

# Re Mytting

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**

**Syvert Francis Mytting**

2012 IIROC 45

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

Heard: April 25, 2012  
Reasons: July 30, 2012

**Hearing Panel:**

Alison Narod (Chair), Chris Lay, Mike Johnson

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## REASONS FOR ORDER

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### Introduction

¶ 1 The Hearing Panel in the instant case was asked by the IIROC Employment Staff and the Respondent to approve a settlement agreement (“Settlement Agreement”) jointly recommended by those parties. The Settlement Agreement sets out the agreed facts and penalty. In this Decision, we have “anonymized” relevant persons by using initials.

¶ 2 The Respondent admits to two offences. First, in August 2009, he acted contrary to IDA By-law 29.1 (now IIROC Dealer Member Rule 29.1), when he personally guaranteed that the value of a client account would be \$1 million on a future date without the authorization of his employer firm, Berkshire Securities Inc. (“Berkshire”), and when he entered into personal financial dealings with the client by agreeing that, if the value of the account on that future date exceeded \$1 million, he would keep the excess value for himself. Second, in 2006 and 2007, he acted contrary to IDA Rule 13.00.1(q) (now IIROC Rule 1300.1(q)) by recommending to as many as five clients that they fund part of their investment portfolio using leveraged investment loans to extents not suitable for them.

¶ 3 The agreed penalty is:

- (a) The Respondent is suspended from registration in any capacity for 5 years (from the date of approval of the Settlement Agreement).
- (b) The Respondent shall pay a \$50,000 fine.
- (c) The Respondent shall pay an additional \$20,000 toward IIROC’s costs related to its investigation and prosecution.

¶ 4 There is no dispute between the parties that the panel has jurisdiction of this matter, but that jurisdiction is limited to approving or rejecting the Settlement Agreement. The matter was set for 5 days of hearing and the Settlement Agreement was reached on the second of those dates.

¶ 5 At the time of the events giving rise to this matter, the Respondent was a Registered Representative employed by Berkshire at its Abbotsford, British Columbia branch.

¶ 6 The Respondent is a seasoned member of the profession. He commenced work in the industry in 1994 and with Berkshire in October 2002. The facts that are the subject-matter of this dispute occurred in 2006 and 2007. Berkshire terminated the Respondent's employment in December 2007, about 4.5 years prior to the date of the Settlement Agreement. He has not worked in the industry since then. By the end of the agreed suspension, the Respondent will have been out of the industry for about 9.5 years. His "book" is gone. It is highly unlikely that he will be able to secure employment in the industry again.

¶ 7 The Respondent acknowledges wrongdoing. The amount owed pursuant to the guarantee referenced in the first offence was made by Berkshire by offset from funds it held for the Respondent.

### *The Guarantee*

¶ 8 The K's were long time clients of the Respondent. In or about December 2006, they sold their business for \$9,000,000. In February 2006 they invested the sale proceeds in two accounts at Berkshire, both managed by the Respondent. One of these accounts contained \$1,000,000 of the sale proceeds which they specifically instructed the Respondent they required to pay taxes on the sale in December 2007 (the "Tax Account"). The New Account Application Form for the Tax Account dated February 1, 2007 incorrectly recorded that the K's investment objectives were 100% long term and their time horizon was 10 years or more.

¶ 9 On February 2, 2007, the Respondent recommended and purchased equity-based mutual funds with the whole of the funds in the Tax Account. Over the next 6 months, these securities declined in value to about \$929,000. Although the K's expressed concern over the declining value of their account, after discussion with the Respondent, it was agreed to maintain the status quo. In August 2007, the clients again expressed concern and the Respondent raised the idea of guaranteeing the future value of the Tax Account.

¶ 10 However, before taking further steps, on August 16, 2007, the Respondent discussed the K's concerns and the prospect of giving them a personal guarantee with his Branch Manager. The Branch Manager advised that he would discuss it with Berkshire's compliance department. The Branch Manager did not inform the Respondent that such a guarantee was prohibited. Despite this, the Respondent admits that he ought to have known that such an agreement was contrary to the prevailing IDA rules.

¶ 11 On August 21, 2007, the Branch Manager advised the Respondent by email that he had discussed the matter with Berkshire's compliance department, and had been told that no advisors may make "any commitment to a client to make up any market losses without having advised the head office compliance of their intentions and the circumstances leading up to this decision." The Respondent did not do this.

¶ 12 On August 25, 2007, the Branch Manager directed the Respondent to correct the NAAF for the Tax Account to reflect its short term nature. However he gave no instructions to change any of the securities in the account. A corrected, undated Client Change Form was produced. The K's were not given a copy of this Client Change Form. On or after August 31, 2007 the Respondent met with the K's and promised to make up any losses on the original \$1 million in the account as at December 15, 2007. The K's and the Respondent agreed that the Respondent would receive any gain on the original \$1 million as of that date. A cryptic notation was made on the undated Client Change Form referencing, but not detailing, these terms.

¶ 13 At the time that the Respondent offered the guarantee, there was no client complaint. He explained that he made the offer in order to stand by his recommendations to an established client. He described the term that he would keep potential gains over \$1 million as being an "afterthought"; he was certain there would be no gains.

