

Re Mackie Research Capital

IN THE MATTER OF:

**The Rules of the Investment Industry Regulatory Organization of
Canada**

and

Mackie Research Capital Corporation

2020 IIROC 42

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

Heard: November 12, 2020 by videoconference

Decision: November 12, 2020

Reasons for Decision: November 20, 2020

Hearing Panel:

Barry H. Bresner, Chair, Nick Pallotta and Stuart Livingston

Appearance:

David McLellan, Senior Enforcement Counsel

Renee Reichelt and Alyssa Duke, Counsel for Mackie Research Capital Corporation

Geoff Whitlam, President of Mackie Research Capital Corporation, present

Aurora Kostiw, IIROC staff, present

REASONS FOR DECISION ON ACCEPTANCE OF SETTLEMENT

A. INTRODUCTION

¶ 1 This proceeding was commenced by Notice of Application issued by the Investment Industry Regulatory Organization of Canada (“IIROC”) on November 5, 2020, in accordance with Section 8428 of the Consolidated Enforcement, Examination and Approval Rules of IIROC (“the Rules”), scheduling a hearing, by videoconference call, to consider whether, pursuant to Section 8215 of the Rules, to accept a Settlement Agreement entered between Enforcement Staff of IIROC (“Staff”) and Mackie Research Capital Corporation (“Mackie”).

¶ 2 The Settlement Agreement attached as Schedule “A” to these Reasons includes an agreed statement of facts in Part III. In accordance with Section 8428 of the Rules, the Hearing Panel was restricted to and relied upon the facts recited in the Settlement Agreement.

¶ 3 The Settlement Agreement includes the admission that, contrary to Dealer Member Rules 38.1 and 2500, between approximately May 2010 and October 2014, Mackie failed to adequately supervise the

portfolio management activities of Darryl Yasinowski (“Yasinowski”), a Registered Representative and Portfolio Manager (“PM”) in Regina, Saskatchewan, with regard to the accounts of five clients (“the Clients”) for whom Yasinowski acted as a PM.

¶ 4 On June 25, 2018, an IIROC Hearing Panel accepted a settlement with Yasinowski which provided for a 6-month suspension from registration, close supervision upon his return for 18 months, a fine of \$90,000 and costs of \$10,000 (*Re Yasinowski* 2018 IIROC 29).

¶ 5 The sanctions provided for in the Settlement Agreement with Mackie for its failure to adequately supervise Yasinowski consisted of (i) payment of a fine to IIROC of \$75,000, and (ii) payment to IIROC of \$10,000 in costs.

¶ 6 For the reasons stated below, the Hearing Panel accepted the Settlement Agreement.

B. BACKGROUND FACTS

¶ 7 The detailed facts contained in the Settlement Agreement are briefly summarized as follows:

- a. Mackie is a Dealer Member with its head office in Toronto and branches across Canada, including Regina. At all material times, Yasinowski was supervised by a Tier 1 Branch Manager (“BM”) in Regina and Tier 2 supervisors in Toronto comprised of compliance officers and options supervisors (the “Mackie Supervisors”). Yasinowski was the only PM in the Regina branch office.
- b. The Tier 1 supervision consisted of a review of new client application forms (“NCAF’s”) and daily trading reports. The Tier 2 supervision included a quarterly suitability review of all managed accounts (excluding options) and more specialized supervision of options account approval and trading.
- c. The Clients’ accounts were all managed, fee-based accounts over which Yasinowski had discretionary authority. Although Yasinowski spent considerable time with his clients and believed he was acting in their best interests, he admitted that he had failed to meet the necessary “know your client” standard and failed to use due diligence to ensure his investment recommendations were suitable for these relatively unsophisticated Clients. More particularly, he pursued a risky investment strategy which involved the use of options (covered and uncovered) and leveraged and inverse ETFs. He also increased leverage through the use of margin in some of the accounts.
- d. The 2011 market correction had a significant impact on the Clients’ accounts. The market decline coupled with the Yasinowski investment strategy left the Clients with limited opportunity to recover their loss of the investment capital. In the result, the Clients sustained losses of between 32% and 56% of their portfolios. Mackie has paid approximately \$115,000 in compensation to the Clients.
- e. There were a number of red flags which should have been detected and addressed by the Mackie Supervisors, including (i) the Clients were approved for Level 4 options trading, the highest risk level for retail options, despite the investment knowledge of the five Clients having been described as “limited” or “poor”, (ii) the stated investment objective on the Clients’ NCAFs simply indicated “growth” without adequate information regarding the Clients’ risk tolerance or asset allocation to permit the Mackie Supervisors to make a reasonable assessment of the

suitability of the investments and (iii) Yasinowski's use of margin in the Clients' accounts.

