

Re D'Ugo

IN THE MATTER OF:

THE MARKET INTEGRITY RULES OF THE INVESTMENT INDUSTRY REGULATORY ORGANIZATION OF CANADA

AND

THE UNIVERSAL MARKET INTEGRITY RULES

AND

TONY D'UGO

2010 IIROC 12

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

Heard: March 15, 2009
Decision: March 26, 2010
(29 paras.)

Hearing Panel:

Paul M. Moore, Q.C, Chair
Selwyn Kossuth
Hugh McNabney

Appearance:

Diana Iannetta, Association Counsel
Kevin Richard, Respondent's Counsel

DECISION AND REASONS AS TO PENALTY

Decision as to Penalty

¶ 1 We order the following sanctions against the respondent, Tony D'Ugo:

- (a) a fine of \$40,000 payable to IIROC; and
- (b) a suspension of access to IIROC-regulated marketplaces for 2 years from March 15, 2010.

¶ 2 We order that the respondent pay \$15,000 of IIROC's costs in this matter.

¶ 3 We order that the respondent rewrite and complete the Conduct and Practices Handbook examination prior to resuming his employment with a brokerage firm, and that once he resumes such employment, he be subject to one year of close supervision by his employer firm.

Background

¶ 4 This matter arose from events during the period January 21, 2008 to February 13, 2008. An

investigation was commenced shortly thereafter but proceedings were, until recently, kept in abeyance until the intervening Ontario Divisional Court case of *Taub v. Investment Dealers Association of Canada*, 2008 CanLII 35707 (ON SCDC), (which held that IIROC did not have jurisdiction to proceed against former members) was overturned by the Ontario Court of Appeal (2009 CanLII 628 (ON CA)).

¶ 5 The respondent admitted that he had committed the contraventions set out in staff's statement of allegations and admitted the facts set out therein. Accordingly, the purpose of the hearing was to determine appropriate sanctions and costs to be born by the respondent.

Reasons

The Contravention

¶ 6 The respondent, a salesman and registered representative at BMO InvestorLine Inc. at the time, entered orders and executed trades in shares of Covalon Technologies Ltd. (COV) on the TSX Venture Exchange for a client and his related accounts with the intention of keeping the closing price of COV at or above \$3.00 per share, so that the client would avoid margin calls from some firms that would be made if the price fell below \$3.00.

¶ 7 The respondent faced two counts in the allegations against him: (i) that during the material time, he entered orders and executed trades in COV for a client and his associates that he knew or ought to have known created or could reasonably have been expected to create, an artificial price and/or bid for the security contrary to Universal Market Integrity Rule (UMIR) 2.2(2)(b) and 10.4(1); and (ii) that during the material time, he accepted trading instructions in respect of three client accounts from a person not authorized in writing to provide such instructions contrary to UMIR 2.1(1) and 10.4(1).

Other Related Factors

¶ 8 The impugned activity took place during the period January 21, 2008 to February 13, 2008.

¶ 9 Under BMO's policy, all telephone calls between the respondent and his clients had been taped. BMO's compliance department commenced an internal investigation of the impugned trading in February 2008. BMO submitted a gatekeeper report to the regulator on February 27, 2008, outlining the trading activity in COV.

¶ 10 BMO subsequently dismissed the respondent for cause and filed a uniform termination notice in March 2008.

¶ 11 The respondent has not worked as an approved person in the investment industry since then.

Suggestions of Counsel

¶ 12 Staff sought the following sanctions:

- (a) a 3 year suspension from access to IIROC-regulated marketplaces; and
- (b) a \$50,000 fine.

In addition, staff sought a costs award of \$15,000 of the \$68,000 of costs which staff stated that IIROC had incurred in this matter.

¶ 13 Counsel for the respondent took us through the trading statistics appended to the statement of allegations and suggested that we should take into account that there were only 26 impugned trades and that several of the impugned trades did not significantly move the market. He also suggested that we should take into account that the respondent's employment had been terminated and that he had been out of the industry for 2 years. He suggested the following sanctions:

- (a) a 3 to 6 months suspension from access to IIROC-regulated marketplaces;
- (b) a fine of \$15,000 to \$20,000; and
- (c) a reprimand.

He also suggested a costs award of between \$5,000 and \$15,000.

