Re Deeb

IN THE MATTER OF:

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

and

Peter Michael Deeb

2013 IIROC 08

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

Heard: September 24, 25, 26, 28 and October 1, 5, 19, 2012
Decision: February 20, 2013

Hearing Panel:
Frederick H. Webber, Chair, Selwyn Kossuth and Sandy Grant
Appearances:
Andrew Werbowski and Rob Del Frate for the Investment Industry Regulatory Organization of Canada
Glen Sawiak, Joseph Groia and Kevin Richard for the Respondent

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DISCIPLINARY DECISION

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1. Allegations and Standard of Proof

¶ 1 This was a disciplinary hearing pursuant to Part 10 of Dealer Member Rule 20 and Section 1.9 of Schedule C.1 to Transition Rule No.1 of IIROC, to determine whether the Respondent has committed the following contraventions that are alleged by IIROC in the Notice of Hearing (NOH):

Count 1

¶ 2 On or about October 28 and 29, 2009 the Respondent commingled client and pro orders, allocated trades after the close of business when the price of securities was known and, in so doing: (a) profited at the expense of his clients and (b) failed to ensure client priority, thereby engaging in conduct unbecoming, contrary to IIROC Dealer Member Rule 29.1.

Count 2

¶ 3 From about November 12, 2008 to December 11, 2009 the Respondent failed to keep and maintain at all times a proper system of books and records, contrary to IIROC Dealer Member Rule 17.2, Dealer Member Rule 200 and National Instrument 31-103 which thereby permitted the Respondent to engage in the type of conduct described in Count 1.

Count 3

¶ 4 Between February 1, 2009 and April 30, 2009 and again between December 2009 and May 2010, the Respondent engaged in the practice commonly known as "free-riding" in that securities were purchased without sufficient cash in the relevant accounts and no attempt was made to properly settle the securities transactions, and thereby engaged in conduct unbecoming, contrary to IIROC Dealer Member Rule 29.1

Count 4

¶ 5 In or about July 2011 the Respondent refused to provide access to certain books and records maintained by Hampton Securities Limited despite a request by IIROC FinOps Staff and thereby violated IIROC Dealer Member Rule 19.6.

¶ 6 Based upon cases such as F.H. McDougall, [2008] S.C.J. No. 54, 2008 SCC 53, IIROC must prove its allegations on the balance of probabilities, based on evidence that is "clear, convincing and cogent to satisfy the balance of probabilities test." Both parties agree that this is the standard to apply in this case and that the burden of proof is on IIROC. It is also well established law that IIROC must prove each and every element of each Count. These standards have been applied by this Panel in coming to its decisions.

2. Counts 1 and 2

IIROC Allegations

¶ 7 The NOH set out the following summary of the facts alleged and to be relied upon by IIROC at the hearing:

> The Respondent was the UDP [Ultimate Designated Person] of Hampton Securities Inc. ("Hampton") and an approved person as well as a registered trader. He is an experienced member of the securities industry.
>
> The Respondent permitted and facilitated certain trading activity which is characterized as follows:
>
> a) He failed to identify transactions as being either client trades or pro trades;
>
> b) He traded or "worked the order" without differentiating between client and pro transactions; and
>
> c) He allocated trades at the end of the business day (or the next business day) at a time when pricing of the transactions was known.
>
> This allowed the Respondent to prefer his own interests ahead of his clients because he made trading allocations when pricing of the transactions was known.
>
> In so doing, the Respondent engaged in conduct unbecoming in that he did not deal with his clients fairly, honestly and in good faith; the Respondent made profits on certain transactions which ought to have been made by clients.
>
> The Respondent's conduct was facilitated by his lack of proper documentation relating to the transactions in question. In particular, the Respondent failed to maintain an adequate record of each order and of any instructions given or received for the purchase or sale of securities.
>
> Without a proper record of each order, the Respondent was able to delay his allocation decision until after the price was known. Furthermore, the Respondent's failure to identify transactions as either client trades or pro trades has effectively prevented the regulator from assessing the propriety of certain other transactions. The Respondent, as UDP, was responsible to ensure that such a proper system of books and records is in place.

Background to Hampton's ARCA trading

¶ 8 Hampton was a small, full-service Dealer Member with head offices located in Toronto Ontario.

¶ 9 A portion of Hampton's business was conducted through Hampton Securities (USA) Limited ("Hampton USA"). Hampton was the majority shareholder of Hampton USA.

¶ 10 Hampton USA was registered with FINRA and the SEC as a Broker-Dealer. It was also registered with and provided access to NASDAQ and NYSE ARCA. Effectively Hampton USA acted as an order execution service for Canadian-based clients of Hampton.

¶ 11 Hampton USA cleared its transactions through National Financial Services LLC. All trades that were executed by Hampton USA eventually settled in the books and records of Hampton. In order to accomplish

proper settlement, the Respondent wrote trade tickets after market closing to allocate the executed trades to an account in Hampton (whether client or proprietary). Hampton USA was the counterparty to these transactions.

¶ 12 REALTICK was a trading platform used by Hampton USA to execute orders in US markets. The REALTICK platform had a limited ability to use order markers and as a result, client and pro orders were not differentiated. REALTICK trading printouts for a specific security contained only rudimentary order information such as the quantity of shares bought or sold, the price and the time of execution. The Respondent was unable to differentiate client orders from pro orders based on the REALTICK trading printouts.

¶ 13 Hampton client trading on ARCA via the REALTICK platform involved the following series of events:

- The Respondent took an order from a client for a buy or sell of a security. The order could be solicited or unsolicited and details of the order were provided.
- The Respondent acknowledged that he wrote the details of such order on a piece of paper which he subsequently discarded. No trade tickets were completed at the time of receiving instructions.
- No documentation remained to record the original client instructions. Client orders were then batched together with proprietary orders and executed by Hampton USA.
- Hampton had access to REALTICK printouts for the executed orders. The printouts did not identify which specific transactions were for client accounts or proprietary accounts.
- After the close of business or on the next day, the executed transactions were then allocated to client accounts. The Respondent completed trade tickets at this point in time to accomplish the allocation.

Trading on October 28 and 29, 2009

¶ 14 On October 28 and 29, 2009, certain Hampton client accounts bought or sold shares in Las Vegas Sands ("LVS"). The transactions were executed by Hampton USA on ARCA through the REALTICK trading platform.

¶ 15 The REALTICK printout for Hampton USA's trading of LVS for October 28, 2009 included only the following information:

Buy	**Sell**	**Time of Execution**	**Price**
5,000		09:36:14 AM	$14.28
	-5,000	09:53:48 AM	$13.84
	-5,000	10:09:03 AM	$13.52
5,000		10:09:49 AM	$13.58
	-5,000	11:00:47 AM	$13.41
15,000		12:00:24 PM	$13.41
15,000		12:14:45 PM	$13.45
8,000		03:32:31 PM	$13.08
48,000	**15,000**	**TOTAL**	

¶ 16 The REALTICK printout indicated that Hampton USA bought 48,000 shares (at a total cost of $646,840) and sold 15,000 shares (generating revenues of $203,850). This resulted in a net purchase of 33,000 shares of LVS at an average price of $13.48. The average price of $13.48 is calculated by taking the total cost for the 48,000 shares divided by the number of shares purchased ($646,840 / 48,000).

¶ 17 After market close on October 28, 2009, the Respondent wrote trade tickets for the above executed orders and subsequently allocated securities to Hampton accounts as follows (the Mr. J.Y. trade was an *as of trade*; it was executed on October 28):

Trade Date	Price	Buy	Sell	Client Name
28-Oct-09	$13.48	11,000		J ASSOCIATES LIMITED
28-Oct-09	$13.48	9,000		Z INVESTMENTS INC.
28-Oct-09	$13.48	1,500		MS. T.R.
28-Oct-09	$13.48	1,500		388 ONTARIO INC.
28-Oct-09	$13.48	2,000		MR. D.S.
28-Oct-09	$13.48	2,000		MR. D.U.
28-Oct-09	$13.48	2,000		MS. L.S.
28-Oct-09	$13.59		15,000	PETER DEEB US INVENTORY
28-Oct-09	$13.48	15,000		PETER DEEB USINVENTORY
29-Oct-09	$13.48	4,000		MR. J.Y.

¶ 18 Not all the clients above were retail clients. Mr. D.U., Z Investments Inc., and J Associates Limited were pro accounts.

¶ 19 The Respondent purchased 15,000 LVS into his US inventory account at a price of $13.48. These shares were then sold at $13.59. The resultant profit is $0.11 per share for a total of $1,650 (15,000 shares x $0.11). This calculation is based on the average purchase price of $13.48 (which is based on the batching together of client and pro orders).

¶ 20 If, however, the first 15,000 shares purchased were purchases for the Respondent's US inventory account, the average purchase price would have been considerably higher and the Respondent would, in fact, have experienced a loss. Given the absence of documentary evidence of the original client instructions, the Respondent cannot confirm which orders ought to have been entered first. The cost of the first 15,000 shares purchased, based on the REALTICK printout information was as follows:

BUY	Time of Execution	Price	Total cost
5,000	09:36:14 AM	$14.28	$71,400
5,000	10:09:49 AM	$13.58	$67,900
5,000	12:00:24 PM	$13.41	$67,050
TOTAL			**$206,350**

¶ 21 The resulting average purchase price of the first 15,000 shares was $13.76 ($206,350 /15,000). If these were all purchases for the Respondent's US inventory account, the revised average purchase price of $13.76 results in a loss of $0.17 per share when the Respondent's US inventory account sold these shares at $13.59.

¶ 22 By batching together client and pro orders and applying an end of day average sale price, the Respondent converted a $0.17 per share loss into a $0.11 per share profit.

¶ 23 Similarly, if the last 33,000 shares purchased were, in fact, client purchases, clients paid a higher average price. The cost of the final 33,000 shares purchased, based on the REALTICK printout information was as follows:

BUY	Time of Execution	Price	Total cost
10,000	12:00:24 PM	$13.41	$134,100
15,000	12:14:45 PM	$13.45	$201,750
8,000	03:32:31 PM	$13.08	$104,640
TOTAL			**$440,490**

¶ 24 The resulting average purchase price of the final 33,000 shares bought was $13.35 ($440,490 / 33,000). Clients were disadvantaged if they paid an average purchase price of $13.48 instead of $13.35 per share.

¶ 25 The REALTICK printout for Hampton USA's trading of LVS for October 29, 2009 included only the following information:

Buy	Sell	Time of Execution	Price
	-15,000	09:31:43 AM	$13.86
15,000		09:35:16 AM	$13.64
	-15,000	09:52:40 AM	$13.92
	-4,500	10:09:22 AM	$14.38
	-10,000	10:46:37 AM	$14.70
	-10,000	10:52:41 AM	$14.71
10,000		11:07:17 AM	$14.85
	-10,000	11:43:35 AM	$14.66
	-10,000	11:44:30 AM	$14.56
10,000		11:46:29 AM	$14.60
	-10,000	11:51:45 AM	$14.56
	-7,000	12:01:21 PM	$14.61
10,000		12:14:02 PM	$14.62
10,000		03:03:31 PM	$14.34
	-10,000	03:06:41 PM	$14.49
	-10,000	04:01:34 PM	$15.00

¶ 26 The REALTICK printout indicated that Hampton USA sold a net amount of 56,500 shares of LVS (111,500 sold and 55,000 bought).

¶ 27 After market close on October 29, 2009, the Respondent wrote trade tickets for the above executed orders and subsequently allocated securities to Hampton accounts as follows:

Group 1

Date	Price	Buy	Sell	Client Name
29-Oct-09	$13.55	11,000		PETER DEEB US INVENTORY
29-Oct-09	$13.55		11,000	J ASSOCIATES LIMITED
29-Oct-09	$13.55		1,500	388 ONTARIO INC.
29-Oct-09	$13.55	1,500		PETER DEEB US INVENTORY
29-Oct-09	$13.55	1,000		PETER DEEB US INVENTORY
29-Oct-09	$13.55		1,000	Z INVESTMENTS INC.
29-Oct-09	$13.55	2,000		PETER DEEB US INVENTORY
29-Oct-09	$13.55		2,000	MR. D.U.
29-Oct-09	$13.55		4,000	MR. J.Y.
29-Oct-09	$13.55	4,000		PETER DEEB US INVENTORY

29-Oct-09	$14.00		7,000	Z INVESTMENTS INC.
29-Oct-09	$14.00	7,000		PETER DEEB US INVENTORY

Group 2

Date	**Price**	**Buy**	**Sell**	**Client Name**
29-Oct-09	$13.65	19,500		O HOLDINGS INC.
29-Oct-09	$14.05		7,000	PETER DEEB US INVENTORY
29-Oct-09	$13.65		19,500	PETER DEEB US INVENTORY
29-Oct-09	$14.05	7,000		O HOLDINGS INC.

Group 3

Date	**Price**	**Buy**	**Sell**	**Client Name**
29-Oct-09	$14.34	55,000		O HOLDINGS INC.
29-Oct-09	$14.44		111,500	O HOLDINGS INC.

¶ 28 The trades in Group 1 appear to represent crosses off market of 26,500 shares of LVS at $13.55 between client accounts and the Respondent's US dollar inventory account (except for Z Investments Inc. who sold at $14.00).

¶ 29 The trades in Group 2 appear to represent a cross off market of the same 26,500 shares between the Respondent's US dollar inventory account and his corporate account, O Holdings Inc. ("O Holdings").

¶ 30 The trades in Group 3 represent the trades that appear to match up with the trades in the previous charts or the processing of the trades done on market (net sale of 56,500 shares).

¶ 31 The following is evident on a review of the transactions noted above:

(a) LVS is a very volatile stock. The fills on October 28 varied from $13.08 to $14.28 and on October 29 from $13.86 to $15.00. On October 28 the stock dropped only to rise again on October 29.

(b) These fills were allocated with resulting profit to the Respondent. The fills were as follows on the 26,500 shares of LVS:

(i) Clients bought 26,500 shares @ $13.48;

(ii) Some clients sold 26,500 shares @ $13.55 ($14.00 for Z Investments Inc.) to the Respondent's USD Inventory account resulting in a profit of $0.07 a share for the clients ($0.52 a share for Z Investments);

(iii) The Respondent's USD Inventory account sold the 26,500 shares to O Holdings @ $13.65 and $14.05;

(iv) The average cost to O Holdings was $13.76 (26,500 shares purchased at a total outlay of $364,525); and

(v) O Holdings sold the 26,500 share on the open market for an average price of $14.44 which represented a profit for O Holdings of $0.68 per share or $18,020.

¶ 32 The allocation which occurred after market close took place at a time when the Respondent knew the prices of all the trades before the allocation process.

¶ 33 In response to investigative Staff queries, the Respondent explained that the trading represented the first leg of a particular investment strategy on behalf of certain clients. The strategy involved a second component to be executed on a subsequent date.

¶ 34 On the evening of October 28, 2009, the Respondent became aware of certain news that he felt would

adversely affect the investment strategy. The Respondent claimed that in order to protect his clients, he would buy the securities and thereby take on the potential liability of an adverse market movement. This "purchase transaction" was nowhere documented, nor was it discussed with individual clients.

¶ 35 As matters turned out, the price was not adversely affected and, by the close of business on October 29, 2009, the price had actually increased. Upon allocation, as set out above, the Respondent profited on his purchase of LVS securities from his clients. The allocation by which the Respondent profited was made at a time when the price movement was known to him.

Overall Review and Other Regulatory Concerns

¶ 36 In the course of the investigation, IIROC reviewed a sampling of six securities over a two year period of time.

¶ 37 On a variety of occasions, the failure of the Respondent to keep proper records of instructions received from clients made it impossible for IIROC to determine if clients were disadvantaged.

¶ 38 Attached as Appendix "A" are transactions which gave rise to regulatory concerns.

