

Re Northern Securities

IN THE MATTER OF:

**The Dealer Member Rules of the Investment Industry Regulatory
Organization of Canada (IIROC)**

and

The By-Laws of the Investment Dealers Association of Canada (IDA)

and

**Northern Securities Inc., Victor Philip Alboini, Douglas Michael
Chornoboy and Fredrick Earl Vance**

2012 IIROC 63

Investment Industry Regulatory Organization of Canada
Hearing Panel (Ontario District)

Heard: May 7 - June 1, July 3, 4, 23 and October 11, 12, 2012

Decision: November 10, 2012

Hearing Panel:

Fred Webber (Chair), Ron Smith, F. Michael Walsh

Appearance:

Kathryn Andrews, James D.G. Douglas and Caitlin Sainsbury, for IIROC Staff

Robert Brush, Anna Markiewicz, Jeffrey Kaufman and David Hausman, for the Respondents

Disciplinary Decision

1. Introduction

¶ 1 This is a disciplinary decision following a hearing pursuant to Part 10 of Dealer Member Rule 20 and Section 1.9 of Schedule C.1 to Transition Rule No.1 of IIROC. The hearing was held before a hearing panel of IIROC (“Panel”) commencing on Monday May 7, 2012.

¶ 2 As stated in the Notice of Hearing dated July 29, 2011 (“NOH”), the purpose of the hearing was to determine whether the Respondents have committed the following contraventions that are alleged by IIROC:

Count 1

Between August and November 2008, Alboini, as Ultimate Designated Person and a Registered Representative at NSI, engaged in a trading practice which improperly obtained access to credit for his client, Jaguar Financial Corporation, and in doing so risked the capital of both NSI and its carrying broker, thereby engaging in business conduct unbecoming or detrimental to the public interest, contrary to IIROC Dealer Member Rule 29.1.

Count 2

Between August and November 2008, Vance, as Chief Compliance Officer, failed to adequately supervise Alboini’s trading activity involving Jaguar Financial Corporation and other NSI clients,

contrary to IIROC Dealer Member Rules 1300.1, 1300.2, and 2500.

Count 3

From 2006 to 2010, NSI, Alboini, as Ultimate Designated Person, and Vance, as Chief Compliance Officer, repeatedly failed to ensure that:

(a) NSI corrected deficiencies found in three business conduct compliance reviews and one trading conduct review; and

(b) NSI had adequate policies, procedures and practices in place;

thereby engaging in conduct unbecoming or detrimental to the public interest, contrary to IDA By law 29.1, IIROC Dealer Member Rule 29.1, UMIR 7.1 and UMIR Policy 7.1.

Count 4

Between November 2008 and January 2011, NSI failed to ensure reasonable efforts were made to execute orders at the best price, contrary to UMIR 5.2 and Policy 5.2, and failed to ensure that adequate policies and procedures were in place regarding its best price obligations, contrary to UMIR 7.1 and UMIR Policy 7.1.

Count 5

NSI, Alboini, as Ultimate Designated Person, and Chornoboy, as Chief Financial Officer:

(a) from February 2008 to February 2009, filed or permitted to be filed inaccurate Monthly Financial Reports which failed to account for leasehold improvement costs, thereby misstating NSI's risk adjusted capital, contrary to IDA By-law 17.2 and IIROC Dealer Member Rule 17.2; and

(b) in September 2009, conducted an underwriting without having sufficient capital, thereby creating a risk adjusted capital deficiency contrary to IIROC Dealer Member Rule 17.2.

¶ 3 At the beginning of the hearing IIROC counsel informed the Panel that Counts 4 and 5(b) were not being pursued.

2. Admissions

¶ 4 The following facts, contained in paragraphs 3-11 of the NOH were admitted by the Respondents in their Response dated September 6, 2011 ("Response"):

1. NSI is a Type 2 introducing broker. At all material times, being from 2006 to 2011, NSI was a registrant of the IDA, and subsequently IIROC. At all material times, NSI was also registered as an Investment Dealer and was a Participating Organization of the Toronto Stock Exchange ("TSX") and therefore a Participant under the Universal Market Integrity Rules ("UMIR").

2. NSI is a full service firm with its head office in Toronto, Ontario. NSI carries on retail trading, institutional trading and corporate finance work.

3. Alboini has been NSI's Ultimate Designated Person ("UDP") and its Chief Executive Officer ("CEO") since June 1999. Alboini has also been a Registered Representative ("RR") at NSI since at least 1999.

4. Chornoboy has been NSI's Chief Financial Officer ("CFO") since June 2006 and Vance has been NSI's Chief Compliance Officer ("CCO") since October 2006.

5. At all material times, Alboini, Chornoboy and Vance were registrants of the IDA and, subsequently, IIROC.

6. NSI was at all material times wholly owned by Northern Financial Corporation ("NFC").

7. NFC is a public company and its shares are traded on the TSX. At all material times,

8. Alboini was a shareholder of NFC and its President and CEO.
9. Jaguar Financial Corporation (“Jaguar”) is a publicly traded company whose shares are traded on the TSX. At all material times, NFC and Alboini were shareholders of Jaguar and Alboini was its President and CEO. During the material period, Jaguar opened and held multiple accounts at NSI, and Alboini was the RR for all of those accounts.
10. Chornoboy has been the CFO for NFC since June 2006 and for Jaguar since December 2006.
11. At all material times, Jaguar, NFC and NSI shared their physical premises.

3. Standard of Proof and Credibility

¶ 5 Based upon cases such as *F.H. McDougall*, [2008] S.C.J. No. 54, IIROC must prove its allegations on the balance of probabilities, based on evidence that is “clear, convincing and cogent to satisfy the balance of probabilities test.” Both parties agree that this is the standard to apply in this case and the Respondents emphasized that the burden of proof is on IIROC. The Panel also understands the Respondents’ position that it must be cautious in drawing inferences, particularly where there is conflicting evidence; conflicting testimony may lead to the conclusion that the burden of proof has not been met. It is also well established law that, based on principles of procedural fairness, IIROC must prove each and every element of each Count and cannot raise new issues which are not particulars of the allegations contained in the NOH. These standards have been applied by this Panel in coming to its decisions.

¶ 6 Where there is contradictory evidence offered by witnesses at the hearing, issues of credibility must be assessed. IIROC counsel referred the Panel to the case of *Faryna v. Chorny*, [1951] B.C.J. No.152, as authority for the factors to be taken into account with respect to assessing the credibility of witnesses:

“The test [for determining credibility] must reasonably subject [the witness’] story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions. Only thus can a Court satisfactorily appraise the testimony of quick-minded, experienced and confident witnesses, and of those shrewd persons adept in the half-lie and of long and successful experience in combining skilful exaggeration with partial suppression of the truth.”

¶ 7 The Panel agrees with IIROC counsel’s assertion that, in assessing the credibility of a witness’ evidence, a relevant factor to be considered is what the witness could hope to gain from the testimony and the outcome of the case and that the Panel may also consider the witness’ appearance of sincerity and truthfulness, whether the witness is candid, frank and responsive to questions asked or evasive and hesitant, whether there were inconsistencies in the witness’ testimony, whether the testimony of the witness was contradicted by the evidence of another witness, and whether the witness has previously given a statement that is inconsistent with his or her testimony at trial and whether the personal demeanour of a witness carried the conviction of truth. As stated in *Young Estate v. RBC Dominion Securities*, [2008] O.J. No. 5418, “it is always well to bear in mind the probability or improbability of a witness’ story and to weight it accordingly. That is a sound common sense test. Did his evidence make sense? Was it reasonable? Was it probable?”

¶ 8 In their closing argument, the Respondents expressed their agreement with these principles for assessing witness credibility.

4. Alleged Settlement

¶ 9 In the Response, the Respondents allege that Alboini entered into a settlement with Ms. Maureen Jensen, now the Executive Director of the Ontario Securities Commission and formerly the Senior Vice-President of Surveillance and Compliance at IIROC (“Jensen”), in respect of the matters which ultimately became the subject of this hearing.

¶ 10 Specifically, the Response alleges that on March 26, 2010, Alboini had a conversation with Jensen whereby he gave Jensen his personal commitment that the outstanding issues between NSI and IIROC would be

resolved. Alboini alleges that Jensen responded by indicating that the IIROC enforcement investigation would “go away” if NSI fulfilled this commitment.

IIROC Evidence:

¶ 11 Jensen testified in response to the allegations raised by Alboini.

¶ 12 Jensen testified that she was involved in dealing with NSI’s compliance issues in early 2010 because of ongoing issues with NSI in respect of its Business Conduct Compliance (“BCC”), Trade Compliance Conduct (“TCC”), and Financial Operations and Compliance (“FinOps”) examinations.

¶ 13 Jensen indicated, and her contemporaneous notes reflect, that Alboini called her on or about February 22, 2010 to discuss the ongoing compliance issues. During the telephone call, Alboini indicated that he wished to get together with IIROC Staff. Ms. Jensen testified that, as a result of Alboini’s request, a meeting of the relevant parties at IIROC and NSI was set up. The meeting took place on March 5, 2010. Mike Prior, Murray Lund and Jensen attended on behalf of IIROC, and Vance and Kyler Wells attended on behalf of NSI. Alboini was unable to attend.

¶ 14 At the meeting, NSI committed to resolving outstanding issues with IIROC, including providing IIROC with an updated version of NSI’s policies and procedures as required by IIROC in the 2008 TCC Report

¶ 15 Jensen recalled speaking subsequently to Alboini on March 26, 2010, the day Alboini alleges a settlement was reached. Jensen stated, and her notes reflect, that she and Alboini had a conversation in which Alboini indicated he had settled some litigation in British Columbia, and that the biggest hurdle for NSI was the IIROC compliance issues.

¶ 16 Jensen recalled that Alboini indicated during the call that he wanted to fix NSI’s compliance issues and make the relationship with IIROC work. However, Jensen’s evidence was clear that she never indicated to Alboini that the enforcement investigation would “go away”. She further testified that she has never used those words to anyone under investigation at IIROC, and it is something that she would never say. Moreover, Jensen testified that, in any event, she had no authority on March 26, 2010 to make any investigation “go away”, and that she made it very clear to Alboini that there was a difference between compliance and enforcement, and that her area of concern was compliance. Jensen advised Alboini that if he wanted to discuss enforcement matters, he would need to speak to Paul Riccardi, Senior Vice-President of Enforcement, Policy, and Regulation at IIROC (“Riccardi”).

¶ 17 Jensen’s testimony is corroborated by her notes taken of her telephone conversations with Alboini. Nowhere in Jensen’s notes is there reference to any kind of agreement or settlement reached with Alboini. In contrast, Alboini has no notes of his telephone calls with Jensen. In addition, Alboini has no notes, emails, or memos to his staff indicating that any kind of settlement was reached.

¶ 18 Following the March 26, 2010 call, Jensen’s notes indicate that she had additional discussions with Alboini. These notes corroborate the fact that no settlement agreement had been reached with Alboini. For example, Jensen’s notes of a call on May 18, 2010 indicate that Alboini and Jensen had a further conversation about the outstanding compliance issues, and Alboini was upset that the enforcement investigation was moving forward at this point. Jensen recalled that Alboini inquired as to what could happen with the enforcement investigation, and she responded by indicating that Alboini would have to speak to Riccardi, because the matter was in enforcement. These discussions are reflected in Jensen’s notes of the call.

¶ 19 On May 20, 2010, Alboini received a letter from Bert Noguera, Senior Investigator at IIROC, advising Alboini that he should consider himself personally a subject of the ongoing enforcement investigation. Shortly thereafter, Alboini contacted Riccardi to discuss the ongoing investigations. Riccardi testified that, during that call, Alboini tried to convince Riccardi that NSI was well on its way to resolving its issues, and asked Riccardi for a meeting. According to Riccardi, Alboini further advised that he did not feel it was necessary for IIROC to proceed with its examination of him. Riccardi advised Alboini that he was not familiar with the details of his case but that he would consult within IIROC to determine whether a meeting was appropriate. Riccardi also testified that he advised Alboini that it was unlikely that a meeting would take place prior to Mr. Alboini’s

examination. Riccardi's evidence was that Mr. Alboini did not raise the issue of having reached a settlement with Jensen during this telephone conversation. Riccardi's oral testimony is corroborated by his notes of the call.

¶ 20 On June 14, 2010 Riccardi sent an email to Alboini indicating that as there were several matters relating to NSI under investigation, and in light of the fact that Alboini was to be examined by IIROC shortly, it was his view that it would be premature to meet to discuss the ongoing matters. Riccardi further advised that he would be pleased to meet with Alboini following completion of the investigations.

¶ 21 On June 17, 2010 Alboini, Jensen, and Riccardi had a telephone conversation in which, Jensen and Riccardi both testified, Alboini raised the issue of the alleged settlement agreement. Jensen and Riccardi both testified that this was the first time in any of their telephone calls with him that Alboini had made the claim that there had been any kind of settlement agreement reached between him and Jensen. Riccardi testified that Jensen immediately and emphatically denied to Alboini the existence of any such agreement.

¶ 22 Alboini responded to Riccardi's June 14, 2010 email via email dated June 18, 2010 in which he outlined the settlement he alleges was reached with Jensen. Riccardi responded to Alboini's email on June 20, 2010, indicating "as Ms. Jensen clearly indicated to you in the course of our telephone discussion on June 17, 2010, no such 'understanding' (as described in your email below) exists."

Respondents' Evidence

¶ 23 Alboini's only evidence in relation to the alleged settlement agreement was his oral testimony indicating that Ms. Jensen told him in the telephone conversation of March 26, 2010 that the enforcement investigation would "go away" if he dealt with NSI's outstanding compliance issues. Chornoboy and Vance testified that Alboini advised them that a settlement was reached with Jensen. If this evidence was entered for the purpose of corroborating Jensen's statement regarding a settlement, it is hearsay. While this Panel may receive hearsay evidence under the Rules of Practice and Procedure, it should be given relatively little weight. If it was entered as evidence that Alboini made the statement to them, it amounts to no more than another instance of Alboini asserting that Jensen made the statement. If the evidence proffered by Chornoboy and Vance was put forward simply to bolster the credibility of Alboini's evidence, it amounts to nothing more than oath helping, and should not be admitted, or if admitted, should be ignored. See *R. v. Llorenz* [2000] O.J.No.1885. Respondents' final submissions state that, for the Panel not to accept Alboini's version of the March 26, 2010 conversation, we must conclude that he fabricated his story. That is not true. It may well be that Jensen said something to make Alboini believe there would be a settlement or he may have come to that conclusion on his own. That is mere conjecture. He may well believe that a settlement was offered. Jensen is clear that it was not offered. Whatever the basis on which the testimony of Chornoboy and Vance was admitted, it was certainly overwhelmed by the testimony of Jensen and Riccardi, and the lack of corroborating documentary evidence of a settlement.

¶ 24 Alboini pointed to email correspondence whereby he forwarded Jensen emails between NSI staff and IIROC regarding the outstanding compliance issues as evidence of the alleged settlement agreement. However, Vance and Mr. Lund of IIROC both testified that Vance had made a commitment to IIROC to provide updated policies and procedures prior to the date Alboini alleges the settlement agreement was made. It is clear from both the documentary evidence and the testimony of Vance and Mr. Lund that the updated policies and procedures were required to be provided by NSI in any event, and had been promised to IIROC prior to any alleged settlement.

Panel Decision Re Settlement

¶ 25 Just as the burden of proof is on IIROC to prove the allegations in the various counts, so it is on the Respondents to prove their allegation of a settlement. They have not satisfied this burden. It is the Panel's decision that no settlement was reached and that this hearing should proceed regarding the Counts which IIROC is continuing to pursue, i.e. Counts 1, 2, 3 and 5(a). Our reasons are as follows.

¶ 26 In order for there to be a settlement there must be an agreement to that effect. Alboini testified that there was a settlement reached in the March 26, 2010 conversation with Jensen. On the other hand, Jensen was very

firm in her testimony that there was no settlement agreement and was not moved from that position in cross-examination.

¶ 27 In addition to the plain disagreement between Alboini and Jensen regarding the existence of a settlement, the Panel also relied on the following factors. In applying the principles stated in section 3 above, the Panel's view of Jensen as a witness is that she was honest and forthright in giving her evidence and does not stand to gain from her testimony. Jensen's testimony is corroborated by her notes and by the testimony and notes of Riccardi. In contrast, the Panel found Alboini to be evasive at a number of points in his testimony and his assertion of a settlement is clearly self-serving. He offers as corroboration, only the testimony of Chornoboy and Vance that he told them that there was a settlement, but there is a total absence of documentation corroborating his oral testimony. Alboini took no notes of his call with Jensen, sent no emails to his senior staff advising them that a settlement had been reached, sent no confirmatory email to Jensen setting out the terms of the alleged settlement and did not confirm a settlement in subsequent correspondence with IIROC. The absence of documentation from Alboini corroborating his settlement discussion with Jensen was significant to the Panel. Given the importance of a settlement to NSI and Alboini, Alboini's training as a lawyer, his experience as a senior business person and the number of opportunities he had to send corroborating documentation, it defies credibility that such documentation would not have been sent if there had been a settlement agreement with Jensen.

¶ 28 As stated above, where there is conflicting evidence, a hearing panel must consider whether a witness' story is consistent with the probabilities. In the present case, this Panel agrees with IIROC counsel that the probability is extremely low that Jensen, an individual with experience in both enforcement and compliance as a securities regulator, and at the relevant time having no authority over enforcement investigations, would enter into a verbal settlement with Alboini by saying she would make the investigation "go away". Unlike Alboini Jensen has no personal stake in the outcome of the case, nor does Riccardi. Alboini's response to a question asked by Mr. Brush during Alboini's examination in chief is indicative of the lack of plausibility of Alboini's position. When asked why he did not send Jensen an email confirming the settlement, Alboini replied:

"You know, I thought about doing that but I decided not to and the reason why is that I didn't want to put it in her face. I mean, she had given me a fantastic opportunity to deal with these issues. I gave my personal commitment and I felt that if I sent her an email, you know, it's sort of pushing it to her. I was comfortable with the telephone handshake, the telephone -- to me, it was a telephone agreement. I was comfortable with that."

¶ 29 The explanation offered by Mr. Alboini is not credible, and in the context of all the other available evidence the only conclusion to be reached is that no such settlement agreement was made.

Detrimental Reliance

¶ 30 In the Response, the respondents argue that as a result of the alleged settlement agreement, IIROC is estopped from bringing the within proceedings in relation to Counts 3 and 5. Since the Panel has concluded that there was no such settlement, IIROC is not estopped from bringing the within proceedings..

5. Count 1

¶ 31 Count 1 alleges that:

Between August and November 2008, Alboini, as UDP and RR at NSI, engaged in a trading practice which improperly obtained access to credit for his client, Jaguar, and in doing so risked the capital of both NSI and its carrying broker, thereby engaging in business conduct unbecoming or detrimental to the public interest, contrary to IIROC Dealer Member Rule 29.1.