- f. Despite the red flags, the Mackie Supervisors failed to effectively supervise Yasinowski's investment strategy and, more particularly:
- (i) failed to question whether the Clients' stated objective of "growth" was consistent with their financial situation, investment objectives and risk tolerance;
 - (ii) failed to question the trading activity in the accounts and to consider whether the trades and holdings were suitable for the Clients;
 - (iii) failed to give due regard to the risks to the Clients and permitted Yasinowski to pursue an unsuitable strategy; and
 - (iv) failed to adequately monitor levels of sector and individual security concentration in the Clients' accounts.
- g. Through the actions of its Supervisors, Mackie failed to adequately discharge its supervisory obligations, contrary to Dealer Member Rules 38.1 and 2500.

C. ROLE OF THE SETTLEMENT HEARING PANEL

¶ 8 pursuant to Rule 8215(5), a settlement hearing panel must decide whether to accept or reject the proposed settlement. In making that determination, a hearing panel will consider whether the proposed sanction falls within a reasonable range of appropriateness, consistent with the IROC Sanction Guidelines ("the Guidelines") and prior IROC decisions.

¶ 9 As stated in *Re Bereskin 2010 IROC 37*, the role of the settlement hearing panel is to assess whether the sanctions "strike a reasonable balance between fairness to the Respondent in the circumstances, and the need to protect the investing public, the industry membership, the integrity of the discipline process, the integrity of the securities markets and prevention of a repetition of the offense."

¶ 10 It is well established in the IROC jurisprudence that a settlement hearing panel is not tasked with deciding whether it would have imposed the same sanctions as those agreed through negotiation by the parties. Rather, the question is whether the proposed sanctions fall within a reasonable range. In that regard, settlement hearing panels have consistently relied on *Milewski (Re)*, [1999] I.D.A.C.D. No.17, for the principle that negotiated settlements should not be interfered with lightly and that it is in the public interest to encourage and support the settlement process.

D. APPLICATION OF THE GUIDELINES

¶ 11 In assessing the fairness and reasonableness of the proposed sanctions for the admitted misconduct by the Respondent, particular attention was paid to the period of time over which the conduct occurred, the nature and number of the impugned transactions, whether the conduct was intentional, wilfully blind or reckless, the harm to the integrity of the markets, the need for specific and general deterrence, the mitigating factors and prior decisions on sanctions in like circumstances.

¶ 12 Although the conduct extended over a period of almost four years, it was limited to the conduct of a single PM in relation to the accounts of five Clients. There is no allegation of a broader systemic failure to supervise within Mackie.

¶ 13 Similarly, there is no suggestion that the failure was intentional, wilful or reckless. The supervisory

failures may have been contributed to, in part, by the fact that, at the material times, Mackie's NCAFs did not always provide sufficient information to permit adequate supervision. In August 2014, prior to the investigation by IIROC, Mackie changed its NCAFs to separate the investment objectives and risk tolerance for each client. Greater clarity was also provided regarding the manner in which Mackie interprets the relationship between different risk tolerance categories and asset allocations. The changes enhanced the ability of Mackie Supervisors to monitor client accounts.

¶ 14 The changes to Mackie's NCAFs also demonstrate Mackie's commitment to a strong supervisory structure and are a mitigating factor. Specific deterrence is not a significant factor in this case, as Mackie clearly recognizes the need for effective supervision.

¶ 15 Mackie voluntarily compensated the Clients for their losses in the amount of \$115,000. That is another mitigating factor. As the lack of supervision was limited to the five clients of Yasinowski and compensation has been paid, the risk to the integrity of the capital markets is not a significant factor in this case.

¶ 16 In agreeing to the proposed settlement, Mackie has taken responsibility for its supervisory failures and has saved the need for a costly and lengthy hearing.

¶ 17 The Panel was presented with a number of other decisions, which addressed failures to perform the supervisory function. While those prior decisions are helpful in arriving at a reasonable range of penalty, they each turn on their own facts.

¶ 18 *Re Assante Capital Management Ltd.* 2015 IIROC 44 is at the high end of the spectrum of sanctions for a failure to supervise. A fine of \$400,000 was imposed for breaches far more egregious than those in the present matter. Tier 1 supervision of the Registered Representative at fault was provided by his wife, the Branch Manager. She approved accounts over a period of years with clearly inappropriate investment and risk parameters for her husband's clients. The Tier 2 supervisors failed to adequately question the dealings in the accounts. The scale of the offending conduct is reflected in the lifetime bans on the husband and wife and fines of \$300,000 and \$250,000 respectively. The clients were also part of a class action in Alberta that Assante settled for \$10 million.

