

## Re Aitchison

IN THE MATTER OF:

**The Rules of the Investment Industry Regulatory Organization of  
Canada**

**and**

**Kenneth Aitchison**

2020 IIROC 23

Investment Industry Regulatory Organization of Canada Hearing Panel  
(Québec District)

Electronic hearing: June 5, 2020 in Montréal, Québec

Decision: June 5, 2020

Reasons for decision: July 13, 2020

### Hearing Panel

Stéphane Rousseau Ad. E., Chair, Normand Durette and Daniel Houle

### Appearances

Fanie Dubuc, Enforcement Counsel

Simon Seida, for Kenneth Aitchison

Kenneth Aitchison

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## DECISION ON SETTLEMENT AGREEMENT

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### BACKGROUND

¶ 1 A Settlement Agreement was entered into between IIROC and the Respondent on April 30, 2020.

¶ 2 In accordance with Rule 8200 and Rule 8400 of IIROC Consolidated Enforcement, Examination and Approval Rules [hereinafter, the Consolidated Rules], the Settlement Agreement was presented to this Hearing Panel at a hearing held on June 5, 2020. Beside counsel for both parties, the Respondent was also present.

¶ 3 Due to the pandemic that was raging at the time, the Hearing Panel conducted an electronic hearing, in this instance a conference call. An electronic hearing is permitted pursuant to Rule 8409 of the Consolidated Rules. The legal counsel for both parties made no objection to holding an electronic hearing.

¶ 4 At the hearing, counsel for both parties jointly recommended acceptance of the Settlement Agreement. The Settlement Agreement, which is appended to this decision and forms an integral part hereof, complies with the provisions of Rule 8215 of the Consolidated Rules.

¶ 5 After hearing the pleadings of the legal counsel for both parties, the Hearing Panel deliberated.

Subsequently, the Hearing Panel handed down its decision to accept the proposed settlement agreement. The Hearing Panel ruled that it would publish its reasons at a later date.

¶ 6 This decision states the grounds for accepting the Settlement Agreement.

## CONTRAVENTION

¶ 7 The parties admit that, between January 2016 and April 2018, the Respondent entered orders on marketplaces in a manner that was not open and fair, nor in accordance with just and equitable principles of trade, contrary to UMIR 2.1 and Policy 2.1 (before September 1, 2016) and Consolidated Rule 1400 (after September 1, 2016).

## SANCTIONS

¶ 8 The settlement agreement proposes the following penalties:

- a) A fine in the amount of \$10,000;
- b) Costs in the amount of \$1,000 payable to IIROC;
- c) A suspension from approval in any capacity for a period of 30 days from the date of acceptance of the Settlement Agreement.

## ROLE OF THE HEARING PANEL

¶ 9 A hearing panel has the authority to accept or reject a settlement agreement. In exercising its authority, the hearing panel has a duty to ensure that the settlement agreement and the proposed penalties fall within a reasonable range of appropriateness.<sup>1</sup>

¶ 10 Thus, in its analysis of the Settlement Agreement, the Hearing Panel intends to follow the principle stated in *Re Maurice* and *Re M Partners and Isenberg*, submitted by counsel for IIROC, according to which a hearing panel will not reject a settlement unless it views the penalty as clearly falling outside a reasonable range of appropriateness.<sup>2</sup> In this regard, the Hearing Panel endorses the observations formulated in *M Partners and Isenberg* regarding the threshold of seriousness that must be met in order to reject a settlement agreement: "A joint submission, in the regulatory context, would be rejected only where the proposal, if accepted, would lead to the conclusion that the regulatory scheme had broken down or was otherwise not in the public interest."<sup>3</sup>

¶ 11 To assess whether the settlement and penalties fall within a reasonable range of appropriateness, the hearing panel takes into account the nature and seriousness of the contravention, as well as the circumstances. It also considers the principles and key factors stated in the IIROC Sanction Guidelines [hereinafter the Guidelines]. Finally, it examines the penalties imposed in decisions rendered in similar cases.

