

Order 2.14

Mark Kassirer, Re

Reference: Subsection 127(1)

In the Matter of the Securities Act, R.S.O. 1990, c. S.5, as amended and In the Matter of Mark Kassirer
Citation: 25 O.S.C.B. 3686

Court: Ontario Securities Commission

Judge: Paul Moore, Harold P. Hands, Theresa McLeod

Date: June 17, 2002

Year: 2002

WHEREAS on June 13, 2002, the Ontario Securities Commission (the "Commission") issued a Notice of Hearing pursuant to subsection 127(1) of the *Securities Act*, R.S.O. 1990, c. S.5, as amended (the "Act") respecting Mark Kassirer ("Kassirer");

AND WHEREAS Kassirer entered into a Settlement Agreement in which he agreed to a proposed settlement of the proceedings, subject to the approval of the Commission;

AND UPON reviewing the Settlement Agreement and the Statement of Allegations of Staff of the Commission and upon hearing submissions from counsel for Kassirer and from Staff of the Commission;

AND WHEREAS the Commission is of the opinion that it is in the public interest to make this Order pursuant to subsection 127(1) of the Act;

IT IS ORDERED THAT:

1. the attached Settlement Agreement executed June 13 and 14, 2002 is approved;
2. pursuant to subsection 127(1), paragraph 4 of the Act, Kassirer Asset Management Corporation ("KAMC") submit to a review by Deloitte & Touche Inc. of current controls and procedures respecting its trading and accounting systems to ensure compliance with applicable securities law. The review shall be at Kassirer's or KAMC's expense. The review shall be completed by no later than September 30, 2002;
3. pursuant to subsection 127(1), paragraph 4 of the Act, a report of the findings of the review described in paragraph 2 above, including any deficiencies, shall be submitted to the Commission to the attention of the Director, Capital Markets and Kassirer concurrently. KAMC shall institute the necessary changes to rectify the deficiencies reported by Deloitte & Touche Inc. by no later than October 31, 2002;
4. pursuant to subsection 127(1), paragraph 1 of the Act, Kassirer must pass the Partners, Directors and Officers examination by no later than December 15, 2002 as a term and condition of his continued registration; and
5. pursuant to subsection 127(1), paragraph 6 of the Act, Kassirer is reprimanded.

IN THE MATTER OF THE SECURITIES ACT, R.S.O. 1990, c. S.5, as amended AND IN THE MATTER OF MARK KASSIRER

Settlement Agreement between Staff of the Ontario Securities Commission and Mark Kassirer

I. Introduction

1. By Notice of Hearing, the Ontario Securities Commission (the "Commission") will convene a hearing to consider the approval of this proposed settlement between Staff of the Commission ("Staff") and the respondent Mark Kassirer ("Kassirer") including the making of an Order pursuant to subsection 127(1) and section 127.1 of the *Securities Act*, R.S.O. 1990, c. S.5 (the "Act").

II. Joint Settlement Recommendation

2. Staff agrees to recommend settlement of an intended proceeding respecting Kassirer in accordance with the terms and conditions described below. Kassirer consents to the making of an Order against him in the form attached as Schedule "A" based on the facts set out in Part III of this Settlement Agreement.

III. Statement of Facts

Acknowledgement

3. Solely for the purposes of this proceeding, and of any other proceeding commenced by a securities regulatory agency, Staff and Kassirer agree with the facts set out in paragraphs 4 through 34.

Phoenix Research and Trading Corporation

4. Phoenix Research and Trading Corporation ("Phoenix Canada") is a company incorporated pursuant to the laws of Ontario. During the material time, Phoenix Canada was registered with the Commission as an investment counsel and portfolio manager pursuant to the Act. Phoenix Canada's registration was voluntarily suspended in May 2000 due to its difficulties in filing audited financial statements and maintaining insurance.