¶ 19 *Re Bergen* 2015 IIROC 37 has some factual similarities to the present case. The Tier 1 supervisor, Bergen, was fined \$50,000 and his employer, Leede Financial Markets Inc. was fined \$90,000 for its failure to provide adequate Tier 2 supervision. The breaches occurred over a 3.5-year period and involved clearly inappropriate aggressive trading by a Registered Representative in the accounts of four clients.

¶ 20 In *Re CIBC World Markets* 2018 IIROC 50, the Tier 2 supervisory failures resulted in a fine of \$125,000. In *Re CIBC World Markets Inc.* 2012 IIROC 57, a fine of \$85,000 was imposed as a result of a failure to effectively supervise option trading over a period of 3.5 years.

¶ 21 The prior decisions that involve the approval of settlements for supervisory offences reflect a wide range of sanctions, which vary with the scope and gravity of the conduct and the mitigating factors in each case.

¶ 22 In all of the circumstances, the agreed sanctions are fair and fall within the reasonable range of sanctions for such conduct. The supervisory failings in this matter, while serious and warranting a substantial fine, are at the lower end of the spectrum of conduct reflected in the prior decisions provided to the Panel and the mitigating factors support the reasonableness of the sanctions in this matter.

E. CONCLUSION

¶ 23 Taking into account the public interest, the agreed facts and the relevant factors described in the Guidelines and the jurisprudence, for the reasons stated above, the Panel accepts the Settlement Agreement agreed by the parties and the sanctions provided for in that Agreement.

Dated at Toronto, Ontario this 20 day of November 2020.

Barry H. Bresner

Stuart Livingston

Nick Pallotta

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 Mackie Research Capital Corporation (“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. At all material times, the Respondent Mackie Research Capital Corporation (“Mackie”) failed to properly supervise the portfolio management activities of Darryl Yasinowski (“Yasinowski”), a Registered Representative (“RR”) and Portfolio Manager (“PM”), in Regina, Saskatchewan as it related to five clients that Yasinowski acted for as a PM.
5. Yasinowski was sanctioned by IIROC in June, 2018.
6. Yasinowski’s investment strategy included, among other things, covered and uncovered option writing. He wrote put options on large cap stocks in circumstances where he wished to acquire the underlying companies and wrote defensive call options against positions held in the clients’ accounts. He also purchased leveraged and inverse ETFs and held them beyond their intended short term period (although in most cases this trading did not result in a loss to clients) and other high risk positions. In addition, he employed extensive use of margin in some of the clients’ accounts.
7. The Yasinowski investment strategy departed from the investment strategies utilized by the majority of PMs at Mackie.
8. Mackie supervisors ought to have identified that the investment objective and risk tolerance information on the NCAFs for the five clients was insufficient for them to properly evaluate whether the investment

strategy being employed by Yasinowski was suitable for those clients. Taken with the nature of the trading in the Clients' accounts, the supervisors failed to adequately discharge their supervisory obligations.

Background

9. Mackie is a Dealer Member with its head office in Toronto, and branch offices located across Canada, including a branch office in Regina.

Yasinowski – Disciplinary Action

10. In June, 2018, an IIROC Hearing Panel accepted a Settlement Agreement between IIROC Staff and Yasinowski in which he admitted that he contravened IIROC Rules with respect to five complainant clients (the "Clients").
11. Yasinowski did spend a considerable amount of time with the Clients, and developed personal relationships with them. Yasinowski believed he was acting in the best interests of the clients.
12. Despite that, Yasinowski admitted that he failed to meet the necessary "know your client" standard and failed to use due diligence to ensure that his investment recommendations were suitable for the Clients when he pursued an investment strategy which involved the use of options (covered and uncovered) and leveraged and inverse ETFs. In addition, he increased leverage by the use of margin in some of the Clients' accounts.
13. The Clients' accounts were all managed, fee-based accounts over which Yasinowski was authorized to exercise discretionary authority. In addition, all of the Clients' account forms contained investment objectives of "growth", which permitted up to 100% high risk holdings.
14. The Clients sustained losses of between 32% and 56% of their portfolios.
15. The 2011 market correction had a significant impact on the clients' accounts. The market decline combined with the Yasinowski investment strategy left the clients with limited opportunity to recover the loss of their investment capital.
16. On June 25, 2018, an IIROC Hearing Panel accepted a sanction for Yasinowski consisting of a suspension from registration in any capacity for 6 months, close supervision for 18 months upon return to the industry, a \$90,000 fine, and \$10,000 in costs.

