

# INVESTMENT INDUSTRY REGULATORY ORGANIZATION OF CANADA

## IN THE MATTER OF THE UNIVERSAL MARKET INTEGRITY RULES

AND

## IN THE MATTER OF BERT GRIFFIN

### OFFER OF SETTLEMENT

#### A. 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 Bert Griffin (the Respondent).
2. The Investigation was commenced by the Investigations and Enforcement Department Staff of Market Regulation Services Inc. (RS) 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 RS and IIROC, effective June 1, 2008, RS has retained IIROC to provide services for RS to carry out its regulatory functions.
3. The Investigation has disclosed matters for which IIROC seeks certain sanctions against the Respondent pursuant to Rule 10.5 of the Universal Market Integrity Rules (UMIR).
4. If this Offer of Settlement is accepted by the Respondent, the resulting settlement agreement (the Settlement Agreement), which has been negotiated in accordance with Part

3 of UMIR Policy 10.8, is conditional upon the approval by a hearing panel appointed pursuant to IIROC Transitional Rule No.1, Schedule C.1 (the Hearing Panel).

5. The Respondent agrees to waive all rights under UMIR to a hearing or to an appeal or review if the Settlement Agreement is approved by the Hearing Panel.
6. The Respondent consents to be subject to the jurisdiction of IIROC and its relevant disciplinary process and rules in relation to this matter.
7. Staff and the Respondent jointly recommend that the Hearing Panel accept this Settlement Agreement.

**B. AGREEMENT AS TO REQUIREMENTS CONTRAVENED**

8. The Respondent agrees that on January 27, 2006, April 11, 2006 and April 21, 2006, he engaged in conduct that resulted in contraventions of UMIR 5.3 and Policy 5.3 (Client Priority) for which he is liable under UMIR 10.3(4).

**C. ADMITTED FACTS**

9. Staff and the Respondent agree with and rely upon the admitted facts and conclusions which are set out in the Statement of Allegations attached as Appendix A to this Settlement Agreement.

**D. DISPOSITION**

10. For the contraventions in paragraph 8 above, Staff and the Respondent have agreed upon disposition as follows:
  - (i) a fine of \$15,000.00 payable by the Respondent to IIROC;
  - (ii) successful completion of the Conduct and Practices Handbook examination within 6 months from the effective date of the Settlement Agreement;
  - (iii) successful completion of the Trader Training Course Examination within 6 months from the effective date of the Settlement Agreement; and

(iv) costs of \$5,000.00 payable by the Respondent to IIROC.

11. If this Settlement Agreement is accepted by a Hearing Panel, the Respondent agrees to pay the amounts referred to in paragraph 10 within 30 days of such acceptance.

**E. PROCEDURES FOR ACCEPTANCE OF OFFER OF SETTLEMENT AND APPROVAL OF SETTLEMENT AGREEMENT**

12. The Respondent shall have until the close of business on Tuesday, August 4, 2009 to accept the Offer of Settlement and serve an executed copy thereof on Staff.
13. This Settlement Agreement shall be presented to a Hearing Panel at a public hearing (the Approval Hearing) held for the purpose of approving the Settlement Agreement, in accordance with the procedures described in UMIR Policy 10.8 in addition to any other procedures as may be agreed upon between the parties. The Respondent acknowledges that IIROC shall notify the public and media of the Approval Hearing in such manner and by such media as IIROC sees fit.
14. Pursuant to Part 3.4 of UMIR Policy 10.8, the Hearing Panel may accept or reject this Settlement Agreement.
15. In the event the Settlement Agreement is accepted by a Hearing Panel, the matter becomes final, there can be no appeal or review of the matter, the disposition of the matter agreed upon in this Settlement Agreement will be included in the permanent record of IIROC in respect of the Respondent and IIROC will publish a summary of the Requirements contravened, the facts, and the disposition agreed upon in the Settlement Agreement.
16. In the event the Hearing Panel rejects the Settlement Agreement, IIROC may proceed with a hearing of the matter before a differently constituted Hearing Panel pursuant to Part 3.7 of UMIR Policy 10.8 and this Settlement Agreement may not be referred to without the consent of both parties.