¶ 32 In order to succeed on this count IIROC must establish all the elements of the Count, viz.

- Alboini, as UDP and RR at NSI
- Engaged in a trading practice

- Which improperly obtained access to credit for Jaguar
- And in so doing risked the capital of both NSI and its carrying broker
- Thereby engaging in conduct unbecoming or detrimental to the public interest, contrary to Dealer Member Rule 29.1.

¶ 33 Each element of Count 1 is dealt with below.

Alboini as UDP and RR at NSI

¶ 34 It is important to note that this count relates only to Alboini as UDP and RR at NSI. Therefore it is his actions, knowledge and state of mind that matter when assessing the other elements of this count. It is also his roles at NSI that are in issue. He wore a number of hats, including senior executive positions at NSI and at companies related to NSI, namely Jaguar, NFC, and Lakeside Steel which play significant roles. As acknowledged by Alboini, those roles may have been in conflict of interest with his roles at NSI, but this count only relates to his roles at NSI.

Engaged in a Trading Practice

¶ 35 The IIROC written argument states that the “essence of the impugned conduct...is that, in or about August 2008, Mr. Alboini began to exploit an opportunity that allowed [Jaguar] access to capital and purchasing power that it did not otherwise have available to it. In essence, Mr. Alboini free-rode on the capital of Penson by using the TA Account to accumulate positions for [Jaguar] when [Jaguar] did not have the funds to pay for the positions. This was done at the expense of NSI who paid the financing costs on the purchases and at significant risk to both Penson and NSI.” The basic factual description of the trading practice is relatively straightforward. As of early July 2008, Jaguar’s sole account at NSI (the “Jaguar Main Account”) was restricted by its carrying broker, Penson Financial Services Canada Inc. (“Penson”), as it had been undermargined for twenty consecutive days. The account had run out of cash and had no marginable securities. When it attempted to buy \$1,259,505 worth of securities of Blue Note Mining Inc. (“Blue Note”), Penson immediately demanded cash payment. Jaguar met this cash demand by selling other securities from the Jaguar Main Account (which was at all times a pro account, being an account in which Alboini, the UDP, CEO and RR at NSI had control and a financial interest) to another client of NSI, which sale was accompanied by an off-book put option which Jaguar granted to the purchaser which had the effect of leaving the downside risk on the Blue Note shares with Jaguar. The sale of other securities reduced its debit cash balance and the account was unrestricted in early August.

¶ 36 In the wake of the Blue Note purchase, between August and November 2008, Alboini began opening separate project accounts for each security Jaguar sought to acquire. Each accumulation of securities was given a code name and treated as a separate project (each a “Jaguar Project”). The Jaguar Projects included the acquisitions of shares of Virtek Vision International Inc. (“Virtek”) and Tiomin Resources Inc. (“Tiomin”) (“Project Vulcan” and “Project Titan,” respectively). Between August and November 2008, Alboini opened ten accounts for Jaguar at NSI (the “Jaguar Project Accounts”). The Jaguar Project Accounts included those bearing numbers 3P6N43E (the “Project Vulcan Account”) and 3PAA11 (the “Project Titan Account”). Alboini was the RR at NSI for each of the Jaguar Project Accounts.

¶ 37 However, instead of buying the securities in the Jaguar Main Account or in the Jaguar Project Accounts neither of which held sufficient funds to make the acquisitions, Alboini placed the orders in the NSI average price accumulation account (the “TA Account”) held at its carrying broker, Penson. NSI later ticketed out, i.e. transferred, the securities to the appropriate Jaguar Project Account, although usually not when an accumulation was completed, but always before month end. This process continued until early November 2008. In some cases Alboini solicited and obtained outside investors to participate in the projects although the accounts remained Jaguar accounts. That is to say, these investors had a beneficial interest in the outcome of the investments. Ultimately, of the 10 project accounts opened during the August to November period, only 3, the Vulcan, Titan and Eagle projects (described in more detail below) had investors other than Jaguar.

¶ 38 The issue is not the trading practice per se but how it fits into the other elements of this count.

Which improperly obtained access to credit for Jaguar

¶ 39 There are two elements to this part of Count 1: (i) whether the trading practice obtained access to credit for Jaguar, and if so, (ii) whether this access to credit was obtained improperly.

Access to credit

¶ 40 It is IIROC's position that the opportunity which Alboini began to exploit (using the TA account for Jaguar purchases rather than the Jaguar Main Account or the Jaguar Project Accounts) "arose because of a gap in the understanding of both NSI and Penson as to their respective obligations to provide margin or capital in respect of purchases in the TA Account." Under the Uniform Type 2 Introducer/Carrier Broker Agreement (the "NSI-Penson Agreement") in effect between NSI and Penson, Penson was responsible for calculation and provision of margin on "client" accounts; NSI had the same responsibility for the principal business carried on for it by Penson. The "gap" in understanding was that Penson viewed the TA account as a principal account of NSI (and therefore had no margin/capital responsibilities), whereas NSI viewed the TA account as a client account (and therefore the margin/capital responsibilities belonged to Penson). The end result was that neither Penson nor NSI provided margin/capital in respect of the TA account during the August-November 2008 period.

¶ 41 The Respondents took the position that Alboini did not exploit this gap and that in fact he "was not aware of any gap in the agreement with Penson, . . . did not engage in any practice to exploit any gap that did exist and [Alboini's] use of the TA Account to obtain financing for Jaguar was neither new nor improper nor did it violate any IIROC rule."

¶ 42 It is important to note that this hearing never determined which of NSI and Penson had the actual legal responsibility to provide regulatory capital for transactions in the TA Account since this issue was not directly addressed by either party. However, it is clear that neither NSI nor Penson were actually putting up regulatory capital in respect of the TA Account during the relevant period.

¶ 43 Although one may well believe on the basis of the evidence that Alboini knowingly exploited this gap, it is the position of the Panel that it is not necessary to decide whether or not Alboini knew about the gap in understanding between NSI and Penson or whether or not he aimed to exploit the gap. The alleged gap relates only to which of NSI or Penson was or should have been putting up regulatory capital for the trades in the TA Account. Alboini knew that NSI was not doing so, and would only be concerned about whether Penson was doing so if they required payment for the securities purchased in the TA Account 3 days after the trade, i.e. on settlement of the trade (on a T+3 basis) as they did in the Jaguar Main Account. He was only concerned about getting Jaguar access to financing for a longer period of time. Respondents asserted that Alboini's use of the TA Account was not new and that payment on a T+3 basis had not previously been required; therefore it is highly likely that he already knew that Penson would not require payment on a T+3 basis in the TA Account; but even if he did not already know that payment on a T+3 basis would not be required, there was no risk to him in trying to gain access to credit by using the TA Account. Once he made the first purchase in the TA Account in respect of Project Vulcan and was not required to pay for the shares on a T+3 basis, he knew that he could continue to get access to credit for Jaguar that it would not have obtained if he had used the Jaguar Main Account or the Jaguar Project Accounts.

¶ 44 If Alboini, as RR had put the various trades directly into the Jaguar Main Account or the Jaguar Project Accounts rather than initially into the TA account and subsequently transferred the securities into the Jaguar Project Accounts as was done, Jaguar would have had to pay for the securities on a T+3 basis. The evidence (see for example, the account summaries and spreadsheet entered in evidence as Exhibit 7) clearly establishes that on various occasions during the period in question it did not have the cash or marginable securities to enable it to do so. By putting the trades initially through the TA Account, Jaguar did not have to pay for the trades until the trades were ticketed out (transferred) to the related project account, sometimes after the accumulation was complete or more usually at the end of the month. This allowed Jaguar additional time to secure the necessary funds to pay for the securities, either on its own or by soliciting investors to participate in the accounts. During the relevant period (August through November 2008), Penson did not require that trades

put through the TA Account be paid for on a T+3 basis. Under the terms of its agreement with NSI, Penson paid for the securities and charged NSI interest on the amount paid for the period until the ticketing out occurred and the securities were paid for by Jaguar. Effectively, Jaguar received free credit for the period from the settlement date to month end and traded without the required regulatory capital during that period. It is clear that Alboini's trading practice gained Jaguar access to credit and thus enabled it to purchase securities which it could not otherwise acquire.

Improper Access to Credit

¶ 45 Therefore it is the Panel's decision that Alboini gained access to credit for Jaguar, but the key issue is whether that access to credit was "improper". In order to make that determination, the Panel looked at the following issues, IIROC arguing that each was an improper use of the TA Account and the Respondents taking the opposite position. It is important to note that IIROC need be successful on only one of these issues for the Panel to conclude that the access to credit was "improper".

(a) Jaguar not creditworthy:

¶ 46 The account statements for the Jaguar Main Account and for the Jaguar Project Accounts as well as the spreadsheet summary of all trading in the accounts contained in Exhibit 7 clearly established that when Alboini arranged to purchase the securities for the various projects, Jaguar did not have the cash or marginable securities to pay for the securities and that Alboini knew that was the case. This is established by the cross-examination testimony of Alboini and Chornoboy and by the trade record documents referred to above. There were securities in the Jaguar Main Account, but these were not marginable and frequently were subject to certain restrictions and valuation issues which were relevant to the issue of the risk to the credit of NSI and Penson (discussed below). Jaguar was not creditworthy by the standards of the investment industry at the time it purchased the securities.

¶ 47 Knowing the creditworthiness of a client before executing trades on its behalf and only executing trades for creditworthy clients is a basic obligation of registered securities dealers and in particular is an obligation of the client's RR. This was admitted by Alboini in his cross-examination on May 25, 2012. If the dealer and the RR allowed non-creditworthy clients to purchase securities, the inability of the client to pay for the securities would materially increase the risk to the broker and its carrying broker, one or both of whom would have to pay for the securities. This risk issue will be dealt with below. It is particularly important to note in this case that the creditworthiness must exist before the trade is executed for the client since, in response to questioning about the creditworthiness of Jaguar, Alboini referred on a number of occasions to being comforted by his ability to raise the amount necessary to pay for the securities from outside investors and by his ability to liquidate other Jaguar assets if necessary, each of which would occur after the trade was executed. However his personal view as to the creditworthiness of Jaguar cannot override the standards applied by the industry, which as RR and UDP, he is obliged to follow.

¶ 48 Penson's concern with client creditworthiness and the obligation of the introducing broker to know the creditworthiness of its client before purchasing securities on its behalf is clear from Penson's Credit Manual revised in 2006 which is part of Exhibit 2. For example, section 2.5 of the manual provides, "Credit verifications are the responsibility of the Introducing Firm....Credit verifications should be processed before clients are allowed to trade." Section 4.0 provides that, "Introducing Firms are responsible to monitor their accounts. Introducing Firms need to ensure accounts are in good standing, and all appropriate documentation is kept up to date." Referring to the credit facility that Penson provides to clients who have signed a margin agreement, section 5.1 provides that "such credit facility is conditional upon the client maintaining margin (collateral) which meets exchange and ...IDA regulations and Penson's own margin requirements..." Section 5.3 provides that "Trading while under-margined will not be permitted. Introducing Firms must ensure that no further trades are executed which increase the amount of the client debt." It is this Panel's opinion that Penson's Credit Manual is in accordance with standard industry practice.

¶ 49 This concern with client creditworthiness is reflected in IIROC Rule 2500 which provides that a new client application form must contain "information necessary to assess suitability, creditworthiness and risk..."

¶ 50 The importance of the client’s creditworthiness is also illustrated by the NSI new client application form (NCAF) which requires client income and asset information under the heading “Information Required by Securities Regulators” and by NSI’s Account Opening policies and procedures which requires completion of “proper documentation”, learning “the essential facts relative to every customer...”, and that the NCAF “must be complete, accurate and signed by the applicant and the IA before the approval process may proceed.”

¶ 51 It is the Panel’s conclusion that Jaguar was not creditworthy when it purchased the securities in the TA Account which were destined for the Jaguar Project Accounts and that Alboini should not have initiated the trades knowing that Jaguar was not creditworthy. This factor alone would be sufficient to establish that Alboini’s gaining access to credit for Jaguar was improper, but the Panel has reviewed each of the other factors.

(b) Alboini’s conflict of interest.

¶ 52 There was a conflict of interest between Alboini’s obligations as UDP, RR and CEO at NSI and his interests as CEO and shareholder at Jaguar. As CEO and a shareholder of Jaguar, Alboini saw opportunities for Jaguar to make money by purchasing the various securities that ultimately ended up in the Jaguar Project Accounts. If Jaguar were successful in these projects Alboini would benefit financially. As UDP, RR and CEO at NSI, it is Alboini’s obligation not to take any action that would knowingly expose NSI’s (or Penson’s) credit to out-of-the-ordinary risks, or breach any IIROC rules or guidelines. In this case, it is the Panel’s conclusion (as outlined in Paragraph 72 - 81 below), that Alboini’s actions in the TA Account on behalf of Jaguar exposed NSI’s credit to out-of-the-ordinary risks.

¶ 53 IIROC Dealer Member Rule 38.5 provides that the UDP must “supervise the activities of the Dealer Member that are directed towards ensuring compliance with [IIROC] rules and applicable securities law requirements...” and must “promote compliance by the Dealer Member, and individuals acting on its behalf, with [IIROC] rules and applicable securities laws.” While IIROC was unable to point to any IIROC rule or securities law that specifically required the UDP or RR to ensure the creditworthiness of clients or not expose the credit of the Dealer Member to unnecessary risks, this was, and remains a basic and obvious obligation, well recognized by industry participants as illustrated by the know-your-client process. Furthermore as UDP and CEO, Alboini owed a fiduciary obligation to NSI to protect the interests of NSI. In this case, Alboini let his interests in making money for Jaguar and himself take precedence over his obligations to NSI, rather than the other way around. This conflict is another factor leading the Panel to conclude that the access to credit was “improper”.

(c) Inappropriate use of TA Account.

¶ 54 NSI’s Policies and Procedures Manual during the relevant period provided that an average price account was to be used:

“...to accumulate stock in inventory in cases where clients do not wish small fills for large orders. These accounts are to be only for institutional accumulation or in the occasional circumstances for a large order from an individual. The trailer of the order must be marked indicating the name of the client and the fact that the trade was completed as an average price trade.”

¶ 55 There was no dispute that this provision applied to the TA Account which was used to accumulate securities for Jaguar which are the subject of Count 1. The issue is whether the use of the account was appropriate.

¶ 56 IIROC argued that Jaguar was not an institutional client as referred to in the Manual, and in support referred to the definitions in the IIROC Dealer Member Rules. The Respondents argued to the contrary, noting that the definition in the Rules was limited to the Rules themselves and that it was inappropriate to import that definition into NSI’s Manual. They also argued that in any event Jaguar fit within the definition of “[a] non-individual with total securities under administration or management exceeding \$10 million”. Alboini testified that all corporations were institutions and that all accumulations in the TA Account for the Jaguar Projects were institutional accumulations. The Panel agrees with the Respondents on this point. There is nothing to prevent NSI from treating Jaguar as an institutional client for the purpose of using the TA Account.

¶ 57 Based on the evidence of the trade records of the TA Account for each project, it appears that the following purchases were made between August and November 2008:

Project Vulcan: 6 in August, and 2 in September;

Project Titan: 8 in September and 20 in October;

Project Eagle: 5 in September and 14 in October;

Project Dragon: 5 in September

Project Tango: 4 in October;

Project Brown: 18 in October;

Project Zion: 3 in October;

Project Mars: 1 in October;

Project Norman: 3 in October;

Project Hunter: 1 in November.

¶ 58 In addition, there were a number of sell orders, cancellations and journal entries.

¶ 59 The Respondents argued that this type of use of the TA Account was a well-established practice at NSI and not something developed just so that Jaguar could take advantage of getting access to credit; furthermore there were no IIROC rules which prohibited the practice and previous IIROC field examinations had reviewed trading in the TA Account on behalf of other NSI clients and raised no objection to the practice. On the first point, it is the Panel's view that the previous use of the TA Account does not, by itself, make the practice appropriate. On the second point, the absence of any IIROC Rule prohibiting the practice is not the same as condoning it. On the last point, the Panel heard no evidence about the nature of the previous field examinations (e.g. the creditworthiness of the client, or the number of individual trades) and cannot conclude that such previous field examinations establish that the trades that are the subject of Count 1 are appropriate.

¶ 60 The NSI manual states that the TA Account must be used for "accumulations...where clients do not wish small fills for large orders." The reasons for such an approach, which is in keeping with industry practice in the Panel's opinion, are to avoid putting one large order into the market which could influence upward the price the buyer might have to pay, to avoid the inconvenience and excessive paperwork which would be required for multiple small orders rather than a single ticket and to facilitate average price fills when an institutional order is to be prorated amongst the clients internal accounts. By its own terms the TA Account was never intended as a source of financing to purchase shares in situations where funds were not available on a T+3 basis. It was IIROC's position that the orders placed by Alboini in the TA Account on behalf of Jaguar were not "large orders" that were worked by the trade desk over an extended period of time, but rather were day orders that were filled seriatim and simply aggregated and assigned an average price for ticketing purposes usually at month end. The trade summary above shows that in some months during the relevant period, very few trades took place.

¶ 61 The Panel agrees with IIROC's position that the orders in the TA Account were not large orders, but were day orders that were accumulated and assigned an average price for ticketing purposes. It is the Panel's conclusion that this trading activity in the TA Account was not in accordance with accepted industry practice regarding the use of client average price accumulation accounts, nor with NSI's manual and was nothing more than Jaguar free-riding on Penson's capital. This was an improper use of the TA Account.

¶ 62 IIROC also took the position that delaying the ticketing out of the TA Account until month end (in most cases) was "contrary to the proper purpose of a price accumulation account" and was therefore improper. The Respondents' position was that the ticketing out process was in accordance with long-standing NSI policy and practice, was often done to "dovetail" with the receipt of investor funds, and was not in contravention of any IIROC rule or notice. The Panel does not agree with the Respondents' position. The fact that the ticketing out process was in accordance with long standing NSI policy and practice, does not make it appropriate.

Dovetailing the ticketing out with anticipated incoming investor funds simply confirms the lack of Jaguar creditworthiness and the additional risk that the investor funds might not in fact be forthcoming. The absence of a specific IIROC rule or notice does not condone the process.