¶ 12 Before proceeding with the analysis of the proposed penalty in light of these criteria, the Hearing Panel presents a summary of the facts on which the parties have agreed and which are set out in the Settlement Agreement.

## FACTS

¶ 13 The Respondent has been a trader since 1973 and has been registered in this capacity with Leede Jones Gables Inc. (Leede) since January 2013.

¶ 14 Between January 2016 and June 2018, the Respondent entered fifty-three (53) irregular buy orders for twenty-eight (28) securities in pre-open, namely between 7 AM and 9:30 AM. The orders were entered on

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<sup>1</sup> *Re Maurice*, 2019 IIROC 20, par. 13, citing *Re Milewski*, [1999] I.D.A.C.D. No. 17.

<sup>2</sup> *M Partners and Isenberg*, 2018 IIROC 25; *Re Maurice*, 2019 IIROC 20.

<sup>3</sup> *M Partners and Isenberg*, 2018 IIROC 25, par. 23 citing *Re Jacob*, 2017 IIROC 17.

markets that allow participants to execute live trades in pre-open: the Canadian Securities Exchange (CSE), Omega ATS (OMG), TSX Alpha (ALF) and Lynx ATS (LYX).

¶ 15 The Respondent admitted that, between January 2016 and June 2018, he regularly checked for securities that were announcing a reverse split. The Respondent conducted this market watch by consulting public news sources, such as Newswire or Reuters.

¶ 16 Specifically, the Respondent's trading strategy consisted in targeting securities which had undergone a reverse split the previous day at market close and then entering bids for these securities in the pre-open, at a price substantially below the new implied price resulting from the reverse split.

¶ 17 Thus, on fifty-three (53) occasions, between January 2016 and June 2018, the Respondent deliberately positioned himself at a bid price that he knew was well below the new implied price of the securities that had undergone a reverse split in an attempt to lead other participants to sell the stock at a price well below its market value. However, no order placed by the Respondent using this trading strategy was ever executed during this period.

¶ 18 The Respondent's trading strategy resulted in warnings from Leede and IIROC Staff on three (3) occasions.

¶ 19 On April 22, 2016, while pursuing this trading strategy, the Respondent entered and changed orders for the Pinetree Capital Ltd. (PNP) security eight (8) times in pre-open. On this occasion, the Leede Compliance Department warned the Respondent verbally to cease the type of activity that he had engaged in earlier that same day in the PNP security. The same day, the Respondent sent to the head of the Leede Compliance Department an email in which he confirmed that he had been warned against entering orders at a price well below the security's market value.

¶ 20 On June 27, 2017, while still pursuing the same trading strategy, the Respondent entered an order for the Caledonia Mining Inc. (CAL) security in pre-open. That same day, the Respondent received a verbal warning from the IIROC Market Surveillance Department concerning his activities executed in the CAL security. On February 14, 2018, the IIROC Enforcement Department issued a letter informing the Respondent of the initiation of a disciplinary investigation into his trading activities.

¶ 21 Finally, on April 20, 2018, the Respondent, while pursuing his trading strategy, entered orders for the Jackpot Digital Inc. (JP) security three (3) times in pre-open. Thus, he positioned himself advantageously on the market with a bid price that was substantially below the new implied price of JP following the reverse split at the close of the previous trading day. The first of the three (3) buy orders, which was traded in pre-open at a price representing 21.67% of the implicit new price, was cancelled in pre-open by the IIROC Market Surveillance Department. IIROC Staff then contacted the Leede Compliance Department.

¶ 22 In the wake of this event, on April 30, 2018, the Leede Compliance Department sent the Respondent a compliance memo that formally warned the Respondent to cease this type of activity, which was to position himself advantageously on the market with a bid price that was substantially below the expected value of the security which had undergone a reverse split the day before. Furthermore, failure to comply with this warning could lead to disciplinary measures and even jeopardize the Respondent's continued employment with Leede. The Respondent signed the memo on May 1, 2018.