Response - Counts 1 and 2

¶ 39 The Response sets forth the following positions of the Respondent in relation to the matters set forth in the NOH:

(i) Recognizing that REALTICK is a wholesale order entry system (not a retail trading platform) which was used for trades in the United States and did not allow for differentiation of client and pro trades, any other alleged failure to identify transactions as client or pro trades would be inadvertent and an exception to the Respondent's trading practice rather than the rule;

(ii) "worked the order" is a vague and arcane term which lacked sufficient clarity and definition for the Respondent to respond other than to repeat his answer in 39 (i) above; and

(iii) timing of the "allocation" of trades (as opposed to identification of trades as between client and pro accounts) is not a violation of any IIROC Rule. As a matter of clarity the term "allocation" was used incorrectly by Staff. In the Response, "allocation" referred to a situation where shares have been purchased without specific knowledge of who the trades are for – in other words the broker does not know when the order is entered which accounts will get the stock. Respondent's position is that there was no allocation of trades, rather he knew who the orders were for when he entered them into REALTICK and all that happened at the end of the day was that, where not previously done, trades were ticketed to show who they were for. The Respondent understood the requirement to identify the client for an order in a time-stamped order ticket prior to entering the trade and it was his position that any technical violation of that requirement was inadvertent and isolated rather than a hallmark of his trading practice.

There was no evidence to suggest the Respondent preferred his own interest ahead of clients.

¶ 40 There was no evidence that:

(a) the Respondent profited on transactions where the profit ought to have been made by his clients;

(b) a hallmark of the Respondent's trading practice was the failure to maintain adequate records; and

(c) an additional hallmark of the Respondent's trading practice was the failure to identify transactions as client or pro trades in order to permit a subsequent "allocation" after the close of the market when a price was known.In fact, throughout the NOH, IIROC consistently confused after hours processing of transactions into the ISM system with real time execution and allocation of trades. The Respondent's position is that he may have committed technical violations in isolated incidents by failing to record the orders on a ticket before entering them on REALTICK but he knew who they were for and was simply late in recording that knowledge on a trade ticket.

¶ 41 Of all the trades which occurred in LVS on October 28, 2009, IIROC's allegations can, at most, only apply to the 2 client accounts involving trades of a grand total of 3,000 shares as set out in paragraphs 47-58 hereof. On October 29, the allegations can only refer to the 1 client trade for Solish/388 Ontario for 1,500 LVS shares as set out in paragraph 61 hereof.

¶ 42 The allegations in paragraphs 15 – 35 above were not based on fact but on a theory comprised of a series of at least 3 erroneous assumptions, witnessed by the use of the word "if" sequentially in paragraphs 20,21 and 23, and the word "appear" sequentially in paragraphs 28, 29 and 30 above.

¶ 43 For example, in their attempt to allege that the Respondent profited at the expense of his clients, IIROC:

a) calculated "share price" using 3 completely different methodologies without any explanation as to why;

b) referred to trades which did not occur in reality. For example in paragraph 20 above, IIROC referred to the "first 15,000 shares purchased" and showed a table of 3 separate 5,000 share trades. In reality there were not three (3) 5,000 share trades at any time on that day and the first 3 trades were in fact: 5,000, 5,000 and 15,000 share trades so IIROC's "last trade of 5,000" must refer to an arbitrary portion of the third trade of the day for 15,000 shares. None of these facts were stated and no explanation was given for why IIROC did this; and

c) used in their calculations and examples client trades that they were advised were subsequently cancelled without mentioning the fact that such trades were cancelled.

Background to Hampton's REALTICK Trading

¶ 44 Hampton was an IIROC member. Its sister company Hampton USA was registered in the United States to the extent necessary to be able to conduct trades in the United States. Such US transactions whether they were on a stock exchange or through REALTICK were cleared through National Financial Services LLC. Only trades which were for Hampton were settled on the books of Hampton.

¶ 45 REALTICK was a wholesale order entry system (not a retail trading platform) which was used by IIROC members to execute orders in the US markets. As such it required manual processing of all trades into accounts (client and pro) at the end of the day when trade runs were sent by REALTICK to subscribers. REALTICK did not have the capacity in terms of execution or reporting to distinguish between client orders and pro orders and as such requires that order details be recorded elsewhere.

¶ 46 There was no evidence to support Staff's allegations that in respect of REALTICK trades, the Respondent's practice was only to:

(a) write details of orders on a piece of paper when orders were received (as opposed to on trade tickets or by some other method) and then throw the paper out at the end of the day; and

(b) complete trade tickets and allocate trades to accounts after the close of business or on the next trading day when the prices are known.

Trading on October 28, 2009

¶ 47 REALTICK trading in LVS on October 28, 2009 using order entry time showed the following trades by the Respondent:

BUY	SELL	TIME	PRICE ($)
5,000		9:34:57	14.28 (1)
	5,000	9:40:25	13.84 (2)
	5,000	10:09:02	13.52 (2)
5,000		10:09:45	13.58 (1)
	5,000	11:00:47	13.41 (2)

15,000	11:59:55	13.42 (1)
15,000	12:05:53	13.45 (1)
8,000	3:32:30	13.07 (1)

(1) average buy price = $13.48

(2) average sell price = $13.59

¶ 48 Trade tickets on October 28 were time stamped after the market close which did not necessarily indicate that the Respondent wrote the tickets at the same time or that he did not otherwise record the client versus pro trades in a different manner earlier.

¶ 49 Both the Respondent and IIROC agree on the average buy price and the average sell price (which sell price was higher) as set out above and which was based on the REALTICK trading information.

¶ 50 In paragraph 20 above, IIROC start to advance a theory, based on speculation not facts and without any explanation as to why they have been selective in their choice of data and method of calculation as to how the Respondent may have profited at clients' expense.

¶ 51 IIROC referred to the first 15,000 LVS shares purchased for the Respondent's inventory account. As stated in paragraph 43(b) above and as shown in paragraphs 47 and 15 above, the 3 purchase trades to which IIROC referred in paragraph 20 never occurred; rather the first three (3) purchase trades were:

(a)

5,000	9:34:57	$14.28
5,000	10:09:45	$13.58
15,000	11:59:55	$13.42
25,000		

and

(b) IIROC does not provide any evidence that these purchase trades (including the artificial 5,000 of the 15,000 share third trade) were for the Respondent's inventory account.

¶ 52 In paragraph 21 above, IIROC then applied these 3 artificial trades (both in terms of numbers of shares traded and the price) to arrive at an entirely new "average" price of $13.76 rather than the $13.48 "average" price they initially stated; again based on pure conjecture and speculation without any evidence or explanation as stated in 43(a) above; to create a $0.17 "loss" per share which loss never occurred.

¶ 53 In paragraph 23 above, IIROC continued their theory which theory remained unsubstantiated by fact. For example, they state "if (emphasis added) the last 33,000 shares purchased were, in fact, client purchases". As stated in paragraphs 47 and 15 above, the trades for the last share purchases on October 28 did not amount to 33,000 but rather were:

15,000	11:59:55	$13.42
15,000	12:05:53	$13.45
8,000	3:32:30	$13.07
38,000		

¶ 54 IIROC is arbitrarily using only 10,000 shares of a 15,000 share trade (that occurred 3 ½ hours before the last trade); assuming in the absence of any evidence that they were client purchases; and as stated in paragraph 43(b) above, calculating without any explanation, yet a third average price of $13.35. In addition, had IIROC used the same simple arithmetic average used when they calculated the $13.48 average price, the number in this part of their theory would have been $13.31 not $13.35 – again this difference in methodology was never stated nor explained by IIROC.

¶ 55 Although IIROC was provided with documentation that showed the client buy trades for Mr. D.S. and

Ms. L.S. (as shown in IIROC's chart in paragraph 17 above) were subsequently cancelled, leaving only the "buy side" clients as Ms. T.R. and 388 Ontario for a total of 3,000 of the 48,000 shares bought on that day, they ignored this fact in advancing their theory. The reason for these cancellations was that unbeknownst to the Respondent neither client was setup on the ISM system to trade options and the Respondent's trading in LVS on October 28 and 29 involved buying and selling LVS equities while trying to concurrently write puts or calls on LVS. Why IIROC neglected to state this omission in the NOH is unexplained as it would, among other things, negatively skew the 3 different "average prices" that their theory sought to advance.

¶ 56 IIROC also neglected to mention that the trade tickets for October 28 showed client orders for 18,000 LVS shares not 15,000 or 33,000 as IIROC used in their hypotheses.

¶ 57 As shown in paragraph 47 above, by averaging the price to $13.48, clients obtained the benefit of getting a better price since the Respondent did not place orders for his inventory until mid-day when the prices had dropped significantly from the opening. By averaging his subsequent lower purchases, clients obtained the lower price of $13.48.

¶ 58 The facts, as opposed to IIROC's unsubstantiated conjectures with respect to the Respondent's trading in LVS on October 28 only support one conclusion - that the average buy price for every trade was $13.48 and the average sell price for every trade was $13.59 resulting in a profit of $0.11 per share.

Trading on October 29, 2009

¶ 59 As stated in paragraph 47 with respect to trading on October 28, the fact that trade tickets were stamped after the market close does not necessarily indicate that they were always written at that time as well or that a record was not made earlier.

¶ 60 The classification by IIROC of trades into 3 separate groups within paragraph 27 above was completely artificial and not based on any factual evidence as witnessed by the use of the phrases "appear to represent" in paragraphs 28 and 29 and "appear to match up" in paragraph 30. Such classification was as arbitrary as the calculation of 3 "average prices" using different undisclosed methodologies in the October 28 trades.

¶ 61 The best factual evidence for LVS sale trades on October 29 comes from page 1028 of the trade blotter which showed the following:

SELLER	**AMOUNT**	**PRICE($)**	**BUYER**
Zilda (pro)	1,000	13.55	YZ (Deeb)
J+D Young (client)	4,000 (1)(2)	13.55	YZ (Deeb)
David Unger (pro)	2,000	13.55	YZ (Deeb)
JHS (pro)	11,000 (3)	13.55	YZ (Deeb)
Solish (client)	1,500	13.55	YZ (Deeb)
	19,500		

(1) 4,000 bought after market on October 28 entered on October 29.

(2) Cancelled because Hampton. was not registered in Newfoundland.

(3) Cancelled because of being a restricted US account.

¶ 62 IIROC selectively did not refer to any of these facts in the NOH even though they were provided with the trade blotter. For example in other portions of the NOH, IIROC did refer to cancelled trades (See Appendix D for example) but failed to mention the cancelled trades on both October 28 and 29.

¶ 63 All of the above sales were of LVS shares purchased at $13.48 on October 28 resulting in a profit per share of $0.11 as stated in paragraph 58 above.

¶ 64 Subsequently the blotter showed as follows:

SELLER	AMOUNT	PRICE ($)	BUYER
YZ (pro)	19,500	13.65	Oaktown (Deeb)
Zilda (pro)	7,000	14.00	YZ (Deeb)
YZ (pro)	7,000	14.05	Oaktown (Deeb)

¶ 65 Paragraph 31 above contained allegations which are either unsubstantiated by fact i.e. the $13.76 or $14.44 "average price" to Oaktown or are simply incorrect.

Respondent's Explanation for the October 29 Client Sales

¶ 66 IIROC was correct that throughout the early morning hours of October 29, bad news was expected to come out of Hong Kong that would affect the LVS share price and in fact the pre-market spread dropping to $11.00 - $13.55 reflected this. The sale price of $13.55 shows that the Respondent gave clients the best price available at the time and only after he spoke with his compliance department. Trading for October 29, 2009 was as follows according to Bloomberg:

Open	High	Low	Close	Volume
$13.73	**$14.85**	**$13.55**	**$14.76**	**63,203,519**

¶ 67 The subsequent transactions referred to in paragraph 65 above were done later in the day when prices had risen and were simply transfers between pro accounts for tax purposes unlike the Respondent's pro trades on October 28 which represented an actual purchase and increase in his holdings rather than the mere transfer between pro accounts on October 29.

¶ 68 The fact remains that even under IIROC's worst case scenario, if the 2 clients (including the client whose order was subsequently cancelled) sold their collective 5,500 shares at $14.05, one would have to accept that the Respondent was prepared to risk his reputation for a profit of $2,750.

¶ 69 IIROC also failed to disclose that in response to Count 2 surrounding the allegations concerning the October 29 trading, both Mr. DS (Dr. David Shier) and Solish/388 (Mitchell Solish and his company 388 Ontario Inc.) provided letters to Staff respectively dated September 8, 2011 and August 26, 2011 saying that the Respondent contacted them in respect of the trades and that they fully understood the circumstances of their respective trades in LVS and that the Respondent did not put his interests ahead of theirs.

Response Re Overall Review and Other Regulatory Concerns

¶ 70 Appendix "A" to the NOH is entitled "Other Transactions with Regulatory Concerns". The Respondent has had no notice of IIROC's concerns with these transactions until reading them in the NOH.

¶ 71 It is unclear what a "regulatory concern" is. It is certainly not presented in a manner where IIROC have provided sufficient facts to allege that these "concerns" constitute an actual breach of any IIROC provision. Together with the fact that IIROC have failed to provide sufficient particulars of the trades, the circumstances surrounding the trades, the manner in which such trades breach a specific IIROC provision, and the specific IIROC provision breached, the Respondent's position is that these matters are irrelevant to and inappropriate for the purposes of the Hearing and are mentioned in the NOH for the sole purpose of creating a prejudicial atmosphere towards the Respondent given IIROC's inability to marshall facts which would support an actual count.

¶ 72 In addition to the foregoing, the few pieces of information cited in Appendix "A" contain numerous errors. Examples of these errors in just 3 of the "regulatory concerns" are as follows:

(a)"April 20, 2009 and April 22, 2009 LVS"

- IIROC failed to disclose that the 15,000 share trade was made on REALTICK and the 800 share LVS "retail" client was actually the Respondent’s assistant whose order was executed through the facilities of the NYSE pursuant to a ticket marked "pro".

- Even if it were not a "pro" trade, IIROC provided no evidence in Appendix A that the so-called "client" wished to sell at the same time of the pro trade and was therefore disadvantaged.

(b) "September 16, 2009 LVS"

- The trading blotter provided to IIROC shows the Respondent trading for 8 client accounts (not 9 as IIROC alleged) of which 3 (not 2 as IIROC alleged) were "pro" accounts.
- IIROC's allegation seems to be based on an implied assumption that a pro account cannot trade with a client account unless it is done for no profit or at a loss and IIROC provided no facts surrounding the timing of these trades in the context of the market price movements on that day.
- The two trades for inventory were done through REALTICK at 10:42 a.m. The client orders were done through ticketed orders time stamped between 1:39 p.m. and 2:47 p.m., long after the inventory trades. It is clear that there was no relation between the two sets of transactions because of the times and because the inventory orders were done through REALTICK and the others were not. This also shows it is not the Respondent's practice to time stamp trade tickets after the market close.

(c) "October 23, 2009 LVS"

- The client "RA" is actually "AR" – Ms. April Roy, who was a personal acquaintance of the Respondent for some time and the trading in her account was done in a discretionary account. IIROC staff doing the 2010 BCR [Business Conduct Review] have insisted that AR accounts be overseen by the Chief Compliance Officer as a "pro" trade so IIROC Staff is completely inconsistent on this position of AR being a "client" or pro".
- IIROC failed to disclose the fact that AR (or RA as IIROC referred to her) has written 2 separate letters to IIROC dated December 9, 2011 and April 27, 2012 saying the Respondent knew her investment objectives, made a considerable amount of money for her in this account and that she had no objections or criticisms of the Respondent in any trades he undertook for her.

Count 1 Analysis

¶ 73 IIROC must prove each of the elements alleged in Count 1, i.e. that on the specified dates, the Respondent:

1. Commingled client and pro orders;
2. Allocated trades after the close of business when the price of securities was known;
3. And , in so doing;
4. profited at the expense of his clients;
5. And failed to ensure client priority;
6. Thereby engaging in conduct unbecoming, contrary to IIROC Dealer Member Rule 29.1.

