

Re Durno

IN THE MATTER OF:

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

and

David Durno

2018 IIROC 32

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

Heard: July 30, 2018
Decision: July 30, 2018
Reasons: August 30, 2018

Hearing Panel:

The Honourable Robert P. Armstrong, Q.C., Chair, Mr. Daniel Iggers and Mr. Peter Gribbin

Appearances:

Elissa Sinha, Senior Enforcement Counsel for IIROC

Melissa MacKewn, Counsel for the Respondent

Mr. Durno, in person

REASONS FOR DECISION

I. INTRODUCTION

¶ 1 A hearing was held in Toronto on July 30, 2018 to determine whether the Hearing Panel was prepared to accept the terms of a settlement pursuant to a Settlement Agreement between the Investment Industry Regulatory Organization of Canada (“IIROC”) and David Durno (the “Respondent”).

¶ 2 The Respondent was a registered representative of TD Waterhouse Canada Inc. (“TDW”) from 1997 to 2016. His employment was terminated by TDW allegedly for cause. He is now employed by another IIROC dealer firm.

¶ 3 The Respondent is alleged to have violated IIROC Rules 29.1 and 42.2 by failing to adequately consider and address the best interests of two clients, SS and MH.

¶ 4 Rule 29.1 provides in part:

Dealer Members and each partner, Director, Officer, Supervisor, Registered Representative, Investment Representative and employee of a Dealer Member (i) shall observe high standards of ethics and conduct in the transaction of their business, (ii) shall not engage in any business conduct or practice which is unbecoming or detrimental to the public interest, and (iii) shall be of such character and business repute and have such experience and training as is consistent with the standards described in clauses (i) and (ii) or as may be prescribed by the Board.

¶ 5 Rule 42, which came into force after March 26, 2012, provides:

Approved Person responsibility to address conflicts of interest.

(1) The Approved Person must consider the implications of any existing or potential material conflicts of interest between the Approved Person and the client.

(2) The Approved Person must address all existing or potential material conflicts of interest between the Approved Person and the client in a fair, equitable and transparent manner, and consistent with the best interests of the client or clients.

(3) Any existing or potential material conflict of interest between the Approved Person and the client that cannot be addressed in a fair, equitable and transparent manner, and consistent with the best interests of the client or clients, must be avoided.

II. THE FACTS

¶ 6 The facts are set out in paragraphs 4 through 21 of the Settlement Agreement as follows:

Overview

4. Between 2010 and 2015, the Respondent maintained accounts for SS and MH. The Respondent recommended and implemented active trading in new issue securities and government bonds for SS and MH.

5. SS and MH were in accounts where they paid a commission on every trade. The Respondent's trading for SS and MH generated large commissions for the Respondent and TDW which reduced the profits realized by SS and MH.

6. In recommending the trading described herein, the Respondent did not adequately consider and address the best interests of SS and MH.

The Respondent

7. The Respondent, David Gary Durno, was a Registered Representative with TDW from 1997 to 2016 when his employment was terminated allegedly for cause. The Respondent is currently registered as an investment advisor with another IIROC Dealer Member firm.

SS

8. SS was born in 1922. As of 2010, SS's Know-Your-Client ("KYC") information reflected that she had average investment knowledge, was retired, had a total net worth of \$2.3 million (\$2 million was liquid) and an annual income of \$75,000.

9. In 2010, SS's stated risk tolerance for her primary account was 30% low risk, 60% medium risk, and 10% high risk. Her investment objectives were 50% income and 50% long-term capital gains. KYC updates in 2011 and 2012 reflect a changed risk tolerance to 40% low, 40% medium and 20% high.

10. The trading was active with the turnover rate in three of the five years exceeding two times. SS did not document an interest in short-term trading. However, the Respondent obtained SS's authorization prior to effecting all trades. SS received trade confirmations for all trades and account statements.

11. Between 2010 and 2015, SS's cash account with the Respondent had an average annual balance of approximately \$2 million and generated net profits of approximately \$24,968.

12. Overall, between 2010 and 2015, the Respondent's trading for SS generated commissions for TDW and himself of \$471,643, \$258,643 of which were paid by SS and the balance by issuers. TDW received approximately half of these commissions.