5. Pursuant to a services agreement with Phoenix Research and Trading (Bermuda) Limited ("Phoenix Bermuda"), Phoenix Canada provided investment advisory and portfolio management services to several entities including the Phoenix Fixed Income Arbitrage Limited Partnership ("PFIA LP"), the Phoenix Equity Arbitrage Limited Partnership ("PEA LP"), Phoenix Fixed Income Arbitrage Fund Limited, Phoenix Fund Limited, Phoenix Equity Arbitrage Fund Limited and Phoenix Alternative Strategies Fund Limited.

6. Unitholders invested in Phoenix Fund Limited, Phoenix Fixed Income Arbitrage Fund Limited and Phoenix Alternative Strategies Fund Limited (collectively, the "Feeder Funds"). The Feeder Funds (and other investors) invested in units of PFIA LP and PEA LP. The Phoenix Hedge Fund Limited Partnership, a TSE-listed hedge fund, also held units of PFIA LP and PEA LP.

7. Kassirer was the Chair of Phoenix Canada. During the material time, Kassirer mistakenly believed that he was registered with the Commission as an investment counsel and portfolio manager pursuant to the Act. Currently, Kassirer is the sole registered officer of Kassirer Asset Management Corporation ("KAMC"). KAMC is registered with the Commission as an investment counsel and portfolio manager pursuant to the Act.

8. Ronald Mock ("Mock") was the CEO and President of Phoenix Canada. During the

material time, Mock was registered with the Commission as an investment counsel and portfolio manager pursuant to the Act. Mock also was the company's registered supervisory procedures officer.

9. Blair Taylor ("Taylor") is a chartered accountant. From July 1997 to October 1999, Taylor was Phoenix Canada's Director of Operations and Finance. In November 1999, he was appointed the CFO. Taylor never was a registered officer of Phoenix Canada.

10. During the material time, Stephen Duthie ("Duthie") was a senior fixed income trader with Phoenix Canada. Duthie has never been registered with the Commission in any capacity.

PFIA LP's Long Position in U.S. Treasury Notes

11. PFIA LP was a hedge fund. Its investment objective was to maximize returns by pursuing professionally-managed fixed income market neutral and arbitrage investment trading strategies. Such trading strategies are designed to reduce exposure to market direction. PFIA LP held investments in U.S. dollars, Canadian dollars and Euros.

12. From the Fall of 1998 through early January 2000, Duthie was responsible for PFIA LP's U.S. dollar portfolio. In the course of trading such portfolio, Duthie exercised discretion as to the specific fixed income securities he bought and sold on behalf of PFIA LP.

13. As of January 4, 2000, PFIA LP held a \$3.3 billion U.S. long position in 6% U.S. treasury notes due August 15, 2009 (the "UST Notes"). The UST Notes represented PFIA LP's entire U.S. dollar portfolio. The UST Notes had been financed by repurchase agreements ("repos"). The UST Notes were not hedged. Such Notes were contrary to the investment guidelines and restrictions of PFIA LP.

14. The Bank of New York informed Phoenix Canada on January 4, 2000 that the latter was in a significant overdraft position (in excess of \$50 million U.S.) The UST Notes caused the overdraft position. As a result, Phoenix Canada was forced to liquidate all of PFIA LP's assets. A loss to PFIA LP of over \$120 million was sustained due to the UST Notes.

15. On January 5, 2000, Phoenix Canada contacted Staff and informed it of the problem with the UST Notes. Phoenix Canada promptly retained a forensic accounting firm to prepare a report respecting the UST Notes.

The Management of Phoenix Canada

16. Phoenix Canada's fixed income arbitrage business was headed by Mock. In connection with such business, Mock managed the Operations Group, comprising the CFO (Taylor), the Operations Manager and the Settlement Clerk. The fixed income traders, including Duthie, reported to Mock. The Research and Risk Manager and Systems Support also reported to Mock (the former only as it related to Phoenix Canada's fixed income arbitrage activity).

17. Kassirer managed Phoenix Canada's equity arbitrage business. No one involved in Phoenix Canada's fixed income arbitrage business reported directly to Kassirer.

18. Taylor was the Director of Operations and Finance and then the CFO of Phoenix Canada. He was the most senior person in the Operations Group. Taylor's duties included the direct supervision of the Operations Manager and the Settlement Clerk.

