

# Re Futher

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

**PAUL PATRICK FUTHER**

2008 IIROC 29

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

Heard: October 28, 2008  
Decision: November 3, 2008  
(30 paras.)

## **Hearing Panel:**

Paul M. Moore, Q.C., Chair  
Duncan Webb  
Donald (Sandy) Grant

## **Appearances:**

Milton Chan & Tamara Brooks, IIROC Enforcement Counsel  
Ellen Bessner, Respondent's Counsel

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## **REASONS FOR APPROVAL OF SETTLEMENT AGREEMENT**

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These are the reasons delivered orally by Paul M. Moore, Q.C., chair of the panel, on October 28, 2008 at the end of the hearing. This version is based on the transcript of the hearing which has been modified and approved by the chair of the panel for publication to provide a public record of the reasons. Reference may be made to the settlement agreement, published in the IIROC bulletin, for a description of the facts and agreed sanctions presented to the panel.

¶ 1 We have come to a decision. We approve the Settlement Agreement as being in the public interest.

¶ 2 The reasons for our approval are as follows.

¶ 3 The sanctions are outlined on page 6 of the terms of settlement. They are a fine in the amount of \$20,000 payable in installments, a suspension from approval in any registered capacity with IIROC for a period of 60 days, a requirement that re-approval as a registered representative be subject to the condition that the respondent successfully complete a 12-month period of strict supervision by his employing firm, and payment costs of \$6,000 in installments.

- ¶ 4 It originally struck us before the hearing, when comparing these sanctions with the sanctions set forth in the four cases that counsel referred to, that the sanctions were lighter than we would have anticipated.
- ¶ 5 However, the standard by which we have to go is not to decide whether the sanctions are what we would have imposed after a contested hearing on sanctions, but rather whether or not the sanctions are within the parameters of acceptability, taking everything into account.
- ¶ 6 The misconduct in question was serious.
- ¶ 7 There was an unsophisticated client.
- ¶ 8 That client suffered harm and loss.
- ¶ 9 The conduct involved discretionary trading without the client's express consent.
- ¶ 10 When the hearing began we mentioned that, based on the facts that were in the Settlement Agreement, we found it difficult to come to the conclusion that the proposed sanctions were within the parameters of acceptability.
- ¶ 11 Counsel for the respondent and counsel for IIROC agreed on consent to disclose more facts. These we found most helpful.
- ¶ 12 It is clear now that the client has been fully compensated for the loss she suffered, including a notional return on her loss of funds. We are satisfied that the client has been made whole.
- ¶ 13 The respondent has come to this process with his hat in hand. He has been remorseful about what happened. He has no history of non-compliance. We are satisfied that there was no malicious intent.
- ¶ 14 Indeed, his failing was partly related to his concern about the client. She was a friend of his mother's.
- ¶ 15 The respondent has been very hard hit by this matter and the settlement costs, and is struggling financially because of it.
- ¶ 16 He is young.
- ¶ 17 He appears to be a responsible person.
- ¶ 18 On his own volition, he removed himself from the position of registered representative and has taken a lesser position with his employer.
- ¶ 19 Although his employer is assisting in the payment of monies to the complainant client, he has agreed to repay his employer and this will be done through deductions over a course of time.
- ¶ 20 He knows he made a mistake. He deeply regrets what happened.
- ¶ 21 We are satisfied that any sanctions should not ruin the respondent. We are satisfied that the respondent is not one who should be removed from the industry on a permanent basis and that the sanctions are appropriate.
- ¶ 22 We note that if the time comes when he wants to be readmitted as a registered representative, an evaluation will be made by the registration authorities at IIROC at the time. We expect that they would recognize that he has fully paid the price for what has happened. Assuming he completes the period of strict supervision referred to in the settlement agreement, we would expect that he will continue to be a useful member of the financial community.
- ¶ 23 We looked carefully at the precedents referred to by counsel for IIROC.
- ¶ 24 Deterrence is an important factor in any sanctioning. We are satisfied that the respondent has suffered sufficiently, that the sanctions are appropriate and that they should act as a deterrent for anyone who might find him or herself in the same position as the respondent.
- ¶ 25 The aggravating factors in this case are harm and loss to the client, the non-sophistication of the client, and the fact that these weren't isolated incidents.

¶ 26 They are clearly offset by the mitigating factors. Namely, the very early cooperation by the respondent; the fact that there was no malicious intent; there was no fraud; there was no deceit.

¶ 27 If anything, there was misguided sympathy and a desire to help a client by having the respondent go beyond his area of expertise and not paying attention to the niceties of getting explicit consent for discretionary trading.

¶ 28 Counsel for IIROC also took us through the guidelines of IIROC for sanctioning. The guidelines are not binding, but they do set forth suggestions with minimums and maximums.

¶ 29 We are satisfied that the settlement is within the guidelines even though they are not binding.

¶ 30 Those are the reasons why we have concluded that this settlement is in accordance with public interest.