13. During this period, most of the securities traded in SS's accounts were government bonds and

medium risk new issue securities. The risk profile of the securities in SS's account were consistent with her stated risk tolerance.

14. In or about October 2015, SS submitted a complaint to TDW. Until receipt of this complaint, TDW had not raised any concerns with the Respondent regarding the trading in the SS accounts (or any other accounts) or the manner or amount of commissions charged in respect of that trading.

15. Following an internal investigation, TDW compensated SS for the difference between the commissions she paid and the fees she would have paid in a fee-based account. The Respondent contributed to the compensation paid to SS.

MH

16. MH was born in 1921. As of 2010, MH's KYC information reflected that she had average investment knowledge, was retired, had a total net worth greater than \$1 million and an annual income of \$25,000-\$50,000. A 2012 update reflected a total net worth of \$1,460,000 (\$560,000 liquid), annual income of \$40,000, and a reduction in investment knowledge from "average" to "none."

17. In 2010, MH's risk tolerance was "low." In 2012, MH's risk tolerance was updated to 80% medium, 20% high. Her investment objectives were 50% income and 50% long-term capital gains.

18. The trading was active with the turnover rate in three of the five years exceeding two times. MH did not document an interest in short-term trading. However, the Respondent obtained MH's authorization prior to effecting all trades. MH received trade confirmations for all trades and account statements.

19. Between 2010 and 2015, MH's account with the Respondent had an annual average balance ranging from \$494,522 to \$611,250 and generated net profits of approximately \$48,330.

20. Overall, between 2010 and 2015, the Respondent's trading for MH generated commissions for TDW and himself of \$162,284, \$126,946 of which was paid by MH and the balance by issuers. TDW received approximately half of these commissions.

21. During this period, most of the securities traded in MH's account were government bonds and medium risk new issue securities. The risk profile of the securities in MH's account was consistent with her stated risk tolerance.

Failure to Adequately Consider Clients' Best Interests

22. Overall, between 2010 and 2015, SS' and MH's costs would have been significantly lower in fee-based accounts. The Respondent did not adequately consider the overall impact of the transaction costs on the profits realized in SS and MH's accounts.

23. For new issue securities, the issuer paid a commission on purchases which was larger than the client would have paid on a secondary issue. This was beneficial to the Respondent. The client paid no commission on the purchase of new issue securities.

24. In recommending the active trading described in this Settlement Agreement in new issues and other securities, the Respondent failed to adequately consider and address the best interests of SS and MH.

III. MITIGATING FACTORS

¶ 7 The parties agreed that in considering the reasonableness of the sanctions and the settlement herein, the panel should consider the following mitigating factors set out in paragraphs 25, 26 and 27 of the Settlement Agreement as follows:

25. The risk profile of the securities in SS and MH's accounts were consistent with their stated risk tolerance and the commissions charged per trade were at or below the amounts authorized by TDW's policies and procedures.

26. The Respondent has no disciplinary history and has recently re-taken the Conduct and Practices Handbook. The Respondent was under close supervision since January 2016 with no issues reported by his Dealer Member firms.

27. The Respondent contributed to the compensation paid by TDW to SS.

IV. THE TERMS OF SETTLEMENT

¶ 8 The parties agreed to the following sanctions and costs:

- a) Fine of \$150,000 inclusive of disgorgement;
- b) Close supervision until December 2018; and
- c) Costs of \$5,000.

V. ANALYSIS

¶ 9 Counsel submit that the agreed upon facts establish that the Respondent failed to adequately consider and address the best interests of his two clients, contrary to Dealer Member Rule 29.1, and after March 26, 2012, Dealer Member Rule 42.2. Counsel also submit that the sanctions agreed upon are within a reasonable range in accordance with the principles articulated in a long line of cases starting with *Re: Milewski*, [1999] 1 DACD No. 17.

¶ 10 Counsel also referred the panel to four other recent cases including: *Re: Donnelly* 2016 IIROC 23; *Re: Kirkland*, 2017 IIROC 56; *re Crandall* 2016 IIROC 37; and *re Budnik* 20 IIROC 55. None of the aforementioned cases is on all fours with the present case before us. However, these cases are useful in providing guidance in considering the application of the principles, which should govern a panel considering whether the proposed sanctions are within a reasonable range.

