

Re Noronha

IN THE MATTER OF:

The Rules of the Investment Industry Regulatory Organization of Canada

and

Jayanth Noronha

2017 IIROC 16

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

Heard: March 6, 2017
Decision: March 21, 2017

Hearing Panel:

Thomas G. Heintzman, Q.C., Chair; Donald Lawson; Richard E. Austin

Appearances:

Elissa Sinha for IIROC Staff

SANCTION DECISION

¶ 1 This is the Sanction Decision arising from the Decision in this proceeding dated January 23, 2017 (the Liability Decision). In the Liability Decision, the respondent Jayanth Noronha (Mr. Noronha) was found guilty on four counts of contravening IIROC Dealer Member Rules 18.15, 29.1 and 42. The counts upon which Mr. Noronha was found guilty are as follows:

Count 1:

Between January 2011 and September 2013 (the Relevant Period), Noronha engaged in business conduct or practice unbecoming or detrimental to the public interest when he recommended and facilitated investments for his clients in shares of Mint Technology, now called The Mint Corporation (Mint) and Voodoo Vox Inc., now called UpSnap, Inc. (VVX) (collectively, the Issuers), which were conducted off the books and records and without the consent of his Dealer Member Firms, contrary to Dealer Member Rule 29.1.

Count 2

During the Relevant Period, Noronha, directly and indirectly through his spouse, accepted remuneration and/or consideration from Mint and VVX, being persons other than his Dealer Member firms, in regards to securities-related activities, contrary to IIROC Dealer Member Rule 18.15.

Count 3

The Relevant Period, Noronha failed to disclose to his dealer Member firm and to his client, and failed to address, a conflict of interest, contrary to IIROC Dealer Member Rule 42.

Count 4

In October 2013, Noronha engaged in business conduct or practice unbecoming or detrimental to the public interest when he deleted email records, contrary to IIROC Dealer Member Rule 29.1.

¶ 2 In the Liability Decision, this proceeding was remitted to the IIROC National Hearing Coordinator to schedule a hearing to address the appropriate sanctions. That hearing (the Sanctions Hearing) was held on March 6, 2017 at the office of Atchison & Denman, Suite 800, 155 University Avenue, Toronto. At the Sanctions Hearing, affidavit proof was filed by counsel for IIROC Staff that Mr. Noronha had been served with the Liability Decision; the submissions to be made to the Sanctions Hearing by counsel for IIROC Staff; and notice of the place, date and time of the Sanctions Hearing. Mr. Noronha did not attend the Sanctions Hearing on March 6, 2017.

¶ 3 At the Sanctions Hearing, counsel for IIROC Staff submitted that the appropriate sanctions for the conduct of which Mr. Noronha has been found guilty are as follows:

- a. A permanent bar from approval from registering with IIROC in any capacity;
- b. A fine in the amount of \$669,500 representing disgorgement of the amounts received by Mr. Noronha, directly and indirectly through his spouse from the Issuers; and
- c. An additional fine in the amount of \$100,000 for all four charges.

In addition, IIROC Staff submitted that Mr. Noronha should be ordered to pay the costs that IIROC Staff has incurred in this matter, in the amount of \$60,629.

¶ 4 We accept the submissions of counsel for IIROC Staff except for the amount of the additional fine. In our view, the fine should be \$200,000 to properly reflect the seriousness of Mr. Noronha's misconduct as reflected in the evidence tendered during the Liability portion of this proceeding and in the Liability Decision.

¶ 5 In this Sanction Decision, we will not repeat the findings made by us in the Liability Decision, which findings may be taken to be incorporated into this Decision. From every aspect, the misconduct of Mr. Noronha was as disgraceful and egregious as one could imagine in the investment industry.

¶ 6 Over a two and half year period, Noronha undertook transactions which were not disclosed to, and were conducted off the books of, his Dealer Member employers. In doing so, he purposefully hid his conflicts of interest from his Dealer Member employers. As we refer to in the Liability Decision, this sort of conduct practiced by a portfolio manager against his Dealer Member employer undermines the integrity of the operation and regulation of the investment industry.

