Ontario Securities Commission | Commission des valeurs mobilières de l'Ontario | 22nd Floor 20 Queen Street West Toronto ON M5H 3S8 | 22e étage 20, rue queen ouest Toronto ON M5H 3S8

Citation: TCM Investments Ltd. (Re), 2017 ONSEC 43
Date: 2017-12-18

IN THE MATTER OF
TCM INVESTMENTS LTD. carrying on business as
OPTIONRALLY, LFG INVESTMENTS LTD.,
AD PARTNERS SOLUTIONS LTD. and INTERCAPITAL SM LTD.

REASONS AND DECISION ON SANCTIONS AND COSTS
(Sections 127 and 127.1 of the *Securities Act*, RSO 1990, c S.5)

Hearing: November 15, 2017

Decision: December 18, 2017

Panel: Timothy Moseley — Vice-Chair and Chair of the Panel

Appearances: Matthew Britton — For Staff of the Commission

No one appearing for the respondents

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REASONS AND DECISION

I. OVERVIEW

[1] In Reasons and Decision on the merits dated October 11, 2017 (the **Merits Decision**),[1] the Ontario Securities Commission (the **Commission**) found that the respondents had contravened the *Securities Act* (the **Act**)[2] by:

a. engaging in the business of trading binary options (which were securities) without being registered with the Commission; and

b. as a result, engaging in a distribution of securities without a prospectus.

[2] Staff of the Commission now seeks various sanctions and costs orders against the respondents. For the reasons set out below, I find that it is in the public interest to remove the respondents from the capital markets permanently, to order that the respondent TCM Investments Ltd. disgorge $100,000, that the respondents be subject to an administrative penalty in the amount of $100,000, and that the respondents be required to pay costs in the amount of $30,298.75.

II. HISTORY OF THE PROCEEDING

[3] This proceeding was commenced on August 25, 2017. Staff served the Notice of Hearing and Statement of Allegations on the respondents, none of whom communicated with Staff or appeared on September 26, 2017, which was the hearing date specified in the Notice of Hearing. Pursuant to subsection 7(1) of the *Statutory Powers Procedure Act*,[3] the merits hearing proceeded the following day in the absence of the respondents.

[4] Following the conclusion of the merits hearing, I ordered that the sanctions and costs hearing be held on November 15, 2017. The Merits Decision repeated that information.

[5] Staff did not hear from the respondents, and the respondents did not appear at the hearing on November 15. Again pursuant to subsection 7(1) of the *Statutory Powers Procedure Act*, the sanctions and costs hearing proceeded in their absence. Staff delivered written submissions and made oral submissions. I requested, and Staff later delivered, supplementary written submissions in support of Staff's request for the imposition of an administrative penalty.

III. SUMMARY OF FINDINGS IN THE MERITS DECISION

[6] In the Merits Decision, the Commission found that:

a. the respondent TCM Investments Ltd. operates a website using the name "**OptionRally**";

b. OptionRally provides a platform for trading binary options;

c. the respondent LFG Investments Ltd. (**LFG**) is the principal on behalf of OptionRally in an affiliate program through which investors could be compensated for referring new clients to OptionRally, and at least one

[1] *Re TCM Investments Ltd.*, 2017 ONSEC 35.
[2] RSO 1990, c S.5.
[3] RSO 1990, c S.22.

Ontario investor was told by an OptionRally representative that LFG was OptionRally's "registrant";

d. the respondent AD Partners Solutions Ltd. (**AD Partners**) is identified on the OptionRally website as a potential recipient of funds deposited by investors, and at least one Ontario investor sent funds to OptionRally through AD Partners;

e. the respondent InterCapital SM Ltd. (**InterCapital**) provides clearing and billing services to OptionRally, and at least one Ontario investor had his OptionRally payments charged directly to InterCapital;

f. all four respondents were engaged together in the trading of binary options in Ontario;

g. during the material time, none of the respondents was registered with the Commission;

h. all four respondents contravened:

   i. subsection 25(1) of the Act, by engaging in the business of trading in securities without being registered; and

   ii. subsection 53(1) of the Act, by conducting illegal distributions of the securities;

i. Ontario residents invested in excess of $100,000 with OptionRally;

j. numerous investors were pressured to increase the funds they invested with OptionRally, and one investor acceded to a request by an OptionRally representative to allow the representative to access the investor's computer remotely in order to enter trades on the investor's behalf; and

k. most investors reported having lost all or substantially all of their funds.

