

Re Pace

IN THE MATTER OF:

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

and

Fernando Pace, Respondent

2019 IIROC 11

Hearing Panel
of the Investment Industry Regulatory Organization of Canada
(Québec District)

Hearing held: March 20, 2019

Decision rendered: March 20, 2019

Written decision published: April 10, 2019

Hearing Panel:

Robert Monette (Chair), Normand Durette, Yves Ruest

Appearances:

Me Fanie Dubuc, Counsel for IIROC

Me Zavier Levine, Counsel for Respondent

REASONS FOR DECISION ON SETTLEMENT AGREEMENT

- ¶ 1 In accordance with the Enforcement Notice dated March 6, 2019, a hearing was held before a Hearing Panel (Hearing Panel) on March 20, 2019.
- ¶ 2 On this occasion, the Hearing Panel heard the pleadings of the legal counsels for both parties, who jointly recommended acceptance of the Settlement Agreement that was concluded between them on February 15, 2019, pursuant to Rule 8200 - Enforcement Proceedings and to Rule 8428 of IIROC's Rules of Practice and Procedure.¹
- ¶ 3 The content of the Settlement Agreement is consistent with the formalities stipulated in IIROC Rule 8215, and the Agreement is appended to this decision, so as to form an integral part thereof.
- ¶ 4 Following the submissions by counsel for the parties and after deliberation, the Hearing Panel accepted

¹ Unless otherwise specified, the Hearing Panel is referring to IIROC's Rules of Practice and Procedure.

the Hearing Settlement, but reserved the right to file the reasons for its decision at a later date.

¶ 5 This decision explains the reasons for the acceptance of the Settlement Agreement.

The contravention

¶ 6 The parties admit that between November 1, 2012 and February 1, 2016, while a registered representative with Desjardins Securities Inc., the Respondent engaged in discretionary trading in the accounts of two clients, without the accounts having been preauthorized and approved by the firm as “discretionary” accounts.

¶ 7 By engaging in the conduct described above, the Respondent contravened Rule 1300.4 and Rule 1300.5, as well as Rule 29.1 of the IIROC Dealer Member Rules.

The penalties

¶ 8 The parties recommend the following penalties and costs:

- A fine in the amount of \$25,000;
- Costs in the amount of \$5,000;
- The obligation to pass the exam based on the Conduct and Practices Handbook Course within six (6) months following acceptance of the Settlement Agreement.

¶ 9 The Respondent agrees to pay the above-mentioned amounts within 30 days of such acceptance unless otherwise agreed between the parties.

The role of the Hearing Panel and the questions raised

¶ 10 As stated in section 8215 of Rule 8200 - Enforcement Proceedings, the Hearing Panel may either accept or reject the settlement agreement; that is its role and it has no discretion to make any changes to said agreement.

¶ 11 While the hearing panel is not bound by the joint recommendation of the parties, it may not simply substitute its opinion for the negotiation process, it must evaluate the reasonable nature of its result, which is the settlement agreement. However, it may intervene in cases where the recommendation is unreasonable.²

¶ 12 To determine the reasonable nature of a settlement agreement, the hearing panel must ensure that the key factors cited in the Dealer Member Disciplinary Sanction Guidelines have been taken into consideration.

¶ 13 As well, the Hearing Panel must verify that the proposed penalties fall within a range of penalties already imposed in similar matters and that they will act as specific and general deterrents.³

¶ 14 Finally, it should be kept in mind that the Settlement Agreement was negotiated by experienced attorneys who ably argued their reciprocal advantages.

¶ 15 Before proceeding with the discussion and analysis of the questions raised, the Hearing Panel wishes to highlight briefly the relevant facts for analysis.

The material facts

¶ 16 Counsel for both parties informed the Hearing Panel that certain facts not mentioned in the Settlement

² *Re Hartner* 2018 IIROC 08; *Re BMO Nesbitt Burns* 2012 IIROC 21

³ *Re Donnelly* 2016 IIROC 23

Agreement would be communicated during their pleadings. With the consent of both parties, the Hearing Panel authorized the disclosure of these new facts, the whole as stipulated in section 8428(6) of the Rules of Practice and Procedure.

¶ 17 The Respondent began working at Desjardins Securities in November 2008.

¶ 18 On March 29, 2010, the Respondent began acting as the registered representative for clients A and B, a married couple who owned a business in the food industry. Client A's investment knowledge was listed as "good", whereas client B's knowledge was described as "limited". The clients had separate personal accounts as well as joint accounts; in addition, client A had corporate accounts.

¶ 19 Between November 1, 2012 and February 1, 2016, the Respondent executed numerous discretionary trades in his clients' accounts. Nearly 80% of these discretionary trades were made in client A's corporate accounts.

¶ 20 Throughout the material period, the discretionary trades were consistent with the clients' investor profiles and generated approximately \$1,414,000 in profits in their accounts; the Respondent, in turn, earned a net commission of approximately \$200,000.

