Re Debus

IN THE MATTER OF:

The Rules of the Investment Industry Regulatory Organization of Canada

and

Joseph Debus

2019 IIROC 05

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

Heard: June 18, 19, 20; September 26, 27; October 4, 11, 18, 20, 23, 24, 29; November 1, December 5, 6, 11, 13, 2018, January 24, 2019 in Toronto, Ontario
Written Decision: March 18, 2019

Hearing Panel:
Susan Lang, Chair, Nick Pallotta and Stuart Livingston
Appearance:
Kathryn Andrews, Sally Kwon, April Engelberg, Enforcement Counsel
Eric Sabbah, Paralegal, for Joseph Debus

REASONS FOR DECISION

¶ 1 This was a lengthy hearing held over many days over several months that included a number of motions regarding production and disclosure, the summons of witnesses, and requests for adjournment, as well as a hearing on the merits. During the hearing on the merits, the Panel heard evidence and argument about Staff's allegations against the Respondent, Joseph Debus, and the Respondent's defence of those allegations. In its Notice of Hearing of July 2017, Staff alleged in summary that the Respondent:

1. improperly recommended that two clients purchase shares in My Screen outside their firm accounts without disclosing these recommendations to his firm (contrary to Rule 29.1 – Business Conduct)
2. effected unauthorized trades in two clients' accounts (contrary to Rule 29.1 – Business Conduct)
3. engaged in discretionary trading in a client's non-discretionary account (contrary Rule 1300.4(c) – Supervision of Accounts)
4. failed to use due diligence to ensure recommendations were suitable for a particular client (contrary to Rule 1300.1(q) – Suitability Determination)

¶ 2 The Respondent denies the allegations. His primary argument is that he was under firm-imposed supervision for most of the time frame at issue (2009 – 2013) and that that supervision would have made it impossible for him to engage in such conduct without being detected by his Dealer Member (firm) and that it

would not have been in his interests to do so because he would have placed his position with the firm in jeopardy. The Respondent also argues that Staff has not met the acknowledged burden of establishing the allegations against him on a balance of probabilities. FH v McDougall, 2008 SCC 53, at para 40 and 46. The balance of probabilities is the only civil standard of proof. See Re Papp, 2016 IIROC 41 at para 12.

¶ 3 This case is primarily factual. After considering the evidence and submissions, the Hearing Panel concludes that the allegations have been proven on a balance of probabilities, for the reasons that follow.

BACKGROUND

¶ 4 Before considering the individual allegations, we review the basic facts and the background that is common to all counts.

Overview

¶ 5 The common factor in all allegations revolves around allegedly high risk investments and Mr. Debus' communications with the particular clients. The factual underpinning for the first allegation arose from the decision by Mr. Debus' firm to prohibit him from promoting and later dealing with shares of My Screen Mobile Inc. (My Screen), a high risk investment. The firm restricted Mr. Debus' activity with My Screen because the investment was high risk and Mr. Debus' clients held significant amounts of stock, as did clients of at least one other of the firm's Registered Representatives. In fact at that time, Mr. Debus and that Registered Representative were partners and that partner's son was President of My Screen. After the prohibition, two of Mr. Debus' clients nonetheless purchased My Screen through other Dealer Members, allegedly at Mr. Debus' recommendation. Mr. Debus allegedly did not tell his firm about these alleged off-book purchases.

¶ 6 For the second and third allegations of unauthorized and discretionary trading, Staff relied on the evidence of two clients, AP and PE, who testified that Mr. Debus did not obtain their authorization before executing certain trades in their non-managed accounts. For the fourth allegation, Staff primarily relied on evidence from its investigator, Frank Scali, to support its allegation that certain trades were not suitable given the client's risk profile.

Debus' contractual relationship with Blackmont/Macquarie

¶ 7 Mr. Debus began working in the investment industry in 1995. In July 2006, he began working at Blackmont Capital Inc. (later Macquarie) as a Registered Representative (RR) under a seven-year contract that would have matured in July 2013. In 2007, he obtained his designation as Associate Portfolio Manager and a Registered Representative Options. In September 2009, he became a Portfolio Manager. For most of the period from 2009 until his departure in 2013, Mr. Debus was under firm-imposed supervision. In January 2012, the firm wrote to Mr. Debus prohibiting him from participating in its discretionary managed program while he was under supervision. The letter also said that there would be no change in Mr. Debus' registration status. Mr. Debus' managed accounts were changed to non-discretionary accounts at that time. None of the accounts in issue in the allegations were managed accounts. Mr. Debus did not advise his clients of his firm supervision at any time.

¶ 8 On March 8, 2013, a few months short of the end of his seven-year contract, Macquarie asked Mr. Debus to resign from the firm. He testified, if he had completed his contract in July 2013, that the firm would have been contractually obliged to forgive the $100,000 balance of his loan and to provide him with $250,000 worth of CI common shares. Mr. Debus subsequently brought a wrongful dismissal action, which remains outstanding.

¶ 9 At the time and in the months preceding the Respondent's departure, Macquarie was in negotiations with Richardson GMP (RGMP), with which it amalgamated in November 2013. Mr. Debus testified that the firm, particularly a fellow adviser at the firm and his former partner, encouraged clients to complain about him. Certain clients sued Mr. Debus. That lawsuit was settled by the insurer, a settlement that Mr. Debus

testifies he opposed. Macquarie and then RGMP refused to give Mr. Debus his files, which he testified made it difficult for him to defend the complaints made against him. Mr. Debus also testified that the firm delayed in providing his Universal Termination Notice.

¶ 10 In 2013, the Respondent began working at Mackie Research Capital, which he left in 2016. From there, he joined Echelon Wealth Partners Inc. where he continues to work as a RR and a Portfolio Manager.

Debus' periods of supervision

¶ 11 The Respondent had an unusually lengthy history of supervision imposed by his firm. From 2009 until 2013 he was under firm-imposed close or strict supervision except for about five months in 2011 when he was not under any supervision.

¶ 12 To be more specific, in February 2009, Blackmont imposed firm-imposed close supervision on Mr. Debus that remained in place until June 2010. In June 2010, the firm (now Macquarie) imposed strict supervision, which was lifted in June 2011. From June until October 2011, Mr. Debus was not under any supervision. In October 2011, Macquarie imposed strict supervision, which only ended when Mr. Debus left the firm in March 2013. The Respondent was not placed under supervision by either Mackie or Echelon. The IIROC Registration Department placed him under close supervision at Echelon in September 2017, a supervision that has since remained in place because of this hearing.

