Re Lang

IN THE MATTER OF:

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

and

Martin David Lang

2014 IIROC 40

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

Heard: June 12, 2014
Decision: June 12, 2014

Hearing Panel:
Stephen D. Gill (Chair); Robert Travers and Barbara Fraser
Appearances:
Paul Smith for I.I.R.O.C.
Patrick Sullivan for Martin Lang

REASONS FOR DECISION
(SETTLEMENT AGREEMENT HEARING)

¶ 1 This Panel was convened in respect of a Settlement Agreement negotiated by IIROC enforcement staff and Martin Lang. We are advised that Mr. Lang has been represented by counsel throughout these proceedings. The Panel heard submissions from Paul Smith, Senior Enforcement Counsel with IIROC, and from Patrick Sullivan, Counsel for Mr. Lang. Mr. Lang was present at the settlement hearing. The procedures with respect to settlement hearings are set forth in IIROC Rules 20.36 to 20.40. According to Rule 20.36, upon conclusion of the settlement hearing, the hearing panel may either accept the settlement agreement, or reject the settlement agreement. Upon acceptance, the settlement agreement shall become effective and binding.

¶ 2 At the conclusion of the settlement hearing, the Panel accepted the Settlement Agreement and indicated that we would provide the Reasons for our decision in due course. These are those Reasons.

¶ 3 In the Settlement Agreement, Mr. Lang has acknowledged that in July 2010, and in June and August 2011 when he was in charge of account credit and margin calculations at Union Securities Ltd. ("Union"), he acted contrary to IIROC Dealer Member Rule 29.1 by making improper entries on reports relied on in the preparation of financial reports which were required to be submitted to IIROC. Mr. Lang has agreed to pay a fine of $15,000.00.

DUTY OF A HEARING PANEL UPON A SETTLEMENT HEARING

¶ 4 The test that is engaged by a hearing panel considering a settlement agreement is well known and the authorities are not in dispute. In *Re Deutsche Bank Securities Ltd.*[1] the Panel stated:

[1] 2013 IIROC 7

"**9** It is clear from jurisprudence emanating from the courts and from Hearing Panels of IIROC, Investment Dealers Association and the Mutual Fund Dealers Association, that our task is not to decide whether, in this case, we would have arrived at the same decision as that reached by the parties. Rather, our duty is to determine whether the penalty is a reasonable one and that it meets the objectives of the disciplinary process which are to maintain the integrity of the investment industry. We cite from the recent decision of the Hearing Panel in *Re CIBC World Markets Inc.,* [2011] IIROC No. 38:

13 Finally, hearings panels will not lightly interfere with a negotiated settlement. As was said in *Re Milewski,* [1999] IDACD No. 17,

> …a District Counsel 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.

14 Or, as put by Winkler, J. (albeit in another context) in *Gilbert v. CIBC,* [2004] O.J. 4260:

> There is a presumption of fairness when a proposed class settlement negotiated at arms length…is presented to the court for approval. A court will only reject a proposed settlement when it finds that the settlement does not fall within a range of reasonableness.
>
> The test to be applied is whether the settlement is fair and reasonable…This allows for a range of possible results and there is no perfect settlement. Settlement is a product of compromise, which by definition, necessitates give and take.

15 In our view, the settlement, negotiated as it was by the parties assisted by capable counsel, does not clearly fall "outside a range of appropriateness" and it should therefore be, and was, accepted by the panel.

10 We share the opinion expressed by the hearing panel in *Re Vorstadt,* [2012] IIROC that the settlement process is an important one which should be "encouraged and supported."

¶ 5 In *Re Clark*[2], the Panel stated:

"It was submitted by staff and accepted by the panel that its role under By-law 20.26 is not the same as its role under By-law 20.10 following a hearing. In considering a settlement under By-law 2.26 the panel should not simply substitute its discretion for that of staff who negotiated the settlement. The panel must be cognizant of the importance of the settlement process and should not interfere lightly 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."

---

[2] [1999] I.D.A.C.D. No. 40

¶ 6 Mr. Smith, counsel for IIROC, submitted that other cases in Canada support this standard. He referred to *Rault v. Law Society of Saskatchewan*[3], a decision of the Saskatchewan Court of Appeal, where the court stated:

