Re Higgs

IN THE MATTER OF:

THE DEALER MEMBER RULES OF THE INVESTMENT INDUSTRY REGULATORY ORGANIZATION OF CANADA

AND

THE BY-LAWS OF THE INVESTMENT DEALERS ASSOCIATION OF CANADA

AND

DARCY ALAN HIGGS

2010 IIROC 3

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

Heard: February 9, 2010
Decision: February 9, 2010
(19 paras.)

Hearing Panel:
Leon Getz, Q.C., Brian Field and Chris Lay

Appearance:
Barbara Lohmann for the Investment Industry Regulatory Organization of Canada
Gary Snarch for Darcy Alan Higgs

DECISION

Introduction

¶ 1 We were constituted as a panel to consider, pursuant to Rule 20.36 of the Investment Industry Regulatory Organization of Canada ("IIROC"), whether to accept a settlement agreement (the "Settlement Agreement") that has been negotiated between the IIROC's Enforcement Department and Mr. Higgs. At the conclusion of the hearing held for this purpose in Vancouver, B.C. on February 9, 2010, and after considering the joint submissions of counsel for IIROC and for Mr. Higgs and the terms of the Settlement Agreement, we accepted it.

¶ 2 These are our reasons for doing so.

The Settlement Agreement

¶ 3 The Settlement Agreement is annexed to this Decision. It contains:

(a) a summary of the underlying facts;

(b) an acknowledgement by Mr. Higgs that between 2003 and 2005:

(i) he failed to properly perform his role as gatekeeper to the capital markets and acted contrary to Rule 1300.1(a) by failing to use due diligence to learn and remain informed of the essential facts relative to the transactions of a particular issuer in a group of client accounts; and

(ii) he effected trades in the accounts of clients based on the instructions of a third party without a duly executed trading authorization, contrary to Rule 200.1 (i) (3)

(c) Mr. Higgs' agreement to:

1. make a global payment of $40,000 on account of both a fine and a contribution towards IIROC's costs in connection with this matter; and

2. a suspension of his registration in all capacities, effective as of May 1, 2009 and expiring on July 31, 2010.

The governing principles applicable to a decision to accept or reject a settlement

¶ 4 There are two broad related principles that apply in connection with a decision to accept or reject a settlement.

¶ 5 The first is succinctly stated in the following passage from the decision in *Re Milewski*:[1]

> 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.

¶ 6 Secondly, in the recent decision of the Saskatchewan Court of Appeal in *Rault v. Law Society of Saskatchewan*[2], the court cited with approval and applied to an administrative tribunal the principles applicable to joint submissions on sentencing in criminal cases described by the Alberta Court of Appeal in *R. v. G.W.C.*[3], namely, that there is an obligation on the tribunal 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.

¶ 7 In our view rejection of the Settlement Agreement would be inconsistent with these principles.

Discussion

¶ 8 We have been influenced by several considerations.

A. THE IIROC DEALER MEMBER DISCIPLINARY SANCTIONS GUIDELINES

General principles – key considerations

¶ 9 The IIROC Dealer Member Disciplinary Sanctions Guidelines (the "Guidelines") identify a number of "key considerations" to be taken into account in determining appropriate disciplinary sanctions. Not all of them are relevant in the present circumstances and those that are must, of course, be considered in the light of the principles set out in *Re Milewski.*

¶ 10 The "key considerations" that seem relevant here are these:

(a) Mr. Higgs began working in the securities industry in 1983. In the 26 years since he has had an

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1 [1999] I.D.A.C. No. 17, August 5, 1999 at page 11. See also *Re Clark*, [1999] I.D.A.C.D. No. 40, Bulletin No. 2674, December 14, 1999.

2 2009 SKCA 81 (CanLII)

3 2000 ABCA 333 (CanLII)

unblemished record.[4]

(b) The investigation of these matters began in May 2005 and ultimately led to the issuance of a Notice of Hearing in May 2009.[5] Although this is not referred to in the Settlement Agreement Mr. Higgs' counsel informed us that his client had been interviewed four times during the course of the investigation and that at the first interview he had essentially admitted to the matters that he has now acknowledged in the Settlement Agreement. Counsel for IIROC did not dispute this fact. Whatever reasons might exist for the four year delay in bringing matters to a head, there has been no suggestion that it was attributable to any lack of cooperation on the part of Mr. Higgs. It also seems reasonable to infer that the fact that the matter has been hanging over his head for some years has had some impact on him.

