



Ontario
Securities
Commission

Commission des
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de l'Ontario

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Citation: Sheehan (Re), 2021 ONSEC 26
Date: 2021-10-12
File No. 2020-38

**IN THE MATTER OF
DANIEL SHEEHAN**

**REASONS FOR APPROVAL OF A SETTLEMENT
(Sections 127 and 127.1 of the *Securities Act*, RSO 1990, c S.5)**

Hearing: October 7, 2021

Decision: October 12, 2021

Panel: Wendy Berman Vice-Chair and Chair of the Panel

Appearances: Rikin Morzaria For Staff of the Commission

Caitlin Sainsbury For Daniel Sheehan

REASONS FOR APPROVAL OF A SETTLEMENT

I. OVERVIEW

- [1] Staff of the Ontario Securities Commission (**Staff of the Commission**), and Daniel Sheehan have jointly submitted that it would be in the public interest to approve a settlement agreement entered into between Mr. Sheehan and Staff dated October 4, 2021 (the **Settlement Agreement**).
- [2] This matter concerns allegations described in the Statement of Allegations dated November 3, 2020. Specifically, Staff allege that Mr. Sheehan contravened Ontario securities law by engaging in the business of trading and advising in securities and by acting as an investment fund manager without registration and where no exemptions were available.
- [3] After considering the Settlement Agreement and the submissions of the parties, I have concluded that it would be in the public interest to approve the Settlement Agreement. These are my reasons.

II. SUMMARY OF THE FACTS

- [4] The underlying facts and the specific breaches of Ontario securities laws are fully set out in the Settlement Agreement, which has been filed with the Commission and is publicly available. Accordingly, I need not repeat them in detail here.
- [5] In summary, during a 10-year period from September 28, 2009 to April 30, 2019, Mr. Sheehan raised approximately \$25 million from about 50 Ontario investors and invested these funds in publicly traded equities, fixed income securities and exchange-traded derivatives.
- [6] Mr. Sheehan carried on this activity through an Ontario limited partnership, Sheehan Associates Limited Partnership (**SALP**), and had authority to make all decisions regarding the business of the partnership, including all investment decisions.
- [7] Prior to commencing these investment management services, Mr. Sheehan sought and obtained legal advice from an experienced securities lawyer on the business structure and securities law requirements. The securities lawyer drafted and advised on the partnership agreement, including the performance-based compensation terms.
- [8] Importantly, the securities lawyer advised Mr. Sheehan that SALP was a private investment club and registration was not required.
- [9] The performance-based compensation terms in the partnership agreement provided that Mr. Sheehan would be paid an annual performance fee equal to 25% of the returns on partnership capital over 6%. The compensation terms were amended twice, with the last amendment reducing compensation to 12.5% on partnership returns above 6% on invested capital in excess of \$450,000.
- [10] Mr. Sheehan received significant performance-based compensation of \$21 million during this period and investors received an annual compounded return of approximately 18.5%.
- [11] To qualify as a private investment club, Mr. Sheehan would not have been able to receive compensation beyond normal brokerage fees for his services. The

securities lawyer advised on the structure of the compensation as reflected in the partnership agreement and did not advise Mr. Sheehan of this requirement.

- [12] Mr. Sheehan did not seek or obtain further legal advice, including when significant amendments were made to the registration requirements in the *Securities Act*¹ (the **Act**) which, among other things, added a new requirement of registration to act as an investment fund manager.
- [13] SALP has been permanently wound up and Mr. Sheehan paid each investor the full amount of their invested capital plus their proportional share of investment returns net of his performance-based compensation. In the course of winding up SALP, Mr. Sheehan waived his 2019 performance-based compensation of \$2,364,577.72.
- [14] Mr. Sheehan has never been registered under the Act to engage in the business of trading or advising in securities or to act as an investment fund manager.
- [15] Mr. Sheehan has admitted that he engaged in the business of trading and advising in securities and acting as an investment fund manager without registration or an exemption contrary to subsections 25(1), 25(3) and 25(4) of the Act.
- [16] As part of the Settlement Agreement, the parties agreed to the following:
- a. Mr. Sheehan will make a voluntary payment of \$1,600,000 to the Commission; and
 - b. Mr. Sheehan will pay the costs of the Commission's investigation in the amount of \$100,000.
- [17] In addition, Mr. Sheehan has provided an undertaking to Staff that he will not apply for registration for a period of one year following the date of the Order approving the Settlement Agreement.
- [18] Mr. Sheehan agreed to make the payments of \$1,600,000 and \$100,000 in advance of the hearing. Staff confirmed that he has done so.

III. LAW AND ANALYSIS

- [19] The Commission's role at a settlement hearing is to determine whether the terms of the settlement fall within a range of reasonable outcomes in the circumstances and whether the approval of the settlement is in the public interest.²
- [20] The Settlement Agreement is the result of extensive negotiations between Staff and Mr. Sheehan, both ably represented by counsel. The Commission respects the negotiation process and accords significant deference to the resolution reached by the parties.³
- [21] Settlements serve the public interest in resolving regulatory proceedings promptly, efficiently and with certainty. Settlements avoid the significant resources that would be incurred in a contested proceeding and promote timely

¹ RSO 1990, c S.5

² *Research in Motion Limited (Re)*, 2009 ONSEC 19, (2009) 32 OSCB 4434 (**Research in Motion**) at paras 44-46

³ *Katanga Mining Limited (Re)*, 2018 ONSEC 59, (2018) 41 OSCB 9987 at para 18; *Research in Motion* at para 45

statements regarding regulatory requirements and standards to all capital market participants.