¶ 7 Mr. Noronha's conduct was not accidental, but planned and actively carried out by him. He entered into the undisclosed and off-book transactions for the very purpose of obtaining compensation from the Issuers in which his clients were investing without that fact being disclosed to the Dealer Member firm with whom he was engaged. He arranged for much of the compensation to be paid to his wife to hide or disguise those arrangements, a scheme which we have found to be a sham. He denied to his Dealer Member firms that he was undertaking any outside business activity and misrepresented the compensation that he received from the Issuers.

¶ 8 The off-book transactions that Mr. Noronha undertook were not in small amounts but amounted to \$4.4 million in Mint and \$1 million for VVX. Nor was the compensation that Mr. Noronha received small. It totalled \$669,500 from Mint and VVX.

¶ 9 Mr. Noronha placed himself in a direct conflict of interest by receiving undisclosed compensation from Mint and VVX when he had a duty to provide independent advice to his clients who were investing in those companies. This is a classic example of a conflict of interest that totally undermines the public's confidence in the investment industry. Not only did Mr. Noronha place himself in a conflict of interest, he tried to hide or disguise it by having the compensation paid to his wife.

¶ 10 And when, in October 2013, his Dealer Member firm, Raymond James, was seeking information about his conduct, Mr. Noronha took steps to remove the Gmail and NTW email records from his computer and disconnected his backup server. He clearly did so for the very purpose of depriving his employer of the opportunity to properly investigate his conduct, and to stop his employer from seeing and obtaining copies of the emails he had deleted and which would show the conduct in which he had engaged. The supervision of investment managers by Dealer Members is another fundamental element of the regulation of the investment industry, and it is one which Mr. Noronha flagrantly interfered with and disregarded.

¶ 11 In short, from the beginning to the end of this saga, Mr. Noronha acted deliberately and dishonestly.

¶ 12 Mr. Noronha has not attended the liability or sanction hearings in this proceeding, has offered no explanation for his conduct and has not accepted responsibility for his actions or shown any remorse.

¶ 13 This is not the first time that Mr. Noronha has contravened the regulations of the investment industry. In 2002, he was disciplined by the Investment Dealers Association of Canada (IIROC's predecessor). He was fined \$25,000 and subjected to other penalties.

¶ 14 With that background, we accept the submission of counsel for IIROC Staff that Mr. Noronha should be barred from participating in the investment industry. The IDA proceeding in which he was involved in 2002, and the discipline to which he was subjected at the end of that proceeding, have had no impact on him. He has taken active steps to avoid detection of his misconduct by his Dealer Member employer. As a result, the procedures upon which the regulation of the investment industry are based, and upon which public confidence in that investment industry depends, have proven worthless so far as regulating Mr. Noronha is concerned. In summary, he is not governable by the regulatory authority of the investment industry.

¶ 15 The Sanctions Guidelines provide for a permanent bar where the contraventions by the respondent involve harm to the integrity of the market or the securities industry, or if there is reason to believe that the respondent cannot be trusted to act in an honest and fair manner in his dealings with the public, clients and the securities industry. Mr. Noronha's conduct demonstrate exactly this harm to the integrity of the securities industry and that he cannot be trusted to act in an honest and fair manner as a registrant in the securities industry. As the Hearing Panel said of the respondent in *Re Vitug*, Mr. Noronha's "actions were deliberate, deceptive and contrary to the interests of his employers, his clients, and the public-at-large...In the last analysis, we determine that the respondent is not the type of person that anyone should want in the securities industry."¹

¶ 16 Accordingly, an order will be made barring Mr. Noronha from registering with IIROC in any capacity.