(c) There is no suggestion in the Settlement Agreement that Mr. Higgs was a participant, or complicit in, any form of market manipulation of the shares of SI Inc. Although the Agreement records the fact that during the Relevant Period, as defined, "the share fluctuation in SI Inc. ranged from $0.20 to $0.58"[6] we note that the Relevant Period is defined as covering a period of some 5 months in 2003 and a further 8 months in 2004 and 2005.

(d) There is nothing to indicate that any of the Account holders suffered any loss or harm. We note that nothing was concealed from them. They received confirmation slips with respect to the transactions in their respective Accounts, and monthly statements,[7] and that they directly satisfied debits in their Accounts attributable to transactions in shares of SI Inc.[8]

Specific sanctions guidelines

¶ 11 We have also taken account of certain specific considerations and sanctioning recommendations identified in the Guidelines as relevant to particular forms of proscribed conduct.

¶ 12 The principal and most serious contravention that Mr. Higgs has acknowledged is that he failed in his obligation to use due diligence to learn and remain informed of the essential facts relative to trading in the Accounts and the R&B Account, as he was required to do by Rule 1300.1. This is the so-called "know your client" rule. Complying with it is central to the "gatekeeper" role of industry participants. The Guidelines refer to this rule as being "of paramount importance for the securities industry." A minimum fine of $10,000 is suggested as appropriate, accompanied, in serious cases, by among other things a period of suspension.

¶ 13 The elements of Mr. Higgs' failure in this respect are particularised in paragraph 56 of the Settlement Agreement.

¶ 14 We have little to add to what others have said about the importance of the "gatekeeper" role.

¶ 15 In relation to breaches of Rule 200.1 (i) (3) the Guidelines refer to a number of the matters that we have already referred to and note that "the extent of the misconduct related to this contravention will vary greatly. A breach of this regulation may only be a technical contravention, where the client provided verbal authority to provide instructions to the registrant."[9] A minimum fine of $5,000 is suggested. Mr. Higgs took instructions from someone, JM, who was in fact authorized by the Account holders to give such instructions. The problem was that he did not have the written authorization from the holders of the Accounts that the Rule requires to act on the instructions of some third party, in this case, JM. This was not a case of unauthorized trading.

¶ 16 We have considered the sanctions provided for in the Settlement Agreement in the light of the key considerations described above, of the specific sanctioning recommendations in the Guidelines and of the factors

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4 Settlement Agreement, paragraphs 15 and 20.

5 Settlement Agreement, paragraphs 17 and 18.

6 Settlement Agreement, paragraph 53.

7 Settlement Agreement, paragraph 47.

8 Settlement Agreement, paragraph 54.

9 Guidelines, section 3.9.

identified in them that are thought to have a bearing on the determination of the appropriate discipline to be applied in a particular case. We do not think that much of value will be achieved by trying to calibrate these matters too finely. We consider the terms provided for in the Settlement Agreement are generally consistent with the considerations referred to, having regard once again to the principles set out in the *Milewski* decision.

B. PRIOR DECISIONS OF HEARING PANELS

¶ 17 Counsel for IIROC referred us to several earlier decisions[10] concerning sanctions in circumstances broadly – and we emphasise this, for each case depends on its particular facts – similar to this. We have considered these, bearing in mind that none of them involved the acceptance or rejection of a settlement agreement. We do not think much is to be gained from a detailed analysis of those cases.

¶ 18 Our conclusion, overall, is that taking account of the considerations to which we have referred, the provisions of the Settlement Agreement with respect to sanctions fall "within a reasonable range".

¶ 19 These are the reasons for our decision to accept the Settlement Agreement.

Leon Getz, Panel Chair

Brian Field, Panel Member

Chris Lay, Panel Member

As of February 9, 2010.

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SETTLEMENT AGREEMENT

I. INTRODUCTION

1. The Enforcement Department Staff ("Staff") of the Investment Industry Regulatory Organization of Canada ("IIROC") has conducted an investigation ("the Investigation") into the conduct of *Darcy Alan Higgs* ("the Respondent").

2. The Investigation was commenced by Enforcement Department Staff ("IDA Staff") of the Investment Dealers Association of Canada ("IDA") prior to May 30, 2008. On June 1, 2008, IIROC consolidated the regulatory and enforcement functions of the Investment Dealers Association of Canada and Market Regulation Services Inc. Pursuant to the *Administrative and Regulatory Services Agreement* between IDA and IIROC, effective June 1, 2008, the IDA has retained IIROC to provide services for IDA to carry out its regulatory functions.