Debus' disclosure position

¶ 13 Initially, RGMP did not make full disclosure of relevant material, whether as a result of the extant lawsuits or otherwise. Perhaps some of the production issues arose because IIROC's request for material was broad and technologically challenging. When Mr. Debus brought a motion for production, the Panel heard significant evidence from RGMP about what documents were available to the firm after the amalgamation and worked with the parties to narrow the production requested. The Panel concluded that further disclosure was required to allow Mr. Debus' the material he needed to defend the allegations. Eventually, RGMP provided further disclosure including emails between Mr. Debus and his managers and between Mr. Debus and the complainants named in the allegations. In the summer and fall of 2018, RGMP produced roughly 15,000 to 20,000 emails. Initially, it had produced 550 emails. Mr. Debus argues that further documents have not been produced and that those documents would exculpate him from the allegations. The Panel does not agree. While we will deal with the Respondent's concerns where necessary and relevant to a particular count, it should be said at the outset that the Respondent received sufficient disclosure to defend the allegations against him. The Panel is not persuaded that Mr. Debus' right to a fair hearing has been compromised.

Debus' credibility

¶ 14 Mr. Debus' credibility was an issue in this proceeding. It is common ground that credibility is tested by the consistency of the proffered evidence with the probabilities presented by the case. The Respondent accepts the authority cited by Staff of Faryna v. Chorny, [1952] 2 D.L.R. 354 (BCCA) at 357 to this effect, including its statement that "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."

¶ 15 We will discuss particular credibility findings when we discuss each of the allegations. However, we say at the outset as a general comment that Mr. Debus is not always careful with his recollection and his evidence. We agree with the submissions of Staff that, at times, Mr. Debus misspoke or his evidence was misleading or inconsistent. Where Mr. Debus' evidence is consistent with other evidence, particularly documentary evidence, and with the probabilities, we accept it. Where his testimony is not supported by other evidence, we have more difficulty accepting its reliability.

¶ 16 In submissions, Staff cite a number of specific areas of Mr. Debus' evidence that raise credibility

concerns. While we highlight only five of them, additional areas support our concerns about the reliability of Mr. Debus' evidence where it is not supported by other evidence.

¶ 17 The first example is Mr. Debus' testimony about the shares he held in My Screen. At the conclusion of the evidence, the Panel was unclear about Mr. Debus' personal holdings in My Screen as opposed to those held by his wife. Initially, Mr. Debus testified at the hearing that he had personally invested in My Screen through a private placement and that "it went into my portfolio and then … they kicked it out" but that he had his investment in certificate form in a safety deposit box. He said that he had "personally" lost roughly $500,000 of his own money, although no documentary evidence was presented to support this assertion. He testified that My Screen did not pay him a commission. In cross-examination, when asked about his holdings he said that he "misspoke". In fact, the stock never went into his portfolio. Later in the hearing, under questioning, he told the Panel that in fact "his" My Screen investment was actually held by his wife. In support of this evidence, he produced a restricted share certificate in his wife's name for 1,500,000 shares. That share certificate was dated 10/01/2010, which was several months after the challenged off-book trading for his clients. However, Mr. Debus proffered the explanation that it took some months to obtain the share certificate after his acquisition in 2009. Mr. Debus did not address why the My Screen shares were put in his wife's name and how he personally could have lost $500,000. He was questioned about his prior statement given during his initial interview with IIROC where he only offered that he personally held $25,000 worth of My Screen. At the hearing, he testified that he only had disclosed the $25,000 of his shares at the initial interview because maybe that was "one chunk" and that he had not been asked "if I bought it for my wife". The particulars of Mr. Debus' shareholdings are by no means critical to the outcome of this case, but also should not have been a difficult part of the evidence.

¶ 18 Second, we turn to the civil lawsuits brought against Mr. Debus after his departure from the firm. Early in the hearing, Mr. Debus, through his representative, implied that the individual clients were motivated to testify in this proceeding in order to support their civil claims in their lawsuit against him. At the end of the hearing, the evidence was unclear about the status of those civil law suits because Mr. Debus had also given evidence about the firm's errors and omissions insurer settling some claims that Mr. Debus thought ought not to have been settled. In argument, Mr. Debus clarified that in fact the civil lawsuit was settled. Again, the evidence on this minor point need not have been so confusing and potentially misleading.

¶ 19 Third, there was evidence that in May 2012 the Respondent altered a "note" he provided to his managers. The note was presented in the form of a screenshot of a Sage App note (explained below) that Mr. Debus inserted in his email to his manager when seeking a trade approval. The note purported to record Mr. Debus' conversation with a client obtaining authorization for the trade. When the Respondent initially sent the note to his manager, his email characterized the trade at issue as "solicited". The manager replied asking whether the purchase was actually solicited by Mr. Debus because the stock was on the firm's restricted list. If it was restricted, the trade would have to be reversed or, to use Mr. Debus' terminology, "busted". Mr. Debus responded saying that the trade had actually been unsolicited. He edited the original "note" and changed the word "solicited" to "unsolicited". At one point, Mr. Debus testified that "solicited" only appeared in the original email because it was part of his "template" and he had neglected in this instance to correct it. In written submissions, Mr. Sabbah described the alteration as having been "at the request of the firm". In argument, he acknowledged that the alteration was better described as "in response" to a query from the firm. These varying explanations and characterizations demonstrate the difficulty with relying on the contents of Mr. Debus' "notes". Another example that raises concern is the similarity of Mr. Debus' Sage App notes to different clients that he sent to his manager. His manager had asked for notes of current conversations with clients regarding Huldra Silver. The notes that Mr. Debus provided were sometimes identical in the time they were created and with such similar content that a question was raised whether these notes actually reflected the content of different conversations with different clients or whether they were written using a cut and paste feature. The specific concern was that Mr. Debus may have simply authored the notes without actually

calling his clients.

¶ 20 Another example is the Respondent's evidence concerning his implementation of trade approvals. The Respondent testified that he put in trades "usually right away" after obtaining approval and then digressed to explain that the exception was trades involving new issues and digressed again to explain at some length why new issues required different treatment. When asked again, Mr. Debus replied that he would typically put orders in on the day of approval and proceeded to explain exceptions for margin call trades. He testified, "[b]ut more or less, yes, we would put the transaction in, you know, a reasonable time, being right away" and then proceeded to give other examples of exceptions. Mr. Debus' testimony is not supported by the documentary evidence, which we will canvas when discussing Count 2. For credibility purposes, we observe that Staff identified instances where orders were entered hours or the next day after receiving approval or at a different price or for a different quantity than was approved. The IIROC investigator gave evidence concerning these instances and his evidence went largely unchallenged on this point.