¶ 17 We also accept the submission of counsel for IIROC Staff that Mr. Noronha should be ordered to disgorge the \$669,500 that has been paid in fees, commission and other payments directly to him or indirectly through his wife arising from the transactions referred to in the Liability Decision.² We have found that the arrangements by which payments were made to Mr. Noronha's wife were a sham and were really to him. As the Sanction Guidelines state, a wrongdoer such as Mr. Noronha should not benefit financially from his misconduct.

¶ 18 We have reviewed the circumstances in which respondents in other IIROC proceedings have been ordered to disgorge the commissions and other payments they had received from off-book and other impugned transactions.³ We are satisfied that an order requiring Mr. Noronha to pay a fine of \$669,500 by way of disgorgement is proper in the present case, in order to ensure that Mr. Noronha does not receive the benefit of

¹ *Vitug (Re)*, 2009 IIROC No. 31 at paras. 12-17; appeals dismissed, *Re Vitug* (2010), 33 O.S.C.B. 3965 (Ontario Securities Commission); 2010 ONSC 4464 (Ont. Div. Ct); see also *Toban (Re)*, 2007 IDACD No. 9 at paras. 176-180.

² Affidavit of Bob Natanson sworn November 15, 2016, Exhibit 110.

³ See for instance: *Toban (Re)*, 2007 IDACD No. 9 at para. 184; *Raby (Re)*, 2013 IIROC 30 at para. 21.

his wrongful conduct.

¶ 19 While the amount of the payments received by Mr. Noronha, and thus the amount of the disgorgement, is much larger than the amounts in some of the prior decisions, this is no reason, in our view, to limit or reduce the amount of the disgorgement. Indeed, if it were to be accepted that the receipt of very large payments from off-book transactions and other transactions undertaken contrary to IIROC's Dealer Member Rules would not be subject to complete disgorgement that would only encourage more prolonged, more egregious and more secretive misconduct.

¶ 20 With respect to the additional fine, if any, that should be imposed upon Mr. Noronha, IIROC Staff submits that the additional fine should be \$100,000. IIROC Staff submit that this fine is somewhat modest in relation to the seriousness of Mr. Noronha's conduct, and that this modesty is due to the large amount of the disgorgement sought by IIROC Staff.

¶ 21 We do not accept IIROC's Staff submission that an additional fine of \$100,000, in addition to the disgorgement ordered above, is adequate or suitable in the present circumstances. In our view, an additional fine in the amount of \$200,000 is appropriate.

¶ 22 In determining the proper amount of the additional fine, if any, the Hearing Panel is authorized to address the protection of the public and the prevention or restraint of future misconduct. Prevention may be specific prevention - directed at the particular respondent in the hearing, or general prevention - to discourage others from undertaking similar conduct. Since our Decision in this case will prevent Mr. Noronha from obtaining employment activity in the investment industry, we have paid particular attention to general prevention and deterrence.

¶ 23 In addressing the nature of general prevention and deterrence and their role in sanctions which may be imposed by investment industry and securities regulators, the Supreme Court of Canada said the following in *Re Cartaway Resources Corp.*:

In my view, nothing inherent in the Commission's public interest jurisdiction, as it was considered by this Court in *Asbestos*, supra, prevents the Commission from considering general deterrence in making an order. To the contrary, it is reasonable to view general deterrence as an appropriate, and perhaps necessary, consideration in making orders that are both protective and preventative. Ryan J.A. recognized this in her dissent: "The notion of general deterrence is neither punitive nor remedial. A penalty that is meant to generally deter is a penalty designed to discourage or hinder like behaviour in others" (para 125)....

...A penalty that is meant to deter generally is a penalty that is designed to keep an occurrence from happening; it discourages similar wrongdoing in others. In a word, a general deterrent is preventative. It is therefore reasonable to consider general deterrence as a factor, albeit not the only one, in imposing a sanction under s. 162. The respective importance of general deterrence as a factor will vary according to the breach of the Act and the circumstances of the person charged with breaching the Act.

