



Ontario
Securities
Commission

Commission des
valeurs mobilières
de l'Ontario

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Citation: Assante Capital Management Ltd. (Re), 2017 ONSEC 45
Date: 2017-12-21
File No. 2017-72

**IN THE MATTER OF
ASSANTE CAPITAL MANAGEMENT LTD. and
ASSANTE FINANCIAL MANAGEMENT LTD.**

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

Hearing: December 21, 2017

Reasons: December 21, 2017

Panel: Philip Anisman
AnneMarie Ryan
Robert P. Hutchison
Commissioner and Chair of the Panel
Commissioner
Commissioner

Appearances by: Michelle Vaillancourt
Matthew Scott
Todd Prendergast
For Staff of the Commission
For Assante Capital Management
Ltd. and Assante Financial
Management Ltd.

REASONS FOR APPROVAL OF SETTLEMENT

The following reasons have been prepared for publication in the Ontario Securities Commission Bulletin, based on the reasons delivered orally in the hearing and approved by the panel, to provide a public record.

- [1] This is the tenth no-contest settlement brought before the Ontario Securities Commission since it determined to permit such settlements in 2014.¹ It is the eighth relating to excessive fees charged to clients as a result of a registrant's inadequate control and supervisory procedures.
- [2] The settlement agreement dated December 18, 2017 (the "Settlement Agreement") states that between August 1, 2011 and May 5, 2017, clients of Assante Capital Management Ltd. and Assante Financial Management Ltd. (the "Assante Dealers") who invested in proprietary mutual funds managed by the Assante Dealers' indirect parent corporation, CI Investments Inc. ("CII"), were charged a higher management expense ratio ("MER") than they were eligible to receive in an equivalent proprietary mutual fund for which they qualified because of inadequacies in the Assante Dealers' systems of controls and supervision (the "MER Systems Deficiency").²
- [3] Following publication of the first such settlement in November, 2014,³ the Assante Dealers conducted a review of their internal practices and procedures and reported their findings to staff of the Commission ("Staff"). This prompted an investigation by Staff, with which the Assante Dealers fully cooperated and which led to the discovery and reporting of the MER Systems Deficiency and to the Settlement Agreement between Staff and the Assante Dealers, approval of which is sought on this application.
- [4] The Settlement Agreement states Staff's conclusion that certain clients of the Assante Dealers were not advised of their eligibility to invest in a mutual fund with a lower MER because the Assante Dealers failed to establish, maintain and apply control and supervisory procedures sufficient to ensure that the Assante Dealers and individuals employed by them complied with securities laws, including their obligation to deal fairly with clients with regard to fees, and to identify and correct such non-compliance in a timely manner, which failure was contrary to section 11.1 of National Instrument 31-103 - *Registration Requirements, Exemptions and Ongoing Registrant Obligations* ("NI 31-103") and the public interest.⁴
- [5] The Assante Dealers neither admit nor deny the accuracy of the facts and conclusions in the Settlement Agreement. Staff states that these facts and conclusions are true and recommends that the Commission approve the Settlement Agreement.⁵

¹ See OSC Staff Notice 15-702 - *Revised Credit for Cooperation Program* (2014), 37 OSCB 2583 ("Staff Notice 15-702").

² Settlement Agreement, para. 5; the funds and the MER Systems Deficiency are described in paras. 16-24.

³ Settlement Agreement, para. 12; see *Re TD Waterhouse Private Investment Counsel Inc.* (2014), 37 OSCB 10742 (the "TD Settlement").

⁴ Settlement Agreement, paras. 27-28.

⁵ Settlement Agreement, paras. 5, 8(a) and 9.

- [6] Because it involves two public interest determinations, approval of a no-contest settlement has been said to be difficult to obtain.⁶ As with all settlements, the agreed sanctions must be within a reasonable range of appropriateness in light of the conduct described in the settlement agreement.⁷ In addition, a no-contest settlement must satisfy the criteria outlined in Staff Notice 15-702.⁸ The Settlement Agreement meets both standards and, taken as a whole, is fair and reasonable.⁹
- [7] The panel has determined that approval of the Settlement Agreement with the Assante Dealers is in the public interest for the following reasons:
- (a) Staff has not found, and did not allege, any dishonesty on the part of the Assante Dealers;¹⁰
 - (b) the Assante Dealers voluntarily undertook an internal review following the TD Settlement, promptly self-reported the deficiencies they discovered in this review and “provided prompt, detailed and candid cooperation” during Staff’s investigation. At Staff’s request, they also conducted an extensive additional review to discover any similar deficiencies concerning qualifications for a lower MER and excessive payment of fees by clients, and advised Staff there were none.¹¹ As a result, the Settlement Agreement appears to address all harm to clients with respect to such excessive fee payments;
 - (c) the Assante Dealers have engaged in significant remediation by implementing CII’s preferred pricing program (“CIPP”) in May, 2017, which ensures that clients automatically receive a lower MER as soon as they qualify for one, without any action having to be taken by an Assante adviser or the client;¹²
 - (d) the Assante Dealers agreed to “pay appropriate compensation” to clients and former clients who were harmed by the MER Systems Deficiency and have paid \$3,600,000 to clients and former clients in accordance with a plan developed by an independent third party and described in the Settlement Agreement (the “Compensation Plan”), which compensation includes an amount representing the time value of monies owed to clients. Of the amount they anticipated paying, approximately \$246,000 remains unpaid;¹³
 - (e) the Compensation Plan ensures that the Assante Dealers will not retain any benefit from the excess fees charged to clients and former clients. *De minimis* amounts of \$25 or less payable to a client (totalling \$1,934) and funds payable to clients who cannot be located after the search process

⁶ *Re BMO Nesbitt Burns Inc.* (2017), 40 OSCB 57, para. 16; *Re RBC Dominion Securities Inc.* (2017), 40 OSCB 5551, para. 13.

