Re Ziaian

IN THE MATTER OF:

The Rules of the Investment Industry Regulatory Organization of Canada

and

Bardya Ziaian

2022 IIROC 12

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

Heard: May 20, 2022 in Toronto, Ontario
Decision: May 20, 2022
Written Reason: June 16, 2022

Hearing Panel:
Donna Campbell, Chair, Debbie Archer and Mary Savona
Appearances:
Sylvia Samuel, Senior Enforcement Counsel
Kevin Richard, for Bardya Ziaian
Bardya Ziaian (present)

REASONS FOR ACCEPTANCE OF SETTLEMENT AGREEMENT

Overview

¶ 1 Staff of the Investment Industry Organization of Canada (IIROC) brought an application before the Hearing Panel, pursuant to Section 8215 of the Consolidated Enforcement, Examination and Approval Rules (Rules), seeking acceptance of a Settlement Agreement dated May 9, 2022 (the Settlement Agreement), between Staff and the Respondent Bardya Ziaian (Respondent).

¶ 2 The Respondent admitted that between August 2013 and December 2013, he failed to make *bona fide* offerings of new issues to public investors in circumstances where he ought to have known that the expressions of interest were not *bona fide*, contrary to Dealer Member Rule 29.3.

¶ 3 IIROC and the Respondent agreed to the following sanctions and costs:

- payment of a fine in the amount of $150,000, inclusive of disgorgement;
- prohibition of approval for the following supervisory positions for 18 months commencing on the date of acceptance of this Settlement Agreement: Ultimate Designated Person, Chief Compliance Officer, and Supervisor, as defined in IIROC rules; and
- costs of $35,000.

¶ 4 An IIROC Settlement Book, containing the Settlement Agreement, applicable regulations and caselaw, and IIROC Staff Submissions (Submissions), were filed with the Hearing Panel and relied upon by the parties in

their submissions.

¶ 5 After reviewing Staff's written Submissions, and hearing from Staff and counsel for the Respondent, the Hearing Panel accepted the Settlement Agreement. The reasons for doing so are set out below.

Agreed Facts

¶ 6 The Settlement Agreement is attached to this Decision. Part III of the Settlement Agreement contains the Agreed Statement of Facts (Agreed Facts), upon which this Decision is based.

¶ 7 In addition, the Hearing Panel spent a significant portion of the Settlement Hearing discussing with counsel how the fine inclusive of disgorgement (fine) was calculated. As detailed later in these Reasons, additional information was provided in those discussions which persuaded the Hearing Panel that the amount of the fine was appropriate and reasonable in the circumstances of this case.

The Respondent & BBS Securities

¶ 8 The Respondent was an Approved Person and the founder, a director, the sole shareholder, supervisor and the Ultimate Designated Person (UDP) at BBS Securities Inc. (BBS) from its inception in October 2008 to November 2017. The Respondent is not currently an Approved Person. BBS offered primarily order-execution services.

Syndicates, Selling Groups and New Issues

¶ 9 Firms that act as underwriters of the financing of new issue securities (the Syndicate or a Syndicate Member) purchase the new issues from the issuers and sell them to their clients or to firms outside the Syndicate (the Selling Group or Selling Group Member). The purpose of the Selling Group is to assist in distributing the new issue to the public. There is no contractual relationship between the Syndicate Members and the Selling Group Members.

¶ 10 Like the Syndicate, a Selling Group Member buys the new issues at a price below the public price, known as the drawdown price and sells them to their clients at the public price. The difference between the two prices is the selling concession.

Respondent's Syndication Activities on behalf of BBS

¶ 11 Between August 2013 and December 2013 (the Relevant Period), the Respondent was responsible for BBS's syndication activities and proprietary trading. As part of his syndication activities, the Respondent sent expressions of interest to various Dealer Members who were part of Syndicates involved in the distribution of new issues.

¶ 12 The expressions of interest were made without confirming there was *bona fide* interest on the part of BBS clients and did not accurately reflect the clients' level of interest. The allocations of new issues were greater than any interest expressed by BBS's clients.

¶ 13 All clients who requested new issue securities received them in the quantity requested.

¶ 14 Most of the new issue securities were placed by the Respondent into a BBS inventory account or non-arm's length accounts over which the Respondent exercised control. Those securities were received at the public offering price.

