Re Dubin

IN THE MATTER OF:

The Rules of the Investment Industry Regulatory Organization of Canada

and

Shane Dubin

2019 IIROC 17

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

Heard: May 29, 2019
Decision: May 29, 2019
Reasons: June 13, 2019

Hearing Panel:
Christopher Portner, Chair, Leo Ciccone and David Lang
Appearance:
Natalija Popovic, Senior Enforcement Counsel IIROC
April Engelberg, Enforcement Counsel IIROC
Robert Brush and Dana Carson, Counsel for the Respondent
In Attendance:
Shane Dubin, Respondent
Alex Oustinov, IIROC Investigator
Anthony Rizzo, Student (IIROC)
Melanie Zetusian, Student (Counsel for Respondent)

SETTLEMENT HEARING DECISION

I. INTRODUCTION

Settlement Agreement

¶ 1 On May 29, 2019, Enforcement Counsel for the Investment Industry Regulatory Organization of Canada ("IIROC") and counsel for Shane Dubin (the "Respondent") submitted a Settlement Agreement between IIROC and the Respondent dated April 16, 2019 (the "Settlement Agreement") to the Hearing Panel for acceptance or rejection pursuant to Section 8215 of IIROC's Consolidated Enforcement, Examination and Approval Rules (the "Consolidated Rules"). Following a hearing at IIROC's offices in Toronto, the Hearing Panel accepted the Settlement Agreement with Reasons to follow. These are our Reasons for such acceptance.

Contravention

¶ 2 The Respondent admitted that, between February 2016 and February 2018, he recommended and facilitated futures and options trading outside his Dealer Member for which he was not approved, contrary to Dealer Member Rule 29.1 (prior to September 1, 2016) and Consolidated Rule 1400.

Agreed Sanctions

¶ 3 The Respondent agreed to pay a fine of $60,000 and costs of $10,000 and re-write the Conduct and Practices Handbook examination within three months.

II. THE FACTS

Overview

¶ 4 The facts on which the parties have agreed are set out in Part III of the Settlement Agreement, a copy of which is attached to these Reasons. By way of a summary, the Respondent, a Registered Representative of Scotia Capital Inc. ("Scotia"), was approved for futures and options on futures trading at Scotia until July 1, 2016 when Scotia discontinued its futures trading business.

¶ 5 As the Respondent wanted to continue to trade futures for his own account, he opened a personal and a corporate account with Yonathan Chanoch Shields ("Shields"), a Registered Representative of R. J. O'Brien & Associates Canada Inc. ("R. J. O'Brien"), who had worked with the Respondent at Scotia from approximately 2004 to 2010. The Respondent's trading strategy entailed writing uncovered U.S. dollar options on futures on a number of futures products including the S&P 500 E-minis, crude oil, natural gas and gold.

¶ 6 In anticipation of Scotia's discontinuance of its futures trading business, commencing in February 2016, the Respondent referred approximately 18 of his clients, colleagues and friends to Shields, 10 of whom (the "Clients") wanted to emulate the Respondent's profitable trading in his R. J. O'Brien accounts. None of the Clients had any prior experience with trading futures. The Respondent disclosed to Scotia that he had opened personal and corporate accounts with Shields at R. J. O'Brien, but did not disclose his activities in relation to the Clients.

¶ 7 The Respondent requested, and was granted, authorization by the Clients to view their respective R. J. O'Brien account statements through an online portal. In some cases, he also received the New Client Application Forms completed by the Clients when opening their R. J. O'Brien accounts, which included an e-mail address for the Respondent to receive copies of the Clients' account statements, so that the Respondent could assist in providing updates to the Clients regarding the performance of their R. J. O'Brien accounts.

¶ 8 Although the Respondent did not have trading authority over the Clients' accounts and was no longer approved for futures or options on futures trading, he made recommendations to Shields and, in some cases, specifically told Shields to adjust the recommendations for volume or quantity of investment. Following such recommendations, Shields would send recommendations by e-mail to the Clients for their approval of the proposed trades, copies of which were sent to the Respondent. At times, the Respondent would follow-up with Clients if they did not provide approvals to the e-mail messages from Shields on a timely basis.

