

# Re Marek

IN THE MATTER OF:

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

**and**

**Earl Marek**

2016 IIROC 36

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

Heard: April 25, 27, 28 and May 31, 2016 in Toronto, Ontario  
Decision on the Merits: October 3, 2016

**Hearing Panel:**

Thomas J. Lockwood, Q.C. – Chair, Lou D’Souza and Daniel Iggers

**Appearances:**

Kathryn Andrews – IIROC Enforcement Counsel

Earl Marek - In Person

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## DECISION ON THE MERITS

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**A. THE ALLEGATION**

¶ 1 By Notice of Hearing, dated November, 2015, the Investment Industry Regulatory Organization of Canada (“IIROC”) made the following Allegation:

“Count 1: On or about February 2012, Earl Marek facilitated off book transactions for two clients without the knowledge or approval of his Member firm, contrary to IIROC Dealer Member Rule 29.1.”

**B. HISTORY OF PROCEEDINGS**

¶ 2 The Notice of Hearing set the Hearing date for February 8, 2016, at the IIROC offices in Toronto, Ontario.

¶ 3 On January 11, 2016, IIROC issued a Memorandum confirming that the Hearing dates would be February 8, 9, 10 and 11, 2016.

¶ 4 On January 22, 2016, Earl Marek (“the Respondent”) forwarded an e-mail to the National Hearing Co-Ordinator requesting a short adjournment of the Hearing. This request was opposed by the IIROC Enforcement Staff.

¶ 5 On January 27, 2016, the Hearing Panel considered the Respondent’s adjournment request. The main reason for the request was the potential unavailability of a particular witness. Staff advised that it was ready and anxious to proceed.

¶ 6 After carefully considering the submissions of both parties, the Hearing Panel directed that the Hearing

on the Merits would proceed on the dates set, but the Respondent could renew his application after the completion of Staff's case, if the witness was still not available.

¶ 7 On February 1, 2016, the Respondent made a further request for an adjournment of the Hearing on the Merits. This was considered by the Hearing Panel via a teleconference call on February 3, 2016.

¶ 8 The essence of the request for an adjournment by the Respondent was that he had come to the realization that he needed the services of a lawyer to represent him at the Hearing on the Merits. He had made certain inquiries in this regard but had not, as yet, retained a lawyer. Thus, he requested that the matter be adjourned both so that he could retain counsel and counsel, once retained, would have time to prepare for the Hearing.

¶ 9 The position of Staff was that they were ready to proceed but could understand if the adjournment request was granted. They submitted that, if an adjournment was to be granted, the Hearing not be bifurcated and that the Hearing, once started, proceed on consecutive days.

¶ 10 After a careful consideration of the submissions of both parties, the Hearing Panel ordered that the Hearing scheduled for February 8 to 11, 2016, be adjourned to April 25, 26, 27 and 28, peremptory to the Respondent. A new date was also set for Disclosure, Witness Statements and Witness Lists.

¶ 11 The Respondent thanked the Hearing Panel and indicated that, in his view, the Order made was fair and reasonable.

¶ 12 On Friday, April 22, 2016, a further teleconference call was convened at the request of the parties. The Respondent advised that he wished to attend a meeting in Nassau, Bahamas, on Monday, April 25, 2016. He agreed that the Hearing on the Merits would start on April 25, 2016. The Respondent stated that he wished to commence the presentation of his evidence on Wednesday, April 27, 2016. He was content that Staff would present its evidence in his absence. He stated that he would have a representative present while the Staff evidence was being presented on April 25 and, perhaps, on April 26, 2016.

¶ 13 The Hearing Panel repeatedly encouraged the Respondent to be present during the presentation of Staff's case and exercise his right of cross-examination.

¶ 14 The Respondent further indicated that he had made the decision to proceed without legal representation. He stated that he was aware of his right to cross-examine Staff witnesses. However, he had decided to attend the meeting in Nassau and to personally forgo this right. He stated that his only request was that he be permitted to commence presenting his evidence on April 27, 2016, and not immediately at the conclusion of Staff's case.

¶ 15 Staff did not oppose the Respondent's request. Staff further stated that it would not seek an Order excluding witnesses, when it was learned that the Respondent intended to have one of his witnesses attend a portion of the Hearing on the Merits, during the presentation of Staff's evidence.

