

Re Barret Capital Management

IN THE MATTER OF:

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

and

Barret Capital Management Inc., Jamie Cohen & Idan Cohen

2012 IIROC 10

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

Hearing: February 13, 2012
Decision: February 22, 2012
(13 paras.)

Hearing Panel:

The Hon. John B. Webber, Q.C. (Chair), Richard Austin and Hugh McNabney

Appearances:

Susan Kushneryk, Senior Enforcement Counsel

Darryl T. Mann, for the Respondents

DECISION AND REASONS

¶ 1 This Panel was convened to hear submissions as to a Settlement Agreement reached between the Respondents and Staff of the Investment Industry Regulatory Organization of Canada (IIROC) on February 10, 2012. The Panel was required to consider whether, pursuant to the IIROC Dealer Member Rules, Guidelines, Regulations or Policies, the Panel should accept the Settlement Agreement.

¶ 2 At the outset of the proceedings, we considered a joint motion by Staff and Respondents' counsel to move the proceedings in camera. We granted that motion. We then considered, in detail, the provisions of the Settlement Agreement itself. We heard submissions of the applicable law that should guide this Panel in determining whether to accept or reject the Settlement Agreement. We heard submissions as to why this particular Settlement Agreement met the appropriate criteria. We then retired to consider both the Settlement Agreement and the applicable legal principles. After due deliberation, the Panel unanimously concluded that it was appropriate to accept the Settlement Agreement.

¶ 3 The investigation by Staff of the Respondents' activities disclosed that the Respondents had engaged in activity which may be disciplined by a hearing panel appointed pursuant to the IIROC Transitional Rule No. 1, Schedule C.1, Part C.

¶ 4 The Respondents admit to the following contraventions of IIROC Member Dealer Rules, Guidelines, Regulations or Policies, as detailed in para. 5 of the Settlement Agreement:

Between September 2009 and December 2011, the Respondents, while Barret was a Dealer Member and J. Cohen and I. Cohen were Registered Representatives, failed to observe high standards of ethics and conduct in the transaction of their business, and engaged in business conduct or practices which are unbecoming or detrimental to the public interest, contrary to

IIROC Dealer Member Rule 29.1, in that they:

- (a) improperly used an allocation account and other accounts to allocate trades to certain clients, to the detriment of other clients;
- (b) misled numerous clients as to the positions in their accounts and the value of their accounts; and
- (c) failed to have adequate compliance supervision, internal controls and books and records.

¶ 5 These activities, more particularly described in paras. 19 to 48 of the Settlement Agreement, clearly disclose and provide a complete basis for the allegations contained in para. 5(a), (b) and (c) above.

¶ 6 Staff and the Respondents have agreed to the following terms of settlement:

- (a) Barret's Membership is immediately suspended;
- (b) Barret will immediately cease dealing with the public;
- (c) Staff may undertake any action with Barret's carrying broker, Laurentian Bank Securities Inc., to facilitate the orderly transfer of client accounts from Barret in a manner consistent with applicable law;
- (d) Barret's right and privileges of Membership are terminated as of 30 days from the date of acceptance of the Settlement Agreement;
- (e) Barret is expelled from the Corporation as of 30 days from the date of acceptance of the Settlement Agreement;
- (f) J. Cohen is prohibited from approval for registration with IIROC at any time within 20 years of the date of acceptance of the Settlement Agreement;
- (g) J. Cohen will pay IIROC a fine in the amount of \$50,000;
- (h) I. Cohen is prohibited from approval for registration with IIROC at any time within 20 years of the date of acceptance of the Settlement Agreement; and
- (i) I. Cohen will pay IIROC a fine in the amount of \$50,000.

In addition, the Respondents agreed to pay IIROC the sum of \$125,000 as costs.

¶ 7 Our consideration as to whether the proposed Settlement Agreement should be accepted or rejected include the principles as to whether it would be in the public interest and whether the penalties imposed will protect investors. We have also considered as to whether it is a reasonable and proportionate penalty having reference to the conduct of the Respondents. We believe that the Settlement Agreement fairly addresses the concerns that we have, including the public interest, reasonableness, specific and general deterrence and the prevention of this type of conduct in the future. We believe that the Settlement Agreement will also foster confidence in the integrity of the Canadian capital markets, IIROC and the regulatory process itself. We believe that each and every one of these factors was dealt with in an appropriate fashion by the Settlement Agreement.