> "**13** The Appellant contends that the principles applied in the public law field of criminal law, with respect to joint submissions on sentencing, should be applied in the matter of sentences imposed pursuant to statutory powers accorded to the Law Society. In Saskatchewan, the principle related to joint submissions for criminal law purposes is set out in *R. v. Webster*,12 wherein Cameron J.A. adopted the principles described by the Alberta Court of Appeal in *R. v. G.W.C.*13 In summary, those principles establish that there is an obligation on a trial judge to give serious consideration to a joint submission on sentencing agreed upon by counsel unless the sentence is unfit or unreasonable; or contrary to the public interest; and, it should not be departed from unless there are good or cogent reasons for doing so.
>
> **14** In Ontario, the Discipline Committee of the Law Society of Upper Canada has formally adopted a policy on the approach to be used in considering joint submissions. In *Law Society of Upper Canada v. Paskar,*14 it stated:
>
> > …Convocation encourages Benchers sitting on Discipline Committees to accept a joint submission except where the Committee concludes that a joint submission is outside a range of penalties as reasonable in the circumstances.
> >
> > …
>
> **15** This was affirmed in *Law Society of Upper Canada v.* Orzech,15 where the Discipline Committee accepted the joint submission although it was of the view that disbarment was the more appropriate penalty and stated at p.6:
>
> > …joint submissions concerning penalty should not lightly be disregarded by the Committee, particularly when they are the outcome of an extended period of discussions and negotiations through the pre-hearing conference process. Where joint submissions concerning penalty are wholly inappropriate having regard to the nature of the conduct involved then such joint submissions can and should be disregarded; however, when the joint submissions are not inappropriate and when they are responsive both to the type of conduct established and the particular circumstances of the Solicitor, it is the Committee's view that only in rare circumstances and with considerable caution should the Committee disregard such joint submissions concerning penalty.
>
> **16** Similar views as those expressed above, in respect of law society discipline matters and the deference accorded to joint submissions on sentencing, are applied in other provinces such as British Columbia,16 Alberta,17 and Manitoba.18 In addition, a similar policy is apparent in the self-governing professions such as physicians.19

[3] [2009] S.J. No. 436

> **17** There are good policy reasons for this principle of deference to joint submissions on sentences. As stated in *G.W.C.* and adopted in this Court in *Webster:*
>
> > [17] The obligation of a trial judge to give serious consideration to a joint sentencing submission stems from an attempt to maintain a proper balance between respect for the plea bargain and the sentencing court's role in the administration of justice. The certainty that is required to induce accused persons to waive their rights to a trial can only be achieved in an atmosphere where the courts do not lightly interfere with a negotiated disposition that falls within or is very close to the appropriate range for the given offence. "The bargaining process is undermined if the resulting compromise recommendation is too readily rejected by the sentencing judge" *R v. Pashe* (1995), 100 Man. R. (2d) 61, at para.11.

¶ 7 At the hearing in Vancouver on June 12, 2014 the Panel received the joint submissions of counsel for IIROC and for Mr. Lang. Counsel took the Panel through the background to the settlement agreement, and also carefully reviewed all of the facts and circumstances, including the penalty, set forth in the Settlement Agreement.

¶ 8 The facts relating Mr. Lang's admitted breach are set forth in paragraphs 8 to 23 of the Settlement Agreement, and as the Settlement Agreement is attached, can be briefly summarized. Dealer member firms, in this case Union, are required to file capital related reports with IIROC financial and operations compliance staff ("FinOps") on a monthly and annual basis, or as requested. These reports are important as they monitor the profitability and solvency of firms, track business activities, and permit IIROC to take remedial action in the event that the financial viability of a firm appears to be in jeopardy. The requirement to submit financial reporting forms include a monthly financial report ("MFR") and an annual filing ("Form 1") of the firm's statement of financial position and Risk Adjusted Capital ("RAC"). IIROC Rules require all dealer member firms to maintain a positive RAC. If at any time the RAC of a dealer member firm is less than zero, that dealer member is required to immediately notify IIROC.

¶ 9 Mr. Lang has extensive experience in the securities industry. He was an exchange examiner at the Vancouver Stock Exchange from 1986 to 1993; he obtained a chartered accountant designation in 1989; he started at Union as Vice-President Finance in 1996. He served as Union's chief compliance officer from 2005 to the end of 2012 as well as Ultimate Designated Person from April 2006 to April 2009.

¶ 10 Mr. Lang's duties and responsibilities were described in paragraph 14 of the settlement agreement:

> "14. The Respondent was in charge of account credit and margin calculations. Margin provisions had to be deducted in the calculation of the firm's RAC according to IIROC Rules including provisions in the Form 1 and the MFR. The Respondent also determined what circumstances permitted a reduction in the margin provision ("**Margin Offset**") which did not have to be deducted from the firm's RAC."

¶ 11 The improper margin offset which Mr. Lang recorded is set forth in the Settlement Agreement in paragraphs 15 to 23. In summary, Mr. Lang improperly recorded a Margin Offset and reduced the margin requirement calculated in the margin report. Mr. Lang believed that the client's short position at Union would be covered by the client's long position in the same shares at another firm and that those shares would be delivered to Union. However, while this trading pattern was consistently established, Mr. Lang had no means to compel it to happen, or to be certain it would happen. There are no IIROC Rules that qualify such circumstances as a Margin Offset. However, after month end, the shares were in fact delivered.