¶ 16 After again encouraging the Respondent to be present during the presentation of Staff's case, the Hearing Panel granted his request that he be permitted to present his evidence commencing on April 27, 2016.

¶ 17 Staff presented its evidence on April 25, 2016. The Respondent had representatives in attendance throughout the presentation of Staff's case. As indicated below, those representatives were provided with an opportunity to cross-examine each of Staff's witnesses. They declined to do so.

## **C. THE EVIDENCE**

¶ 18 Staff called the following evidence:

### **I. ("PL")**

¶ 19 PL is the president of TCO, a software development company. He testified that the first time he heard about the opportunity to buy Facebook shares was through JM, the Respondent's son. At the time, JM was an employee of TCO.

¶ 20 According to PL, JM said that the Respondent would have a block of pre-IPO Facebook shares and wanted to sell some to mitigate his risk. PL said that he was interested in discussing the matter with the Respondent.

¶ 21 The Respondent subsequently met with PL and his brother, D, in TCO's boardroom. JM was not present at the meeting.

¶ 22 At the meeting in January of 2012, according to the testimony of PL, there was a discussion about the merits of Facebook, including whether buying Facebook at a pre-IPO price was a good investment, the price at which the shares would be available, the estimated IPO price and the future prospects for Facebook shares.

¶ 23 It was PL's clear understanding that the Respondent was buying the shares and was selling some off to mitigate his risk. There was some urgency, as the transaction had to be completed before the date of the IPO, which was coming shortly after the meeting. The Respondent advised that if either or both of the L brothers did not take shares, they would be offered to other investors.

¶ 24 According to PL, the Respondent stated that the underwriters of the IPO were Goldman Sachs and that he would be receiving his shares from a contact which he had at the firm.

¶ 25 The Respondent advised PL that he was with Macquarie Private Wealth Inc. ("Macquarie") and that the process would be smoother, with far less red tape and paperwork, if it went through Macquarie. The Respondent stated that he hoped that this would be the beginning of a longer term relationship.

¶ 26 PL did not believe that the Respondent would be receiving a fee himself – it was a straight flow through – he was buying the shares from his contact at Goldman Sachs and wanted to mitigate his risk. The Respondent did mention that there would be a small administration fee of approximately \$1.00 per share, which would go to Macquarie.

¶ 27 The Respondent advised that there would be a 6 month moratorium on the sale of the shares following the IPO.

¶ 28 PL testified that "the fact that he (the Respondent) worked for a well-known firm and that he was registered with the governing bodies in Ontario made us feel secure that the risk was minimal and the reward was high."

¶ 29 At the first meeting, both PL and his brother indicated that they were very interested in purchasing Facebook shares. A further meeting was arranged at which JM was present. This meeting also occurred in TCO's boardroom.

¶ 30 At the second meeting, both PL and his brother said that they would each buy 1,000 shares at a price of approximately \$28.00 per share. PL testified that he thought that the transaction would be completed by a money transfer into the Respondent's business or personal account. According to PL, the Respondent made it clear that they were buying from him. The Respondent indicated that it did not matter if PL purchased the shares personally or through his company.

¶ 31 On Friday, February 3, 2012, PL sent an e-mail to the Respondent stating, in part: "thanks again for dropping by and helping us out with the shares. Please let us know what we need to do on Monday (wire information, and forms etc.) and we shall get it done ASAP."

¶ 32 PL testified that the Respondent forwarded, through e-mail, wire transfer instructions. On Monday, February 6, 2012, he took these instructions to a branch of TD Canada Trust and tried to wire the funds. He was advised that the information was incomplete and that the transfer could not be concluded. He sent an e-mail to the Respondent on February 6, 2012, seeking clarification as to both the intermediary bank and the beneficiary bank. He also sought an address for New Economy Holdings Limited ("New Economy"). PL did not know who New Economy was as he thought that the funds were going to the Respondent.

¶ 33 When PL received the instructions he saw that the money was going to the Cayman Institutional Bank in the Cayman Islands. Although that was a surprise to him, he still thought that the money was going to the

Respondent.

¶ 34 On February 9, 2012, PL successfully wired \$28,900.00 (US) to the Cayman Institutional Bank.