Commingled client and pro orders

¶ 74 The Panel was not referred to any rule or policy which prohibits commingling of client and pro accounts, but the issue appears to be dealt with in the context of rules and policies dealing with “ensuring client priority” which are reviewed in paragraph 88-90 below. However, the evidence, in particular the testimony of the Respondent, clearly establishes that the investment plan proposed by the Respondent, agreed to by the clients and carried out on October 28 and 29, involved commingling of client and pro accounts, albeit not in the conventional sense of distinct client and pro orders being submitted for trade in the same time frame. The investment plan in this case involved a joint participation of clients and pros (including the Respondent) in a common plan to buy shares of LVS and then write calls on LVS with the intention that the group as a whole share in the profit on the spread between the average price paid for the net shares purchased and the sale of the

call options. Each participant committed to a certain number of shares resulting in a total of 33,000 shares for the group, but when the shares were purchased on October 28 2009, no particular purchase related specifically to any particular client or pro account. It only mattered that, at the end of the day, the required 33,000 shares had been purchased to satisfy the total purchases requested by the members of the group.

¶ 75 Consequently, the Panel finds that, as a factual matter client and pro accounts were commingled, but the manner in which the client and pro accounts were commingled does not give rise to any issue under this count unless it does so under the "client priority" requirement.

Allocated trades after the close of business when the price of securities was known

¶ 76 The transactions in question were entered through the REALTICK system, used by Hampton for processing orders in U.S. securities. Because REALTICK is a wholesale system and does not differentiate between client and pro accounts at the time of the trade, when orders were returned to Hampton, it had to manually input the orders into its internal system where they were distributed into the appropriate client account.

¶ 77 The shares of LVS were purchased and sold on October 28, 2009 at various prices as shown in paragraph 15, but the price of the 33,000 net shares purchased was averaged as shown in paragraph 16 and it was this average price which was shown as the purchase price for the account of each participant in the plan when trade tickets were completed by the Hampton trade desk after trading closed on October 28, 2009. According to the Respondent's testimony, this was in accordance with the plan agreed to by the participants. The trade tickets also showed the number of shares "allocated" to each participant, but according to the Respondent's uncontroverted testimony, this "allocation" simply reflected the number of shares which each client and pro participant had agreed in advance to purchase, and the top part of the trade ticket had been completed earlier in the day. There is no evidence that the number of shares or the purchase price therefor was "allocated" in the sense of being manipulated or favouring one client or pro account over another.

¶ 78 Consequently the Panel finds that the shares of LVS purchased on October 28, 2009 were simply distributed into the various client and pro accounts for which they were purchased in accordance with instructions received prior to the trades and were not "allocated" in any improper sense.

And in so doing

¶ 79 This wording simply requires a causal connection between the factual matters discussed in paragraphs 74 – 75 and 76 – 78 and the remaining parts of Count 1. No issue arises out of this wording; the issues arise in connection with the effects of those factual matters, which are reviewed below.

Profited at the expense of his clients

¶ 80 There are two parts to this issue, first, did the Respondent profit from the commingling and allocation activities described in paragraphs 74 – 75 and 76 – 78, and second, if so, was this at the expense of his clients?

¶ 81 The Respondent does not dispute that he made a profit from the trading on October 28, 2009. He sold 15,000 shares at a profit of $.11 per share, above the average price for all the shares purchased that day, $1650 in total. The Respondent's explanation is that, as the price of the LVS shares declined during the day and the spread widened, he resorted to selling and shorting in order to get the lowest possible average price for his clients; if there had been no intraday trading and averaging of the prices, the average price would have been higher, and the clients benefited by $.10 per share from the Respondent's intraday trading. At paragraphs 28-31 of the NOH (paragraphs 20 – 24 above), IIROC engaged in certain calculations regarding the transactions on October 28, 2009 designed to show that the Respondent profited and the clients were disadvantaged. IIROC also offered the testimony of Mr. Varela, IIROC Manager of Investigations, to justify the logic of those calculations. The Respondent's position, is that those calculations and Mr. Varela's justification for them is pure speculation unsupported by any evidence, the trading used in those paragraphs might not be allowed under current IIROC rules against "trading ahead of a client order" and would have resulted in the clients paying considerably more than the average price which they paid.

¶ 82 This Panel agrees with the Respondent's position regarding the trading on October 28, 2009 and therefore that the profit made by the Respondent on that date was not made at the expense of his clients, but was in furtherance of his efforts to enable his clients to benefit from his overall strategy.

¶ 83 Having accumulated the shares on October 28, 2009, the second part of the strategy was to sell call options to cover the position. The Respondent was unable to do this on October 28th. The uncontroverted evidence is that the news overnight regarding LVS' Hong Kong subsidiary was negative and that the Respondent expected that would negatively affect the price of LVS shares and his ability to achieve the spread he was trying to get for his clients. In fact the pre-market price for LVS shares fell very low and the Respondent was concerned that he had exposed positions for his clients.

¶ 84 The Respondent testified that, after discussing the situation with Mr. Kelterborn of Hampton's compliance department, the Respondent decided that he could purchase shares from his clients into his inventory account. The Respondent also testified that he obtained the consent of certain clients to purchase their shares at the then ask price of $13.55. All of this took place before the market opened on October 29th. As with the transactions on October 28th, the $13.55 price received by the clients was not allocated to their accounts until after the close of markets on October 29th. IIROC pointed out that there were no documents confirming these conversations nor were the clients or Mr.Kelterborn called as witnesses. On the other hand there was no evidence controverting the Respondent's testimony. It should also be noted that certain of the share purchases made on October 28th were later cancelled for reasons not germane to this case. The result was that only two retail clients ended up with the shares purchased on October 28th totaling 3000 shares.

¶ 85 The Respondent purchased certain of the client shares at the agreed price of $13.55 which resulted in a profit of $.07 per share for those clients. The bad news forecast for the LVS shares did not in fact materialize, the price rose during October 29th and the Respondent bought and sold shares during the day at prices not less than the $13.55 paid to his clients. A total of 26,500 shares of LVS were transferred from the Respondent's U.S. Inventory account to the account of Oaktown Holdings (Oaktown), a company owned and controlled by the Respondent, which sold the shares for a profit of $18,020.

¶ 86 It is this Panel's conclusion that the Respondent (or a company owned and controlled by him) made a profit from the trading on October 29th. This profit was made on the open market and resulted from a share price increase which was the opposite of what the Respondent anticipated would happen. IIROC asserted that the share price started to rise very early in the trading day and that the Respondent could have let the clients maintain their positions when the bad news did not materialize. IIROC's position does not recognize the fact that the Respondent had already agreed with the clients to purchase their shares and he could not have been expected to anticipate that the share price would continue to rise. Furthermore the purchase price of $13.55 allocated to the client accounts at the end of the day was determined prior to the opening of trading and simply recorded after trading closed, as was the case on October 28th. It is also this Panel's conclusion that the profit was not made at the expense of the clients. Given the information available to the Respondent prior to the market opening on October 29th, his purchase of shares from the clients was done to protect them from anticipated losses, resulted in a profit to them and was consented to by the clients.

¶ 87 This Panel also finds its conclusions are supported by the fact that there were no client complaints, apparently no clients were interviewed by IIROC to confirm their instructions to the Respondent and IIROC objected to the admission of letters of support from Dr. David Shier and Mitchell Solish, two clients who traded on October 28th and 29th which confirmed their agreement with the strategy and with the purchase of their shares on October 29th.

<u>And failed to ensure client priority</u>

¶ 88 IIROC cited no rule or policy requiring client priority regarding the trades in question which occurred on a U.S. market. In closing argument, IIROC counsel referred to UMIR provision 5.3 which deals with client priority. He acknowledged that it does not apply in this case because UMIR only applies to Canadian marketplaces, but suggested it was instructive regarding the Panel's conclusion on Count 1. He argued that UMIR 5.3 was designed to minimize the conflict of interest that occurs when a Participant (or its employees)

competes with the firm's clients for execution of orders. He also acknowledged that part 4 of UMIR Policy 5.3 contemplates a registrant trading alongside its clients as happened in this case and states that "A participant does not have to provide priority to a client order if the client specifically consents to the participant trading alongside or ahead of the client." This is subject to a number of conditions involving the manner in which client consent is obtained.

¶ 89 In addition, Rule 29.3A provides that "A Dealer Member shall give priority to orders for the accounts of customers…over all other orders for the same security at the same price…"

¶ 90 It is important to note that Count 1 was not based on any breach of UMIR provision 5.3 or Rule 29.3A, nor was it fully argued in reference to those provisions which were referred to in closing arguments only by analogy as being instructive to help the Panel determine whether there has been a breach of Rule 29.1. In the circumstances in which Count 1 was presented and argued, it is this Panel's conclusion that those provisions do not apply to the type of plan carried out in this case where there was a grouping of client and pro accounts in a common scheme to benefit the group as whole with each participant getting its share of the anticipated profit based on its relative participation, all consented to by the clients in advance of putting the plan into effect. No order for the purchase of LVS shares was for any particular client or pro account. Accordingly the commingling of client and pro accounts which occurred was not improper even arguing by inference from UMIR 5.3 and Rule 29.3A which do not technically apply. However, this Panel leaves it to future panels to determine specifically whether a plan the same or similar to the plan in this case, carried out on a Canadian market, and fully presented and argued, offends those provisions.

Thereby engaging in conduct unbecoming, contrary to IIROC Dealer Member Rule 29.1

¶ 91 IIROC counsel cited no cases to the Panel with circumstances similar or analogous to the facts under Count 1 and in which a breach of Rule 29.1 was found. He invited the Panel to apply our own experience to determine whether the trading was "proper", "consistent with observing a high standard of ethics", and was it conduct which the Panel would "consider to be unbecoming".

¶ 92 Rule 29.1 sets out a general standard by which to judge the conduct in question and many cases have examined what the standard entails in a variety of fact situations. Some of these were cited to this Panel. For example, the case of Little (Re), [2007] I.D.A.C.D. No.24, provides that not every transgression by an employee of a Member causes a breach of the Rule. It also provides that moral turpitude or bad faith could turn a minor transgression into conduct unbecoming, but they are not an essential ingredient of all such charges. This Panel agrees with those statements.

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

> "It is our view that transgressions must be looked at in the light of the reputation which the investment industry must maintain in the eyes of the public and the effect which the transgression could have on that reputation. The public interest demands that the Members of the industry, and their employees, be held to a very high standard of financial probity. They must be trusted because they handle other people's money. They must be seen to be trustworthy. If conduct could even appear to cast doubt upon that probity, then it could be detrimental to the public interest and constitute conduct unbecoming."

¶ 94 These passages from Little were also cited with approval in the recent case of Re Northern Securities 2012 IIROC 63 which also decided that whether the Respondent subjectively knew or thought the conduct was "unbecoming" is irrelevant. The determination of whether the conduct is "unbecoming" under Rule 29.1 is to be determined on an objective basis by each panel on a case by case basis, having regard to principles of interpretation and prior case law precedent.

¶ 95 Re Bahcheli, [2004] I.D.A.C.D. No. 12 and Re Doering, [2007] I.D.A.C.D. No. 27 stand for the proposition that, while moral turpitude is no longer an essential element of the test for culpability under Rule 29.1, bad faith on the part of the respondent must be proven. In Doering, the respondent failed to advise his employer of his outside business activities and the panel concluded that "from an objective point of view, the

public would [not] have felt any degree of discomfort with the Respondent's breach of By-law 18.14, even if they had known this at the time".

¶ 96 Re Gareau, [2005] I.D.A.C.D. No. 25, cited by Respondents' counsel, concluded that R.29.1 is "primarily intended to focus on quasi-criminal and unethical conduct rather than negligent conduct "

¶ 97 In Re Blackmont Capital Inc., 2011 BCSECCOM490, the British Columbia Securities Commission found that there was no "conduct unbecoming" on the basis that "there is no evidence that respondents' conduct was intentional, was motivated by dishonest intent or for an improper purpose, or was otherwise unethical. Neither…was the respondents' conduct likely to impair the public's trust of the industry."

¶ 98 Blackmont also cited the following from Re Octagon Capital Corp., [2007] I.D.A.C.D. No.16:

> "There is no evidence Octagon acted unethically or for an improper purpose…had a conflict of interest…dishonest motive or blameworthy conduct…"

¶ 99 Each case dealing with Rule 29.1 is fact-dependent and each of the cases is factually distinguishable from this case. It is this Panel's conclusion that for conduct to be "conduct unbecoming" under Rule 29.1, there must be some element of wrongdoing or falling below the standard of conduct reasonably accepted in the securities industry in order to maintain the public trust in the members who handle the public's money. This is so whatever language from the cases cited is used to characterize that conduct, "bad faith", "dishonest intent", "improper purpose", quasi-criminal, "unethical" or other similar language.

¶ 100 Commingling of client and pro accounts occurred but not in the sense contemplated by UMIR 5.3 or Rule 29.3A or in any other improper manner. The shares traded on October 28th and 29th, 2009 were not allocated in any improper manner, but were simply distributed to the accounts as agreed to in advance. The Respondent profited from some of the trades in question, but not at the expense of his clients as alleged. Therefore it is the Panel's decision that the Respondent's conduct cannot be characterized as "unbecoming" as interpreted in the cases cited, and was not conduct with which the public would have felt any discomfort if it knew about the conduct. Therefore Count 1 is dismissed.

Count 2 Analysis

Preliminary Jurisdictional issue

¶ 101 Before dealing with the substance of Count 2, there was a jurisdictional issue based upon the drafting of the Count which must be dealt with. Count 2 is an allegation against the Respondent personally that he failed to keep proper records contrary to IIROC Rules 17.2 and 200 and National instrument 31-103. However these provisions which IIROC alleges were breached by the Respondent are directed specifically at the Dealer Member, in this case Hampton and not at any individuals employed by the Dealer Member. Yet Hampton was not named in Count 2, and in fact IIROC counsel confirmed at the hearing that there was no systemic record keeping failure at Hampton and that it was the record keeping failures of the Respondent personally that IIROC alleges were in breach of the specified Rules.

¶ 102 The issue therefore is whether the Panel has jurisdiction to find against the Respondent under this Count however deficient his record keeping may have been, because IIROC Rules 17.2, and 200 and National Instrument 31-103 do not on their face appear to govern the conduct of the Respondent. This jurisdictional issue was not raised by the Respondent in his Response to the NOH nor was it raised in his written closing submissions dated November 5, 2012. The issue was raised by the Panel during the hearing but not fully dealt with. During closing oral argument, IIROC counsel again raised the issue of why the Respondent and not Hampton was the subject of Count 2. In addition to the factual reason (that it was the Respondents personal record keeping not Hampton's that was the problem), IIROC counsel invoked the second part of Rule 29.1 which reads:

> "For the purposes of disciplinary proceedings…, each Dealer Member shall be responsible for all acts and omissions of each partner, Director, Officer, Supervisor, Registered Representative, Investment Representative and employee of a Dealer Member; and each of the foregoing individuals shall comply

with all Rules required to be complied with by the Dealer Member." (emphasis added).

¶ 103 The Panel then pointed out that Rule 29.1 was not cited in Count 2 of the NOH nor was it referred to anywhere in the particulars in relation to Count 2, and questioned whether this omission from the drafting of the NOH resulted in the Panel being unable to find against the Respondent under IIROC Rules 17.2 and 200 and National Instrument 31-103. IIROC counsel responded that, in drafting an NOH, IIROC is attempting to achieve some brevity and plain language in the charging provisions while identifying the specific sections that are being relied on, i.e. not so much to make the formal legal arguments, but to give the Respondent notice of the allegations and the case he has to meet. Furthermore, in this case, there are a number of references to the Respondents position as UDP and his responsibility as UDP for the books and records system.

¶ 104 The Panel then questioned whether there were any cases involving allegations against an individual under Rules which are directed against the Dealer Member, in which the failure to also invoke a Rule such as the second part of Rule 29.1 or Rule 38 which are directed at the individuals, resulted in the loss of jurisdiction of the panel to find against the Respondent. IIROC counsel said he was unaware of any such cases, but also stated that the general state of the law is that NOHs in the administrative context are not to be treated as akin to a criminal indictment in that less precision is required in the drafting of the NOH so long as the Respondent is given notice of the case they have to meet.