¶ 12 In the circumstances, the Margin Offset taken was $1.32 Million. As the Settlement Agreement states:

> "Union's RAC would have been overstated by that amount, however other margin offsets were available, which resulted in RAC being overstated by only -$86,000."

¶ 13 Two examples of margin reduction problems are set forth at paragraphs 20 to 23 of the Settlement Agreement. Essentially it was a practice of using sales of securities and cheques received subsequent to the weekly reporting date to reduce required margin. Apparently this practice had been going on for some time. When IIROC advised the firm that the practice should not continue, the practice ceased immediately.

¶ 14 The IIROC Dealer Member Disciplinary Sanction Guidelines (the "Guidelines") were referred to by counsel, with particular emphasis on Dealer Member Rule 17. At paragraph 4.5 of the Guidelines, it states:

> "Every Dealer Member shall keep and maintain at all times current books and records necessary to record properly its business transactions, pursuant to Dealer Member Rule 17.2. The records required under Dealer Member Rule 17.2 are set out in Dealer Member Rule 200."

¶ 15 In paragraph 4.5 the following considerations in addition to General Principles are set forth:

1. The nature of the inaccurate or missing information.
2. The materiality of the inaccurate or missing information.
3. The extent of any loss to client("s") or the Dealer Member firm.
4. Whether there was an intentional disregard for Corporation (IIROC) requirements or if the failure to keep proper records was due to carelessness or inadvertence.

¶ 16 The recommended sanctions for a senior manager are:

1. Fine: minimum of $10,000.
2. Re-write the PDO.
3. Period of suspension from director/officer/supervisory and/or compliance responsibilities.
4. Permanent bar from approval within all registered capacities in the most egregious of cases.

These are recommended sanctions, they are not mandatory.

¶ 17 This case has important mitigating factors. As set forth in paragraph 24 of the Settlement Agreement, Mr. Lang had not previously been subject to disciplinary sanction, and he fully cooperated with IIROC staff during the investigation. Further, by this Settlement Agreement he has admitted his wrongdoing, and that also is a mitigating factor.

¶ 18 Counsel referred the Panel to other decisions (*Re Northern Securities*, 2012 IIROC 63) but clearly no two cases are exactly alike. We found the authorities cited to be of limited value in deciding whether, in our opinion, the sanctions set forth in the Settlement Agreement are within a reasonable range of appropriateness.

¶ 19 Having carefully considered the submissions of counsel, the authorities, and the facts and circumstances and penalties set forth in the Settlement Agreement, we concluded that the Settlement Agreement, and particularly the penalty agreed upon by the parties, were within a reasonable range of appropriateness, and for that reason we accepted the Settlement Agreement.

¶ 20 These Reasons may be signed in counterpart.

Stephen D. Gill, Panel Chair

Robert Travers, Panel Member

Barbara Fraser, Panel Member

SETTLEMENT AGREEMENT

I. INTRODUCTION

1. IIROC Enforcement Staff **("Staff")** and Martin David Lang **(the "Respondent")** consent and agree to the settlement of this matter by way of this agreement **(the "Settlement Agreement")**.

2. The Enforcement Department of IIROC has conducted an investigation **("the Investigation")** into the conduct of the Respondent.

3. 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

4. Staff and the Respondent jointly recommend that the Hearing Panel accept this Settlement Agreement.

5. The Respondent admits that in July 2010 and in June and August 2011 when he was responsible for account credit and margin calculations he acted contrary to IIROC Dealer Member Rule 29.1 by making improper entries on reports relied on in the preparation of financial reports which were required to be submitted to IIROC.

6. Staff and the Respondent agree that this matter shall be settled by the Respondent paying a fine of $15,000.

III. STATEMENT OF FACTS

(i) Acknowledgment

7. 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

8. These facts relate to periods in 2010 and 2011 when the Respondent was in charge of account credit and margin calculations at Union Securities Ltd. **("Union")**, a Dealer Member firm. The Respondent played an important role in preparing documents that were used in calculating Union's risk adjusted capital **("RAC")**. In this role, the Respondent made and reviewed entries in credit reports which were not properly supported. The inaccurate reporting compromised the integrity of the self-reporting system that IIROC relies on to monitor Dealer Member firms.

Capital Reporting Requirements of Dealer Members

9. Dealer Member firms are required to file capital-related reports with IIROC Financial and Operations Compliance Staff **("FinOps")** on a monthly and annual basis, or as requested. The objective of these reports is to monitor the profitability and solvency of firms, to identify trends and changes in business activities, and to impose restrictions or take immediate remedial action in the event that the financial viability of a firm appears to be in jeopardy.