¶ 21 Finally, the Respondent testified in chief that the client PE had no holdings in October 2012 in two speculative and controversial stocks, Copper Mountain and Huldra Silver. The Respondent said that at that time, in 2012, he recommended that PE acquire those stocks in order to achieve more growth in his Investment Pension Plan (IPP) account. In cross-examination, the Respondent acknowledged that PE already held those stocks in 2011. This is another illustration of how Mr. Debus is not always careful about the accuracy of what he says. Even when he was testifying in chief, he said these stocks were new holdings even though he had in front of him an email where his manager stated that the client already held these positions. We appreciate that a witness is under pressure when testifying, particularly in a proceeding that has potentially significant consequences such as this one. That said, it does little to instill confidence in the reliability of the Respondent's evidence when, on several occasions, he was careless, sometimes extremely careless, with the accuracy of his evidence.

Reliability of the Supervision Defence

¶ 22 An area of general concern relevant to all counts is Mr. Debus' position that it would not have been possible for him to engage in any of the alleged improper conduct because all his activity was supervised and monitored by the firm at all times. Mr. Debus argues that any unauthorized trades, off-book recommendations or unsuitable trades would have been identified by the firm's technology or by its managers or by client complaints or in the firm's monthly reports to IIROC.

¶ 23 The Panel does not accept Mr. Debus' argument that his supervision guaranteed professional good conduct. The close and strict supervision maintained by the firm could not identify all misconduct and did not purport to be able to do so. By way of example, Mr. Debus placed much weight on his managers randomly contacting his clients to check on the bona fides of the information that he was providing to the firm. He argued that since he knew clients might be contacted, he would be careful to obtain proper instructions. However, Mr. Debus has shown himself prepared to interpret requirements differently than his firm. In addition, even on Mr. Debus' evidence, the firm was only in touch with 70% of his clients. Since his manager did not contact the other 30% of clients, they could not have identified all concerns. Importantly to the specific allegations, while the firm was in touch with DB and learned of his concerns, the firm was not in touch at all with AP or PE, the other two complainants in this proceeding. There was also a period of close supervision where Mr. Debus' trades did not require pre-approval and another brief period of time when he was not under supervision at all. Staff allege that Mr. Debus recommended the off-book trades and some of the unauthorized /discretionary trading when he was under close supervision and that he engaged in unauthorized/discretionary trading when he was under no supervision and when he was under strict supervision.

¶ 24 Mr. Debus' supervision defence is strongest when he is under the second period of strict supervision from December 2011 until March 2013. Even then the firm could not have identified the alleged misconduct

and certainly could not have done so if he was not under its supervision. For example, any off-book recommendations were not recorded on the firm's system and Mr. Debus, we will conclude, did not otherwise report his recommendations to the firm. The firm could not have known about them. Similarly, the firm could not have readily detected unauthorized or discretionary trades made by Mr. Debus because, when asked, he told his supervisors that he had been in touch with his clients and was authorized to complete the trades. With respect to suitability, separate from the Dealer Member, the RR has a responsibility to ensure the suitability of investments for each individual client and account. Indeed, in his written submissions, the Respondent states that "Mr. Debus and Macquarrie were responsible to ensure that trades were suitable for PE."

¶ 25 For these reasons, the Panel does not accept Mr. Debus' blanket defence that any wrongdoing would or should have been contemporaneously identified by the firm. It is not the firm's supervision of Mr. Debus that is at issue in the proceeding but rather his own conduct or misconduct as set out in the allegations. In the end, responsibility for his actions, and his communications and relationships with clients, rests with Mr. Debus and not with the firm.

¶ 26 There are other examples of arguments raised by Mr. Debus that are largely not relevant to the disposition of this case. For example, Mr. Debus argues that IIROC should have questioned more individuals in the course of its investigation. On this point, the objective is procedural fairness. Deficiencies in the investigation would be relevant to the question of whether the Respondent had a fair hearing. See Proprietary Industries Inc. (Re), [2005] ASCD No 1045. In this case, the Panel concludes that the Respondent did have a fair hearing. The Respondent also raises arguments that are not relevant to the core of the case against him. Those arguments include that his firm treated him unfairly in his dismissal so close to the end of his contract and in its failure to produce his files and his Universal Termination Notice, about which the Panel makes no comment since it is not the issue in this proceeding. He also argues that he must have done nothing wrong because AP and PE made no complaint until 2013. In his written submissions, Mr. Debus made statements and gives evidence of facts that were not supported by the evidence before us. This case must be determined on the basis of the relevant evidence that is before the Panel.

¶ 27 In arriving at our conclusions, we did not find significant assistance from the evidence of two witnesses called by Mr. Debus. One was his friend and business partner, Scott Barker, who talked about Mr. Debus' attributes as a partner and as a father. Mr. Debus also owes Mr. Barker $80,000. Mr. Barker was not in a position to contribute material relevant evidence to the questions at issue in this hearing. Mr. Cavalaris, who works at Echelon but had not worked at Blackmont or Macquarie, was called as a fact witness. He testified that Mr. Debus acted in an exemplary manner at Echelon, including about matters of compliance. However, Mr. Cavalaris was not in a position to provide helpful evidence on the factual underpinnings of the allegations in this proceeding and, understandably, was not proffered as an expert witness.

¶ 28 Mr. Debus took significant exception to the scope of the IIROC investigation and the work of Mr. Scali. He insisted his managers knew about the off-book My Screen acquisitions. Staff did not call Mr. Bramson, Mr. Debus' manager, as a witness. Neither did Mr. Debus, although he brought a successful motion to summons him to the hearing. Accordingly, there was no evidence from a manager at the firm. Neither side is obliged to call a witness. The onus is on Staff to establish its case. The Panel's obligation is to decide the case on the evidence that is presented.

¶ 29 We turn from those matters common to all the allegations to consider whether Staff established each of the specific allegations on a balance of probabilities.

OFF-BOOK TRADING – COUNT 1

¶ 30 As amended, Count 1 alleges:

> In 2009, the Respondent recommended that clients AP and DB purchase shares of My Screen outside of their accounts held with him, without disclosing this activity [recommendation or purchase] to his

Dealer Member firm, contrary to IIROC Dealer Member Rule 29.1

¶ 31 This allegation asserts a recommendation by the Respondent to DB and to AP to buy My Screen outside of the clients' accounts with the firm as well as a failure to disclose these recommendations and purchases to the firm. We turn first to the Rules and the cases.

¶ 32 Rule 29.1 provided that a RR "(i) shall observe high standards of ethics and conduct in the transaction of their business, (ii) shall not engage in any business conduct or practice which is unbecoming or detrimental to the public interest".