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. The Respondent consents to be subject to the jurisdiction of IIROC.

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[10] *Re Aloni*, Penalty Decision, July 22, 2008; *Re Kasman and Anderson*, OSC, July 14, 2009; *Re Ng*, [2007] I.D.A.C.D. No. 47, December 20, 2007; and *Re Faiello*, [2007] I.D.A.C.D. No. 4, Bulletin No. 3605, January 24, 2007.

5. Staff and the Respondent consent and agree to the settlement of these matters by way of this settlement agreement ("the Settlement Agreement") 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.

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

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

8. 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.

9. If the Hearing Panel accepts the Settlement Agreement, the Respondent waives his/her/its right under IIROC rules and any applicable legislation to a disciplinary hearing, review or appeal.

10. 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.

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

12. 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.

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

III. STATEMENT OF FACTS

(i) Acknowledgment

14. 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

The Respondent

15. The Respondent became employed in the securities industry in September 1983 as a Registered Representative ("RR") with Bache Securities. From May 1984 to October 1996, the Respondent was employed as an RR with Brink, Hudson, & Lefever Ltd. On October 3, 1996, the Respondent commenced employment as an RR with Haywood Securities Inc. ("Haywood"). He resigned from Haywood on May 1, 2009 and is not currently a registrant in the securities industry.

16. The Respondent's resignation from Haywood on May 1, 2009, was a direct result of his anticipation that a Notice of Hearing in relation to the matters herein would imminently be issued.

17. The Notice of Hearing was issued on May 11, 2009.

18. The investigation into these matters commenced in May of 2005.

19. The Respondent earned a Bachelor of Commerce from the University of British Columbia.

20. The Respondent has no previous disciplinary history.

21. On June 1, 2008, the Respondent became a regulated person of IIROC.

JM

22. JM is a resident of Bedford, Nova Scotia. He is a venture capitalist and in particular, is the president, CEO and sole director of BF Corporation ("BF Corp"). JM's business office is located in an office building on Bedford Highway, Bedford, Nova Scotia (the "Premises").

23. JM was introduced to the Respondent by KM, a long time client of the Respondent. KM is also a resident of Nova Scotia and is a venture capitalist and stock promoter who many years ago was licensed as a registered representative in the securities industry.

24. At no time did JM maintain an account at Haywood nor did he have written executed trading authorization to transact in any account at Haywood.

DC

25. DC is a resident of Nova Scotia and is JM's son.

26. DC is also the sole officer/director, president and secretary of a numbered Nova Scotia company ("226NS").

27. On or about December 9, 2003, 226NS opened an account with the Respondent at Haywood. DC is the only party authorized to transact in that account.

28. DC was introduced to the Respondent by JM.

LM

29. LM is a resident of Nova Scotia and is the nephew of JM's wife.

30. LM is the president of GD Ltd. ("GD Ltd."), a company with operations based in Cape Breton, Nova Scotia and an office located in the Premises. GD Ltd. borrowed monies from JM and/or BF Corp.

31. LM owns 55% of GD Ltd. through two companies, an Ontario numbered company ("102Ont.") and a Nova Scotia numbered company ("233NS").

32. LM also owns another company, RT Ltd. ("RT Ltd."). LM is the president, secretary and sole director of that company.

33. LM was introduced to the Respondent through KM, the same individual who introduced the Respondent to JM. LM never met the Respondent in Vancouver and saw him only once in Nova Scotia.

34. On or about April 21, 2003, GD Ltd. opened an account with the Respondent at Haywood. LM is identified as the only party authorized to transact in that account.

35. On or about November 18, 2002, RT Ltd. opened an account with the Respondent at Haywood. LM is identified as the only party authorized to transact in that account.

36. On or about November 20, 2002, 102Ont. opened an account with the Respondent at Haywood. LM is the president, secretary and the sole director of that company. LM is identified as the only party authorized to transact in that account.

RS

37. RS is a resident of Nova Scotia, a friend of JM and also a long time employee of GD Ltd. and works out of the Premises. RS and KM (who introduced the Respondent to JM and LM) are also friends.

38. RS is the president, secretary and one of two directors of a Nova Scotia numbered company ("305NS"). The other director is another son of JM's (not DC).

39. On or about July 3, 2003, 305NS opened an account with the Respondent at Haywood. RS is identified as the only person authorized to transact in that account.

