

Re Bush

IN THE MATTER OF:

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

and

The By-Laws of the Investment Dealers Association of Canada (IDA)

and

Allan Mansfield Bush

2011 IIROC 52

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

Hearing: July 5, 2011 in Toronto, Ontario
Decision: September 12, 2011
(30 paras.)

Hearing Panel:

Thomas J. Lockwood, Q.C. (Chair), Sandy Grant, Brigitte Geisler

Appearances:

Rob Del Frate , Enforcement Counsel
Scott Kugler, Respondent's Counsel

DECISION AND REASONS

Introduction

¶ 1 As a result of a Settlement Agreement entered into between the Investment Industry Regulatory Organization of Canada ("IIROC") and Allan Mansfield Bush (the "Respondent"), in June of 2011, a Settlement Hearing was conducted in Toronto, on July 5, 2011, pursuant to the IIROC Dealer Member Rules.

¶ 2 After hearing submissions, both as to the applicable law and as to why this particular Settlement Agreement met the appropriate criteria, the Hearing Panel retired to consider whether we were in a position to accept the Settlement Agreement on the basis of the material before us.

¶ 3 After consideration, the Hearing Panel unanimously accepted the Settlement Agreement and made an Order to this effect on July 5, 2011. At that time, we advised that we would provide written Reasons for our Decision. This constitutes those Reasons.

¶ 4 4. The Settlement Agreement is as follows:

"I. INTRODUCTION

1. IIROC Enforcement Staff and Allan Mansfield Bush (the “Respondent”), consent and agree to the settlement of this matter by way of this settlement agreement (“the Settlement Agreement”).
2. The Enforcement Department of IIROC has conducted an investigation (“the Investigation”) into the conduct of the Respondent.
3. 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.
4. The Respondent consents to be subject to the jurisdiction of IIROC.
5. 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

6. Staff and the Respondent jointly recommend that the Hearing Panel accept this Settlement Agreement.
7. The Respondent admits to the following contraventions of IIROC Rules, Guidelines, IDA By-Laws, Regulations or Policies:

Contravention #1: Between November 2006 and June 2008, the Respondent made unsuitable investment recommendations for the accounts of two of his clients, FO and MG, without using due diligence to ensure that the recommendations were suitable for those clients based on their financial situation, investment knowledge, investment objectives and risk tolerance contrary to IDA Regulation 1300.1(q) (now Dealer Member Rule 1300.1(q))

Contravention #2: Between November 2007 and February 2009, the Respondent, without the knowledge or approval of his Dealer Member firm, provided compensation to three clients for account losses, contrary to IDA By-law 29.1 (now Dealer Member Rule 29.1).

8. Staff and the Respondent agree to the following terms of settlement:

A total fine in the amount of \$15,000, broken down as follows:

1. \$7,500 fine for contravention 1, including the disgorgement of \$2,000 in commissions earned on the unsuitable investments; and
2. \$7,500 fine for contravention 2;

9. The Respondent agrees to pay costs to IIROC in the sum of \$5,000.

III. STATEMENT OF FACTS

(i) Acknowledgment

10. 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

A. Overview

11. Between November 2006 and June 2008, the Respondent made 3 unsuitable investment recommendations to two of his clients. These highly speculative investments did not meet the investment objectives or risk factors of the accounts and resulted in significant losses. To

compensate for these losses, between November 2007 and February 2009, the Respondent provided monthly payments to the two clients without the knowledge or consent of his Dealer Member. He also made ad hoc payments to a third client as compensation for account losses. Clients are entitled to a fair and unbiased determination as to the validity of their complaints. By making the payments directly to the clients, the Respondent potentially deprived the clients of their right to a proper compensation. The Respondent's actions created an actual or potential conflict of interest between his best interests and the best interests of his clients.

B. Registration History

12. Since December 29, 2001, the Respondent has been registered as a Registered Representative with a Waterloo, Ontario branch of CIBC World Markets Inc. ("CIBC"), a Dealer Member of IIROC.
13. On June 1, 2008, the Respondent became a regulated person of IIROC.