17. The Respondent agrees that, in the event he fails to comply with any of the terms of the Settlement Agreement, IIROC may enforce this settlement in any manner it deems appropriate and may, without limiting the generality of the foregoing, suspend the Respondent's access to marketplaces regulated by IIROC until IIROC determines that the Respondent is in full compliance with all terms of the Settlement Agreement.

18. The Respondent agrees that neither he, nor anyone on his behalf, will make a public statement inconsistent with this Settlement Agreement.

IN WITNESS WHEREOF the parties have signed this Settlement Agreement as of the dates noted below.

DATED at Toronto on the 20<sup>th</sup> day of ~~July~~<sup>Aug</sup>, 2009.

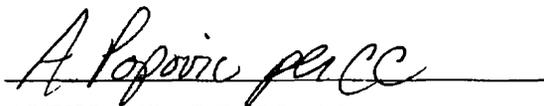
  
\_\_\_\_\_  
Witness Signature

  
\_\_\_\_\_  
BERT GRIFFIN

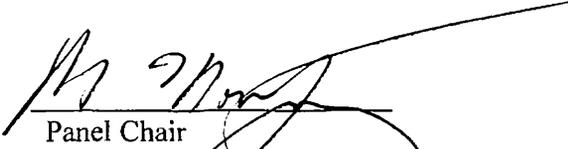
Sabrina Carvalho  
Name of Witness

3501 Glen Erin Dr., Miss., ON  
Address of Witness

DATED at Toronto, Ontario on the 27th day of July, 2009.

Per:   
\_\_\_\_\_  
ALEKSANDAR POPOVIC  
VICE-PRESIDENT, ENFORCEMENT  
INVESTMENT INDUSTRY REGULATORY ORGANIZATION OF CANADA  
Suite 1600, 121 King Street West  
Toronto, Ontario M5H 3T9

This foregoing Settlement Agreement is hereby approved this 20<sup>th</sup> day of August, 2009,  
by the following hearing panel constituted to review the terms thereof:

Per:   
Panel Chair

Per:   
Panel Member

Per:   
Panel Member

**APPENDIX "A"**

**INVESTMENT INDUSTRY REGULATORY ORGANIZATION OF CANADA**

**ON BEHALF OF**

**MARKET REGULATION SERVICES INC.**

**IN THE MATTER OF:**

**THE RULES OF THE INVESTMENT INDUSTRY REGULATORY  
ORGANIZATION OF CANADA**

**AND**

**THE UNIVERSAL MARKET INTEGRITY RULES**

**AND**

**BERT GRIFFIN**

**STATEMENT OF ALLEGATIONS**

**I. REQUIREMENTS CONTRAVENED**

1. Bert Griffin (the "Respondent"), at all material times a Registered Representative at Berkshire Securities Inc. ("Berkshire"), is alleged to have engaged in conduct that resulted in the following contraventions of Rule 5.3 and Policy 5.3 (Client Priority) of the Universal Market Integrity Rules ("UMIR") for which he is liable pursuant to UMIR 10.3(4):
  - (i) on January 27, 2006, he failed to give priority to 3 client buy orders over a non-client buy order for the shares of Century Mining Corp.;
  - (ii) on April 11, 2006, he failed to give priority to 2 client buy orders over a non-client buy order for the shares of Discovery Air; and
  - (iii) on April 21, 2006, he failed to give priority to 2 client buy orders over a non-client buy order for the shares of Discovery Air.