¶ 33 Whether off-book transactions amount to conduct unbecoming or detrimental was a matter considered in Re Trueman, 2016 IIROC 29. That case highlighted the importance of the "fundamental principle of outside business activity and disclosure". The Panel in that case pointed out that disclosure of outside business is essential both for the purpose of the firm's Tier 1 internal ability to supervise all the activities of the sales person to ensure those activities are in the client's best interests and for the purpose of an independent compliance review at a Tier 2 level. The protection afforded by appropriate supervision is thwarted if a RR undertakes outside activity unbeknownst to the Dealer Member.

¶ 34 In Re Noronha, 2017 IIROC 3, at paras 50 and 51, relying on Re Trueman, the Panel stated that the "conducting of off-book transactions by securities registrants has been repeatedly recognized by IIROC Hearing Panels as conduct or practice unbecoming or detrimental to the public interest, and thereby contrary to Dealer Member Rule 29.1."

¶ 35 In Re Blackmore, 2014 IIROC 43, the Panel accepted a settlement agreement in which Mr. Blackmore admitted that he facilitated off-book investments for clients, contrary to Dealer Member Rule 29.1. In doing so, the Panel described deceit as being at the core of off-book business observing that:

> Deceit, in turn, is not only anathema in the investment industry, it negates, and cannot co-exist with, "high standards of ethics" or integrity…. Deceit, in any form, is abhorrent conduct and is a serious offence in the investment industry.

¶ 36 In his submission, Mr. Debus does not take exception with the law presented by Staff but argues as a factual matter that he did not recommend the purchase of the investment outside the Dealer Member and that when he did learn of his clients' outside acquisitions, he notified his managers. As we will now explain, we do not accept Mr. Debus' position.

¶ 37 My Screen promoted a software program venture that proposed to provide mobile phone users with an option that would allow them to reduce their telephone bill. If a My Screen user clicked to read an advertisement at the end of a telephone call, the user would save 10 cents on their mobile account and the advertiser would have information it could use to do targeted advertising. My Screen was traded on the Over-the-Counter (OTC) pink sheet market. Mr. Debus recommended My Screen to certain clients, some of whom he gave promotional materials from My Screen and some of whom he took to promotional meetings. One of the Respondent's fellow representatives at Blackmont was his partner, at least until Mr. Debus' ended that partnership while they were both still at Macquarie. The partner was also the father of the President of My Screen and, on this basis, Mr. Debus indicated to his clients he had good information about the investment. The Respondent was consistently enthusiastic about My Screen. He told clients that this was "a good story", that he liked the story. In doing so, in our view, Mr. Debus was marketing or promoting or recommending that clients invest in My Screen. My Screen was acknowledged to be a high risk investment.

¶ 38 By March 2009, Blackmont compliance was expressing its concern about My Screen and the Respondent's conduct in promoting that investment. This concern arose in part because, in an over-abundance of enthusiasm for the investment, the Respondent distributed a confidential My Screen internal memorandum. He did so even though the My Screen memorandum specifically stated that it is "not to be

reproduced or distributed to the public or press". After discussion with Mr. Debus about the impropriety of this distribution, the firm wrote him a discipline letter on March 4, 2009. That letter set out the firm's view of Mr. Debus' "poor judgment" and warned him of potential disciplinary action for future violations.

¶ 39 Shortly afterwards, the firm introduced an OTC risk form in which a purchasing client would be required to acknowledge the risks of such investments. The form made it clear that such a client could lose the entire investment. When this form became available, Mr. Debus resumed buying My Screen for clients and had them sign the OTC form. The firm reminded him that he was nonetheless required to clear all sales of My Screen in advance of any purchase. The firm continued to have concerns and became more specific in the restrictions it imposed on Mr. Debus. On March 30, 2009, Compliance wrote to Mr. Debus telling him "you are not to be involved in any way with My Screen Mobile (MYSL). No more buys, only selling of existing positions. No more lunches with representatives from MYSL with existing clients or prospects."

¶ 40 In May and July 2009, two of the Respondent's clients, DB and AP, bought My Screen through other Dealer Member firms.

DB's outside purchase of My Screen

¶ 41 DB was a retired dentist with a reasonably high net worth, although with no investment industry experience. He purchased My Screen with the help of his friend and former investment adviser at Bank of Montreal Nesbitt Burns (BMONB), Matthew Sitka. Mr. Sitka testified that DB asked him to purchase the shares through a corporate account he maintained with his firm. DB told Mr. Sitka that he already held My Screen shares that he had acquired through Mr. Debus, but that the Respondent had been prohibited by his firm from buying more. DB talked with Mr. Sitka about his enthusiasm for the stock and showed him an investor deck given him by Mr. Debus. He told him Mr. Debus would arrange a three-way call to facilitate the acquisition of more My Screen stock and that Mr. Debus would initiate the call when DB was with him at his office.

¶ 42 We conclude that, when with DB, Mr. Debus placed a call to Mr. Sitka. Mr. Sitka testified that during that call Mr. Debus told him that his firm's Compliance would not allow him to buy anymore My Screen because he was too concentrated in the stock. Mr. Sitka testified that the Respondent talked about DB buying about 100,000 shares, or at least a significant number of shares, and that he, the Respondent, could arrange liquidity through their respective trading desks. Mr. Sitka said he expressed discomfort to DB about the amount of stock proposed and cautioned they did not have to "jump in with both feet." Ultimately, it was decided that DB would buy 22,000 shares of My Screen for approximately US$25,000. On July 16, 2009, DB's corporate account with BMONB bought the shares, and the purchase was entered on July 21, 2009. Mr. Sitka testified that during the call he declined an offer from the Respondent to buy some shares personally because, as he said, he had not done his due diligence on the investment.

¶ 43 The Respondent acknowledged that he and DB participated in the three-way call with Mr. Sitka, although he denied that the call was about recommending the stock or about arranging liquidity. From his perspective, he said, he hoped to persuade Mr. Sitka to take an interest in the My Screen investment. He acknowledged that he explained the My Screen "story" to Mr. Sitka, and that he spoke about how much he liked the investment. Despite his expressed enthusiasm for the investment, Mr. Debus argues that DB relied on the advice of Mr. Sitka and not himself in deciding to purchase My Screen with BMONB. We do not accept this argument. When Mr. Debus offered My Screen for Mr. Sitka's personal investment during the course of the telephone call, Mr. Sitka said he would "take a pass" because he had not taken a proper measure of the investment. DB, who already held shares in My Screen through Mr. Debus, would have heard this and would have known Mr. Sitka had not taken a measure of the investment.