¶ 8 As well, we have carefully reviewed the IIROC Penalty Guidelines and the effect of these Penalty Guidelines on this type of conduct. We have also reviewed the various decisions which have been provided to us by Enforcement Counsel which disclose that similar types of activity have resulted in monetary penalties and appropriate costs not unlike the proposed penalties and costs included in the Settlement Agreement. In our view, the proposed penalties are entirely within a reasonable amount for a matter of this nature and should not be disturbed.

¶ 9 We are also of the view that a negotiated settlement should not be disturbed provided that the penalties are within the reasonable range of appropriateness. In that regard, we considered the remarks of the panel of the District Council in *Re Milewski*, [1999] I.D.A.C.D. No. 17, decided on July 28, 1999. The Panel made these

comments at page 9:

Although a settlement agreement must be accepted by a District Council before it can become effective, the standards for acceptance are not identical to those applied by a District Council when making a penalty determination after a contested hearing. In a contested hearing, the District Council attempts to determine the correct penalty. 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. Put another way, the District Council will reflect the public interest benefits of the settlement process in its consideration of specific settlements.

¶ 10 We have considered other matters such as the fact that the Respondents have not been the subject of any previous IIROC disciplinary hearings. We consider that the inclusion of the individual Respondents as part of the Settlement Agreement to be most important. This agreement dispenses with the necessity of separate proceedings as against Messrs. J. Cohen and I Cohen. It is also important that para. 14 from the Statement of Facts be considered. This paragraph clearly indicates that the focus of the inquiry and investigation made by Staff dealt with futures and options on metals, energies and all other exchange-traded commodities. The focus of the investigation is not on the Respondents trading in physical metals. We consider that the Respondents can be deemed to be remorseful because of their cooperation which resulted in their removal from the industry. We have also noted that there is no evidence of any client losses or harm in this case. We are satisfied that the prohibition from approval for registration will also apply to any possible transfers of their registrations to another IIROC member that the Respondents may seek to implement. We would note that while a lifetime ban would typically be suggested or imposed in a fact situation similar to those in this matter, the co-operation of the two individual Respondents has had the effect of saving IIROC Staff considerable effort and expense and for this reason their removal from the industry for 20 years as opposed to a lifetime ban was acceptable to us.

¶ 11 Finally, we observe that trade supervision is critical to ensure that, among other things, all trade orders when accepted are recorded when they occur. The necessity to maintain adequate records by the Respondents of all trades, enquiries and responses and resolutions resulting therefrom did not exist. This proper record keeping is a key element in the overall supervision structure of the Respondents. This activity provides the basis for supervision over the Respondents' trading. As this supervision was lacking, the Settlement Agreement makes ultimate good sense.

¶ 12 For all of the above reasons, we have accepted the Settlement Agreement and signed the appropriate Order presented to us at the hearing.

¶ 13 We agreed to provide reasons for our decision after the hearing. These are our reasons.

Dated at Toronto, this 22nd day of February 2012.

The Hon. John B. Webber, Q.C., Chair

Richard Austin, Member

T. Hugh McNabney, Member

SETTLEMENT AGREEMENT

I. INTRODUCTION

1. Enforcement staff of the Investment Industry Regulatory Organization of Canada ("IIROC") and the Respondents, Barret Capital Management Inc. ("Barret"), Jamie Cohen ("J. Cohen") and Idan Cohen ("I. Cohen") (together, the "Cohens") (Barret and the Cohens together, the "Respondents") consent and

agree to the settlement of this matter by way of this agreement (the “Settlement Agreement”).