- [22] I have reviewed the Settlement Agreement in detail and considered the submissions of counsel for the parties. I also conducted a confidential settlement conference with counsel for the parties during which I reviewed the proposed Settlement Agreement, asked questions of counsel and heard their submissions.
- [23] In assessing whether it is in the public interest to approve the settlement, I considered various aggravating and mitigating factors.
- [24] The breaches of Ontario securities law in this matter are serious. Registration is a cornerstone of securities law designed to ensure that those who sell or promote securities are proficient, solvent and act with integrity.⁴ Facilitation of unregistered trading and advising defeats some of these necessary legal protections and undermines investor protection and the integrity of the capital markets.
- [25] The unregistered trading and advising activities by Mr. Sheehan occurred over a lengthy period and on a significant scale. Mr. Sheehan, through SALP, raised \$25 million of invested funds from approximately 50 investors and received \$21 million in compensation over a 10-year period.
- [26] This matter also involves unique mitigating circumstances, which include that:
- a. Mr. Sheehan sought and obtained legal advice from an experienced securities lawyer on structuring the business and any legal requirements including registration requirements prior to commencing these activities;
 - b. The securities lawyer advised Mr. Sheehan that SALP was a private investment club and registration was not required under Ontario securities laws;
 - c. The performance compensation paid to Mr. Sheehan was based on a structure established by the securities lawyer and terms drafted by the securities lawyer. The securities lawyer did not advise Mr. Sheehan that to qualify as a private investment club, Mr. Sheehan was not permitted to take compensation beyond normal brokerage fees;
 - d. Mr. Sheehan reasonably relied in good faith on the legal advice from the securities lawyer;
 - e. Mr. Sheehan did not engage in any dishonest or intentional misconduct; and
 - f. Mr. Sheehan did not intend to, nor knowingly, act contrary to the Act.
- [27] The Commission has previously considered legal advice as a relevant factor in the determination of appropriate sanctions for a contravention of the Act.⁵
- [28] In my view, Mr. Sheehan acted responsibly and exercised reasonable diligence by seeking and obtaining legal advice from an experienced securities lawyer on the structure of the partnership and any securities registration requirements

⁴ *MRS Sciences Incorporated (Re)*, 2014 ONSEC 14, (2014) 37 OSCB 5611 at para 88

⁵ *Bloomberg Trading Facility Limited (Re)*, 2020 ONSEC 31, (2020) 43 OSCB 9721 at para 15; *Energy Syndications Incorporated (Re)*, 2013 ONSEC 24, (2013) 36 OSCB 6500 at para 83

prior to commencing any investment management services. He reasonably relied in good faith on the advice that the proposed investment activities through the SALP structure would not require registration under Ontario securities laws.

- [29] This good faith reliance on specialized legal advice is a significant mitigating factor in my consideration of whether the terms of the Settlement Agreement fall within a range of reasonable outcomes.
- [30] I also considered the following additional mitigating factors:
- a. Mr. Sheehan did not solicit investors to SALP;
 - b. No investors suffered any harm arising from these investment activities and Staff is not aware of any complaints from any SALP investors. Upon the windup of SALP, Mr. Sheehan paid each investor the full amount of their invested capital and their proportional share of investment returns net of his performance-based compensation;
 - c. Mr. Sheehan waived his 2019 performance-based compensation of \$2,364,577.72 during the windup of SALP; and
 - d. Mr. Sheehan has accepted responsibility for his actions through detailed admissions without the need for protracted proceedings and his agreement to settle the proceedings will avoid the use of the significant Staff and Commission resources for a full merits hearing.
- [31] As outlined above, I have considered the totality of the circumstances, including the seriousness of the misconduct, the nature and duration of the misconduct, and the above mitigating factors in my assessment of the proposed settlement terms.

IV. CONCLUSION

- [32] In my view, the terms of the Settlement Agreement fall within a range of reasonable dispositions in the circumstances and will have a significant deterrent effect on Mr. Sheehan and others.
- [33] The terms of the Settlement Agreement, including the significant monetary payments and the undertaking, hold Mr. Sheehan accountable for his conduct and further the protective purposes of the Act.
- [34] The settlement also demonstrates that compliance with registration requirements will be enforced even in circumstances where the individual or entity did not engage in any intentional misconduct or any dishonest or abusive conduct and exercised diligence in obtaining specialized legal advice.
- [35] In my view, the settlement terms in the circumstances appropriately reflect the principles applicable to sanctions, including the importance of fostering investor protection and confidence in the market, recognition of the nature and circumstances of the misconduct, and recognition of and the need for specific and general deterrence of such misconduct.
- [36] For these reasons, I conclude that the Settlement Agreement is in the public interest. I approve the Settlement Agreement on the terms proposed by the parties and will issue an order substantially in the form requested.

Dated at Toronto this 12th day of October, 2021.

“Wendy Berman”

Wendy Berman