¶ 15 Some of the new issues for which the Respondent received allocations contained a specific disclosure that the securities were not 'pro-eligible' or alternatively were 'available for retail.' Even in those instances, the Respondent allocated new issues to BBS's inventory accounts or accounts in his name or over which he exercised control. The Respondent did not always have a written acknowledgement from the syndicate that the issue had become pro-eligible.

¶ 16 After receiving confirmation of the allocation that the Respondent's firm would receive, the Respondent would frequently sell the shares short and cover when the new issue closed, and the securities were received. On other occasions, the Respondent would sell the shares as soon as they were received upon closing of the deal.

¶ 17 The Respondent's overall trading in new issues was profitable. BBS received benefit in the form of drawdown prices or selling concessions for the new issues, and as the sole shareholder, the Respondent benefitted indirectly from the selling concessions received by BBS.

Agreed Facts Constitute a Contravention of Dealer Member Rule 29.3

¶ 18 The Respondent agrees his conduct contravened Dealer Member Rule 29.3 which states:

> <u>During such period of distribution to the public a Deal Member shall make a bona fide offering of the total amount of such participation to public investors.</u> The term "public investors" does not include any officer or employee of a bank, insurance company, trust company, investment fund, pension fund or similar institutional body or the immediate families of any such officer or employee of any such institution regularly engaged in the purchase or sale of securities for such institution, unless such sales are demonstratively for bona fide personal investment in accordance with the person's normal investment practice. For the purposes of this Rule 29.3 the term "normal investment practice" shall mean the history of investment in an account with the Dealer Member and if such history discloses a practice of purchasing mainly "hot issues" such record would not constitute a "normal investment practice". [emphasis added]

The Role of a Hearing Panel When Reviewing a Settlement Agreement

¶ 19 Under IIROC Rule 8215(5), a hearing panel may accept or reject the settlement agreement. The factual foundation for the hearing panel's decision is the agreed facts. The role of a hearing panel is to satisfy itself that the sanctions proposed by the parties fall with a reasonable range of appropriateness. A hearing panel will reflect the public interest benefits of the settlement process in its consideration of specific settlements: *Re Milewski*, 1999 I.D.A.C.D No. 17, p.10.

¶ 20 Settlements are in the public interest and should be encouraged. They are often hotly debated with both parties compromising their positions to reach a mutually acceptable position. The panel will recognize that it is not privy to all the facts, motivations and considerations animating each party and culminating in the proposed settlement: *Re Donnelly* 2016 LNIIROC 23, paras. 7-8.

IIROC Sanction Guidelines and Their Application in this Case

The Sanction Guidelines

¶ 21 The IIROC Sanction Guidelines (Sanction Guidelines) are intended to promote consistency, fairness and transparency by providing a framework to guide the exercise of discretion in determining sanctions which meet the general sanctioning objectives.

¶ 22 The purpose of sanctions in a regulatory proceeding is to protect the public interest by restraining future conduct that may harm the capital markets. 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). Any sanction imposed must be proportionate to the conduct at issue and should be reduced or increased depending on the relevant mitigating and aggravating factors. The hearing panel should also consider sanctions imposed for similar contraventions in similar circumstances.

¶ 23 Part I of the Sanction Guidelines sets out general principles to provide a framework to be considered in connection with imposition of sanctions. Part II sets out an illustrative and non-exhaustive list of key factors to be considered when determining the appropriate sanctions.

The Hearing Panel's Assessment of the Proposed Sanctions

¶ 24 The Hearing Panel accepted that the proposed sanctions addressed the following general principles:

- a respondent should not benefit financially from the misconduct,
- a suspension should be considered where there have been one or more serious contraventions, or the misconduct has caused some measure of harm to investors or the integrity of the marketplace or securities industry as a whole,
- sanctions may be tailored to the misconduct at issue in each case, and
- the total or cumulative sanction should appropriately reflect the totality of the misconduct.

Summary of Aggravating and Mitigating Factors

¶ 25 In considering the appropriateness of the sanctions, the Hearing Panel considered aggravating and mitigating factors.

¶ 26 The key aggravating factors are:

- the misconduct was intentional;
- the misconduct involved multiple new issues and trades, and multiple distributions;
- the misconduct took place over five months;
- the misconduct was profitable for the Respondent, and as the sole shareholder of his firm, the Respondent benefited indirectly from the compensation received by his firm in the form of selling concessions;
- the Respondent held gatekeeper positions in his firm as the Approved Person; and
- there was potential harm to market integrity as the Syndicates for the various new issues expected the allocated securities would be placed with retail clients.