2. Schedule "A" sets out the text of the relevant Requirements.

## **II. RELEVANT FACTS AND CONCLUSIONS**

### **OVERVIEW**

3. This matter concerns the Respondent's handling of client orders and trades on January 27, April 11 and April 21, 2006 (the "Relevant Period").
4. On October 13, 2006, Berkshire Securities Inc. ("Berkshire") filed a gatekeeper report pursuant to UMIR 10.16 outlining potential violations of UMIR 4.1 and 5.3 by the Respondent.
5. As a result, RS Staff (and subsequently IIROC Staff) conducted an investigation, resulting in the findings below.
6. During the Relevant Period, Berkshire was registered as an investment dealer, was a Participating Organization of the Toronto Stock Exchange (the "TSX"), a Member of the TSX Venture Exchange (the "TSXV"), and therefore, a Participant under UMIR.
7. The Respondent has been a Registered Representative since 1995 and employed by Berkshire since October 10, 2003.
8. The shares of Century Mining Corp. (hereinafter referred to by its stock symbol "CMM") trade on the TSXV.
9. The shares of Discovery Air (hereinafter referred to by its stock symbol "DA.A") trade on the TSX.
10. The non-client orders entered by the Respondent were entered for his personal account.
11. All times are expressed in Eastern Standard Time (EST).

### **CLIENT PRIORITY**

12. UMIR 5.3 restricts Participants and their employees from trading in the same securities as their clients in order to minimize the conflict of interest *that occurs* when a firm or trader

competes with the firm's clients for executions. The Respondent contravened this rule on multiple occasions by taking out an offering that his clients could have obtained had the client orders been entered first.

13. UMIR 5.3 provides an exception, whereby a Participant does not have to provide priority to a client order if the client specifically consents to the Participant trading ahead or alongside a particular order. A client cannot give a blanket consent permitting the Participant to trade ahead or alongside. Where the client has specifically consented to the Participant trading ahead or alongside that order, the consent must be recorded on the order ticket for the exception to apply.
14. After the Respondent was advised of the findings herein, the Respondent provided IIROC Staff with client statements wherein the clients indicate that they were either aware that the Respondent was purchasing shares of the same securities for his own account at or around the time of their purchases or that they consented to the Respondent trading ahead or alongside of their orders.
15. However, the Respondent did not record that any client had specifically consented to the Respondent trading ahead or alongside on any of the order tickets, as required by UMIR 5.3(6), nor did the Respondent make any other record of any of the clients providing their consent.
16. The Respondent's order handling practices and record-keeping violated UMIR 5.3 and Policy 5.3 and Berkshire's internal record-keeping policy.
17. Effective May 26, 2006, the applicable securities commissions approved amendments to repeal and replace Rule 5.3 and Policy 5.3. The post-May 26, 2006 version of UMIR 5.3 would apply equally to the allegations made herein.

### **CONTRAVENTIONS OF UMIR 5.3**

#### **Trading in CMM on January 27, 2006**

18. On January 27, 2006, the Respondent traded ahead of three client buy orders for the shares of CMM.
19. On January 26, 2006, the Respondent solicited orders for the shares of CMM from three clients: the order ticket for client A indicated the client wanted to purchase 100,000 shares; the order ticket for client B indicated the client wanted to purchase 50,000 shares; and the order ticket for client C indicated the client wanted to purchase 25,000 shares.
20. At 9:44:12 on January 27, the Respondent placed a non-client buy order for 50,000 shares at \$0.44 and was immediately filled for 49,500 shares. The fill of 49,500 shares moved the market to 500 shares at \$0.44 bid and 58,000 shares at \$0.445 ask. At 10:00:03 an offer came in for 500 shares at \$0.44 and the balance of the Respondent's order was filled.
21. The Respondent entered a buy order for 50,000 shares for client A at 9:55:22, which was filled at a price of \$0.445. The Respondent entered another buy order for 50,000 shares for client A at 11:29:37 which was filled at a price of \$0.445.
22. Client A was disadvantaged by \$.005 in both trades of 50,000 shares, amounting to a financial disadvantage to the client of \$500 had the order been entered at the opening as it should have.
23. The Respondent entered a buy order for 50,000 shares for client B at 10:41:16 which was filled at a price of \$0.445.
24. Client B was disadvantaged by \$.005 on the trade of 50,000 shares, amounting to a financial disadvantage to the client of \$250.
25. The Respondent entered a buy order for client C at 11:04:31 which was filled at a price of \$0.445.