10. Dealer Member firms are required to submit financial reporting forms which include a Monthly Financial Report **("MFR")** and an annual filing **("Form 1")** of the firm's statement of financial position and RAC.

11. FinOps relies on the information contained in the Form 1 and the MFR of all Dealer Member firms in assessing the firm's profitability and solvency.

12. The Form 1 and the MFR calculates a Dealer Member firm's RAC. RAC is a defined measure of a Dealer Member Firm's capital prepared pursuant to Generally Accepted Accounting Principles then adjusted for regulatory purposes. IIROC Rules require all Dealer Member firms to maintain a positive RAC. If at any time the RAC of a Dealer Member firm is less than zero, that Dealer Member is required

to immediately notify IIROC.

The Respondent

13. The Respondent was an Exchange Examiner at the Vancouver Stock Exchange from 1986 – 1993 and obtained the Chartered Accountant designation in 1989. He started at Union as a Vice-President Finance in 1996. He served as Union's Chief Compliance Officer from 2005 to the end of 2012 as well as Ultimate Designated Person from April 2006 to April 2009.

14. The Respondent was in charge of account credit and margin calculations. Margin provisions had to be deducted in the calculation of the firms's RAC according to IIROC Rules including provisions in the Form 1 and the MFR. The Respondent also determined what circumstances permitted a reduction in the margin provision (**"Margin Offset")** which did not have to be deducted from the firm's RAC.

Improper margin offset

15. Union's self-declared RAC in the first six months of 2010 averaged $2.89 Million. Its highest RAC was $3.38 Million in January, 2010 and its lowest was $2.67 Million in February, 2010.

16. Union's self-reported Profit/Loss in the first six months of 2010 was a loss of $1.33 Million. It had losses in five consecutive months up to the end of June, 2010.

17. On Union's July 31, 2010 MFR the Respondent recorded a Margin Offset and reduced the margin requirement calculated on a margin report. The margin was required due to a client's short position in a Union account. The Respondent reduced the margin required on the client's short position at Union because the client had a corresponding long position in the same shares at another firm that the Respondent was told were going to be delivered to Union.

18. The Respondent believed the client's trading pattern was consistently established and that the client would deliver the long shares from the other firm to Union to offset the short position, but he could not be certain this would happen. There are no IIROC rules that qualify such circumstances as a Margin Offset. After month end, the shares were in fact delivered to Union.

19. The margin offset taken was $1.32 Million. Union's RAC would have been overstated by that amount, however other margin offsets were available, which resulted in RAC being overstated by only- $86,000.

Margin Reduction (Example #1)

20. On Union's May 31, 2011 MFR, the Respondent included a margin reduction of $95,000 for a cheque that was received after May 31, 2011 and deposited on June 6, 2011 (or four (4) business days). This cheque was backdated to May 31, 2011 in Union's real-time back office processing, recordkeeping and reporting system, Dataphile. The cheque was cleared by the bank.

21. Union's self-declared RAC on its May 31, 2011 MFR was therefore overstated. Its self-declared RAC for that month was $3.18 Million.

Margin Reduction (Example #2)

22. Union's August 12, 2011 weekly RAC estimate indicated that sales of securities and cheques from clients received subsequent to the weekly reporting date were being calculated to reduce the required margin figure. As a result, RAC was overstated.

23. The overstatement of RAC was not significant enough to make Union RAC deficient on August 12, 2011. However, since the practice of using sales of securities and cheques received subsequent to the weekly reporting date to reduce required margin was acknowledged to have not been limited to that specific weekly estimate, the full impact this practice had on Union's other weekly RAC estimates and MFR was not readily determinable. When IIROC advised the firm that the practice should not continue, the practice ceased immediately.

Mitigating Factors

24. The Respondent has not previously been subject to disciplinary sanction and fully co-operated with IIROC Staff during the Investigation.

IV. TERMS OF SETTLEMENT

25. 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.

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

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

28. 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.

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 matters disclosed in the Investigation.

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

32. 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.

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

34. 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 Respondent at Vancouver, British Columbia, this 20th day of May, 2014.

"Hayley Matonovich"	"Martin Lang"
WITNESS	**RESPONDENT**

AGREED TO by Staff at Vancouver, British Columbia, this 21st day of May 2014.

"Suzana Mujkanovic"	"Paul Smith"
WITNESS	**PAUL SMITH** Enforcement Counsel on behalf of Staff of the Investment Industry Regulatory Organization of Canada

ACCEPTED at the Vancouver, British Columbia, this 12 day of June, 2014, by the following Hearing Panel:

Per: "Stephen Gill"
Panel Chair

Per: "Robert Travers"

Panel Member

Per: "Barbara Fraser"

Panel Member