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Commission

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Citation: TCM Investments Ltd. (Re), 2017 ONSEC 35  
Date: 2017-10-11

**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  
(Section 127 of the *Securities Act*, RSO 1990, c S.5)**

**Hearing:** September 27, 2017

**Decision:** October 11, 2017

**Panel:** Timothy Moseley Chair of the Panel

**Appearances:** Matthew Britton For Staff of the Commission  
Raphael Eghan

No one appearing for the respondents

## TABLE OF CONTENTS

I.	OVERVIEW .....	1
II.	PRELIMINARY MATTERS .....	1
	A. Related proceeding.....	1
	B. This proceeding .....	2
III.	BACKGROUND FACTS.....	2
	A. Introduction .....	2
	B. The Respondents .....	2
	C. Investors .....	3
IV.	ANALYSIS.....	4
	A. Introduction .....	4
	B. Did TCM engage in the business of trading in securities?.....	4
	C. Did TCM illegally distribute securities?.....	4
	D. Did the other Respondents engage in acts in furtherance of trades? .....	5
	E. Offers to cover losses .....	5
V.	CONCLUSION.....	6

## REASONS AND DECISION

### I. OVERVIEW

[1] Staff alleges that from January 1, 2012, to July 31, 2017 (the **Material Time**):

- TCM Investments Ltd., carrying on business as OptionRally (**TCM**),
- LFG Investments Ltd. (**LFG**),
- AD Partners Solutions Ltd. (**AD Partners**), and
- InterCapital SM Ltd. (**InterCapital**),

collectively referred to as the **Respondents**, engaged in the business of trading binary options without being registered. Staff alleges that the trading was a distribution of securities in circumstances where no preliminary prospectus or prospectus was filed and receipted. Staff submits that this conduct therefore contravened Ontario securities law.

[2] At the hearing of the merits of Staff's allegations, the Respondents did not appear. Staff adduced evidence that established the alleged contraventions. At the conclusion of the hearing, I gave an oral decision to that effect and advised that reasons would follow. These are my reasons.

### II. PRELIMINARY MATTERS

#### A. Related proceeding

[3] On May 10, 2017, the Ontario Securities Commission issued a temporary order against the Respondents.<sup>1</sup> The temporary order was issued because it appeared to the Commission that the Respondents may have contravened Ontario securities law by:

- a. trading securities and advising without registration and without an applicable exemption, contrary to subsection 25(1) of the *Securities Act*<sup>2</sup> (the **Act**); and
- b. trading securities without a prospectus having been filed and receipted as required, contrary to subsection 53(1) of the Act; and
- c. perpetrating a fraud, contrary to clause 126.1(1)(b) of the Act.

[4] The temporary order provided that all trading in any securities by the Respondents was to cease, and that the exemptions contained in Ontario securities law no longer applied to the Respondents.

[5] On May 24, the Commission held a hearing to consider Staff's request to extend the temporary order. Staff properly served the Notice of Hearing and the temporary order on the Respondents but none of them communicated with Staff or appeared at the hearing. Pursuant to Rule 7.1 of the *Ontario Securities Commission Rules of Procedure*<sup>3</sup> and subsection 7(1) of the *Statutory Powers*

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<sup>1</sup> *Re TCM Investments Ltd.* (2017), 40 OSCB 4636.

<sup>2</sup> RSO 1990, c S.5.

<sup>3</sup> (2014), 37 OSCB 4168.

*Procedure Act*,<sup>4</sup> the hearing proceeded in the absence of the Respondents. The Commission extended the temporary order.<sup>5</sup>

- [6] The Commission extended the temporary order again on June 13.<sup>6</sup> The portion of the temporary order with respect to exemptions expired on July 7. On July 6, the portion of the temporary order prohibiting the Respondents from trading in securities was extended to September 28, the day following the merits hearing in this proceeding.<sup>7</sup>

#### **B. This proceeding**

- [7] This proceeding was commenced on August 25, 2017, when the Secretary to the Commission issued a Notice of Hearing in relation to Staff's Statement of Allegations dated August 24. The Notice of Hearing set September 26, 2017, as the hearing date.
- [8] Staff properly served the Notice of Hearing and Statement of Allegations on the Respondents, none of whom communicated with Staff or appeared at the hearing on September 26. The Commission was not in a position to proceed with the hearing on that day so issued an order providing that the merits hearing would commence the following day, September 27. On that day, the hearing proceeded in the absence of the Respondents.