IV. ANALYSIS – SANCTIONS

A. Introduction

[7] Subsection 127(1) of the Act lists the sanctions that the Commission may impose where it finds that it is in the public interest to do so. The Commission must exercise this jurisdiction in a manner consistent with the two purposes of the Act; namely, the protection of investors from unfair, improper or fraudulent practices, and the fostering of fair and efficient capital markets and confidence in the capital markets.[4]

[8] The Supreme Court of Canada has held that the public interest jurisdiction and the sanctions listed in section 127 of the Act are protective and preventive and are intended to be exercised to prevent likely future harm to Ontario's capital markets.[5]

[9] The Commission has identified a non-exhaustive list of factors to be considered with respect to sanctions generally, including the seriousness of the misconduct, any benefits received by the respondent, any mitigating or aggravating factors, and the likely effect that any sanction would have on the respondent ("specific

[4] Section 1.1 of the Act.
[5] *Committee for Equal Treatment of Asbestos Minority Shareholders v Ontario (Securities Commission)*, 2001 SCC 37 (***Asbestos***) at paras 42-43.

deterrence") as well as on others ("general deterrence"). Sanctions must be appropriate and proportionate to the circumstances of the case and the conduct of each respondent.[6]

B. Removal from the capital markets

[10] Staff submits that it would be in the public interest for the Commission to order that:

a. the respondents cease trading and acquiring securities permanently;

b. the exemptions contained in Ontario securities law not apply to the respondents permanently; and

c. the respondents be prohibited permanently from becoming or acting as a registrant, an investment fund manager or a promoter.

[11] As the Supreme Court of Canada has held, it is the Commission's role to remove from the public markets "those whose past conduct is so abusive as to warrant apprehension of future conduct detrimental to the integrity of the capital markets."[7]

[12] The respondents' conduct was serious. It contravened two provisions of the Act, both of which are cornerstones of the investor protection regime. Binary options are risky investments, and over a period of time, the respondents repeatedly pressured many investors to provide additional funds. There is no evidence of any attempt by the respondents to assess the investors' financial situation, risk tolerance, investment objectives, or ability to tolerate a loss of their investments. There is no evidence that the respondents made meaningful or any disclosure to the investors about the risks associated with the investments. OptionRally received more than $100,000 from Ontario investors, and as noted above, most investors lost all or substantially all of their funds.

[13] The respondents failed to respond to communications from Staff, and failed to participate in any way in the proceeding against them. The repeated and extended nature of the breaches, and the respondents' failure to respond in any way to Staff's concerns, suggest that the respondents have no concern about the harm they caused investors, and no respect for the regulatory framework that applies to their activities.

[14] There are no mitigating factors.

[15] There is every reason to believe that if the respondents continue to participate in Ontario's capital markets, they will cause further harm to the integrity of those markets, and further harm to investors. The Commission must use the tools that it has under subsection 127(1) of the Act to remove the respondents from the markets. I will therefore grant Staff's request for an order to that effect.

C. Disgorgement

[16] Paragraph 10 of subsection 127(1) of the Act authorizes the Commission to order a respondent to disgorge "any amounts obtained" as a result of non-compliance with the Act. Staff seeks a disgorgement order in the amount of $100,000, only as against OptionRally.

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[6] *Re Bradon Technologies Ltd.* (2016), 39 OSCB 4907 at para 28.
[7] *Asbestos* at para 43, citing *Re Mithras Management Ltd.* (1990), 13 OSCB 1600.