¶ 14 After completing the Client Change Form and reaching the agreement at issue with the K's, the

Respondent faxed the Form to Berkshire's head office and left a copy on his Branch Manager's desk.

¶ 15 The Form wended its way to Berkshire's compliance department and internal discussions about the account were had with the Respondent in October 2007. However, no steps were taken in relation to the account until Berkshire contacted the K's in early December 2007, by which time the value of the account further declined to about \$847,000. As noted, Berkshire discussed this with the Respondent on December 18, 2007. On December 24, 2007, Berkshire paid the client \$171,068.

¶ 16 It is agreed that the Respondent genuinely intended to make up any losses in the account and was in a position to do so in December 2007. Berkshire later paid the K's the shortfall and set off those monies off against assets and monies it owed to the Respondent.

### ***Suitability of Leveraged Loans***

¶ 17 The Respondent had a lengthy history as a Mutual Fund Dealer. According to the Settlement Agreement, while he was a Registered Representative at Berkshire, the Respondent generally believed that because equities had historically increased in value over time, they would continue to do so into the future. As a result, he generally advised clients to invest as much money in equity mutual funds as they could access, including by borrowing as much money as a financial institution would loan them and using that money to invest in equity mutual funds.

¶ 18 The relevant clients are identified by initials, set out below:

- GM & AM
- DF
- IW & LW
- MA & NS
- CR & DM

¶ 19 The Respondent recommended that these clients apply for investment loans through AGF Trust Company and B2B Trust Company, which each required that monies loaned for investment in mutual funds be secured against the mutual funds. All the monies borrowed from those companies were invested in equity-based mutual funds which were purchased on a deferred sales charge ("DSC") basis. Each client loan was charged a variable rate of interest which was either .5% or .75% more than the company's prime rate. Accordingly, the rate of interest would fluctuate with the prime rate. At the time of their most recent loans, the interest rate being paid by each client was 6.5%.

¶ 20 In recommending that the clients borrow as much as they could from AGF Trust Company or B2B Trust, the Respondent advised them that:

- (d) they would not have to make interest payments out of their cash flow, because those payments could be made by selling portions of the mutual funds and that the value of those funds would increase more than enough to cover the interest payments;
- (e) leveraging was a long term strategy that could not fail over time unless you abandoned the strategy and sold the investments;
- (f) borrowing money to invest was consistent with a medium risk tolerance;
- (g) leveraging money to invest was the only way to save enough money for retirement and that anybody who did not leverage would never be successful investing.

¶ 21 In making his recommendation, the Respondent did not advise the clients that, in order to break even the mutual funds had to generate an annual return at least equivalent to the rate of interest charged on the loan. Nor did he advise them that there was a potential for increase in risk if the lender company's prime rate increased.

¶ 22 The Settlement Agreement states:

- 51 Some of the Clients applied for more than one loan so that total amounts of loans increased over time as follows:

Client	Loan Amounts and Dates	Total Loans
GM & AM	\$300,000 from AGF in April 2008; \$100,000 from AGF in October 2006; \$200,000 from AGF in December 2006; \$150,000 from AGF in June 2007.	\$750,000
DF	\$102,000 from AGF in June 2007 which consolidated an existing investment loan of \$32,000	\$102,000
IW & LW	\$100,000 from AGF in May 2007	\$100,000
MA & NS	\$100,000 from AGF in November 2005; \$147,000 from AGF in May 2006 which consolidated an existing \$117,000 loan; \$316,000 from AGF in June 2006 which consolidated an existing investment loan; \$300,000 from B2B Trust in August 2006.	\$863,000
CR & DM	\$50,000 from B2B Trust in October 2006; \$30,000 from AGF in October 2006; \$20,000 from AGF in June 2007	\$100,000

- 56 The amount of money the Respondent recommended each of the Clients borrow to invest was not suitable for the Clients because the loan was higher than it should have been based on their age, income, net worth, and risk tolerance as recorded on the NCAF for each client.

- a) In the case of GM & AM:
  - (i) their \$750,000 investment loan was 114% of their \$660,000 net assets as indicated on their June 2007 NCAF;
  - (ii) their \$750,000 investment loan was 3,750% of their \$20,000 liquid net assets as indicated on their June 2007 NCAF; and
  - (iii) their combined annual income on their June 2007 NCAF was \$99,000
- b) In the case of DF:
  - (i) her June 2007 NCAF indicated that she was 62 years old and not married;
  - (ii) her \$102,000 investment loan was 58% of her \$175,000 net assets as indicated on her June 2007 NCAF;
  - (iii) her \$102,000 investment loan was 227% of her \$45,000 liquid net assets as indicated on her June 2007 NCAF;
- c) In the case of IW & LW:
  - (i) their June 2007 NCAF indicated that IW was 57 years old and LW