26. Client C was disadvantaged by \$.005 on the trade of 25,000 shares, amounting to a financial disadvantage to the client of \$125 had the order been entered at the opening as it should have.
27. By trading ahead of the client orders, the Respondent's non-client order took out an offering the clients could have obtained and the Respondent's non-client order obtained a better price at the expense of the three client orders.

#### **Trading in DA.A on April 11, 2006**

28. On April 11, 2006, the Respondent traded ahead of two client buy orders for the shares of DA.A.

#### **Client D**

29. At 9:27:07, the Respondent entered a buy order for client D for 20,000 shares that was filled at the opening at a price of \$0.90. The order ticket indicated that client D wanted 200,000 shares of DA.A.
30. By 11:13, client D had accumulated 90,000 shares through a number of trades.
31. The order ticket for client D entered at 10:34:01 indicated that the client's limit price was \$1.00.
32. At 11:20:01, the Respondent entered a non-client buy order for 30,000 shares at \$0.95. There were 16,000 shares offered at \$0.94. The next best offer was 15,500 shares at \$0.95. The Respondent's order took out the offer of 16,000 shares at \$0.94 and the remaining 14,000 shares were filled at \$0.95.
33. The Respondent's non-client order was filled at prices below client's D's stipulated limit price.
34. At 11:25, the Respondent entered another buy order for client D for 22,500 shares at \$0.90, despite the fact that client D had a limit price of \$1.00. This order remained unfilled until 13:19 when it was cancelled.

35. The order ticket entered at 11:25 indicated that client D continued to want 200,000 shares of DA.A.

**Client E**

36. At 9:34:36, the Respondent entered a buy order for client E for 20,000 shares at \$0.90, which was immediately filled.
37. The order ticket indicated that the client had requested and wanted more shares of DA.A.
38. At 11:20:01, the Respondent entered a non-client buy order as described in paragraph 32 above when he knew client E wanted more shares.
39. At 11:28:14, the Respondent entered a buy order for client E for 5,000 shares at \$0.95. The order was filled at \$0.95 at 11:30:26.
40. The Respondent should not have entered a non-client order when he was aware that clients D and E wanted to acquire shares of the same security on the same side of the market.

**Trading in DA.A on April 21, 2006**

41. On April 21, 2006, the Respondent traded ahead of two client buy orders for the shares of DA.A.
42. At 15:52:10, the Respondent entered a non-client buy order for 12,500 shares at \$1.50 which was filled immediately.
43. At 15:55:53 and 15:56:21 (approximately four to five minutes after the entry of the non-client order), the Respondent entered client orders for client F and client G.
44. The order for client F for 20,000 shares was filled at a price of \$1.50.
45. The order for client G for 30,000 shares was filled for 28,300 shares at \$1.50. The balance of 1,700 shares expired unfilled.

46. The Respondent should not have entered a non-client order when he was aware that clients F and G had outstanding orders for the same security on the same side of the market.

### **III. CONCLUSION**

47. On January 27, April 11 and April 21, the Respondent failed to give priority to client orders over non-client orders in the same security and on the same side of the market.
48. On January 27, 2006, the Respondent's order handling resulted in a financial disadvantage to the clients.
49. On April 11, 2006, although no explicit financial disadvantage resulted from the Respondent's conduct, one client was disadvantaged by not receiving a fill he may have obtained in the absence of the Respondent's non-client order. On April 21, 2006, the Respondent's conduct also resulted in one client not receiving a fill that he may have obtained.
50. In addition, there were other instances during the Relevant Period that the Respondent's poor order handling practices made it difficult to determine whether a contravention of UMIR had occurred.