¶ 35 After the shares had been purchased, PL had contact with the Respondent whenever the latter came to visit his son, JM, at the TCO premises. This occurred approximately every three weeks. PL and the Respondent would have discussions on the performance of the Facebook stock, as well as other investment opportunities. PL noted that nothing seemed amiss.

¶ 36 In October of 2012, PL opened up an account at Macquarie in the name of his company, TCO.

¶ 37 On October 26, 2012, PL wrote to the Respondent advising that TCO's year end was July 31<sup>st</sup> and the TCO accountant was asking for proof of purchase of the Facebook shares. He wrote again on October 31, 2012, making the same request. There was no positive response to either of these e-mails.

¶ 38 According to PL, over the next several months he tried, without success, to obtain copies of the documentation evidencing the purchase of the Facebook shares.

¶ 39 Finally, on June 12, 2013, PL sent an e-mail to the Respondent which read, in part, as follows:

“Currently based on what's happened so far, any one of three scenarios look all equally valid to me.

- 1) We have the FB shares but it's taking unusually (sic) to obtain documentation
- 2) RK took the money and used that money for personal use
- 3) You took the money and used that money for personal use.

The latter 2 scenarios are considered fraud and it's a criminal offense (sic). So sure hope it's scenario 1 for all of our sakes.

So in the spirit of disclosure, this is what I am planning to do:

S, my financial controller has identified a formal complaints process. If I do not get resolution on this matter by this Friday, S has instructions to go ahead and file the formal complaint against you and Macquarie. (I don't care about RK since I bought the stocks through you.)

I will also have a discussion with S and DL on Friday to see if it makes sense for us to file a criminal complaint for fraud . . . “

¶ 40 The Respondent immediately responded to this e-mail, in part, as follows:

“P, it's 1 or 2, with 2 being highly unlikely. I want to make it clear that this was an “off-book opportunity” – nothing to do with Macquarie or any other investment firm, as the funds went directly from you to an account in the Caymans (same situation as done by Goldman Sachs – at the same price). I was not a middle man, as the funds did not go through me. I merely brought the “opportunity” to your attention – as I recall, it was JM who mentioned to you that there were some shares floating around. These shares were being sold by a Facebook consultant, and RK got a call on these shares from his brother, who is at Morgan Stanley, which is Facebook's firm. . . . No one realizes this is taking an insane amount of time more than me as I bought 3300 shares and I can produce the wire transfers . . . “

¶ 41 On November 2, 2013, the Respondent sent an e-mail to “Facebook investors”, including PL, with respect to the Facebook shares, which stated at the bottom, in bold type “**Please delete my Macquarie e-mail address effective immediately and only use (the Respondent's “g-mail” address) for all correspondence.**”

¶ 42 As of the date of the Hearing on the Merits, PL testified that he had not received the Facebook shares from the Respondent, or anyone else. Likewise he testified that he had not received a return of his \$28,900.00 (US) from the Respondent or anyone else.

¶ 43 PL testified that he considered himself to be a client of Macquarie the moment he decided to go ahead and purchase the Facebook shares, despite the fact that the formal documentation was only completed several months later. He said that this was because the Respondent, at the initial meeting, indicated that because he was helping PL acquire the Facebook shares it was anticipated that he was going to invest through him for the time being as this was the start of a relationship. Thus, the formal opening of the account was not that relevant especially since he knew that he could not sell the Facebook shares for a period of time. He said that he began to communicate with the Respondent using the Macquarie e-mail address.

¶ 44 Although provided with an opportunity to do so, the Agent for the Respondent advised the Hearing Panel that she did not have any questions to ask of PL.

## **II. DL (“DL”)**

¶ 45 DL owns and operates a digital marketing agency known as JIG.

¶ 46 At the time relevant to these proceedings, DL was sharing an office with his brother, PL, who was employing JM as his graphic designer.

¶ 47 His brother let him know that there was an opportunity to purchase 1,000 shares of Facebook on a private basis. In January of 2012, the Respondent met with DL and PL to discuss this opportunity.

¶ 48 The Respondent told him that he worked at Macquarie. DL told him that he did not have an investment advisor. The Respondent suggested that when the Facebook shares came in, he (the Respondent) would set up an account and manage the shares through Macquarie. They both agreed that this would be the beginning of a relationship.