¶ 27 The key mitigating factors are:

- the Respondent has no disciplinary history;
- no clients of the firm were harmed by the conduct;
- clients who requested new issues received them, and in the quantity requested;
- new issues went into the inventory account at the public, not the drawdown, price and trading from the inventory was based on the public price and took place on the open or secondary market; and
- the Respondent has admitted his conduct and agreed to the imposition of sanctions.

Comparable Cases

¶ 28 The Sanction Guidelines state a hearing panel considering sanctions should consider the sanctions imposed for similar misconduct in similar circumstances.

¶ 29 The Hearing Panel acknowledges the difficulty in establishing a range of sanctions for conduct which has rarely been the subject of consideration by this regulator, particularly when negotiating a settlement. As noted by the Ontario Securities Commission, 'It is rare that substantially similar precedents can be found to assist in determining appropriate sanctions': *Re Sutton*, 2018 ONSEC 42, para. 190.

¶ 30 *Re Vargas* 2019 IIROC 06 was the only case cited to the Hearing Panel. In that case, over a period of 16 months, the Respondent (an Approved Person) requested numerous new issue allocations with virtually no

intention of selling them to retail investors. In almost all instances he would place the allocated new issue shares in his firm's pro-trading inventory account or his personal trading account. He obtained significant commissions by reason of obtaining shares at the discounted drawdown price and trading them to non-retail clients. On numerous occasions there was no evidence that the Respondent advised his retail distribution network the new issues were available.

¶ 31 While some of the conduct is similar to that of the Respondent, there are notable differences. The transactions in *Re Vargas* took place over a much longer time period and involved other misconduct, such as early ticketing to avoid the margin requirements in order to participate in deals that far exceeded his capital trading limits.

¶ 32 In *Re Vargas*, the sanctions were a $620,000 fine inclusive of disgorgement, a one-year suspension, six months of close supervision upon the re-registration of the Respondent with a Dealer-Member, and costs of $50,000.

¶ 33 When considering the financial penalty, the Hearing Panel in *Re Vargas* noted that it had some difficulty in determining the appropriateness of the amount when the agreed facts did not contain the particulars necessary to understand the underlying calculations. The Hearing Panel was advised by the parties that as certain transactions and facts remained in dispute, a global penalty was agreed upon. After hearing from counsel, the Hearing Panel agreed that the financial penalty was appropriate given the facts of the case.

Conclusion of the Hearing Panel

¶ 34 The Hearing Panel encountered difficulty in assessing the appropriateness of the financial penalty in this case, for reasons similar to those expressed in *Re Vargas*. It was not apparent to the Panel how the number was calculated and its basis. The parties advised that determining the financial benefit accruing to the Respondent was not easily done. While the Respondent did earn profits from trading the new issues, he also benefited indirectly from the selling concessions earned by BBS on the various deals; yet, there was an absence of evidence establishing his share of the selling concessions, or his share of the firm's gains or losses on trading in the secondary market.

¶ 35 There was no agreement on how to calculate the Respondent's indirect benefit as distinct from the amounts received by BBS. Staff provided the Hearing Panel with an overview of their calculation of the financial penalty and counsel for the Respondent made it clear that Staff's calculation was viewed as inaccurate and flawed in approach. While the approach of both parties initially differed markedly and was the subject of disagreement, through negotiation both parties agreed the global amount of $150,000 was a reasonable approximation of disgorgement and a fine for the Respondent's contravention of Rule. 29.3.

¶ 36 After hearing from the parties, the Hearing Panel accepted that the financial penalty of $150,000 consisting of a fine inclusive of disgorgement was appropriate in all the circumstances.

¶ 37 The Hearing Panel also accepted that a prohibition relating to the supervisory positions of UDP, Chief Compliance Officer and Supervisor, for a period of 18 months, was warranted given the positions that the Respondent had held at BBS when the misconduct occurred.

¶ 38 Finally, the Hearing Panel accepted that the payment of costs of $35,000 was appropriate.

¶ 39 As noted previously, the purpose of sanctions is to restrain future conduct that may harm the capital markets through the imposition of sanctions which are significant enough to prevent and discourage future misconduct by the respondent (specific deterrence) and to deter others from engaging in similar misconduct (general deterrence). Sanctions are not intended to be punitive but to correct and prevent misconduct, and to protect and maintain the integrity of the capital markets.

¶ 40 The Hearing Panel finds that the proposed sanctions fall with a reasonable range of appropriateness

and that in all of the circumstances, the proposed sanctions are proportionate, fair and reasonable, and will act as deterrents to both the Respondent and other members of the industry.

