Re Ber

IN THE MATTER OF:

The Rules of the Investment Industry Regulatory Organization of Canada

and

Jeffrey Brian Ber

2022 IIROC 08

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

Heard: March 30, 2022 in Edmonton, Alberta (by videoconference)
Decision: March 30, 2022
Reasons for Decision: April 13, 2022

Hearing Panel:
Eric Spink, QC, Chair, David Johnson and Don Milligan
Appearances:
David McLellan, for IIROC Enforcement Staff
Ellen Bessner and Zachary Pringle, for Jeffrey Brian Ber
Jeffrey Brian Ber (present)

REASONS FOR ACCEPTANCE OF SETTLEMENT

Introduction

¶ 1 This settlement hearing was convened pursuant to a Notion of Motion for Settlement Hearing dated March 18, 2022, to consider a Settlement Agreement between the staff of of the Investment Industry Regulatory Organization of Canada ("IIROC") and Jeffrey Brian Ber ("Respondent"), under Sections 8215 and 8428 of the Consolidated Enforcement, Examination and Approval Rules of IIROC ("Consolidated Rules").

¶ 2 In the Settlement Agreement, the Respondent admitted the following contravention:

> In March 2017, the Respondent received an off-book payment from an issuer without the approval of his Dealer Member, contrary to Consolidated Rule 1400.

¶ 3 The Settlement Agreement proposed the following sanctions and costs:

(i) A fine in the amount of $70,000;
(ii) Suspension from registration in any capacity with IIROC for a period of three years; and
(iii) Costs in the amount of $5,000.

¶ 4 IIROC's counsel made submissions, which were effectively joint submissions because they were wholly supported by Respondent's counsel. After hearing those submissions, the Panel accepted and signed the Settlement Agreement. These are our Reasons.

Facts

¶ 5 The Settlement Agreement is attached as an Appendix. The Agreed Facts are summarized below.

¶ 6 The Respondent has been registered with IIROC since 2007 and, from October 2016 to April 2017, was a Registered Representative at TD Waterhouse Canada Inc. ("TDW"). He has not been registered or employed in the securities industry since April 2017.

¶ 7 In 2014, the Respondent assisted a junior issuer on the TSXV ("Issuer"), which was seeking financing, with marketing and presentation materials.

¶ 8 TD Securities Inc. was one of the underwriters of an equity offering by the Issuer that closed March 14, 2017, in which the Respondent purchased over 12 million shares, for $6,751,250, in 55 client accounts. Later in March 2017, the Respondent received and deposited a cheque from the Issuer for $104,568.75. The Respondent did not seek approval for or disclose this payment to TDW.

¶ 9 In April 2017, TDW conducted an internal investigation in which the Respondent admitted receiving the funds. The Respondent states and the Issuer publicly reported that the funds were paid for the consulting work the Respondent had provided over prior years but for which he only received payment in March 2017. TDW subsequently unwound the allocation of over 7 million shares to certain client accounts, resulting in no losses or fees charged to those clients.

¶ 10 The Respondent has no prior disciplinary history with IIROC.

¶ 11 The Respondent provided Enforcement Staff with evidence of his inability to pay and, if not for that, the amount of the agreed-upon fine would have been greater.

Test to be applied

¶ 12 The Panel was referred to *Re Milewski*, [1999] IDACD No. 17, which says that a panel: "will not reject a settlement unles it views the penalty as clearly falling outside a reasonable range of appropriateness"; and "will reflect the public interest benefits of the settlement process in its consideration of specific settlements" (pp. 9-10). Those principles are more fully articulated in the "public interest test" described by the Supreme Court of Canada in *R. v. Anthony-Cook* 2016 SCC 43, and which was applied to IIROC settlement hearings in *Re Malic* 2021 IIROC 10, *Re Smith* 2019 IIROC 13 and *Re Scotia Capital* 2017 IIROC 48.

¶ 13 The public interest test asks whether the proposed sanctions "would bring the administration of justice into disrepute, or would otherwise be contrary to the public interest" (*Anthony-Cook*, para. 5). This as an "undeniably high threshold" and a joint submission should only be rejected where it is "so unhinged from the circumstances of the offence and the offender that its acceptance would lead reasonable and informed persons, aware of all the relevant circumstances, including the importance of promoting certainty in resolution discussions, to believe that the proper functioning of the justice system had broken down" (*Anthony-Cook*, para. 34).

¶ 14 In *Anthony*-Cook, the Supreme Court said that the high threshold for departing from joint submissions is appropriate because the Crown and defence counsel are "well placed to arrive at a joint submission that reflects the interests of both the public and the accused" (para. 44). In the Panel's view, the same considerations apply in these proceedings: Enforcement Counsel is charged with representing the public interest (as articulated in Consolidated Rule 1400 and, especially s. 1402(1)); Respondent's counsel has a duty to act in his client's best interests; both counsel, as a rule, are highly knowledgeable about the circumstances and the strengths and weaknesses of their respective positions; and both are bound professionally and ethically not to mislead the panel; so, "[i]n short, they are entirely capable of arriving at resultions that are fair and consistent with the public interest" (para. 44). The Panel is thus obligated to approach the Settlement

Agreement "from a position of restraint" (para. 46).