Supervision Structure

17. At all material times, Yasinowski was supervised by a Tier 1 Branch Manager ("BM") in his branch office, and Tier 2 supervisors in Toronto comprised of compliance officers and options supervisors (the "Mackie Supervisors").
18. Yasinowski was the only Portfolio Manager in the branch office which consisted of fewer than six employees. The BM also maintained his own clients.
19. Tier 1 supervision duties performed by the BM of Yasinowski consisted of the review and approval of new client application forms ("NCAF's"), and the review of daily trade reports.
20. Tier 2 supervision of Yasinowski was conducted out of the Toronto head office by Compliance Officers, who conducted a quarterly suitability review of all managed accounts (excluding options). Options supervision of Yasinowski was conducted by other individual supervisors at the head office who were

responsible for the more specialized supervision of options account approval and trading. The credit department was responsible for a review of margin levels and concentration.

21. The purpose of daily and quarterly trade review and surveillance was to identify issues such as suitability, concentration and other compliance concerns.

Supervision Failures

22. The investment strategy employed by Yasinowski in the Clients' accounts ought to have raised red flags for the supervisors, including the following:
 - a. The Clients stated investment knowledge was described as "limited" or "poor";
 - b. The stated investment objective on the Clients' NCAF simply indicated "growth" as the objective and did not provide enough information about the Clients' risk tolerance or asset allocation to allow the supervisors to make a reasonable assessment of whether the investments in the Clients' portfolios were suitable;
 - c. The Clients were approved for Level 4 options trading, the highest risk level for retail options trading, despite their lack of investment knowledge and experience; and
 - d. Yasinowski employed the use of margin in the Clients' accounts.
23. Despite the presence of red flags, Mackie Supervisors failed to take the necessary action to supervise Yasinowski's investment strategy in managing the Clients accounts. In particular, various compliance officers:
 - a. Failed to question whether the Clients' stated investment objective of "growth" was consistent with their true financial situation, investment objectives and risk tolerances;
 - b. Failed to question the Yasinowski trading activity in the accounts and whether the trades and holdings were suitable for the Clients;
 - c. Failed to give due regard to the risks to the Clients, and allowed Yasinowski to pursue a strategy which was not suitable for the Clients; and
 - d. Failed to adequately monitor levels of sector and individual security concentration in the Clients accounts.
24. In failing to adequately question the account activity in light of the above noted red flags, Mackie, through the actions of its supervisors, failed to adequately discharge its obligations to conduct supervision, contrary to Dealer Member Rules 38.1 and 2500.
25. The failure to adequately supervise the Clients at issue related to one PM, Yasinowski, and a limited number of Clients.
26. Prior to the commencement of the investigation respecting Yasinowski, the Mackie NCAF was changed in August 2014 to separate the account objectives and risk tolerance. Greater clarity around how Mackie interprets different risk tolerance categories into expectations for asset allocations was also provided. This change enhanced the ability of Mackie supervisors to monitor client accounts operated by PMs such as Yasinowski. These changes demonstrate Mackie's commitment to a strong supervisory structure and are a mitigating factor.
27. In addition, Mackie settled with the Clients by paying approximately \$115,000 to the Clients.

28. By settling, Mackie has saved the need for a lengthy and costly hearing. It has also indicated Mackie's acceptance of its responsibilities.

PART IV – CONTRAVENTIONS

Between approximately May, 2010 and October, 2014, the Respondent, Mackie Research Capital Corporation, failed to adequately supervise a Registered Representative and certain of his client accounts, contrary to Dealer Member Rules 38.1 and 2500.

PART V – TERMS OF SETTLEMENT

29. The Respondent agrees to the following sanctions and costs:
- a. A fine in the amount of \$75,000
 - b. Costs in the amount of \$10,000.
30. 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

31. 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.
32. 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

33. This Settlement Agreement is conditional on acceptance by the Hearing Panel.
34. 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.
35. 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.
36. If the Hearing Panel accepts the Settlement Agreement, the Respondent agrees to waive all rights under the IROC Rules and any applicable legislation to any further hearing, appeal and review.
37. 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.
38. The terms of this Settlement Agreement are confidential unless and until this Settlement Agreement has been accepted by the Hearing Panel.
39. 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.

- 40. 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.
- 41. 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

- 42. This Settlement Agreement may be signed in one or more counterparts which together will constitute a binding agreement.
- 43. A fax or electronic copy of any signature will be treated as an original signature.

DATED this 30th day of October, 2020.

“Witness” _____

Witness

“Mackie Research Capital Corporation” _____

Mackie Research Capital Corporation

“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 12th day of November, 2020 by the following Hearing Panel:

Per: “Barry Bresner” _____

Panel Chair

Per: “Nick Pallotta” _____

Panel Member

Per: “Stuart Livingston” _____

Panel Member

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