The foregoing version of the reasons is hereby approved, at Toronto, this 3<sup>rd</sup> day of November, 2008.

Paul M. Moore, Q.C., Chair

Duncan Webb

Donald (Sandy) Grant

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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 Paul Patrick Futher (“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.
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

15. The Respondent has been registered with the Association as a Registered Representative since May 1994. The Respondent completed the Canadian Options Course in May 1997, and has been registered as a Registered Representative (Options) (“RRO”) since that time. In March, 2008, the respondent voluntarily resigned his options license and became an Associate Advisor, thus not providing any advice to clients but acting as an assistant to another registered advisor. In August, 2008, Blackmont registered this change on the NRD.
16. At all material times, the Respondent was employed with Blackmont Capital Inc., or its predecessor First Associates Investment Inc., in Waterloo, Ontario.
17. The following is the Respondent’s registration history:

From	To	Firm
09/2005	Current	Blackmont Capital Inc.
12/2002	09/2005	First Associates Investment Inc.
06/1997	12/2002	Robert Caldwell Capital Corp
09/1995	06/1997	Porthmeor Securities Inc.
05/1994	09/1995	RJ Beatty Financial Corp.

18. The investigation by the Association was commenced on November 1, 2006 based on the Case Assessment review of ComSet reports filed by Blackmont on June 28, 2006.
19. On June 1, 2008, the Respondent became a regulated person of IIROC.

### The Client KH

20. KH is a retired woman born in 1940. She has a grade 12 education and limited knowledge or education in investing. Prior to her retirement in 2003, KH was employed primarily in administrative positions, at ManuLife and other companies.
21. KH was widowed in 1995. Prior to her husband’s death, they did not have any savings as a couple because they travelled extensively. KH had a small registered account in which she contributed \$20.00 monthly.
22. KH knew the Respondent through his parents and opened an account with the Respondent following her husband’s death. KH deposited the proceeds of a life insurance policy into the account.
23. In July, 1997, the Respondent commenced employment at Robert Caldwell Capital, predecessor of First Associates Investment Inc. and Blackmont Capital Inc. KH opened a RIF account and a Canadian dollar

investment account with margin facilities with the Respondent. In January 2001, she opened an RRSP account with the Respondent. In May, 2002 she opened a US dollar investment accounts with margin facilities with the Respondent. KH continued to maintain these accounts and had no other investment accounts during the material time.

24. KH's investment objective was to generate monthly income to supplement the income she was already receiving from her government pension and social benefits. KH instructed the Respondent to avoid investments that were high risk. At the same time, KH impressed upon the Respondent that she wished to have sufficient income from her investments in order to continue her extensive travel and to pay for her car payments. From July 1997 to May 2006, KH withdrew more than \$178,000 in total, which negatively impacted her capital.

#### **The Complainant's Investment Account**

25. At the time KH opened two investment accounts with margin facilities, she had virtually no understanding of margin other than a belief that it was risky. The Respondent admitted that he did not know whether KH fully understood margin.
26. Margin facilities were used in both KH's Canadian fund and US fund investment accounts. From 1997 to early 2003, KH's Canadian fund investment account had a debit balance, ranging up to \$17,000. From 2002 to 2006, KH's US fund account was constantly in debit positions ranging up to \$36,000.
27. All of the trades in KH's accounts were solicited. While the Respondent made recommendations to KH, generally she was not interested in the operation of her accounts. The Respondent would sometimes visit KH at her home to have her sign documents. He rarely discussed the trading in her account during those visits.
28. In the case of the options trading in her accounts, between 2002 and 2006, the Respondent attempted to contact KH for instructions but on occasions he initiated trades and informed her after the fact. KH was not advised prior to trading as to the type of security, quantity, price, and/or timing of a majority of the transactions. KH did not authorize these trades in her account.
29. KH travelled frequently and was often out of reach. During her absence, the Respondent effected trades in KH's account without her instruction prior to the transactions.

#### **Options Trading in KH's Account**

30. In order to accommodate KH's increasing desire for income for her travels to Asia and Europe and pressure she put on the Respondent to improve her returns, the Respondent suggested that she take on more risk by trading options. The Respondent explained to KH what "puts" and "calls" were, but did not provide a detailed description of the strategies employed nor did he explain the risks associated with such trading strategies in detail. KH signed an options agreement for her investment accounts on May 13, 2002. At the time of signing the options agreement, KH's account documents were updated to reflect a decreasing income objective and substantially greater risk tolerance.
31. Between 2002 and 2006, KH's investment accounts were operated on margin and there were over 300 option trades conducted in the accounts:

<b>Year</b>	<b>Number of Option Trades</b>
2002	39
2003	146
2004	74
2005	56
2006	8
<b>Total</b>	<b>323</b>

During this five year period, KH's Canadian fund account generated \$10,945 of commission while her US fund account generated \$ 25,626 of commission.