¶ 63 The Panel agrees with the IIROC position. It is industry practice to ticket out when a trade has concluded and to collect funds at that point. If the account is being used for a true accumulation, payment might be delayed until the accumulation has been completed if the creditworthiness of the client is not in question, but it should never be delayed beyond completion of the accumulation. It is industry practice to get paid for an order on as timely a basis as possible. Indeed a member should not even take an order unless it has good reason to believe it will be paid for on a timely basis. Delaying the ticketing out until month end could only benefit Jaguar, could not be in the best interests of NSI (or Penson) and is an inappropriate use of the TA Account

(d) Misleading Penson re Jaguar Creditworthiness

¶ 64 It is clear that Penson was concerned about the ability of Jaguar to pay for the securities that it purchased. This conclusion is supported by the evidence that it shut down the Jaguar Main Account in July 2008, and the concern it expressed for getting paid as soon as it became aware of the Blue Note purchase and the ticketing out of the TA Account to the Project Vulcan Account. One of the benefits of using the TA Account instead of the Jaguar Main Account or the Project Accounts was that the identity of the beneficial owner of the securities being accumulated was hidden from Penson, although the Respondents argued that Penson would have figured it out eventually from the pattern of purchases and ticketing out to the Project Accounts. There was no evidence whether Penson knew or did not know that Jaguar was the beneficial owner, since Penson was not a witness, but it is not unreasonable to conclude that Jaguar's identity was hidden from Penson for at least some time and this helped Alboini proceed with the accumulations for Jaguar. At one point in his cross-examination, Alboini is asked, regarding the information contained in the trade documents in the TA Account, "And nowhere on there does it indicate that the client that places the order in the TA Account is Jaguar Financial Corporation, does it." Alboini replies, "Very common not to, yes." And later he is asked, "But as far as the information that they have available to them at the time of the trade date, they don't know that the trade is being made, other than by Northern Securities?" and Alboini responds "That is correct. That's the beauty of the confidentiality to the fullest extent possible, in a market accumulation..."

¶ 65 However, a far more important factor was Alboini misleading Penson into thinking it could treat the Jaguar Main Account and the Jaguar Project Accounts as if they were one account. This led Penson to conclude that it had more security for the Jaguar purchases than it actually possessed. This issue revolves around the creation of a series of cross-guarantees whereby the Jaguar Main Account guaranteed each of the Jaguar Project Accounts and each Jaguar Project Account (except, it is alleged by Alboini, Project Vulcan and Project Titan) guaranteed the Jaguar Main Account. The available guarantee documents for each project were in evidence, but no guarantee documents were produced for Project Vulcan or Project Titan and there is conflicting evidence whether they ever existed. In response to concerns expressed by Penson in late September 2008 regarding payment for securities in the Project Vulcan and Project Titan accounts, Vance emailed Penson advising that "we have cross guaranteed the three (3) Jaguar accounts." Vance testified that he was referring to the Jaguar Main Account, the Project Vulcan Account and the Project Titan Account. This was done at the request of Chornoboy. It is clear that both Vance and Chornoboy thought guarantees existed whereby Project Vulcan and Project Titan guaranteed the Jaguar Main Account and certainly Penson was advised accordingly by Vance.

¶ 66 Alboini believed that guarantees from Project Vulcan and Project Titan in favour of the Jaguar Main Account existed based on representations made to him during the IIROC investigation as well as Vance and Chornoboy's belief that they existed. When such guarantees could not be produced, the Respondents' position was that Alboini came to believe that they never did exist and this supported his belief that creating such guarantees would not have been proper and never should or would have occurred because there were outside investors in these accounts.

¶ 67 Furthermore Project Eagle, in which a company called Lakeside Steel (in which Alboini had an ownership interest) had a beneficial interest, guaranteed the Jaguar Main Account (and consequently the other Project Accounts) and had assets that came from Lakeside. Alboini's testimony also established that Lakeside

approved the purchase of the securities in Project Eagle, but did not approve the use of its funds for any other purpose and specifically did not approve the guarantee given by Project Eagle. This all occurred with Alboini's knowledge.

¶ 68 It is the Panel's conclusion that whether or not the Project Vulcan and Project Titan guarantees actually existed is not of particular importance because Alboini in fact knew Penson was treating the three accounts as one, i.e. as if the cross-guarantees actually existed and did nothing to correct Penson's treatment of them. During his cross-examination, the Chairman of the Panel asked Alboini, "Aside from the guarantees though, I think you've testified already that you knew that Penson was treating all of the Jaguar accounts as if they were one." Alboini responded, "They were treating all of the Jaguar accounts on a global basis. That's what they indicated to me. And they made that clear to me at the outset."

¶ 69 Later in his cross-examination, Alboini was asked directly whether he did "anything to correct any misimpression that Penson might have as to the availability of cash in other accounts to cover the Vulcan deficit?" and soon thereafter "I take it though that, in response to my question, at no time during the month of October did you inform Penson that they shouldn't be looking to either the Project Titan account or the Project Eagle Account to cover the deficit in the Vulcan account." Alboini's response to both questions was evasive, but it was very clear to the Panel that Alboini never corrected Penson's misimpression that they could treat the Jaguar Main Account and the Jaguar Project accounts as one account. The critical point is that, to Alboini's direct knowledge, both Project Vulcan and Project Titan had third party investors for whom Jaguar agreed to hold the securities in trust and Project Eagle had Lakeside Steel as a beneficial owner. Therefore the Jaguar Main Account and these three project accounts had different beneficial interests and could not be properly treated as one. To Alboini's direct knowledge Penson was treating all the Jaguar accounts as one and he did nothing to inform them that they could not do so. It is the Panel's conclusion that Alboini's failure to correct Penson's misimpression about the propriety of treating the Jaguar accounts as one was improper and was a factor in getting Jaguar access to credit.

(e) Transfer of Client Money Direct to Project Accounts

¶ 70 It is IIROC's position that the transfer of money directly from a client to a pro account (such as the Jaguar Main Account and the Jaguar Project Accounts) without a written letter of authorization was improper. It is clear from the testimony of Alboini and Chornoboy that investor money was either in their client account at NSI or was put into their account and subsequently journaled out to the appropriate Jaguar Project Account on the instructions of Alboini. In particular, IIROC was critical of the use of money from Lakeside Steel. On September 30, 2008 shares of Energem Resources were ticketed out of the TA Account to the Project Eagle Account that created a deficit of \$638,353.66 which Penson immediately required to be covered. The cover was provided by a cheque for \$853,631.60 from Lakeside Steel directly into the Project Eagle Account. Chornoboy testified that he was aware that should not have occurred and that third party cheques should not be deposited to pro accounts. The Respondents took the position that this transfer was of no particular importance because the transaction was processed by Penson, not NSI, and that the transfers of client money into the Vulcan and Titan Project accounts was authorized by the client opportunity documents. The Panel has concluded that these transfers of client money to pro accounts, while inappropriate, were largely the result of sloppy documentation and procedures and are not a factor in determining whether Jaguar's access to credit was "improper". However, this incident again reflects negatively on the multiple roles that Alboini played with the parties involved.

¶ 71 Based on the Panel's conclusions regarding the issues relating to Jaguar's lack of creditworthiness, Alboini's conflict of interest, the inappropriate use of the TA Account and Alboini's misleading Penson regarding the treatment of Jaguar Main Account and the Jaguar Project Accounts as described above, the Panel's decision is that Jaguar's access to credit was "improper" for the purposes of Count 1.

And in so doing risked the capital of both NSI and its carrying broker

¶ 72 There are several elements to this portion of Count 1. First, there is a causation issue; the words "and in so doing" require that IIROC prove that the "improper access to credit", discussed in paragraph 39 above, caused risk to the capital of both NSI and its carrying broker, Penson. Second they must prove there was risk to

NSI's and Penson's capital beyond the normal day to day risk they incur by the nature of their businesses; and third, IIROC must prove that the risk was to the capital of both NSI and Penson. The central issue is a proper analysis of the risk incurred by NSI and Penson, if any.

¶ 73 The essence of IIROC's position on the risk issue is that the absence of creditworthiness in Jaguar when the trades were made resulted in an unusual risk to the credit of both NSI and Penson, because if Jaguar did not pay for the securities that it purchased, both NSI and Penson could have been required to do so. The Respondents' position is that Penson's capital was never at risk because the assets in the Jaguar Main Account were always sufficient to pay for the securities purchased for the Jaguar Project Accounts, and because Penson could control its risk by refusing any purchase or liquidating any purchase if it felt at risk; and that NSI's capital was never at risk in respect of the Jaguar Main Account or the Jaguar Project Accounts and was at risk in respect of the TA Account only if Penson used up the security deposit from NSI and then only if the Jaguar Main Account assets were insufficient to pay for the securities, which was not the case in their view.

¶ 74 IIROC's position was that the risk to the capital of NSI and Penson must be determined on an objective basis. The Panel agrees with this position. Whether or not NSI or Penson thought their capital was or was not at risk is not relevant, nor is the fact that ultimately neither NSI nor Penson needed to actually put up any regulatory capital for the securities which Jaguar bought since Jaguar, directly or with outside investors, eventually paid for them.

¶ 75 The mechanism by which the Jaguar purchases were made is that NSI would send the trade purchase order to Penson who would execute the trade and pay for it. Thus the initial cash exposure was on Penson which charged interest to NSI on the funds used to make the purchase. Penson held a \$1.7 million comfort deposit from NSI (which was part of NSI's regulatory capital, not in addition to it) as security in the event the securities were not paid for. If the securities were not paid for, Penson would look first to the security deposit (which would in turn impair NSI's regulatory capital) and if the comfort deposit were not sufficient, it would look to NSI and Jaguar in turn, for the balance. If either Jaguar or NSI could not pay the balance, Penson's regulatory capital would be impaired. Thus, the failure of Jaguar to pay for its purchases would impair the regulatory capital of NSI and Penson. Until Jaguar actually paid for the securities, the regulatory capital of both was at risk, particularly in the circumstances where it is clear from the evidence that it could not pay on a timely, i.e. a T+3, basis.

¶ 76 Furthermore, as noted above, Penson was of the view that NSI was putting up margin or regulatory capital for trades in the TA Account. During the relevant period, had NSI actually been putting up margin for the Jaguar trades, it would have, on more than one occasion, exceeded its required to margin (RTM) amount.

¶ 77 One factor which determines whether there was unusual risk to the capital of NSI and Penson is the extra time the securities purchased remained unpaid by Jaguar. At the beginning of August 2008, when the Jaguar Main Account was no longer restricted by Penson, it could have been used by Jaguar for the project purchases as could the various Project Accounts; but this would have meant that Jaguar would have to pay on a T+3 basis and it did not have the cash or marginable securities to do so. By using the TA Account, it did not have to pay for the securities until month-end. The additional time allowed for actually getting paid for the securities increases the risk to NSI and ultimately Penson that they would not be paid for. During this extended period of time, the securities could decline substantially in value and therefore if either NSI or Penson were required to liquidate the position to recover unpaid funds, it would thereby be placed at unusual risk as opposed to the situation with normal T+3 settlement.

¶ 78 Jaguar's lack of creditworthiness according to the standards of the industry is another factor. It is clear from the earlier discussion that Jaguar was not creditworthy in that it did not have cash or marginable securities when it made the purchases and that Alboini should not have initiated trades for Jaguar, a non-creditworthy client. This lack of creditworthiness is a significant factor creating unusual risk to NSI and Penson. If Jaguar failed to pay for the securities purchased, NSI and/or Penson would have to do so. Again, Alboini's multiple, conflicted roles placed him in a position where he could not objectively assess Jaguar's fitness to place orders with NSI. On a number of occasions, Alboini testified that he was not worried about this lack of creditworthiness because of his confidence in being able to find investors and being able to look to the assets in

the Jaguar Main Account. This means that Jaguar's ability to pay was conditional on Alboini's success in getting adequate funds from these two sources, an additional risk factor. While the purchases in the TA Account and the Jaguar Project Accounts were not treated as "contingent" purchases, they were akin to contingent purchases because of the financing condition. IDA (now IIROC) Member Regulation Notice MR0280 dated March 31, 2004 is instructive on the issue of risk to the Member on contingent orders. It states that "If the member is accumulating securities...with a contingency that has not occurred..., then the client is under no obligation to purchase the security. In this case, the member is at risk while taking on the position (i.e., the client is not the beneficial owner of the security while in inventory) and must margin the position as inventory (on a trade date basis) until the order is completed and contracted to the client."

¶ 79 The Respondents argued that the capital of, respectively, NSI and Penson was never at risk because the Jaguar Main Account assets were at all times sufficient to pay for all the securities being purchased. IIROC counsel disagreed, citing the following. First of all, whatever the value of those assets, the full value of most of those assets (Royal Laser and Lakeside Steel which comprised about 80 % of the assets) could not be accessed because of restrictions in Section 93.4 of the Ontario Securities Act which was entered into evidence as Exhibit 26. The Respondents argued that even without reference to the Royal Laser and Lakeside Steel shares, the remaining assets were sufficient to pay for the Jaguar purchases. However, IIROC counsel cast serious doubts upon the value of those assets by pointing to the month end values of those assets, as shown in Tab 59, Vol. 1, Count 1 of IIROC's Hearing Brief. At the end August, the value was about \$21,500,000; at the end of September, about \$15,900,000; at the end of October, about \$9,500,000; at the end of November, about \$10,700,000 and at the end of December, about \$4,800,000. While some of these figures are outside the time period of Count 1, the trend line certainly illustrates the speculative nature of the securities held and the risk in relying on the value of the securities in the Jaguar Main Account, even if all were available which they were not.

¶ 80 A significant factor in assessing the risk to either NSI or Penson is the nature of the securities being purchased for the Jaguar Project Accounts. They were generally very small cap companies with low priced securities that were of a relatively speculative and illiquid nature as acknowledged by Alboini at pages 566-567 and 568 of the transcript of proceedings. They were not marginable under industry rules, i.e. they did not qualify for the extension of credit. It is unnecessary to determine the precise riskiness of each of these securities, only that, if they needed to be liquidated in order to satisfy any obligation of Jaguar, doing so would have been more problematic than if they were securities of a less speculative nature.

¶ 81 Given all these factors, it is the Panel's conclusion that access to credit created by Alboini's trading practice as described above, caused the capitals of both NSI and Penson to be put at a greater risk than would have occurred had the TA Account not been used for the Jaguar Project Account purchases.

Thereby engaging in conduct unbecoming or detrimental to the public interest, contrary to IIROC Dealer Member Rule 29.1.

¶ 82 The last issue to decide is whether the foregoing factual elements constitute conduct unbecoming or detrimental to the public interest contrary to Rule 29.1. This Rule sets out a somewhat vague standard by which to judge the conduct of Dealer Members and many cases have examined what the standard entails in a variety of fact situations. Some of these were cited to this Panel by counsel for both parties. For example, the case of Little (Re), [2007] I.D.A.C.D. No.24, provides that not every transgression by an employee of a Member causes a breach of the Rule. It also provides that moral turpitude or bad faith could turn a minor transgression into conduct unbecoming, but they are not an essential ingredient of all such charges. This Panel agrees with those statements.

¶ 83 *Little* also cites an important principle with which this Panel agrees:

"It is our view that transgressions must be looked at in the light of the reputation which the investment industry must maintain in the eyes of the public and the effect which the transgression could have on that reputation. The public interest demands that the Members of the industry, and their employees, be held to a very high standard of financial probity. They must be trusted because they handle other people's

money. They must be seen to be trustworthy. If conduct could even appear to cast doubt upon that probity, then it could be detrimental to the public interest and constitute conduct unbecoming.”

¶ 84 This Panel also believes that another principle is applicable in a case such as this where no member of the public suffered any harm. It is this Panel’s position that Dealer Members owe a duty to each other to deal honestly and fairly in accordance with generally accepted industry standards (so long as those standards are not below their obligation to the public interest) so as not to expose other Dealer Members or their employees to unnecessary and unexpected risks. No cases were cited to the Panel in support of this principle, but we believe it to be applicable in this case.

¶ 85 In addition, it is useful to ask whether the practices in question are such that they could be recommended to be followed generally in the industry or, on the contrary, do they fall below the standard of what could be recommended? It is the Panel’s view that Alboini’s actions fell very far below the standards that would or should be acceptable to member firms.

¶ 86 The Respondents’ counsel took the position that, even if the forgoing factual elements were found against them, that did not constitute a breach of Rule 29.1 by Alboini. In oral argument, Respondents’ counsel argued that Alboini did not “knowingly” engage in conduct which he had any reason to believe was “unbecoming” and therefore committed no breach of Rule 29.1. The Panel disagrees with this position. Alboini’s conduct was quite intentional, it was not inadvertent, i.e. he “knowingly” engaged in the conduct which is the subject of Count 1. Whether he subjectively knew or thought the conduct was “unbecoming” is irrelevant. The determination of whether the conduct is “unbecoming” under Rule 29.1 is to be determined on an objective basis by each Panel on a case by case basis, having regard to principles of interpretation and prior case law precedent.

¶ 87 Respondents’ counsel referred to *Re Bahcheli*, [2004] I.D.A.C.D. No. 12 and *Re Doering*, [2007] I.D.A.C.D. No. 27 for the proposition that, while moral turpitude is no longer an essential element of the test for culpability under Rule 29.1, bad faith on the part of the respondent must be proven. In *Doering*, the respondent failed to advise his employer of his outside business activities and the panel concluded that “from an objective point of view, the public would [not] have felt any degree of discomfort with the Respondent’s breach of By-law 18.14, even if they had known this at the time”.

¶ 88 *Re Gareau*, [2005] I.D.A.C.D. No. 25, cited by Respondents’ counsel, concluded that R.29.1 is “primarily intended to focus on quasi-criminal and unethical conduct rather than negligent conduct “ In *Re Blackmont Capital Inc.*, 2011 BCSECCOM490, the British Columbia Securities Commission found that there was no “conduct unbecoming” on the basis that “there is no evidence that respondents’ conduct was intentional, was motivated by dishonest intent or for an improper purpose, or was otherwise unethical. Neither...was the respondents’ conduct likely to impair the public’s trust of the industry.”

¶ 89 Each case dealing with Rule 29.1 is fact-dependent and each of the cases cited by Respondents’ counsel is factually distinguishable from our case. It is this Panel’s conclusion that Alboini’s conduct is “conduct unbecoming” under Rule 29.1. The factors cited for the conclusion in paragraphs 45 - 70 that the access to credit had been obtained “improperly” and the risk to the capitals of NSI and Penson caused by such improper access to credit as stated in paragraph 5.6, lead the Panel to the conclusion that Alboini’s conduct was “conduct unbecoming” and a violation of Rule 29.1. This is so whatever language from the cases cited is used to characterize that conduct, “bad faith”, “dishonest intent”, “improper purpose”, or “unethical” and whether judged from the standpoint of the public or that of the industry.

¶ 90 Respondents’ counsel also argued that mere negligence is not sufficient for a finding of “conduct unbecoming” citing *Re Octagon Capital Corp.*, [2007] I.D.A.C.D. No.16 and the proposed amendments to the wording of Rule 29.1. This Panel does not need to deal with the issue of negligent conduct since Alboini’s conduct was quite intentional.

¶ 91 Respondents’ counsel further argued that Alboini’s use of the TA Account as described above did not violate any rule, policy or guideline of IIROC nor did it violate any policy or procedure of NSI. While breach of an IIROC rule, policy or guideline or NSI internal policy or procedure would help lead to the conclusion that

such conduct amounted to “conduct unbecoming”, on the plain wording of Rule 29.1, such a breach is not necessary for this Panel to conclude that Alboini’s conduct was “conduct unbecoming” under Rule 29.1.