¶ 49 According to DL, it was the Respondent’s suggestion that an account be set up at Macquarie. The purpose of this account was to manage his RRSPs. DL testified that he had some RRSP room and it was important for him to take advantage of that.

¶ 50 The Respondent also told DL that he would provide him with some ideas for other investment opportunities.

¶ 51 DL and the Respondent talked about Facebook. The Respondent told him that the pre-IPO purchase was a timely opportunity. He asked the Respondent if he, DL, could purchase more than 1,000 shares. He was told that he could not as he, the Respondent, was going to buy for himself and his son.

¶ 52 The Respondent told him that these shares were not available to the public. He was told that the price would be approximately \$28.00 per share.

¶ 53 DL was told that there was some urgency as the transaction had to be completed prior to the Facebook IPO.

¶ 54 No fee was to be paid to the Respondent but he would get the benefit of being about to manage the shares through the Macquarie account.

¶ 55 It was DL’s understanding that he was buying the shares through the Respondent.

¶ 56 DL did not make a purchase commitment at the January 2012 meeting. He did some checking and then decided to make the purchase. He called the Respondent and said that he would purchase 1,000 shares. The Respondent said that he would provide wire instructions. He did so over the telephone. He said that the total price was \$28,900.00 (US).

¶ 57 DL then went with his brother, PL, to wire the money. The forms were filled out. He later learned that the money had been returned. He called the Respondent to say that the wire instructions were wrong. The Respondent called back to say that the instructions were not wrong, but that the form had been filled out incorrectly.

¶ 58 The Respondent told DL that New Economy was just a company set up to broker the deal with the

Facebook representative.

¶ 59 DL went back to the bank and filled out the form as instructed by the Respondent. A few days later, the Respondent called to say that the money had been received.

¶ 60 After the Facebook shares were purchased, DL had a number of follow-up meetings with the Respondent.

¶ 61 DL subsequently received a Macquarie New Client Application Form. He completed it. The Respondent picked it up. He was specifically told by the Respondent that the shares would be eligible for RRSP accounts.

¶ 62 When the Facebook shares did not come in and the RRSP deadline was looming in 2013, the Respondent suggested that DL put \$28,000.00 into his account and when the shares did come in, Macquarie would return the cash value of what he had deposited.

¶ 63 The Facebook shares did not come in. DL eventually complained to IIROC. He also closed his Macquarie account.

¶ 64 As of the date of the Hearing on the Merits, DL had received neither the Facebook shares nor a return of his \$28,900.00 (US).

¶ 65 Although provided with an opportunity to do so, the agents for the Respondent, Ms. So and JM, advised the Hearing Panel that they did not have any questions by way of cross-examination of the Staff's witnesses.

### **III. Sharon Lloyd Gyurkovics ("SLG")**

¶ 66 SLG testified that she had been an investigator at IIROC since 2004. She was currently a senior investigator in the Enforcement Department. She was the investigator assigned to the Respondent's file.

¶ 67 She produced and had marked as an exhibit the Form 33-109F4 relating to the Respondent. It showed that the Respondent commenced employment with Macquarie on October 11, 2011.

¶ 68 She testified that Richardson GMP Limited ("Richardson") acquired Macquarie in November of 2013 and continued under the name of Richardson.

¶ 69 The Respondent continued his employment with Richardson until April 17, 2014. She testified that he is not currently a Registrant.

¶ 70 SLG testified that she made inquiries as to whether the Respondent had advised his firm about PL's and DL's Facebook purchase in February of 2012. She was not able to find any evidence that he did. In fact, Richardson advised that they had searched their records and were not able to locate any correspondence from the Respondent to either of his branch managers at the relevant period of time "with respect to a list of clients and the pending transfer in of assets associated with Facebook."

¶ 71 SLG testified that she made the specific inquiry as, during the course of his interview with IIROC, the Respondent indicated that "he had thought he had e-mailed them to let them know that he was expecting a number of clients to transfer in Facebook shares."

¶ 72 SLG also testified with respect to a Richardson internal investigation report. It found, *inter alia*, that an investigation of the accounts, beneficially owned by PL and DL, indicated that no Facebook transactions were processed in either account. In addition, Macquarie had no record of the Respondent at any time either informing or seeking approval from the firm to execute the Facebook transactions.

