008, the IDA has retained IIROC to provide services for IDA to carry out its regulatory functions.

4. The Respondent consents to be subject to the jurisdiction of IIROC.

5. The Investigation discloses matters for which the Respondent may be disciplined by a hearing panel appointed pursuant to IIROC Transitional Rule No.1, Schedule C.1, Part C ("the Hearing Panel").

II. JOINT SETTLEMENT RECOMMENDATION

6. Staff and the Respondent jointly recommend that the Hearing Panel accept this Settlement Agreement.

7. The Respondent admits that:

   a) Between September and December 2008, he executed seven (7) unauthorized trades, contrary to Dealer Member Rule 29.1;

   b) Between September and November of 2008, he parked stocks purchased for a retail client in the firm's average price account and institutional accounts and then misrepresented the true nature of those stock positions to his firm's Chief Compliance Officer ("CCO"), contrary to Dealer Member Rule 29.1;

   c) On October 6, 2008, he executed an off-marketplace trade without approval from Regulation Services and above the market price, contrary to Dealer Member Rule 29.1.

8. Staff and the Respondent agree to the following terms of settlement:

   a) A fine to IIROC in the sum of $35,000;

   b) A period of suspension from registration in any category with IIROC for 18 months;

   c) Successful completion of the Conduct and Practices Handbook examination; and

   d) Upon his re-approval in any registered capacity with IIROC, a six month period of close supervision.

9. The Respondent agrees to pay costs to IIROC in the sum of $5,000.

III. STATEMENT OF FACTS

(i) Acknowledgment

10. For the purposes of this Settlement Agreement only, Staff and the Respondent agree with the facts set out in this Section III and acknowledge that the terms of the settlement contained in this Settlement Agreement are based upon those specific facts.

(ii) Overview

11. The Respondent began work at J.F. Mackie and Co. Ltd. ("J.F. Mackie") as a trader in 2002, and then as

Registered Representative in 2005. This enforcement action pertains to the Respondent's handling of 3 different accounts held by M.V. and I.V. (the "Clients"). The conduct involves making unauthorized trades, and making an off-marketplace trade above market price. The Respondent was also parking shares in the firm's average price, and institutional accounts in order to conceal the shares he had purchased on behalf of the Clients without having the necessary cash in their accounts. The Respondent had thought that the redemption of other securities in the clients' accounts would generate cash, but he had misunderstood the redemption terms of those securities. The Clients have reached a settlement with J.F. Mackie for losses arising from the Respondent's conduct.

12. The Respondent's actions resulted in a loss to J.F. Mackie of approximately $418,000.00. He acknowledged his misconduct to J.F. Mackie and entered into a settlement agreement dated March 20, 2009 in which he agreed to pay the firm $154,041.83 comprised of a promissory note coupled with payment equivalent to the value of his shares in J.F. Mackie. The Respondent has continued to make timely restitution in accordance with the terms of his agreement with J.F. Mackie and there is currently approximately $60,000.00 owing on the promissory note.

(iii) Registration History

13. At the time of the violations, the Respondent was a Registered Representative ("RR") with J.F. Mackie in Calgary.

14. The Respondent was an RR from July 18, 2002 until his termination from J.F. Mackie on December 18, 2008. He has not worked in the industry since then.

15. The Respondent has no disciplinary history.

(iv) Personal Circumstances

16. At the time of the violations, the Respondent was twenty-six years old.

17. The Respondent is currently employed as a banker by a member firm in a non-registered capacity. For the two years 2009 and 2010 following his termination the Respondent worked in a freelance capacity and earned an income of under $60,000 in each of those years.

18. The Respondent has expressed remorse for his conduct, settled amicably with J.F. Mackie and remains on good terms with the Clients. He did not and never intended to achieve a personal financial gain from the conduct in question.

(v) Unauthorized Trading

19. The Clients are the parents of a high school friend of the Respondent. In 2006, they opened three accounts (the "accounts") with J.F. Mackie. The Respondent was the RR of record for those accounts until he left J.F. Mackie in December of 2008.

20. At the time the accounts were opened, the Clients provided the Respondent with verbal authorization to make discretionary trades on their behalf. However, the Respondent neither obtained that authorization in writing or notified J.F. Mackie.

21. The Clients allowed the Respondent to make discretionary trades on their accounts, but did not authorize him to make any trades that would put their accounts in a debit position, or increase any existing debit position.

22. Between September and December of 2008, the Respondent made seven such trades, as outlined below:

Client Account 1							
Number	**Settlement Date**	**Transaction**	**Description**	**Quantity**	**Price**	**Cost**	**Debit Created**
1	4-Sep-08	Buy	Aeroquest Intl. Ltd.	130,000	$ 1.60	$208,000.00	74,425.00

2	3-Oct-08	Buy	Aeroquest Intl. Ltd.	301,400	$ 1.38	$414,735.98	409,795.00
3	3-Oct-08	Buy	Bonterra Energy Incm. T/U	1,700	$35.00	$ 59,500.00	59,500.00
4	3-Oct-08	Buy	First Majestic Silver Crp.	150,000	$ 3.07	$460,600.00	460,600.00
5	28-Nov-08	Buy	Altai Res. Inc.	100,000	$ 2.02	$202,000.00	49,668.00

Client Account 2							
Number	**Settlement Date**	**Transaction**	**Description**	**Quantity**	**Price**	**Cost**	**Debit Created**
1	5-Dec-08	Buy	Aeroquest Intl. Ltd.	81,600	$ 1.29	$105,559.84	65,810.00

Client Account 3							
Number	**Settlement Date**	**Transaction**	**Description**	**Quantity**	**Price**	**Cost**	**Debit Created**
1	5-Dec-08	Buy	Aeroquest Intl. Ltd.	21,000	$ 1.29	$ 27,240.00	26,911.00

23. The Respondent attempted to conceal the unauthorized trades by parking the various shares in other J.F. Mackie accounts.