¶ 105 In closing oral argument, the Respondent's counsel referred the Panel to the case of Blackmont Capital Inc. 2011 BCSECCOM 490, in particular paragraphs 24 and 25 in support of his argument that the Respondent cannot have the books and records keeping responsibility of the Dealer Member, Hampton, which was not charged. He stated that there were no cases that make individuals liable for acts of the Dealer Member under the second paragraph of Rule 29.1. Paragraphs 24 and 25 of Blackmont read as follows:

> "24. A [NOH] is the foundation of hearings before IIROC panels and [the B.C. Securities Commission]. It identifies the alleged misconduct that the respondent has to meet. It establishes the issues to be determined at the hearing. It follows that a panel does not have jurisdiction to determine matters not alleged in the [NOH]. Particulars need not be in the [NOH], but must relate to an allegation that is in the [NOH].
>
> 25. It follows that the IIROC hearing panel did not have the jurisdiction to make a finding that the respondents contravened Rule 29.6 because the [NOH] did not allege misconduct that would constitute a contravention of that Rule. The panel therefore erred in law in finding that the respondent contravened Rule 29.6."

¶ 106 On the face of it the Blackmont case appears to support a conclusion that the Panel in this case does not have jurisdiction to find against the Respondent under Count 2 because the conduct of the Respondent would not, per se, constitute a contravention of Rules 17.2 and 200 and National Instrument 31-103 cited in Count 2. However, the Response to the NOH and the Respondent's closing written arguments never raised this issue and the entire case was conducted by the Respondent as a substantive matter and without any objection to this Panel's jurisdiction. The jurisdictional issue was not raised until closing oral argument and then was not debated in any manner. The applicability of Blackmont to our case was not examined and no other cases, if any, dealing with the jurisdictional issue and the requirements for the proper drafting of the NOH were addressed by IIROC or the Respondent. The Panel did not hear any argument regarding whether the Respondent could be found in contravention of the law cited in Count 2 under Rule 29.1 even though Rule 29.1 was not specifically cited in the NOH. It is this Panel's conclusion that, in the specific circumstances of this case as outlined above, Count 2 should not be dismissed against the Respondent on jurisdictional grounds. That should only occur in a case where the issue is properly raised, researched and debated by both parties.

Substantive Matters

¶ 107 As a substantive matter, Count 2 relates to the record keeping of the Respondent personally between November 12, 2008 and December 11, 2009, and in particular in relation to the trading on October 28th and 29th, 2009 which is the subject of Count 1. The NOH alleges that the trading in question was facilitated by his lack of proper documentation, in particular a record of each order and of instructions given or received for the purchase

or sale of securities.

¶ 108 The evidence regarding record keeping by the Respondent is as follows:

- The REALTICK trading printouts contain only rudimentary order information such as the quantity of shares bought or sold, the price and the time of execution, but do not distinguish between client and pro accounts, do not show a record of the original client instructions nor when the client order was given and do not show to which client the orders relate;
- The Respondent wrote the details of each order on pieces of paper which he did not keep. The Respondent testified that he completed the top portion of the trade tickets in accordance with the client instructions soon after receiving those instructions and then discarded the pieces of paper on which he had originally written the instructions. The truth of that testimony was questioned by IIROC counsel because it was not mentioned in the Response to the NOH nor in the Respondent's investigative interviews, but the Respondent's testimony remained uncontroverted;
- Trade tickets were completed after the close of trading when the executed transactions were distributed to the client accounts on the Respondent's instructions;
- There are no records of the Respondents conversations with his clients on October 29th, 2009 regarding his purchasing their shares, nor of his conversation with Mr. Kelterborn regarding the propriety of doing so.

¶ 109 The following are the legal requirements referred to by IIROC in its written submissions regarding Count 2. Rule 17.2 requires that a proper set of books and records be kept and maintained. Rule 200 (g) specifies the keeping of an adequate record of each order, and of any other instructions given or received showing the terms and conditions of the order or instruction, the account to which it relates, the time of entry of the order or instruction, to the extent feasible the time of execution or cancellation, the price at which the order or instruction was executed and the time of report of execution. The guide to Rule 200 specifies the information which must be reflected on the firm's books and records, but does not prescribe any particular form; it states the expectation that internal controls will make available clear and accurate information to IIROC. Section 11.5 of National Instrument 31-103 requires the maintenance of records which accurately record its business activities, financial affairs and client instructions and demonstrate the extent of the firm's compliance with securities legislation and provide an audit trail for client instructions and for each trade transmitted or executed (emphasis added).

¶ 110 It was IIROC's position that the Respondent did not comply with his record keeping obligations on the following grounds. There was no record of the time of entry of the orders. No one can identify when the Respondent received client orders or which REALTICK transactions related to which clients. The only record which relates to the Hampton clients was the trade ticket allocation after the market is closed.

¶ 111 The Respondent took the position that there is no prescribed industry system or methodology for processing trade orders and that the applicable IIROC Rules do not require that the time of receiving client instructions be recorded. The Respondent asserted that he transferred client instructions from his notepad onto trade tickets which contained all the required information about the clients, the price and the quantity of the orders for the purchase of shares. The failure to keep the original notes after the information was transferred to the trade tickets does not constitute a breach of rules cited in Count 2.

¶ 112 It is clear to the Panel that the requirements for the keeping of books and records focus on the need for the books and records to accurately reflect the client instructions and the transactions which took place. It is therefore necessary to recognize what the plan was and how it was carried out, particularly since the trading in this case was somewhat unusual (the Respondent testified that the type of trading done on October 28, 2009 represented about 2% of his trading activity). The more specific requirements for record keeping reflect the more usual practice of individual client purchases and sales of securities. As the Panel stated in paragraph 90, the plan carried out in this case involved a grouping of client and pro accounts in a common scheme to benefit the group as whole with each participant getting its share of the anticipated profit based on the spread between

the average price of the securities purchased and the sale price of the calls, all consented to by the clients in advance of putting the plan into effect. No order for the purchase of LVS shares was for any particular client or pro account. The Panel agrees with the Respondent that there is no requirement that the time of receiving the client instructions be recorded, nor is there a requirement that the client instructions be recorded when received or as soon thereafter as possible. What is required for the transactions on October 28th is that the record at the end of the day accurately reflect the instructions for those transactions, including the identity of the client and pro accounts, the number of shares each agreed to buy and the average price for those shares to which they had agreed. What is also required is that the books and records provide an audit trail so that the accuracy of the books and records can be confirmed by the regulator. This was emphasized by IIROC's witness, Mr. Varela and its importance confirmed by the Respondent's witness, Mr.Boyce.

¶ 113 It is the Panel's decision that the trade ticket information at the end of the day on October 28th as transferred to the Hampton client accounts, appears to accurately reflect what the Respondent testified to as the plan that the clients had agreed to. However, it is also the Panel's decision that there was inadequate documentation of the plan and the client's agreement with it. The Respondent's testimony may well accurately reflect what the clients agreed to, but there was inadequate corroborative documentation. There should have been an outline of the plan in writing including the fact that client and pro accounts would be commingled, that the purchase price for the shares would be averaged for all participants and that each participant's profit would be based on the spread between the average cost and the sale price of the calls. There should also have been written consent from all clients.

¶ 114 Similarly, for the transactions on October 29th, there should have been documentation confirming the conversation with Mr. Kelterborn and written consents from the clients to the purchase of their shares, even if the consents followed those purchases.

¶ 115 Consequently, it is the decision of the Panel that the Respondent failed to keep and maintain at all times a proper system of books and records as alleged in Count 2.

¶ 116 There was considerable discussion about the content of paragraphs 44, 45 and 46 of the NOH as outlined in paragraphs 36, 37 and 38 above, referred to by IIROC as "Overall Review and Other Regulatory concerns. These paragraphs were objected to by the Respondent in his Response to the NOH and he brought a motion to have Appendix "A" to the NOH struck from the NOH. During the hearing of the motion, IIROC counsel clarified that the paragraphs in question and Appendix "A" were additional examples of poor record keeping related only to Count 2 and not to Count 1. On September 24, 2012, the Panel issued an order refusing the Respondent's motion to strike. However, the Panel has decided that those paragraphs and Appendix "A" remained too vague and confusing to add anything to the Panel's decision on Count 2, and accordingly do not add anything to the Panel's conclusions stated in Paragraphs 113 and 114.

3. Count 3

IIROC Allegations

¶ 117 The NOH sets out the following summary of the facts alleged and to be relied upon by IIROC at the hearing:

¶ 118 The industry practice commonly known as "free-riding" occurs when securities are purchased without sufficient cash in an account and no attempt is made to properly settle the securities transactions.

¶ 119 Between February 1 and April 30, 2009 the Respondent engaged in free-riding in both his RRSP account and his TFSA.

¶ 120 On July 31, 2009, IIROC identified free-riding as a significant deficiency in its 2009/10 FinOps report.

¶ 121 By letter dated August 31, 2009, the Respondent acknowledged receipt of the said 2009 FinOps Report as detailed in paragraph 131 below.

¶ 122 Notwithstanding the acknowledgment contained in the August 31, 2009 letter, FinOps Staff noted further instances of free-riding in a guaranteed group of accounts controlled by the Respondent. These

transactions occurred between December 1, 2009 and May 31, 2010.

¶ 123 On February 2, 2011, FinOps Staff identified the free riding as a significant deficiency in its 2010/11 FinOps Compliance and report.

¶ 124 Initially, the Respondent indicated that the FinOps Staff member made erroneous conclusions, but ultimately acknowledged FinOps Staff's concerns with the trading activity and agreed to implement procedures to detect and stop customers, employees and officers of the firm from engaging in trades that would raise such concern in the future.

Transactions between February 1 and April 30, 2009

¶ 125 During the 2009/2010 FinOps review of Hampton, the FinOps examiner noted nine occurrences of free-riding in the Respondent's RRSP account between February 1, 2009 and April 14, 2009. These transactions are set out in Appendix "B" to the NOH and attached hereto.

¶ 126 For the transactions set out in Appendix "B", securities were purchased without sufficient cash in the account and no attempt was made to properly settle the securities transactions.

¶ 127 Also during the 2009/2010 FinOps review of Hampton, the FinOps examiner noted three occurrences of free-riding in the Respondent's TFSA between April 16 and 30, 2009.These transactions are set out in Appendix "C" to the NOH and attached hereto.

¶ 128 For the transactions set out in Appendix "C", securities were purchased and sold on the same day without sufficient cash in the account and no attempt was made to properly settle the securities transactions.

¶ 129 In addition, between March 31 and April 1, 2009, the Respondent executed four trades in his TFSA that were cancelled by the CFO and staff at Hampton's carrying broker. These transactions are set out in Appendix "D" to the NOH and attached hereto.

¶ 130 On July 31, 2009, FinOps Staff delivered to the Respondent its 2009/2010 FinOps Report for the Monthly Financial Report of March 31, 2009. This report noted the above-described free-riding as a significant deficiency.

¶ 131 On August 31, 2009, the Respondent acknowledged the FinOps Report delivered on July 31, 2009 and specifically noted:

> *We have reminded all staff that the trading in cash, margin and registered accounts is prohibited without sufficient equity or margin in advance of the trade being done.*

Transactions between December 1, 2009 and May 31, 2010

¶ 132 During the 2010/11 FinOps review of Hampton, the examiner noted further instances of free riding during the period December 1, 2009 to May 31, 2010 within a guaranteed group of accounts controlled by the Respondent.

¶ 133 The guaranteed group of accounts included Oakmont Holdings Inc. (O Inc), the Respondent's personal account and certain trust accounts for members of the Respondent's family.

¶ 134 The examiner reviewed the guaranteed group of accounts' month end margin positions for the period December 1, 2009 to May 31, 2010. The examiner noted that the group of accounts was under margin at month end for January 2010 and May 2010 in the respective sums of $3,547 and $9,165.

¶ 135 The examiner also reviewed the guaranteed group of accounts' specific trading for May 2010 and summarized the margin positions on a daily basis.

¶ 136 The Respondent employed a strategy of using covered call options on LVS to hedge his long position in the underlying stock. During the month of May 2010, the Respondent's LVS positions were not always fully hedged and, as a result, trading was not properly settled which allowed the account to maintain an under margin position. Furthermore, the Respondent withdrew approximately $53,000 in the month of May 2010 which served to increase the debit position in the account.

¶ 137 Finally, the examiner performed a detailed analysis of O Inc's trading activity for May 2010, including margin calculations on a daily basis. The calculation evidences that the O Inc. account was under margined on numerous days for the period between December 1, 2009 and May 30, 2010.

¶ 138 In September 2010, FinOps staff met with the Respondent and Hampton's CFO to discuss the findings regarding free-riding and the supporting calculations. The Respondent did not provide a satisfactory explanation as to the trading activity in question.

¶ 139 On February 2, 2011, FinOps Staff delivered to the Respondent its 2010/2011 FinOps Report for the Monthly Financial Report of May 31, 2010. This report noted that in the prior year, FinOps Staff had expressed its concerns about free-riding that had occurred in registered accounts of the Respondent and that during the current review FinOps Staff noted similar activity in other accounts controlled by the Respondent. The trading activity was again identified as a significant deficiency.

¶ 140 By letter dated March 3, 2011, the Respondent advised that he had spent considerable time with the examiner in an effort to explain the "mistakes in her conclusion". The Respondent notes that he is "unsure as to the concern as described in Staff's letter".

¶ 141 On or about March 10, 2011, the Respondent met with senior FinOps Staff personnel regarding his letter of March 3, 2011, which did not adequately address the findings of the 2010/2011 field exam as set out in the February 2, 2011 FinOps Report.

¶ 142 By correspondence dated March 14, 2011, IIROC FinOps Staff confirmed the meeting of March 10, 2011 and required:

> *a) Confirmation that the free riding identified in the guaranteed group of accounts controlled by a senior officer will cease immediately; and*
>
> b) Procedures to be implemented by the firm to detect and stop customers, employees and officers of the firm from free riding.

¶ 143 By correspondence dated March 21, 2011, the Respondent wrote to IIROC FinOps Staff and stated:

> *We acknowledge your concerns regarding the trades referred to in your letter. We will implement procedures to detect and stop customers, employees and officers of the firm from engaging in trades that would raise such concern in the future, and we thank you for bringing these issues to our attention. We anticipate having these procedures in place by April 30, 2011.*

¶ 144 The Respondent has engaged in trading activity commonly known as free-riding and has thereby engaged in conduct unbecoming contrary to Dealer Member Rule 29.1. In addition, the Respondent has specifically acknowledged to FinOps Staff that he would advise his Staff about the impropriety of the practice, but continued to engage in the conduct in different accounts.

Response

¶ 145 The Response sets forth the following positions of the Respondent in relation to the matters set forth in the NOH:

> "Unlike violations relating to "margin" and "short selling" both of which have extensive definitions in the IIROC Rules, the violation of which is used to allege "conduct unbecoming" contrary to IIROC Dealer Member Rule 29.1, there is no definition of "free riding" in any IIROC Rule. Since at least the IDA Rules which were effective October 1994, there has been no definition of "free riding" unlike the Securities and Exchange Commission ("SEC") which together with the Federal Reserve Board has defined the constituent components of free riding in the United States. In fact FinOps Staff stated in an April 20, 2011 email to the CFO of Hampton that "'There isn't a specific rule that states 'thou shalt not free ride…'"
>
> In addition, there are numerous and inconsistent interpretations of "free riding" by administrative and judicial bodies in Canada to which IIROC do not refer.

As there is no IIROC provision which clearly spells out the constituent factual components of an offence called "free riding" and there is no uniform definition utilized by Canadian administrative and judicial bodies, there can be no prohibition against it because not only is it not an offence but given the variation in interpretations by the bodies referred to above an accused cannot be certain of what the factual elements of "free riding" are in a case against him.

Lastly there is no evidence in the [NOH] to support the allegations of "free riding" in whatever various forms it is alleged to have occurred and in particular the "facts" in Appendices B, C and D are so erroneous and incomplete that given the lack of factual particulars, the circumstances surrounding each such transaction, the specific IIROC provision breached and the allegation of the manner in which it was breached, they do not allow the Respondent to know what case he has to meet.