PFIA LP's U.S. Dollar Portfolio

19. Phoenix Canada management informs Staff that, between January 1999 and early January 2000, Duthie was authorized to engage in a low risk, matched book trading strategy of repos and open reverse repurchase agreements ("open reverse repos") in U.S. treasury benchmark issues. Duthie did not engage, however, in such a trading strategy. Rather, he accumulated unhedged long bond positions.

20. Management relied only on Duthie's representations that the UST Notes (and other long bonds reported during the material time) were open reverse repos (the "purported open reverse repos").

21. Within one day of being informed by the Bank of New York that PFIA LP was in a significant overdraft position, Phoenix Canada discerned that the UST Notes were long bonds and not the purported open reverse repos.

22. The purported open reverse repo transactions fell outside the scope of controls and procedures then in place at Phoenix Canada. Phoenix Canada failed to:

(i) establish, implement and monitor appropriate alternative controls and procedures respecting the purported open reverse repo transactions;

(ii) maintain the books and records necessary for the proper recording of the purported open reverse repo transactions; and

(iii) segregate duties relating to the purported open reverse repos.

As a result of these failures, the true nature of the UST Notes was not detected by management.

23. Phoenix Canada's method of capturing Duthie's trades in the purported open reverse repos was inappropriate and unreliable. Phoenix Canada's computer trading system ("Alydia") was not designed to record open repos or open reverse repos. Thus, all trades by Duthie in the purported open reverse repos were entered into the (long) bond module of Alydia. Phoenix Canada then made two manual adjustments based solely on Duthie's representations. This method of recording the purported open reverse repos was fundamentally flawed.

24. Phoenix Canada prepared, on a daily basis, a value at risk ("VAR") report. The information used to create the VAR report was pulled from the information inputted to Alydia. Phoenix Canada adjusted the VAR report program so that the purported open reverse repos (entered as long bonds) were treated as short term long bonds (which they were not) and their risk assessed accordingly. This adjustment was inaccurate and based solely on Duthie's representations as to the existence of the purported open reverse repos and the length of time such repos would be held.

25. Further, Phoenix Canada relied exclusively on Duthie to assign a "price" to the purported open reverse repos (entered as long bonds) to adjust the net income. The "price" assigned to the purported open reverse repos was unsubstantiated and unreliable.

26. Phoenix Canada failed to:

(i) maintain any record of the original trades of the purported open reverse repos;

(ii) segregate PFIA LP's U.S. bond inventory between long bonds and purported open reverse repos;

(iii) make the accounting adjustments necessary to accurately record the purported open reverse repos; and

(iv) maintain and retain any documentation respecting the calculation of the adjusted "price" of the purported open reverse repos.

As a result of these failures, the true nature of the UST Notes remained undetected by Phoenix Canada.

27. Moreover, Phoenix Canada failed to segregate duties by:

(i) relying solely on the representations of Duthie to allocate PFIA LP's U.S. bond inventory between long bonds and open reverse repos;

(ii) permitting Duthie to execute trades on behalf of PFIA LP respecting the purported open reverse repos and make the net income adjustment; and

(iii) permitting Duthie to access collateral by virtue of his participation in cash management activities while engaged in his own profit and loss activities.

As a result of these failures, the true nature of the UST Notes remained undetected by Phoenix Canada.

28. Phoenix Canada reported incorrect information respecting the purported open reverse repos to the Bank of Bermuda, Phoenix Bermuda and the beneficial owners of PFIA LP. Phoenix Canada consistently reported the purported open reverse repos as long bonds.

29. Further, the accumulation of the UST Notes contravened PFIA LP's investment objectives and restrictions and thus, the Notes were not a suitable investment for PFIA LP.

Kassirer's Conduct

30. Kassirer failed to supervise adequately and provide oversight of Phoenix Canada's conduct respecting the UST Notes, the purported open reverse repos and Duthie's activities.

31. As the Chair, Kassirer failed to monitor adequately the overall business of Phoenix Canada, including its risk controls. Among other things, Kassirer did not make appropriate and adequate inquiries of other Phoenix Canada management and staff respecting the VAR report and the adjustments made to that report to reflect Duthie's activities.