- was 55 years old and that their combined annual income was \$82,000;
- (ii) their \$100,000 investment loan was 29% of their \$340,000 net assets as indicated on their June 2007 NCAF;
  - (iii) their \$100,000 investment loan was 500% of their \$20,000 liquid net assets as indicated on her June 2007 NCAF;
- d) In the case of MA & NS:
- (i) their 2005 NCAF indicated that NS was 72 years old and MA was 63 when the loans were advanced and that their combined annual income was \$62,000;
  - (ii) their \$863,000 investment loan was 64% of their \$1,358,000 net assets as indicated on their 2005 NCAF;
  - (iii) their \$863,000 investment loan was 81% of their \$1,060,000 liquid net assets as indicated on their 2005 NCAF;
- e) In the case of CR & DM:
- (i) their June 2007 NCAF indicated that their combined annual income was \$73,000;
  - (ii) their \$100,000 investment loan was 56% of their \$180,000 net assets as indicated on their October 2006 NCAF;
  - (iii) their \$100,000 investment loan was 152% of their \$66,000 liquid net assets as indicated on her October 2006 NCAF;

¶ 23 The Respondent acknowledges that his clients did not understand and he did not adequately explain the risks of using leveraged loans to create an investment portfolio.

¶ 24 We are confined to considering the facts set out in the agreed Settlement Agreement. They do not indicate whether these clients obtained gains or sustained losses on their leveraged investments.

## **REASONS**

### ***Sanctions***

¶ 25 IDA Bylaw 29.1 states:

29.1 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.

For the purposes of disciplinary proceedings pursuant to the Rules, each Dealer Member shall be responsible for all acts and omissions of each partner, Director, Officer, Supervisor, Registered Representative, Investment Representative and employee of a Dealer Member; and each of the foregoing individuals shall comply with all Rules required to be complied with by the Dealer Member.

¶ 26 The IDA's Disciplinary Sanction Guideline 2.4 explains that registrants must conduct themselves in a professional manner. It stresses the importance of avoiding harm to the public standing of the profession and its reputation. It cautions that registrants should disclose any personal business activities to ensure that the firm is

able to ensure a high level of service and avoid questionable activities. It sets out factors IDA Hearing Panels may consider when recommending sanctions. These recommended sanctions range from a minimum fine of \$10,000 to permanent prohibition from the industry in egregious cases.

¶ 27 IDA Rule 13.00.1(q) states:

13.00.1(q) Each Dealer Member, when recommending to a customer the purchase, sale, exchange or holding of any security, shall use due diligence to ensure that the recommendation is suitable for such customer based on factors including the customer's financial situation, investment knowledge, investment objectives and risk tolerance.

¶ 28 The IDA's Sanctions Guideline for Dealer Member Rule 1300.1(p) respecting improper sales practices specifically refers to unsuitable recommendations. It states, in part:

The core of a registered representative's business activity is to make recommendations for his/her clients. Registrants have a basic duty to ensure that the recommendations are suitable, and in accordance with the clients' investment objectives and risk factors. The courts have generally held that a registrant owes a fiduciary duty to the client where the client relies upon the advice and recommendations of the registrant. This fiduciary relationship requires the registrant to act carefully, honestly and in good faith in dealing with the client. Therefore, a registrant who makes unsuitable recommendations has breached his/her fiduciary duty owed to the client.

Even in absence of general fiduciary relationship between registrant and client, there is at the very least, a relationship of trust and confidence that exists between a registrant and client. A client will rely upon and place confidence in the recommendations made by the registrant, who has an obligation to ensure the recommendations are suitable. Where the recommendations are unsuitable for the client, the registrant has breached his position of trust and failed to fulfill the most basic of responsibilities towards the client.

¶ 29 The Guideline lists considerations to be taken into account when determining sanctions. Those sanctions range from a minimum fine of \$10,000 to suspensions in the most egregious cases involving elements of deception and misrepresentation.

### *Personal Dealings*

¶ 30 With respect to the charge relating to personal dealings with clients, we observe that the Respondent's counsel endeavoured to excuse the Respondent's conduct by pointing to Berkshire's failure to properly supervise his activities. In separate proceedings, Berkshire has been found at fault for this. However, this does not abrogate the Respondent's independent obligations as a registrant. Nor does it answer the whole of the charge. The Respondent's conduct was not otherwise fully without fault.

¶ 31 In particular, the communications between the Respondent and his superiors reveal that the Respondent did not fully and openly comply with his Employer's directions despite its failures. For example, after raising the issue of a possible guarantee with his Branch Manager, the Respondent was directed to give Berkshire's compliance department documentation and an explanation of the circumstances for review. He did not do so. Rather, he made the impugned agreement with the client and afterwards made a cryptic note on a corrected, but undated, Client Change Form mentioning the guarantee and obliquely referencing the agreement that he would receive any gain.

¶ 32 The Respondent's counsel also pointed out that there was no complaint about the handling of the Tax Account. This is of little comfort. It was because the client was frequently raising concerns with the Respondent that the Respondent offered the guarantee against loss and the agreement regarding gain. Both the Respondent and the client would have known that this agreement would alleviate any need for the client to escalate his concern beyond the Respondent.