Transactions between February 1 and April 30, 2009

- AND -

Transactions between December 1, 2009 and May 31, 2010

The allegations in these 2 headings of the NOH concerning "free riding" are essentially the same except as to dates and types of account – cash (RRSP and TFSA) as opposed to margin. IIROC consistently submit that the "common practice" of "free riding" constitutes conduct unbecoming under Dealer Member Rule 29.1 yet unlike margin requirements and short selling where each of those activities are extensively defined in the UMIR Rules, Staff never:

> (a) provided IIROC's definition of free riding. A FinOps Staff email dated April 20, 2011 to [the Respondent's] CFO stated in part:
>
> "There isn't a specific rule that states 'thou shalt not free-ride' (emphasis added) however the intent behind cash or margin accounts is that trades will settle by bringing in cash (re. cash accounts) or cash/securities with loan value (margin accounts) and not merely settle by selling the security prior to settlement date"; and
>
> (b) Staff never discussed with [the Respondent] or his employees whether the activity of "free riding" varies between different accounts such as margin or cash accounts, where in the former different rules would apply. For example, paragraphs 54-59[of the NOH] contain allegations that various accounts were under margin yet no allegation is made in respect of [the Respondent] being in breach of margin requirements, only that he was "free riding".

The IDA Rulebook as it existed in October of 1994 did not include a definition of "free riding". It was that Rulebook that predated the IIROC Rules adopted June 1, 2008. IIROC Transition Rule 1.2 adopted as Rules those "regulatory By-laws, Regulations, Forms and Policies" of the IDA that were in force and effective immediately prior to June 1, 2008. Transition Rule 1.2.3 adopted "all regulatory notices, bulletins, directives and guidance provided by the IDA to IDA Regulated Persons in force and effect immediately prior to June 1, 2008". Subsequently to June 1, 2008 IIROC has chosen not to define "free riding". There can be no conviction for an activity which IIROC has not defined nor stipulated to be a breach of its Rules and for which there is no uniformity of interpretation by the courts or IIROC panels.

¶ 146 In the [NOH], Staff appear, for the first time, to define "free riding" as being the purchase of securities:

> (a) "without sufficient cash in the account" (without specifying what "sufficient" means nor at what time the cash must be in the account); and
>
> (b) where "no attempt was made to properly settle ("properly settle" being undefined) the securities transaction.".

Although this "definition" of free riding would indicate that for free riding to occur, a transaction must be "properly settled" (whatever that term means), Staff later contradict themselves by alleging that "free riding" can also extend to an undefined term called "Attempted Transactions" as set out in Appendix D to the [NOH] which only deals with cancelled transactions which by definition cannot be "properly settled."

¶ 147 The only place that "free riding" is mentioned by IIROC in "by-laws, regulations, forms or policies", apart from disciplinary decisions, is in IIROC Notice 09-0171 dated June 11, 2009 applicable to "best practices" and it is of no help:

> "Control procedures are in place to detect and prevent practices by clients that sell the same security that was purchased that created the margin call (i.e. also referred to as "free riding"). (Margin Accounts page 6).
>
> "For any cash accounts that are determined to be "free riding" (undefined), any future trades will require that the cash or security position be delivered to the account prior to trade execution". (Cash Accounts page 6).
>
> "Free riding" is simply referred to in Notice 09-0171 in the context of margin and cash accounts but it is never defined.

¶ 148 [IIROC] consistently refer to "free riding" as "common practice" but never frame or define the constituent parts of the offence or refer to the wide variances of the definitions of "free riding" in case law even when invited to by the [Respondent's] counsel as set out in paragraph I-4of this Response [paragraph 205 below]. In addition,[IIROC] acknowledge in an August 29, 2011 email that even NBCN upon whom the [Respondent] and Hampton Securities Ltd. rely for credit policies do not have a definition of "free riding".

¶ 149 In Cole v. Merrill Lynch Canada Inc., 2005 Can L11 56201 (Ont SCJ) the court states at paragraph 28:

> "'Free Riding' occurs when there is buying and selling without paying for the security. It occurs when the client has insufficient securities or cash in the account to cover the purchase, yet buys and sells a security and makes a profit."
>
> There is no finding as to the timing of when sufficient security or cash must be in the account nor is there a discussion of whether a "fail" must occur nor did the Court discuss whether the practice of free riding is different in cash versus margin accounts.

¶ 150 The case of Questrade Inc. v. IDA 2009 LNIIROC 49, dealt primarily with what was in effect a member providing unlimited margin. The definition of free riding in paragraph 34 of Questrade for margin accounts is different from the definition of the Ontario Superior Court of Justice in Cole which is somewhat incomprehensible. Questrade defines "free riding" in a "reverse" context as:

> "The current IDA requirement does not require the collection of minimum margin prior to executing a trade. However, a firm must collect the initial margin requirement in accordance with our minimum margin requirements, irrespective of whether the position is ultimately closed out prior to collection of the margin. If not the client would be 'free riding'."

¶ 151 In IIROC Bulletin #3291 dated May 27, 2004, the Pacific District Counsel ("PDC") of the IDA defined "free riding" in yet another manner saying at paragraph 7:

> "On or about May 24, 2001 and May 25, 2001, he purchased 350 shares of Fuel Cell Energy Inc. in the E Account at a cost of approximately $44,500, and sold those shares prior to settlement dated without first obtaining payment for the said shares, a practice commonly known as free riding."

¶ 152 A further and different interpretation of free riding was used by the Ontario District Council less than 3 weeks before the PDC decision above. Bulletin #3283 dated May 11, 2004 stated at page 4:

> "FREE RIDING
>
> From February 1997 to November 1999, 28 accounts where Mr. Illidge was responsible, were opened in the names of 26 different individuals or corporate entities and traded for prolonged periods of time without adequate funds or margin. Trading occurred in 12 of these accounts without any (emphasis added) funds ever having been deposited in the accounts."

¶ 153 In Bulletin #3250 dated February 6, 2004 Enforcement Counsel and a registered representative entered into a Settlement Agreement wherein the registered representative agreed with Enforcement Counsel that free

riding consisted of:

> "Conduct(ing) three trades in the joint cash account of Mr. and Mrs. A. and sold those shares prior to settlement date without first obtaining payment for the said shares."

The issue in this case was that a registered representative and Enforcement Counsel agreed to a definition in that specific case of what constituted "free riding" as opposed to what a panel interpreted free riding to be or what IIROC could have defined it to be. Again the definition in this case is different from the Ontario Superior Court in Cole which adds the proviso that at the time of purchase the client has insufficient cash or securities to cover the purchase (emphasis added).

¶ 154 Other cases, whether they be uncontested or litigated, use yet another definition by referring to "free riding" simply as an incident where the registered representative knew or ought to have known that the client was "using the firm's capital to finance their trading activities".

OSC v Zuk, Walton, Reid, Djordjevic, Danzig and Coleman (2007), 30 OSCB 2599.

¶ 155 Unlike IIROC which has chosen not to define "free riding" and the various administrative or judicial bodies which have interpreted "free riding" inconsistently, other securities regulators such as the SEC for example, in conjunction with the Board of Governors of the Federal Reserve have used the credit extension provisions of the Federal Reserve Board's Regulation T to define "free riding" – otherwise referred to as the governing of a broker-dealer's use of a cash or margin account to purchase a security for an investor. This is why the observation re NBCN's credit policies in paragraph [148 above] is important.

¶ 156 With respect to cash accounts, the SEC Office of Investor Education and Advocacy in dealing with Regulation T in respect of credit extensions and free riding have said:

> "…Regulation T authorizes a broker-dealer to use a cash account to purchase a security for an investor if:
>
> - there are "sufficient" funds in the account; or
> - the broker-dealer accepts in good faith the investor's agreement that the investor will promptly make "full cash payment" for the security before selling it and does not contemplate selling the security prior to making such payment."

The SEC then goes onto give a number of permitted trading examples.

¶ 157 In SEC v Sholom Teitelbaum S.D.N.Y. 80 Civil 7317, the test for margin accounts was set out as follows:

> "Teitelbaum was charged with violating the antifraud and margin provisions of the securities laws by placing orders for the purchase and short sale of various options contracts without intending to pay (emphasis added) for the purchases or cover the short sales, and failing to make timely and proper payment for the purchase or to tender securities (emphasis added) to cover the short positions."

¶ 158 Given the variance in what authorities have determined to be "free riding" in cash as opposed to margin accounts, until IIROC passes a definition(s) of free riding for cash accounts and margin accounts as has been done for margin requirements and short selling so that Staff are able to specifically stipulate in a count what the factual components are that trigger a "free riding" offence, which has not been the case in the [NOH] in respect of [the Respondent], anyone accused of conduct unbecoming cannot know the exact factual components of an allegation that someone was involved in "free riding".

¶ 159 [IIROC] allegations, especially in paragraphs [131, 142 and 143 above] do not establish the admission of "free riding" by the Respondent. There is no acknowledgment that "free riding" occurred, only that the Respondent acknowledged (as opposed to agreed with) FinOps Staff's concerns.

¶ 160 It is clear that there was a continual disagreement over the years between [the Respondent] and FinOps Staff as to what constituted "free riding" and that the disagreement existed as far back as December 1, 2009. In the [NOH], [IIROC] refer to this disagreement as the Respondent "not provid(ing) a satisfactory explanation as

to the trading activity in question " [paragraph 138 above] and the Respondent having "spent considerable time with the examiner in an effort to explain the 'mistakes in her conclusion'" [paragraph 140 above]

¶ 161 [IIROC] neglect to state that in a meeting between [the Respondent] and Ciro Mirabella of FinOps Staff in March 2011, Mirabella told [the Respondent] to sign a letter admitting to "free trading" or the matter would be referred to Enforcement. This resulted in [the Respondent] writing the March 21, 2011 letter referred to by Staff in [paragraph 143 above] (which wording specifically does4 not mention or admit to "free riding") and that non-admission as to free riding appears to be the rationale for the "free riding" matter being referred to Enforcement.

¶ 162 Throughout the [NOH] and Appendices B, C and D Staff:

(a) never state the exact definition of "free riding" that they employ for the

(b) "transactions" in the RRSP or TFSA cash accounts;

(c) never explain what an "attempted transaction" is vis-à-vis the TFSA and how there can be "free riding" in the absence of a transaction;

(d) do not provide enough factual components for [the Respondent] to understand the case(s) he has to meet in each alleged incident of "free riding" or in the case of Appendix D "attempted free riding"; and

(e) have made numerous and substantive factual errors through repeated omissions and commissions.

¶ 163 Even though one definition of "free riding" requires all the money for a transaction to be in an account prior to execution of the trade and another definition stipulates that the money does not have to be in the account until immediately prior to the time the security is subsequently sold, [IIROC] only refer to the "Trade Date" in all 3 appendices - not a settlement date and not a subsequent sale date. [IIROC] also does not provide any information relating to cash and other securities in an account which could pay for a purchase transaction under yet another definition of free riding and instead only refer to something called a "debit balance caused by the transaction".

¶ 164 In all 3 Appendices, there is no disclosure of whether each transaction is a purchase or sale and the term "profit", "notional" or otherwise, is undefined and unexplained nor is there any explanation of what rule is breached and in what manner.

¶ 165 Appendix D is simply inexplicable data concerning cancelled transactions that cannot be reconciled to Hampton Statements and begs the question as to how a cancelled transaction can be defined as "free riding" under any of the definitions of "free riding" or defined as the apparently new offence of "attempted free riding" when Staff previously allege that one component of free riding is that the securities transaction must be "properly settled."

Count 3 Analysis

¶ 166 In order to succeed on Count 3, IIROC must establish four elements, viz., that on the dates specified, the Respondent

1. "engaged in the practice commonly known as 'free-riding' in that
2. securities were purchased without sufficient cash in the relevant accounts and
3. no attempt was made to properly settle the securities transactions,
4. and thereby engaged in conduct unbecoming, contrary to IIROC dealer Member Rule 29.1."

¶ 167 The first three elements are factual elements of Count 3, and even if proven, do not establish that the Respondent did anything contrary to IIROC Rules or which was otherwise illegal, i.e. free-riding as described, by itself, is not unlawful for the purposes of this Count. IIROC must also prove that such free-riding is contrary to Dealer Member Rule 29.1. The Respondent argued that "free-riding" is not a defined term and that there were a number of cases in which different fact situations had been defined as "free-riding". The Panel agrees with

that position, but the wording of Count 3 invokes only one definition which is in two parts, (1) the purchase of securities without sufficient cash in the account, and (2) no attempt is made to properly settle the securities transactions. Free-riding is not a defined term, it is common industry jargon which may have somewhat different meanings in different situations, but it is this Panel's decision that the definition used in Count 3 comprising the two elements just referred to, is within the common usage of the term in the industry.

¶ 168 IIROC alleges free-riding in two different time frames and different accounts. The first involves trading in the Respondent's TFSA and RRSP accounts between February 1, 2009 and April 30, 2009. These are both cash accounts. The second involves trading within a group of accounts controlled by the Respondent between December1, 2009 and May 31, 2010. These were all margin accounts. The two sets of transactions must be analyzed separately.

February 1, 2009- April 30, 2009, TFSA and RRSP accounts.

¶ 169 IIROC's witness, Mr. Lo, testified regarding the four transactions in the Respondent's TFSA account shown on Appendix D to the NOH and the three transactions in his TFSA account shown on Appendix C to the NOH. In each case, Mr. Lo's evidence was that there was insufficient cash in the account to pay for the securities purchased. The Appendix D transactions were cancelled within 1-2 days. Payment for the Appendix C transactions was made by selling the same securities.

¶ 170 The Respondent took the position that, since the TFSA and RRSP accounts were cash accounts, the Cash Account Settlement Rule (CASR) applied. The CASR is contained in IIROC Form 1, Schedule 4, known as the Joint Regulatory Financial Questionnaire and Report, or simply the "Q". Note 8 of the "Q" provides that settlement of transactions in a cash account should be made on the settlement date. It is common ground in this case that the settlement date for purchase of securities is 3 days after trade date (T+3), and for options purchases is 1 day after trade date (T+1). The "Q" provides that payment may be made by cash, the application of the proceeds of sale of the same or other securities held long (emphasis added) or by the transfer of funds from a margin account. The "Q" also provides that a customer may, "in an isolated instance", settle by the sale of the same security when the equity (excluding all unsettled transactions) in the account does not exceed the amount of the transaction.

¶ 171 Mr. Boyce testified for the Respondent regarding the TFSA transactions shown on Appendix C as follows:

- The purchase of the call options on April 16, 2009 put the account into a debit position of $720.94, but the relatively small amount of the debit made the concept of free-riding inapplicable;
- There was insufficient equity to cover the share purchase on April 22, 2009, but the debit was a small amount, lasted only for a day when the shares were sold and this would not be an egregious example, and would not be a breach of the CASR because it fit under the isolated instance example;
- The debit in the account when the April 24, 2009 transaction occurred was relatively small, would fit within the isolated transaction exception and would not be significant in terms of free-riding.

In summary, it was Mr. Boyce's opinion that the slight overages would be considered as immaterial by the industry and would not be a breach of the CASR.

¶ 172 The Panel does not agree with Mr. Boyce's opinion regarding the Appendix C transactions. The amount of the cash shortfall may have been relatively small in these instances, but any shortfall still means that there was insufficient cash to pay for the securities; and there was no attempt made to pay for them. The isolated transaction exemption cannot, on the face of its wording, apply to more than one transaction in a short period of time, in particular since it was invoked by Mr. Boyce in regard to the RRSP transactions which are reviewed in paragraph 175 below. These transactions therefore constitute free-riding as alleged in Count 3.