July 23, 2009

Charles Corlett  
Enforcement Counsel  
Investment Industry Regulatory  
Organization of Canada  
121 King St. West, Suite 1600  
Toronto, Ontario M5H 3T9  
Telephone: 416-646-7253  
Facsimile: 416-364-2998

TO: Bert Griffin c/o  
Robert Brush  
Crawley Meredith Brush LLP  
Suite 704  
205 Richmond Street West  
Toronto, ON M5V 1V3

EXCERPTS FROM THE UNIVERSAL MARKET INTEGRITY RULES

Pre-May 26, 2006 version

5.3 Client Priority

- (1) A Participant shall give priority to its client orders over all of its non-client or principal orders in the same security and on the same side of the market, unless the non-client or principal order is executed at a price above the client's limit price (for a buy order) or below the client's limit price (for a sell order).
- (2) A Participant shall give priority to its client market orders over its non-client or principal orders in the same security and on the same side of the market.
- (3) Subsections (1) and (2) shall not apply to allocations made by a trading system of a marketplace, provided that any client orders of the Participant were entered immediately upon receipt by the Participant and were not subsequently changed or removed from the system (other than changes or removals made on the instruction of the client).
- (4) Subsections (1) and (2) shall not apply to client orders where the client has specifically given the Participant discretion with respect to execution of an order or where the Participant is making a *bona fide* attempt to obtain best execution for a client order, provided that no director, officer, partner, employee or agent of the Participant with knowledge of open client orders for a security that have not been fully executed enters a non-client or principal order on the same side of the market in such security.
- (5) Subsections (1) and (2) shall not apply with respect to a particular client order where the client has specifically consented to the Participant trading ahead or alongside that order.
- (6) The Participant shall record the specific consent referred to in subsection (5) on the order ticket.
- (7) The exemptions in subsections (3), (4) and (5) shall not apply unless the Participant has implemented a reasonable system of internal policies and procedures to ensure compliance with this Rule and to prevent misuse of information about client orders.
- (8) Subsections (1) and (2) shall not apply to a client order that has been entered directly by the client of the Participant on a marketplace that does not require the disclosure of the identifier of the Participant in a consolidated market display and the director, officer, partner, employee or agent of the Participant who enters a

principal order or a non-client order does not have knowledge that the client order is from a client of the Participant until the execution of the client order.

## **POLICY 5.3 – CLIENT PRIORITY**

### **Part 1 – Background**

*Rule 5.3 restricts Participants and their employees from trading in the same securities as their clients in order to minimize the conflict of interest that occurs when a firm or a pro trader competes with the firm's clients for executions.*

*The Rule governs two types of activities. The first is trading ahead of a client order, which is taking out a bid or offering that the client could have obtained had the client order been entered first. By trading ahead, the pro order obtains a better price at the expense of the client order.*

*The second activity governed by the rule is trading along with a client, or competing for fills at the same price.*

*The application of the rule can be quite complex given the diversity of professional trading operations in many firms, which can include such activities as block facilitation, market making, derivative and arbitrage trading. In addition, firms may withhold particular client orders in order to obtain for the client a better execution than the client would have received if the order had been entered directly on a marketplace. Each firm must analyze its own operations, identify risk areas and adopt compliance procedures tailored to its particular situation.*

### **Part 2 – Broker's Legal Obligations**

*Agency law imposes certain obligations on those who act on behalf of others. Among those obligations is a prohibition on an agent appropriating for itself an opportunity that could go to the principal (client) unless the principal specifically consents.*

*At common law, the client can consent to the Participant trading ahead or alongside. Such consent must be specific to an order, and not contained in a general consent in a client account agreement. For example, an institutional client may consent to splitting fills with the Participant or may consent to the Participant trading ahead in order to move the market to the agreed-upon price for a block trade (e.g. permitting the Participant as pro to move the market down to the price at which it will buy a block from the client).*

*Participants have overriding agency responsibilities to their clients and cannot use technical compliance with the rule to establish fulfilment of their obligations if they have not otherwise acted reasonably and diligently to obtain best execution of their client orders. Firms should obtain legal advice that their own order handling procedures comply with their obligations to their clients.*

### **Part 3 – Prohibition on Intentional Trading Ahead**

*Rule 5.3 provides that a Participant must give priority of the execution to client orders, subject to certain exceptions necessary to ensure overall efficiency of order handling. The Rule contains*

*an exception for allocations in a trading system provided that the firm enters client orders immediately and does not interfere with the system allocation in any way. The rationale is that a pro who has committed to the marketplace ahead of a client is not taking a trading opportunity from the client as the client's trading opportunity does not arise until he or she gives an order.*

