Re Debus

IN THE MATTER OF:

The Rules of the Investment Industry Regulatory Organization of Canada

and

Joseph Debus

2019 IIROC 18

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

Heard: May 28, 2019 in Toronto, Ontario
Written Decision: June 25, 2019

Hearing Panel:
Susan Lang, Chair, Nick Pallotta and C. Stuart Livingston
Appearance:
Kathryn Andrews, Sally Kwon, April Engelberg, Enforcement Counsel
Mark M. Persaud for Joseph Debus

REASONS FOR DECISION ON SANCTIONS

INTRODUCTION

¶ 1 In our March 18, 2019 Reasons concerning the merits of the allegations against Joseph Debus, the Respondent, the Panel concluded that Staff established all four alleged contraventions. These Reasons address the appropriate sanctions for those contraventions.

¶ 2 These are the particulars of the four contraventions, followed by the Panel's determination of the appropriate sanctions [emphasis added]:

1. In 2009, the Respondent recommended that clients AP and DB **purchase** shares of My Screen Mobile Inc. **outside of their accounts** held with him, **without disclosing this activity** to his Dealer Member firm, contrary to IIROC Dealer Member Rule 29.1;

   Sanction: Fine of $40,000

2. Between August 2009 and August 2012, the Respondent effected **unauthorized trades** in the account of client AP, contrary to IIROC Dealer Member Rule 29.1;

   Sanction: See Contravention 3

3. Between June 2009 and February 2013, the Respondent engaged in **discretionary trading** in client PE's account, without the account having been accepted and approved as a discretionary account, contrary to IIROC Dealer Member Rule 1300.4;

   Sanctions for Contraventions 2 and 3:

Fine of $20,000

Disgorgement of $10,000

4. Between December 2011 and February 2013, the Respondent failed to use due diligence to ensure that recommendations made for client PE were **suitable** for him, based on his investment objectives and risk tolerance, contrary to IIROC Dealer Member Rule 1300.1(q);

Sanction: Fine of $5,000

General Sanctions:

The Respondent be:

- Suspended for nine months beginning 14 days after the date of this Decision;
- Placed under strict supervision by his Dealer Member firm for 12 months upon any re-registration with IIROC; and
- Required to successfully re-write and pass the Conduct and Practices Handbook examination within six months of any re-registration with IIROC.

¶ 3 In addition, the Respondent shall pay $30,000 towards IIROC's costs of investigation and prosecution.

¶ 4 These Reasons address how the Panel arrived at the above sanctions.

BACKGROUND

¶ 5 To explain the sanctions imposed, we provide background about the contraventions, the sanctions sought and the Respondent's circumstances.

Contraventions

¶ 6 The first contravention deals with off-book trading with respect to two clients when the Respondent was a Registered Representative with Macquarie Private Wealth Inc. At the time, the Respondent was under close supervision by his firm. In particular, the firm restricted the Respondent's activity with a high risk stock listed on the OTC pink sheets called My Screen Mobile. The firm first became concerned when the Respondent distributed a My Screen internal memorandum even though it was marked "not to be reproduced or distributed to the public". The firm sent a discipline letter to the Respondent on March 4, 2009 concerning that distribution. The firm became further concerned with the investment and its concentration levels both within the firm and with the Respondent. On March 29, 2009, the firm prohibited the Respondent from being involved in any way with My Screen. In May and July 2009, despite the prohibition, the Respondent encouraged one client and facilitated the other to purchase My Screen through other Dealer Members. The Panel also concluded that the Respondent did not tell Macquarie about this activity.

¶ 7 The second and third contraventions arose out of unauthorized trading in the account of one client and discretionary trading in the account of another. Since these were not managed or discretionary accounts, the Respondent was required to obtain approval from the client for all four elements of a trade: security, price, quantity and timing. Each client testified that the Respondent conducted trades for them without their specific approval. Each account involved numerous trades over at least three years. In addition, the Respondent sent notes to his manager. He testified that those notes reflected instructions he received from his clients approving the trades. The Panel did not accept the Respondent's evidence that he had sought client approval. In our Reasons on the merits, we addressed concerns about the reliability of the Respondent's evidence (paras 15-21) and about whether the Respondent had in fact called his clients or whether he had simply authored the notes without consulting his clients (para 19). The Panel concluded that the Respondent's argument that his notes accurately reflected calls with his clients was not reliable and was not consistent with other evidence showing discrepancies in the elements of timing, price and quantity.