2. IIROC’s Enforcement Department has conducted an investigation (the “Investigation”) into the Respondents’ conduct.
3. The Investigation discloses matters for which the Respondents 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

4. IIROC staff (“Staff”) and the Respondents jointly recommend that the Hearing Panel accept this Settlement Agreement.
5. The Respondents admit to the following contraventions of IIROC Dealer Member Rules, Guidelines, Regulations or Policies:

Between September 2009 and December 2011, the Respondents, while Barret was a Dealer Member and J. Cohen and I. Cohen were Registered Representatives, failed to observe high standards of ethics and conduct in the transaction of their business, and engaged in business conduct or practices which are unbecoming or detrimental to the public interest, contrary to IIROC Dealer Member Rule 29.1, in that they:

- (a) improperly used an allocation account and other accounts to allocate trades to certain clients, to the detriment of other clients;
 - (b) misled numerous clients as to the positions in their accounts and the value of their accounts; and
 - (c) failed to have adequate compliance supervision, internal controls and books and records.
6. Staff and the Respondents agree to the following terms of settlement:
 - (a) Barret’s Membership is immediately suspended;
 - (b) Barret will immediately cease dealing with the public;
 - (c) Staff may undertake any action with Barret’s carrying broker, Laurentian Bank Securities Inc., to facilitate the orderly transfer of client accounts from Barret in a manner consistent with applicable law;
 - (d) Barret’s rights and privileges of Membership are terminated as of 30 days from the date of acceptance of this Settlement Agreement;
 - (e) Barret is expelled from the Corporation as of 30 days from the date of acceptance of this Settlement Agreement;
 - (f) J. Cohen is prohibited from approval for registration with IIROC at any time within 20 years of the date of acceptance of this Settlement Agreement;
 - (g) J. Cohen will pay IIROC a fine in the amount of \$50,000;
 - (h) I. Cohen is prohibited from approval for registration with IIROC at any time within 20 years of the date of acceptance of this Settlement Agreement; and
 - (i) I. Cohen will pay IIROC a fine in the amount of \$50,000.
 7. The Respondents agree to pay IIROC the sum of \$125,000 to reflect the costs that Staff incurred in connection with this matter.

III. STATEMENT OF FACTS

(i) Acknowledgment

8. Staff and the Respondents 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

A. Overview

9. Barret and the Cohens abused their privilege of access to the capital markets by using client funds, in many instances at their own discretion, in disregard of securities regulation.
10. Barret and the Cohens used an allocation account and other accounts over a number of years to allocate trades, including unauthorized trades, to particular client accounts. Barret continued to earn commissions, including in some accounts that had been depleted.
11. Barret and the Cohens took various steps to mislead numerous clients as to the positions in their accounts and the value of their accounts.
12. Barret's compliance was wholly inadequate and failed to prevent the various wrongdoings at Barret. Further, as a result of those inadequacies, it is difficult to accurately trace certain individual investors' funds.
13. In all instances, the Cohens were Barret's principals and directed its activities. They were responsible for its actions at all relevant times.

B. Barret and Registration History

14. Barret is a small investment dealer operating from an office on Eglinton Avenue East in midtown Toronto. It promotes itself as specializing in futures and options on metals, energies and all other exchange-traded commodities. It also offers to purchase physical gold and silver in clients' investment accounts. Barret's trading in physical metals is not the focus of this proceeding.
15. Barret has been a member of IIROC, and previously the Investment Dealers Association of Canada ("IDA"), since 2003.
16. Barret's two principals, J. Cohen and I. Cohen, are brothers. J. Cohen is Barret's President, Chief Executive Officer and Chief Compliance Officer. I. Cohen is Barret's Chief Operating Officer. In addition to the Cohens, Barret has one other person registered to trade securities. Barret also has or had a referral relationship with individuals in Israel who assisted with finding Israeli investors.
17. J. Cohen has been registered with IIROC, and previously the IDA, since 2003. Prior to working at Barret, J. Cohen worked at each of Gordon-Daly Grenadier Securities Inc. and MST Trading Canada. I. Cohen has been registered with IIROC, and previously the IDA, since 2004.
18. None of Barret, J. Cohen or I. Cohen has any prior disciplinary history.