¶ 11 In *Donnelly* at paragraph 5, the panel articulated three considerations that should be taken into account by a panel considering a Settlement Agreement as follows:

First, the agreed penalties had to be within an applicable range taking into account similar cases. Secondly, the agreed penalties had to be fair and reasonable (i.e. proportional to the seriousness of the contravention and taking into consideration other relevant circumstances) and should appear to be so to members of the public and industry. Thirdly, the agreed penalties should serve as a deterrent to the Respondent and to the industry.

¶ 12 We are satisfied that in recommending the active trading described in the Settlement Agreement in new issues and other securities that the Respondent failed to adequately consider and address the best interests of SS and MH. We conclude that in failing to consider and address the best interests of SS and MH, that the Respondent was in breach of Dealer Member Rule 29.1 and after March 26, 2012, Dealer Member Rule 42.2.

¶ 13 In considering the agreed sanctions, we are satisfied that they fall within a reasonable range. We are also satisfied that the agreed sanctions are fair and reasonable in that they appear to be proportional to the seriousness of the breaches by the Respondent and would be so recognized by the members of the public and the securities industry. Finally, we are satisfied that the agreed sanctions will serve as a deterrent to the Respondent and to the securities industry as a whole.

¶ 14 In arriving at our conclusion, we have taken into consideration the circumstances of the Respondent and also the mitigating factors such as the fact that the Respondent has no disciplinary history and has recently retaken the Conduct and Practices Handbook course. We also note that the Respondent has been under close supervision since January 2016 with no issues reported by his Dealer Member firms and that the Respondent contributed to the compensation paid by TDW to SS.

VI. Conclusion

¶ 15 In the result, the panel hereby approves the Settlement Agreement entered into between IIROC and David Gary Durno on the 18th day of July, 2018.

Dated at Toronto, this 30th day of August, 2018.

Robert P. Armstrong

Daniel Iggers

Peter Gribbin

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 David Gary Durno (“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.

Overview

4. Between 2010 and 2015, the Respondent maintained accounts for SS and MH. The Respondent recommended and implemented active trading in new issue securities and government bonds for SS and MH.
5. SS and MH were in accounts where they paid a commission on every trade. The Respondent’s trading for SS and MH generated large commissions for the Respondent and TDW which reduced the profits realized by SS and MH.
6. In recommending the trading described herein, the Respondent did not adequately consider and address the best interests of SS and MH.

The Respondent

7. The Respondent, David Gary Durno, was a Registered Representative with TD Waterhouse Canada Inc. (“TDW”) from 1997 to 2016 when his employment was terminated allegedly for cause. The Respondent is currently registered as an investment advisor with another IIROC Dealer Member firm.

SS

8. SS was born in 1922. As of 2010, SS’ Know-Your-Client (“KYC”) information reflected that she had average investment knowledge, was retired, had a total net worth of \$2.3 million (\$2 million was liquid) and an annual income of \$75,000.
9. In 2010, SS’ stated risk tolerance for her primary account was 30% low risk, 60% medium risk, and 10% high risk. Her investment objectives were 50% income and 50% long-term capital gains. KYC updates in 2011 and 2012 reflect a changed risk tolerance to 40% low, 40% medium and 20% high.

10. The trading was active with the turnover rate in three of the five years exceeding two times. SS did not document an interest in short-term trading. However, the Respondent obtained SS' authorization prior to effecting all trades. SS received trade confirmations for all trades and account statements.
11. Between 2010 and 2015, SS' cash account with the Respondent had an average annual balance of approximately \$2 million and generated net profits of approximately \$24,968.
12. Overall, between 2010 and 2015, the Respondent's trading for SS generated commissions for TDW and himself of \$471,643, \$258,643 of which were paid by SS and the balance by issuers. TDW received approximately half of these commissions.
13. During this period, most of the securities traded in SS' accounts were government bonds and medium risk new issue securities. The risk profile of the securities in SS' account were consistent with her stated risk tolerance.
14. In or about October 2015, SS submitted a complaint to TDW. Until receipt of this complaint, TDW had not raised any concerns with the Respondent regarding the trading in the SS accounts (or any other accounts) or the manner or amount of commissions charged in respect of that trading.
15. Following an internal investigation, TDW compensated SS for the difference between the commissions she paid and the fees she would have paid in a fee-based account. The Respondent contributed to the compensation paid to SS.