### **III. BACKGROUND FACTS**

#### **A. Introduction**

- [9] At the merits hearing in this proceeding, Staff filed the May 23, 2017, affidavit of Steve Carpenter, an investigator in the Commission's Enforcement Branch. The same affidavit had previously been filed in support of Staff's request to extend the temporary order. Staff also called Mr. Carpenter to give oral evidence. No other evidence was adduced.
- [10] I accept all of Mr. Carpenter's evidence.

#### **B. The Respondents**

- [11] The Respondent TCM is a United Kingdom corporation that operates a website using the name "**OptionRally**". That website indicates that TCM is authorized and regulated by the International Financial Services Commission of Belize. As of May 3, 2017, however, TCM is no longer licensed by that authority.
- [12] OptionRally provides a platform for trading binary options, the reference assets for which include stocks, indices and commodities. Investors are invited to open accounts with OptionRally, following which the account holders may elect to purchase binary options using funds debited from their accounts.
- [13] The Respondent LFG is the principal on behalf of OptionRally, in an affiliate program through which investors could be compensated for referring new clients to OptionRally.
- [14] The Respondent AD Partners is identified on the OptionRally website as a United Arab Emirates-based potential recipient of funds deposited by investors.

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<sup>4</sup> RSO 1990, c S.22.

<sup>5</sup> *Re TCM Investments Ltd.* (2017), 40 OSCB 4838.

<sup>6</sup> *Re TCM Investments Ltd.* (2017), 40 OSCB 5140.

<sup>7</sup> *Re TCM Investments Ltd.* (2017), 40 OSCB 6055.

[15] The Respondent InterCapital is a United Kingdom corporation. According to the OptionRally website, InterCapital provides clearing and billing services to OptionRally.

[16] During the Material Time, none of the Respondents was registered with the Commission. All four Respondents were engaged together in the sale of binary options in Ontario.

### **C. Investors**

[17] Since May 2014, the Commission's Inquiries and Contact Centre received more than 30 complaints or enquiries regarding OptionRally. More than 20 of the complainants invested an aggregate of approximately \$300,000. Those figures include investments by 14 Ontario residents.

[18] Mr. Carpenter gave evidence, either in his affidavit or orally, about information received from various Ontario residents, including:

- a. E.E., who invested US\$3,000 with OptionRally in October 2015;
- b. D.T., who opened an OptionRally account in April 2016 after speaking to a representative by telephone;
- c. M.B., who:
  - i. paid US\$250 to OptionRally in April 2016;
  - ii. received a telephone call several days later from an OptionRally representative pressuring him to make a larger deposit;
  - iii. paid an additional US\$2,000 to OptionRally;
  - iv. permitted an OptionRally representative to take remote control of her computer in order to enter trades on M.B.'s behalf on the OptionRally trading platform; and
  - v. was directed by the OptionRally representative on at least one occasion to make specific trades;
- d. H.B., who opened an OptionRally account in May 2016 after speaking to a representative by telephone, and who deposited approximately \$20,000;
- e. N.A., who complained in June 2016 that OptionRally representatives convinced him to invest over \$100,000, all but \$58 of which was lost;
- f. G.B., who advised in March 2017 that he had invested \$250 with OptionRally by way of a charge to his credit card;
- g. D.A., who had invested \$50,000 with OptionRally; and
- h. C.G., who had invested \$50,000 with OptionRally.

[19] At least one investor sent funds to OptionRally through AD Partners.

[20] Most investors reported having lost all or substantially all of their funds. As far as Mr. Carpenter knows, no investor experienced a net gain.

## **IV. ANALYSIS**

### **A. Introduction**

[21] The evidence shows that TCM was the principal actor in the matters alleged by Staff. I begin the analysis by considering TCM's activities, and whether those activities contravene Ontario securities law. I then consider the role of the other three Respondents.

### **B. Did TCM engage in the business of trading in securities?**

[22] Staff's allegations require consideration of whether the binary options offered for sale by the Respondents are securities, and if so whether the Respondents have engaged in the business of trading in those securities.

[23] Binary options are all-or-nothing bets by the investor. Typically, and in the case of the OptionRally binary options, the bet is successful if a reference asset, such as a share, commodity or currency, meets one or more predetermined conditions at a specified time; for example, if the price of a share of a particular issuer will be above a specified amount on a certain date. Generally, binary options settle in cash if they are successful. A binary option does not provide for delivery of the reference asset.