¶ 33 With respect to the considerations that the Sanctions Guideline says are relevant to breaches of Rule

29.1, we note that although the Respondent did not conceal or attempt to conceal his activity from his employer, he was not fully forthcoming, transparent or open about this activity to his Employer. The K's were harmed by this loss, but this was not an issue of unsuitability. In the result, they were duly compensated. No clients were harmed by the activity because they were compensated.

¶ 34 The Respondent used his professional position as a means of redressing his client's losses and protecting his relationship and reputation with his client by providing him with a guarantee. There was a real, perceived or potential conflict between his personal and business interest and those of the K's insofar as he agreed to absorb the losses and take the gains resulting from his recommendations. He did not engage in any illegal conduct or other regulatory offences in connection with this activity.

### ***Suitability***

¶ 35 With respect to the charges relating to suitability, counsel for the Respondent invited the panel to take into consideration that the practices the Respondent engaged in were known to Berkshire and not discouraged by it. He did not hide his conduct. Rather, he brought it to his Branch Manager's attention and he cooperated with his Employer. His actions respecting mutual fund strategies and the use of leveraged loans were established and commonplace practices in the mutual fund industry. He acknowledged that he may have been "too bullish", the degree of leveraging he recommended may have been inappropriate and he may have been arrogant in his recommendations. However, he did not intentionally try to offend the rules.

¶ 36 In our view, it is not an answer to the suitability charge that the Respondent had not spent the entirety of his career as a registered representative. Indeed, security industry courses and early industry training as well as industry rules and sanctions place a heavy emphasis on the know-your-client and suitability obligations. As a registrant, the Respondent was familiar with his gatekeeper obligations and should have known that he was contravening IDA rules. As a Registered Representative, the Respondent had gatekeeper obligations to ensure that his recommendations were suitable for his individual client's needs, based on their respective financial positions, investment objectives and risk tolerance. He failed to do this.

¶ 37 With respect to other considerations relating to the suitability offence, although there was no evidence of an ulterior motive, the facts disclosed a pattern of making unsuitable recommendations, which were consistent with the Respondent's practices and beliefs about suitable investment strategies for mutual fund investors. The Respondent's unsuitable recommendations reflected a "generic" investment strategy drawn from his background as a mutual fund dealer which he utilized without prudent regard for his individual client's needs, based on their financial position, investment objectives and risk tolerances. As a result, a number of clients sustained significant losses directly attributable to the unsuitable recommendations. We note that the level of sophistication of the clients was not disclosed by the Settlement Agreement.

### ***Consideration of Settlement Agreement***

¶ 38 Counsel for the parties agreed that where a hearing panel is considering a settlement agreement, it is not entitled to consider facts extraneous to those contained in the settlement agreement.

¶ 39 The following passage quoted from *Union Securities Ltd. (Re)* [2006] I.D.A.C.D. 13 informs our view of the appropriate approach to take when considering whether to approve negotiated settlement agreements, but, we note, it does not bind us:

5. In the "ordinary" case, the proper approach to the question whether to accept a settlement agreement is described in two decisions, both handed down in 1999: *Re: Clark* and *Re: Milewski*:

6. In *Clark* the panel said:

In considering a settlement under By-law 20.26 [By-law 20.36] the panel should not simply substitute its discretion for that of staff who negotiate the settlement. The panel must be cognizant of the importance of the settlement process and should not lightly interfere in a negotiated settlement. In our view, as a result, panels must also

be careful in using previous settlements as precedent. The settlement process is one of negotiation and compromise and the penalty imposed following a settlement will often be less onerous than one imposed following a hearing where similar findings are made.

In *Milewski*, the panel said:

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.

¶ 40 Counsel for both parties in the instant case took the position that the proposed Settlement Agreement fell within a reasonable range of appropriateness. In the particular circumstances of this case, and for the reasons set out below, we agree.

¶ 41 We note that guidelines are just that; guidelines are of assistance, but not binding. We are concerned that a rubber stamping approach not be taken to the use of the sanction guidelines. Each proposed Settlement Agreement must be considered on its facts. An important consideration is the fact that it is a negotiated, agreed result.

¶ 42 There are a multitude of reasons why parties may reach a settlement, including one that includes terms that may appear to a person not privy to all of the facts as unduly light or harsh. The terms of settlements are typically carefully negotiated, as was the case here where settlement terms were reached with the assistance of counsel. Indeed, negotiations carried on into the time set for hearing.

¶ 43 Parties may settle because of their respective views of the likelihood of success on one or more charges or the sanctions that might be imposed if the matter proceeds to hearing. They may settle because of concerns about whether or not their resources and financial wherewithal can withstand a contested hearing. They may settle because the settlement is preferable to the effect on their reputation of proceeding to hearing or for other business reasons. They may settle because of illness, change of career or imminent retirement. They may simply not wish to expose themselves to the risks inherent in litigation.

¶ 44 Because of all this, settlement agreements are often given a measure of deference by a hearing panel charged with the task of deciding whether they are acceptable. However, because they are not the result of a full hearing where the evidence is probed and tested, they have less precedential value when used as comparisons for future cases.