¶ 44 In our view, DB relied on the recommendation of Mr. Debus in making his decision to invest further in My Screen and on Mr. Sitka to facilitate that investment. We are persuaded that, in that call, the Respondent

encouraged DB's acquisition of 22,000 shares of My Screen and that the discussion included conversation supporting the purchase of the stock (about which Mr. Debus was "excited"), the amount, the price and the method of acquisition. As Mr. Sitka described the call, it was about "executing this trade to get more shares into DB's name in this entity at our firm".

¶ 45 Mr. Sitka testified that immediately after the call, he called DB to confirm his instructions. He then, from what he remembered, asked his trading desk to call Debus' firm's trading desk. He explained that "the shares appeared there and crossed over to our firm and I booked them into his account." Mr. Sitka was uncertain in his memory of this aspect of the transaction and we conclude that he was in error in his recollection of a cross over between the firms. That error stemmed from his belief that the shares were illiquid.

¶ 46 When Mr. Sitka testified in June 2018, the firm's trade sheets had not been produced by RGMP so they were not put to him during his evidence. Once they were produced, Mr. Sitka was not given an opportunity to respond to their contents. The trade sheets do not disclose a cross-over, and they do disclose some liquidity. It appears from the evidence that Mr. Sitka simply put in the order on the OTC pink sheet market, and it was filled in the normal course. In our view, this error on Mr. Sitka's part, about which he was uncertain in any event, was minor and was not critical to his central evidence concerning the contents of the telephone call.

¶ 47 We accept Mr. Sitka's evidence that Mr. Debus participated in the telephone call with DB, that he was enthusiastic about the investment and that he discussed quantity and price. This establishes, on a balance of probabilities, that Mr. Debus recommended that DB acquire My Screen outside the firm's account.

¶ 48 Mr. Debus says he later told the firm about DB's acquisition at BMONB (and AP's) in case DB subsequently wanted to move his holding into the firm. In 2010, Mr. Bramson contacted DB to see if he was content with his account. DB expressed unhappiness. Mr. Bramson called a meeting that included DB and Mr. Debus. In discussion about his discontent, DB told Mr. Bramson that he (including his family) had lost $150,000 on My Screen. At the time, the family held about $65,000 of My Screen at Macquarie. It is not clear that Mr. Bramson realized that DB must therefore have held My Screen elsewhere, as Mr. Debus argues he did. Even accepting that Mr. Bramson appreciated that DB held stock elsewhere, such knowledge by Macquarie cannot be interpreted as knowledge that Mr. Debus recommended that DB buy My Screen from another firm.

¶ 49 In any event, we do not accept that Mr. Debus told his managers about the off-book My Screen purchase at the time of its acquisition. Mr. Debus knew he was to stay away from encouraging the purchase of My Screen and he knew there would be consequences if the firm had any reason to suspect he was suggesting that clients buy it through other firms.

¶ 50 We conclude on this point by observing that DB did not testify for medical reasons but that we were satisfied with our conclusions based on the evidence that we did have.

AP's outside purchase of My Screen

¶ 51 AP was a practising and very successful dentist and businessman in his mid-thirties when he was introduced to Mr. Debus in 2009 through his neighbour, DB, who had done well with his investments. At the time, AP had or had held full-service investment accounts with BMONB and TD Direct Investments. He also held a self-managed BMO InvestorLine account. On May 21, 2009, AP opened a non-registered margin account (his first margin account) with the Respondent at Blackmont with an initial value of $162,885.

¶ 52 In addition to his investment at Blackmont, AP bought My Screen through his BMO InvestorLine account on May 29, 2009, eight days after opening his account with Mr. Debus.

¶ 53 AP testified that when he spoke about My Screen, Mr. Debus told him that he knew the founder and that the stock would significantly appreciate within a couple of years. In support of the stock's promise, Mr. Debus described a marketing plan that projected My Screen would be "worth hundreds of millions and

possibly billions". AP testified that, although Mr. Debus recommended the stock, he told AP that he would have to buy My Screen elsewhere because Blackmont did not want him to buy anymore since he already had several clients invested.

¶ 54 AP testified that on Mr. Debus' recommendation, he bought My Screen through his InvestorLine account. He did so in two batches of approximately US$50,000 each. He testified that the Respondent told him he would arrange with the founders for shares to be available. It was the first time AP had heard of or purchased pink sheet stock. He said that Mr. Debus had told him that it was not the best exchange, but that Mr. Debus believed in the stock. Although Mr. Debus denied recommending My Screen to AP as an outside purchase, he did not cross-examine AP about his evidence to the contrary.

¶ 55 AP bought the first 50,000 shares in May 2009 and it is common ground that he told Mr. Debus that he had completed this purchase. He bought another tranche of 50,000 shares in July 2009. Mr. Debus denies knowledge of this acquisition. As the share price dropped, Mr. Debus recommended that AP continue to hold on to the stock. (At this point, the Panel concludes that AP would have told him about the second tranche even if he had not done so earlier.) The Respondent continued to be enthusiastic about the investment, always conveying another "morsel" of information to AP to explain the stock's downturn and why it would recover and do well. For example, AP testified that Mr. Debus told him about billionaires looking to invest in the company and that My Screen had hired the CEO of Yahoo. AP knew Mr. Debus could have information like this through My Screen's President.

¶ 56 Later, AP said, when Mr. Debus offered him a private placement for more My Screen, he explained that the stock's price had fallen due to poor management but that new management was now in place. On his own, AP invested a further US$50,000 in My Screen shares and warrants. AP readily acknowledged that Mr. Debus did not tell him to buy this third tranche of stock. Overall, cumulatively with these three tranches of investment in My Screen, AP testified that he lost $175,000.

¶ 57 Mr. Debus flatly denies any such recommendation and testified that he simply told AP that his firm would not let him buy more My Screen. He said he would not have made such a recommendation and thereby jeopardize his position with his firm. We do not accept the Respondent's description of his discussion about My Screen with AP.

¶ 58 AP's description of the discussion is more consistent with other evidence. We note that AP purchased My Screen through his InvestorLine account several days after opening his account with Mr. Debus and the second time in July 2009 the day after DB bought his off-book My Screen. This purchase by AP was consistent both with Mr. Debus telling him about his enthusiasm for the investment and with Mr. Debus' inability to purchase the stock at Blackmont. As well, AP had not previously invested in My Screen or any other pink sheet stock. Much of AP's evidence about his discussions with Mr. Debus regarding My Screen was not challenged or not successfully challenged on cross-examination.

¶ 59 To the extent that Mr. Sabbah tried to suggest that AP relied on Mr. Debus' assistant at Blackmont, AP was clear that he did not recall doing so with respect to My Screen and there was no evidence to suggest otherwise.