¶ 73 The investigation showed that the TCO accounts, beneficially owned by PL, were opened in October of 2012, but that no activity had occurred in either the Canadian or US cash account since inception.

¶ 74 With respect to DL, the records indicated that a Canadian and US cash account, as well as an RRSP, were opened in December of 2012. While there was some activity in the accounts, there was no evidence to support a purchase of Facebook shares taking place in same.

¶ 75 The report acknowledged that both PL and DL provided documentation to Macquarie showing that they had each wired funds in the amount of \$28,900.00 (US) to the Cayman Institutional Bank in February of 2012, which they claimed was for the purchase of Facebook shares, based on instructions provided to them by the Respondent.

¶ 76 Macquarie found that if the Respondent co-ordinated this arrangement “it was done outside of the scope of Macquarie and without the firm’s knowledge. Industry guidelines dictate that any Registrant who engages or assists a client in transactions outside of the firm of their employment, must seek approval by their employer prior to that arrangement. We have no record of any such review or approval.”

¶ 77 The investigation report concluded that the Respondent “should have brought the matter to the attention of Macquarie immediately. Specifically, [the Respondent], as a registrant, should have been aware of his obligation to disclose this type of activity for review and approval. We believe that [the Respondent] had sufficient opportunities to inform Compliance of the situation, but chose to act alone in this regard. This was only brought to the firm’s attention when two complaints were filed against [the Respondent].”

¶ 78 Although provided with an opportunity to do so, the agent for the Respondent advised the Hearing Panel that he did not have any questions.

#### **IV. JM (“JM”)**

¶ 79 The Respondent called his son, JM, as his first witness.

¶ 80 JM testified that he first heard about an opportunity to buy Facebook shares pre-IPO from R K (RK). He agreed that he discussed the matter with his father, the Respondent, before he made his purchase.

¶ 81 He testified that he spoke about this opportunity with PL, who was more interested in the price and availability of the shares than who was selling and why they were selling. He testified that PL knew that the shares were coming from a contractor but he never inquired about a name or how JM had come into contact with this individual.

¶ 82 JM testified that he bought 3,300 shares through his company E52 Financial Limited. He said that he paid for the shares himself.

¶ 83 He testified that, to his knowledge, the Respondent did not buy any Facebook shares pre-IPO.

¶ 84 He testified that he paid approximately \$28.00 (US) per share for an investment of over \$90,000.00 (US). At the date of the Hearing on the Merits, he had not received the Facebook shares, although he had heard that the shares had been sold and that the money was being held. He said that he heard this from RK but that it was all hearsay and he had not seen any documents.

¶ 85 He testified he believed that all of his shares were sold by a trust company, the name of which he did not know. He believed that his shares were sold on a verbal “okay” to sell from him. The trust company was never in touch with him. However, he has never received any money for his shares.

¶ 86 He testified that he was aware of meetings between the Respondent and PL and DL, which dealt, in part, with the Facebook shares.

¶ 87 In cross-examination, he was referred to an e-mail from the Respondent to PL of June 12, 2013, where the Respondent stated: “I bought 3300 shares and I can produce the wire transfers.” He testified that: “they were hammering both of us so much that we just . . . we became somewhat defensive in our responses, and I believe he adopted my . . . the language kind of just saying that we’re in this both together, like “I didn’t screw you. I’m not cheating you” that kind of deal. And that’s the only reason he adopted that language . . . “.

¶ 88 JM confirmed that the Respondent did not purchase 3,300 share of Facebook pre-IPO.

#### **V. The Respondent**

¶ 89 He testified that a lot of consultants did work for Facebook and, as Facebook did not have the money to

pay in cash, they paid in shares. RK mentioned to both JM and the Respondent that he was aware of the availability of some Facebook shares pre-IPO.

¶ 90 He testified that RK knew both PL and DL before he, the Respondent, met them.

¶ 91 The Respondent advised that his son was interested in investing and PL and DL indicated to JM that they were interested as well.

¶ 92 He testified that he met PL and DL in their office. They asked him if he was investing as well. He said that, at that point, he was considering it.