¶ 8 The fourth contravention arose with respect to investments exceeding a client's high risk tolerance of 20%. The Panel was not persuaded that the client's high risk investments constituted as much as 47% of his portfolio, as was alleged by Staff. However, the Panel concluded that the client's high risk investments were unsuitable in that they exceeded the client's 20% high risk tolerance ranging as they did from 23.3% in March 2012 to 21.1% in February 2012 with a peak in September 2012 of 23.9%.

Positions of the Parties on Sanctions

¶ 9 The sanctions proposed by Staff and the position of the Respondent follow:

1. A one-year suspension starting on the date of the Hearing Panel's sanctions decision proposed by Staff. No suspension or at most a three-month suspension proposed by the Respondent.
2. A fine in the amount of $40,000 in relation to Contravention 1 proposed by Staff. A fine of $20,000 proposed by the Respondent.
3. A fine in the amount of $40,000 (including disgorgement of net profits) in relation to Contraventions 2 and 3 proposed by Staff. A fine of $20,000 proposed by Respondent.
4. A fine in the amount of $20,000 in relation to Contravention 4 proposed by Staff. A fine of $5,000 proposed by the Respondent.
5. A requirement to successfully re-write the Conduct and Practices Handbook examination within six months of any re-registration with IIROC, proposed by Staff and agreed to by the Respondent.
6. Strict supervision by his Dealer Member firm for 12 months upon any re-registration with IIROC.

Respondent

¶ 10 The Respondent, who has been in the investment industry since 1995, began working in 2006 as a Registered Representative with Blackmont, which later became Macquarie. In 2007, he became a Portfolio Manager. During the course of his time at Macquarie, he spent an unusually long time under firm-imposed supervision. During the 2009 and 2013 timeframe of the contraventions, the Respondent was always under supervision, except for a period of about five months. After his termination from Macquarie, the Respondent first joined Mackie Research Capital and later Echelon Wealth Partners Inc. He was not under supervision at either firm until IIROC's Registration Department placed him under close supervision in September 2017. He has continued under that supervision, without incident, throughout these proceedings. He has remained active in the industry and Echelon is both satisfied with his compliance and will continue supervision to ensure "the public is adequately protected."

¶ 11 Mr. Debus is currently in his early fifties. He is the primary support for his family, including his wife and two teenage children. He is involved in the community.

¶ 12 Mr. Debus disclosed that he currently owes more than $500,000, including approximately $150,000 to the Canada Revenue Agency, approximately $140,000 in bank and credit card debt, and over $210,000 to his former lawyer and former paralegal. Despite being given the opportunity to do so, the Respondent decided not to provide other financial information, such as his income and assets to support his position of financial hardship and inability to pay.

¶ 13 With that background, we address the principles of law. Those principles are not in dispute in this case, rather the dispute lies in the application of the principles to the facts of the case.

PRINCIPLES AND FACTORS

¶ 14 The primary goal of sanctions is not to punish but rather to discourage a respondent and others in the industry from transgressing. To discourage misconduct, sanctions are designed to provide deterrence specific

to the particular respondent (specific deterrence) and deterrence to others in the industry generally (general deterrence). Sanctions are also intended to have the effect of encouraging public confidence in the investment industry and the regulation of capital markets. See Sanction Guidelines – General Principle 1.

¶ 15 In this case, Staff emphasize the importance of general deterrence. The Respondent argues that the facts of this case are different from the earlier cases relied upon by Staff. He also argues that the Panel should give significant weight to his rehabilitation and intention to remain in the industry as well as his inability to pay and financial hardship.

¶ 16 In Re Pariak-Lukic, 2015 LNONOSC 357 at paras 82 and 103, the Ontario Securities Commission observed that, even where the respondent would suffer significant consequences, a Panel must still address general deterrence. The Panel is obliged to balance both deterrence considerations as well as bear in mind the importance of supporting market integrity.

¶ 17 Sanctions imposed on a respondent should be proportionate to the established contraventions and similar to contraventions imposed in other cases. In other words, sanctions must be in accordance with industry understanding in order to achieve their purpose: Re Wong, 2010 IIROC 50 at para 29 citing Re Mills, [2001] IDACD No 7.

¶ 18 The determination of appropriate sanctions is fact-specific and discretionary. Sanctions will be reduced or increased depending on mitigating and aggravating factors.

¶ 19 The General Principles of the Sanction Guidelines also recommend consideration of a suspension in the face of serious, multiple, repeat, willful and harmful misconduct. The General Principles and the case law refer to the aggravating factor of a prior disciplinary record. The Respondent in this case has no prior disciplinary record. That said, the Panel is alert to the circumstance that the contraventions occurred while this Respondent was under supervision by his firm and when he would have had a heightened appreciation for the importance of regulatory requirements.