¶ 9 On February 5, 2018, the S&P Index experienced a significant spike in volatility and a corresponding drop in value. As a result, by the end of the day on February 6, 2018, the Respondent and the Clients sustained significant losses in their accounts, which lead to the liquidation of the Clients' R. J. O'Brien accounts. On the same day, the Respondent advised Scotia that certain of his clients had accounts with Shields that had suffered losses and, when questioned, he disclosed the extent of his involvement.

¶ 10 As a result of the foregoing, Scotia terminated the Respondent's employment in April 2018, following which he was employed by Canaccord Genuity and again became a registrant on July 24, 2018.

Mitigating Factors

¶ 11 In their written submissions, Staff of IIROC notes that the following factors were taken into consideration in the Settlement Agreement:

(a) The Respondent has no disciplinary history;

(b) By admitting the misconduct described above and agreeing to resolve the matter by means of a settlement agreement, the Respondent reduced the length of time required to investigate the matter which permitted an early resolution;

(c) The Respondent did not receive any commissions, fees or other remuneration;

(d) The Respondent was not registered with IIROC from April 13, 2018 to July 24, 2018; and

(e) By settling with IIROC, the Respondent has expressed remorse for his actions and has been under strict supervision since re-registering.

III. THE ROLE OF THE HEARING COMMITTEE

¶ 12 Pursuant to subsection 8215(5) of the Consolidated Rules, the Hearing Panel may only accept or reject the Settlement Agreement. Enforcement Counsel referred the Hearing Panel to *Re Milewski*[1] in which the District Council stated that:

> 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.[2]

¶ 13 In determining whether to accept the Settlement Agreement, the Hearing Panel should also be satisfied with respect to the following three considerations described in *Re Donelly*[3], each of which we address below:

(a) The agreed penalties must be within an acceptable range, taking into account similar cases;

(b) The agreed penalties must be fair and reasonable, that is, proportional to the seriousness of the contravention, and considering other relevant circumstances, and should appear to be so to members of the public and industry; and

(c) The agreed penalties should serve as a deterrent to the respondent and to industry.

IV. ANALYSIS

¶ 14 In determining whether the penalties on which the parties have agreed are within an acceptable range, we have considered the sanctions imposed in 12 previous IIROC cases submitted to us by the parties, four of which dealt with off-book transactions.4 In the submission of counsel for the parties, the sanctions set out in paragraph 3 above are within a reasonable range given the mitigating factors described in the Settlement Agreement.

¶ 15 We have considered the cases submitted by the parties and have taken into account the mitigating factors described in the Settlement Agreement and summarized in paragraph 11 above. Given the foregoing and the fact that, at all times, the Clients were clients of R. J. O'Brien and received recommendations from Shields with respect to proposed trades, we agree that the proposed sanctions are within an acceptable range.

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[1] [1999] I.D.A.C.D. No. 17.

[2] *Supra*, at pages 11-12.

[3] 2016 IIROC 23 at para. 5.

[4] *Hodge (Re)*, 2013 IIROC 31 at paras. 2, 7 and 8; *Dennis (Re)*, 2011 IIROC 39 at para. 16; *Dariotis (Re)*, 2011 IIROC 75 at paras. 7, 8 and 11; and *Gaudet (Re)*, 2010 IIROC 29 at paras. 4-5.

¶ 16 As the Respondent has been subjected to sanctions which we believe are proportionate to his contravention of Dealer Member Rule 29.1 (prior to September 1, 2016) and Consolidated Rule 1400, we are satisfied that the sanctions will act as a specific deterrent to the Respondent and provide a general deterrent to the industry.

¶ 17 IIROC's Sanction Guidelines state that the purpose of sanctions in regulatory proceedings is to protect the public interest by restraining future conduct that may harm the capital markets. Accordingly, sanctions should be significant enough to prevent and discourage future misconduct by the respondent and deter others from engaging in similar misconduct.5

¶ 18 IIROC's Sanction Guidelines cite the case of Re Mills6 in which the Hearing Panel stated that industry expectations are of particular relevance to general deterrence and that excessive penalties may reduce respect for the process, thereby diminishing their deterrent effect.