C. The Clients – FO and MG

14. In or around early 1994, FO and MG opened accounts with the Respondent at his previous employer. When the Respondent joined CIBC in 2001, the couple moved their Registered Retirement Income Fund ("RRIF") accounts as well.
15. In 2004, FO also opened a margin account with the Respondent. At that time, FO was 70 years old and retired. His annual income was \$40,000 to \$50,000, his net worth was \$350,000 to \$500,000 and his estimated net liquid assets were \$200,000. His investment knowledge was "good". MG was 67 years old, her annual income was approximately \$17,000, her net worth was approximately \$350,000 and her estimated net liquid assets were \$150,000. Her investment knowledge was fair.
16. FO and MG were making monthly withdrawals from the two RRIF and one margin accounts in the aggregate amount of \$4,000.
17. Prior to 2004, FO and MG's investments consisted of mainly mutual funds. Not satisfied with the performance and fees associated with the mutual funds, FO and MG's mutual fund investments were sold and the proceeds were used to purchase income trust units. By October 2006, FO's entire margin account consisted of holdings in four different income trusts. FO and MG's RRIF accounts also held income trust units. These holdings had been generating annual returns of approximately 12-13%.
18. In October 2006, the federal government announced changes to Canadian tax laws regarding income trust units. In order to maintain the 12-13% returns needed to fund the monthly withdrawals, the Respondent recommended that units of the income trusts be sold and that FO and MG purchase shares in Jump TV, a high risk, speculative investment.
19. Between November 2006 and February 2007, units of the income trusts were sold and shares of Jump TV were purchased. The investment in Jump TV for the accounts of FO and MG was unsuitable based on the clients' investment objectives and risk tolerances.
20. In addition, the total purchases of Jump TV in the three accounts equaled approximately \$150,000. This represented anywhere from 30% to 60% of the holdings in the each of the three accounts. This high concentration in a single, high risk security further increased the risk of the investment.
21. In May 2007, CIBC Compliance expressed concern that the holdings in FO and MG's accounts were not appropriate in light of the risk tolerance levels listed on their respective NCAFs. CIBC directed the Respondent to update the Know Your Client ("KYC") information for FO and MG.

22. The Respondent contacted FO and MG to discuss updating the KYC information for their accounts. By letter dated May 14, 2007, the Respondent confirmed that the investment objectives for the three accounts were being changed to reflect the increased risk.
23. After the initial purchase, the shares in Jump TV increased in value. After reaching \$9.50 per share on January 31, 2007, the shares began to fall in price. Between January 2007 and January 2008, the monthly closing price for shares of Jump TV were as follows:

January 2007	\$9.50
February 2007	\$8.45
March 2007	\$7.17
April 2007	\$6.75
May 2007	\$6.79
June 2007	\$5.04
July 2007	\$3.75
August 2007	\$3.61
September 2007	\$3.07
October 2007	\$1.90
November 2007	\$2.10
December 2007	\$2.26
January 2008	\$1.50

24. As a result of the share price decrease and corresponding drop in the value of the accounts, FO and MG's monthly withdrawals were at risk. In October 2007, the Respondent advised FO and MG that their monthly income was at risk and recommended that they reduce the monthly withdrawals in order to protect their capital. When FO and MG advised that they required the monthly income, the Respondent offered to supplement the monthly payments until the value of the Jump TV shares increased to their initial offering price.
25. In November 2007, the regular monthly withdrawals from FO and MG's accounts were either reduced significantly or ceased altogether and in their place the Respondent began making payments from his personal funds to maintain FO and MG's monthly income level of \$4,000.
26. Between November 2007 and January 2009, the Respondent made monthly payments to FO and MG totaling approximately \$58,860. None of these payments were disclosed to CIBC.
27. In January 2008, the Respondent recommended FO and MG purchase shares in Bioniche Life Sciences, a high risk, speculative investment. In June 2008, the Respondent recommended FO and MG participate in the initial public offering of Fluid Music Inc, another high risk, speculative investment.
28. The shares of Jump TV, Bioniche Life Sciences and Fluid Music Inc. were purchased at a combined cost of approximately \$237,000. By February 2009, the market value of these securities in the three accounts was approximately \$27,000. However, the share prices of Bioniche Life Sciences and Fluid Music Inc. (now known as Mood Media Corporation) have since recovered and are above the levels at which they were purchased by these clients. The

shares of Jump TV (now known as NeuLion Inc.) remain below the levels at which they were purchased by these clients.