¶ 173 Regarding the Appendix D transactions which were canceled, the TFSA account clearly did not have sufficient cash to pay for the transactions, but the Respondent testified that the transactions were erroneously put into his TFSA account and were intended for his U.S. margin account. However, as pointed out by IIROC

counsel, the U.S. margin account was restricted at the time, and between February 28 and April 30, 2009 had a debit cash balance in excess of $157,000. It did not have sufficient cash to pay for the March 31st and April 1st transactions. On the other hand, the Respondent testified that he had deposited $500,000 with the carrying broker as security for his margin accounts and that trading in this account was never restricted. Whatever may have been the conclusion if the transactions had been done in the U.S. margin account, they were done in the TFSA account which did not have sufficient cash to pay for them. These transactions therefore constituted free-riding as alleged in Count 3. The fact that they were soon cancelled is irrelevant because when the purchases were made, the TFSA account did not have sufficient cash to pay for them and no attempt was made to pay for them.

¶ 174 Mr. Lo testified for IIROC regarding the Respondent's trading in the RRSP account between January 30 and April 30 2009. He identified seven transactions that he considered to be free-riding. These were seven of the nine transactions originally set out in Appendix B to the NOH. Mr. Lo's testimony was as follows:

- The debit balance created by the January 30 purchases was not cleared until February 25;
- The debit balance created by the March 6 purchase was not cleared until March 13 ;
- The debit balance created by the April 3 purchase was not cleared until April 9;
- The April 14 transaction was actually several purchases and sales during the day; each was cleared later the same day by the sale of the same securities;
- The Hampton credit policies stated that "all purchases in the registered accounts must be covered in full by the settlement date at the latest." The trades to which Mr. Lo referred in his testimony were not cleared by the settlement date.
- The foregoing transactions were referenced in the FinOps 2009 Report with which Hampton's CFO agreed. In response to the Report, the Respondent noted: "We have reminded all staff that the trading in cash, margin and registered accounts is prohibited without sufficient equity or margin in advance of the trade being done."

¶ 175 Mr. Boyce testified for the Respondent regarding the RRSP transaction, as follows:

- The equity in the account on January 30 was $151,000.91 which was greater than the cost of the call options, $58,921.56; therefore settlement was properly made by the sale of other securities. Mr. Boyce acknowledged that the debit position was not cleared for 17 days, which he called a "case of late payment", but argued that since that was within the 20 day requirement before the account would have to be restricted under paragraph 6 of the CASR, there was no breach of the CASR.
- The Panel does not agree with the Respondent's position regarding the January 30, 2009 transactions. This is a cash account not a margin account and therefore the securities in the account do not provide borrowing power. The "20 day rule" applies to the manner in which the Member must treat the account after securities remain unpaid and does not address the non-payment itself. The plain fact is the call options were not paid for by settlement date as required and no attempt was made to pay for them. Therefore this transaction constitutes free-riding as alleged and defined in the NOH.
- The equity in the account was higher than the cost of the March 6 purchases and therefore Mr. Boyce made the same argument regarding this trade as regarding the January 30 trade while again acknowledging that a deficit position was created and not cleared by settlement date.
- Again, the Panel disagrees with the Respondent's position and for the same reasons as regarding the January 30 trades. The call options were not paid for by settlement date and no attempt was made to pay for them. Therefore this transaction constitutes free-riding as alleged.
- Regarding the April 3 call option purchase, Mr. Boyce again argued that there was sufficient equity in the account prior to the purchase, while acknowledging that there was an account debit which, he

testified, was cleared by the sale of other securities on the settlement date, and therefore there was no breach of the CASR.

- However, as pointed out by IIROC counsel, the sale of the securities to clear the debit position did not itself clear for three days and therefore the debit position remained on the settlement date for the April 3 purchase. Again the Panel disagrees with the Respondent's position. The April 3 purchase was not paid for by settlement date and no attempt was made to pay for it. Therefore this transaction constitutes free-riding as alleged.
- Regarding the three purchases of Bank of America shares on April 14, Mr. Boyce testified that the debit positions caused by such purchases were properly eliminated through the sale of the same securities in the account the same day. Hence there was no breach of the CASR as the account was fully within equity, or if not so, the isolated instance provision would apply.
- Once again, the Panel disagrees with the Respondent's position. As previously stated, equity in the account is not relevant and the isolated instance exception cannot be used on multiple occasions within a short time frame. As noted by IIROC counsel, the April 14 transactions took place within a few days of the transactions in the TFSA. Therefore the April 14 transactions constituted free-riding as alleged.

¶ 176 The Panel also found that the provision in the Hampton credit policy requiring payment in registered accounts by settlement date to be significant in that it acknowledges that free-riding as alleged by IIROC is not to be allowed. In addition, the Hampton letter in response to the 2009 FinOps Report acknowledges the impropriety of the free-riding activity referred to by IIROC, even if it does not admit a breach of IIROC rules.

Margin account trading December 1, 2009- May 31, 2010.

¶ 177 The IIROC witness, Ms Lasrado, identified five instances of alleged free-riding in a group of margin accounts controlled by the Respondent. Before dealing with the alleged free-riding, several preliminary issues need to be resolved.

¶ 178 The first is whether free-riding can occur in a margin account. IIROC's position is that free-riding can occur in a margin account. Mr. Boyce testified for the Respondent and offered the opinion that it was theoretically possible but that he had never heard of it. This Panel agrees with IIROC's position. The concept of free-riding compares the cost of securities purchased with the amount of assets in the account to pay for the purchase by the settlement date. The concern is that if there are insufficient assets in the account on settlement date to pay for the purchases, the client is placing the firm's capital at risk. Essentially, the client is permitted to trade on the "house's money rather than the client's money" (as Mr. Boyce characterized the practice). In the case of cash accounts, the asset in the account must be cash. Both parties agree that free-riding can occur in cash accounts. Conceptually, there is no reason why free-riding cannot occur in margin accounts; in margin accounts, the assets in the account may comprise cash plus marginable securities which must be in an amount sufficient to pay for the purchases by the settlement date. Mr. Boyce conceded the possibility of free-riding in a margin account. IIROC counsel referred the Panel to the cases of Cole v. Merrill Lynch Canada Inc. [2005] O.J. No. 6245 and Re Questrade [2009] IIROC 49 where free-riding was found to have occurred in margin accounts. In the recent case of Re Northern Securities 2012 IIROC 63, the panel found that free-riding occurred in a margin account. The U.S. Federal Reserve Board's Regulation T, cited by the Respondent and referred to in paragraph 155, defines "free riding" to include the use of both cash and margin accounts to purchase a security for an investor. The Teitelbaum case, cited by the Respondent and referred to in paragraph 157, involved free riding in a margin account. Finally, paragraph 6 of the "Q" deals with the requirement to properly settle purchases in margin accounts; this is conceptually identical to paragraph 8 of the "Q" dealing with cash accounts (recognizing the factual differences between the two types of accounts, e.g. allowing the loan value of securities to be used to pay for purchases) and therefore supports the conclusion that free-riding can occur in margin accounts. It is the Panel's decision that free-riding may occur in a margin account.

¶ 179 The second preliminary issue is whether the analysis of free-riding in a margin account may be done on

a settlement date basis (as was done by IIROC) or must be done on a trade date basis (as was done by Mr. Boyce on behalf of the Respondent). IIROC asserted that using the settlement date was appropriate because Hampton used the settlement date as their basis for determining settlement and margining of client accounts. The Respondent disagreed, stating that IIROC "incorrectly confused payment being due on settlement date with when margin deficiencies are calculated. They are calculated on a trade date basis…the [carrying broker's] under margin reports…indicate the margin requirements being done on a trade date basis." The carrying broker's under- margin reports were entered into evidence as Exhibit 20 and were calculated on a trade date basis. IIROC disagreed with the Respondent's position on the basis that the notes and instructions to the "Q" allow firms to "determine margin deficiencies for clients, brokers, and dealers on either a settlement date basis or a trade date basis." In addition, both "Hampton and NBCN used settlement date for determining margin deficiencies, as confirmed in Hampton's and NBCN's credit policies." Also, when Ms. Lasrado sent her analysis to Hampton prior to issuing the 2010 FinOps Report, Hampton's CFO pointed out certain errors (which were corrected), but he never objected to the free-riding analysis being done on a settlement date basis.

¶ 180 The Panel's decision is that it is appropriate to analyze possible free-riding activity in a margin account on a settlement date basis rather than a trade date basis. The Panel agrees with IIROC reasoning on this issue and disagrees with the Respondent's reasoning. In addition to the reasons cited by IIROC, it is important to remember that the activity which is characterized as free-riding, involves the failure by the purchaser of the securities (in this case the Respondent) to pay for its purchases and such actions cannot be considered free-riding until settlement date when the purchaser becomes obligated to pay for the securities purchased. The carrying broker may do its margin analysis on a more conservative, i.e. trade date, basis for the purposes of analyzing its RAC exposure and, as expressed by Mr. Boyce, "so that it can know how much margin is going to be required by the settlement date." However, the purchaser is not obliged to pay before settlement date and therefore free-riding cannot occur before settlement date, however the carrying broker may deal with it on its books. The carrying broker may be lax in its supervision of payment by the settlement date and not diligently enforce such payment; or it may realize payment has not been made by the settlement date and allow that to happen for a number of reasons including the payment history and/or creditworthiness of the purchaser. In both of these cases, free-riding can occur even though the carrying broker may allow it to happen. It is not such actions of the carrying broker which determine whether free-riding has occurred. It is the simple failure by the purchaser of the securities to pay for them by the settlement date, accompanied by the absence of intention to pay for them. The existence of free-riding is a factual matter, not a legal conclusion and it is the actions or failure to act of the purchaser of the securities, measured at the settlement date which determines whether it has occurred.

¶ 181 The other preliminary matter which must be addressed involves the wording of Count 3 and whether it can apply to margin accounts. This was raised for the first time in closing verbal argument by the Respondent's counsel. He stated that, since Count 3 provided that "securities were purchased without sufficient cash", this meant that Count 3 only referred to cash accounts. While Count 3 could have been worded more appropriately, this issue was not raised until the last moment and was not set out in the Response to the NOH or in closing written argument by the Respondent, it was not argued by the parties and testimony from both parties proceeded on the basis that Count 3 included both cash and margin accounts. Therefore it is the Panel's conclusion that Count 3 is sufficiently worded to refer to both cash and margin accounts.

¶ 182 Turning then to the question of whether free-riding, as alleged, occurred in this case. Ms Lasrado, on behalf of IIROC, examined the Respondent's personal accounts and other accounts in a cross-guaranteed relationship and identified five instances of free-riding in the Oaktown account, an account controlled by the Respondent.

¶ 183 <u>December 2- December 9, 2009</u>

- Ms Lasrado testified that purchases on December 2 created a margin deficiency which was increased or decreased by trades on December 3, 4 and 7. No payment was made for these trades and the deficiency was not eliminated until December 9 when the purchased shares were sold to eliminate the deficiency.

- Mr. Boyce testified that the group of accounts was fully margined during this period on a trade date basis, and that the Respondent was not required to put cash into the account because the transactions were settled through the sale of covered call options. Mr. Boyce testified that he could not reconcile his calculations with those of Ms Lasrado. He agreed that these trades created a trade date cash balance deficit and that no payment other than the writing of covered calls occurred; however Mr. Boyce testified that during this time period there was sufficient margin in the account.

- It is the Panel's decision that Ms Lasrado's testimony was not impugned on cross-examination. However, Mr. Boyce for the Respondent came to the opposite conclusion regarding the existence of margin deficiencies, apparently based on the same financial records. This difference of opinion cannot be explained by the use of trade date versus settlement date. However, since the Panel has concluded that settlement date is preferable, we must conclude that Ms Lasrado's analysis is correct, i.e. that there was insufficient cash plus marginable securities in the group of accounts to pay for the securities purchased in this time frame and no attempt was made to properly settle the accounts. Therefore the transactions described in this section constitute free-riding as alleged.

¶ 184 <u>January 29- March 11, 2011</u>

- Ms Lasrado testified that 5000 shares of LVS were purchased on January 26 to settle on January 29, 2010 bringing the margin deficiency in the Oaktown account to $17,149. This deficiency continued until March 10-11 when 7000 shares of LVS were sold, clearing the deficiency. No payment was made for the shares purchased and the securities were sold to eliminate the margin requirement.

- Mr. Boyce testified that the January 26 purchase and a sale of call options on January 27 resulted in a margin deficiency of $3231.09. There was no evidence of the margin deficiency on January 29, but on February 2 through a sale of covered calls and other transactions, there was a margin excess of $12,905.27. Mr. Boyce also testified that he saw no breaches of the Margin Account Settlement Rules (MASR) or other rules flowing from these transactions. Mr. Boyce's evidence was challenged on cross-examination by IIROC counsel pointing to a number of cash withdrawals on dates when the accounts were in margin deficit and which were not in Mr. Boyce's analysis.

- The Panel again prefers the testimony of Ms Lasrado on the same basis as explained in Paragraph 183. Therefore the transactions described in this paragraph constitute free-riding as alleged.

¶ 185 <u>May10- May 12, 2012</u>

- Ms Lasrado testified that on May 10 a series of transactions including a $6775 cash withdrawal resulted in a margin deficiency of $1,043.85 across the group of accounts. Transactions on May 11 increased the deficit to $17,934.71. On May 12, purchases and sales of LVS eliminated the deficit. Payment was not made for the trades between May 11 and 12 and the securities were sold to eliminate the margin requirement.

- Mr. Boyce confirmed that margin deficiencies occurred in the accounts. In cross-examination he also conceded that cash withdrawals were made which were not shown on his calculations and no cash was brought into the accounts. On May 6, there was $27 excess margin, comprised only of cash and no securities, but purchases of $276,991.20 and sales of $216,019.34, resulting in a margin deficiency of $15,487.19. The same deficiency existed the next day when sales of $230,315.70 and purchases of $162,800 occurred. Mr. Boyce justified these transactions while the accounts had a margin deficit on the basis of the creditworthiness of the client, but admitted that there was nothing in the Margin Account Settlement Rules about the client's creditworthiness. He also stated that such occurrences were fairly common in margin accounts.

- It is the Panel's decision that these transactions constitute free-riding as alleged. Ms Lasrado's testimony was not impugned and Mr. Boyce's testimony resulted in the same conclusion; his justification on the basis of creditworthiness is not in the rules and is not accepted by the Panel on the issue of free-riding. The creditworthiness of the client and trading practices in margin accounts are relevant when we

examine whether the free-riding activity was a contravention of Rule 29.1, but it does not change the Panel's conclusion that, as a matter of fact, free-riding occurred.

¶ 186 May 19-21, 2010

- Ms Lasrado's evidence was that on May 19, the Respondent wrote 25 calls on LVS (for settlement on May 20) with no long position in the account, creating a margin deficiency of $2354.27. No payment was made for the trade and the calls were bought back on May 21 to eliminate the margin requirement. In addition, $17,000 was taken out of the Oaktown Canadian account on May 21 to create a margin deficiency of $13,773.22.
- Mr. Boyce testified that on May 19 the Respondent purchased 10,000 LVS and sold 7500 LVS (for settlement on May 24), thus creating a long position of 2500 shares when the May 19 calls were written, so that on a trade date basis, the account had a margin excess of $4425.78. He stated that the transaction did not breach any of the margin or other rules and was within the normal bounds of margin trading.
- Again, the Panel prefers the settlement date analysis of Ms Lasrado and concludes that the transactions on these dates constitute free-riding as alleged.

¶ 187 May 24, 2010

- Ms Lasrado testified that on May 24, there was a margin deficiency of $13,773 in the group of accounts. The Respondent sold 10,000 LVS and bought 7500 LVS on May 24. 25 calls were written on the net 2500 LVS shares, the effect of which was to keep a margin deficiency of $12.003.98 in the accounts. The deficiency was eliminated the same day by selling the 7500 shares.
- Mr. Boyce's testimony did not contradict that of Ms Lasrado regarding the transactions on May 24. Therefore it is the Panel's decision that the transactions on May 24 constituted free-riding as alleged.