[17] The Commission has previously held that it should consider the following factors when determining whether a disgorgement order is in the public interest, and if so, the appropriate amount of such an order:

a. whether an amount was obtained by a respondent as a result of non-compliance with the Act;

b. the seriousness of the misconduct and the breaches of the Act and whether investors were seriously harmed;

c. whether the amount obtained as a result of the non-compliance is reasonably ascertainable;

d. whether the individuals who suffered losses are likely to be able to obtain redress; and

e. the deterrent effect of a disgorgement order on the respondents and other market participants.[8]

[18] As noted above, OptionRally received at least $100,000 in direct contravention of the Act, the misconduct was serious, and investors were seriously harmed. There is no evidence to suggest that the harmed investors have any reasonable prospect of recovering their losses.

[19] A disgorgement order is designed to prevent a respondent from retaining any amount obtained through conduct that violates the Act, and to serve as a partial deterrent to the respondent and others. The evidence supports Staff's request for an order in the amount of $100,000 against OptionRally. I find that it is in the public interest to make such an order.

D. Administrative penalty

[20] Staff seeks administrative penalties of approximately $500,000 against each respondent, pursuant to paragraph 9 of subsection 127(1) of the Act. That provision allows for an administrative penalty of not more than $1 million for each failure to comply with Ontario securities law.

[21] Staff submits that this case involves several significant aggravating circumstances that warrant the requested penalties.

[22] First, Staff notes that the respondents are offshore entities. However, Staff submitted no authority for the proposition that a respondent's geographic location, including whether the respondent is inside or outside Ontario, should affect the appropriate amount of an administrative penalty. Further, Staff did not establish a legal or policy basis for such a proposition. One might imagine that investors' likelihood of recovery is diminished generally for offshore entities, but there was no evidence or submission to that effect in this case, and the likelihood of recovery is already reflected in the disgorgement order referred to above. I am not persuaded that the respondents' location is an aggravating factor in this case.

[23] Second, Staff asserts that because "the respondents operate[d] behind a façade of corporate entities in foreign jurisdictions and elect[ed] not to respond to these proceedings, the amount of money raised from Ontario investors cannot be easily determined." Staff submits that the $100,000 amount referred to above

[8] *Re Limelight Entertainment Inc.* (2008), 31 OSCB 12030 at para 52.

may not, and likely does not, represent all the funds illegally raised by the respondents. I cannot give effect to these submissions when determining an administrative penalty, because:

a. Staff made no allegation in the Statement of Allegations that the respondents were part of a "façade", or that there was any similar attempt to mask identities or misrepresent corporate relationships, and in any event there was, at best, only inconclusive circumstantial evidence to that effect; and

b. the fact that the exact amount of investor losses cannot be determined is not surprising; indeed, it is common, but this uncertainty cannot support a conclusion, on the balance of probabilities, that the investor harm was any greater than is established by the evidence.

[24] Third, Staff claims in its supplementary written submissions that "none of the corporate respondents has taken steps to see that operations in Ontario are ceased", and "the OptionRally platform for trading binary options was still accessible by Ontario investors on September 17, 2017." However, at the oral hearing with respect to sanctions and costs, Staff expressly advised that because there was no evidence in the record to this effect, Staff was not relying on this assertion as an aggravating factor. I therefore disregard it.

[25] Staff's alternative submission is that if I do not accept the suggested aggravating factors, an administrative penalty of approximately $100,000 would be appropriate. I turn to a brief review of some previous Commission decisions that are of assistance in determining an appropriate penalty.

[26] In the Commission's recent decision in *Re Black Panther Trading Corporation*,[9] the Commission found that the respondents had perpetrated fraud through an illegal distribution, resulting in a profit to the respondents of approximately $314,000. The Commission imposed, in addition to a disgorgement order and other sanctions, a joint and several administrative penalty of $300,000.