D. The Client - MT

29. MT was a relative of FO and MG and was also a client of the Respondent. The Respondent had also recommended that MT make an investment in Jump TV.
30. Shortly after the Respondent began making monthly payments to FO and MG, the Respondent began making similar payments to MT.
31. Between December 2007 and January 2009, the Respondent made ad hoc payments to MT totaling approximately \$25,000.

E. Internal Discipline

32. In or around January 2009, CIBC became aware of the payments to FO, MG and MT as a result of a complaint made by FO and MG. They immediately required the Respondent to cease making the payments.
33. In September 2009, CIBC reached a settlement with FO and MG, pursuant to which the clients received \$190,000 and retained the \$58,860 paid by the Respondent, for total compensation of \$248,860. The Respondent has agreed to reimburse CIBC in full and, as of June 1, 2011, he had repaid \$56,800.
34. In March 2010, CIBC imposed internal discipline measures on the Respondent consisting of:
 - (i) A letter of reprimand;
 - (ii) A fine in the amount of \$30,000;
 - (iii) A requirement that the Respondent re-write the Conduct and Practices Handbook Course; and
 - (iv) Close Supervision for a period of 12 months.
35. The Respondent has paid the \$30,000 fine, completed the 12 month period of close supervision, and re-written the Conduct and Practices Handbook Course.

IV. TERMS OF SETTLEMENT

36. 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.
37. The Settlement Agreement is subject to acceptance by the Hearing Panel.
38. The Settlement Agreement shall become effective and binding upon the Respondent and Staff as of the date of its acceptance by the Hearing Panel.
39. 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.
40. 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.
41. 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.
42. The Settlement Agreement will become available to the public upon its acceptance by the Hearing Panel.

43. 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.
44. Unless otherwise stated, any monetary penalties and costs imposed upon the Respondent are payable immediately upon the effective date of the Settlement Agreement.
45. 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 Waterloo, in the Province of Ontario, this 6th day of June, 2011.

“Wendy Anne Lagne”

“Allen Bush”

WITNESS

RESPONDENT

AGREED TO by Staff at the City of Toronto, in the Province of Ontario, this 8th day of June, 2011.

“Shermina Karim”

“Rob DeIfrate”

WITNESS

ROB DELFRATE

Name

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

¶ 5 During the course of submissions, the Hearing Panel was advised, with the consent of the parties, of certain additional facts:

- (a) The “complaint”, referred to in paragraph 32 of the Settlement Agreement, was made by FO and MG to the Respondent. It was the Respondent who then reported it to CIBC.
- (b) The 12 months of Close Supervision imposed by CIBC on the Respondent, which is referred to in paragraph 34(iv) of the Settlement Agreement, included the following:
 - (i) the Respondent could not make any recommendations or trades without receiving prior approval;
 - (ii) every trade made by the Respondent was monitored by the Branch Office and reviewed by Head Office;
 - (iii) the Respondent met with the Branch Manager on Friday of each week and went through all client recommendations;
 - (iv) all of the Respondent’s “Know Your Client” forms were updated;
 - (v) the Respondent was not allowed to do any marketing for a year;
 - (vi) the Branch Manager met with 150 of his clients;
 - (vii) CIBC did a complete audit of the business and financial affairs of the Respondent.

¶ 6 As the admitted events took place both before and after June 1, 2008, the date IIROC was retained by the IDA to carry out its regulatory functions, both IDA and IIROC Regulations, Rules and By-Laws are apposite. In the Settlement Agreement, the Respondent admitted breaching IDA Regulation 1300.1(q) (now Dealer Member Rule 1300.1(q)) and IDA By-Law 29.1 (now Dealer Member Rule 29.1). These provide as follows:

RULE 1300

SUPERVISION OF ACCOUNTS

1300.1.

Suitability Determination Required When Recommendation Provided

(q) Each Dealer Member, when recommending to a customer the purchase, sale, exchange or holding of any security, shall use due diligence to ensure that the recommendation is suitable for such customer based on factors including the customer's financial situation, investment knowledge, investment objectives and risk tolerance.

BY-LAW NO. 29

BUSINESS CONDUCT

29.1. Members and each partner, director, officer, sales manager, branch manager, assistant or co-branch manager, registered representative, investment representative and employee of a Member (i) shall observe high standards of ethics and conduct in the transaction of their business, (ii) shall not engage in any business conduct or practice which is unbecoming or detrimental to the public interest, and (iii) shall be of such character and business repute and have such experience and training as is consistent with the standards described in clauses (i) and (ii) or as may be prescribed by the Board of Directors.