R & B

40. R & B is a Swiss based private bank that offers investment counseling and asset management for private clients. R & B had an account at Haywood which was opened on or about May 19, 1993 (the "R & B Account").

41. The Respondent processed trades of Shannon International Inc. ("SI Inc.") in that account. It is acknowledged that JM did not place any trading orders through the R&B Account.

42. R & B was not the beneficial owner of any of the assets in the Haywood account. Rather, R & B was an execution bank acting on behalf of clients.

SI Inc.

43. A Registration Statement under the US Securities Act of 1933 filed with the US Securities and Exchange Commission ("SEC") in June 1999 indicates that SI Inc. was incorporated in February 1999 in the State of Nevada "for the purpose of financing and owning oil and natural gas development properties."

44. SI Inc's shares were cleared for trading on the Over the Counter Bulletin Board ("OTCBB") in or about January 2003.

Trading in the Accounts

45. The Haywood accounts of 226NS, GD Ltd., RT Ltd., 102Ont., and 305NS are collectively referred to as the "Accounts".

46. Between July 2003 and November 2003 and between July 2004 and February 2005 (the "Relevant Period"), there were a large number of transactions in the shares of SI Inc. in the Accounts.

47. JM did not have any accounts at Haywood, nor did he have any trading authorization over any account at Haywood. However, the Respondent acknowledges that JM placed trading orders for the Accounts. It is acknowledged that the Respondent had oral authorization from the respective account holders of the Accounts to accept trade instructions from JM. All confirmation slips and monthly statements were sent to and received by the account holders.

48. The Respondent's assistant also stated that he accepted orders from JM for the Accounts because the Respondent advised him to do so. Accordingly, the Respondent failed to ensure that JM was formally authorized to transact in the Accounts, as required by Rule 200.1(i)(3).

49. Haywood telephone records indicate that during the Relevant Period, there were numerous telephone calls placed between the Respondent and JM.

50. The Respondent failed to advise any supervisory or managerial personnel at Haywood about JM's involvement with the Accounts.

Account Trading in SI Inc.

51. From July 2003 to November 2003, significant percentages of the total trading volume in SI Inc. transpired in the Accounts and the R & B Account. The percentages are as follows:

Date	Reported Volume	Volume from Accounts and R & B	% of Reported Volume
July 2003	1,634,100	205,000	12.55
August 2003	221,100	37,500	16.96
September 2003	603,600	146,000	24.19
October 2003	1,276,200	386,000	30.25
Nov. 2003	2,044,700	740,000	36.19
Total	5,779,700	1,514,500	26.20

52. From July 2004 to February 2005, significant percentages of the total trading volume in SI Inc. transpired in the Accounts and the R & B account at Haywood. The percentages are as follows:

Date	Reported Volume	Volume from Accounts and R& B	% of Reported Volume
July 2004	1,226,650	909,500	74.15
August 2004	368,500	105,000	28.49
September 2004	837,450	318,000	37.97
October 2004	1,304,900	781,000	59.85
November 2004	315,000	99,000	31.43
December 2004	1,332,800	505,000	37.89
January 2005	606,900	315,000	51.9
February 2005	2,857,884	720,000	25,19
Total	8,850,084	3,752,500	42.4

53. During the Relevant Period, the share fluctuation in SI Inc. ranged from $0.20 to $0.58.

Purchases with No Cash Settlements

54. There are several instances during the Relevant Period whereby no cash was deposited to settle purchases of SI Inc. in the Accounts, resulting in month end debits. The shares were either sold at month end or early the following month with the effect of "flattening" the debit in the account. It is acknowledged that on a number of occasions during the Relevant Period cheques were received by Haywood directly from the account holders of the respective Accounts to satisfy debits relating to the purchase of shares in SI Inc.