## **ANALYSIS**

¶ 23 The Sanction Guidelines are intended to "promote consistency, fairness and transparency by providing a framework to guide the exercise of discretion in determining sanctions which meet the general sanctioning objectives."<sup>4</sup> Notably, the Sanction Guidelines are intended to assist hearing panels in the fair and efficient

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<sup>4</sup> *Sanction Guidelines*, February 2, 2015, p. 2.

determination of appropriate sanctions. However, it should be kept in mind that the Guidelines are not binding upon a hearing panel.

¶ 24 The Sanction Guidelines are divided into two parts. Part I states the Principles for determining sanctions (the Principles). Part II identifies the Key Factors in determining sanctions. The hearing panel intends to refer to these Principles, Key Factors, as well as the case law in the exercise of its discretionary power.

¶ 25 In the matter before us, counsel for IIROC invited the Hearing Panel to consider the facts in the matter in light of the Principles of the Sanction Guidelines in its analysis of the appropriateness of the penalty. In view of the submissions of counsel for IIROC, as well as those of the Respondent's counsel, the Hearing Panel makes the following observations.

¶ 26 One, disciplinary sanctions are preventative in nature. Their purpose is to protect the investing public, strengthen market integrity, and improve overall business standards and practices. From this perspective, sanctions must strive for both specific deterrence and general deterrence. In short, sanctions must prevent and discourage future misconduct by the respondent, as well as deter others from engaging in similar misconduct.

¶ 27 Two, disciplinary sanctions should be more severe for respondents with prior disciplinary records. In this matter, the Respondent, who has been registered since 1973, has no disciplinary record.

¶ 28 Three, the Principles state that for multiple violations, the total or cumulative sanctions should appropriately reflect the totality of the misconduct. In this matter, the Hearing Panel finds that the Respondent resorted to the trading strategy described above on fifty-three (53) occasions between January 2016 and June 2018. Furthermore, he continued to use this trading strategy despite warnings from the Leede Compliance Department and IIROC Staff.

¶ 29 Four, the Hearing Panel notes that the Principles mention that sanctions should ensure that a respondent does not financially benefit as a result of the misconduct. In the matter before us, the facts presented by the parties show that, while the Respondent sought to financially benefit with the trading strategy, he derived no such benefit since none of the orders were executed.

¶ 30 Five, a suspension should be considered where there has been one or more serious contraventions, a pattern of misconduct or fraudulent, willful and/or reckless misconduct. A suspension is also relevant, according to the Principles, when the misconduct in question has caused some measure of harm to investors, the integrity of a marketplace or the securities industry as a whole.

¶ 31 In this matter, we are dealing with a pattern of misconduct, which took the form of repeated contraventions of the fundamental tenets of fairness established by the UMIR (now Rule 1400 of the Consolidated Rules). The contraventions occurred over a period of two and a half years, warnings notwithstanding. We find, however, that the misconduct is not fraudulent, given that the Respondent was entering bona fide orders. Similarly, no investor or market participant was harmed, since the orders were not executed.

¶ 32 Counsel for IIROC also referred us to the case law, to enlighten us regarding the guidelines relating to the reasonable range of appropriateness of the penalty proposed in this Settlement Agreement.<sup>5</sup>

¶ 33 Regarding the fines, the decisions submitted concern manipulative and deceptive activities, more specifically orders that could reasonably be expected to create a false or misleading appearance of trading activity through strategies involving order layering or spoofing. According to the case law, the fines imposed were \$10,000 and, in one decision, \$5,000. In the latter case, the lower fine was explained by the fact that the respondent's actions were not as serious. With regard to the one-month suspension provided in the proposed

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<sup>5</sup> *Re Vermette*, 2018 IIROC 43; *Re Waddington*, 2017 IIROC 39; *Re Sole*, 2016 IIROC 30; *Re Li*, 2015 IIROC 26.

settlement agreement, the Hearing Panel notes that it agrees with most of the decisions submitted by counsel for IIROC. As regards costs, a sum of \$1,000 was imposed in the majority of the decisions submitted.