¶ 188 The foregoing transactional activity was referenced in the 2010 FinOps Report. A draft version had been discussed with the Hampton CFO who required some corrections, which were made. However he did not take further issue with Ms Lasrado's calculations. In addition, the Respondent, on behalf of Hampton, provided a response to the 2010 Report which stated:

> "We will implement procedures to detect and stop customers, employees and officers from engaging in trades that would raise such concerns in the future…"

It is the Panel's decision that the absence of objection by the CFO to Ms Lasrado's analysis and the Hampton response confirm the existence of free-riding in the group of margin accounts as alleged. The response from the Respondent on behalf of Hampton, while not admitting any wrong-doing, also confirms that free-riding is a legitimate regulatory concern.

Rule 29.1 Conduct Unbecoming

¶ 189 Having decided that the Respondent engaged in free-riding in his TFSA, RRSP and margin accounts as alleged in Count 3, the Panel must still determine whether such conduct constituted a breach of Rule 29.1. It is common ground between the parties that there is no specific rule prohibiting free-riding and IIROC counsel was clear that IIROC was alleging only that the free-riding activities of the Respondent constituted a breach of Rule 29.1. While it is unnecessary in this case to determine whether failure by the Respondent to comply with the CASR and MASR in the "Q" is "illegal", it is the Panel's opinion that such failure would not be "illegal". The "Q" is structured as a Dealer Member reporting requirement which includes how Dealer Members must ensure payment for securities purchased in cash and margin accounts respectively, and how they must deal with and report failure by the investor to comply. But the "Q" only sets standards by which the industry can measure and report whether free-riding has occurred; it is not a prohibition of that activity by the investor. Furthermore if the "Q" did not exist, the same activity by the investor could be free-riding according to the industry and case law definitions of that term.

¶ 190 IIROC's position was that not every breach of the CASR or MASR will result in a breach of Rule 29.1,

but "where there is a pattern of failures to settle transactions, this activity should be viewed as conduct unbecoming and a breach of Dealer Member Rule 29.1." In this case the Respondent was able to conduct numerous transactions without bringing funds into the account; he was trading on the firm's capital, not his own.

¶ 191 The Respondent's position was that his conduct fell short of the types of conduct found to be "conduct unbecoming" in various cases cited to the Panel; the Respondent's trading did not breach any regulatory rule, it was not deliberate, egregious or repetitive and never placed the firm's capital at risk and therefore should not be considered "conduct unbecoming".

¶ 192 As with Count 1, the Panel reviewed a number of cases dealing with Rule 29.1 in order to determine what types of activity have been found to be "conduct unbecoming", including the cases referred to in paragraphs 91 – 98. As stated in paragraph 99, the characterization of the types of activity found to be "conduct unbecoming" include "bad faith", "dishonest intent", "improper purpose", "unethical", "quasi-criminal", and "conduct likely to impair the public's trust in the industry". The Respondent's counsel also referred the Panel to the case of Re Ryckman 1996 CarswellAlta 111, 10C.C.L.S.49, 5 A.S.C.S.223 where the Alberta Securities Commission found that the respondent engaged in a number of market manipulation techniques including wash trading, uptick and downtick trading and free-riding/debt kiting. These activities were characterized as "deliberate, deceptive and exposed other legitimate market participants to increased risk" and stated that "this conduct was designed to deceive investors to trade at artificial prices." In Northern Securities, the panel found that the respondent "improperly obtained access to credit for his client…and in so doing risked the capital of both [the introducing broker] and the carrying broker, thereby engaging in conduct unbecoming…contrary to Dealer Member Rule 29.1." The term "free-riding was not used in the formal allegation, but was used during the case to describe the actions of the respondent, and such actions would fall within the use of the term in this case. In concluding that the free-riding actions of the Respondent amounted to a breach of Rule 29.1, the panel decided that the respondent gained access to credit for his client (a company owned and controlled by him) which it would not otherwise have obtained, and did so in an improper manner in that

- he executed trades for a client which he knew was not creditworthy;
- he was in a conflict of interest by favouring the profit seeking of a client which he owned over protecting the capital of both the introducing broker (which he controlled) and the carrying broker;
- he used the firms inventory account in a manner in which it was not intended to be used;
- he knew that the carrying broker did not realize that it was required to put up regulatory capital for trades in the inventory account;
- he mislead the carrying broker regarding the lack of creditworthiness of the client; and
- he enabled the transfer of client money directly into pro accounts.

¶ 193 In reviewing the Respondent's conduct against the standards set in Rule 29.1 as interpreted by the cases, the following factors tend to establish that the Respondent's conduct was "unbecoming" and therefore a breach of Rule 29.1:

- The trading was intentional, not inadvertent or negligent;
- The trading extended over a relatively long period of time rather than being an isolated event;
- The trading constituted free-riding as a factual matter which is, and should be discouraged by the industry because it can expose the capital of the introducing broker and carrying broker to undue risk. This is confirmed by Hampton's and NBCN's credit policies and by Hampton's letters in response to the IIROC FinOps Reports.
- The Respondent was the UDP at Hampton and as such had an obligation to set a high standard of propriety in his own trading as an example for the firm.

¶ 194 On the other hand, the following factors tend to establish that the Respondent's conduct was not a breach of Rule 29.1:

- In most individual instances, the free-riding lasted for a short period of time which limited the exposure of NBCN's and Hampton's credit to risk;
- At the time of the impugned trades, NBCN's credit department reviewed and pre-approved all of the Respondent's trades. Throughout the years NBCN had never refused to approve any of the Respondent's trades. Between December 2009 and May 2010, he withdrew funds from his U.S. margin account on numerous occasions without any objection from NBCN. The Panel agrees with the Respondent, that such withdrawals would not have been allowed by NBCN if the accounts were undermargined or if NBCN otherwise felt they were at risk. In effect, the Respondent's trading was done with the consent of the carrying broker. This is to be contrasted with the situation in the Northern Securities case where the carrying broker was unaware that its capital was at risk regarding trading in the inventory account, partly through the deceptive actions of the respondent in that case, and consistently required payments from the respondent in other accounts where they knew their capital was at risk. The reason free-riding is to be avoided, is that it can expose the brokers to capital risk. Here, the brokers were aware of the Respondent's trading and consented to it because they did not feel their capital was at risk. Consequently, the Respondent also concluded that his trading did not problematical.
- When requested to do so, the Respondent deposited $500,000 into a contra account at NBCN as additional security for the Respondent's trading in his accounts. NBCN could freely access the funds in this contra account. The Respondent mentioned this deposit briefly in his testimony, but it was otherwise ignored during the conduct of the case until late in oral argument when it was again mentioned by the Respondent's counsel. It was not mentioned in the Response to the NOH nor in the Respondent's closing written argument. It formed no part of the analysis of the witnesses for either party. IIROC counsel stated that neither he nor the IIROC witnesses were aware of the $500,000 until it was raised in closing oral argument. It became clear to the Panel during closing arguments that the $500,000 deposit had little or no effect on whether free-riding occurred. However, the Panel found that payment of the $500,000 by the Respondent when requested to do so by the carrying broker is not the type of activity described in the cases as "conduct unbecoming and therefore is a significant factor weighing against a finding of a breach of Rule 29.1.

¶ 195 IIROC counsel stated that the Panel must use its experience to determine whether the free-riding activities of the Respondent were sufficiently egregious to constitute a breach of Rule 29.1. The Panel has done so and has concluded that free-riding as alleged in Count 3 was not a breach of Rule 29.1, based on the following factors. First is the creditworthiness of the Respondent. There was evidence of his ability and willingness to pay to secure the purchases he made, including the $500,000 deposit, and no evidence from IIROC to the contrary. This is in contrast to the situation in Northern Securities. Second, most of the instances of free-riding lasted for a very short period of time, often less than a day. The less time that an account is unpaid, the less the brokers' capital is at risk. Again this is in contrast to the situation in the Northern Securities case. The essential problem with free-riding is that it can expose the capital of the carrying broker, and in turn the introducing broker, to risk of loss if the investor fails to pay for the securities purchased. While the actions of the Respondent were free-riding from a factual standpoint, not all instances of free-riding are a breach of Rule 29.1. In this case, the exposure of the brokers' capital to risk was minimal and the actions of the Respondent did not reach the egregious level required by Rule 29.1 as interpreted by the cases. Third, the trading activity of the Respondent was known to Hampton and NBCN, was reviewed by them and was approved by them except in a few instances when the trades were cancelled for reasons unrelated to this Count, or the Respondent paid additional funds when requested. The Respondent's trading was therefore with the consent of the brokers and lacked the deception, manipulation, bad faith, dishonest intent, improper purpose, unethical quality, quasi-criminality, or conduct likely to impair the public's trust in the industry, the standards variously used in Northern Securities, Ryckman and the other cases referred to above.

¶ 196 The Panel wishes to conclude its analysis of Count 3 with a message that the decision that the free-riding in this particular case was not prohibited as alleged, is not to be read so as to condone the practice of free-riding. In the absence of a specific rule prohibiting all free-riding, whether it falls within Rule 29.1 will be a matter of the nature and extent of the practice. However as a general matter, the Panel feels that free-riding ought to be avoided because of its potential risk to the capital of the brokers involved and to the integrity of the capital markets.

4. Count 4

IIROCAllegations

¶ 197 Dealer Members and their officers and directors have an obligation to make books and records available to regulatory Staff upon request.

¶ 198 Despite a request from FinOps Staff, in July 2011, the Respondent failed to provide access to certain books and records.

¶ 199 In or about July 2011, FinOps Staff advised the Respondent that in connection with its annual examination of Hampton's May 2011 Monthly Financial Report, it wished to follow up on the prior year's examination results regarding free riding in the client accounts controlled by the Respondent.

¶ 200 Accordingly, FinOps Staff requested copies of the client statements of the accounts of and the accounts controlled by the Respondent for April, May and June 2011.

¶ 201 Despite this request, the Respondent has failed to allow access to the requested books and records.

Response

¶ 202 The Respondent took the following position regarding IIROC's allegations:

- The obligation to make books and records available to IIROC staff is not absolute. The request must be relevant and must be made (a) in good faith and (b) not in a manner which is unfair or which otherwise breaches or can reasonably be perceived as breaching the general duties of procedural fairness and natural justice.
- A request made during an investigation to examine records, which on the face of it only relates to an activity which IIROC alleges violates the Rules, but where the activity is clearly not prohibited by the Rules such as free-riding, is not relevant to the investigation. The same request by IIROC which also relates to matters which have already been referred to Enforcement breaches procedural fairness and natural justice.
- At the time FinOps Staff made the request to examine the books and records of the Respondent in respect of alleged "free riding" violations on July 13, 2011, they also admitted that the alleged "free riding" violations had already been referred to Enforcement.

¶ 203 Although in general, IIROC is the determinant of what is relevant for the purposes of an investigation, the power to compel disclosure is not absolute and a request must be relevant for the purposes of what IIROC is empowered to investigate. Just as a request for a member's history of provincial driving offences is not relevant to an IIROC investigation, the requests made by IIROC as set out in the NOH to produce documents in respect of an offence which does not exist on its face cannot be relevant. Additionally, the request was made in the absence of IIROC providing any factual parameters of what was alleged to be an offence (especially in light of the fact that IIROC admit there was a disagreement between the examiner and [the Respondent] as to what constituted "free riding"), and that also makes the request not only irrelevant but abusive since the requests failed to contain sufficient specificity of an alleged offence.

¶ 204 In an August 23, 2011 email from FinOps Staff, the following statement is made:

> "Peter was determined to be free riding based on last year's examination"…

¶ 205 A response by counsel dated August 29, 2011 stated:

"If (emphasis added) you mean by the phrase "free riding" as purchasing securities without the ability or intention to pay for them, then Mr. Deeb has not been "free riding". An allegation has been made against Mr. Deeb in a draft Notice of Hearing, which has been circulated. However, that allegation is false and [the Respondent] will be contesting it should the matter be pursued by IIROC."

¶ 206 FinOps Staff cannot and do not allege that their investigation was delayed, impeded or otherwise prejudiced by the refusal, which was based on advice from the Respondent's counsel, because the investigation had already progressed to the point where IIROC believed they had gathered sufficient facts and had referred the "free riding" matter to Enforcement. As the "free riding" matter had already been referred to Enforcement, the objection to produce was a result of a reasonable apprehension that FinOps Staff was seeking or appear to have been seeking further specifics for the purpose of "perfecting", "curing" or "widening" the factual allegations which were the subject matter of the reference to Enforcement under the guise of a legitimate continuing investigation. Such a request in that context is offensive by virtue of the fact that, among other things, forcing someone to continually provide materials to be used as evidence against him or her means that the nature of the allegations made could constantly change up to and (without limits being set as to when a response does not have to be complied with), even during the Hearing itself. Without some clear limitations on when the requirement to produce documents can be utilized (which is not after a matter is referred to Enforcement), a member alleged to have violated a rule could never at any moment know the facts of the case he or she has to respond to.

¶ 207 FinOps Staff chose not to respond to the refusal. Had they responded by stating in writing that the further requests for "free riding" documents were completely unrelated to the matters already referred to Enforcement and that FinOps Staff was not making the inquiries with a view to locating and providing additional materials to Enforcement, procedural fairness and natural justice may not have been breached.

Analysis of Count 4

¶ 208 The evidence established that the Respondent was, at all times, willing to supply the requested material, but did not do so on advice from his counsel at that time who advised that the records should only be considered in the context of the enforcement investigation . The Respondent's counsel argued that the Respondent did not refuse to comply, but as communicated to IIROC through his counsel, simply said that the request would be dealt with in the context of the enforcement proceedings. The refusal came on counsel's advice and was communicated by the counsel. There was no evidence that the issue was dealt with during the enforcement proceedings. The requested books and records were provided to IIROC in October 2012 when the Respondent retained new counsel.

¶ 209 Despite the fact that the records were ultimately provided and the fact that the Respondent personally was willing to provide the records, it is the Panel's decision that, in response to the IIROC request in 2011, the reply by counsel on behalf of the Respondent, was a refusal to comply with the request. The only issue is whether the reliance on counsel's advice excuses the refusal or only mitigates the penalty for the refusal.

¶ 210 It is the Panel's decision that Rule 19.6 is clear in its requirement to provide requested records to IIROC and agrees with IIROC's position that reliance on legal advice does not per se excuse a refusal to comply but only goes to mitigate the sanction, citing Re Bassett [2005] I.D.A.C.D. No. 26. No other cases were cited to the Panel during the hearing on the merits. However, during the penalty phase, Respondent's counsel referred to the case of Re Bahcheli, 2007 CarswellNat 6513. This case and the cases which were referred to by the panel in that case make it clear that the obligation to comply with IIROC requests under Rule 19.6 and 19.5 are not absolute. In Bahcheli, the Respondent failed to provide certain documents in a timely manner, in response to an IDA request, relying on legal advice that the documents were subject to third party privacy rights and solicitor/client privilege. The documents were not under Bahcheli's control and he made significant efforts to obtain them. The Bahcheli panel ordered that "in the circumstances of the unaddressed privacy and privilege issues and the Respondent's efforts to satisfy the association's demands…" the allegations against Bahcheli were dismissed.

¶ 211 Issues of procedural fairness and natural justice raised in the Response to the NOH were not argued during the case, but cases referred to in the Bahcheli case (e.g. Re Credifinance Securities Limited [2006]

I.D.A.C.D No. 30, 2006 CarswellNat 5800) support the proposition that "not only must the investigation be instituted reasonably and in good faith but it must also be conducted reasonably." In this case it was not argued that the request by IIROC was unreasonable, no issues of privacy or solicitor /client privilege were raised and the documentation was under the Respondent's control. Therefore, it is the Panel's decision that the Respondent failed to comply with Rule 19.6 as alleged.

¶ 212 The Panel recognizes that this decision may appear to be harsh on the Respondent who only refused to comply because of counsel's advice and also will put a significant onus on all registrants to ignore counsel's advice to refuse requests by IIROC under Rule 19.6. However to excuse a refusal to respond to IIROC requests under Rule 19.6 because counsel advised the registrant to do so, where the request is reasonable and there are no countervailing issues such as privacy or solicitor/client privilege, is clearly not contemplated by the wording of Rule 19.6 or the case law and would open a Pandora's box of such refusal's and severely limit IROC's ability to carry out its regulatory mandate.