Principles applied in this Case

¶ 14 The panel's main concerns in determining appropriate sanctions were:

- (a) protection of the investing public;
- (b) protection of IIROC's membership;
- (c) protection of the integrity of the IIROC process;
- (d) protection of the integrity of the securities markets; and
- (e) prevention of a repetition of conduct of the type under consideration.

(See *Re Derivative Services Inc.*, [2000] I.D.A.C.D. No. 26)

¶ 15 We considered both general and specific deterrence. General deterrence involves dissuading others from committing the type of conduct at issue, while specific deterrence involves dissuading the respondent from again committing the type of conduct at issue.

¶ 16 General and specific deterrence go together and can be achieved if a sanction is appropriately unpleasant to the respondent taking into account the respondent's specific misconduct and is also in line with industry expectations. As stated in *Re Mills*, [2001] I.D.A.C.D. No. 7.:

Industry expectations and understandings are particularly relevant to general deterrence. If a penalty is less than industry understandings would lead its Members to expect for conduct under consideration, it may undermine the goals of the Association's disciplinary process; similarly, excessive penalties may reduce respect for the process and concomitantly diminish its deterrent effect. Thus the responsibility of the District Council in a penalty hearing is to determine a penalty appropriate to the conduct and respondent before it, reflecting that its primary purpose is prevention rather than punishment.

¶ 17 Industry expectations are formed through several sources, including the UMIR Disciplinary Sanction Guidelines, and previous disciplinary decisions.

UMIR Disciplinary Sanction Guidelines

¶ 18 The UMIR Disciplinary Sanction Guidelines were prepared by Market Regulation Services Inc. (RS), and subsumed by IIROC when the regulatory and enforcement functions of the Investment Dealers Association of Canada and RS were consolidated in IIROC. They outline the general principles and specific considerations to be considered for certain types of misconduct, as well as recommended sanctions for certain types of misconduct. They are not binding rules but are helpful indications of expectation that are usually considered by hearing panels.

¶ 19 The guidelines identify the following applicable factors which a hearing panel may consider in determining appropriate sanctions. Following them are our comments on their applicability to our case.

- (a) *Prior disciplinary record:*

The respondent has no prior disciplinary record.

- (b) *Extent of harm to market integrity, reputation of the marketplace, other market participants, listed companies and/or investors:*

In this case, there was no evidence of specific harm to clients or client losses. However, the market in COV shares during the material time generally remained above the intended level of \$3.00 per share, thus avoiding margin calls to the detriment of unnamed other firms. Market manipulation negatively impacts investor confidence in securities markets and the integrity of the capital markets. Lack of a discernible victim does not lessen the severity of the impugned conduct. Conduct involving market manipulation is serious because of the

breadth and scope of its impact.

(c) *Timeframe and scope of misconduct and transactions involved:*

The respondent's activities spanned a three week period. This was not an extended period of time; however, the time period was only cut short as a result of the actions of BMO's management and compliance staff.

(d) *Extent to which the respondent was enriched by the misconduct:*

There was no evidence that the respondent received commissions from the trades conducted.

(e) *Acceptance of responsibilities, acknowledgement of misconduct and remorse:*

The respondent admitted the contraventions alleged and the underlying facts.

(f) *Internal discipline:*

The respondent was terminated by BMO as a result of the misconduct and has not worked as an approved person in the industry since the termination.

Precedents

¶ 20 In *Re Fabi*, [2008] IIROC No. 16, an IIROC hearing panel accepted a settlement agreement where the respondent admitted he entered orders and executed trades which he ought reasonably to have known would create an artificial sale price for six securities. The misconduct took place over one trading day. The respondent admitted that his conduct was negligent, not that his conduct was knowingly and deliberately deceitful. The respondent had been suspended by his firm for a three month period, without pay. The agreed-upon penalty for the purposes of the settlement was as follows:

- (a) a \$15,000 fine; and
- (b) costs to IIROC of \$5,000.

¶ 21 In *Re Scott*, 2003/11/25 RS OOS No. 2003-010, an RS hearing panel accepted a settlement where the respondent admitted that for a 5-month period, he participated in the use of a manipulative or deceptive method of trading in connection with the purchase and sale of a security which created an artificial price. The respondent also admitted he paid for shares in an off market transaction. While the respondent was terminated by his firm as a result of this misconduct, he obtained employment at another dealer member shortly thereafter. The agreed-upon penalty for the purposes of the settlement was as follows:

- (a) a \$125,000 fine;
- (b) a 2 year suspension from access to RS-regulated marketplaces;
- (c) disgorgement of \$53,756; and
- (d) payment of costs of \$35,000.