V. CONCLUSIONS

¶ 19 For the foregoing reasons, we have concluded that the terms of the Settlement Agreement are fair and reasonable, are within an acceptable range and should serve as a deterrent to the Respondent and the industry. As a result, the Hearing Panel has concluded that the Settlement Agreement is in the public interest and, accordingly, is accepted.

Dated this 13 day of June, 2019.

Christopher Portner

Leo Ciccone

David Lang

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 Shane Dubin ("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. Beginning in February 2016, the Respondent, a Registered Representative at Scotia Capital Inc. ("Scotia"), referred several of his clients, colleagues and friends, to Yonathan Chanoch Shields ("Shields"), a Registered Representative at R.J. O'Brien & Associates Canada Inc. ("R.J. O'Brien).

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[5] IIROC's Sanction Guidelines February 2, 2015 at paragraph 1 of Part I.

[6] [2001] I.D.A.C.D. No. 7 at page 3.

5. The Respondent was a client of Shields' at R.J. O'Brien and engaged in a high risk futures options trading strategy. The Respondent made the referrals so that the individuals could engage in the same strategy. After July 1, 2016 the Respondent was not approved for futures or option on futures trading.

6. At times the Respondent provided trading recommendations to Shields for the client accounts at R.J. O'Brien, although he did not have trading authority over the accounts. The clients understood that the Respondent was providing recommendations to Shields and that they were mirroring the Respondent's trading strategy. At times, the Respondent also reported performance results to the clients regarding their accounts at R.J. O'Brien.

7. The Respondent did not disclose this activity to Scotia.

8. In February 2018, the clients and the Respondent sustained significant losses in their R.J. O'Brien accounts and the accounts were liquidated.

Background

9. The Respondent has been a Registered Representative since 2000. In April 2018, he was notified by Scotia that it was dismissing him for cause for the conduct that is the subject matter of this settlement. He has been employed since April 2018 at Canaccord Genuity Corp. and became a registrant on July 24, 2018.

10. The Respondent and Shields worked together at Scotia from approximately 2004 until 2010.

The Options on Futures Strategy

11. The Respondent was approved for futures and options of futures trading at Scotia until July 1, 2016 when the firm discontinued its futures trading business. He was no longer approved for such trading after that date. Since the Respondent wanted to continue to trade futures on his own account, he contacted Shields in early 2016 to advise that he had been trading a futures strategy and wanted to continue to do so with Shields.

12. In 2016, the Respondent opened a personal account and a corporate account with Shields at R.J. O'Brien and implemented a high risk trading strategy suitable for sophisticated investors.

13. The strategy consisted of writing uncovered US dollar options on futures on a number of futures products including the S&P 500 E-minis, crude oil, natural gas, and gold (the "Strategy"). The Strategy aimed to identify short-term option writing opportunities, both calls and puts, within the futures markets and was predominantly focused on S&P 500 E-mini contracts.

The Client Referrals

14. In anticipation of Scotia's July 1, 2016 discontinuation of its futures trading business, beginning in February 2016, the Respondent made approximately 18 referrals of clients, colleagues, and friends to Shields; ten of which are addressed herein (the "Clients").

15. The Respondent referred the Clients to Shields as he could not implement the Strategy for them at Scotia and the Clients were interested in mirroring his very profitable trading in his R.J. O'Brien accounts. The Clients had no prior experience with futures trading.

16. While the Respondent disclosed to Scotia that he had opened personal and corporate accounts with Shields at R.J. O'Brien, he did not disclose his activity in relation to the Clients.

The Respondent's Involvement with Opening of Client Accounts at R.J. O'Brien

17. The Respondent was aware that the Clients were asked to complete a R.J. O'Brien New Client Application Form ("NCAF"). In some cases, the Respondent sent Shields general KYC information for the Clients, with the Clients' consent, that had previously been collected at Scotia in order to assist with the completion

of the NCAFs.