¶ 60 We conclude that Mr. Debus recommended that AP buy My Screen, at least in May 2009. We are also persuaded that Mr. Debus knew that AP did so based on all the evidence, including their post-acquisition frequent conversations about the stock's continuing diminution in value. Those conversations are consistent with Mr. Debus' evidence that he counselled clients to stay with My Screen irrespective of their ongoing losses because he continued to have personal faith in the investment on a long-term basis.

¶ 61 We also conclude that Mr. Debus did not tell his firm about AP's acquisitions of My Screen. Mr. Debus testified that he told Mr. Bramson about AP's purchase of My Screen in case AP later wanted to transfer it into Blackmont. However, Mr. Debus' evidence does not fit well with the fact that Blackmont's Compliance was

very concerned about his dealings with My Screen and had specifically cautioned him "not to be involved in any way with My Screen Mobile" as recently as March 30, 2009, shortly before AP's first acquisition of My Screen in May 2009.

¶ 62 We conclude that Staff has established that Mr. Debus recommended off-book trading in My Screen to DB and to AP without disclosing this to his Dealer Member firm. We also conclude that this constituted misconduct within the meaning of Rule 29.1 as both unbecoming and detrimental to the public interest.

UNAUTHORIZED/DISCRETIONARY TRADING - COUNTS 2 AND 3

¶ 63 Count 2 as amended alleges that "[b]etween August 2009 and August 2012, the Respondent effected unauthorized trades in the account of client AP, contrary to IIROC Dealer Member Rule 29.1."

¶ 64 Count 3 alleges that "[b]etween June 2009 and February 2013, the Respondent engaged in discretionary trading in client PE's account, without the account having been accepted and approved as a discretionary account, contrary to IIROC Dealer Member Rule 1300.4."

¶ 65 We briefly review the law about authorized and discretionary trades noting that there is no dispute about the law. Our decision on Counts 2 and 3 will turn on our findings of fact.

¶ 66 Authorized trades are ones authorized by the clients before a trade proceeds. To be authorized, the client must approve all four elements of a trade: the security, quantity, price and timing. In Re Li, 2016 IIROC 7, the Panel found the Respondent failed to confirm the four elements of the trade with the client in advance and concluded at para 30 that, accordingly, the trades were unauthorized. The Panel in Re Li also references Re Wenzel, which referred to a definition of a discretionary trade by the Alberta Securities Commission that "when a person effects a securities transaction for a client without obtaining from the client, in advance, specifics as to four elements of the transaction-quantity, security, price and timing-that person is exercising "discretion".

¶ 67 Repeated trading without first having discussed those trades with the client is unauthorized trading, constitutes conduct unbecoming and is a serious violation: Re Armstrong, 2015 IIROC 34 at paras 6-11. Unauthorized or discretionary trading is seen as a fundamental breach of the advisor's duty to his or her client. Re Tersigni, 2016 IIROC 19 at para 28 explains the perils of unauthorized discretionary trading even when such trading was accepted and even welcomed by the client:

> While his clients welcomed the discretionary trading, the Respondent was offering them a service that he was not entitled or qualified to provide. He was operating outside his firm's supervisory and support systems set up for the employees they expected to manage client portfolios, placing the clients at risk.

¶ 68 Rule 29.1 referenced business conduct "unbecoming or detrimental to the public interest". Rule 1300.4(c) prohibits a RR from discretionary trading unless the account has been approved as a discretionary account by a designated Supervisor. It is common ground that neither of the relevant accounts of AP or PE were managed or discretionary accounts so that Mr. Debus was not entitled to conduct any unauthorized or discretionary trading.

¶ 69 Applying these authorities means that Mr. Debus was required to obtain approval from AP and PE concerning all four elements before effecting trades on their behalf. The question is whether he obtained client approval on the facts, the onus being on Staff to prove that he did not do so on the balance of probabilities.

¶ 70 AP and PE testified that they did not authorize many of the individual trades executed by Mr. Debus. Both testified that they provided Mr. Debus with their oral authorization to execute trades for them as Mr. Debus decided appropriate. Mr. Debus testified to the contrary. He said that he spoke to AP and PE and obtained their instructions in advance of placing all trades; he knew their accounts were not managed and he was not entitled to do any unauthorized or discretionary trading. He says he did not engage in such prohibited

trading because he could have been caught and his position at the firm jeopardized. In weighing the evidence, it is helpful to be mindful of the backgrounds of AP and PE.

¶ 71 AP was a very successful and busy dentist and businessman and a frequent investor who had other accounts with other Dealer Members. AP opened his account with Mr. Debus in May 2009. Although AP's recollection was that he did not review his statements from Mr. Debus' firm on a regular basis, we accept that he was knowledgeable about his holdings for the most part and that he took an active interest in his account. Thus, we accept Mr. Debus' evidence that AP was an interested investor.

¶ 72 PE was a freight broker with experience in investing. His relevant account in this case was Fox Forwarding, which was an Investment Pension Plan account. Before he transferred his account to Mr. Debus in April 2009, PE's IPP had lost significant value as a result of the 2008 economic downturn. It was important to PE that Mr. Debus earn an annual return of 7% on the IPP in order to meet Canada Revenue Agency requirements for this type of account.

¶ 73 AP testified that while Mr. Debus sought his approval for trades when he first opened the account, he gradually stopped doing so. More specifically, AP testified that the Respondent initially discussed stock purchases with him but, after some time passed, they "discussed it and he was allowed to make the trade on my behalf." AP continued, "I don't know if I ever signed something to that effect, but definitely verbally I told him if you think something is a good idea, do it." AP explained that he had faith in Mr. Debus, at least at the outset, and that he was content that Mr. Debus make certain investment decisions for him, although less so as AP's losses continued.

¶ 74 PE testified that Mr. Debus showed him a software tool Mr. Debus said he used together with his own experience to help him choose appropriate stocks for a portfolio. PE also initially had faith in Mr. Debus. He observed that his Fox Forwarding account did well for the first two years under Mr. Debus' management. After that, it did not fare well. Both clients readily admit that they had no complaint about Mr. Debus' trading during the initial period and only took exception when he recommended and purchased stocks that did poorly.

¶ 75 However, the fact that AP and PE authorized Mr. Debus to proceed with trades without consultation, which we conclude they did, does not excuse Mr. Debus undertaking such unauthorized or discretionary trades. As observed in Re Tersigni, the necessary safeguards were not in place for him to do so without placing his clients at risk.

¶ 76 Mr. Debus pointed to five areas that he argues support his position that he cleared all trades with AP and PE during the period at issue.