¶ 20 Finally, General Principles 4 and 7 refer to ensuring a respondent does not financially benefit from misconduct and the consideration of inability to pay in setting monetary sanctions.

¶ 21 With these General Principles in mind, Staff argued the non-exhaustive list of Key Factors contained in Part II of the Sanctions Guidelines, which largely reflect the factors developed in the case law.

¶ 22 One such factor considers the number of contraventions. In the face of multiple contraventions, the total sanction should reflect the totality of the misconduct. Along the same line, multiple contraventions over an extended period of time may show a pattern of misconduct.

¶ 23 Contravention 1, the off-book trading, involved two clients. While the most egregious of the contraventions, the trading occurred over a relatively brief period of time in 2009 when, the Respondent testified, he was overly enthused about the potential for the My Screen investment. The misconduct followed shortly on the heels of the firm prohibiting the Respondent from any activity with the stock. This is aggravating. Also aggravating is the Respondent's failure to disclose this activity to the firm. This breach of trust undermined the ability of his firm to monitor his conduct. *Re Wong, supra,* at para 42.

¶ 24 Contraventions 2 and 3, involving two clients, took place over three to 3.5 years and included numerous acts in two different accounts. This demonstrated a pattern of misconduct.

¶ 25 Contravention 4, regarding unsuitable trading, took place over a year and involved only one client.

¶ 26 Another relevant factor is the willfulness of a respondent's conduct. Was the conduct "intentional, willfully blind or reckless with respect to regulatory requirements"? (Sanction Guidelines Part II; Factor 4). In this case, the Respondent acted deliberately and intentionally when he recommended the two clients purchase My Screen elsewhere and when he did not tell his firm of his recommendations and the clients'

acquisitions. Similarly, with Contraventions 2 and 3, the Respondent knew that he was prohibited from unauthorized and discretionary trades. He had been specifically told that he could not use his Portfolio Manager designation to manage accounts. His conduct was therefore deliberate and intentional. The willfulness of the misconduct is less evident with respect to Contravention 4. Nonetheless, the Respondent had an obligation independent of that of his firm to ensure trades met the client's risk profile and, albeit to a much lesser extent than alleged, he did not meet that obligation.

¶ 27 The extent of harm to clients and to the markets is also relevant. In Contravention 1, the two clients who bought My Screen for more than $83,000 USD sold their stock about two years later for an insignificant return. Contravention 3 resulted in an unrealized loss to the client of $4,694. The Respondent's conduct was also by definition harmful to market integrity and the reputation of the market place.

¶ 28 A respondent must not financially benefit from his or her misconduct (Factor 9). In this case, the Respondent received net commissions of approximately $12,200 (before income tax) from the unauthorized and discretionary trading. Those profits are properly subject to a sanction of disgorgement, which Staff requests in the amount of $10,000.

¶ 29 Another commonly considered factor is the "level of vulnerability of the injured or affected client(s)" (Factor 7). Vulnerability was not as significant an issue in this case. Although affected clients experienced losses, the clients in question were experienced investors with multiple accounts. All trades in question represented a small percentage of each client's overall portfolio. In that respect, these cases were unlike those cases cited to us by Staff where vulnerable unsophisticated clients lost significant amounts of money that would adversely affect their retirement, such as was the case in Re Floyd & McDonald, 2013 IIROC 4 and 2013 IIROC 27 and in Re Gareau, 2011 IIROC 53 and 2011 IIROC 72.

¶ 30 Another relevant Guidelines' factor is whether a respondent reasonably relied upon competent supervisory advice (Factor 17). This factor cannot assist the Respondent with respect to Contravention 1 where his firm could not supervise the off-book trading because it was unaware of the activity. Similarly, the firm could not supervise unauthorized and discretionary trading where the Respondent had told the firm he had obtained client approval for the trades. It may be a modest factor with respect to Contravention 4 where there was no evidence that the Respondent's supervisors identified unsuitable trades for this client. However, the Respondent also appropriately acknowledged his own obligation to ensure suitability. In determining an appropriate sanction for Contravention 4, we bear in mind also that this was less egregious misconduct than in the other Contraventions.

¶ 31 In arriving at our determination of sanctions we have considered all the Principles and Factors, the authorities cited and the submissions of the parties as well as the totality of the sanctions. In this case, the most difficult matter to determine is the period of suspension.

Suspension

¶ 32 The Sanction Guidelines General Principle 5 mandates consideration of a suspension in this case. Contraventions 1-3 were serious; Contraventions 2 and 3 demonstrated a pattern of misconduct; the Contraventions were willful or reckless; and the misconduct caused harm to the investors and the industry.