32. While the Respondent had limited experience in trading options since the time he became licensed in 1997, he employed spread and long straddle options trading strategies in KH's account. With the exception of two transactions in January 2004, KH's US funds investment account traded exclusively in options. Because these trades were facilitated by margin, KH's US fund account was constantly in debit positions. Starting in April 2003, the debit balance in the US fund account triggered interest charges.
33. During the material time, KH made regular monthly withdrawals from her accounts to pay for her living expenses. In addition to the Old Age Security ("OAS") she received, KH withdrew sums regularly from her RIF account. She withdrew \$855 each month from her accounts prior to 2004 and \$2,000 each month from 2004 to 2006. During the material time KH also made additional requests for cheques drawn on her accounts, totaling more than \$50,000.
34. For most of the period in which KH had an account with the Respondent, she did not review her statements in detail. KH admitted that she would look at the front page, and "as long as it had a plus on the front" she would not review the other pages because she trusted the Respondent to take care of her investment. While she would occasionally question the Respondent about declining balances in her accounts, he would generally assure KH that the losses were temporary. The Respondent had one or two general conversations with KH to encourage her to reduce her withdrawals, but acknowledged that he was not certain whether KH understood that her account was being depleted due to both investment loss and her withdrawals. Between 2002 and 2006, KH suffered approximately a \$6,000 loss in her Canadian account and almost \$48,000 in her US funds account.
35. KH has settled a claim against Blackmont and the Respondent in relation to the recovery of her losses and legal costs. Blackmont financed the settlement and the Respondent signed a promissory note in favour of Blackmont for reimbursement of the losses and legal costs until the settlement is repaid in full. Starting in April 2008, Blackmont has been deducting a portion of the Respondent's monthly salary and any commission he obtains until the settlement amount is fully repaid.

#### **IV. Contraventions**

36. The Respondent admits to the following contraventions of IIROC Rules, Guidance, IDA By-Laws, Regulations or Policies:
  - i. Between 2002 and 2006, the Respondent, at all material times a Registered Representative employed by a Member of the Association, engaged in business conduct or practice which is detrimental to the public interest where he, without his client's knowledge, conducted discretionary transactions in the account of KH, without being duly registered to do so and without those accounts being specifically approved and accepted as discretionary by the Member firm, contrary to IDA Regulation 1300.4;
  - ii. Between 2002 and 2006, the Respondent, at all material times a Registered Representative employed by a Member of the Association, failed to use due diligence to ensure that the recommendations he made for the account of client KH were appropriate for KH and in keeping with that client's investment objectives and risk tolerance, contrary to IDA Regulation 1300.1 (q), and its predecessor 1300.1(d) prior to 2004.

#### **VI. Terms of Settlement**

37. The Respondent agrees to the following terms of settlement:
  - a) A fine in the amount of \$20,000, payable in eight quarterly installments of \$2,500 on the following dates:
    - i. effective date of this Settlement Agreement;
    - ii. January 1<sup>st</sup>, 2009;
    - iii. April 1<sup>st</sup>, 2009;
    - iv. July 1<sup>st</sup>, 2009;
    - v. October 1<sup>st</sup>, 2009;

- vi. January 1<sup>st</sup>, 2010;
  - vii. April 1<sup>st</sup>, 2010;
  - viii. July 1<sup>st</sup>, 2010;
  - b) A suspension from approval in any registered capacity with IIROC for a period of sixty days;
  - c) The requirement that his re-approval as a Registered Representative be subject to the condition that he successfully complete a twelve month period of strict supervision by his employing firm.
38. The Respondent shall pay a portion of Staff's costs of this proceeding in the amount of \$6,000.00, payable in four quarterly installments of \$1,500, starting on October 1, 2009.
39. Unless otherwise stated, any monetary penalties and costs imposed upon the Respondent are payable immediately upon the effective date of the Settlement Agreement.
40. 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 the City of Kitchener in the Province of Ontario, this 22 day of October, 2008.

Original Executed by:  
*Shirley Bolger*

*Paul Futher*

\_\_\_\_\_  
 Witness

\_\_\_\_\_  
 Paul Patrick Futher  
 Respondent

AGREED TO by Staff at the City of Toronto in the Province of Ontario, this 24<sup>th</sup> day of October, 2008.

Original Executed by:  
*Carla Estevao*

*Milton Chan*

\_\_\_\_\_  
 Witness

\_\_\_\_\_  
 Milton Chan  
 Enforcement Counsel on behalf of Staff of the  
 Investment Industry Regulatory Organization of  
 Canada

ACCEPTED at the City of Toronto in the Province of Ontario, this 28<sup>th</sup> day of October, 2008, by the following Hearing Panel:

Original Executed by:  
*Paul Moore*

Per: \_\_\_\_\_  
 Panel Chair  
*Duncan Webb*

Per: \_\_\_\_\_  
 Panel Member  
*Donald (Sandy) Grant*

Per: \_\_\_\_\_  
 Panel Member