¶ 77 First, he points to the fact that neither client raised any concern between the opening of their accounts in 2009 and Mr. Debus' departure from the firm in 2013, which is the period of time reflected in Counts 2 and 3. Only after his departure in 2013 did the clients complain, he says, at the instigation and encouragement of Mr. Debus' former partner. That partner was the RR assigned by Macquarie to contact clients after Mr. Debus' departure to see if they would remain with the firm. By this time, a significant rift had developed in the working relationship between Mr. Debus and his partner. According to Mr. Debus, his partner did not hesitate to "badmouth" him. AP and PE acknowledged that they were told after Mr. Debus' departure that some of their stocks, including investments such as My Screen, Huldra Silver, Copper Mountain and Avrev, had little value. However, PE testified that he was told this by his new RR at RBC and not by Mr. Debus' partner. Mr. Debus says that the two clients complained not because they were unhappy with the way he handled their investments, but simply because they were unhappy with their losses. Mr. Debus is right that no client complaints were forthcoming initially. However, the fact that the clients did not complain earlier is not the issue. The issue is not whether or why they were unhappy, or even if they were unhappy at all, but whether Mr. Debus acted without authority contrary to the IIROC Dealer Member Rules.

¶ 78 Mr. Debus did not cross-examine either AP or PE on their evidence of their conversations with him

purporting to give him discretion to trade stock without their specific authorization. AP and PE were quite clear about those conversations and seemed, even now, to be unaware that Mr. Debus was not entitled to trade at his discretion even if they had given him their permission to do so. Their evidence was not shaken on this point.

¶ 79 Second, Mr. Debus implied early in the hearing that AP and PE were testifying against him to bolster their civil actions against him. However, it turned out that those civil actions apparently had been resolved much earlier. While AP and PE would want to be consistent with the positions they took to obtain the settlements, they did not otherwise have a current motivation of self-interest.

¶ 80 Third, Mr. Debus argues, since he was under supervision for much of the time frame, that he could not have executed trades for these clients unless he had first obtained approval based on their instructions. In support of his evidence that he always obtained the clients' pre-approval, Mr. Debus relies on his Sage App notes that he says he made during discussions with AP and PE. He says those Sage App notes documented the particulars of the detailed instructions they gave for each trade. He says he included a screenshot of each note when writing to his managers seeking pre-trade approval.

¶ 81 We do not accept this argument because, as we will discuss, it is not consistent with the documentary evidence and that of the Staff investigator. We turn to discuss this argument in the context of the various supervisions imposed on Mr. Debus.

¶ 82 From February 26, 2009 to June 10, 2010, Mr. Debus was under close supervision. The only restrictions the firm put on Mr. Debus during this supervision related to conditions that he take on no new discretionary business and he conduct himself in a particular way in relation to new issues and margin and debit balances. During this period of supervision, Mr. Debus conducted 43 trades for AP and 35 trades for PE, none of which required pre-approval. Consistent with the fact that Mr. Debus did not require pre-approval, the extensive production did not provide any evidence of him making a request for pre-approval, let alone details of his clients' instructions for particular trades.

¶ 83 It follows that Mr. Debus cannot rely on his close supervision as evidence that he could not have engaged in unauthorized or discretionary trading during this period.

¶ 84 From June 11, 2010 until June 11, 2011, Mr. Debus was under firm-imposed strict supervision. During this time, he conducted 22 trades for AP and 37 trades for PE. Unlike the terms of his close supervision, Mr. Debus was now required to obtain pre-approval for all client trades. Consistent with this, the documentary evidence disclosed that the Respondent wrote emails to his manager requesting approval for all of AP's trades and for 27 or 28 of PE's trades. Neither the IIROC investigator nor Mr. Debus was able to identify any Sage App or other note attached to Mr. Debus' pre-approval requests during this first period likely because such a requirement was not part of his terms of supervision. On the balance of probabilities, Mr. Debus likely started making and incorporating Sage App notes after this period of supervision and only during his second period of strict supervision.

¶ 85 We accept that AP and PE initially authorized certain trades after they opened their respective accounts with Mr. Debus, but that Mr. Debus proposed to exercise discretion in their trades, which he started to do at some point during this period.

¶ 86 Mr. Debus was not under any supervision from June 12, 2011 until October 26, 2011. Accordingly, he certainly was not required to and did not obtain pre-approval for this period and there was no evidence of instructions he received from his clients.

¶ 87 Mr. Debus was under firm-imposed strict supervision from October 27, 2011 until Mr. Debus left Macquarie on March 8, 2013.

¶ 88 Staff allege that Mr. Debus sold stock for AP during this period without prior authorization. In this time

frame, there were nine trades in AP's account. AP testified that he did not authorize these trades, all of which were for relatively small amounts to satisfy margin calls for deficiencies in AP's account. (By the terms of a margin account, the firm was entitled to proceed with a margin trade without the authorization of a client.)

¶ 89 In respect to AP, Mr. Debus initially testified that seven of the nine margin trades in this supervision period (2011 – 2013) were made by the firm and that he had executed only the remaining two, or perhaps only one. Later, he said he did not "specifically remember" how many of the margin call trades that he completed. Later he acknowledged his Sage App notes purportedly indicate that he had spoken to AP about the margin trades on several occasions. By way of explanation of the change in his evidence, Mr. Debus testified that even "though I did speak to the client, sometimes I was too late, they'd (the firm) already sold it."

¶ 90 In our view, the most likely explanation is the one given by AP, that he did not speak to Mr. Debus at all about most if not all of the margin sales. This would be consistent with AP's understanding that Mr. Debus was authorized to do all trades without consulting him.

¶ 91 In addition, several of the margin trades entered by Mr. Debus for AP did not even comply with the Sage App notes that he provided to the firm. For example, in September 2010, Mr. Debus obtained approval to sell 4,000 shares, but he executed the trade for 6,000 shares. In October 2010, he received approval to sell 3,000 shares and he sold 5,000. On Monday, October 25, 2010, he received approval at 9:52 am but did not enter the trade until Friday, October 28 at 9:30 am. In August 2012, Mr. Debus received approval to sell 500 shares and he entered an order to sell 400 shares. In November 2012, he received approval for a trade on Friday November 9, 2012 and he entered the order on Wednesday November 14, 2012. We conclude that the changes to these trades were unauthorized.

¶ 92 The trades in PE's Fox account in this period totalled 22. PE testified that the Respondent did not discuss these trades with him in advance, except for one stock, Canada Lithium. PE readily accepts that Mr. Debus and he discussed Canada Lithium, a purchase suggested by PE. It appears that Mr. Debus also communicated with PE about his acquisition of Cott Corp. and obtained his approval to acquire that stock. In his evidence, PE did not recall a discussion with Mr. Debus about Cott. However, he was also clear that he was not complaining about or concerned with the Cott acquisition, but rather his concern rested with stocks such as Huldra Silver, Copper Mountain and Avrev.