¶ 15 That restraint requires the Panel to consider the Settlement Agreement "within the four corners of the Agreed Facts" (as IIROC Counsel put it). As is common with settlement agreements, the Agreed Facts in this case are brief, so that careful consideration leads inevitably to curiosity about facts that are not included, which the Panel is obliged to resist. Although s. 8428(6) of the Consolidated Rules permits the disclosure of additional relevant facts in certain circumstances, that is merely a procedural exception to the general rule stated in s. 8215(5), which gives panels only the binary power to accept or reject a settlement agreement – not the power to modify. Panels should particularly avoid seeking additional facts in cases like this, where the Settlement Agreement was negotiated between counsel, because doing so would fundamentally undermine the negotiation process and negate the public-interest benefits described in *Anthony-Cook*.

Guidelines, Previous Decisions, and Key Factors in Determining Sanctions

¶ 16 The Panel was referred to the 2015 IIROC Sanction Guidelines ("Guidelines") and to the following decisions: *Re Dubois* 2014 IIROC 18; *Re Blackmore* 2014 IIROC 43; *Re Lee* 2013 IIROC 10; *Re Bridgman* 2018 IIROC 14; *Re Rudensky* 2018 IIROC 38; and *Re Stefiuk* 2011 IIROC 24.

¶ 17 The Panel applied the first principle stated in the Guidelines (p. 4):

> The purpose of sanctions in a regulatory proceeding is to protect the public interest by restraining future conduct that may harm the capital markets. In order to achieve this, sanctions should be significant enough to prevent and discourage future misconduct by the respondent (specific deterrence), and to deter others from engaging in similar misconduct (general deterrence).

¶ 18 The non-binding Guidelines recognize that sanctioning is a "discretionary and fact specific process", describing general principles that are illustrated by a non-exhaustive list of "key factors". Counsel reviewed all these and emphasized the following points:

- the single contravention was serious, intentional, and the Respondent obtained a financial benefit;
- the Respondent has no disciplinary history, has admitted the contravention, and is here today;
- the Respondent has been unemployed since 2017 and provided Staff with evidence of his inability to pay, which is why the proposed fine is less than the amount of the financial benefit received.

¶ 19 Counsel reviewed the decisions, noting that none of them was directly on point and that the current case is unique. The decisions are, however, broadly relevant as illustrations of why undisclosed off-book activities are considered a threat to market integrity or the reputation of the marketplace. The Panel agreed with the statement in *Re Blackmore* (at para. 14):

> The core element, the *sine qua non*, in Mr. Blackmore having conducted off-book business activities without the approval of his firm is deceit. Deceit, in turn, is not only anathema in the investment industry, it negates, and cannot co-exist with, "high standards of eithcs," or integrity."

The Panel agreed also with the statements in *Re Rudensky* (at paras. 22 and 41) about the gravity of depriving one's firm of its ability to identify, and respond to, conflicts of interest. Counsel submitted, and the Panel agreed, that the Respondent's contravention was more serious than those in the other cases because the Respondent's firm was participating in the equity offering of the Issuer's shares.

¶ 20 Having regard to all of the above, the Panel found that the agreed-upon sanctions are fair, reasonable, and sufficient to provide both specific and general deterrence.

Conclusion

¶ 21 For these reasons, the Panel accepted the Settlement Agreement on March 30, 2022.

Dated at Edmonton, Alberta this 13 day of April, 2021.

Eric Spink

David Johnson

Don Milligan

SETTLEMENT AGREEMENT

PART I – INTRODUCTION

1. The Investment Industry Regulatory Organization of Canada ("IIROC") will issue a Notice of Application to announce that it will hold a settlement hearing to consider whether, pursuant to section 8215 of the Consolidated Enforcement, Examination and Approval Rules of IIROC, a hearing panel ("Hearing Panel") should accept the settlement agreement ("Settlement Agreement") entered into between the staff of IIROC ("Staff") and Jeffrey Brian Ber ("Respondent").

PART II – JOINT SETTLEMENT RECOMMENDATION

2. Staff and the Respondent jointly recommend that the Hearing Panel accept this Settlement Agreement in accordance with the terms and conditions set out below.

PART III – AGREED FACTS

3. For the purposes of this Settlement Agreement, the Respondent agrees with the facts as set out in Part III of this Settlement Agreement

4. The Respondent has been a Registered Representative ("RR") since 2007. Between October 2016 and April 2017, he was an RR in Calgary, Alberta with TD Waterhouse Canada Inc. ("TDW"). The Respondent is not currently employed as an RR with a Dealer Member.

5. In March 2017, the Respondent received a payment of $104,568.75 from a junior oil and gas issuer that traded on the TSXV (the "Issuer"). The Respondent did not seek approval for or disclose this payment to TDW.