¶ 34 In light of the foregoing, given the Respondent's cooperation, which both counsel emphasized, the Hearing Panel is of the opinion that the penalty consisting of a \$10,000 fine, together with costs in the amount of \$1,000, fall within the reasonable range of appropriateness given the circumstances of the matter.

## **CONCLUSION**

¶ 35 In conclusion, the Hearing Panel is of the opinion that the Settlement Agreement and the penalty imposed fall within a reasonable range of appropriateness given the circumstances of the matter.

¶ 36 For these reasons, and as was ruled at the hearing, the Hearing Panel accepts and endorses the Settlement Agreement appended to this decision.

Dated at Montréal (Québec) this 13<sup>th</sup> day of July, 2020.

Stéphane Rousseau

Normand Durette

Daniel Houle

## **SETTLEMENT AGREEMENT**

### **PART I – INTRODUCTION**

1. The Investment Industry Regulatory Organization of Canada ("IIROC") will issue a Notice of Application to announce that it will hold a settlement hearing to consider whether, pursuant to Section 8215 of the Consolidated Enforcement, Examination and Approval Rules of IIROC, a hearing panel ("Hearing Panel") should accept the settlement agreement ("Settlement Agreement") entered into between the staff of IIROC ("Staff") and Kenneth Aitchison ("Respondent").

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

2. Staff and the Respondent jointly recommend that the Hearing Panel accept this Settlement Agreement in accordance with the terms and conditions set out below.

### **PART III – AGREED FACTS**

3. For the purposes of this Settlement Agreement, the Respondent agrees with the facts as set out in Part III of this Settlement Agreement.

### **Registration History**

4. The Respondent has been a trader since 1973 and has been registered in this capacity with Leede Jones Gables Inc. (Leede) since January 2013.

### **Background**

5. Between January 2016 and June 2018, the Respondent entered fifty-three (53) improper bids in twenty-eight (28) securities during the pre-open between 7:00 a.m. and 9:30 a.m.
6. The Respondent entered these orders on marketplaces that allow participants to execute live trades during the pre-open: Canadian Securities Exchange (CSE), Omega ATS (OMG), TSX Alpha (ALF) and Lynx ATS (LYX).
7. The Respondent admitted that between January 2016 and June 2018, he routinely looked for securities announcing a reverse split (stock consolidation). According to the Respondent, he conducted this review

by consulting public news sources, such as *NewsWire* or *Reuters*.

8. The reverse split is a process that aims to reduce the number of shares in a given security that may be outstanding on the marketplaces, in order to improve the security's market price.
9. The Respondent's trading strategy consisted in targeting securities which had undergone a reverse split the previous day at market close and then entering bids for these securities in the pre-open, at a price substantially below the new implied price resulting from the reverse split.
10. On fifty-three (53) occasions, between January 2016 and June 2018, the Respondent deliberately positioned himself at a bid price that he knew was well below the new implied price of the securities that had undergone a reverse split in an attempt to lead others participants to sell the stock at a price well below its market value. The Respondent failed to transact business openly and fairly and in accordance with just and equitable principles of trade when trading on a marketplace.
11. The Respondent was an experienced trader and knew or ought to have known that entering bid prices well below the new implied price and thus attempting to trade at unreasonable prices was improper.