MH

16. MH was born in 1921. As of 2010, MH's KYC information reflected that she had average investment knowledge, was retired, had a total net worth greater than \$1 million and an annual income of \$25,000-\$50,000. A 2012 update reflected a total net worth of \$1,460,000 (\$560,000 liquid), annual income of \$40,000, and a reduction in investment knowledge from "average" to "none".
17. In 2010, MH's risk tolerance was "low". In 2012, MH's risk tolerance was updated to 80% medium, 20% high. Her investment objectives were 50% income and 50% long-term capital gains.
18. The trading was active with the turnover rate in three of the five years exceeding two times. MH did not document an interest in short-term trading. However, the Respondent obtained MH's authorization prior to effecting all trades. MH received trade confirmations for all trades and account statements.
19. Between 2010 and 2015, MH's account with the Respondent had an annual average balance ranging from \$494,522 to \$611,250 and generated net profits of approximately \$48,330.
20. Overall, between 2010 and 2015, the Respondent's trading for MH generated commissions for TDW and himself of \$162,284, \$126,946 of which was paid by MH and the balance by issuers. TDW received approximately half of these commissions.
21. During this period, most of the securities traded in MH's account were government bonds and medium risk new issue securities. The risk profile of the securities in MH's account were consistent with her stated risk tolerance.

Failure to Adequately Consider Clients' Best Interests

22. Overall, between 2010 and 2015, SS' and MH's costs would have been significantly lower in fee-based accounts. The Respondent did not adequately consider the overall impact of the transaction costs on the profits realized in SS and MH's accounts.
23. For new issue securities, the issuer paid a commission on purchases which was larger than the client would have paid on a secondary issue. This was beneficial to the Respondent. The client paid no commission on the purchase of new issue securities.

24. In recommending the active trading described in this Settlement Agreement in new issues and other securities, the Respondent failed to adequately consider and address the best interests of SS and MH.

Mitigating Factors

25. The risk profile of the securities in SS and MH' accounts were consistent with their stated risk tolerance and the commissions charged per trade were at or below the amounts authorized by TDW's policies and procedures.
26. The Respondent has no disciplinary history and has recently re-taken the Conduct and Practices Handbook. The Respondent was under close supervision since January 2016 with no issues reported by his Dealer Member firms.
27. The Respondent contributed to the compensation paid by TDW to SS.

PART IV – CONTRAVENTIONS

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

Between 2010 and 2015, the Respondent failed to adequately consider and address the best interests of two clients, contrary to Dealer Member Rule 29.1 and, after March 26, 2012, Dealer Member Rule 42.2.

PART V – TERMS OF SETTLEMENT

29. The Respondent agrees to the following sanctions and costs:
- a) Fine of \$150,000, inclusive of disgorgement;
 - b) Close supervision until December 2018; and
 - c) Costs of \$5,000.
30. If this Settlement Agreement is accepted by the Hearing Panel, the Respondent agrees to pay the amounts referred to above within 30 days of such acceptance unless otherwise agreed between Staff and the Respondent.

PART VI – STAFF COMMITMENT

31. 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.
32. 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

33. This Settlement Agreement is conditional on acceptance by the Hearing Panel.
34. 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.
35. 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.

36. 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.
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 based on the same or related allegations.
38. The terms of this Settlement Agreement are confidential unless and until this Settlement Agreement has been accepted by the Hearing Panel.
39. 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.
40. 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.
41. 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

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

DATED this “18” day of ~~June~~ “July”, 2018.

“Witness” _____
 Witness

“David Gary Durno” _____
DAVID GARY DURNO

“Kathryn S. Andrews” _____
 Witness

“Elissa Sinha” _____
 Elissa Sinha
 Enforcement Counsel on behalf of Enforcement
 Staff of the Investment Industry Regulatory
 Organization of Canada

The Settlement Agreement is hereby accepted this “30” day of “July”, 2018 by the following Hearing Panel:

- Per: “Robert Armstrong” _____
 Panel Chair
- Per: “Dan Iggers” _____
 Panel Member
- Per: “Peter Gribbin” _____
 Panel Member