¶ 45 In the instant case, considering the Settlement Agreement in light of all the materials put before us, including the parties' submissions respecting the applicable case law and the facts which we are entitled to consider, and the fact that the parties have agreed to its terms, we find that, overall, it falls within a reasonable range of appropriateness. That is not to say, however, that had the matter proceeded to hearing, we would have reached a similar result or that we agree that elements of the settlement are appropriate when considered outside the context of the terms of the Settlement Agreement. Accordingly, we wish to make some additional comments.

¶ 46 Counsel for the Respondent relied on a statement made by the panel at paragraph 6 of the *Union Securities Ltd.* case, *supra*, that “[a] penalty under settlement agreement is likely to be at the low end of the spectrum in view of the fact that a settlement is negotiated, permits the Association staff to avoid the cost of a contested hearing and guarantees them a favourable result.”

¶ 47 It is true that a “settlement” is always negotiated. However, it does not axiomatically follow that it will be at the “low end”. Settlements are typically, but not inevitably, a result of compromise, but the reasons for the compromise are not always known to a hearing panel.

¶ 48 In the instant case, the Respondent maintained that he agreed to the settlement for commercial or economic reasons. He appeared to begrudgingly accept the settlement to avoid the costs of the contested

hearing and the findings that may have resulted. We note that one of the charges that were initially levelled against the Respondent was withdrawn. The fines imposed were somewhat on the “light” side. However, the suspension of five years fell on the more egregious side, although we note it is not said to be a permanent ban from the industry.

¶ 49 Despite this, in the circumstances of this case, the sanctions impose a more onerous result, in fact, than might be inferred from a consideration of the sanctions taken out of the context of the facts alone. The Respondent was a seasoned member of the industry and virtually at the end of his career. By the end of a five year suspension, which is effective on the date of approval of the Settlement Agreement, he will have been prevented from working in the industry for approximately 9.5 years. It is trite to say that by that time his “book” will have dissipated and re-entry into the industry will be prohibitive. The Settlement Agreement, and the Respondent’s name and conduct, will be publicly known and that, too, will adversely affect his reputation and his ability to successfully re-enter the industry after such a long absence.

¶ 50 In short, in accepting the settlement, the Respondent is accepting a total period of exclusion from the industry that will be, from a practical perspective, a substantial impediment to his return. In this regard, we view the precedential value of the sanctions as limited to the facts of the case.

¶ 51 In summary, the seriousness of the Respondent’s misconduct may be viewed as spanning a spectrum from inadvertent to more egregious conduct that did not, however, involve intentional wrongdoing such as dishonesty, deception, fraudulence and criminality. The sanction guidelines suggest a minimum fine of \$10,000 relating to each breach of each rule, on the minimal end, to a suspension in the case of a breach of Rule 1300.1(p) and permanent prohibition in the case of breach of Rule 29.1 at the most egregious ends of the spectrum. As mentioned, what will effectively amount to a 9.5 year exclusion from industry is akin to a permanent suspension for a person in the winter of his or her career. Accordingly, both parties have recognized that the agreed sanctions in this case have very serious impacts in the particular circumstances of this case.

¶ 52 We find this Settlement Agreement falls within a reasonable range of appropriateness and accept it.

Dated this 30<sup>th</sup> day of July, 2012.

Alison Narod, Panel Chair

Chris Lay, Panel Member

Mike Johnson, Panel Member

## **SETTLEMENT AGREEMENT**

### **I. INTRODUCTION**

1. IIROC Enforcement Staff (“Staff”) and Syvert Francis Mytting (“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.
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 the following:
  - (a) In August 2007, he acted contrary to IDA By-law 29.1 (now IIROC Dealer Member Rule 29.1) by personally guaranteeing the future value of a client account without the authorization of his firm and entered into personal financial dealings with the client and obtained a potential interest in the client's account by claiming for himself any funds, in excess of the original account value, in the account on a future date.
  - (b) In 2006 and 2007, in relation to as many as 5 clients, he acted contrary to IDA Rule 1300.1 (q) (now IIROC Rule 1300.1 (q)) by recommending that the clients fund part of their investment portfolio using leveraged investment loans to extents which were not suitable for the clients.
8. Staff and the Respondent agree to the following terms of settlement:
  - a) The Respondent is suspended from registration in any capacity for five years.
  - b) The Respondent shall pay a \$50,000 fine.
  - c) The Respondent shall pay an additional \$20,000 toward IIROC's costs related to this investigation and prosecution.

### **III. STATEMENT OF FACTS**

#### ***(i) Acknowledgment***

9. 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) Factual Background***

#### **Overview**

10. This Settlement Agreement relates to events that occurred primarily in 2007 when the Respondent was a Registered Representative ("RR") responsible for client accounts at a Berkshire Securities Inc. ("Berkshire") branch in Abbotsford, British Columbia.
11. Contravention (a) in paragraph 7 of this Settlement Agreement relates to a promise to guarantee the future value of a client's account. That promise was made after the recommended securities purchased in the account had declined in value. The general time period related to these events is February 1 – December 18, 2007.
12. Contravention (b) in paragraph 7 of this Settlement Agreement relates to the suitability of recommendations made to five clients to use leveraged investment loans to fund their investment accounts. The Respondent made some of these recommendations before 2007 but the recommendations were primarily made in May and June 2007.
13. The Respondent had been previously registered in the securities industry since 1994 and worked at Berkshire from October 2002 until he was dismissed by Berkshire on December 18, 2007. He has not since worked for any Dealer Member or in any registered capacity related to the securities industry.