6. In early 2014, the Issuer was in the process of seeking financing. The Respondent assisted the Issuer with marketing and presentation materials.

7. In March 2017, TD Securities Inc. participated in an underwriting syndicate with respect to an equity offering of the Issuer's shares. It closed on March 14, 2017.

8. In conjunction with the financing, the Respondent sought and received an allotment of 12,275,000 shares ($6,751,250) for his clients. The Respondent purchased the Issuer's shares in 55 client accounts.

9. On or about March 23, 2017, the Issuer provided the Respondent with a cheque payable to him personally in the amount of $104,568.75 for consulting services provided. On or about March 29, 2017, the Respondent deposited this cheque into his primary bank account at another financial institution.

10. In April 2017, TDW conducted an internal investigation into the Respondent's conduct. The Respondent admitted to TDW that he received funds from the Issuer. The Respondent states and the Issuer publicly reported that the funds were paid for the consulting work the Respondent had provided over prior years

but for which he only received payment in March 2017. Subsequently, TDW unwound the allocation of 7,776,000 shares to certain client accounts, resulting in no losses or fees charged to these clients.

11. The Respondent has no prior disciplinary history with IIROC.

12. If it were not for financial evidence of the Respondent's inability to pay provided to Staff, the amount of the fine agreed to in this Settlement Agreement would have been greater.

PART IV – CONTRAVENTIONS

13. By engaging in the conduct described above, the Respondent committed the following contraventions of IIROC's Rules:

    a) In March 2017, the Respondent received an off book payment from an issuer without the approval of his Dealer Member, contrary to Consolidated Rule 1400.

PART V – TERMS OF SETTLEMENT

14. The Respondent agrees to the following sanctions:

    a) A fine in the amount of $70,000;

    b) A three year suspension from registration in any capacity with IIROC; and

    c) Costs in the amount of $5,000.

15. If this Settlement Agreement is accepted by the Hearing Panel, the Respondent agrees to pay the amounts referred to above within 30 days of such acceptance unless otherwise agreed between Staff and the Respondent.

PART VI – STAFF COMMITMENT

16. If the Hearing Panel accepts this Settlement Agreement, Staff will not initiate any further action against the Respondent in relation to the facts set out in Part III and the contraventions in Part IV of this Settlement Agreement, subject to the provisions of the paragraph below.

17. If the Hearing Panel accepts this Settlement Agreement and the Respondent fails to comply with any of the terms of the Settlement Agreement, Staff may bring proceedings under Rule 8200 against the Respondent. These proceedings may be based on, but are not limited to, the facts set out Part III of this Settlement Agreement.

PART VII – PROCEDURE FOR ACCEPTANCE OF SETTLEMENT

18. This Settlement Agreement is conditional on acceptance by the Hearing Panel.

19. This Settlement Agreement shall be presented to a Hearing Panel at a settlement hearing in accordance with the procedures described in Sections 8215 and 8428, in addition to any other procedures that may be agreed upon between the parties.

20. Staff and the Respondent agree that this Settlement Agreement will form all of the agreed facts that will be submitted at the settlement hearing, unless the parties agree that additional facts should be submitted at the settlement hearing. If the Respondent, or his counsel, does not appear at the settlement hearing, Staff may disclose additional relevant facts, if requested by the Hearing Panel.

21. If the Hearing Panel accepts the Settlement Agreement, the Respondent agrees to waive all rights under the IIROC Rules and any applicable legislation to any further hearing, appeal and review.

22. 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 based on the same or related allegations.

23. The terms of this Settlement Agreement are confidential unless and until this Settlement Agreement has been accepted by the Hearing Panel.

24. The Settlement Agreement will become available to the public upon its acceptance by the Hearing Panel and IIROC will post a full of copy of this Settlement Agreement on the IIROC website. IIROC will also publish a summary of the facts, contraventions, and the sanctions agreed upon in this Settlement Agreement.

25. If this Settlement Agreement is accepted, the Respondent agrees that neither he nor anyone on his behalf, will make a public statement inconsistent with this Settlement Agreement.

26. The Settlement Agreement is effective and binding upon the Respondent and Staff as of the date of its acceptance by the Hearing Panel.

PART VIII – EXECUTION OF SETTLEMENT AGREEMENT

27. This Settlement Agreement may be signed in one or more counterparts which together will constitute a binding agreement.

28. An electronic copy of any signature will be treated as an original signature.

DATED this 16 day of March , 2022.

"Witness"

Witness

"Jeffrey Brian Ber"

Jeffrey Brian Ber

DATED this 17 day of March , 2022.

"Witness"

Witness

"David McLellan"

David McLellan

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

The Settlement Agreement is hereby accepted this 30 day of March, 2022 by the following Hearing Panel:

Per: "Eric Spink"

Panel Chair

Per: "David Johnson"

Panel Member

Per: "Don Milligan"

Panel Member