It may well be that the regulation of market behaviour only works effectively when securities commissions impose ex post sanctions that deter forward-looking market participants from engaging in similar wrongdoing. That is a matter that falls squarely within the expertise of securities commissions, which have a special responsibility in protecting the public from being defrauded and preserving confidence in our capital markets. (underlining added)⁴

¶ 24 Applying this passage to the duty of an IIROC Hearing Panel, the Supreme Court of Canada is drawing attention to the special responsibility of the Hearing Panel to protect the public and preserve confidence in the

⁴ *Re Cartaway Resources Corp.*, [2004] 1 SCR 672 at paras. 60-62.

capital markets. The Hearing Panel is to do so by examining the circumstances giving rise to the particular case and then to order sanctions that address, not just the particular respondent, but the conduct of future market participants.

¶ 25 The authority of IIROC Hearing Panels to take the specific circumstances of the case into account in making a sanctions order that will accomplish general deterrence is expressly recognized in the first principle stated in the IIROC Sanctions Guidelines:

1. Disciplinary sanctions are preventative in nature and should be designed to protect the investing public, strengthen market integrity, and improve overall business standards and practices.

The purpose of sanctions in a regulatory proceeding is to protect the public interest by restraining future conduct that may harm the capital markets. In order to achieve this, sanctions should be significant enough to prevent and discourage future misconduct by the respondent (specific deterrence), and to deter others from engaging in similar misconduct (general deterrence).

¶ 26 In our view, the fine of \$100,000 proposed by IIROC Staff significantly fails to address this principle. That fine is not large enough in proportion to the seriousness of the misconduct in this case, and it will not sufficiently dissuade future similar conduct.

¶ 27 This Decision and the Liability Decision have recited at length the intentional and duplicitous nature of Mr. Noronha's misconduct that over an extended period of time contravened every conceivable aspect of the obligation of good faith of a participant in the investment industry. He was willing to conduct himself in that fashion even though he had been disciplined for similar conduct in 2002. And he conducted himself in that fashion for the purpose of earning \$665,000 over three years.

¶ 28 A fine of \$100,000, or about 15 percent of what he generated in income, is not likely to dissuade a person from acting in a similar fashion in the future. Maybe no amount will, but in our view a fine in a substantially larger amount is necessary to seek to achieve that objective. And a fine of that larger amount is necessary for the purpose of properly expressing the degree of wrongfulness of Mr. Noronha's conduct. In our view, a fine of \$200,000 is appropriate.

¶ 29 In *Re Vitug*, a fine of \$350,000 was imposed by an IIROC hearing panel. In describing the respondent in that case, the IIROC Hearing Panel said the following:

12. As we stated in our reasons on the merits, the respondent is someone who does not appear to be concerned about the truth. He acted deceitfully and with intention to avoid discovery by his employers.
13. He has shown no remorse for his actions.
14. Although the respondent has no disciplinary history, and although there were no complaints against him by his aunt or his father-in-law or anyone else, as far as we know, his actions were deliberate, deceptive and contrary to the interests of his employers, his clients, and the public-at-large.....
16. As we said in the decision on the merits, the respondent's contraventions are serious in that they go to the fundamental foundation of trust between the registered representative and his employer and the registered representative and his clients. The respondent's misconduct is serious and demonstrated a clear disregard for industry standards and his employer's policies and procedures.
17. We determine that it is necessary to protect the public against the respondent in the future by keeping him out of the industry.
18. None of the cases presented to us was directly relevant as a guide to an appropriate fine for the

respondent.