*The Rule also contains an exception where a client order has been withheld in a bona fide attempt to get better execution for the client, provided that any pro who is trading ahead of the client order does not have knowledge of that order and that the firm has reasonable procedures in place to ensure that information concerning client orders is not used improperly within the firm. These procedures will vary from firm to firm and no one procedure will work for all firms.*

*A Participant cannot intentionally obtain execution of a pro order ahead of a client order without the specific consent of the client, unless the trade is at a better price than the client's limit. A Participant can never intentionally trade ahead of a client market or tradeable limit order without the specific consent of the client. Such consent must be specific to a particular order, and details of the agreement with the client must be noted on the order ticket.*

*Examples of "intentional trades" include, but are not limited to:*

- withholding a client order from entry on a marketplace (or removing an order already entered on a marketplace) to permit the entry of a competing pro order ahead of the client order;*
- entering a client order in a relatively illiquid market and entering a pro order in a more liquid marketplace where the pro order is likely to obtain faster execution; and*
- adding terms to an order (other than on the instructions of the client) so that the order ranks behind pro orders in the regular market at that price.*

#### ***Part 4 – No Knowledge of Client Order***

*Rule 5.3 also contains two exceptions that requires that the director, officer, partner, employee or agent of the Participant who enters the principal order or the non-client order be unaware that the client order has not been entered. The two exceptions are:*

- if the client specifically grants discretion to the Participant with respect to the entry of the order; and*
- if the Participant withholds the client order from entry in a bona fide attempt to get better execution for the client.*

*In these circumstances, the Participant must have reasonable procedures in place to ensure that information concerning client orders is not used improperly within the firm. These procedures will vary from firm to firm and no one procedure will work for all firms. If a firm does not have reasonable procedures in place, it cannot rely on the exceptions in subsections (3), (4) and (5) of Rule 5.3. Reference should be made to Policy 7.1 – Policy on Trading Supervision Obligations.*

*The procedures must address the handling of client orders and must be followed up by after-the-fact monitoring. At a minimum, these procedures, which must be documented, must include:*

- *Education of all traders in their responsibilities in handling client orders. In particular, traders must be informed that intentionally trading ahead of a client order is prohibited and will result in disciplinary action against the trader.*
- *Identification of particular areas within the firm where there is a risk of non-compliance. For many firms this would include:*
  - *the point at which the order is taken (e.g. a branch or institutional desk);*
  - *the points at which orders are managed (e.g. an OMS trader or retail special handling desk); and*
  - *areas of the firm that are in proximity to areas where orders are handled.*
- *After-the-fact reviews of trading must also be conducted. Client complaints must be documented and followed-up. On a monthly basis (at a minimum) the firm must compare execution of a reasonable sample of non-client orders with contemporaneous client orders in the same security on the same side of the market. A Participant will be expected to investigate instances where it appears that a pro may have traded with knowledge of a client order prior to its entry on a marketplace.*

*Periodically the firm must review its procedures to ensure that they are appropriate to ensure that the firm is meeting both the requirements of Rule 5.3 and its agency obligation to clients.*

#### ***PART 5 – CLIENT CONSENT***

*A Participant does not have to provide priority to a client order if the client specifically consents to the Participant trading along side or ahead of the client. Any request must be specific to that order. A client cannot give a blanket consent to permit the Participant to trade along side or ahead of any future orders the client may give the Participant.*

*A Participant must keep a record of the client's consent to withhold orders for seven years from the date of the instruction and, for the first two years, the consent must be kept in a readily accessible location.*

*If the client has given the Participant that is to be executed at various times during a trading day (e.g. an "over-the-day" order) or at various prices (e.g. at various prices in order to approximate a volume-weighted average price), the client is deemed to have consented to the entry of entry of principal and non-client orders that may trade ahead of the balance of the client order. However, if the unentered portion of the client order would reasonably be expected to affect the market price of the security, the Participant may be precluded from entering principal or non-client orders as a result of the application of the frontrunning rule.*