¶ 93 The Respondent indicated, however, it was RK who was assembling the group, not himself. He said that, in that group were clients of his. He said that when PL and DL were talking to him about investing, they were not clients.

¶ 94 The Respondent testified that, other than letting PL and DL know of the investment opportunity, he was not involved.

¶ 95 He said that he knew that his son was investing and that he was a client of Macquarie. Thus, if he was going to invest personally, he would have to get approval from his firm. However, as he was aware that people who were investing were clients, he did not want to be seen as “commingling funds or being involved with them.” Thus, although he strongly considered investing in the pre-IPO Facebook shares, he did not do so.

¶ 96 He testified that he did not receive any compensation or benefit from his participation other than he assumed that once his clients got their shares, they would deposit them to their accounts at Macquarie.

¶ 97 The Respondent testified that he received no compensation “because I wasn’t actually doing anything.”

¶ 98 He testified that, having been in the investment business for over 25 years, he was well aware of the compliance rules. He testified that he had held the position of a branch manager in both the United States and Canada and had been licensed in both jurisdictions. He was well aware of his obligation to report any kind of business activity engaged in away from the firm. However, in his view, as he was not receiving anything it was not really a business transaction and, therefore, there was no need to report anything.

¶ 99 The Respondent testified that, prior to when PL and DL became involved in this transaction, he had advised both the manager, who hired him, and the manager who succeeded that manager that there were a number of clients that had Facebook shares and when they received the shares, they would be coming to the firm. He testified that no one at Macquarie asked how they were able to get pre-IPO shares.

¶ 100 He testified that RK forwarded to him the wire instructions to give to JM. He passed those on to PL and DL.

¶ 101 He testified that, at the time of the wire instructions, he had never heard of New Economy Holdings.

¶ 102 He said that he thought that the IPO was in May of 2012 and that the lock-up period probably extended to October or early November of that year. He testified that there was uneasiness because of the lack of supporting documentation and that he really only got involved because of his son. He said that people were upset with RK and didn’t want to talk to him and so they called the Respondent.

¶ 103 He said that he knew some of his clients were involved as was his son so “I became a messenger of sort. . . . But just to make things easier, I started referring to it as “our group”.”

¶ 104 The Respondent said that he began sending out what he called “messenger e-mails”. He didn’t send any to JM as he gave him verbal updates.

¶ 105 He testified that he believed the Facebook shares were sold in September of 2014. He realizes that the proceeds have not been disbursed.

¶ 106 In cross-examination, he admitted he did not know what to say about the fact that Macquarie had indicated that they could not find any e-mails from the Respondent to either of his managers dealing with the

Facebook issue. He agreed that he did not call either of them as witnesses at the Hearing.

¶ 107 He admitted that he had not provided notes of any meetings or telephone conversations he had with either PL or DL.

¶ 108 In cross-examination, the Respondent was taken through a number of e-mail exchanges with either PL or DL concerning the Facebook stock. The re matter on the subject line says “Facebook stock”. In none of these e-mails does the Respondent state that the Facebook transaction has nothing to do with him. Likewise RK, whom he testified was the real person behind the transaction, was not copied on the e-mails or referred to therein.

¶ 109 In a June 12, 2013, e-mail to the Respondent, PL states, *inter alia* “I bought the stocks through you.” The Respondent responded by stating: “I merely brought the “opportunity” to your attention.” In cross-examination, the Respondent indicated that even that was not correct as he maintained that it was his son who brought the opportunity to PL’s attention.

¶ 110 When asked why he said “I bought 3300 shares”, when his son had actually bought the shares, he testified that he was trying to show that he was concerned. This was in response to the numerous comments from PL and DL that they didn’t like the way he was handling the matter.

¶ 111 When cross-examined about why he requested both PL and DL not to use the Macquarie e-mail address, he stated: “Well, essentially, I don’t want information about an off-book transaction that I’m actually not involved with popping up on Macquarie because that infers I am involved.”

¶ 112 The Respondent was referred to an e-mail to DL, dated June 18, 2013 in which he stated, *inter alia*, “Every interested party wired funds to the same destination, including myself.” While conceding that the statement was not accurate, he stated that he said it to reduce PL’s and DL’s anxiety.