19. Any fine should be significant to the respondent and his circumstances.
20. He is a high income earner. The dollar volumes involved in his activities were not insignificant. The infractions were deceitful and serious. There was planning and organization by the respondent over a significant period of time to carry on his deception.
21. A fine of \$350,000 will be significant to the respondent and should act in part as a general deterrent to others and as a specific deterrent to him.”⁵

¶ 30 The misconduct of Mr. Noronha as disclosed in the present proceeding is as egregious as the misconduct disclosed in *Re Vitug*. The financial circumstances of Mr. Noronha may be worse than Mr. Vitug’s who attended at the IIROC hearing with counsel, was described by the Hearing Panel as a “high income earner” and appealed the IIROC decision to the O.S.C. and the Superior Court, unlike Mr. Noronha whose counsel said early in this proceeding that Mr. Noronha could not afford to defend himself due to lack of funds. Principle 7 of the IIROC Sanction Guidelines states that inability to pay should not be a predominant or determining factor and that the burden of raising financial hardship is on the respondent. In this case, Mr. Noronha has not provided any evidence of financial hardship.

¶ 31 In an appropriate case, a Hearing Panel may, having regard to the evidence of the respondent, reduce the fine from what it might otherwise be in light of the other elements of the Sanction Decision. A Hearing Panel might do so even when the respondent is unrepresented for good reason, as IIROC Staff has inferentially submitted that we should do. But in the present case, no good reason for doing so has been presented.

¶ 32 We have already said that the receipt by Mr. Noronha of very large payments arising from transactions undertaken contrary to IIROC’s Dealer Member Rules does not justify reducing the amount of disgorgement. So also, the receipt of those large payments and the resultant large disgorgement is not itself a good reason to reduce the additional fine. To the contrary, it might well be argued that a higher profit by the respondent from his wrongdoing – and thus a higher disgorgement – should result in at least as severe a fine, if not more severe. Thus, in *Re Arapis* the disgorgement was \$25,000 and the additional fines were \$10,000 each for two contraventions, or \$20,000 in total, or 80 percent of the disgorgement.⁶ In the present case, IIROC Staff is seeking an additional fine of \$100,000 for all four counts upon which Mr. Noronha has been found guilty. The additional fine of \$100,000 represents about 15 percent of the disgorgement, while the order which we are making results in an additional fine of about 30 percent of the disgorgement.

¶ 33 In our view, there is not any necessary relationship between the amounts of the disgorgement and the additional fine. We refer to this relationship only to point out that there has been no good reason shown to us why the amount of the additional fine should be reduced due to the amount of the disgorgement. We prefer to directly address what the amount of the additional fine should be, by determining what amount of additional fine will deliver the proper message about the Hearing Panel’s view of the seriousness of Mr. Noronha’s misconduct, and will carry out the preventive and protective functions of the IIROC sanctions regime. In our view, a fine of \$200,000 is justified and necessary, in addition to the other elements of the Decision. It is justified by the very serious and prolonged misconduct of Mr. Noronha and his prior discipline record. It is necessary in order to protect the public interest and discourage future similar conduct that may harm the capital markets.

¶ 34 Finally, IIROC Staff submits that Mr. Noronha should be ordered to pay IIROC Staff’s costs of this proceeding, pursuant to IIROC Dealer Member Rule 20.49. A Bill of Costs has been provided and the costs are

⁵ *Re Vitug*, supra at paras. 12-21.

⁶ *Arapis (Re)*, 2011 IIROC 37 at para. 8 and 16.

reasonable. In light of the previous IIROC decisions allowing such costs, an order to this effect is appropriate in this case to ensure that Mr. Noronha pays the costs incurred by IIROC to bring his wrongdoing to a hearing.

¶ 35 Accordingly, it is ordered that:

- a. Mr. Noronha be and he is hereby subject to a permanent bar from approval from registering with IIROC in any capacity;
- b. Mr. Noronha shall pay to IIROC a fine in the amount of \$669,500 representing disgorgement of the amounts received by Mr. Noronha, directly and indirectly through his spouse from the Issuers; and
- c. Mr. Noronha shall pay to IIROC an additional fine in the amount of \$200,000 for all four charges.
- d. Mr. Noronha shall pay to IIROC the costs that IIROC Staff has incurred in this proceeding, in the amount of \$60,629.

Dated at Toronto this 21st day of March, 2017

Thomas G. Heintzman

Donald Lawson

Richard E. Austin

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