[27] In that same decision,[10] the Commission reviewed five earlier sanctions decisions. Four of the five decisions involved findings of fraud, and in those cases, the administrative penalties imposed ranged from $150,000 to $600,000, and from approximately 10% to approximately 50% of the amounts obtained as a result of the non-compliance.[11] The fifth decision, which resulted in an administrative penalty of $200,000, did not include a finding of fraud, but involved an individual who had previously been a registrant for ten years, and who had engaged in the business of advising without representation, and repeatedly misled Staff during the investigation.[12]

[28] While the present case involved neither an allegation of fraud nor a registrant (current or former), the conduct was serious. It involved repeated pressure on vulnerable investors, and it was callous with respect to the harm that might be caused to those investors. The respondents chose not to participate in this

[9] 2017 ONSEC 8 (***Re Black Panther***).
[10] *Re Black Panther* at para 77.
[11] *Re Lyndz Pharmaceuticals Inc.* (2012), 35 OSCB 7357; *Re Richvale Resource Corporation* (2012), 35 OSCB 10699; *Re Moncasa Capital Corp.* (2013), 37 OSCB 229; *Re 2196768 Ontario Ltd.* (2015), 38 OSCB 2374.
[12] *Re Doulis* (2014), 37 OSCB 11511.

proceeding and therefore offered no mitigating factors. In my view, it is in the public interest to impose an administrative penalty of $100,000, the amount requested by Staff in its alternative submission. Further, given my finding that the respondents engaged together in the misconduct, it is appropriate that they be jointly and severally liable for that penalty.

V. ANALYSIS – COSTS

[29] Section 127.1 of the Act provides that if the Commission is satisfied that a company has not complied with Ontario securities law, the Commission may order the company to pay the costs of the investigation, and of or related to the hearing. A costs order is a means by which the Commission can recover some of the costs it has expended in connection with the matter.

[30] Staff requests an order requiring the respondents, jointly and severally, to pay costs of $30,298.75. That amount, which is substantiated by affidavit evidence submitted by Staff, is made up of time spent by one Senior Litigation Counsel and one Investigator, according to hourly rates previously adopted by the Commission. I find that the time spent by Staff on the matter is reasonable under the circumstances, and that the hourly rates are appropriate.

[31] Accordingly, the respondents shall be required to pay costs of $30,298.75, jointly and severally.

VI. CONCLUSION

[32] The Commission will issue an order that provides as follows:

a. pursuant to paragraph 2 of subsection 127(1) of the Act, trading in any securities or derivatives by the respondents shall cease permanently;

b. pursuant to paragraph 2.1 of subsection 127(1) of the Act, the acquisition of any securities by the respondents shall cease permanently;

c. pursuant to paragraph 3 of subsection 127(1) of the Act, the exemptions contained in Ontario securities law shall not apply to the respondents permanently;

d. pursuant to paragraph 8.5 of subsection 127(1) of the Act, the respondents shall be prohibited permanently from becoming or acting as a registrant, as an investment fund manager or as a promoter;

e. pursuant to paragraph 9 of subsection 127(1) of the Act, the respondents, jointly and severally, shall pay to the Commission an administrative penalty of $100,000, which amount shall be designated for allocation or use by the Commission in accordance with paragraphs b(i) or (ii) of subsection 3.4(2) of the Act;

f. pursuant to paragraph 10 of subsection 127(1) of the Act, TCM Investments Ltd. shall disgorge to the Commission $100,000, which amount shall be designated for allocation or use by the Commission in accordance with paragraphs b(i) or (ii) of subsection 3.4(2) of the Act; and

g. pursuant to section 127.1 of the Act, the respondents shall pay $30,298.75 to the Commission to reimburse the costs of the investigation and hearing, for which they shall be jointly and severally liable.

Dated at Toronto this 18th day of December, 2017.

"*Timothy Moseley*"

Timothy Moseley