¶ 41 The Hearing Panel accepts the Settlement Agreement.

Dated at Toronto, Ontario this 16 day of June 2022.

Donna Campbell

Debbie Archer

Mary Savona

SETTLEMENT AGREEMENT

PART I – INTRODUCTION

1. The Investment Industry Regulatory Organization of Canada ("IIROC") will issue a Notice of Motion to announce that it will hold a settlement hearing to consider whether, pursuant to section 8215 of the IIROC Rules, a hearing panel ("Hearing Panel") should accept the settlement agreement ("Settlement Agreement") entered into between the staff of IIROC ("Staff") and Bardya Ziaian ("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.

Overview

4. The Respondent was an Approved Person and also the founder, a director, the sole shareholder, supervisor and the Ultimate Designated Person ("UDP") at BBS Securities Inc. ("BBS") from its inception in October 2008 until November 2017.

5. Between August 2013 and December 2013 (the "Relevant Period"), the Respondent was responsible for his firm's syndication activities and proprietary trading.

6. As part of his syndication activities, the Respondent sent expressions of interest to various Dealer Members who were part of underwriting syndicates involved in the distribution of securities ("new issues"). The Respondent's practice in sending initial expressions of interest to the underwriters/underwriting syndicates was to express interest without having confirmed *bona fide* interest from clients and where there was not interest from clients at the level at which he expressed interest to the underwriters.

7. Although clients always received the securities that they requested during the relevant time period, most of the new issue securities were placed by the Respondent into his firm's inventory accounts or accounts held in the Respondent's name or over which the Respondent exercised control. As such, the Respondent's activities resulted in there being no *bona fide* offering of those securities to public investors.

8. After receiving confirmation of the allocation that the Respondent's firm would receive, the Respondent would frequently sell the shares short and cover when the new issue closed and the securities were received. On other occasions, the Respondent would sell the shares as soon as they were received upon

closing of the deal.

9. The Respondent's firm received the new issue allocations at the "drawdown price," which is the price set by the syndicate manager for intra-syndicate transfers or to the selling group. The "selling concession" is the difference between the public offering price and the drawdown price. The selling concession represents the commission earned by the broker for distributing the new issue to clients.

10. The vast majority of the new issues were allocated by the Respondent to his firm's inventory accounts or non-arm's length client accounts over which the Respondent had control, at the public offering price. A small number of new issues were allocated to retail clients as requested.

11. The purpose of the selling group is to assist in distributing the new issue to the public. Some of the new issues for which the Respondent received allocations contained a specific disclosure from the syndicate members that the securities were "not pro-eligible" or alternatively were "available for retail" at the time of original dissemination.

The Respondent

12. The Respondent was an Approved Person with BBS, a Dealer Member, during the Relevant Period. He founded BBS, which offered primarily order-execution services. Specifically, the Respondent was a director, shareholder, supervisor and the UDP at BBS from its inception in October 2008 until November 2017.

13. The Respondent is not currently an Approved Person.

14. During the Relevant Period, the Respondent had multiple functional responsibilities at BBS including the conveying of expressions of interest to underwriting syndicates for new issue deals as well as proprietary trading.

New Issue Financing

15. When an issuer seeks to raise capital in the public markets, it will generally engage the services of one or more firms to act as underwriters of the financing. These firms are commonly referred to collectively as the "Syndicate" or, individually, as a "Syndicate Member."

16. Syndicate Members will enter into a contractual underwriting agreement with the issuer, pursuant to which the Syndicate Members purchase the new issue securities from the issuer at an agreed price, less a commission. The Syndicate Members then offer these securities to their clients at the public offering price agreed to, and receive the securities at a "drawdown price." The "selling concession" is the difference between the public offering price and the drawdown price. The syndicate also receives underwriting fees.

17. Syndicate Members may also elect to sell underwritten securities to firms which are outside the syndicate (the "Selling Group" or "Selling Group Members"). These sales are made at the drawdown price. The Selling Group offers the new issues to its clients at the public offering price.

18. There is no contractual relationship between the Syndicate Members and the Selling Group Members. The Syndicate sends an e-mail to potential members of a Selling Group advising that a particular new issue has become available.

19. If a member of the Selling Group has demand from its clients, that demand is communicated to the Syndicate Members by way of an expression of interest. The Selling Group Member may then be allocated some new issue securities by the Syndicate, at the Syndicate Member's discretion.