For the purposes of disciplinary proceedings pursuant to the By-laws, each Member shall be responsible for all acts and omissions of each partner, director, officer, sales manager, branch manager, assistant or co-branch manager, registered representative, investment representative and employee of a Member; and each of the foregoing individuals shall comply with all By-laws, Regulations and Policies required to be complied with by the Member.

FACTORS CONCERNING ACCEPTANCE OF A SETTLEMENT AGREEMENT

¶ 7 In Milewski (Re) [1999] I.D.A.C.D. No. 17, the Hearing Panel stated that:

"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. Put another way, the District Council will reflect the public interest benefits of the settlement process in its consideration of specific settlements."

¶ 8 In Re Bereskin [2010] IIROC No. 37, at paragraph 5, it was stated that it is the responsibility of the Hearing Panel:

" . . . to determine whether the penalties set forth in the Settlement Agreement strike a reasonable balance between fairness to the Respondent in the circumstances and the need to protect the investing public, the industry membership, the integrity of the discipline process, the integrity of the securities markets and prevention of a repetition of the offense."

¶ 9 In Re Higgs [2010] IIROC No. 3, at paragraph 6, the Hearing Panel noted that:

". . . the governing principles applicable to a decision to accept or reject a settlement are similar to the principles applicable to joint submissions on sentencing in criminal cases, "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 so doing."

IIROC DEALER MEMBER DISCIPLINARY SANCTION GUIDELINES ("GUIDELINES")

¶ 10 The Hearing Panel also considered the Guidelines in coming to our conclusion as to the appropriateness of the suggested penalties. We note that these Guidelines are not mandatory, but simply suggest the types and ranges of sanctions that might be appropriate to particular case types.

¶ 11 The Guidelines deal with “unsuitable recommendations” as follows:

"The core of a registered representative's business activity is to make recommendations for his/her clients. Registrants have a basic duty to ensure that the recommendations are suitable, in accordance with the clients' investment objectives and risk factors. The courts have generally held that a registrant owes a fiduciary duty to the client where the client relies upon the advice and recommendations of the registrant. This fiduciary relationship requires the registrant to act carefully, honestly and in good faith in dealing with the client. Therefore, a registrant who makes unsuitable recommendations has breached his/her fiduciary duty owed to the client.

Even in absence of general fiduciary relationship between registrant and client, there is at the very least, a relationship of trust and confidence that exists between a registrant and client. A client will rely upon and place confidence in the recommendations made by the registrant, who has an obligation to ensure the recommendations are suitable. Where the recommendations are unsuitable for the client, the registrant has breached his position of trust and failed to fulfill the most basic of responsibilities towards the client."

¶ 12 The Guidelines recommend a minimum fine of \$10,000, disgorgement of profits, re-write of the Conduct and Practices Handbook Course, a period of close and/or strict supervision and, in egregious cases, a period of suspension.

¶ 13 With respect to attempting to settle a client's claim for compensation, the Guidelines state as follows:

"A client who has a complaint regarding the activities of a registrant is entitled to a fair and unbiased determination as to the validity of that complaint. If the client's complaint is well-founded, he is entitled to present same to civil dispute resolution channels and the Dealer Member firm for compensation; and to the appropriate regulatory bodies to consider possible disciplinary action. A registrant who attempts to, or does, settle a client claim deprives his client of these options, and prefers his interest over that of his client."

¶ 14 The range of recommended sanctions include a minimum fine of \$10,000, a 6–12 month suspension from acting in a relevant capacity, successful completion of an appropriate industry program within 6 months, and a period of close supervision for 12-24 months. In egregious cases, the Guidelines recommend that the Hearing Panel consider a permanent prohibition.

¶ 15 The Guidelines also set out a series of general principles which can be used by the Hearing Panel to assess the gravity of the particular breaches committed by a Respondent and to help determine whether the proposed sanctions, set out in the Settlement Agreement, are reasonable in the circumstances. Both Counsel for Staff and Counsel for the Respondent dealt with certain of these principles during the course of their Submissions.