¶ 93 Subsequent to PE's evidence, Mr. Debus received further production from RGMP, including an email chain where PE appears to approve a purchase of Cott. Mr. Debus decided not to put this email to PE, although he was at liberty to do so. In the end, we accept that PE was likely in error about Cott. However, that error did not diminish his evidence about the stocks that were of concern to him, trades that were not supported by similar documentary evidence. On the basis of PE's evidence, we conclude that, for the most part, Mr. Debus exercised his discretion in buying stock for PE's IPP account.

SUITABILITY - COUNT 4

¶ 94 Count 4 alleges that:

> Between December 2011 and February 2013, the Respondent failed to use due diligence to ensure that recommendations made for client PE were suitable for him, based on his investment objectives and risk tolerance, contrary to IIROC Dealer Member Rule 1300.1(q).

¶ 95 Rule 1300.1(q) provides:

> Each Dealer Member, when recommending to a client the purchase, sale, exchange or holding of any security, shall use due diligence **to ensure that the recommendation is suitable** for such client based on factors including the client's current financial situation, investment knowledge, **investment objectives and** time horizon, **risk tolerance** and the account or accounts' current investment portfolio

composition and risk level. [emphasis added]

¶ 96 While the Rule addresses the obligation of each "Dealer Member", the Respondent concedes that Dealer Member includes a RR by virtue of Rule 29.1 of Schedule B.1 to Transition Rule No. 1 of the IIROC Dealer Member Rules. That Rule provides that a RR "shall comply with all Rules required to be complied with by the Dealer Member." Staff also points to Re Phillips, 2011 IIROC 60 at para 18 to support that interpretation.

¶ 97 In this case, Staff's investigation resulted in the allegation that Mr. Debus did not fulfill his obligation of ensuring suitable recommendations based on PE's risk tolerance and investment objectives. PE's concern about the losses in this account centred particularly on high risk investments such as Avrev, Copper Mountain Mining, Huldra Silver and Sentry Select Precious Metals.

¶ 98 PE's high risk tolerance was particularly relevant given the nature of his account as a pension account. When PE first transferred his IPP account to the Respondent in early 2009, his high risk tolerance was set at 10%. In January 2012, his high risk tolerance was increased to 20%.

¶ 99 Staff alleges that the account's investments exceeded the 20% high risk tolerance between December 2011 and February 20, 2013.

¶ 100 In support of its allegation, Staff relied upon the evidence of its investigator. On the basis of his own risk ratings, the investigator gave the opinion that the percentage of high risk investments in PE's account ranged from 23% to 47%. After the investigator was queried about his rating of two convertible debentures as high risk, he provided a second analysis based on rating them as medium risk. That analysis calculated the account contained 23% to 37% high risk investments. Both opinions concluded that the IPP investments exceeded PE's tolerance for high risk investments.

¶ 101 In his submissions, Mr. Debus provided his own assessment of the high risk content of the IPP account. The calculations of both the investigator and Mr. Debus were based on a quarterly pinpoint analysis of the account from March 2012 to February 2013, a period of approximately a year.

¶ 102 Mr. Debus' chart showed the account held more than 20% high risk investments. According to his numbers and assessment, PE held high risk investments ranging from 23.3% in March 2012 to 21.1% in February 2013. At its peak in September 2012, PE held high risk investment of 23.9%. Given these numbers, even on Mr. Debus' own assessment, PE's account exceeded the 20% limit of his client's high risk tolerance.

¶ 103 The difference in Mr. Debus' assessment of the risk tolerance at a maximum of 23.9% and the investigator's analysis at 37% lies in whether three particular investments (Amaya Gaming, Retrocom REITS and JFT Strategies Fund) should have been rated as high risk, as argued by the investigator; or as medium risk, as argued by Mr. Debus. Ranking the risk of an investment is generally a task that requires expertise. We had no qualified expert evidence in this case.

¶ 104 The investigator had five years' experience with IIROC enforcement and had taken the Canadian Securities Course. His evidence was proffered only as factual evidence. Counsel for Staff specifically stated that the investigator was not called as an expert witness. In our view, as a fact witness, the investigator could have given evidence about the risk ratings given the shares and debentures by Mr. Debus' firm. That evidence could have assisted the Panel. The investigator did not offer that information. Instead, he performed his own analysis of what he considered to be the appropriate risk ratings. This kind of pragmatic analysis is no doubt helpful for an initial investigation as well as for settlement discussions, but it is not expert evidence for the purpose of a disciplinary hearing.

¶ 105 As in Re Carbonelli and Conway, 2012 IIROC 56 paras 116-117, expert evidence would have been helpful on the issue before the Panel as would have been the risk ratings determined by Mr. Debus' firm. While we conclude that we have sufficiently clear evidence to satisfy us on the balance of probabilities that

the account contained more than 20% high risk investments, we do not have the evidence to satisfy us that that overage was as much as 47% or even 37%.

¶ 106 This leaves us with Mr. Debus' calculation of overage of less than 4%. Mr. Sabbah argued "as a rule of thumb, investment firms allow up to 5% variance for suitability due to market factors and volatility". On that basis, he argued that the overage of high risk investments in PE's account was within acceptable levels. However, Mr. Sabbah conceded that there was no evidence presented about such a "rule of thumb" during this hearing. We cannot give effect to this argument. Overage of 3.9% is still more high risk than the client had been prepared to assume.

¶ 107 We are not persuaded to the contrary by the absence of evidence that the firm communicated any concerns about the account's risk tolerance to Mr. Debus. There could be many explanations. The Panel received evidence of instances where the firm apparently did not identify or address suitability concerns with Mr. Debus promptly.

¶ 108 In the result, whether we accept Mr. Debus' risk ratings or those of the investigator, PE's IPP account contained more than 20% high risk investments for approximately one year. For that reason, the allegation in Count 4 has been established on a balance of probabilities.

CONCLUSION

¶ 109 These reasons explain why the Panel concludes that Counts 1, 2, 3 and 4 of the Amended Notice of Hearing have been proven.

¶ 110 We remit this matter to the IIROC National Hearing Coordinator to schedule a sanctions hearing. If no agreement to sanctions is reached within two weeks of the date of this decision, IIROC Staff shall deliver sanction submissions within one week thereafter and Mr. Debus shall deliver his responding submissions within one week thereafter. If this timetable is not feasible, either party may request the National Hearing Coordinator to arrange a telephone conference with the Panel to consider amendments to the timetable.

Dated at Toronto, Ontario this 18th day of March, 2019.

Susan Lang

Nick Pallotta

Stuart Livingston