#### **The KFL Guarantee**

14. AK & SK (collectively, the "Ks") were long time clients of the Respondent. In or about December 2006 the Ks sold their business and, after considering different financial proposals, invested money from that sale in Berkshire accounts it opened on or about February 1, 2007, with the Respondent as the RR responsible for the accounts.
15. Part of the K's total investment was in a separate account, (the "KFL Account") because the Ks instructed the Respondent that they needed \$1,000,000 available in December 2007 to pay taxes due on the sale of the business.

16. The Ks invested the balance of the sale proceeds in a separate account (the “Other Account”).
17. The New Account Application Form (“NAAF”) for the KFL Account dated February 1, 2007 indicated the following:
  - Investment Objectives: 100% Long Term
  - Risk Tolerance: 100% Medium
  - Time Horizon: 10 years or more
18. The 100% Long Term Investment Objective and the 10 years or more Time Horizon was incorrect. This was corrected in August, 2007 (see paragraph 30).
19. On February 1, 2007 \$1,000,000 was deposited into the KFL Account.
20. On February 2, 2007 the Respondent recommended and executed the purchase of equity based mutual funds in the KFL Account.
21. On or around the same day, the Respondent recommended and purchased the same securities in the same percentages in the Other Account.
22. The securities the Respondent recommended and purchased generally declined in value after they were purchased so that the value of the original \$1,000,000 investment in the KFL Account at the end of each of the first 6 months was approximately as follows:
  - February 28           \$ 971,477
  - March 31               \$ 976,664
  - April 30               \$ 988,228
  - May 31                 \$ 983,451
  - June 30                \$ 959,475
  - July 31                 \$ 929,171
23. From February to August, AK contacted the Respondent regularly to express his concern over the decline in value of the KFL Account. They discussed whether they should put the account into money market, but at the conclusion of each conversation AK agreed to keep the money invested as it was.
24. On an unspecified day in August, 2007, the Respondent met with AK to discuss the KFL Account. The Respondent raised the idea of guaranteeing the value of the KFL Account.
25. On August 16, 2007, the Respondent informed his branch manager (“BM”) that the Ks were unhappy with the performance of the KFL Account and the Respondent\* raised the issue of him (the Respondent) personally guaranteeing against losses in the account. The BM told the Respondent he would discuss the matter with Berkshire’s compliance department, but did not tell the Respondent that guaranteeing losses in a client account was prohibited.
26. On August 17, 2007 the BM discussed the idea of the Respondent guaranteeing losses in the KFL account with Berkshire’s compliance department and then on August 21, 2007 emailed the Respondent, as follows:
 

Further to our discussions in respect of your one client’s account and your concern about the recent market volatility and its impact on the account holdings, I have discussed the issue with compliance in general terms and need to advise you of their response. Compliance requires that an advisor may not make any commitment to a client in respect of making up any market losses without having involved head office compliance and advising them of their intention and the circumstances leading up to this decision. A written communication detailing all this is required. Compliance requires the advisor to

advise them of the situation without delay. Please copy me on all your\* correspondence to head office compliance in this regard.

27. On August 25, 2007 the Branch Manager emailed Mytting and instructed him to amend the NAAF for the KFL Account to properly reflect the short term nature (less than one year) of the account. The Branch Manager gave no instruction to change any of the securities in the account. The email stated as follows:

I have reviewed this file. The following had been indicated on the NAAF:

Investment Objectives – 100% long term

Risk Tolerance – 100% medium Risk

Time Horizon – 10 years or more.

Based on the client's time horizon of less than one year for the funds, the KYC information does not support this correctly. Please review this with your client and submit the necessary paperwork so that Dataphile may be updated.