¶ 22 In *Re Gregorian*, 2006/04/18 RS DN No. 2006-003, an RS hearing panel accepted a settlement where the respondent admitted that over a 15-month period he participated in his client's use of manipulative or deceptive methods of trading which created or could reasonably be expected to have created a false or misleading appearance of trading activity or an artificial price for a security. The agreed-upon penalty for the purposes of the settlement was as follows:

- (a) a fine of \$39,000;
- (b) a 5 year suspension from access to RS-regulated marketplaces; and
- (c) disgorgement of \$26,260.

¶ 23 In *Re St. Pierre*, [2008] IIROC No. 11, an RS hearing panel found that the respondent (i) for a 2 month period, participated in manipulative or deceptive methods of trading in respect of the purchase of shares which were reasonably likely to have the effect of creating an artificial price for those securities; (ii) for a 1 month

period, entered orders which could reasonably be expected to create an artificial last sale price; (iii) for a 5 month period, facilitated or participated in manipulative or deceptive trading practices in connection with the entry of orders which had the effect of creating a false or deceptive appearance of trading activity; and (iv) for a 6 month period, entered orders to purchase shares when he knew or reasonably ought to have known that the entry of such orders would have, or was reasonably likely to have, the effect of creating a false or deceptive appearance of trading activity. The hearing panel in *St. Pierre* imposed the following sanction:

- (a) a \$30,000 fine;
- (b) a 5 year suspension from access to RS-regulated marketplaces;
- (c) a requirement that the respondent complete the Conduct and Practices Handbook examination prior to resuming employment with a brokerage firm;
- (d) a requirement that the respondent be subject to heightened supervision if he resumed employment with a brokerage firm, for the duration of the suspension period; and
- (e) payment of costs of \$70,000.

¶ 24 In *Re Smith*, 2002/10/24 RS OOS No. 2002-11, an RS hearing panel accepted a settlement where the respondent admitted that for a 12 month period, he purchased, sold or offered to purchase or sell securities where he ought to have known that the effect of such a purchase or sale might be to unduly disturb the normal position of the market or to create an abnormal market condition in which market prices would not fairly reflect current market values. The agreed-upon penalty for the purposes of the settlement was as follows:

- (a) a \$7,500 fine; and
- (b) payment of costs of \$2,500 to RS.

¶ 25 Counsel for the respondent referred us to *Re Moorhead*, 2008/05/22 RS DN No. 2008-001, where an offer of settlement of Kevin Moorhead with RS resulted in a fine of \$40,000, a 3 month suspension and a costs award of \$10,000 against Moorhead, as a result of actions he knew or ought to have known resulted in manipulation. Unfortunately, we did not have the guidance of a decision and reasons of the panel accepting the settlement as to why they concluded that the settlement was appropriate.

Conclusion

¶ 26 Unlike in some of the precedents presented to us, our case was not one where the respondent neglected to perform due diligence, or did not ask the right questions, or was fooled by a client. The respondent in our case was specifically told by his client that the client wanted to control the price of a stock, and he knowingly, deceptively and pro-actively assisted the client in this endeavour.

¶ 27 We did not consider as mitigating factors, the small number of the impugned transactions or the effectiveness of the respondent's manipulative trading before the activity was ended through intervention by BMO. Furthermore, we were not able to conclude that there was minimal effect on the market caused by the posting of the trade volume activity.

¶ 28 We concluded that a fine of \$40,000, and a period of time when the respondent did not have access to IIROC-regulated marketplaces were appropriate in our case. We concluded that the disciplinary action taken by BMO, namely the dismissal of the respondent, and the fact that the respondent had not been successful, in spite of some attempts on his part, in finding employment as an approved person in the industry since March 2008 should be taken into account by us when determining the appropriate length of the respondent's suspension by us.

¶ 29 Our costs award is within the range suggested by both counsel.

DATED at Toronto this 26th day of March, 2010.

Paul M. Moore, Q.C.

“Hugh McNabney”

Hugh McNabney

Copyright © 2010 Investment Industry Regulatory Organization of Canada. All Rights Reserved.