Cross Trades

55. The Respondent effected the following cross trades of SI Inc. between the Accounts and the R & B account.

Date	**Report Time**	**MPID B/S**	**Volume**	**Price**	**Account**
11/13/03	13:19:56	NAIB B	300,000	0.40	R & B
11/13/03	13:20:04	NAIB S	300,000	0.40	102 Ont. & GD Ltd.
3/23/04	16:02:04	NAIB B	20,000	0.50	226 NS
3/23/04	16:02:46	NAIB S	20,000	0.51	305 NS
6/9/04	10:45:17	NAIB S	10,000	0.51	305 NS
6/9/04	10:45:23	NAIB B	10,000	0.50	RT Inc.
7/8/04	9:55:44	AGIS B	350,000	0.58	RT, GD, 305 NS, 102 Ont
7/8/04	9:56:53	AGIS S	350,000	0.58	R&B
10/22/04	10:27:12	PENA B	248,000	0.40	305 NS
10/2204/	10:28:26	VFIN B	248,000	0.40	102 Ont
10/29/04	11:01:27	VFIN B	35,000	0.40	102 Ont
10/29/04	11:01:59	VFIN S	35,000	0.40	GD Ltd.
1/5/05	13:3l:40	VFIN B	50,000	0.41	R & B
1/5/05	13:31:44	VFIN S	50,000	0.41	GD Ltd.
2/8/05	14:57:18	VFIN B	40,000	0.35	R & B
2/8/05	14:57:20	VFIN S	40,000	0.36	GD Ltd.

2/9/05	15:33:56	UCAP B	30,000	0.35	R & B
2/9/05	15:34:01	UCAP S	30,000	0.36	GD Ltd.

Respondent's Obligation to Make Diligent Inquiries

56. The Respondent was required by Rule 1300.1 to make reasonable, diligent inquiries to learn and remain informed of the essential facts in respect of the trading in SI Inc. in the Accounts and in the R & B Account; however, he failed to make those inquiries, particularly given the factors listed below:

    (a) JM placed trading orders in the Accounts notwithstanding that he was not a client nor did he have written trading authorization over those accounts;

    (b) A significant percentage of the total trading volume in SI Inc. transpired in the Accounts;

    (c) There were several instances during the Relevant Period whereby purchases of either SI Inc. were effected in one of the Accounts for which there was no cash settlement. Rather, the shares were sold either at month end or early the following month with the effect of "flattening" the debit in the account;

    (d) There were several instances where two of the Accounts or an Account and the R & B Account were on opposite sides of the market for SI Inc. on the same day;

    (e) The Respondent was made aware of ongoing credit issues in the Accounts; and

    (f) RRs have gatekeeper obligations.

IV. CONTRAVENTIONS

57. The Respondent admits to the following contraventions of IIROC Rules, Guidance, IDA By-Laws, Regulations or Policies:

    1) Between 2003 and 2005, the Respondent, at all material times an RR at Haywood, a Member firm, failed to properly perform his role as gatekeeper to the capital markets and acted contrary to Rule 1300.1(a) (then Regulation 1300.1 (a)) by failing to use due diligence to learn and remain informed of the essential facts relative to the transactions of a particular issuer in a group of client accounts.

    2) Between 2003 and 2005, the Respondent, at all material times an RR at Haywood, a Member firm, effected trades in the accounts of clients based on the instructions of a third party without the existence of a duly executed trading authorization, contrary to Rule 200.1(i)(3) (then Regulation 200.1(i)(3)).

V. MITIGATING FACTORS

58. As a result of the pending Notice of Hearing filed on May 11, 2009, the Respondent resigned his position as a registrant at Haywood on May 1, 2009. He has not been employed as a registrant since that date.

59. The Respondent has no regulatory history.

60. During the Relevant Period, the share fluctuation in SI Inc. ranged from $0.20 to $0.58.

61. The account holders of the Accounts orally advised the Respondent that JM had authority to transact trades in their respective accounts.

62. The investigation into these matters commenced in May of 2005.

VI. TERMS OF SETTLEMENT

63. The Respondent agrees to the following terms of settlement:

    a) A global payment totalling $40,000, which comprises both a fine and a portion of Staff's costs of this proceeding;

    b) A suspension of registration in all capacities for a period of 15 months;

    c) In this case, the 15-month suspension will commence on May 1, 2009 and end on July 31, 2010, as the Respondent resigned from his position in the industry on May 1, 2009 in anticipation of the Notice of Hearing being imminently issued in this matter.

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

AGREED TO by the Respondent at the City of Vancouver in the Province of British Columbia, this 29th day of January , 2010.

"Witness signature"
Witness

"Respondent's signature"
Respondent

AGREED TO by Staff at the City of Vancouver in the Province of British Columbia, this 29th day of January, 2010.

"Lorne Herlin"
Witness

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

ACCEPTED at the City of Vancouver in the Province of British Columbia, this 9th day of February, 2010 , by the following Hearing Panel:

Per: "Leon Getz"
Panel Chair

Per: "Brian Field"
Panel Member

Per: "Chris Lay"
Panel Member