[24] The binary options offered by the Respondents meet the definition of "investment contract", and were therefore securities under paragraph (n) of the definition of "security" in subsection 1(1) of the Act. The term "investment contract" is not defined in the Act, but previous Commission decisions have consistently followed the Supreme Court of Canada decision in *Pacific Coast Coin Exchange v Ontario (Securities Commission)*,<sup>8</sup> and held that an investment contract will be found where, as in this case:

- a. there is an investment of funds with a view to profit;
- b. in a common enterprise; and
- c. the profits are to be derived solely from the efforts of others.<sup>9</sup>

[25] TCM, using the name OptionRally, directly solicited transactions in the binary options, and regularly undertook activities similar to those of a registrant by offering the binary options for sale. OptionRally was being remunerated for this activity, and as a result I conclude that OptionRally meets the test set out in Part 1.3 of Companion Policy NI 31-103CP *Registration Requirements, Exemptions and Ongoing Registrant Obligations*. OptionRally was engaged in the business of trading.

### **C. Did TCM illegally distribute securities?**

[26] Subsection 53(1) of the Act prohibits any person or company from trading in a security if the trade would be a distribution of the security, unless a preliminary prospectus and a prospectus have been filed and receipts have been issued for them.

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<sup>8</sup> [1978] 2 SCR 112.

<sup>9</sup> See, e.g., *Re Black Panther Trading Corp.* (2017), 40 OSCB 1115 at paras 83-84.

- [27] The binary options sold by TCM had not previously been issued. Each trade in those binary options was therefore a “distribution” as that term is defined in subsection 1(1) of the Act. No preliminary prospectus or prospectus was filed.
- [28] As a result, each trade of a binary option by TCM contravened subsection 53(1) of the Act.

**D. Did the other Respondents engage in acts in furtherance of trades?**

- [29] Subsection 1(1) of the Act defines “trade” to include “any act, advertisement, solicitation, conduct or negotiation directly or indirectly in furtherance of”, among other things, any sale or disposition of a security. Staff alleges that the respondents LFG, AD Partners and InterCapital all played a role in TCM’s trading of binary options, and therefore that those respondents engaged in acts in furtherance of the trades.
- [30] As noted above, LFG was the principal in an OptionRally affiliate program, through which investors could be compensated for referring other investors to OptionRally. In addition, investor E.O. reported to the Commission’s Inquiries and Contact Centre that she had been advised that LFG was OptionRally’s “registrant”.
- [31] AD Partners accepted investor funds on behalf of OptionRally, according to the OptionRally website. At least one investor sent funds through AD Partners.
- [32] Finally, with respect to InterCapital, at least one investor, M.B., had his OptionRally payments charged directly to InterCapital. In addition, InterCapital was described on the OptionRally website as providing clearing and billing services.
- [33] I find that each of these three Respondents committed acts in furtherance of the prohibited trades, and that they thereby committed the same contraventions as found against TCM in paragraphs [25] and [28] above.

**E. Offers to cover losses**

- [34] Some of the evidence adduced by Staff described instances of OptionRally investors who had lost money, receiving unsolicited contacts from apparently unrelated parties seeking their business. When the investors told these parties that the investors had lost money through OptionRally, the parties attempted to persuade the investors to deposit money with them. The parties promised to facilitate trading that would allow the investors to make up their losses.
- [35] To Staff’s knowledge, there is no commonality among the names of individuals or entities who contacted investors for this purpose. Despite that, Staff points to the pattern of these “recovery schemes” and submits that one ought to be suspicious about the correlation between investor losses and approaches by the third parties. Staff also notes that some investors (the identities of whom were not specified) were asked to deposit more money or to join a class action lawsuit against OptionRally.
- [36] Staff urges the conclusion that the parties are connected to OptionRally and that these offers to help the investors recoup their losses were nothing more than further attempts to get more money from the OptionRally victims.

[37] Staff's suspicion is reasonable and may be correct. However, there are other reasonable possibilities, including that the investors' information was sold to these other parties. I am not prepared to find, on a balance of probabilities, that any of the Respondents was in fact connected to these subsequent offers to help the investors. There is no direct evidence of any such connection, and the circumstantial evidence is not substantial enough to support that conclusion. I decline to engage in the speculation that would be required in order to accede to Staff's submission on this point.

**V. CONCLUSION**

[38] For the reasons set out above, I find that each of the four Respondents contravened subsection 25(1) of the Act by engaging in the business of trading in securities without being registered, and that they contravened subsection 53(1) of the Act by conducting illegal distributions of the securities.

[39] As I ordered following the conclusion of the merits hearing,<sup>10</sup> the hearing on sanctions and costs will be held on November 15, 2017, at 10:00 am.

Dated at Toronto this 11<sup>th</sup> day of October, 2017.

*"Timothy Moseley"*

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Timothy Moseley

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<sup>10</sup> *Re TCM Investments Ltd.* (2017), 40 OSCB 8044.