Staff's Review

20. During the Relevant Period, the Respondent's firm was a member of the Selling Group for a number of

new issues. Although as an order execution only firm the Respondent's firm would not typically have access to new issues, the Respondent's firm subscribed for and made new issues available to its clients.

21. Staff reviewed numerous deals during the Relevant Period. Rather than requesting new issues based on client interest, the Respondent requested allocations of new issues that were greater than any interest expressed by BBS's clients.

22. Although BBS provided notice to clients on its website of available new issues, the expressions of interest from clients in response to such notices did not correspond to the level of interest conveyed by the Respondent to the various underwriting syndicates. Through the notices posted to BBS's website, BBS clients were given the opportunity to participate in the new issues that were made available to BBS.

23. The vast majority of securities received by BBS from the Syndicate Members were taken into a BBS inventory account or non-arm's length client accounts over which the Respondent exercised control. Other retail clients, who received notice of and the first opportunity to take all of the new issue allocation that they wanted, received all of the securities that they requested, but the total that went to client accounts represented a small percentage of the new issue securities allocated by the Syndicate Members. The Respondent received new issues into accounts held in his name or over which he exercised control at the public offering price.

24. On numerous occasions, after the Respondent received confirmation of an allocation for a new issue, the Respondent sold short a corresponding number of securities in the marketplace. The Respondent covered his short position using the securities received from the underwriting syndicate when the distribution closed.

25. On other occasions, shares were disposed of immediately upon receipt through either the BBS inventory account or accounts controlled by the Respondent and were not allocated to retail clients.

26. Some of the communications from syndicate members regarding the new issues in which the Respondent expressed interest and received allocations contained an explicit disclosure that the securities were "not pro-eligible" or alternatively were "available for retail." Even in these instances, the Respondent allocated new issues to BBS's inventory accounts or accounts in his name or over which he exercised control. The Respondent did not always have a written acknowledgment from the syndicate that the transaction had become pro eligible.

27. The Respondent's overall trading in new issues, including those positions held for many days, was profitable.

28. The Respondent's firm also received significant benefit in the form of drawdown prices or selling concessions for the new issues, and as the sole shareholder, the Respondent benefitted indirectly from the selling concessions received by his firm.

29. The monetary sanctions agreed to below reflect a portion of the financial benefits received by the Respondent in addition to a monetary fine.

Respondent's Position

30. The Respondent asserts that for any new issue that he believed to be oversubscribed, any allocation to BBS, as a member of the selling group, would likely be a small percentage of what was requested.

31. The Respondent asserts that for any transaction that became a "hung deal," the syndicate would want BBS to take as many shares as it could. The Respondent further asserts that he made additional expressions of interest after new issues became "hung deals" and these additional expressions of interest were not based on client interest, as the Respondent believed them to then be pro-eligible.

Conclusion

32. The purpose of the selling group is to distribute new issues to the public. The Respondent obtained new issues and, while failing to make *bona fide* offerings of the new issues to public investors, obtained the financial benefits described above.

PART IV – CONTRAVENTIONS

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

> Between August 2013 and December 2013, the Respondent failed to make *bona fide* offerings of new issues to public investors in circumstances where he ought to have known that the expressions of interest were not *bona fide*, contrary to Dealer Member Rule 29.3.

PART V – TERMS OF SETTLEMENT

34. The Respondent agrees to the following sanctions and costs:

    a) payment of a fine of $150,000, inclusive of disgorgement;

    b) prohibition of approval for the following supervisory positions for 18 months commencing on the date of acceptance of this Settlement Agreement: Ultimate Designated Person, Chief Compliance Officer, and Supervisor, as defined in IIROC Rules; and

    c) costs of $35,000.

35. 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

36. 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.

37. 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 IIROC 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

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

39. 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.

40. 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 does not appear at the settlement hearing, Staff may disclose additional relevant facts, if requested by the Hearing Panel.

41. 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.

42. 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.

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

44. 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.

45. 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.

46. 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

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

48. A fax or electronic copy of any signature will be treated as an original signature.

DATED this ”9th” day of May, 2022

"David Sutton"

Witness

"Bardya Ziaian"

Respondent

"Ricki Ann Newmarch"

Witness

"Sylvia Samuel"

Sylvia Samuel

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

The Settlement Agreement is hereby accepted this "20" day of May, 2022 by the following Hearing Panel:

Per: "Donna Campbell"

Panel Chair

Per: "Debbie Archer"

Panel Member

Per: "Mary Savona"

Panel Member

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