¶ 92 It is this Panel’s conclusion that Alboini’s conduct was “conduct unbecoming” in violation of Rule 29.1.

6. Count 2

Allegations and Particulars

¶ 93 Count 2 alleges that:

Between August and November 2008, Vance, as Chief Compliance Officer, failed to adequately supervise Alboini’s trading activity involving Jaguar Financial Corporation and other NSI clients, contrary to IIROC Dealer Member Rules 1300.1, 1300.2, and 2500.

¶ 94 In addition to the basic wording of Count 2, the NOH set out the following particulars regarding Count 2:

“Although Alboini did not fully disclose to Vance the full extent of Alboini’s business dealings with Jaguar and NSI in the summer and fall of 2008, there were a number of red flags arising from Alboini’s conduct. Those red flags should have led Vance to make further inquiries into Alboini’s activities with Jaguar and its trading activity.

¶ 95 The red flags which should have been apparent to Vance as CCO were as follows:

- a) Alboini opened ten new accounts for Jaguar between August and November 2008;
- b) the New Client Application Forms for these ten new accounts were incomplete, including the absence of any indication as to whether or not any third parties held any beneficial interests in the accounts;
- c) transfers of funds were effected between NSI retail client accounts and pro accounts held by Jaguar, without proper account documentation to do so;
- d) Vance was aware, as indicated to IIROC Staff, that a “majority of the investors” in the Jaguar Projects were also NSI clients; and
- e) over two million Telehop shares were traded out of a pro account (the 3PAAJE Account) into a retail client account on one day.

¶ 96 In failing to make inquiries when faced with the red flags mentioned above, notwithstanding Alboini’s lack of full disclosure to the Compliance Department, Vance failed to properly supervise Alboini’s trading activity at NSI.”

¶ 97 It should be noted that the hearing proceeded on the basis of the particulars alleged, not just on the basic wording of Count 2. Therefore it was incumbent on IIROC to prove at least one of the particulars and that it constituted a failure by Vance to properly supervise Alboini’s trading activity at NSI, contrary to the Rules cited in Count 2.

Applicable IIROC Rules

¶ 98 Count 2 contains allegations that Vance, as Chief Compliance Officer (CCO), failed to adequately supervise Alboini’s trading activity, contrary to IIROC Rules 1300.1, 1300.2 and 2500. The Panel noted that these rules address primarily the conduct of a dealer member and not specifically that of a CCO, although there are some references to certain obligations of supervisors. The conduct of a CCO is dealt with in IIROC Rule 38.7 which is not referred to in Count 2. However, Respondents’ counsel never made any objection to the applicability of Rules 1300.1, 1300.2 and 2500 to Vance’s conduct even after the issue was raised by the Panel in the hearing. At all times, the hearing proceeded on the basis that Rules 1300.1, 1300.2 and 2500 applied to the conduct of Vance. Consequently, it is the decision of the Panel that the Respondents have suffered no procedural unfairness due to the absence of Rule 38.7 from the wording of Count 2 and have waived their right to object to the application of Rules 1300.1, 1300.2 and 2500 to Vance’s conduct.

Adequate Supervision by Vance of Alboini Trading

¶ 99 The essence of the allegations against Vance in Count 2 is that he “failed to adequately supervise Alboini’s trading activity involving [Jaguar] and other NSI clients...” based upon Vance’s actions in response to the five red flags listed in the particulars. IIROC contends that, although “Alboini did not fully disclose to Vance the full extent of Alboini’s business dealings with Jaguar and NSI in the summer and fall of 2008”, the red flags should have “led Vance to make further inquiries into Alboini’s activities with Jaguar and its trading activity.” The issue therefore, is to determine how proactive Vance, as CCO, should have been to ensure the propriety of Alboini’s trading activity when faced with each of the red flags.

¶ 100 The wording of Rules 1300.1, 1300.2 and 2500 give some guidance as to the standard of conduct expected of the CCO. For example, paragraph (a) of Rule 1300.1 requires that Dealer Members (and by extension their CCO) use due diligence to learn and remain informed of essential facts regarding customers, orders and accounts. Similarly, paragraph (o) requires due diligence to ensure that acceptance of any order is within the bounds of good business practice. Rule 1300.2 (a), in effect, requires the CCO to establish and maintain procedures for account supervision to ensure that the handling of client business is within the bounds of ethical conduct, consistent with just and equitable principles of trade, and is not detrimental to the interests of the securities industry. Rules 1300.1, 1300.2 and 2500 also set out detailed and extensive obligations regarding account opening and supervision.

¶ 101 Rule 38.7 specifically requires the CCO to establish and maintain policies and procedures for assessing compliance with the IIROC rules and securities legislation and to monitor and assess compliance with such rules and legislation.

¶ 102 It is this Panel’s opinion that the wording of the rules referred to does not fully describe the breadth or depth of the responsibilities which a CCO has for ensuring that the Dealer Member and all its employees comply with IIROC rules, securities legislation and good business practices, and which are expected, or ought to be expected, according to acceptable industry standards. In this Panel’s opinion, acceptable industry standards for a CCO reasonably require, or ought to require, that they diligently and proactively monitor and update practices and procedures to guard against any questionable practices, that they question business practices until they receive an explanation which satisfies them that nothing untoward is happening, and that they generally act as the moral compass to ensure compliance with the rules, laws and good business practices. They must be prepared to diligently challenge practices, longstanding or new, and explanations for practices that may be questionable, even if those practices or explanations come from their superiors in the firm. This approach is consistent with *Re Rowan* (2008), 31 OSCB 1615 where the Commission stated “It is insufficient for a CCO to accept information provided by a registered representative at face value....industry standards dictate that trust in a registered representative should always be accompanied by independent checks of the information provided...” This Panel has applied these standards in evaluating Vance’s conduct in relation to Count 2.

Red Flags

¶ 103 In the NOH, five red flags were identified by IIROC. In their closing submissions, IIROC identified additional red flags and also alleged a failure to comply with Rule 29.1. Respondents’ counsel objected to both matters. The panel agrees with the Respondents that the additional red flags could not be raised at this late stage in the proceedings because to do so would be procedurally unfair to the Respondents, and IIROC counsel conceded that they would not rely on a failure to comply with Rule 29.1. Consequently, Count 2 was decided by the Panel on the basis originally set out in the NOH.

¶ 104 IIROC’s position was simply that the red flags should have led Vance to make further inquiries into Alboini’s trading activities and in failing to do so, Vance failed to properly supervise Alboini’s trading activity. The issues in relation to each alleged red flag are, whether it is a red flag requiring further inquiries, if so, did Vance make sufficient further inquiries and did any failure to make further inquiries constitute a failure by Vance to properly supervise Alboini’s trading activities.

¶ 105 The Panel reviewed the Respondents’ positions with respect to each of the alleged red flags as follows:

- (a) Alboini opened ten new accounts for Jaguar: Respondents' counsel's position was that Vance was aware of the ten new accounts, but was told the reasoning behind the accounts by both Alboini and Chornoboy and therefore no further inquiry was necessary. Vance was not told the investment reasoning behind these accounts, but was told that they were for administrative reasons. It is the Panel's decision that Vance was too accepting of the explanation given to him because Alboini, the UDP and Vance's boss, was behind the explanation. The Panel understands the difficult position that Vance was thus put in, but as CCO, Vance should have made more diligent inquiries, even if it meant challenging a plan being promoted by Alboini. That is what is required of a CCO. This was a red flag that should have caused Vance to make further inquiries. Failure to make further inquiries constituted a failure by Vance to properly supervise Alboini's trading activities, as alleged.
- (b) The NCAFs for these ten new accounts were incomplete, including the absence of whether there were any third party interests in the accounts. Vance's position was that he was not aware of any third party interests in the Jaguar Project Accounts and therefore the failure of the NCAFs to mention any third party interests could not have been a red flag to him. Vance, as CCO was responsible for approving all new accounts at NSI and had an obligation to question missing information. The Panel was presented with evidence of missing NCAFs for the Project Accounts, Vance's approval with no RR signature (Project Eagle) and numerous missing NCAF support documents that he claimed "may be misfiled". Project Brown and Project Tango were opened with no CCO or senior officer signatures. Additionally, accounts for Projects Mars, Norman, Zion and Hunter were opened without Compliance department approval. Vance claimed he did not see these NCAF forms. It is the Panel's decision that for Vance to say that he was unaware of missing third party information is an insufficient excuse. Vance's testimony made clear the fact that he took little initiative to ensure compliance within NSI. Rules 1300.1, 1300.2 and 2500 have extensive, detailed requirements regarding the account opening process; Vance should have made further inquiries regarding the completeness of the NCAFs, and failure to do so was a failure by Vance to properly supervise Alboini's trading activity, as alleged.
- (c) Transfers of funds were effected between NSI client accounts and pro accounts held by Jaguar, without proper documentation to do so. Vance's position was that he did not know that funds were transferred as alleged, but knew that Penson, which did the actual transfers, was careful about proper documentation; furthermore, Vance said that he did not personally review the transfers but relied on subordinates which, he said, was common in the industry. Rule 2500 provides that "Supervisors may delegate tasks but not responsibility." Vance was responsible for knowing about the funds transfers as alleged. It may be that the investor opportunity documents were the documents that authorized the funds transfers (as believed by Alboini and Chornoboy), but Vance did not make inquiries regarding the documents and thus was unaware of their content. It is the Panel's opinion that Vance should have been more aware of such funds transfers and that proper client authorization existed for such transfers. Failure to be more diligently aware of all the circumstances regarding the transfer of funds between client and Jaguar pro accounts was a failure to properly supervise Alboini's trading activity, and if this Count had been worded differently, the Panel might have found that the allegations in Count 2 had been established. However Count 2 was based upon failure to make further inquiries when faced with such red flags. Vance was never faced with this red flag. Therefore, if this were the only red flag referred to in Count 2, the Panel could not conclude that the allegation against Vance was established.
- (d) Vance was aware that a majority of the investors in the Jaguar Projects were also NSI clients. Vance's position was that, since investors in Jaguar and NFC endeavours were usually NSI clients, he saw nothing questionable about the involvement of such clients in two of the Jaguar Projects. The fact that NSI clients historically invested with Jaguar does not by itself condone such practice. Good business practice requires that a CCO be extra-careful to ensure proper disclosure documentation is on file and that NSI clients have been fully advised of the corporate relationships when they are investing with Jaguar, a firm in which the NSI UDP exercises control and has a personal financial interest. Vance's testimony demonstrated a lack of situational awareness and little interest in questioning what should have been a major compliance concern at NSI. This was a red flag which should have caused Vance to

make more diligent inquiries into all the circumstances of the client investments in the Jaguar Projects to ensure that the clients were fully advised and knew what they were doing. Failure to do so was a failure on his part to properly supervise Alboini's trading activity, as alleged.

- (e) Over 2,000,000 Telehop shares were traded from a pro account to a client account in one day. Vance's position was that he was unaware of this transaction and it therefore could not be a red flag. However he admitted that it would have been a red flag had he known about it and would have made further inquiries. Transfers between client and pro accounts are particularly sensitive, and even though Vance did not know about the transfer, he cannot escape the responsibility for knowing about such transfers. However, Count 2 alleges that, when faced with such red flags, Vance should have made further inquiries. Therefore, just as in the case of paragraph 105(c), if this were the only red flag, the Panel could not conclude that the allegation against Vance was established.

¶ 106 Based upon our conclusions set out in paragraphs 105(a), (b) and (d), the Panel has decided that the allegations in Count 2 have been established.

7. Count 3

Allegations

¶ 107 Count 3 contains the following allegations:

From 2006 to 2010, NSI, Alboini, as UDP, and Vance, as CCO, repeatedly failed to ensure that:

- (a) NSI corrected deficiencies found in three business conduct compliance (BCC) reviews and one trading conduct (TCC) compliance review; and
- (b) NSI had adequate policies, procedures and practices in place;

thereby engaging in conduct unbecoming or detrimental to the public interest, contrary to IDA By-law 29.1, IIROC Dealer Member Rule 29.1, UMIR 7.1 and UMIR Policy 7.1.

¶ 108 There was an issue with respect to the wording of Count 3 in that paragraphs (a) and (b) both appear to refer to IDA By-law 29.1 and IIROC Dealer Member Rule 29.1 as well as to UMIR 7.1 and UMIR Policy 7.1. IIROC counsel clarified for the Panel that paragraph (a) was intended to refer only to IDA By-law 29.1 and IIROC Dealer Member Rule 29.1 and that paragraph (b) was intended to refer only to UMIR 7.1 and UMIR Policy 7.1. In fact the hearing proceeded solely on the basis of the allegation in paragraph (a) and IDA By-law 29.1 and IIROC Dealer Member Rule 29.1. IIROC did not pursue the allegations in paragraph (b) as they relate to UMIR 7.1 and UMIR Policy 7.1.

Particulars

¶ 109 The NOH contains the following particulars in relation to Count 3:

- i. Between 2004 and 2008, Staff of the IDA, RS and subsequently IIROC conducted three BCC reviews (formerly known as "sales compliance reviews") and one TCC review of NSI. Each of the deficiencies listed below (in paragraph 109.iv) was raised with NSI, including with Vance after his employment at NSI commenced in October 2006.
- ii. Final reports for the above-mentioned compliance reviews were issued as follows:
 - a. on March 22, 2005, the final 2004 Sales Compliance Review listing the below deficiencies was sent to NSI;
 - b. on May 23, 2007, the final 2006 Sales Compliance Review listing the below deficiencies was sent to NSI;
 - c. on April 30, 2009, the final 2007 Business Conduct Review listing the below deficiencies was sent to NSI; and
 - d. on February 8, 2010, a letter was sent to NSI, making reference to a report issued in

December 2008 that listed the below Trading Conduct Compliance deficiencies, of which several were repeats from previous trading conduct compliance reviews.

- iii. IIROC gave NSI ample opportunity to address the outstanding deficiencies in the firm's daily business and supervision of its employees. Despite some efforts and repeated assurances by NSI that the deficiencies would be addressed, and notwithstanding a settlement reached with RS in May 2008 regarding trading conduct failings from 2003 to 2005, NSI, Alboini and Vance failed to address the deficiencies during the material time.
- iv. NSI's conduct during the material time included the following:
 - a. failing to maintain current and accurate information about and properly supervise employees' external securities accounts;
 - b. failing to maintain adequate grey and restricted lists and failing to ensure proper procedures were created and followed regarding use of the lists;
 - c. failing to maintain adequate physical barriers in its office space to contain corporate finance information;
 - d. failing to develop and maintain a firm-specific 90-day training program to complement the Canadian Securities Institute program; and
 - e. failing to adequately supervise trading conduct, including audit trail, order markers, grey lists and short sale markers.
- v. As UDP, Alboini was ultimately responsible for NSI's conduct during the material time, including its deficiencies in the firm's daily business and supervision of its employees.

Correction of Deficiencies

¶ 110 The central factual issue in this count is whether NSI, Alboini and Vance each repeatedly failed to ensure that deficiencies identified by IIROC in the particularized BCC and TCC reports were corrected by NSI. It is important to understand that each BCC and TCC report from IIROC listed deficiencies at the time of the audit and this was emphasized to the recipients of the reports. Therefore, steps taken by NSI, Alboini or Vance to deal with the deficiencies after that point in time are irrelevant to the existence of the deficiencies at the time of the audit. IIROC does not determine whether the deficiencies have been corrected until it conducts its next BCC or TCC review, often several years later.

¶ 111 The deficiencies listed in paragraph 109(iv) (a), (b), (c) and (d) were identified by IDA (now IIROC) in the 2004 BCC and were also identified in the 2006 and 2007 BCC reports as repeat deficiencies, as acknowledged by Vance. These deficiencies related to employee external accounts, grey and restricted lists, physical barriers and a 90-day training program.

¶ 112 The deficiencies listed in paragraph 109(iv) (e) had been identified in NSI's 2003, 2004 and 2005 Trade Desk Reviews (the predecessor to the TCC) and were admitted by NSI in the settlement of a disciplinary hearing in 2008. Notwithstanding the settlement, the subsequent TCC report issued in 2008 found a repetition of the same deficiencies as acknowledged by Vance. These related to audit trails, order markers, grey lists and short sale markers.

¶ 113 In certain responses to the BCC and TCC reports, the Respondents did not dispute the findings but advised of corrective steps that they were undertaking. The Respondents' testimony and their closing submissions set out many examples of the steps that NSI, Alboini and particularly Vance after he joined NSI in 2006, took to deal with the deficiencies. It is not necessary to repeat them here. In the Respondents' submissions it is stated that the deficiencies were "faithfully addressed" by NSI, that Vance was involved in "steps to address the deficiencies", that "...NSI, under Mr. Vance's direction and with the assistance of Mr. Alboini, made genuine and consistent efforts to work with TCC staff..." and other similar characterizations of the Respondents' steps to deal with the deficiencies. It is the Panel's view that addressing the deficiencies or taking steps to correct them is not the same as correcting them. As pointed out above, deficiencies are identified as at

the audit date and subsequent steps to correct them are only effective if the deficiencies have been corrected, in IIROC's opinion, when it returns to do a follow-up audit. In this case, the follow-up audits found that the steps referred to by the Respondents had not corrected the previous deficiencies.

¶ 114 In other responses to the BCC and TCC reports, the Respondents asserted that IIROC was incorrect in identifying deficiencies as such (e.g. with respect to grey and restricted lists) or that sufficient corrections had been made (e.g. with respect to the issue of physical barriers).

¶ 115 The critical issue is, by what standard is the Panel to determine whether the deficiencies alleged by IIROC existed and, if so, whether they were corrected. The Panel has decided that the existence of a deficiency and whether it has been corrected must be determined by the regulator, IIROC, in accordance with applicable laws and its published rules, regulations, policies and bulletins and, in particular, its interpretation thereof. This is a complex industry with numerous members in a variety of circumstances; this requires that many of the applicable laws, rules and policies must be of general application, requiring flexibility and interpretation to fit differing circumstances. If a Member or registrant believes that IIROC is mistaken in this regard, their only option is to ignore IIROC's position and, as in this case, be open to IIROC taking disciplinary proceedings; otherwise they must comply with the IIROC position.

¶ 116 In the case of *Re Questrade Inc.* [2009] I.I.R.O.C. No.49, IIROC found that a continual refusal to comply with IIROC rules was a breach of IIROC Rule 29.1. Questrade appealed to the OSC, (*Re Questrade Inc.* (2011), 34 OSCB 2595) arguing that its deliberate refusal to follow the IDA's interpretation of the rules was not a deliberate refusal to follow the rules themselves, that IDA's findings, guidance or interpretations do not have the effect of a rule and were not binding on Questrade per se. The OSC disagreed with Questrade and ruled that Questrade was required to follow the IDA interpretation. That case is very persuasive to the Panel in this case. It is this Panel's conclusion that, subject to the condition stated in paragraph 117, Members and registrants ultimately must follow IIROC's interpretation of all applicable laws, published rules, policies and bulletins etc. and are not entitled to simply disagree with IIROC or follow their own interpretation. It is IIROC, not NSI, Alboini or Vance, which determines the existence of deficiencies in NSI practices and whether they have been corrected.