¶ 113 In November of 2013, the Respondent forwarded an e-mail to “Facebook investors”. He testified that these were either clients of his or a referral of a client. In this e-mail he states, *inter alia*, “I can sell each person’s position separately.” He then requested information as to when they want the shares sold. He also gives the information to persons who do not want their shares sold.

¶ 114 He testified that, as an investment advisor, people who had accounts with him would look to him to monitor and update them on the status of the transaction. He referred to them as “our group” or “my group” despite the fact that he testified he had nothing to do with the transaction.

¶ 115 However, on further cross-examination, he said that these people were looking on him as their financial advisor and that the transactions were going to go through Macquarie. Although he was seeking instructions from clients, he didn’t want any Macquarie correspondence regarding what, he claimed, was still an off-book transaction that he was not involved in.

## **VI. RK**

¶ 116 The Respondent sought to call RK by way of a telephone conference call. RK was in the Bahamas and was unable to attend in person. Counsel for Staff consented.

¶ 117 RK testified that the members of the buying group, including PL and DL, were persons who were known to him.

¶ 118 RK admitted that he was not present at the meeting with PL, DL and the Respondent.

¶ 119 He testified that he was neither an IIROC registrant nor an OSC registrant, just a private investor. He testified that he was not a client of the Respondent, although he knew that he was a broker.

¶ 120 RK testified that he is the sole director of New Economy Holdings. He would not reveal if he is the owner.

¶ 121 RK testified that in September 2014, a trust company sold all of the Facebook shares, including those of

PL and DL. He could not recall if PL and DL gave instructions to sell. The trust company sold the shares which were in the name of New Economy.

¶ 122 He testified that the decision to sell the Facebook shares was made by himself, “likely with consultation with some of the larger partners within the group.”

¶ 123 RK testified the proceeds of sale are currently being held by a trust company in the Bahamas.

¶ 124 RK testified that New Economy did not have a power of attorney to make a decision to sell on behalf of the individual investors. RK did what he thought was in the best interest of all the pre-IPO Facebook investors.

#### **D. CREDIBILITY OF WITNESSES**

¶ 125 Cross-examination is the means by which you get to test the evidence led by the other party. It has been called “the greatest legal engine ever invented for the discovery of the truth.” (Wigmore)

¶ 126 The well-known Rule in Browne v Dunn (1893), 6 R 67 H.L. states that if you are going to argue or lead evidence that a witness’s evidence should not be accepted, you have an obligation to put that proposition to the witness and give him an opportunity to respond.

¶ 127 As indicated, the Respondent chose not to attend the Hearing on the Merits during the presentation of Staff’s case. He had agents present, who, although invited by the Hearing Panel to do so, did not cross-examine the witnesses called by IIROC Staff.

¶ 128 On several occasions prior to the Hearing on the Merits, the Hearing Panel urged the Respondent to attend. He felt that a meeting in Nassau was more important. The Respondent made a conscious decision not to attend the Hearing on the Merits when the evidence against him was being presented. He made a conscious decision not to contest any of that evidence by way of cross-examination.

¶ 129 The evidence of the three Staff witnesses, PL, DL and SLG, was given in a straight-forward and believable manner. We found it to be credible.

¶ 130 The evidence of the Respondent was less straight-forward. It changed over time.

¶ 131 One small example related to whether the Respondent was purchasing any of the Facebook shares for himself. Both PL and DL testified that the Respondent said that he was an investor. In fact, they believed that he was permitting them to purchase a portion of his shares, to minimize his risk. The Respondent denied the accuracy of these statements by PL and DL, although as indicated, neither PL or DL were cross-examined on this point.

¶ 132 In cross-examination, the Respondent testified that, initially, he may have led the L brothers to believe that he was a purchaser. However, when the participants grew beyond the two L brothers who, he maintained, were not clients, to individuals he thought of as clients, he decided not to invest.

¶ 133 Yet, on June 18, 2013, he sent an email to DL which stated, in part: “Every interested party wired funds to the same (destination including myself” emphasis added). The Respondent testified that that statement was not accurate but was made to try “to reduce their anxiety by saying, I’m in the same boat as you.”

¶ 134 Earlier, on June 12, 2013, the Respondent had written to PL stating, in part: “No one realizes this is taking an insane amount of time more than me – as I bought 3300 shares – and I can produce the wire transfers.” In cross-examination, the Respondent admitted that this was not a true statement.