28. On or after August 31, 2007 the Respondent met with the Ks at their house and promised to make up any losses in the KFL Account from the original \$1,000,000 investment as measured against the balance in the KFL Account as at December 15, 2007. The Respondent and the Ks also agreed that the Respondent would receive any funds in excess of \$1,000,000 in the KFL Account as of December 15, 2007.
29. Although the BM did not tell the Respondent such an agreement was prohibited, the Respondent ought to have known such an agreement was contrary to IDA rules.
30. At this meeting the Ks and the Respondent signed a Berkshire Client Information Change Form ("Client Change Form"). This corrected the Time Horizon for the KFL Account to reflect "Less than 1 year" and under the heading "Notes" on the Client Change Form the Respondent wrote:
- SMCC Management Inc. and/or Sy Mytting guarantee this account against loss as at Dec. 15/07. Value over \$1,000,000 pd. to SMCC/Mytting. (A) and (S) have been clients for 9 years.
31. By August 31, 2007 the original \$1,000,000 invested in the KFL Account had dropped to approximately \$ 903,047.
32. The Client Change Form was not dated.
33. SMCC Management Inc. is 100% owned by the Respondent.
34. On or after August 31, 2007 (the Respondent's recollection is that it occurred on a Saturday, after he met with the Ks – which would be September 1, 2007), the Respondent faxed the Client Change Form to Berkshire's Head Office. The Respondent then left a copy of the faxed Client Change Form on the BM's desk.
35. The next business day, September 4, 2007, the BM found a copy of the Client Change Form in his office.
36. On September 5, 2007 the Respondent emailed the BM and advised him that he had sent a client change form for the KFL Account to Berkshire. That same day the BM sent the Client Change form to Regional Compliance in Vancouver. Regional Compliance emailed the details to the Associate VP of Head Office Compliance in Toronto and advised that the BM had "more details and can provide more background as requested."
37. On September 7, 2007 the BM sent the Associate VP of Compliance the August 21<sup>st</sup> Email, the August 25<sup>th</sup> Email, the Client Change Form and the fax record.
38. On September 7, 2007 the Regional Manager of Compliance instructed the BM to ask the Respondent whether the Ks had a copy of the Client Change Form. On September 10, 2007 the BM spoke with the respondent about this, and the BM confirmed with Regional Compliance and the Associate VP of Compliance that Mytting did not believe that the Ks had a copy of the Client Change Form.

39. On October 11, 2007 Mytting had occasion to meet with the Associate VP of Compliance in Toronto in person, at Berkshire's head office in Burlington, Ontario. During this meeting, although the Associate VP raised the KFL Account in her discussions with Mr. Mytting, the Associate VP took no action and made no substantive inquiries into the account.
40. On October 22, 2007 Mr. Mytting cooperated in a recorded interview concerning the KFL Accounts conducted by the BM and a member of Berkshire Compliance.
41. No steps were taken in relation to the KFL Account until Berkshire first contacted the Ks by telephone on December 3, 2007.
42. Between September and December 2007, the value of the KFL Account declined further so that the value at the end of each month was as follows:
  - September 30 \$890,100
  - October 31 \$852,030
  - November 30 \$847,322
43. The Respondent genuinely intended to make up any losses in the Account, and he remained in a position to do so in December 2007. At the point at which he offered the guarantee against loss to the Ks, there was no client complaint, and his reason for making the offer was to stand by his recommendations to an established client.
44. The offer to guarantee against loss was separate from the agreement that any value over \$1,000,000.00 was to be paid to the Respondent. As of August 31, 2007 the account had declined in value by \$96,930.23. AK confirmed that potential gains was an "afterthought" and he was certain there would be no gains.
45. On December 3, 2007 Berkshire required the Respondent and AK to cease communication. Both cooperated with this request. Thereafter Berkshire dealt directly with AK regarding the guarantee.
46. On December 18, 2007, Berkshire dismissed the Respondent.
47. On December 24, 2007, Berkshire paid KFL \$171,068. At this time Berkshire retained certain assets and monies owed to the Respondent. The money Berkshire paid the Ks was later offset against those monies.

### **Suitability of Leveraged Loans**

48. When he was an RR at Berkshire, the Respondent generally believed that because equities had historically increased in value over time that equities would continue, into the future, to increase in value. Based on this belief, the Respondent generally advised clients and prospective clients to invest as much money in equity mutual funds as they could access. This included borrowing as much money as a financial institution would loan them and investing that money in equity mutual funds.
49. The following people (the Clients) were clients of Mytting at Berkshire:
  - GM & AM
  - DF
  - IW & LW
  - MA & NS
  - CR & DM
50. The Respondent recommended the Clients apply for investment loans through AGF Trust Company and

B2B Trust Company, which loaned money on the condition that it be invested in mutual funds which secured the loan.

51. Some of the Clients applied for more than one loan so that total amounts of loans increased over time as follows:

Client	Loan Amounts and Dates	Total Loans
GM & AM	\$300,000 from AGF in April 2006; \$100,000 from AGF in October 2006; \$200,000 from AGF in December 2006; \$150,000 from AGF in June 2007.	\$750,000
DF	\$102,000 from AGF in June 2007 which consolidated an existing investment loan of \$32,000.	\$102,000
IW & LW	\$100,000 from AGF in May 2007.	\$100,000
MA & NS	\$100,000 from AGF in November 2005; \$147,000 from AGF in May 2006 which consolidated an existing \$117,000 loan; \$316,000 from AGF in June 2006 which consolidated an existing investment loan; \$300,000 from B2B Trust in August 2006.	\$863,000
CR & DM	\$50,000 from B2B Trust in October 2006; \$30,000 from AGF in October 2006; \$20,000 from AGF in June 2007.	\$100,000

52. All of the monies borrowed from AGF Trust Company and B2B Trust Company were invested in equity based mutual funds which were purchased on a deferred sales charge (“DSC”) basis<sup>1</sup>.
53. Each client loan was charged a variable rate of interest which was either .5% or .75% greater than the company’s prime rate. If the company’s prime rate increased the rate of interest would increase. If the company’s prime rate decreased the rate of interest would decrease. At the time of their latest loan each client was paying interest at a rate of 6.5%.
54. In making the recommendation to borrow as much money as AGF Trust Company or B2B Trust would loan them, the Respondent advised the Clients that:
- a) They would not have to make interest payments out of their own cash flow because interest payments could be made by selling portions of the underlying mutual funds and that increases in the value of the underlying mutual funds would be more than enough to cover the interest