¶ 117 This Panel would temper the conclusion in paragraph 116 by stating that it is not every interpretation and directive by IIROC that Members and registrants must follow. What are the limits on IIROC's ability to compel Members and registrants to follow its interpretations and directives? The case of *Dunsmuir v. New Brunswick* [2008] 1 S.C.R. 190, 2008SCC 9 reestablished the principles for judicial review of tribunal decisions. Ours is not a case of judicial review and this Panel is not saying that it is applying *Dunsmuir*, but this Panel is influenced by the principles stated in *Dunsmuir* and we have concluded that the ability of IIROC to compel Members and registrants to obey its interpretations and directives is subject to the condition that IIROC's interpretation may be overturned by an IIROC disciplinary hearing panel (or the OSC on appeal) if the panel (or the OSC) finds the interpretation to be arbitrary or unreasonable, contrary to law or beyond its jurisdiction. It is this Panel's view that none of the deficiencies found, nor corrective instructions given by IIROC in this case were unreasonable, arbitrary, contrary to law or beyond its jurisdiction, and consequently the Respondents are compelled to obey IIROC's determination of the existence of deficiencies, its corrective instructions and its findings that the deficiencies had not been corrected.

¶ 118 It is important to note that, at no point in the disciplinary proceedings or at any time during the timeframe that is the subject of this count, did the Respondents assert that IIROC could not regulate in respect of the matters which are particularized as deficiencies, viz. employee external accounts, grey and restricted lists, physical barriers for corporate finance, the 90 day training program and supervision of trading conduct. The Respondents never argued that there were no applicable laws, published IIROC Rules, policies, bulletins etc. on which IIROC could base its findings. The Respondents either disputed the findings, conceded that NSI was non-compliant but was taking corrective measures, or asserted that they were compliant. It is this Panel's conclusion that NSI, Alboini and Vance were obliged to comply with all of IIROC's findings of deficiencies and to correct them, which they had not done at the relevant times.

¶ 119 There is no need to outline the history of each of the deficiencies in these reasons, but the Panel notes for

the record that the evidence at the hearing clearly establishes the legal basis for IIROC's deficiency findings and that NSI, Alboini and Vance failed to correct such deficiencies. However, the Panel will review the issue of physical barriers (referred to in paragraph 109 iv (c)) to illustrate our conclusions.

¶ 120 On April 30, 2009, IIROC issued its final report on its 2007 BCC review. This followed its usual procedure of issuing a draft report, getting a response from NSI, meeting with NSI to discuss issues raised by the draft and by NSI's response, revising the draft as necessary, and issuing the final BCC report. The final 2007 BCC report lists "Corporate Finance- Physical Barriers" as a "Repeat Significant Item". It cites OSC 33-601 as the legal basis for its requirements regarding physical barriers for corporate finance. It stated that the 2004 and 2006 SCR's (predecessors to the BCC) had also found inadequate controls over safeguarding of the confidential information in the Corporate Finance area. It noted that in response to the previous reports, NSI had advised that they would be changing locations to ensure physical separation of the Investment Banking Group. Specifically, NSI's response to the 2006 BCC final report regarding deficiencies in physical barriers provides that "NSI does not contest the finding. We are pleased to report that NSI will be moving to new premises at the end of 2007 and one of the main reasons for the move is to ensure that we provide physical separation with the Investment Banking Group."

¶ 121 The final 2007 BCC report continues that "at the time of the 2007 examination, the floor plans of the new office... did not demonstrate adequate controls to contain potential material and non-public information as follows:

- A 5 foot wall was the only divider between the Corporate Finance area and the rest of the Member.
- The computer service room was located within the Corporate Finance area.
- There were two entrances to the Corporate Finance area. One was pass card access only. The other was a divider separating Corporate Finance from other departments, which did not adequately prevent access by other employees.
- The Head of Private Client division was also acting in the capacity of an Investment Banker, and his office was located within the retail area.

A recent tour of the new premises confirmed that it was designed according to plan."

¶ 122 It then outlined its requirements to correct this deficiency. As noted, NSI did not dispute the findings in the 2006 BCC report, but IIROC continued to find deficiencies in its 2007 BCC report, despite NSI's advice that its move to new premises was partly to correct the previously identified physical barrier deficiencies.

¶ 123 The legal basis for requiring physical separation of the Corporate Finance function in Member firms at the relevant times was OSC Policy 33-601. It is stated to provide "general guidelines concerning undisclosed material information..." and that "circumstances of each registrant will differ and accordingly does not consider it appropriate or feasible to mandate particular policies or procedures." It then lists a number of policies and procedures which a registrant should consider to limit unauthorized transmission of inside information, including "restricting access to those areas of the registrant that typically are in receipt of inside information, including corporate finance and mergers and acquisitions departments..."

¶ 124 In paragraph 2.3(a) (ii), OSC 33-601 provides that "if restricting access to departments is impractical or impossible, as in the case of a smaller registrant, treating all of its departments as being 'behind the wall' ...all trading and advisory activities of the registrant are subject to any restrictions imposed." In an email dated November 14, 2007 from Vance to IIROC, Vance cited paragraph 2.3(a) and asserted that NSI was complying with OSC 33-601; in reply IIROC stated that NSI "is not considered to be a 'smaller registrant', so part (ii) is not applicable. The key is 'restricting access'. Northern's proposed floor plan does not restrict access. That would be accomplished through full walls and locked doors between corporate finance and the rest of the firm..."

¶ 125 In his testimony, Alboini was asked whether he agreed with IIROC's view that NSI was a smaller registrant. He replied, "Not at all. It's a completely erroneous judgment." He continued, "...there are no

guidelines whether--in OSC 33-601 as to what is small and what is not small. There are no guidelines in IIROC. There are no rules in IIROC in their member regulation notice dealing with containment infrastructures. There are no criteria that are set out.”

¶ 126 NSI, Alboini and Vance also disputed IIROC’s opinion that the five foot wall did not sufficiently restrict access to the corporate finance area. In his testimony, Alboini stated that “under 33-601, you will not find anything in 33-601 that says you must have a wall that goes to the ceiling, you must have a self-contained area where there is no access...” and concludes that OSC 33-601 leaves it up to each member to consider restricting access. However, in response to questioning from the Panel, Alboini conceded that “it would have been impractical, but not impossible” (alluding to the language in paragraph 2.3(a) (ii)) to have a full wall rather than a five foot wall. He made a similar concession in cross-examination and also conceded that it was a matter of spending a few more dollars.

¶ 127 These disputes over whether NSI was a “smaller registrant”, whether a five foot wall was sufficient, NSI’s opinion that it was sufficiently compliant with OSC 33-601 through other measures it had taken (e.g. memos to employees, code names for projects), are examples of, and illustrate NSI’s, Alboini’s and Vance’s misunderstanding of, or refusal to recognize, IIROC’s proper role in applying rules of general application to specific circumstances. They may have disagreed, but since IIROC’s interpretation was within the scope of possible reasonable conclusions, NSI, Alboini and Vance are required to comply with IIROC’s view of what is a deficiency and whether it has been corrected.

¶ 128 The Respondents also asserted that many of the deficiencies cited by IIROC as “repeat” deficiencies were not in fact so because they were not the same as in earlier reports. This was disputed by IIROC counsel who presented a summary chart of the deficiencies to demonstrate their repeat nature. The Panel agrees with the conclusion of IIROC counsel on the basis that they were sufficiently similar from report to report to be characterized as “repeat” deficiencies. However the panel also notes that the wording of Count 3 does not require that the deficiencies be “repeat” deficiencies, only that NSI, Alboini and Vance repeatedly failed to correct the deficiencies that were contained in the BCCs and the TCC.

¶ 129 It was apparent to the Panel that Alboini chose not to fully comply with IIROC’s determination of deficiencies unless it suited him. At a number of points in his testimony in the hearing and in his IIROC interview prior to the hearing, Alboini stated that “If it doesn’t hurt our business, we will do what IIROC wants us to do” or words of similar effect. If NSI, Alboini and Vance choose not to comply with IIROC’s determination that there were deficiencies and that they have not been corrected, they are subject to disciplinary proceedings and the only question remaining then is whether the repeated failure to correct the deficiencies constitutes a breach of IDA By-law 29.1 and IIROC Dealer Member Rule 29.1.

IDA By-law 29.1 and IIROC Rule 29.1

¶ 130 As set out in the hearing panel and the OSC decisions in *Questrade*, the continuing refusal of a Member over a period of time to comply with the published IIROC Rules or IIROC’s interpretation thereof, is conduct unbecoming or contrary to the public interest and a breach of Rule 29.1. This Panel agrees that both rulings in *Questrade* are applicable in this case.

¶ 131 In their closing submissions, the Respondents outlined numerous actions taken by the Respondents to address the deficiencies found by IIROC and state that “In light of the fact that NSI has addressed all of the deficiencies in the [TCC and BCC Reports], there is no basis on which to conclude that either Mr. Alboini or Mr. Vance engaged in conduct unbecoming or detrimental to the public interest.”

¶ 132 Similarly, Respondents asserted that NSI has not refused to comply with the published rules of IIROC. They argued that IIROC’s position is controverted by the evidence of “NSI’s responses to the examination reports, the changes instituted by NSI to comply with [IIROC’s] requirements and requests, the significant resources expended on expert consultants and new personnel to improve the compliance function at NSI, and [IIROC’s] own acknowledgment...that NSI had been striving to tackle outstanding items.” All of this may be true, but none of it amounted to a “correction” of the deficiencies noted by IIROC.

¶ 133 The Respondents' counsel also argued that, even if these efforts to address deficiencies do not amount to correction of them, the efforts should be taken into account in determining whether the Respondents actions were a breach of IIROC Dealer Member Rule 29.1. This Panel has considered all the actions taken by the Respondents, particularly those of Vance after he joined NSI, and has concluded that they do not outweigh the extensive evidence of the Respondents failure to obey legal and reasonable findings and directives from IIROC, the intentional substitution of their own view of what was required for that of IIROC and the failure to understand, or intentional disregard of, the relationship between the regulator, IIROC, and the Respondents as the regulated parties. This was not a "partnership" between IIROC and NSI as mentioned by Alboini on a number of occasions; as regulated persons, the Respondents are required to comply with all legal and reasonable findings and directives of the regulator, and they have not done so in this case. The panel in *Questrade* held that;

"...the continuing refusal of Questrade over a two year period...to comply with the published Rules of its regulatory body is contrary to the public interest. The public has a legitimate expectation that the Members of a regulatory regime will obey the published rules and regulations.

Without Rules, a regulatory organization cannot protect the public interest. When Rules are promulgated and published, they are to be followed. A deliberate refusal to follow the Rules, in the circumstances of this case, constitutes conduct unbecoming."

This Panel finds the words of the *Questrade* panel to be applicable in this case.

¶ 134 On the basis of the foregoing, this Panel finds that NSI, Alboini and Vance repeatedly failed to ensure that NSI corrected deficiencies found by IIROC as alleged, thereby engaging in conduct unbecoming or detrimental to the public interest, contrary to IDA By-law 29.1 and IIROC Dealer Member Rule 29.1.

8. Count 5(a)

Allegations

¶ 135 Count 5(a) alleges that NSI, Alboini, as Ultimate Designated Person, and Chornoboy, as Chief Financial Officer from February 2008 to February 2009, filed or permitted to be filed inaccurate Monthly Financial Reports which failed to account for leasehold improvement costs, thereby misstating NSI's risk adjusted capital, contrary to IDA By-law 17.2 and IIROC Dealer Member Rule 17.2.

Particulars

¶ 136 The NOH stated the following particulars regarding Count 5(a):

- a) NSI found new premises for its Toronto office in 2007 and retained a contractor to make improvements. The contractor proceeded with its work and issued invoices to NSI from time to time in 2007 and early 2008. After deducting an interim payment made by NSI, the final cost of the contractor's work was \$521,515.55.
- b) Chornoboy was responsible for reviewing the contractor's invoices and arranging for payment. Chornoboy failed to record the liabilities owing to the contractor on NSI's monthly financial reports and its annual financial statements. The invoices were properly liabilities of NSI, unless and until a different amount was agreed upon or ordered by a court, and they ought to have been recorded.
- c) As a result of failing to properly record the liabilities to the contractor, NSI's Monthly Financial Reports filed with IIROC were inaccurate for the 13 months from February 2008 to February 2009. Importantly, by not recording the liabilities, NSI concealed six instances in which it was in early warning for the purpose of IIROC Dealer Member Rule 30.
- d) As UDP, Alboini was ultimately responsible for the failures to properly record NSI's liabilities and for the breach of IIROC Dealer Member Rule 30.

Admissions

¶ 137 In their Response, the Respondents admitted that Chornoboy made an error in failing to take the

leasehold improvement costs into account. In their closing submissions, Respondents state that "...Chornoboy has admitted that he erred in his accounting treatment of certain leasehold improvements, and it is undisputed that errors with respect to NSI's RAC calculations consequently resulted." Therefore Chornoboy has admitted that he is in breach of IDA By-law 17.2 and IIROC Dealer Member Rule 17.2 as alleged. In their closing arguments Respondents' counsel acknowledged that, by reason of Chornoboy's admission, NSI is vicariously liable of a breach of IDA By-law 17.2 and IIROC Dealer Member Rule 17.2 as alleged. The remaining issue is Alboini's responsibility.

Alboini Responsibility

¶ 138 In their closing submissions, Respondents acknowledged that Alboini is responsible for supervising the compliance activities of NSI and those acting on its behalf. However they argue that "this does not make [Alboini] directly culpable for any error committed by those persons under his supervision as UDP." Their position is that Alboini admitted nothing and testified that he was unaware of the error even though he did review the financial statements. Consequently, it is inappropriate for this Panel to hold Alboini personally culpable for Chornoboy's error solely as a result of his position as UDP, otherwise the UDP of every firm would be personally culpable whenever any error or omission is made by any individual at the firm.

¶ 139 This Panel agrees with the general premise of the Respondents' position, that the UDP's responsibilities do not make him culpable for every error committed by individuals in his firm. IIROC Dealer Member Rule 38.5 states that the UDP must "supervise" the activities of, and "promote compliance by" the Dealer Member and the individuals acting on its behalf. Therefore it is this Panel's position that, while the UDP cannot be culpable for all actions of anyone in his firm, a UDP is culpable for some actions of individuals in his firm, and the issue is to determine whether Alboini should be held culpable for the actions of Chornoboy that are contained in the allegations in Count 5(a).

¶ 140 There are two factors which lead this Panel to conclude that Alboini should be held culpable under Count 5(a) as alleged. Firstly, the failure in reporting arose out of the leasehold improvements to the new premises of NSI (the move that was reported by Vance to IIROC when indicating that the physical barriers deficiency would be corrected and which is referred to in Count 3 above). There can be no issue that Alboini was aware of the move and its cost, which involved payment of over \$500,000 in settlement of the claim of the construction firm which did the leasehold improvements. This was simply too significant a number for Alboini not to be aware of it given the size of NSI and its very small executive team at NSI.

¶ 141 Secondly, in their closing argument, Respondents' counsel admitted that Alboini reviewed the Monthly Financial Reports (MFRs), but said he was unaware of the error. There is no direct evidence that he was aware of the error, but given the following factors:

- his involvement in the move to the new premises;
- the size of the settlement;
- the size of the error relative to the totals in the MFRs;
- the fact that he reviewed the MFRs with Chornoboy;
- this was a substantial error made by a senior member of the firm,

it is the Panel's conclusion that Alboini failed to supervise the activities of, and promote compliance by NSI and Chornoboy with IIROC rules regarding proper reporting in its MFRs as alleged.

9. Decision

¶ 142 The Panel delivered its formal decision regarding the allegations on July 23, 2012, as follows:

The Panel finds that there was no settlement agreement between Mr. Alboini and Ms Jensen as alleged by the Respondents in their Response dated September 6, 2011.

¶ 143 The Panel makes the following findings against NSI, Mr. Alboini, Mr. Vance, and Mr. Chornoboy

Count 1: Between August and November 2008, Alboini, as Ultimate Designated Person and a Registered Representative at NSI, engaged in a trading practice which improperly obtained access to credit for his client, Jaguar Financial Corporation, and in doing so risked the capital of both NSI and its carrying broker, thereby engaging in business conduct unbecoming or detrimental to the public interest, contrary to IIROC Dealer Member Rule 29.1;

Count 2: Between August and November 2008, Vance, as Chief Compliance Officer, failed to adequately supervise Alboini's trading activity involving Jaguar Financial Corporation and other NSI clients, contrary to IIROC Dealer Member Rules 1300.1, 1300.2 and 2500;

Count 3: From 2006 to 2010, NSI, Alboini, as Ultimate Designated Person, and Vance, as Chief Compliance Officer, repeatedly failed to ensure that NSI corrected deficiencies found in three business conduct compliance reviews and one trading conduct review, thereby engaging in conduct unbecoming or detrimental to the public interest, contrary to IDA By law 29.1 and IIROC Dealer Member Rule 29.1.

Count 5 (a): NSI, Alboini, as Ultimate Designated Person, and Chornoboy, as Chief Financial Officer from February 2008 to February 2009, filed or permitted to be filed inaccurate Monthly Financial Reports which failed to account for leasehold improvement costs, thereby misstating NSI's risk adjusted capital, contrary to IDA By-law 17.2, and IIROC Dealer.

Delivery of Reasons

¶ 144 After delivering its decision, the Panel indicated that full reasons for the decision would follow in due course and invited counsel to suggest dates for the penalty phase of the hearing. Respondents' counsel took the position that they could not properly address the matter of the appropriate penalties until they had seen the Panel's full reasons for the decision and that dates for the penalty phase should not be determined until after they had an opportunity to review the Panel's reasons. The Respondents' counsel did not cite any authority whatsoever for their position, no IIROC rules, no cases and no legal principles.

¶ 145 The Panel disagreed with the Respondents' counsel. It was the Panel's decision that, in order to deal with the issue of penalties, the Respondents required only the decision itself and did not require the reasoning that led to the decision. The penalty phase deals with issues such as the seriousness of the Respondents' conduct, mitigating and aggravating factors, intentional or inadvertent conduct etc., all of which are well known to Respondents' counsel. These are all based on the evidence, are properly matters for argument at the penalty phase and the Respondents' counsel did not require the Panel's reasons in order to fully present their submissions regarding the appropriate penalties. Furthermore, the Panel could not see why the Respondents' counsel required the Panel's reasons any more than IIROC's counsel, who did not require the reasons prior to the penalty phase. Accordingly counsel and the Panel then agreed that the penalty phase would occur on October 11 and 12, 2012.