(vi) Misrepresentation

24. In September of 2008, the Respondent made approximately $930,175.00 worth of purchases on behalf of the Clients, which exceeded the cash held in their accounts. The Respondent booked these purchases in J.F. Mackie's average price account, and the accounts of several of J.F. Mackie's institutional investors. When J.F. Mackie's CCO questioned the Respondent about these shares, he misled her in order to conceal the fact that he was parking them.

25. By October 2, 2008, the Respondent had transferred 301,400 Aeroquest shares from the Clients' account to J.F. Mackie's average price account. When questioned by J.F. Mackie's CCO via email on October 22 as to why the shares were still in that account, the Respondent untruthfully claimed that they were being held for Client "A" and they would be booked out of the account in the next couple of days.

26. On November 14, 2008, J.F. Mackie's CCO questioned the Respondent about a transaction where he booked 393,000 Aeroquest shares from the average price account to Client "B", and then later cancelled the transaction. The Respondent told the CCO that the shares were booked to the wrong account. This was an untruthful statement intended to mislead the CCO as the shares were purchased on behalf of the Clients and the Respondent was parking them in Client "B" temporarily.

27. On November 18, 2008, JF Mackie's CCO sent the Respondent an email questioning him about Bonterra and First Majestic shares that had been moved into the account of Client "C". The Respondent stated that Client "C" had requested delayed settlement and the Clients' had agreed to take the position.

This was an untruthful statement intended to mislead the CCO since the shares had been purchased on behalf of the Clients.

(vii) Executed Off-Marketplace Trades

28. In May of 2008, the Respondent negotiated the purchase of 100,000 shares of Altai Resources Inc. ("Altai") at $2.02 per share. At that time, the shares were subject to a statutory hold which was to expire on September 6, 2008 and Regulation Services ("RS") approval was required to trade the shares as an off-marketplace transaction.

29. On May 27, 2008, the parties sought and received approval from RS to conduct the trade off-marketplace. However, a number of issues arose that delayed the trade.

30. On September 30, 2008, the parties traded the Altai shares on the same terms negotiated in May. However, the Respondent failed to obtain the necessary approval from RS. On October 6, the Altai shares were purchased for the Clients into the JF Mackie average price account by way of an off-marketplace transaction.

31. The Respondent purchased the shares at $2.02 per share as agreed in May. Although the shares had previously traded at approximately $4.00 when the May, 2008 agreement was negotiated, the shares were trading publicly between $0.36 and $0.47 by the time the trade was completed. This resulted in the Clients paying approximately $155,000.00 to $166,000.00 over the October 2008 market price for the Altai shares.

IV. TERMS OF SETTLEMENT

32. This settlement is agreed upon in accordance with IIROC Dealer Member Rules 20.35 to 20.40, inclusive and Rule 15 of the Dealer Member Rules of Practice and Procedure.

33. The Settlement Agreement is subject to acceptance by the Hearing Panel.

34. The Settlement Agreement shall become effective and binding upon the Respondent and Staff as of the date of its acceptance by the Hearing Panel.

35. The Settlement Agreement will be presented to the Hearing Panel at a hearing ("the Settlement Hearing") for approval. Following the conclusion of the Settlement Hearing, the Hearing Panel may either accept or reject the Settlement Agreement.

36. If the Hearing Panel accepts the Settlement Agreement, the Respondent waives his/her/its right under IIROC rules and any applicable legislation to a disciplinary hearing, review or appeal.

37. If the Hearing Panel rejects the Settlement Agreement, Staff and the Respondent may enter into another settlement agreement; or Staff may proceed to a disciplinary hearing in relation to the matters disclosed in the Investigation.

38. The Settlement Agreement will become available to the public upon its acceptance by the Hearing Panel.

39. Staff and the Respondent agree that if the Hearing Panel accepts the Settlement Agreement, they, or anyone on their behalf, will not make any public statements inconsistent with the Settlement Agreement.

40. Unless as otherwise stated in paragraph 8(b), any suspensions, bars, expulsions, restrictions or other terms of the Settlement Agreement shall commence on the effective date of the Settlement Agreement.

AGREED TO by the Respondent at the City of Calgary, in the Province of Alberta, this 1st day of May, 2012.

"Witness signature"	"Respondent's signature"
WITNESS	**RESPONDENT**

AGREED TO by Staff at the City of Calgary in the Province of Alberta this 1st day of May, 2012.

"Witness"	"Tayen Godfrey"
WITNESS	**TAYEN GODFREY** Enforcement Counsel on behalf of Staff of the Investment Industry Regulatory Organization of Canada

ACCEPTED at the City of Calgary in the Province of Alberta, this 1st day of May, 2012, by the following Hearing Panel:

Per: "Brian Foster"
Panel Chair

Per: "Peter McWilliams"
Panel Member

Per: "Don Milligan"
Panel Member