### **The Warnings issued to the Respondent concerning his trading strategy**

#### **July 22, 2016: Pinetree Capital Ltd. (PNP)**

12. On July 21, 2016, Pinetree Capital Ltd. (PNP) closed at a price of \$0.035.
13. Following the market close, PNP underwent a hundred (100) to one (1) reverse split.
14. As result, the new implied price was \$3.50.
15. On July 22, 2016, the Respondent entered and amended orders eight (8) times during the pre-open for PNP.
16. The orders were entered on CSE, OMG and ALF, marketplaces that allow participants to execute live market trades in the pre-open.
17. Six (6) of the Respondent's eight (8) orders became the best bid price for PNP.
18. The Respondent positioned himself advantageously on the market with a bid price that was substantially below the new implied price of PNP following the reverse split at the close of the previous trading day.
19. The Respondent's orders ranged from \$0.10 to \$0.60, representing between 2.86% and 17.14% of the security's new implied price after the reverse split.
20. On the morning of July 22, 2016, the Respondent received a verbal warning from the Leede Compliance Department to cease the type of trading activity he engaged in that morning in PNP.
21. Following this warning, that same day, the Respondent sent an email to the head of the Leede Compliance Department, in which he confirmed having been warned for placing orders well below market.

#### **June 27, 2017: Caledonia Mining Inc. (CAL)**

22. On June 26, 2017, Caledonia Mining Inc. (CAL) closed at a price of \$1.65.
23. Following the market close, CAL underwent a five (5) to one (1) reverse split.
24. As result, the new implied price was \$8.25.
25. On June 27, 2017, the Respondent entered an order in the pre-open for CAL.
26. The order was entered on OMG, a marketplace that allows participants to execute live market trades in the pre-open.

27. he Respondent's order became the best bid price at \$2.25.
28. The order placed by the Respondent for CAL at \$2.25 represented 27.27% of the new implied price after the reverse split.
29. The Respondent positioned himself advantageously on the market with a bid price that was substantially below the new implied price of CAL following the reverse split at the close of the previous trading day.
30. On June 27, 2017, the Respondent received a verbal warning from IIROC's Market Surveillance Department concerning his order entry in CAL earlier that morning.
31. On February 14, 2018, IIROC's Enforcement Department issued a letter informing the Respondent of the initiation of an enforcement investigation concerning his trading activities.

**April 20, 2018: Jackpot Digital Inc. (JP)**

32. On April 19, 2018, Jackpot Digital Inc. (JP) closed at a price of \$0.03.
33. Following the market close, JP underwent a ten (10) to one (1) reverse split.
34. As result, the new implied price would be \$0.30.
35. On April 20, 2018, the Respondent entered orders for JP three (3) times in the pre-open.
36. The orders were placed on OMG, a marketplace that allows participants to execute live market trades in the pre-open.
37. The three (3) orders placed by the Respondent ranged from \$0.065 to \$0.12 and allowed him to position himself with the best bid price.
38. The orders entered by the Respondent for JP represented between 21.67% and 40% of the new implied price of the security after the reverse split.
39. The first bid traded in the pre-open at a price representing 21.67% of the new implied price.
40. That trade was canceled in pre-open by IIROC's Market Surveillance Department.
41. The Respondent positioned himself advantageously on the market with a bid price that was substantially below the new implied price of JP following the reverse split at the close of the previous trading day.
42. On April 30, 2018, Leede sent the Respondent a document entitled "Compliance Memo" which stated the following facts:
  - I. On April 20, 2018, IIROC's Market Surveillance Department communicated with the Leede Compliance Department concerning the activities executed that same day by the Respondent in pre-open for the Jackpot Digital Inc. (JP) security.
  - II. On April 20, 2018, following the placement of orders for the Jackpot Digital Inc. (JP) security, the Respondent was formally warned by Leede to cease this type of activity, which was to position himself advantageously on the market with a bid price that was substantially below the expected value of the security which had undergone a reverse split the day before.
  - III. Consequently, failure to comply with this warning could result in disciplinary measures and even be prejudicial to his continued employment with Leede.
43. The Memo was signed by the Respondent on May 1<sup>st</sup>, 2018.

**CONCLUSION**

44. The Respondent was an experience trader and ought to have known that entering bid prices well below the new implied price and thus attempting to trade at unreasonable prices was improper.