Harm to the Clients

¶ 16 Between November of 2006 and June of 2008, the Respondent made three unsuitable investment recommendations to two of his clients. These recommendations resulted in a substantial decrease in the clients' portfolio values. The Respondent attempted to mitigate these price decreases by making monthly payments to the clients, which eventually totaled \$58,860. When the CIBC became aware of the wrongdoing of the Respondent, it settled the claims of the clients by paying them an additional \$190,000, for a total compensation of \$248,860. The Respondent has agreed to, and is in the process of, reimbursing CIBC in full.

Blameworthiness

¶ 17 The position of Staff was that the Respondent's conduct did not appear to them to have been manipulative or fraudulent. Staff submitted that the Respondent appeared to have been acting in what he believed to be the best interests of his clients. When the share prices of the unsuitable investments decreased, the Respondent offered to supplement the monthly payments until the value of the shares increased to their

initial offering price. However, these payments continued for more than a year during which time the Respondent made no disclosure to CIBC.

Extent to Which the Respondent was Enriched by the Misconduct

¶ 18 The Respondent earned commissions on the unsuitable investments totaling approximately \$2,000. Pursuant to the terms of the proposed settlement, the Respondent will disgorge this amount. It was the submission of Staff that the Respondent's conduct in this case does not appear to have been aimed at self-enrichment.

Acceptance of Responsibility, Acknowledgement of Misconduct and Remorse

¶ 19 The Respondent has admitted that his conduct was in violation of the IDA By-laws and regulations in place at the time.

¶ 20 By making the admissions contained in the Settlement Agreement and by co-operating fully with IIROC, the Respondent has avoided the necessity of IIROC conducting both a protracted investigation and a lengthy hearing at considerable additional expense to IIROC and, ultimately, to the membership of IIROC.

Prior Disciplinary Record

¶ 21 The Respondent has been registered with CIBC since 2001 and in the securities industry since 1987. He has no prior disciplinary record.

Credit for Internal Sanctions

¶ 22 The Guidelines suggest that "a credit should be accorded for any fine or suspension that may have been imposed upon a respondent by his/her own Dealer Member firm arising out of internal disciplinary action."

¶ 23 Apart from the completion of the 12 month period of Close Supervision, detailed above in paragraph 5, CIBC, in March of 2010, also imposed the following internal discipline measures:

- (a) a letter of reprimand;
- (b) a fine in the amount of \$30,000, which, we were advised, was donated by the CIBC to charity; and
- (c) a requirement that the Respondent re-write the Conduct and Practices Handbook Course.

Previous Regulatory Decisions in Similar Circumstances

¶ 24 The Hearing Panel was also provided with a number of IDA and IIROC precedent cases, including:

- (a) Petriccione (Re) [2002] I.D.A.C.D. No. 26;
- (b) Wong (Re) [2005] I.D.A.C.D. No. 24; and
- (c) Kwok (Re) [2010] IIROC No. 38.

¶ 25 In two of those cases, a period of suspension was imposed by the Settlement Agreements. While the Hearing Panel in each case accepted the proposed penalties as being within the reasonable range of appropriateness, it questioned whether a suspension was required in all cases involving an attempt to settle a client claim.

¶ 26 In the Settlement Agreement before us, there was no provision for a period of suspension. However, taking into account the agreed upon facts of this case, the penalties already imposed and to be imposed on the Respondent, the lengthy discipline-free history of the Respondent in the securities industry, we agree with the parties that no suspension was warranted.

¶ 27 We believe that the proposed penalties will deter future misconduct by the Respondent, deter others from engaging in similar misconduct, improve overall compliance by industry participants and foster confidence in the regulatory process.

¶ 28 We also noted the nature of these proceedings, the fact that they are public and the effect that this has had, and will have, on the Respondent.

¶ 29 After a careful consideration of all of the above factors, we unanimously concluded that the Settlement Agreement was reasonable and in the public interest and should be accepted by this Hearing Panel.

PENALTIES IMPOSED

¶ 30 In summary, the penalties which were imposed on the Respondent are the following:

- (a) a total fine in the amount of \$15,000; and
- (b) costs payable to IIROC in the amount of \$5,000.

DATED the 12th day of September, 2011.

Thomas J. Lockwood, Q.C., Chair

Sandy Grant, Member

Brigitte Geisler, Member

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