C. Trade Allocations

19. Barret and the Cohens used allocation and other accounts from at least as early as September 2009 until at least November 2011. Through these accounts, Barret and the Cohens entered trades through the day, in many instances at their discretion, without identifying client account numbers. Trades were only allocated to Barret clients once the trades were concluded and their net gain or loss was known.
20. Barret and the Cohens allocated winning and losing trades to client accounts. Barret does not have complete or adequate written records of client instructions regarding those trades and no confirmation that clients to whom losing trades were allocated either wanted those trades or wanted their money to fund those losing trades.

Allocation Account at MFG

21. MF Global Canada Co. ("MFG") was Barret's carrying broker from at least as early as 2007 until the spring of 2010. At least as early as February 2007, Barret used an allocation account (at various times referred to as a bulk account or a break account), bearing MFG account number Y75-10888 and subsequently 606Y7501 (the "Barret Allocation Account").

22. Over the period from September to December 2009 (the “Review Period”), all commodity futures trading at Barret was done through the Barret Allocation Account. No trades were initially placed through individual client accounts.
23. Barret and the Cohens do not have records evidencing that they obtained client orders for trades placed during the Review Period. Clients contacted by IIROC staff advised that they did not authorize all of the trades in their accounts. Time stamps on trade tickets for Barret trades over the Review Period do not correlate with the time when orders were entered in the Barret Allocation Account. Rather, the trade tickets were time stamped after – often hours or even a day after – the trades were entered.
24. Barret and the Cohens transferred, or allocated, the trades from the Barret Allocation Account into individual client accounts by way of e-mail communication to MFG only once those trades were concluded.
25. MFG closed the Barret Allocation Account in February 2010. The loss of the Barret Allocation Account presented a challenge for Barret and the Cohens and their business. Barret and the Cohens were forced to find another way to carry on Barret’s business.

“Give-Up” Arrangements at RJOB

26. In June 2010, Barret moved to R.J. O’Brien and Associates Canada Inc. (“RJOB”) as its carrying broker. RJOB refused to provide Barret with an allocation account.
27. While at RJOB, Barret and the Cohens may have entered into or had a pre-existing arrangement with a floor broker or brokers on one or more commodity exchanges, such as the New York Mercantile Exchange (NYMEX) or the Chicago Mercantile Exchange (CME). Through an arrangement with a floor broker or brokers, Barret and the Cohens could enter trades by telephone to them directly. Those brokers would clear those trades and later “give up” those trades to Barret at RJOB.
28. While RJOB was its carrying broker, only 49% of Barret’s trades were executed at RJOB. The balance, 51%, was executed with floor brokers or dealers other than RJOB. There would have to be a client number attached to those trades when they were given up to RJOB, but it is possible that trades could be entered with outside floor brokers or dealers without providing client account numbers initially.
29. RJOB found it difficult to deal with Barret because of the high numbers of errors. Addressing RJOB’s errors and account adjustment requests took a disproportionate amount of RJOB’s staff time.
30. Trading through an independent broker by way of a give-up arrangement and requesting multiple cancels and corrects in client accounts are both ways to effect post-trade allocations.

“Give-up” Agreement at LBS

31. Barret moved to Laurentian Bank Securities Inc. (“LBS”) as its carrying broker in June 2011. Barret does not have an allocation (or bulk) account at LBS.
32. LBS had an unusual number of cancellation and corrections on Barret account allocations.
33. On or about August 9, 2011, Barret executed a “give-up” agreement with LBS and Newedge Canada Inc. (“Newedge”). Pursuant to that agreement, Barret could place orders with Newedge on any given day and Newedge placed those trades in an omnibus account at Newedge for Barret trades, bearing account number K2045 (the “Barret Omnibus Account”). Newedge later “gave up” those trades to LBS. More than half of the trades that Barret and the Cohens entered at Newedge were entered with the trade desk, rather than through Newedge’s electronic platform which required a Barret client account number to enter a trade.
34. In the normal course, Barret placed its orders by instant message communication with a Newedge floor trader. Those trades were executed in the Barret Omnibus Account. Of Barret’s trades through Newedge, 99% of were entered by way of instant message rather than by telephone.
35. Initially, Barret and the Cohens often provided Barret client account numbers only at the end of day.

Starting sometime in October 2011, however, LBS required Newedge to accept Barret orders only when accompanied by a client account number. Newedge complied with that request. After Newedge began requiring client account numbers from Barret, the number of cancel and correct requests by Barret on its trading increased significantly.