¶ 21 During that same period, the Respondent only met with client A and, at that, only two or three times a year in order to update the investment strategies, which included, among others, stepping up trading in individual securities and reducing management fees. The Respondent did not communicate with client B at all, and there is no written authorization permitting client A to effect trades and issue instructions in his spouse's account.

¶ 22 Later on, client A asked the Respondent not to contact him beforehand anymore before proceeding with trades in his accounts or those of his spouse. The Respondent accepted client A's request to apply a "discretionary" type of management to all of his accounts without first obtaining the authorization to act in this manner.⁴

¶ 23 In February 2016, the clients declared themselves dissatisfied with the return on their accounts. The respondent admitted having contravened the IIROC Dealer Member Rules, and was dismissed.

¶ 24 The Respondent has been employed with Mackie Research Capital Corporation since June 2016.

Discussion

¶ 25 The IIROC Disciplinary Sanction Guidelines are intended to assist hearing panels in determining whether to accept settlement agreements. Counsel for IIROC has highlighted some of the factors that enable hearing panels to evaluate the appropriateness of sanctions and this Hearing Panel is satisfied to rely on them for its analysis.

¶ 26 Although the volume of trades is fairly high and occurred over a fairly lengthy period, the Respondent's conduct did not result in any economic harm to his clients.

¶ 27 The Respondent's conduct however denotes a disregard for rules. The Respondent should not have counted on his client A's goodwill when he circumvented his regulatory obligations; it was his duty to explain the most adequate way of proceeding to his clients. Furthermore, the Respondent needed to maintain closer communication with client B.

¶ 28 As the hearing panel decided in *Re Skelton*

.... *A registrant has a basic obligation not to engage in discretionary trading in a client's account*

⁴ Contrary to Rule 1300.4 and Rule 1300.5.

*without prior written authorization from the client and approval of the firm. The obligation applies even where the client acquiesces...*⁵

¶ 29 The Respondent did not benefit financially from the misconduct, and has no disciplinary record. After admitting to his misconduct, he was dismissed. The Respondent cooperated in IIROC's investigation.

¶ 30 The Hearing Panel concludes from this first part of the analysis that the key factors retained and taken into consideration are adequate.

¶ 31 Counsel for IIROC has filed an explanatory working paper in support of its case law that characterizes the causes cited according to different criteria, such as the alleged contravention, the mitigating or aggravating factors, the penalties imposed...⁶.

¶ 32 The alleged contraventions all pertain to unauthorized discretionary trading in client accounts not approved as "discretionary" accounts. In the majority of these matters, even if the hearing panels note that the clients may have acquiesced to the strategy, they stress the importance and the duty of the representatives to comply with the rules that prescribe the close supervision of "discretionary" accounts.

¶ 33 The fines imposed range from \$10,000 for one contravention over a short six-month period (*Re Smith*) to a sum of \$40,000 for a contravention in which the client suffered heavy losses (*Re Hartner*).

¶ 34 The mitigating and aggravating factors retained are of the same nature as those analyzed here, although we note however that, in many cases, the respondent kept his job, contrary to the matter at hand.

¶ 35 Taking into account the particularities of each matter, the Hearing Panel is satisfied that the proposed penalties fall within a range of penalties handed down in similar matters.

¶ 36 The Hearing Panel is convinced that the imposed sanctions are significant enough to discourage future misconduct by the Respondent and to deter others from engaging in similar misconduct; thus protecting the integrity of the marketplace.

Conclusion

¶ 37 For the reasons given here, and as was decided at the Hearing, the Hearing Panel considers the Settlement Agreement reasonable and accepts it.

Montréal, April 10, 2019

Robert Monette

Normand Durette

Yves Ruest

SETTLEMENT AGREEMENT

PART I - INTRODUCTION

1. The Investment Industry Regulatory Organization of Canada (IIROC) will issue a notice of application to announce that a settlement hearing will be held before a Hearing Panel (the Hearing Panel) to consider whether, pursuant to Rule 8215 of IIROC's Enforcement, Examination and Approval Rules, it should

⁵ *Re Skelton* 2012 IIROC 46

⁶ See exhibit R-1

accept a settlement agreement (the Settlement Agreement) between Staff of IIROC (Staff) and Fernando Pace (the Respondent).

PART II - JOINT SETTLEMENT RECOMMENDATION

2. Staff and the Respondent jointly recommend that the Hearing Panel accept the Settlement Agreement in accordance with the terms set forth below.

PART III – AGREED FACTS

3. For purposes of the Settlement Agreement, the Respondent agrees with the facts set out in Part III of this Settlement Agreement.

Registration History

1. The Respondent has been approved as a registered representative with IIROC, as well as its predecessor, the Investment Dealers Association of Canada (IDA), since 2001.
2. The Respondent was employed with Dealer Member Desjardins Securities Inc. (DS) from November 2008 until his dismissal in May 2016.
3. Since June 2016, the Respondent has been employed with Dealer Member Mackie Research Capital Corporation.