18. The Respondent requested, and was granted, authorization by the Clients to view their respective account statements through an online portal at R.J. O'Brien. In some cases, the NCAFs included an email address for the Respondent to receive copies of the Clients' account statements.

19. The purpose of having access to the Clients' account statements was so the Respondent could assist in providing updates to the Clients regarding their R.J. O'Brien account performance.

20. The Respondent was aware that several of the Clients used a line of credit to fund the Strategy, which increased the risk of using the Strategy.

The Respondent's Recommendations and Performance Updates

21. The Respondent did not have trading authority over the Clients' accounts and was not approved for futures or options on futures trading. He nevertheless made recommendations to Shields for trading in the Client accounts; and in some cases the Respondent specifically told Shields to adjust the recommendations for volume or quantity of investment.

22. The Respondent was aware that following his recommendations to Shields, the latter would then send recommendations via email to the Clients for their approval of the proposed trades; at times, the Respondent was copied on these emails.

23. The Respondent was aware that the Clients were to approve the recommendations before a trade could be executed. At times, the Respondent would follow up with Clients if they did not provide timely approvals to Shields' emails.

24. The Respondent provided some of the Clients with updates and summaries of the activity and performance of their respective R. J. O'Brien accounts.

The Client Losses and Liquidation of the Accounts

25. On Monday, February 5, 2018, the S&P Index experienced a significant spike in volatility and a corresponding drop in value.

26. The Respondent was aware that by the end of day on February 6, 2018, both he and the Clients had sustained significant losses in their accounts and that subsequently the Clients' accounts were liquidated.

27. In a number of cases, the Respondent contacted the Clients to ensure they were aware of the losses in their R. J. O'Brien accounts.

28. On February 6, 2018, the same day that he learned about the losses, the Respondent advised Scotia that certain of his clients had accounts with Shields that had suffered losses. When questioned by Scotia, he disclosed the extent of his involvement with both Shields and the Clients.

Additional Relevant Factors

29. The following factors are noted:

- the Respondent has no disciplinary history;
- the Respondent was terminated by Scotia;
- the Respondent admitted to the misconduct described above and agreed to resolve this matter by way of a settlement agreement with IIROC staff, his admissions shortened the length of time required to investigate this matter and led to an early resolution;
- the Respondent did not receive any commissions, fees or other remuneration from his conduct;

- the Respondent was not registered with IIROC from April 13, 2018 until July 24, 2018, has been under strict supervision since re-registering; and
- by settling with IIROC, the Respondent has expressed remorse for his actions.

PART IV – CONTRAVENTION

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

    Between February 2016 and February 2018, the Respondent recommended and facilitated futures and options trading outside of his Dealer Member and for which he was not approved, contrary to Dealer Member Rule 29.1 (prior to September 1, 2016) and Consolidated Rule 1400.

PART V – TERMS OF SETTLEMENT

31. The Respondent agrees to the following sanctions and costs:

    a. A fine of $60,000;

    b. A requirement to re-write the Conduct and Practices Handbook examination within three months; and

    c. Costs of $10,000.

32. 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

33. 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.

34. 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

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

36. 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.

37. 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.

38. 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.

39. 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.

40. The terms of this Settlement Agreement are confidential unless and until this Settlement Agreement has been accepted by the Hearing Panel.

41. 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.

42. 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.

43. 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

44. This Settlement Agreement may be signed in one or more counterparts which together will constitute a binding agreement.

45. A fax or electronic copy of any signature will be treated as an original signature.

DATED this "16th" day of "April", 2019

"Witness"
Witness

"Shane Dubin"
Shane Dubin

DATED this "16th" day of "April", 2019

"Alex Oustinov"
Witness

"April Engelberg"
April Engelberg

Enforcement Counsel on behalf of Enforcement Staff of the Investment Industry Regulatory Organization of Canada

The Settlement Agreement is hereby accepted this "29" day of "April", 2019 by the following Hearing Panel:

Per: "Christopher Portner"
Panel Chair

Per: "David Lang"
Panel Member

Per: "Leo Ciccone"
Panel Member