45. The Respondent was required to transact business openly and fairly and in accordance with just and equitable principles of trade when trading on a marketplace.
46. The Respondent's failure to comply with UMIR 2.1. and Consolidated Rule 1400 and was harmful to market integrity and the reputation of the marketplaces.

#### **PART IV – CONTRAVENTIONS**

47. By engaging in the conduct described above, the Respondent committed the following contraventions of IIROC's Rules:

Between January 2016 and April 2018, the Respondent entered orders on marketplaces, in a manner that was not open and fair nor in accordance with just and equitable principles of trade, contrary to UMIR 2.1 and Policy 2.1 (pre-September 1<sup>st</sup>, 2016) and Consolidated Rule 1400 (after September 1<sup>st</sup>, 2016).

#### **PART V – TERMS OF SETTLEMENT**

48. The Respondent agrees to the following sanctions and costs:
  - a) A fine of \$10,000;
  - b) Costs in the amount of \$1,000 to be paid to IIROC;
  - c) A suspension from approval in any capacity for a period of 30 days from the date of acceptance of the Settlement Agreement.
49. If this Settlement Agreement is accepted by the Hearing Panel, the Respondent agrees to pay the amounts referred to above, a total sum of \$11,000, within 30 days of such acceptance unless otherwise agreed between Staff and the Respondent.

#### **PART VI – STAFF COMMITMENT**

50. If the Hearing Panel accepts this Settlement Agreement, Staff will not initiate any further action against the Respondent in relation to the facts set out in Part III and the contraventions in Part IV of this Settlement Agreement, subject to the provisions of the paragraph below.
51. If the Hearing Panel accepts this Settlement Agreement and the Respondent fails to comply with any of the terms of the Settlement Agreement, Staff may bring proceedings under Rule 8200 against the Respondent. These proceedings may be based on, but are not limited to, the facts set out Part III of this Settlement Agreement.

#### **PART VII – PROCEDURE FOR ACCEPTANCE OF SETTLEMENT**

52. This Settlement Agreement is conditional on acceptance by the Hearing Panel.
53. This Settlement Agreement shall be presented to a Hearing Panel at a settlement hearing in accordance with the procedures described in Sections 8215 and 8428, in addition to any other procedures that may be agreed upon between the parties.
54. Staff and the Respondent agree that this Settlement Agreement will form all of the agreed facts that will be submitted at the settlement hearing, unless the parties agree that additional facts should be submitted at the settlement hearing. If the Respondent does not appear at the settlement hearing, Staff may disclose additional relevant facts, if requested by the Hearing Panel.
55. If the Hearing Panel accepts the Settlement Agreement, the Respondent agrees to waive all rights under the IIROC Rules and any applicable legislation to any further hearing, appeal and review.
56. 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 based on the same or related

allegations.

57. The terms of this Settlement Agreement are confidential unless and until this Settlement Agreement has been accepted by the Hearing Panel.
58. The Settlement Agreement will become available to the public upon its acceptance by the Hearing Panel and IIROC will post a full of copy of this Settlement Agreement on the IIROC website. IIROC will also publish a summary of the facts, contraventions, and the sanctions agreed upon in this Settlement Agreement.
59. If this Settlement Agreement is accepted, the Respondent agrees that neither he nor anyone on his behalf, will make a public statement inconsistent with this Settlement Agreement.
60. The Settlement Agreement is effective and binding upon the Respondent and Staff as of the date of its acceptance by the Hearing Panel.

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

61. This Settlement Agreement may be signed in one or more counterparts which together will constitute a binding agreement.
62. A fax or electronic copy of any signature will be treated as an original signature.

SIGNED on April 28, 2020.

(S) Kenneth Aitchison

**KENNETH AITCHISON**

Respondent

SIGNED on April 30, 2020.

(S) Fanie Dubuc

**FANIE DUBUC**

Senior Enforcement Counsel on behalf  
of Enforcement Staff of the IIROC

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