¶ 146 In their submissions in the sanctions phase of the hearing, the Respondents again asserted that:

“It is fundamentally unfair to expect the respondents to be able to make meaningful submissions as to the appropriate sanctions and costs in the absence of reasons showing how and why the Hearing Panel arrived at its findings on the merits hearing”

¶ 147 The Respondents referred this Panel to the case of *Re Rowan*, [2009] LNONOSC 941 at paragraph 13 in support of their position, stating: “In a bifurcated hearing where sanctions and costs are considered following the determination of a hearing on the merits, it is essential that careful consideration be given to the findings reached on the merits hearing.” In fact, paragraph 13 states, “We [meaning the sanctions hearing panel] must consider the findings of...the Hearing Panel when determining the appropriate sanctions to impose...” There is no reference in paragraph 13 to the “reasons” being necessary. That follows paragraph 12 which lists the “findings” of the Hearing Panel; these are nothing more than the ultimate findings on the merits without any reasons. *Re Rowan* does not support the Respondents' position. It states that the sanctions hearing panel must consider the findings on the merits and does not provide that the respondents (or any party) are entitled to the reasons before dealing with the sanctions. Also, it makes no reference to the reasons being necessary, only the

ultimate findings.

¶ 148 In *Re Rowan*, the reasons as well as the ultimate findings were available to the sanctions panel because that is the way the hearing was structured. Even if paragraph 13 had stated that the sanctions panel must consider the findings and the reasons, that still would not support the Respondents' position that it was "essential" that they receive the reasons as well as the ultimate findings before having to deal with sanctions.

¶ 149 In their reply to the Respondents' Sanctions Submissions, IIROC asserts that:

"there is no requirement that a Hearing Panel hold a bifurcated hearing in an IIROC disciplinary proceeding, nor is there a requirement that reasons be provided prior to a sanctions hearing. There are numerous examples of IIROC Hearing Panels determining issues of liability and sanctions simultaneously. There is no authority to support the Respondents' assertions that they have been prejudiced in any manner by the procedure adopted by the Hearing Panel, nor is there any authority to suggest that the procedure in any way violates the principles of natural justice."

¶ 150 This Panel agrees with the IIROC position on these matters, and reiterates its conclusion that the Respondents did not require the reasons for its decision on the merits prior to dealing with sanctions issues.

¶ 151 This Panel also noted that, despite their protestations to the contrary, the Respondents were able to present full, complete and meaningful submissions on the sanctions issues in this case.

10. Penalties and Costs

Possible Penalties

¶ 152 On October 11 and 12, 2012 the penalty or sanctions phase of the hearing took place. The purpose of this phase of the hearing was to consider the appropriate penalties or sanctions, if any, to impose on NSI, Alboini, Vance and Chornoboy pursuant to IIROC Rules 20.33 and 20.34.

¶ 153 Under Rule 20.33, the possible penalties against an Approved Person (Alboini, Vance and Chornoboy in this case) are as follows:

- a) a reprimand;
- b) a fine not exceeding the greater of:
 - i. \$1,000,000 per contravention; and
 - ii. an amount equal to three times the profit made or loss avoided by such Approved Person by reason of the contravention;
- c) suspension of approval for any period of time and upon any conditions or terms;
- d) terms and conditions of continued approval;
- e) prohibition of approval in any capacity for any period of time;
- f) termination of the rights and privileges of approval;
- g) revocation of approval;
- h) a permanent bar from approval with the Corporation; or
- i) any other fit remedy or penalty.

¶ 154 Under Rule 20.34, the possible penalties against a Dealer Member (NSI in this case) are as follows:

- a) a reprimand;
- b) a fine not exceeding the greater of:
 - i. \$5,000,000 per contravention; and
 - ii. an amount equal to three times the profit made or loss avoided by the Dealer Member by

reason of the contravention;

- c) suspension of the rights and privileges of the Dealer Member (and such suspension may include a direction to the Dealer Member to cease dealing with the public) for any period of time and upon any conditions or terms;
- d) terms and conditions of continued Membership;
- e) termination of the rights and privileges of Membership;
- f) expulsion of the Dealer Member from Membership in the Corporation; or
- g) any other fit remedy or penalty

Penalties Sought By IIROC

¶ 155 IIROC asked the Panel to make an order against each of the Respondents as follows:

Alboini

- a) In relation to Count 1:
 - i. a fine of \$500,000;
 - ii. a one-year suspension from registration in all capacities; and
 - iii. disgorgement of all commissions received by Alboini as a result of the trades made in NSI's TA Account between August and November 2008;
- b) In relation to Count 3:
 - i. a fine of \$100,000; and
 - ii. a six-month suspension from serving as UDP of NSI, to be served concurrently with the suspension in relation to Count 1;
- c) In relation to Count 5(a), a fine of \$35,000.

Vance

- d) In relation to Count 2:
 - i. a fine of \$35,000; and
 - ii. a three-month suspension from registration in any supervisory capacity, including acting as CCO.
- e) In relation to Count 3:
 - iii. a fine of \$50,000; and
 - iv. a three-month suspension from registration in any supervisory capacity, including acting as CCO, to be served concurrently with the suspension in relation to Count 2.

Chornoboy

- f) In relation to Count 5(a), a fine of \$25,000.

NSI

- g) In relation to Count 3, a fine of \$250,000; and
- h) In relation to Count 5(a), a fine of \$50,000.

Costs

¶ 156 In addition, IIROC submitted a bill of costs to the Panel outlining expenses incurred by IIROC as a result of this proceeding. In its penalty submissions, IIROC requested that the Panel assess against the

Respondents, on a joint and several basis, a portion of the significant expenses incurred by IIROC in the investigation and prosecution of this matter in the amount of \$340,000, pursuant to IIROC Dealer Member Rule 20.49. In its final submissions, IIROC changed its “joint and several” request to individual amounts as reflected below in sections 15 and 16.

Sanctions Principles

¶ 157 IIROC asserted that a panel’s main concerns in determining an appropriate penalty in the context of a disciplinary hearing are as set out in the IIROC Dealer Member Disciplinary Sanctions Guidelines – March 2009 (the “Guidelines”):

- a) protection of the investing public;
- b) protection of IIROC’s Membership;
- c) protection of the integrity of IIROC’s process;
- d) protection of the integrity of the securities markets; and
- e) prevention of repetition of conduct of the type under consideration.

¶ 158 Furthermore, the penalty imposed should reflect the panel’s assessment of the measures necessary in a specific case to accomplish the goals set out above, and may take into account the seriousness of the respondent’s conduct.

¶ 159 In imposing appropriate sanctions, the panel should also consider both specific and general deterrence. Specific deterrence involves ensuring that the Respondents do not commit the same type of conduct again, while general deterrence involves ensuring that other Dealer Members and Approved Persons do not commit similar violations of the IIROC Rules. The sanctions imposed must reflect and be proportionate to the nature of the Respondents’ contravention and take into consideration the circumstances in which the contravention was committed and other aggravating and mitigating factors, if any.

¶ 160 IIROC asserted that general deterrence is an appropriate consideration in making orders that are both protective and preventative, citing *Re Sabourin* (2010), 33 OSCB 5299, and, as stated by the Ontario Securities Commission in *Re Mithras Management Ltd.* 1990 LNONOSC 119:

“... the role of this Commission is to protect the public interest by removing from the capital markets - wholly or partially, permanently or temporarily, as the circumstances may warrant - those whose conduct in the past leads us to conclude that their conduct in the future may well be detrimental to the integrity of those capital markets. We are not here to punish past conduct; that is the role of the courts, particularly under section 118 [now 122] of the Act. We are here to restrain, as best we can, future conduct that is likely to be prejudicial to the public interest in having capital markets that are both fair and efficient. **In so doing we must, of necessity, look to past conduct as a guide to what we believe a person's future conduct might reasonably be expected to be;** we are not prescient, after all.” [Emphasis added]

¶ 161 IIROC also pointed out that, according to the Guidelines, “Registrants and Dealer Member firms have significant responsibilities that they must meet if investors are to be protected and market integrity maintained. **Registrants who choose to act in ways that threaten the integrity of the capital markets must have the expectation that they will be held accountable through enforcement action by regulators.** Sanctions should be based on the circumstances of the particular misconduct by a respondent with an aim at general deterrence.”[Emphasis added]

¶ 162 General deterrence can be achieved if a sanction strikes an appropriate balance by addressing an Approved Person’s specific misconduct but is also in line with industry expectations. In *Re Mills*, [2001] I.D.A.C.D. No. 7, the District Council held as follow with respect to general deterrence:

“Industry expectations and understandings are particularly relevant to general deterrence. If a penalty is less than industry understandings would lead its Members to expect for the conduct under consideration,

it may undermine the goals of the Association’s disciplinary process; similarly, excessive penalties may reduce respect for the process and concomitantly diminish its deterrent effect. Thus the responsibility of the District Council in a penalty hearing is to determine a penalty appropriate to the conduct and the respondent before it, reflecting that its primary purpose is prevention, rather than punishment.”

¶ 163 This Panel agrees that general deterrence is an important objective in most (if not all) cases, and is in this case. We agree with the statement in *Re Mills* that general deterrence will be achieved if the sanction strikes an appropriate balance by addressing the specific conduct at issue and industry expectations. No “premium” over specific deterrence needs to be, nor should be, given to achieve general deterrence.

¶ 164 Industry expectations are formed through several sources, including through the Guidelines and previous IIROC and IDA disciplinary decisions. This Panel also agrees with the following statement from *Re Mills* regarding the usefulness of prior cases in determining sanctions in the case at hand:

“Comparison with penalties imposed in similar cases may provide another means of ensuring proportionality, always recognizing that the imposition of sanctions is premised in large part on factors specific to the circumstances of each case and that only rarely will there be correspondence on all matters between two cases.”

¶ 165 The Guidelines also provide some guidance in respect of “repeat offenders”, of which NSI is one. It is acknowledged that an important objective of the disciplinary process is to deter future misconduct by imposing progressively escalating sanctions on repeat offenders. For this reason, it is well accepted that a Hearing Panel should consider a respondent’s relevant disciplinary history in determining sanctions.

¶ 166 The Guidelines set out the following additional list of key considerations when determining sanctions that are relevant to the within proceeding:

- a) harm to client, employer and/or the securities market;
- b) blameworthiness of the respondent;
- c) degree of participation of the respondent in the conduct at issue;
- d) extent to which the respondent was enriched by the misconduct;
- e) acceptance of responsibilities, acknowledgment of misconduct and remorse;
- f) planning and organization; and
- g) multiple incidents of misconduct over an extended period of time.

¶ 167 This Panel agrees with the factors and principles expressed above and has applied them in determining the appropriate sanctions in this case.

¶ 168 In their Sanctions Submissions, the Respondents did not take issue with these general sanctions principles, but they did assert that consistency of the sanctions in this case with those imposed in prior cases cited, “implies proportionality.... Thus a significant fine against a smaller firm such as Northern has a disproportionate impact as compared with the same fine against a larger firm. Similarly, a lengthy suspension of a key manager of a smaller firm can be expected to result in more significant disruption to that firm’s ongoing business and operations than is the case for firms that have a larger management team.” As asserted by IIROC’s counsel, the Panel may take that into account along with other factors, but it should not apply a “discount” on its sanctions to compensate for the relatively larger effect the sanctions may have on a smaller firm.

¶ 169 The Respondents also cited *Re Brighten*, [2005] I.D.A.C.D. No. 44, for the proposition that lack of clarity regarding applicable requirements can be a mitigating factor in determining an appropriate sanction. The Panel deals with this assertion in paragraph 201.

¶ 170 Deciding on appropriate sanctions in a particular case is not a matter of mathematical precision. It involves the exercise of judgment by the Panel based on all the relevant factors in the Guidelines and elsewhere, comparing the facts and issues in the particular case with prior decisions and having regard to the submissions

of both parties. That is the process followed by this Panel in deciding on the appropriate sanctions.

¶ 171 The Panel noted that a large portion of the sanctions submissions of both IIROC and the Respondents involved a further review of the facts of the case and precedent cases already dealt with. Much of this appeared to be either irrelevant to the sanctions issues or an attempt to re-argue the case on its merits. In coming to its decision on sanctions, the Panel did not deal with those portions of the submissions which were merely an attempt to re-argue the merits of the decision; the Panel treated the remainder as relevant only to the submissions on the appropriate sanctions and did not set them out again in the sanctions part of our decision.

11. Sanctions- Count 1 Alboini

¶ 172 The Hearing Panel found that between August and November, 2008, Alboini, as UDP and a registered representative at NSI, engaged in a trading practice which improperly obtained access to credit for his client, JFC, and in doing so risked the capital of NSI and its carrying broker, thereby engaging in conduct unbecoming or contrary to the public interest, contrary to IIROC Dealer Member Rule 29.1

¶ 173 IIROC referred the Panel to several precedents for comparison with the findings regarding Count 1. In *Re Connacher*, 2011 IIROC 28, an IIROC disciplinary hearing, David Bruce Connacher was found to have engaged in conduct unbecoming or detrimental to the public interest, contrary to IIROC Rule 29.1, for having conducted trades in his firm's average price inventory account ("API") in a manner that was misleading and deceptive, and for having entered into several loan arrangements with two of his clients without the knowledge or consent of his employer. In that case, the panel found that Connacher used the API to accumulate significant securities positions and would only later decide which clients would receive the positions. The panel further found that the accumulated positions would not be booked out of the API in a timely manner, remaining in the account for weeks and at times months.

¶ 174 Ultimately, as the general market declined in the fall of 2008, the positions accumulated by Connacher also declined in value, thereby making it difficult for Connacher to book the positions out to clients. In late October 2008 attempts were made to book out over \$63 million in securities to two of Connacher's biggest clients. Both clients denied placing the orders and the trades failed to settle. Evergreen Capital Partners Inc. ("Evergreen"), Connacher's firm, was unable to pay for the trades and ceased operations. The panel found that as part of his trading strategy, Connacher engaged in the following improper and/or deceptive practices:

- a) executed both the buy and sell of a particular security in the API and subsequently book out to his clients. In doing so, he used Penson and/or Evergreen's capital to finance winning trades for his clients;
- b) allocated positions to his clients at prices less than the market price at which the security was bought. Such pricing discrepancies provided a benefit to his clients at the expense of Penson and/or Evergreen;
- c) transferred some of his accumulated positions to the API of the other Evergreen traders, thereby creating a misleading impression to the firm that he managed down his own API; and
- d) booked out positions to clients and immediately canceled them days later, thereby creating a misleading impression to the firm that he was managing down his own API.

¶ 175 The panel found that Connacher knowingly violated critical rules of his employer and the industry, and ordered that Connacher be barred for life from any form of registration in any capacity with a Member firm of IIROC, that he pay a fine of \$500,000, and that he pay costs of \$71,315, on a full indemnity basis.

¶ 176 IIROC emphasized the factual similarities with our case, while acknowledging that Connacher's conduct was not the same as Alboini's, nor was the resulting loss to the firms involved. Evergreen suffered a large loss and went out of business, while NSI suffered no actual loss. IIROC also pointed out that Alboini's conduct exposed NSI to the possibility of large losses if the HudBay investment had gone down, not up. The Respondents' characterized Connacher's conduct as much more egregious than Alboini's, and the result in *Connacher* was much more serious. The Respondents suggested that *Connacher* is relevant by way of "counter-

example” regarding the appropriate sanctions.

¶ 177 In *Re Cuthbertson*, 2012 IIROC 24, an IIROC settlement hearing, the respondent admitted to the following violations of IIROC Rule 29.1:

- a) having made seven unauthorized trades between September and December 2008;
- b) between September and November, 2008 he parked stocks purchased for a retail client in the firm’s average price account and institutional accounts and then misrepresented the true nature of those stock positions to his firm’s CCO; and
- c) on October 6, 2008 he executed an off-marketplace trade without approval from Regulation Services and above the market price.

¶ 178 The panel agreed that there were a number of mitigating factors in the case, including that the respondent had cooperated with IIROC and was young at the time of his misconduct. The panel imposed an 18 month suspension from registration in any capacity with IIROC, a fine of \$35,000, and upon re-approval, a six month period of close supervision.

¶ 179 The Respondents’ position was that *Cuthbertson* was not relevant to our case because the conduct involved off-marketplace trades and unauthorized trading in a client account, neither of which are involved in our case.

¶ 180 IIROC also referred the Panel to the cases of *Re Pan*, 2012 IIROC 22 and *Re Benarroch*, 2011 IIROC 11 which, however, the Respondents asserted were not relevant to our case because the facts were significantly different. This Panel reviewed those cases and did not find them particularly helpful. *Connacher* and *Cuthbertson* were of some help to the Panel, but the factual differences limited their applicability in our case.

¶ 181 While the cases referred were of limited help to the Panel in determining the sanctions regarding Count 1, this Panel found the Guidelines, in particular the key considerations listed in paragraph 166 above as applicable to the specific facts and findings in our case were of much more help, and these are reviewed as follows:

Harm to Clients, Employer and/or the Securities Market (Guideline 3.1)

¶ 182 The Guidelines provide that actual harm may be quantified by considering the type, number and size of the transactions, the number of clients affected, the time over which the misconduct took place and the size of the loss suffered by the clients or the firm. Harm can also be measured by subjective factors, e.g. the impact of the misconduct on the client’s life, on the reputation of the Dealer Member or the reputation of the Canadian securities industry.

¶ 183 The Respondents pointed out that there was no actual harm or loss in this case. This is true from the standpoint of financial loss. In their oral submissions on sanctions, Respondents’ counsel also attempted to argue that there was no or little risk to Penson and NSI. The Panel has already decided that Alboini’s actions caused risk to the capitals of NSI and Penson even if no financial loss actually occurred. Furthermore, his conduct, being conduct unbecoming or contrary to the public interest, will certainly have a negative impact on the reputation of NSI and on the securities industry.

¶ 184 The Panel finds that the absence of actual financial loss is a mitigating factor in favour of Alboini, but is somewhat offset by the risk of loss caused by his actions and their affect on the reputations of NSI and the industry.

Blameworthiness (Guideline 3.2)

¶ 185 The Guidelines provide that distinctions should be made between unintentional or negligent conduct, and conduct that involves manipulative, fraudulent or deceptive conduct, and between isolated incidents and repeated, pervasive or systematic contraventions.

¶ 186 The Respondents asserted that there was “no manipulative, fraudulent or deceptive conduct” and that Penson was at least partly to blame for the risk to its capital and that of NSI. Regarding the “cross-guarantees”,

they stated that they were of no financial or regulatory effect and did not change the position of the parties; there was no misuse of investor funds in the projects and there was no manipulation, fraud or deception of Penson.