¶ 33 Of the suspension cases cited by Staff many involved significant suspension periods imposed primarily for the purposes of general deterrence. In those cases, the suspension would not affect the individual respondent, often because the registrant had already left the industry and had no intention of returning. In other cases, a lengthy suspension was imposed in the context of a settlement and usually where the respondent had been out of the industry for some time and had no intention of returning. In other cases, the respondent failed to appear and so the suspension was unopposed.

¶ 34 In its submissions, Staff relied on Re Marek, 2017 IIROC 13 at paras 32-34 and 39 which imposed a one-

year suspension for a respondent who facilitated off-book transactions noting that the respondent in that case, as did the Respondent in this case, breached the trust between his clients and himself and his firm and himself. Marek, like this case, was a contested hearing although the respondent in Marek was effectively self-represented. However, the respondent in Marek was retired and had no intention of returning to the industry.

¶ 35 Staff also relied upon Re Noronha 2017 IIROC 3 and 2017 IIROC 16. That case also involved a registrant who engaged in off-book trading and had clients invest in two private placements. The respondent in that case was permanently barred from IIROC. However, the circumstances of *Noronha* were much more egregious. In addition, the registrant had not been registered for some three years before the penalty hearing and chose not to appear. In these circumstances, the emphasis was on general deterrence as specific deterrence was of less significance.

¶ 36 In *Pariak-Lukic (Re),* 2015 LNONOSC 367 the Ontario Securities Commission (OSC) concluded that an IIROC panel erred in not imposing a suspension on the respondent. The OSC imposed a two-year suspension. At paras 91-92, the OSC explained why the IIROC panel erred in relying on *Steinhoff*, 2014 BCSECCOM 23 in coming to the conclusion in that case that a suspension was not warranted. In that case, the British Columbia Securities Commission (BCSC) refused a suspension on the basis that it would "be tantamount to the termination of the registrant's career". As well, the BCSC observed that the Respondent had not acted "dishonestly" or "with reckless disregard".

¶ 37 In distinguishing *Steinhoff* from *Pariak-Lukic*, the OSC pointed out that *Steinhoff* had involved a suitability contravention and a loss of $125,000 while *Pariak-Lukic* involved off-book investments without a prospectus or prospectus exemption (conduct unbecoming) and significant losses of $3.0 million. In addition, at para 104, the OSC observed that Ms. Pariak-Lukic "demonstrated reckless disregard for her clients". This was in contrast to the finding in *Steinhoff* that the respondent's misconduct did not involve moral turpitude. In the result, the OSC concluded that Ms. Pariak-Lukic should be suspended for two years, which was appropriate for "egregious cases involving large value high risk off-book distributions." In arriving at that conclusion and addressing the objectives of protection of the investing public and the integrity of the securities markets, the OSC observed that the IIROC panel had not given sufficient weight to general deterrence and the public interest.

¶ 38 In *Northern Securities (Re),* 2014 LNONOSC 581, the OSC conducted a *de novo* review of an IIROC sanctions and costs decision. On the merits, the OSC accepted the merits decision of the IIROC panel to the extent it concluded that the respondent Alboini had improperly gained access to credit for his client and in doing so risked the capital of his firm, which constituted conduct unbecoming. In addition, Mr. Alboini, as Ultimate Designated Person, had filed or permitted to be filed inaccurate Monthly Financial Reports (para 12). In applying the law, the OSC considered the Sanction Guidelines and previous IIROC decisions as well as the principles addressed in *Re Cartaway Resources Corp.,* [2004] 1 SCR 672 regarding the importance of both specific and general deterrence. In the result, the OSC imposed a one-year sanction on Mr. Alboini for all types of registration and two years for registration as UDP. We observe that Mr. Alboini did not need registration in order to continue his work.

¶ 39 The case of this Respondent is different. This Respondent has continued in the industry throughout the investigation and the hearing. He continues to work at Echelon without incident. For almost six years, he has demonstrated an ability to work within the requirements of the regulations. Echelon's confidence in the Respondent as well as the apparent success of its IIROC-imposed supervision for the past 20 months are evidence of an acceptance of governance by this Respondent and some measure or indication of his potential for rehabilitation. The Panel takes into account Echelon's report of compliance by the Respondent and its undertaking to provide appropriate supervision to ensure investor protection. The Panel otherwise does not accept the Respondent's argument to the effect that he should have a particular deduction from his

suspension for the number of months of IIROC-imposed supervision.