Particulars

4. On or around March 29, 2010, the Respondent began acting as the registered representative for clients A and B (the clients) at DS.
5. The clients were married and owned a business in the food industry.
6. According to the New Client Application Forms, client A's investment knowledge was listed as "good" and client B's investment knowledge was described as "limited".
7. According to the New Client Application Forms, the clients each earned an annual income of more than \$150,000 and possessed assets valued at \$8 million in total.
8. The clients both held the following accounts: a margin account in Canadian dollars, a registered account in US dollars, as well as a joint account in Canadian dollars and a joint account in US dollars.
9. Client A also had a corporate account in Canadian dollars and a corporate account in US dollars.
10. Between November 1, 2012 and February 1, 2016, the Respondent executed more than 700 discretionary trades in his clients' accounts. Nearly 80% of these discretionary trades were made in client A's corporate accounts.
11. The Respondent's registration never authorized him to handle discretionary accounts and the clients' accounts were never preauthorized and approved as such.
12. Moreover, for the period of November 1, 2012 to February 1, 2016, the Respondent did not request that his client B grant written authorization to her spouse, client A, so that the latter might issue instructions to the Respondent regarding her personal accounts.
13. The Respondent confirmed to Staff of IIROC that, between November 1, 2012 and February 1, 2016, he only had regular contact with client A, in person or by phone. He did not communicate with client B.
14. Both clients received their statements of account on a monthly basis.
15. The Respondent confirmed to Staff of IIROC that at the end of October 2012, following the sale of his business, client A informed him of his decision to alter his investment strategy, principally in his

corporate accounts.

16. Client A asked the Respondent to trade more individual securities, rather than mutual fund securities, in his corporate accounts, and to offer him a service similar to what a portfolio manager would offer. As well, client A wished to pay as few management fees as possible.
17. The Respondent confirmed to Staff of IIROC that his client A asked him not to contact him beforehand anymore before proceeding with trades in his accounts or those of his spouse.
18. The Respondent confirmed to Staff of IIROC that he accepted client A's request and that they agreed to apply this "discretionary" type of management to all of his accounts, as well as to those of client B. Furthermore, to limit management fees, the Respondent proposed to client A that he trade new issue securities.
19. According to the evidence in the case file, the discretionary trades effected by the Respondent during the material period were consistent with the clients' investor profiles and did not cause them any losses.
20. Between November 1, 2012 and February 1, 2016, the discretionary trades effected by the Respondent in the account of his clients A and B generated approximately \$1,414,000 in profits, and net commissions of approximately \$200,000 for the Respondent.

PART IV – CONTRAVENTION

21. By engaging in the conduct described above, the Respondent contravened Rule 1300.4 and Rule 1300.5, as well as Rule 29.1 of the IIROC Dealer Member Rules.
 1. Between November 1, 2012 and February 1, 2016, while a registered representative with Desjardins Securities Inc., the Respondent engaged in discretionary trading in the accounts of two clients, without the accounts having been preauthorized and approved by the firm as "discretionary" accounts, contrary to IIROC Dealer Member Rules 1300.4 and 1300.5.

PART V - TERMS OF SETTLEMENT

22. The Respondent accepts the following penalties and costs:
 - a) A fine in the amount of \$25,000;
 - b) Costs to IIROC in the amount of \$5,000;
 - c) The obligation to pass the exam based on the Conduct and Practices Handbook Course within six (6) months following acceptance of this Settlement Agreement by the Hearing Panel.
23. If the Hearing Panel accepts this Settlement Agreement, 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

24. If the Hearing Panel accepts the 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.
25. 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 in Part III of this Settlement Agreement.

PART VII – SETTLEMENT ACCEPTANCE PROCEDURE

26. The Settlement Agreement is subject to acceptance by the Hearing Panel.
27. The Settlement Agreement shall be presented to a Hearing Panel at a settlement hearing held 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.
28. Staff and the Respondent agree that the Settlement Agreement shall constitute the entirety of the agreed facts presented at the Settlement Hearing, unless the parties agree that additional facts should be presented. If the Respondent does not appear at the Settlement Hearing, Staff may communicate additional material facts at the request of the Hearing Panel.
29. If the Hearing Panel accepts the Settlement Agreement, the Respondent waives his right, under IIROC rules and any applicable legislation, to a disciplinary hearing, review or appeal.
30. 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 same allegations or to related allegations.
31. The terms of this Settlement Agreement are confidential unless and until this Settlement Agreement has been accepted by the Hearing Panel.
32. The Settlement Agreement will become available to the public upon its acceptance by the Hearing Panel and IIROC will post a full 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.
33. 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.
34. The Settlement Agreement shall become effective and binding upon the Respondent and Staff from the date of its acceptance by the Hearing Panel.

PART VIII – SIGNATURE OF THE SETTLEMENT AGREEMENT

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

SIGNED at Montréal, this 13th day of February, 2019.

(S) Fernando Pace

Fernando Pace

Respondent

SIGNED at Montréal, this 15th day of February, 2019.

(S) Fanie Dubuc

Fanie Dubuc

Enforcement Counsel, for IIROC Enforcement Staff