¶ 187 The Panel does not agree with the Respondents' position. Alboini's conduct was quite intentional and amounted to a systematic attempt to improperly benefit Jaguar, in which he had a financial interest, at the risk and expense of NSI and Penson. Alboini's conduct can also be characterized as manipulative and deceptive in the Panel's view. The existence and effect of the cross-guarantees were not relevant to the Panel's decision because Alboini, in any event, let Penson believe they could treat all the Jaguar accounts as one when he knew they could not do so. All of the foregoing is based on the Panel's conclusions laid out in more detail in the reasons on the merits phase of the hearing. His conduct was not as benign as alleged by the Respondents in their Sanctions Submissions, even though no financial losses were incurred.

Degree of Participation (Guideline 3.3)

¶ 188 IIROC asserts that Alboini was the directing mind behind the misuse of the TA Account and the Project Accounts. Based on all of the evidence, there can be no doubt that this was the case, however much the Panel may speculate about the blame-worthiness of Penson, as we were invited to do by the Respondents.

Enrichment of the Respondent (Guideline 3.4)

¶ 189 The Guideline provides that "where the registrant benefited financially from the misconduct...it may be appropriate to require that any profits, commissions, fees, or any other compensation earned be disgorged."

¶ 190 It is clear on the evidence that Alboini received significant benefits from his conduct which is the subject of Count 1 in the form of commissions and indirectly as CEO and significant shareholder in Jaguar.

Prior Disciplinary Record (Guideline 3.5)

¶ 191 The Guidelines provide that absence of a prior disciplinary record may indicate prior moral character and may be a mitigating factor unless the misconduct is so egregious as to nullify that mitigating effect; a prior disciplinary history may highlight a concern about specific deterrence and the need to impose escalating sanctions on repeat offenders. Past misconduct should be compared to the misconduct at issue for relevance, but even unrelated past misconduct may offer evidence of prior disregard for regulatory requirements, investor protection or market integrity.

¶ 192 Alboini has no prior disciplinary record. However NSI was the subject of a prior disciplinary proceeding involving the failure to maintain adequate risk adjusted capital which resulted in a settlement agreement with the IDA (now IIROC). This settlement agreement was signed by Alboini on behalf of NSI and given his significant role as senior executive, shareholder and directing mind behind the actions of NSI, it is this Panel's conclusion that the absence of a disciplinary record by Alboini personally should not be a mitigating factor.

Acceptance of Responsibilities, Acknowledgment of Misconduct and Remorse (Guideline 3.6)

¶ 193 The Guidelines provide that an admission of wrongdoing may be a mitigating factor because it implies remorse and acknowledgement of responsibility.

¶ 194 The Panel agrees with IIROC's position that Alboini has shown no remorse and does not accept responsibility for his actions. This is amply established by the evidence and there is nothing in the Respondents' Sanctions Submissions that contradicts this position.

Planning and Organization (Guideline 3.10)

¶ 195 The Guidelines provide that evidence of planning and organization are aggravating factors, including the number, size and character of the transactions, evidence of calculated and deliberate acts, attempts to conceal the misconduct, or lull into inactivity, mislead, deceive or intimidate a client, regulatory authorities or a the Member firm, and whether the Respondent ignored prior IIROC (or other regulator) warnings that the conduct violated the Rules or legislation.

¶ 196 As previously stated, Alboini's actions which are the subject of Count 1 were planned, deliberate and systematic. There is nothing in the Respondents' Sanctions Submissions which contradict this conclusion.

Permanent Ban (Guideline 4.3, General Principles)

¶ 197 This Guideline provides that a permanent ban from approval of an individual may be considered where it is clear that a respondent's conduct is indicative of a resistance to governance or there is reason to believe that the respondent could not be trusted to act in an honest and fair manner in all their dealings with the public, their clients and the securities industry as a whole. The Panel has decided that this factor is applicable to Alboini in respect of Count 1.

Other Factors

Alboini Truthfulness

¶ 198 IIROC took the position that Alboini was not a truthful witness and that his "untruthfulness and evasiveness as a witness should be aggravating factors going to the length of time he is suspended from registration."

¶ 199 The Respondents disagreed with IIROC's position, stating that "adverse credibility issues... can have no bearing on sanction, including, in particular, suspension."

¶ 200 While this Panel found Alboini to be an evasive witness, the Panel made no finding that he was untruthful, and did not take this issue into account in determining sanctions against him.

Novelty of Count 1 Allegations

¶ 201 The Respondents submitted that the allegations in Count 1 were "novel", were not expressly proscribed by IIROC Rules or applicable legislation, nor were there any Rules concerning the operation of a client average price accumulation account. They also stated that the relationship between IIROC and the Dealer Members and Approved Persons is based on a contract which obliges the Members and Approved Persons to follow rules which IIROC adopts from time to time without any requirement for their consent or any ability to dispute these rules or IIROC's interpretation thereof; consequently IIROC's obligation to perform the contract in good faith requires that there be certainty as to Member and Approved Persons' obligations. Where the Rules are comprehensive and complex, a general 'conduct unbecoming' or 'public interest' provision should not be resorted to fill in a perceived gap in the Rules. It must be noted that Respondents never raised this issue prior to the sanctions phase of the hearing, and that this Panel has decided that Alboini's conduct constitutes a breach of Rule 29.1. Therefore the Respondents' assertion that the allegations in Count 1 were novel should, and will only apply to the sanctions which may be imposed.

¶ 202 The Respondents also took the position that for the purpose of assessing sanctions, IIROC had never identified, either to Alboini or IIROC's membership generally, that "there was any gap in the extraordinarily comprehensive and complex Rules prescribing margin requirements. In particular... IIROC had never made [Alboini] or its membership aware that a Type 2 Introducing Broker was obliged either to confirm that its carrying broker was providing, or itself was to provide, margin on non-contingent client accumulation accounts." The Respondents then submitted that the Panel "cannot and should not impose a fine in respect of Count 1. Moreover the [Panel] cannot impose any sanction in respect of Count 1 without finding that Northern was obliged to provide margin in respect of positions in the non-contingent client accumulation account with [Penson]." The Panel disagrees with Respondents' position. As noted in the merits phase of the decision, it is only Alboini's actions which are at issue and he was only interested in gaining access to credit for Jaguar without having to pay on a T+3 basis; he was indifferent about who was obliged to provide margin for the TA Account so long as he obtained that advantageous credit.

¶ 203 Alternatively, the Respondents assert that any sanction must reflect that no respondent had yet faced disciplinary proceedings based on an introducing broker's use of a non-contingent client accumulation account; the decision in this case will set industry expectations and therefore there is no need for general deterrence other than the determination of the case itself.

¶ 204 IIROC disagreed with the Respondents' position that a general conduct unbecoming or public interest position should not be resorted to in order to fill in a perceived gap in the Rules, citing the case of *Re Biovail*

Corp. (2010), 33 OSCB 8914. *Biovail* was an OSC proceeding in which the OSC alleged a violation of section 127 of the Securities Act which provides that the Commission can make certain orders where it is in the public interest to do so. Counsel for the respondent submitted that the OSC “cannot make out its case under section 127 unless it can prove a breach of the Act or abuse of the capital markets.” The OSC held that the OSC’s “public interest jurisdiction allows it to make an order under section 127 of the Act even if there is no breach of Ontario securities law or any conduct inconsistent with a policy statement.” [emphasis added]. The Respondents countered that the *Biovail* decision was based on the OSC’s “public interest” mandate, but this Panel does not have a public interest mandate and therefore *Biovail* is not applicable.

¶ 205 This Panel agrees with the IIROC position. There is no difference in principle between the “public interest” jurisdiction of the OSC under section 127 and the jurisdiction of IIROC and this Panel under Rule 29.1 to discipline “conduct unbecoming or detrimental to the public interest”. This Panel finds that *Biovail* supports the conclusion which the Panel reached in the merits phase of the case, and that it may impose sanctions under Rule 29.1. The issue is whether the allegations are so novel, that the sanctions should be less severe. IIROC’s position was that Alboini’s conduct should not be considered less severe merely because no other Approved Person has ever faced disciplinary proceedings based on the same set of facts. This Panel agrees with IIROC’s position. Even though there may not have been any prior cases based on facts similar to Count 1 of this case, the conduct engaged in by Alboini is below the standard that would reasonably be acceptable to members of the industry (as this Panel has concluded in the merits phase of the case). The allegations in Count 1 are not so “novel” that reasonable industry members would not find that such allegations could lead to a finding that they were in breach of Rule 29.1. The factors which led the Panel to conclude that Alboini “improperly” gained access to credit for Jaguar and thereby risked the capital of both NSI and Penson are below the standards reasonably acceptable to the industry. The allegations are not so novel that this Panel thinks that they merit a reduction in the severity of the sanctions to be imposed.

Affect on NSI

¶ 206 The Respondents’ counsel took the position that the Panel should take into account the effect our sanctions decision will have on NSI. They allege that, given that Alboini is the driving force behind NSI, there is a serious risk that the firm will be in real jeopardy if he is suspended from all registrable activities. They presented a number of letters from NSI employees and clients confirming the importance of Alboini to NSI. Respondents’ counsel confirmed that they solicited letters of support but did not provide a template for employees or clients to follow. However, the Panel noted the similarity in wording of many of the letters and these letters did not have a great effect on the sanctions which the Panel determined. The Respondents’ counsel invited the Panel to craft sanctions which would allow NSI to continue, but with safeguards to protect against any actions by Alboini, e.g. by putting him under strict supervision by someone who is not currently with NSI. IIROC argued that there was no evidence that NSI will go out of business if Alboini is suspended and that should not be taken into account or individuals who are important to their firms would never be suspended. The Panel agrees with this. The Panel also has concluded that there is sufficient evidence that Alboini could not effectively be controlled by anyone brought into, or currently in NSI, or by any restriction on him other than a suspension.

¶ 207 The Panel concluded that the effect of suspending Alboini might have on NSI is not a sufficient reason to consider not doing so. There is no evidence that it would go out of business, but even if the effect of a suspension would be significantly negative, the Panel believes that Alboini’s conduct merits suspension based on the criteria listed above. The Panel also noted that any suspension of Alboini from his activities with NSI will not affect his activities with Jaguar.

Sanctions on Alboini - Count 1

¶ 208 IIROC made the following submissions regarding sanctions for Count 1. “A sanction consisting of a fine of \$500,000, disgorgement of commissions earned on trades made in the TA Account, and a suspension in all capacities for one year is (a) in keeping with the precedent cases described above, (b) appropriate given the volume of trading undertaken by Alboini and the risk posed by Alboini’s activity to NSI, Penson, and NSI’s clients, (c) will serve to act as a deterrent to Alboini engaging in this type of serious misconduct in the future,

and (d) will send an important message of general deterrence to the industry that deceitful, self-serving behavior, coupled with a disregard for the interests of clients and the integrity of the capital markets, will not be countenanced by IIROC. Further, the sanction is appropriate in that the length of the suspension sought is less than that imposed in the precedent cases described above, despite Alboini having engaged in similarly egregious conduct and, along with the fine sought, will serve the guiding purposes of specific and general deterrence.”

¶ 209 In addition to their submissions on the suspension of Alboini outlined in paragraph 206, the Respondents submitted that the Panel “cannot and should not impose a fine in respect of Count 1.” Alternatively, any fine should reflect the novelty of the allegations. They also submitted that where, as in this case, there has been no actual loss it is wholly inappropriate to require disgorgement of commissions received by Alboini; such disgorgement should be limited to circumstances where the commissions were not earned or the trades were artificial. The Panel does not agree with these submissions by the Respondents.

¶ 210 The Panel followed the process described in paragraph 170 in making the following decisions regarding sanctions on Alboini under Count 1:

Fine: The Panel agreed with the fine suggested by IIROC in the amount of \$500,000 and orders accordingly, such fine to be payable within 30 days of the date of this decision.

Disgorgement: The Panel agrees with IIROC that Alboini should disgorge the commissions earned by him in respect of the trades made in NSI’s TA Account between August and November 2008 and orders accordingly, the amount thereof to be disclosed to IIROC by NSI and paid within 30 days of the date of this decision.

Suspension: The Panel orders that Alboini be suspended from approval by or registration with IIROC in all capacities for two years commencing 14 days after the date of this decision, and that Alboini be permanently barred from approval by, or registration with IIROC as a UDP anywhere in the industry commencing 14 days after the date of this decision.

12. Sanctions- Count 2 Vance

¶ 211 The Panel found that between August and November 2008, Vance as CCO of NSI, failed to adequately supervise Alboini’s trading activity involving Jaguar and other NSI clients, contrary to IIROC Rules 1300.1, 1300.2, and 2500.

¶ 212 The Respondents’ counsel asserted that it is not appropriate to impose a period of suspension for failure to supervise where the respondent did not obtain a financial benefit as a result of the lack of supervision, citing the cases of *Re Van Hee* (2009), LNIIROC 34 and *Re Brant Securities Ltd*, [2004] I.D.A.C.D. No 20. In its Penalty Submissions and its Reply, IIROC counsel pointed out to the Panel that various other IIROC decisions have imposed sanctions on respondents for failure to supervise where there was no financial benefit to the respondent, but where the failure to supervise involved a failure to recognize red flags and a failure to make diligent inquiries. They cited *Re Murdoch*, 2012 IIROC 23, *Re Stevenson*, 2008 IIROC 24 and *Re Benarroch*, 2011 IIROC 11. In *Murdoch*, the panel’s sanctions were a suspension of Murdoch’s registration for 12 months as branch manager or from acting in any supervisory capacity, a fine of \$50,000 and costs payable to IIROC of \$3500. In *Stevenson*, the panel imposed a global fine of \$50,000, a suspension from approval as sales manager, officer and director, including revocation of his vice-president designation, for 12 months and prohibition on approval by IIROC in the position of branch manager, co-branch manager or officer, or to act in any other management, compliance or supervisory function for 12 months. In *Benarroch*, the respondent Glover was CCO and Alternate UDP at Credifinance; Glover was fined \$50,000, suspended for 5 years from any registration with IIROC which permits a supervisory role and suspended from any registration with IIROC for 1 year.

¶ 213 Respondents’ counsel also took the position that “Any financial sanction must be appropriate having regard to [Vance’s] position and ability to pay” and that “a fine of more than \$25,000 for Counts 2 and 3 combined would impose an undue financial hardship on him.” IIROC argued that there is no evidence before the Panel in respect of Vance’s financial position and that the Panel should disregard the Respondents’ submission. The Panel agrees with IIROC’s position and further notes that the Guidelines do not refer to

lessening fines in the case of financial hardship.

¶ 214 The following factors from the Guidelines are also relevant in determining the appropriate sanctions regarding Count 2:

Harm to clients, employer and /or the securities market (Guideline 3.1)

¶ 215 The fact that there was no actual financial loss is a mitigating factor

Blameworthiness and Degree of Participation (Guidelines 3.2 and 3.3)

¶ 216 The Respondents asserted “that negligence does not necessarily equate to blameworthiness.” Perhaps negligence does not necessarily equate to blameworthiness, but it does in this case because Vance did not display the degree of diligence expected of a CCO, as the Panel has concluded in its decision on the merits of the allegations. The Respondents also assert that “Vance was as diligent as possible, in the circumstances, in dealing with [Penson’s] credit inquires and concerns.” This was not the conclusion of the Panel; Vance was CCO and was fully to blame for the failures to supervise which the Panel has identified in paragraphs 103-106. The Respondents’ counsel also asserted that the allegations are “premised on [Vance’s] omissions and not on acts of commission.” Again, acts of omission do not excuse a failure to exercise diligence by a CCO. However, he was not a participant in Alboini’s trading scheme which is a mitigating factor as noted by IIROC counsel.

Enrichment (Guideline 3.4)

¶ 217 Vance did not receive any direct financial benefit from his actions. This is a mitigating factor as noted by IIROC counsel.

Prior Disciplinary Record (Guideline 3.5)

¶ 218 Vance has not been the subject of any prior disciplinary proceedings by IIROC or any of its predecessors. This is a mitigating factor, as noted by IIROC counsel.

Failure to Supervise Guidelines (Guideline 4.3)

¶ 219 In addition to the factors set out above, the Guidelines also set out factors to be considered in failure to supervise case. Those relevant to our case are:

- (a) The extent of inadequacy in the procedures for supervision or the actual supervision of employees ;
- (b) The extent of employee misconduct;
- (c) “ red flag” warnings that should have been caught by a proper system of supervision/failure to follow up or to conduct periodic reviews; and
- (d) Corrective measures taken since discovery of the problem.

¶ 220 The Guidelines recommend

- a minimum fine of \$25,000,
- re-write of PDO,
- period of suspension or permanent bar from director/officer/supervisory and or compliance responsibilities,
- permanent bar from approval in all capacities in egregious cases.

¶ 221 The Panel views Vance’s misconduct as serious, though not egregious and has taken into account the difficult position he was in because the activity which he did not adequately supervise was conducted by his boss, Alboini, who appeared to be a very forceful personality. However, that does not excuse a person who takes on the role of CCO from exercising diligence in carrying out the duties expected of that position. In deciding on appropriate sanctions, the Panel is particularly mindful of the need for general deterrence and that a message must be sent to CCOs that they must take their obligations very seriously, no matter who in the organization may object.

¶ 222 The Panel followed the process described in paragraph 170 in making the following decisions regarding the sanctions on Vance under Count 2:

Fine: the Panel orders that Vance pay a fine of \$25,000, payable within 30 days of the date of this order; and

Suspension: the Panel orders that Vance be suspended from approval by, or registration with IIROC in any supervisory capacity including acting as Chief Compliance Officer anywhere in the industry, for a period of 3 months commencing 14 days after the date of this order.

13. Sanctions-Count 3 NSI, Alboini, and Vance

¶ 223 The Panel found that from 2006 to 2010, NSI, Alboini as UDP, and Vance as CCO, repeatedly failed to ensure that NSI corrected deficiencies found in three business conduct compliance reviews and one trading conduct review, thereby engaging in conduct unbecoming or detrimental to the public interest, contrary to IDA By-Law 29.1 and IIROC Rule 29.1

¶ 224 IIROC referred the Panel to several cases which it asserted were relevant in determining the appropriate sanctions under Count 3. *Re Questrade Inc.*, [2009] IIROC No. 49 and 2010 IIROC 17 dealt with a continual refusal to comply with IIROC directives and is referred to in the merits part of this decision; the panel imposed a fine on the Member Dealer of \$150,000 and awarded costs of \$50,000. The *Questrade* panel noted that the fine was reduced by important mitigating factors, cooperation with IIROC, activities at the less egregious end of the spectrum, remedial actions taken by the respondent and absence of harm to clients. IIROC pointed out that the continuing refusal to comply with IIROC directives took place over a similar length of time as in our case and that the same mitigating factors are not present in our case.

¶ 225 In *Re Argosy Securities Inc.*, 2008 IIROC 22, IIROC brought disciplinary proceedings against Argosy for failing to properly respond to IDA concerns regarding its sales compliance program, and against Dax Sukhraj, its CEO, Director and UDP for failing to ensure that Argosy fulfilled representations to IIROC that it would implement the appropriate policies. The panel noted that there were good faith attempts by Argosy to comply, but the attempts too often fell short of the required norm. This factor was also present in our case. The *Argosy* panel imposed a global fine of \$150,000 against Sukhraj.