<sup>1</sup> If the client sold the mutual fund the fund company would charge a percentage fee to sell the fund unless the fund was held for more than seven years. The amount charged is based on the value of the funds when they were purchased and is deducted from the value of the funds sold. The percentage rate depends on how long the client held the funds. If the fund was sold: within two years of purchase (5.5 %); during the third year (5.0%); during the fourth year (4.5%); during the fifth year (4.0%); during the sixth year (3.0%); and during the seventh year (1.5%). After seven years no fee is charged to sell the funds. The funds permit a 10% annual withdrawal without fees.

payments;

- b) Leveraging was a long term strategy that could not fail over time unless you abandoned the strategy and sold the investments;
- c) Borrowing money to invest was consistent with a medium risk tolerance; and
- d) Leveraging money to invest was the only way to save enough money for retirement and that anybody who didn't leverage would never be successful investing.

55. In making the recommendation, the Respondent did not advise the Clients that:

- a) The funds had to generate an annual return which at least equaled the rate of interest they were being charged on the loan just to break even; or
- b) There was a potential increase in risk if the company's prime rate increased.

56. The amount of money the Respondent recommended each of the Clients borrow to invest was not suitable for the Clients because the loan was higher than it should have been based on their age, income, net worth, and risk tolerance as recorded on the NCAF for each client.

a) In the case GM & AM:

- (i) their \$750,000 investment loan was 114% of their \$660,000 net assets as indicated on their June 2007 NCAF;
- (ii) their \$750,000 investment loan was 3,750% of their \$20,000 liquid net assets as indicated on their June 2007 NCAF; and
- (iii) their combined annual income on their June 2007 NCAF was \$99,000.

b) In the case of DF:

- (i) her June 2007 NCAF indicated that she was 62 years old and not married;
- (ii) her \$102,000 investment loan was 54% of her \$175,000 net assets as indicated on her June 2007 NCAF;
- (iii) her \$102,000 investment loan was 227% of her \$45,000 liquid net assets as indicated on her June 2007 NCAF;

c) In the case of IW & LW:

- (i) their June 2007 NCAF indicated that IW was 57 years old and LW was 55 years old and that their combined annual income was \$82,000;
- (ii) their \$100,000 investment loan was 29% of their \$340,000 net assets as indicated on their June 2007 NCAF;
- (iii) their \$100,000 investment loan was 500% of their \$20,000 liquid net assets as indicated on her June 2007 NCAF;

d) In the case of MA & NS:

- (i) their 2005 NCAF indicated that NS was 72 years old and MA was 63 when the loans were advanced and that their combined annual income was \$62,000.
- (ii) their \$863,000 investment loan was 63% of their \$1,358,000 net assets as indicated on their 2005 NCAF;
- (iii) their \$863,000 investment loan was 81% of their \$1,060,000 liquid net assets as indicated on their 2005 NCAF;

e) In the case of CR & DM:

- (i) their June 2007 NCAF indicated that their combined annual income was \$73,000;
- (ii) their \$100,000 investment loan was 56% of their \$180,000 net assets as indicated on their October 2006 NCAF;
- (iii) their \$100,000 investment loan was 152% of their \$66,000 liquid net assets as indicated on her October 2006 NCAF;

For clarity, for the purpose of this paragraph liquid net assets are included in net assets.\*

57. The Clients didn't understand and the Respondent did not adequately explain the risks of using leveraged loans to create an investment portfolio.

**IV. TERMS OF SETTLEMENT**

- 58. 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.
- 59. The Settlement Agreement is subject to acceptance by the Hearing Panel.
- 60. The Settlement Agreement shall become effective and binding upon the Respondent and Staff as of the date of its acceptance by the Hearing Panel.
- 61. 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.
- 62. 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.
- 63. 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.
- 64. The Settlement Agreement will become available to the public upon its acceptance by the Hearing Panel.
- 65. 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.
- 66. Unless otherwise stated, any monetary penalties and costs imposed upon the Respondent are payable immediately upon the effective date of the Settlement Agreement.
- 67. Unless otherwise stated, any suspensions, bars, expulsions, restrictions or other terms of the Settlement Agreement shall commence on the effective date of the Settlement Agreement.

\*indicates a handwritten change made to the original document.

AGREED TO at Vancouver, British Columbia, Canada this 25th day of April, 2012.

"Dwight Stewart"

Witness

"Sy Mytting"

Sy Mytting

AGREED TO at Vancouver, British Columbia, Canada this 25th day of April, 2012.

"Brad McKay"

Witness

"Paul Smith"

Paul Smith

Enforcement Counsel, IIROC

ACCEPTED at Vancouver British Columbia, this 25th day of April, 2012.

“Alison Narod”

Ms. Alison Narod, Panel Chair

“Chris Lay”

Mr. Chris Lay, Panel Member

“Mike Johnson”

Mr. Mike Johnson, Panel Member

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