¶ 135 The Respondent’s evidence was often self-serving and rambling and, although we do not think that the Respondent deliberately lied to the Hearing Panel, we accept the evidence given by PL, DL and SLG, wherever that evidence conflicts with the evidence given by the Respondent.

#### **E. DECISION**

¶ 136 Dealer Member Rule 29.1 reads as follows:

“29.1. Dealer Members and each partner, Director, Officer, Supervisor, Registered Representative, Investment Representative and employee of a Dealer Member (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, and (iii) shall be of such character and business repute and have such experience and training as is consistent with the standards described in clauses (i) and (ii) or as may be prescribed by the Board.”

¶ 137 It is clear to us that this was an “off book” transaction. The Respondent agreed with this proposition in cross-examination.

¶ 138 It is, likewise, clear to us that Macquarie had no knowledge of this transaction and did not give its approval, protestations by the Respondent to the contrary notwithstanding.

¶ 139 The Respondent took deliberate steps to keep the details of the transaction away from Macquarie, especially after things did not go as planned. He went so far as to request that his clients delete the Macquarie e-mail address and to only use his private e-mail address in all future correspondence. He testified that he did that so that Macquarie would not ask questions for what he claimed was a transaction he was not involved with.

¶ 140 In our view, the Respondent was intimately involved in this transaction. He had his clients, PL and DL, open accounts at Macquarie to receive the Facebook shares, if and when they became available. He testified that he hoped the referral of this opportunity to the L brothers would mark the beginning of an investment relationship. There was no need to immediately formalize the relationship as it was understood by all that there would be a 6 month freeze after the IPO before the shares became freely tradeable.

¶ 141 Both of the Lbrothers thought that they were Macquarie clients in February of 2012 after the meeting at which the Respondent outlined his position at Macquarie.

¶ 142 When asked at what point he thought he was a client of Macquarie, PL replied: “The moment I decided to go ahead and purchase the Facebook shares, I considered myself within the Macquarie ecosystem, a client of Macquarie.”

¶ 143 In February of 2012, PL and DL believed they were clients of Macquarie, they acted in a manner and were treated by the Respondent as if they were clients. The documentary formalization of their relationship came later.

¶ 144 As stated in the Conduct and Practices Handbook:

“Dealing in securities outside of the normal business of the firm, sometimes referred to as selling away or outside deals may expose clients to unknown risks and expose registrants and firms to civil liability. Such activity done without the knowledge of the firm prevents effective supervision of the handling of client accounts, which is a requirement placed upon firms by SROs. Firms may be exposed to liability for the actions of their employees in the effecting [of] such trades, even though the firm was unaware of the activities.”

¶ 145 We were referred to a number of Decisions where Hearing Panels have concluded that facilitating off-book transactions without the knowledge or approval of the Member firm is a breach of Dealer Member Rule 29.1 or its equivalent.

¶ 146 These Decisions included:

- (a) *Wu (Re)*, [2002] IDACD No. 28;
- (b) *Gaudet (Re)*, 2010 IIROC 29;
- (c) *Stefiuk (Re)*, 2011 IIROC 24;
- (d) *Blackmore (Re)*, 2014 IIROC 43;

- (e) *Pariak-Lukic (Re)*, 2014 IIROC 1; and
- (f) *MacEachern (Re)*, 2014 IIROC 37.

¶ 147 After a careful consideration of all of the evidence presented, we are, unanimously, of the view that: “On or about February 2012 Earl Marek facilitated off book transactions for two clients without the knowledge and approval of his Member firm, contrary to IIROC Dealer Member Rule 29.1.”

**F. PENALTY HEARING**

¶ 148 We have, as yet, made no decision as to what, if any, penalty should be imposed on the Respondent as a consequence of our finding that the Allegation set out in the Notice of Hearing has been established.

¶ 149 In this regard, we request that the National Hearing Co-Ordinator contact the parties to establish a mutually agreeable date for an Oral Hearing where the Hearing Panel can receive the evidence and submissions of the parties with respect to penalty.

DATED at Toronto this 3rd day of October, 2016.

Thomas J. Lockwood

Chair

Lou D’Souza

Member

Daniel Iggers

Member

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