¶ 226 In *Re Jory Capital Inc.*, 2011 IIROC 7, a panel found that Patrick Cooney, the sole director of Jory had breached IIROC rules by failing to implement a number of programs, systems and policies and failing to ensure Jory fulfilled its representations to IIROC, all over 4 or 5 year periods. The *Jory* panel stated that "... continuing breach of rules and regulations reflected Cooney's lack of concern for honouring IIROC and IDA's financial compliance rules over a lengthy period and therefore the public interest requires that significant sanctions be imposed." That statement is applicable in this case. The panel imposed a \$100,000 fine and a permanent ban from registration in all capacities except registered representative, investment representative, or trader on Cooney. Jory was required to pay a fine of \$120,000.

¶ 227 In determining the appropriate sanction in respect of Count 3, the Panel reiterates its agreement with the IIROC submissions, that compliance with IIROC Rules is not a process of negotiation between IIROC and the Member or Approved Person. Without rules, and compliance with those rules by those being regulated, a regulatory organization cannot protect the public interest. Protection of the integrity of the IIROC process is one of the factors in determining an appropriate sanction. Members and Approved Persons must understand the importance of complying with the directions of IIROC regarding compliance examinations to ensure that IIROC can properly regulate its Members, protect the investing public and maintain the ongoing integrity of the capital markets.

NSI

¶ 228 In this case, IIROC sought a fine of \$250,000 against NSI based partly on its previous disciplinary history in relation to the same misconduct and the size of the fine imposed in the context of its previous settlement agreement with IIROC. The fine sought is twice the fine agreed to in the prior settlement, and reflects the seriousness of the misconduct described in Count 3. IIROC also asserts that the fine is within the range of

finer imposed in similar cases. The Respondents argued that the size of the firm must be taken into account in determining proportionality in regard to the appropriate sanctions. While firm size may be taken into account by the Panel together with all other relevant factors, as stated by IIROC counsel there is no discount for size. This is supported by *Re Mills* [2001] I.D.A.C.D. No. 7 referred to previously, in particular at paragraphs 6-11 of that case. This Panel agrees with IIROC that a fine of \$250,000 against NSI is appropriate and so orders, such fine to be paid within 30 days of the date of this decision.

Alboini

¶ 229 IIROC also sought a fine of \$100,000 against Alboini and a 6 month suspension from serving as UDP of NSI, to be served concurrently with the suspension sought under Count 1. IIROC relied on the following factors:

- (a) the potential harm to clients of NSI's ongoing failure to ensure it corrects deficiencies contained in both Trading Conduct Compliance ("TCC") Examinations and Business Conduct Compliance ("BCC") Examinations;
- (b) Alboini's ongoing refusal to comply with Staff's directions in respect of correcting deficiencies in one TCC Examination and three BCC Examinations over a period of at least six years;
- (c) Alboini's failure to accept responsibility for NSI's deficiencies;
- (d) Alboini's ultimate responsibility for NSI's deficiencies in each of the relevant BCC and TCC examinations given that he was, at all material times, UDP of NSI;
- (e) Alboini's evidence that only "if it doesn't hurt our business, we will do what IIROC wants us to do";
- (f) that Alboini was also UDP of NSI during the previous disciplinary hearing brought against NSI; and
- (g) the significant length of time in which a number of TCC and BCC deficiencies remained outstanding despite multiple requests from Staff.

¶ 230 As a mitigating factor, the Respondents counsel pointed to the numerous and ongoing attempts by NSI to correct the deficiencies, and the fact that the deficiencies have now been largely remediated. These efforts would have been a more powerful factor had they not continued to be unsuccessful in the opinion of IIROC.

¶ 231 The Panel agrees that the factors cited by IIROC in paragraph 229 support serious sanctions against Alboini under Count 3 and finds the cases referred to in paragraphs 224, 225 and 226 to be helpful. The Panel also finds that Guideline 4.3, General Principles, is applicable in determining the appropriate sanctions against Alboini under Count 3 as with Count 1 (see paragraph 197). The Panel has decided that the following are appropriate sanctions against Alboini under Count 3:

Fine: the Panel orders that Alboini pay a fine in the amount of \$100,000, to be paid within 30 days of the date of this decision; and

Suspension: the Panel orders that Alboini be suspended from approval by, and registration with IIROC in all capacities for a period of one year from the date of this decision, concurrent with the two year suspension in regard to Count 1, and that he be permanently suspended from approval by, and registration with IIROC as UDP anywhere in the industry.

Vance

¶ 232 IIROC also sought a fine of \$50,000 against Vance, along with a three-month suspension from registration in any supervisory capacity, including acting as CCO, to be served concurrently with the suspension in relation to Count 2. In doing so, IIROC took into consideration the following factors:

- (a) the potential harm to clients of NSI's ongoing failure to ensure it corrects deficiencies contained in both TCC and BCC Examinations;

- (b) that Vance was CCO in the period following two of the BCC Examinations and the TCC Examination referred to in the Notice of Hearing;
- (c) that Vance was not CCO at NSI during the period of time covered by the previous disciplinary hearing brought against NSI
- (d) Vance's refusal or inability to comply with Staff's directions in respect of correcting deficiencies in one TCC Examination and two BCC Examinations over a period of at least four years; and
- (e) the significant length of time in which a number of TCC and BCC deficiencies remained outstanding.

¶ 233 The Respondents' counsel submitted that any fine against Vance under Counts 2 and 3 should not be cumulative. The Panel did not agree with that position since the types of misconduct in the two counts were different as were the Rules applicable thereto.

¶ 234 The Panel agrees that the factors cited by IIROC in paragraph 232 are the relevant factors in determining the appropriate sanctions against Vance under Count 3. Accordingly this Panel orders that Vance pay a fine in the amount of \$25,000, in addition to the fine in respect of Count 2, such fine to be paid within 30 days of the date of this decision.

14. Count 5(a)- Chornoboy, NSI and Alboini

¶ 235 The Panel found that NSI, Alboini as UDP, and Chornoboy as CCO, filed or permitted to be filed inaccurate Monthly Financial Reports which failed to account for leasehold improvement costs, thereby misstating NSI's risk adjusted capital, contrary to IDA By-Law 17.2 and IIROC Rule 17.2.

¶ 236 The Guidelines provide guidance on the range of appropriate sanctions in instances where a Dealer Member or senior manager has failed to maintain current books and records in violation of IIROC Rule 17.2. The recommended sanctions for a Dealer Member include a minimum fine of \$25,000, and suspension until such time as the record keeping violations have been corrected. For senior managers, the recommended sanctions include a minimum fine of \$10,000, a period of suspension from director/officer/supervisory and/or compliance responsibilities, and a permanent bar from approval in all registered capacities in the most egregious cases.

¶ 237 The Guidelines also set out a number of factors to be considered in failure to maintain proper books and records cases in addition to the general principles set out above. Those relevant to these proceedings include:

1. the nature of the inaccurate or missing information;
2. the materiality of the inaccurate or missing information; and
3. whether there was an intentional disregard for [IIROC] requirements or if the failure to keep proper records was due to carelessness or inadvertence.

¶ 238 IIROC counsel referred the Panel to several prior cases for guidance as to the appropriate sanction in this case. In *Re Interactive Brokers Inc.*, 2009 IIROC 30, a hearing panel accepted a settlement agreement whereby Interactive Brokers Inc. ("Interactive Brokers") acknowledged having failed to keep proper books and records in accordance with IIROC Rule 17.2. Interactive Brokers also admitted to violations of IIROC Rules 1200, 16.2, and 29.1. The hearing panel ordered Interactive Brokers to pay a global fine of \$40,000 and to pay partial costs to IIROC Staff in the amount of \$10,000.

¶ 239 In *Re HSBC James Capel Inc.*, [2001] I.D.A.D.C. No. 29 ("HSBC"), a hearing panel accepted a settlement agreement whereby HSBC acknowledged having failed to maintain risk adjusted capital greater than zero and to maintain a proper system of books and records, contrary to By-laws 17.1 and 17.2, respectively. The hearing panel ordered HSBC to pay a fine in the amount of \$60,000, in addition to \$10,710 toward the Association's costs of investigation of the matter.

¶ 240 In *Re Aquino*, [2001] I.D.A.D.C. No.10, Aquino admitted that, during the 1998 to 1999 fiscal year of his Dealer Member, he failed to keep and maintain a proper system of financial books and records, contrary to By-

law 17.2 of the IDA, and failed to establish and maintain adequate internal controls in accordance with Policy 3 of the IDA contrary to By-law 17.2A of the IDA. The discipline penalties assessed against Aquino were a fine in the amount of \$10,000 and a requirement that he re-write the PDO Exam. In addition, Aquino was required to pay \$1,250 towards the Association's costs of investigating this matter.

¶ 241 In respect of the Guideline factors listed at paragraphs 237(1) and 237(2), the RAC error is significant in that it occurred over the period of time in which Alboini was undertaking the trading activity set out in Count 1, and, as set out in Exhibit 12 filed at the hearing, if NSI's RAC calculation had accounted for JFC's unfunded liabilities in the TA Account and other JFC accounts, NSI would have had negative RAC for the months of August, September, and November 2008, thereby creating a significant risk to NSI and its other clients.

¶ 242 IIROC counsel also advised the Panel that NSI was the subject of a 2001 disciplinary proceeding (*Re Northern Securities Inc.*, [2001] I.D.A.C.D. No.31) in which the Ontario District Council accepted a settlement agreement negotiated between NSI and IDA Staff. Pursuant to the Settlement Agreement, Northern admitted that on February 28, 2001, March 29, 2001 and April 16, 2001, it failed to maintain its RAC at a level greater than zero in accordance with IDA Form 1, contrary to IDA By-law 17.1. The discipline penalty assessed against Northern was a fine in the amount of \$10,000. As well, Northern was ordered to pay \$5,000 toward the Association's costs of the investigation and prosecution of the matter.

¶ 243 IIROC sought a fine of \$50,000 against NSI, \$35,000 against Alboini, and \$25,000 against Chornoboy in relation to this Count, based on the following factors:

- (a) NSI's previous disciplinary history;
- (b) the recommended minimum sanctions set out in the Guidelines;
- (c) the materiality of the RAC error; and
- (d) the fact that the error took place over a number of months.

¶ 244 IIROC also acknowledged mitigating factors, including that that the error appears to have been inadvertent, and that the Respondents have accepted responsibility for the error. The Respondents also pointed out that Chornoboy has no prior disciplinary history with IIROC, is no longer employed in the securities industry and obtained no financial benefit from the error. They also asserted that Chornoboy has particularly suffered because of the adverse publicity from this case which, they allege without any proof thereof, caused an employment opportunity to be withdrawn and will negatively affect his future employment possibilities, and that therefore a reprimand would be sufficient sanction. Respondents' counsel also suggested that Alboini relied on, and was entitled to rely on, the accounting expertise of Chornoboy, and that this should be a mitigating factor.

¶ 245 The Panel agrees that the factors listed in paragraph 243 are applicable in this case as are the mitigating factors referred to in paragraph 244, and our decision is based on those factors. The Panel understands the difficult position in which Chornoboy may now find himself. However, his error was serious and that must be reflected in the sanction imposed. A reprimand would not be sufficient to reflect the seriousness of Chornoboy's error and would not strike the appropriate balance necessary to achieve general deterrence. The Panel wants to emphasize that the sanctions on which we have decided would have been much more severe if there had been evidence that Chornoboy's failure to properly account for the leasehold improvements was intentional, or that Alboini in fact was aware of the failure or encouraged it. The Panel also found the cases referred to instructive in coming to our decision.

¶ 246 The Panel makes the following orders in respect of Count 5(a);

Alboini is ordered to pay a fine in the amount of \$25,000, in addition to the fines in respect of Counts 1 and 3, such fine to be paid within 30 days of the date of this decision;

Chornoboy is ordered to pay a fine in the amount of \$ 25,000, such fine to be paid within 30 days of the date of this decision; and

NSI is ordered to pay a fine in the amount of \$25,000, such fine to be paid within 30 days of the date of

this decision.

15. Costs

¶ 247 IIROC presented a bill of costs in the approximate amount of \$1.1 million, supported by an affidavit and materials from Ricki Ann Newmarch, a Litigation Administrative Assistant in its Enforcement Department. In its Penalty Submissions, IIROC requested that the Panel, pursuant to Dealer Member Rule 20.49, assess against the Respondents on a joint and several basis, a portion of those expenses incurred by IIROC in the investigation and prosecution of this matter, in the amount of \$340,000. However, in the affidavit and at the hearing, IIROC indicated that they were in fact seeking \$150,000 from NSI, \$125,000 from Alboini, \$50,000 from Vance and \$15,000 from Chornoboy. It should be noted that the bill of costs of approximately \$1.1 million did not include the substantial costs of conducting the lengthy hearing itself and reaching the decisions recorded herein.

¶ 248 IIROC counsel referred the Panel to the case of *Re Steinhoff*, 2012 IIROC 39 at paragraph 58 for guidance regarding the appropriate costs ruling in our case. The Steinhoff panel stated:

“With respect to costs, we agree with the comments of the panel in *Re Van Hee* [2009] IIROC No. 34 (July 22, 2009) where they stated that an award of costs should not constitute an additional penalty against the Respondent but should reflect the time and effort expended by IIROC, and the panel’s assessment of how much of those costs the Respondent should be asked to bear. Further, we agree with their analysis that a conservative approach should be taken with respect to costs, and in this case we have reviewed the Bill of Costs presented by IIROC and believe it is reasonable. This was a hard fought case. IIROC succeeded in respect of five counts, but failed in two others. The Respondent brought a motion at the commencement of this matter for an order prohibiting the publication or release of information relating to this proceeding, in particular the Notice of Hearing and Particulars; significant affidavit evidence was submitted, and the motion was fully argued. The application was dismissed. Following the delivery of the Decision in this matter the Respondent brought an application to adjourn the hearing of penalty submissions on the basis, amongst others, that the Respondent intended to commence an action in the B.C. Supreme Court seeking an order quashing the hearing Panel decision. The motion was denied. Further, there was a lengthy hearing on the merits, and extensive written arguments, both as to liability, and penalty, was submitted by both parties. Also, as previously noted, the Bill of Costs did not include the costs of the Panel, the hearing rooms, court reporter, transcripts, exhibits, etc.”

¶ 249 This Panel noted the similarities between our case and *Steinhoff*.

- This was also a hard-fought case, involving over four weeks of hearings and a large amount of complex evidence;
- IIROC were successful on all four counts which they pursued;
- Respondents brought a motion to quash the proceedings on which they were unsuccessful and which involved considerable additional documents, two days of hearings and additional counsel;
- The bill of costs did not include costs of the Panel, hearing rooms, reporter, transcripts, exhibits, etc.

These factors were taken into account in determining the appropriate costs to be awarded.

¶ 250 The Respondents’ counsel took the position that, “According to *Mills*, costs are an element of the sanction and therefore have to be taken into account in determining the overall consistency of the disposition of the matter having regard to the public interest and industry expectations.” This position also appears to be supported by the foregoing quote from *Steinhoff*. The Panel agrees with this position and has taken it into account in its assessment of costs. IIROC counsel stated that the element of proportionality was already included in the amount of costs claimed.

¶ 251 The Respondents’ counsel also asserted that “...Hearing Panels must be careful not to create an undue impediment to respondents pursuing the defence of allegations particularly since they are not entitled to receive an award of costs in the event they are successful”. In support they referred the Panel to *Re Creditfinance*

Securities Limited, [2006] I.D.A.C.D. No. 30. The Panel agrees with this position and has taken it into account in its assessment of costs.

¶ 252 The Respondents' counsel then submitted that "The fact that [IIROC]...chose to retain outside counsel...has no bearing on the costs that should be recoverable from a respondent, citing *Re Nott et al.*, [2011] IIROC No. 26, where the panel significantly reduced the amount of the costs claimed by IIROC (which was 50% of the actual bill of costs). The Panel does not agree with the Respondents on this submission. In *Nott*, the reduction of costs claimed had nothing to do with the fact that outside counsel were used. The panel in *Nott* stated that "Although the amount claimed for costs is reasonable and realistic adding this amount to the fine would be excessive." Respondents' counsel asserted that the costs claimed in our case were excessive and suggested costs should not exceed \$170,000.

¶ 253 Following the approach suggested in *Steinhoff* and *Mills*, this Panel has taken a conservative view of the appropriate costs to award. We have also reviewed the IIROC bill of costs and found it to be reasonable. Having regard to the factors and principles stated in paragraphs 248, 249, 250, 251 and 252, the Panel has decided to award costs of \$150,000 against NSI, \$125,000 against Alboini, \$50,000 against Vance and \$15,000 against Chornoboy.

16. Summary of Sanctions and Costs

¶ 254 Alboini: The Panel orders that Alboini pay a fine in the amount of \$500,000 in respect of Count 1, in the amount of \$100,000 in respect of Count 3 and in the amount of \$25,000 in respect of Count 5(a), for a total fine of \$625,000, and that Alboini pay costs in the amount of \$125,000, such total fine and costs to be paid within 30 days of the date of this decision. The Panel also orders that Alboini shall disgorge the commissions earned by him in respect of the trades made in NSI's TA Account between August and November 2008, the amount thereof to be disclosed to IIROC by NSI and paid within 30 days of the date of this decision. The Panel also orders that Alboini be suspended from approval by or registration with IIROC in all capacities for two years commencing 14 days after the date of this decision, and that Alboini be permanently barred from approval by, or registration with IIROC as a UDP anywhere in the industry commencing 14 days after the date of this decision.

¶ 255 Vance: The Panel orders that Vance pay a fine of \$25,000 in respect of Count 2 and a fine of \$25,000 in respect of Count 3 for a total fine of \$50,000, and that Vance pay costs in the amount of \$50,000, such total fine and costs to be paid within 30 days of the date of this order. In addition, the Panel orders that Vance be suspended from approval by, or registration with IIROC in any supervisory capacity including acting as Chief Compliance Officer anywhere in the industry, for a period of 3 months commencing 14 days after the date of this order in respect of Count 2 and the same suspension for concurrent period of 3 months in respect of Count 3.

¶ 256 NSI: The Panel order that NSI pay a fine of \$250,000 in respect of Count 3 and a fine of \$50,000 in respect of Count 5(a), for a total fine of \$300,000, and that NSI pay costs in the amount of \$150,000, such total fine and costs to be paid within 30 days after the date of this decision.

¶ 257 Chornoboy: The Panel orders that Chornoboy pay a fine of \$25,000 in respect of Count 5(a) and that he pay costs in the amount of \$15,000, such fine and costs to be paid within 30 days after the date of this decision.

Dated this 10th day of November, 2012.

Fred Webber- Chair

F. Michael Walsh-Member

Ron Smith- Member

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