32. By the end of 1999, PFIA LP's U.S. dollar portfolio was invested entirely in the purported open reverse repos. Given the concentration in, and the size and significance of, Duthie's portfolio, Kassirer failed to make sufficient efforts to understand the true nature of Duthie's activities.

33. Kassirer's conduct as described in paragraphs 30 through 32 was contrary to the public interest.

34. Kassirer co-operated with Staff in its investigation concerning the UST Notes.

IV. Terms of Settlement

35. Kassirer agrees to the following terms of settlement:

(i) The making of an Order:

(a) approving this Settlement Agreement;

(b) requiring KAMC to submit to a review by Deloitte & Touche Inc. of current controls and procedures respecting its trading and accounting systems to ensure compliance with applicable securities law. The review shall be at Kassirer's or KAMC's expense. The review shall be completed by no later than September 30, 2002;

(c) a report of the findings of the review described in paragraph (i)(b) above, including any deficiencies, shall be submitted to the Commission to the attention of the Director, Capital Markets and Kassirer concurrently. KAMC shall institute the necessary changes to rectify the deficiencies reported by Deloitte & Touche Inc. by no later than October 31, 2002;

(d) imposing terms and conditions on the registration of Kassirer namely that Kassirer pass the Partners, Directors and Officers (PDO) examination by no later than December 15, 2002; and

(e) reprimanding Kassirer; and

(ii) Kassirer will make a payment by certified cheque to the Commission in the amount of \$10,000 respecting the costs of the Commission's investigation.

V. Staff Commitment

36. If this settlement is approved by the Commission, Staff will not initiate any other proceeding under the Act against Kassirer respecting the facts set out in Part III of this Settlement Agreement.

VI. Approval of Settlement

38. Counsel for Staff or for Kassirer may refer to any part, or all, of this Settlement Agreement at the Settlement Hearing. Staff and Kassirer agree that this Settlement Agreement will constitute the entirety of the evidence to be submitted at the Settlement Hearing.

39. If this settlement is approved by the Commission, Kassirer agrees to waive his rights to a full hearing, judicial review or appeal of the matter under the Act.

40. Staff and Kassirer agree that if this settlement is approved by the Commission, they will not make any public statement inconsistent with this Settlement Agreement.

41. If, for any reason whatsoever, this settlement is not approved by the Commission, or an order in the form attached as Schedule "A" is not made by the Commission;

(i) this Settlement Agreement and its terms, including all discussions and negotiations between Staff and Kassirer leading up to its presentation at the Settlement Hearing, shall be without prejudice to Staff and Kassirer;

(ii) Staff and Kassirer shall be entitled to all available proceedings, remedies and challenges, including proceeding to a hearing of the allegations in the Notice of Hearing

and Statement of Allegations of Staff, unaffected by this Settlement Agreement or the settlement discussions/negotiations;

(iii) the terms of this Settlement Agreement will not be referred to in any subsequent proceeding, or disclosed to any person except with the written consent of Staff and Kassirer, or as may be required by law; and

(iv) Kassirer agrees that he will not, in any proceeding, refer to or rely upon this Settlement Agreement, the settlement discussions/negotiations or the process of approval of this Settlement Agreement as the basis of any attack on the Commission's jurisdiction, alleged bias or appearance of bias, alleged unfairness or any other remedies or challenges that may otherwise be available.

VII. Disclosure of Settlement Agreement

42. Except as permitted under paragraph 38 above, this Settlement Agreement and its terms will be treated as confidential by Staff and Kassirer until approved by the Commission, and forever if, for any reason whatsoever, this settlement is not approved by the Commission, except with the written consent of Staff and Kassirer, or as may be required by law.

43. Any obligations of confidentiality shall terminate upon approval of this settlement by the Commission.

VIII. Execution of Settlement Agreement

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

45. A facsimile copy of any signature shall be as effective as an original signature.

June 14, 2002.

"Mark Kassirer"

Mark Kassirer

June 13, 2002.

"Michael Watson"

Staff of the Ontario Securities Commission

Per: Michael Watson