¶ 40 In determining the question of suspension, the Respondent asks us to take into consideration his financial and familial circumstances. The Respondent submits that he needs ongoing registration to maintain his obligations to his family and his creditors. However, since the Panel has no evidence about the Respondent's income and assets or what role the Respondent had available to him in the absence of registration, we are unable to give any weight to this argument.

¶ 41 We do not accept the Respondent's oral argument that there should be no suspension nor his written argument for a suspension of no more than three months. Those positions are not reasonable given the circumstances of the Contraventions, particularly Contraventions 1-3, and the circumstances of the Respondent. For at least general deterrence, but also for specific deterrence, as well as for the integrity of the regulatory framework, a suspension is necessary in this case to denounce the nature and extent of the misconduct. As a whole, the misconduct involved multiple transgressions, at least three clients, continued over a prolonged period of time and caused harm to both clients and the integrity of the markets. As well, the misconduct involved a level of breach of trust with both clients and the firm as well as an element of deceit. In the Panel's view, the first three Contraventions, particularly the first one, call for a suspension of a significant duration.

¶ 42 In all the circumstances, the Panel concludes that an appropriate period of supervision of nine months would satisfy the objectives of general and specific deterrence and market integrity.

Fines

¶ 43 The Respondent argues inability to pay and financial hardship with respect to the quantum of fines, pleading for reduced numbers. In doing so the Respondent cites approximately $500,000 in debt but decided not to submit evidence regarding his income or assets. Given the partial information provided, the Panel cannot draw any conclusion about Mr. Debus' financial circumstances. In these circumstances, the Respondent has not satisfied the burden upon him to provide reliable evidence of alleged impecuniosity. See also *Marek*, *supra,* at para 37.

¶ 44 The Panel imposes fines and other sanctions commensurate with the contraventions, their circumstances, and the Respondent's circumstances. In doing so, the Panel is mindful of the importance of protecting the investing public by deterring the specific respondent as well as other registrants in the industry from similar conduct. As well, the Panel is mindful of the need to protect market integrity, which is undermined by conduct particularly of off-book trading but also of unauthorized and discretionary trading. We find the appropriate sanctions to be:

1. a fine of $40,000 in relation to Contravention 1;
2. a fine of $20,000 in relation to Contraventions 2 and 3;
3. disgorgement to IIROC of $10,000 in relation to the net profit arising from Contraventions 2 and 3;
4. a fine of $5,000 in relation to Contravention 4;
5. a suspension of nine months from approval by, or registration with, IIROC in all categories anywhere in the industry, commencing 14 days after the date of this decision;
6. strict supervision for 12 months by his Dealer Member firm for 12 months upon any re-registration with IIROC;
7. the Respondent shall re-write and pass the Conduct and Practices Handbook examination within six months of re-registration with IIROC.

COSTS

¶ 45 Staff seek $50,000 costs from the Respondent. Staff advise that this amount represents a portion of the investigator's time and a portion of one Enforcement Counsel's time and does not include time spent by two Staff paralegals or the other Enforcement Counsel on this file. This request for costs also does not include any costs arising from the concerns with RGMPs disclosure that arose at the outset and during this hearing. In *Marek, supra,* which has certain similarities to this case, the respondent was ordered to pay $15,000, albeit that was the amount sought by Staff in that case.

¶ 46 In considering the totality of all the circumstances, the Respondent shall pay IIROC costs of $30,000.

¶ 47 We are advised by IIROC that it will work with the Respondent to achieve a reasonable payment schedule for the fines and costs. The Respondent did not seek a particular schedule. A reasonable payment schedule would depend on the Respondent's circumstances arising from his suspension and his other circumstances of which the Panel does not have knowledge.

RESULT

¶ 48 Accordingly, an Order will issue in accordance with these Reasons imposing the following sanctions and costs on the Respondent:

1. a fine of $40,000 in relation to Contravention 1;
2. a fine of $20,000 in relation to Contraventions 2 and 3;
3. disgorgement to IIROC of $10,000 in relation to the net profit arising from Contraventions 2 and 3;
4. a fine of $5,000 in relation to Contravention 4;
5. a suspension of nine months from approval by, or registration with, IIROC in all categories anywhere in the industry, commencing 14 days after the date of this Order;
6. strict supervision for 12 months by his Dealer Member firm for 12 months upon any re-registration with IIROC;
7. the Respondent shall re-write and pass the Conduct and Practices Handbook examination within six months of re-registration with IIROC;
8. the Respondent shall pay to IIROC costs in the amount of $30,000.

Dated at Toronto, Ontario this 25 day of June 2019.

Susan Lang

Nick Pallotta

Stuart Livingston