36. Starting in October 2011, Barret also re-allocated entered trades by simply changing the account numbers directly with the Newedge floor trader, through subsequent instant messages on the same day.
37. Barret's trading through Newedge dates to the end of November 2011.

D. Failing to Accurately Report to Clients and Misleading Numerous Clients

38. Barret and the Cohens misled numerous clients as to the positions in and value of their accounts. They did so by creating an appearance of value in some accounts through option trading, by providing misleading or inaccurate information about client accounts and by making off book payments to clients.

Account Value

39. A "gut" trade is an option writing strategy which is typically a short strategy with a sale of a call and a put on the same underlying interest with the same expiration date. There can be large premiums attached to these trades, but there are also significant liabilities attached. The potential profit is the premium but there is a risk of unlimited loss if the price of the underlying interest moves significantly.
40. Barret and the Cohens wrote "gut" trades in client accounts, creating the appearance of value in the accounts as a result of the premiums attached to the trades. The premiums were reflected in a line in client monthly statements called "Ending Balance", but the liabilities were only reflected in a separate line on the statements.
41. Barret and the Cohens misled numerous clients as to the value of their accounts by referring to the premiums attached to their options as representing the value of their accounts.

Account Values and Holdings

42. Barret and the Cohens misled numerous clients by providing a false account statement to at least one client and by providing misleading information to various clients about their accounts in other instances.
43. Certain clients believed that the value of their accounts was higher than it actually was and that they held securities in their accounts that they did not actually hold.

Payments to Clients On and Off Book

44. Barret allocated winning trades into client accounts, often preceding payments out to clients from their accounts. In some instances, the winning trades and payments out were preceded by demands for payments from clients.
45. Separate from the payments to clients from their accounts, Barret also arranged payments to clients by way of wire transfer or cheque from J. Cohen or I. Cohen directly or from a third party.
46. A total of \$290,984.17 was paid by a third party to 42 Barret clients over the period from February 1 to March 8, 2011. Additional payments were made to clients directly by J. Cohen or I. Cohen over that period.

E. Inadequate Compliance Supervision

47. Barret's supervision records are wholly inadequate. The records do not indicate what accounts were reviewed, what issues were found in what accounts or what follow-up steps were taken.
48. There is no indication that Barret tracked the accounts or trading activities as required by IIROC's Dealer Member Rules. There is no indication that Barret monitored the risk loss limits in client accounts or the margin and credit levels in client accounts.

F. Commissions Continued

49. Barret continued to earn commission on its trading in client accounts and, in some instances, Barret generated commissions after client accounts had been depleted.

IV. TERMS OF SETTLEMENT

50. 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.

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

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

53. 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.

54. If the Hearing Panel accepts the Settlement Agreement, the Respondents waive their rights under IIROC rules and any applicable legislation to a disciplinary hearing, review or appeal.

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

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

57. Staff and the Respondents 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.

58. Unless otherwise stated, any monetary penalties and costs imposed upon the Respondents are payable immediately upon the effective date of the Settlement Agreement.

59. 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.

AGREED TO by the Respondents at the City of Toronto, in the Province of Ontario, this 10th day of February, 2012.

"Leah Takeuchi"

Witness

"Leah Takeuchi"

Witness

"Leah Takeuchi"

Witness

"Jamie Cohen"

Barret Capital Management Inc.

Per:

"I have the authority to bind the corporation"

"Jamie Cohen"

Jamie Cohen

"Idan Cohen"

Idan Cohen

AGREED TO by Staff at the City of Toronto, in the Province of Ontario this 13th day of February, 2012.

"Vito Pedone"

Witness

"Susan Kushneryk"

Susan Kushneryk

Senior Enforcement Counsel on behalf of

Staff of the Investment Industry Regulatory
Organization of Canada

ACCEPTED at the City of Toronto, in the Province of Ontario, this 13th day of February, 2012, by the following
Hearing Panel:

“John Webber”

The Honourable John Webber

“Richard Austin”

Mr. Richard Austin

“Hugh McNabney”

Mr. Hugh McNabney