⁷ *Re Sentry Investments Inc.* (2017), 40 OSCB 3435, para. 6.

⁸ Staff Notice 15-702, paras. 16-17.

⁹ *Re Ernst & Young LLP* (2014), 37 OSCB 9227, para. 7.

¹⁰ Staff Notice 15-702, para. 20(a).

¹¹ Settlement Agreement, paras. 8(b)(iii)-(iv) and (viii); Staff Notice 15-702, paras. 17(a) and (b).

¹² Settlement Agreement, para. 8(b)(ix); Staff Notice 15-702, paras. 17(d) and (f).

¹³ Settlement Agreement, paras. 8(b)(v)-(vi) and 20; Staff Notice 15-702, paras. 17(c) and (e).

described in the Settlement Agreement will be donated to United Way Financial Literacy Programs;¹⁴

- (f) the Compensation Plan provides a process for resolving clients' inquiries and requires regular reporting to a manager or deputy director in the Compliance and Registrant Regulation Branch of the Commission concerning implementation of the Compensation Plan, including client inquiries;¹⁵
- (g) the Assante Dealers agreed to make voluntary payments to the Commission of \$140,000 for allocation or use for investor protection purposes and \$25,000 for its costs and they have paid these amounts;¹⁶ and
- (h) finally, Staff's declaration that the facts and conclusions in the Settlement Agreement are true is an important element of a no-contest settlement, as stated in Staff Notice 15-702.¹⁷ It provides an additional and necessary basis for concluding that approval of this Settlement Agreement is in the public interest.¹⁸

[8] The Compensation Plan does not form a part of the Settlement Agreement and has not been filed. As is apparent from the Settlement Agreement, it is satisfactory to Staff and was presented to the Commission in a confidential settlement conference before this panel to provide context to help the panel assess the reasonableness of the settlement.¹⁹ The panel has accepted this confidential treatment of the Compensation Plan because the Settlement Agreement describes its substance and because the circumstances of this case are not sufficiently different to alter the process followed in earlier similar no-contest settlements on which the Assante Dealers presumably relied when entering into this Settlement Agreement. The panel emphasizes, however, that reliance should not be placed on this practice being accepted in other circumstances.

[9] As is well recognized, the Commission's disciplinary authority is protective. It is intended to protect investors and our capital markets by preventing conduct that is harmful to them.²⁰ The Settlement Agreement states that it reflects principles of specific and general deterrence; Staff's position is that the Assante Dealers' voluntary and compensatory payments emphasize Staff's expectation that registrants have systems with appropriate controls and supervision that reasonably ensure compliance with securities law, including dealing fairly with clients in all respects, and that enable timely identification and correction of non-compliance.²¹

[10] The panel agrees. The remedial program adopted by the Assante Dealers clearly accomplishes specific deterrence; they have conducted a review to ensure that

¹⁴ Settlement Agreement, para. 8(b)(vii).

¹⁵ Settlement Agreement, paras. 8(b)(vii)(F) and (G).

¹⁶ Settlement Agreement, paras. 8(b)(x)-(xii); Staff Notice 15-702, para. 17(e).

¹⁷ Staff Notice 15-702, para. 16(a).

¹⁸ See *Re Ernst & Young LLP* (2014), 37 OSCB 9227, para. 13; *Re RBC Dominion Securities Inc.* (2017), 40 OSCB 5551, para. 13.

¹⁹ Settlement Agreement, para. 8(b)(vi).

²⁰ See *Securities Act*, R.S.O. 1990, c. S.5, s. 1.1.

²¹ Settlement Agreement, para. 8(b)(xiii).

there are no other instances of MER-related excessive fees paid by their clients and they have adopted the CIPP, which ensures that a similar MER Systems Deficiency cannot occur in the future.

- [11] The Settlement Agreement also reflects general deterrence, as is demonstrated by the history of no-contest settlements relating to similar conduct by other registrants. As is said above, this is the eighth such no-contest settlement. It and the six that immediately preceded it resulted from reviews conducted by registrants who self-reported their findings following the TD Settlement, which was the first. This Settlement Agreement, like the other seven, is indicative of the benefits obtainable through no-contest settlements.
- [12] For all of these reasons, the panel has decided to approve this settlement in the public interest and will issue an order substantially in the form of the order agreed to by Staff and the Assante Dealers and contained in the Appendix "A" to the Settlement Agreement.

Dated at Toronto this 21st day of December, 2017.

"Philip Anisman"

Philip Anisman

"AnneMarie Ryan"

AnneMarie Ryan

"Robert P. Hutchison"

Robert P. Hutchison