5 Decision on the Merits

¶ 213 At the end of the hearing on the merits, the Panel raised the issue of whether it should issue a basic decision without reasons before proceeding to the penalty phase, if required, or whether it should not proceed with the penalty phase, if required, until after full reasons were issued. Counsel decided that the Panel should issue a basic decision without reasons and counsel would then decide how they wished to proceed. Accordingly, the Panel issued its decision dated November 13, 2012, which provided as follows:

¶ 214 **The Panel has decided that IIROC has been unsuccessful in establishing the allegations in Counts 1 and 3, and therefore dismisses these Counts against the Respondent.**

¶ 215 Count 1 alleged that on or about October 28 and 29, 2009, the Respondent commingled client and pro orders, allocated trades after the close of business when the price of securities was known and, in so doing: (a) profited at the expense of his clients and (b) failed to ensure client priority, thereby engaging in conduct unbecoming, contrary to IIROC Dealer Member Rule 29.1

¶ 216 Count 3 alleged that between February 1, 2009 and April 30, 2009 and again between December 2009 and May 2010, the Respondent engaged in the business practice commonly known as "free-riding" in that securities were purchased without sufficient cash in the relevant accounts and no attempt was made to properly settle the securities transactions, and thereby engaged in conduct unbecoming, contrary to IIROC Dealer Member Rule 29.1.

¶ 217 **The Panel has decided that IIROC has been successful in establishing the allegations in Counts 2 and 4, and therefore that the Respondent has engaged in the following conduct:**

¶ 218 Count 2: From about November 12, 2008 to December 11,2009 the Respondent failed to keep and maintain at all times a proper set of books and records, contrary to IIROC Dealer Member Rule 17.2, Dealer Member Rule 200 and National Instrument 31-301 which thereby permitted the Respondent to engage in the type of conduct described in Count 1.

¶ 219 Count 4: In or about July 2011 the Respondent refused to provide access to certain books and records maintained by Hampton Securities Limited despite a request by IIROC FinOps Staff and thereby violated IIROC Dealer Member Rule 19.6.

6 Penalty and Costs

¶ 220 After the decision on the merits was issued, counsel decided that they could proceed with the penalty phase prior to the issuance of full reasons. The penalty phase was heard on December 13, 2012 regarding Counts 2 and 4.

¶ 221 By-law 20.33 provides that, if the Hearing Panel concludes that the Respondent did commit any or all of the contraventions alleged in the NOH, it may impose any one or more of the following penalties:

(a) a reprimand;

(b) a fine not exceeding the greater of:

(i) $1,000,000 per contravention; and

(ii) an amount equal to three times the profit made or loss avoided by such Approved Person by reason of the contravention.

(c) suspension of approval for any period of time and upon any conditions or terms;

(d) terms and conditions of continued approval;

(e) prohibition of approval in any capacity for any period of time;

(f) termination of the rights and privileges of approval;

(g) revocation of approval;

(h) a permanent bar from approval with the Association; or

(i) any other fit remedy or penalty.

In addition, if the Panel concludes that the Respondent did commit any or all of the contraventions alleged in the NOH, the Panel may pursuant to By-law 20.49 assess and order any investigation and prosecution costs determined to be appropriate and reasonable in the circumstances.

¶ 222 IIROC proposed the following penalties

1. A fine of $50,000 regarding Count 2;
2. A fine of $25,000 regarding Count 4;
3. A requirement that the Respondent provide, within 30 days from the date of the penalty decision, evidence that the books and records violations have been remedied on a going forward basis; and
4. A requirement that the Respondent re-write the Partners, Directors and Officers examination within 6 months from the date of the penalty decision.

¶ 223 The Respondent's position was that the appropriate penalty was, at most, a reprimand.

¶ 224 IIROC stated several general principles which the Panel should follow in determining the appropriate sanctions in this case.

- Sanctions in a securities regulatory context should be preventative, protective and prospective in nature. They are intended to prevent likely future harm to the capital markets, citing Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission), [2009] 2 S.C.R. 132.
- General deterrence is an appropriate consideration in making orders that are both protective and preventative, citing Re Cartaway Resources Corp. [2004] 1 S.C.R. 672.
- For a penalty to strike an appropriate general deterrence effect, it must be in line with industry expectations, citing the Dealer Member Disciplinary Guidelines (the Guidelines) which cited Re Mills, [2001] I.D.A.C.D. No. 7.
- The Panel should take the following broad considerations into account: protection of the public, IIROC's membership, the integrity of IIROC's process and of the integrity of the securities markets, and prevention of a repetition of the type of conduct under consideration.
- The Guidelines provide assistance by setting out general principles and key considerations that a hearing panel should consider. However they are not binding on the Panel.

The Panel agrees with these principles, the only issue being how they apply in this particular case.

7. Count 2

¶ 225 IIROC counsel pointed to the following key considerations as well as several cases for the Panel's guidance in coming to its decision on sanctions.

Harm to the client, Dealer Member and securities market:

¶ 226 IIROC acknowledged that the Dealer Member was not affected, but stated there was potential harm to the clients and the failure in record keeping directly affected IIROC's ability to ensure that a proper audit trail of client orders had been maintained, thus harming the integrity of the securities market.

¶ 227 Although Count 2 alleges that the failed record keeping occurred between November 12, 2008 and December 11, 2009, the only substantial evidence focused on the transactions of October 28-29, 2009, and specifically the failure by the Respondent to keep the notes of his conversations with clients on October 28th and of his conversation with Mr. Kelterborn on the morning of October 29th. It is common ground that the type of trading occurring on October 28-29, 2009 comprised only 2% of the Respondent's trading activity. The allegation of potential client harm is speculative; there is no evidence of actual client harm and the only evidence supports the conclusion that his clients were happy with the Respondents trading. Regarding harm to the integrity of the market, the Respondent's uncontroverted testimony was that his discussions with his clients on October 28, 2009, were reflected on the trade tickets at the end of the day; there is no evidence that the Respondent's testimony about the Kelterborn conversation is inaccurate and there is no specific requirement that such a conversation had to be documented, although that might have been advisable. The alleged record keeping failures shown on Appendix A to the NOH were adequately explained by the Respondent and Mr. Boyce.

¶ 228 It is the Panel's decision that the record keeping failure of the Respondent was an isolated event and there is no evidence that it had any adverse affect on the clients, the Dealer Member or the integrity of the securities market.

Blameworthiness and Degree of Participation:

¶ 229 IIROC alleged that the Respondent was solely responsible for the record keeping violations, that they were intentional and were not isolated; as the CEO and UDP of his firm and a senior, experienced member of the industry, he should demonstrate exemplary conduct.

¶ 230 It is the Panel's decision that the Respondent was solely responsible for the record keeping failure and that it was intentional, not inadvertent. However it is the Panel's conclusion that the record keeping failure was not manipulative, fraudulent or deceptive and was isolated. The failure was in the nature of sloppiness and, given his position in his firm and in the industry, the Respondent should have been more careful.

Enrichment

¶ 231 As acknowledged by IIROC, the Respondent was not enriched by his actions.

Prior disciplinary Record:

¶ 232 As acknowledged by IIROC, the Respondent does not have a prior disciplinary record.

Multiple Incidents over Extended Time Period:

¶ 233 IIROC alleged that Count 2 covered the period from November 12, 2008 to December 11, 2009 and appears to represent 2% of Hampton's overall business.

¶ 234 It is the Panel's decision that the only substantial evidence of failed record keeping was the Respondent's failure to keep his notes of client conversations on October 28, 2009 or to make a record of his October 29, 2009 conversation with Mr. Kelterborn. The record keeping failure is isolated and not systemic or over an extended period of time.

Nature of Inaccurate or Missing Information:

¶ 235 IIROC alleged that clear evidence of client instructions was missing; there was no evidence of when the order was received or that clients specifically agreed to the commingling of client and pro accounts. The only

record of the client order was the end of day allocation to the client accounts.

¶ 236 As stated above, it is the Panel's decision that, while it would have been better practice to keep his notes of the client conversations, there is no evidence that his failure to do so resulted in inaccurate information regarding the trades. The Respondent's testimony and the absence of any client complaints confirm that the clients agreed to the commingling of client and pro accounts and that the allocations at the end of the day were accurate.

Materiality of the Inaccurate or Missing Information:

¶ 237 IIROC alleged that the missing information is a significant audit trail deficiency.

¶ 238 As already stated, it would have been preferable to keep the notes of the client conversations and to make and keep notes of the conversation with Mr. Kelterborn. However, there is no specific requirement that the Respondent do so and the evidence was that the Kelterborn conversation took place and that the trade tickets later in the day accurately reflect client instructions. The absence of the notes were of no real significance since IIROC could easily confirm the accuracy of the information simply by asking Mr. Kelterborn and the clients to confirm the information, which IIROC apparently chose not to do.

Loss to the Client or Dealer Member:

¶ 239 As acknowledged by IIROC, there was no loss to clients or the Dealer Member.

Intentional Disregard for Requirements, or Carelessness/ Inadvertence:

¶ 240 IIROC alleged that the manner of record keeping was intentional rather than inadvertent, but acknowledged that there was no evidence that the Respondent specifically chose to ignore IIROC requirements.

¶ 241 While the manner of record keeping was intentional, not inadvertent, it is the Panel's decision that it was not manipulative, fraudulent or deceptive.

UMIR Guideline 10.11:

¶ 242 IIROC's position was that, because of the record keeping failures, IIROC investigators were unable to determine whether clients had been adversely affected without making assumptions as to the timing of receipt of client instructions.

¶ 243 The Panel does not agree with the stated IIROC position. IIROC could easily have interviewed all the clients, which it chose not to do. IIROC also ignored 2 client letters which supported the Respondent's trading activity on October 28-29, 2009.

Cases

¶ 244 IIROC counsel cited several cases for the Panel's consideration but admitted that they were "not overly helpful for the hearing panel because the nature of the misconduct is quite dissimilar to the present situation." These cases had no effect on the Panel's decision.

¶ 245 IIROC counsel also referred the Panel to the case of Re National Bank Financial Corp., Paul Clarke and Todd O'Reilly [2011] IIROC 1, in which the respondents failed to record client account numbers or identifiers upon receipt of client orders and delayed timely allocation of trades to client accounts, which resulted in the ability to effect improper post-execution allocation of trades and grant preferential treatment to certain clients, and also caused contraventions of UMIR 10.11(1) by failing on receipt or origination of certain orders to record specific information relating to the orders. The audit trail deficiencies included numerous and repeated instances of:

1. Failing to immediately record the client account number or client identifier;
2. Time-stamped empty trade tickets;
3. Trade tickets with no identification of the order price and/or quantity;
4. Trade tickets that did not include the date or time the order was varied and did not have price

changes;

5. Trade tickets where a client identifier was later replaced by another client identifier which received the purchased shares; and
6. Information added or changed on trade tickets at a later time from the information on the original ticket.

These audit trail deficiencies stand in sharp contrast to our case in number, frequency and intended purpose. In National Bank, the panel also found a breach of the requirement to conduct business openly and fairly and in accordance with just and equitable principles of trade. This is also in sharp contrast to our case where the primary allegations in Counts 1 and 3 were dismissed. The Panel did not find that the National Bank case was particularly instructive in coming to its decision on the appropriate penalty.

Decision re Count 2 Penalty

¶ 246 It is the Panel's decision that the only evidence of record keeping failures by the Respondent is his failure to keep his notes of client instructions and to make and keep his notes of his conversation with Mr. Kelterborn. These failures were isolated, not systemic, were not fraudulent, deceptive or manipulative; the Respondent's testimony and the absence of client complaints confirm that the later trade ticket information accurately reflects what would have been in the client notes and in any notes which would have been made of the Kelterborn conversation; and the IIROC investigation was not impaired by the absence of the notes because they could easily have completed their investigation by interviewing the clients and Mr. Kelterborn. This Panel fully recognizes the importance of complete and accurate record keeping to the ability of IIROC to carry out its regulatory function, but it is this Panel's conclusion that the record keeping failures in this case were at the very low end of the scale in terms of egregious conduct. On the other hand, the Respondent was the CEO and UDP of his firm, and as such needs to be especially scrupulous in his personal trading so as to set a good example for those in his firm. The Panel is also mindful of the importance of general deterrence in determining an appropriate sanction.

¶ 247 Consequently the Panel's decision as to the appropriate penalty for Count 2 is:

- A simple reprimand as suggested by Respondent's counsel would not be sufficient, given the Respondent's senior positions at his firm and the need for general deterrence, and in any event this decision will act as a reprimand without the need for a formal reprimand;
- A fine in the amount of $10,000 is appropriate, given the fact that the record keeping deficiencies were relatively minor as outlined above;
- Since the record keeping violations were isolated and not ongoing or systemic, there is no requirement that the Respondent provide any evidence that they have been remedied;
- Since the Respondent is a senior, experienced member of the industry and the record keeping violations were isolated, not systemic and were relatively minor, there is no need for the Respondent to rewrite the Partners, Directors and Officers examination.

Count 4

¶ 248 The panel acknowledges, as stated by IIROC in its submissions, that it is fundamental to the operation of IIROC's regulatory regime, that the subject of an investigation or compliance examination provide full cooperation in producing requested documentation. Several cases cited by IIROC confirm that a refusal or failure to comply with a request for information is a serious matter and merits substantial sanctions. See for example, Re Derivative Services Inc. [2000] I.D.A.C.D. No. 26, Re Union Securities Ltd. [2005] I.D.A.C.D. No. 51, and Re Morrison [2009] LNIIROC 4. This is not disputed by the Respondent. However both parties agree that the Respondent was always willing to provide the requested documents, only refused to do so on the advice of his former counsel because of the ongoing enforcement investigation, and ultimately provided the documents when he appointed new counsel. The Respondent's counsel contrasts the Respondent's behavior with the outright refusals in the cases cited by IIROC.

¶ 249 Having decided that reliance on legal advice in the circumstances of this case does not excuse the refusal but only goes to the issue of mitigation of the sanction, the only real issue is the extent to which reliance on counsel's advice should be a mitigating factor in determining the appropriate sanction for a refusal to cooperate under Rule 19.6. IIROC has requested a fine of $25,000 and Respondent's counsel suggests that there should be no fine in the circumstances. As in the Bahcheli case, it is easy for the Panel to sympathize with the difficult position that the Respondent was in. However the Panel feels that the issue of general deterrence is important and that all registrants must appreciate their obligation to comply with IIROC request under Rules 19.6 and 19.5. Therefore this Panel has decided that a fine of $10,000 is merited.

Costs

¶ 250 Pursuant to Dealer Member Rule 20.49, IIROC requested costs in the amount of $15,000, reflecting their partial success. This would allow IIROC to recover a small portion of the costs attributable to conducting the investigation and hearing so that these costs do not have to be borne by IIROC or subsidized by other Dealer Members or Approved Persons. The Respondent argued that no costs should be awarded to IIROC, given the Respondent's relative success in this case, and his own substantial costs already incurred in defending the allegations against him.

¶ 251 The Respondent raised certain "fairness" arguments based upon the nature of the cost system in IROC disciplinary matters. The cost regime is not a "loser pays" system as is generally the case in civil law suits. In criminal matters, no costs are awarded to a successful Crown or defendant. Both regimes thus achieve a level of fairness. However in IIROC disciplinary proceedings, IIROC may seek costs when it is successful, but there is no explicit provision for a successful respondent to be awarded costs, and therefore this is an inherently unfair system. The Respondent did not seek costs in this matter, but to achieve a level of fairness, given the Respondent's relative success, suggested that no costs should be awarded to IIROC.

¶ 252 This Panel is sympathetic to the Respondent's arguments regarding the unfairness of the costs regime. Prior cases have dealt with this issue by taking a conservative approach to cost awards where the respondents have achieved relative success. In Re Octagon Capital Corp., [2007] I.D.A. C.D. No. 16, the panel quoted with approval the following from Re Credifinance Securities Ltd., 2006 CarswellNat 5800:

> "We think that care should be exercised so that the fear of attracting an award of very large costs does not have the effect of inhibiting a Member, or an approved person, from advancing a defence which it thinks is meritorious….a successful respondent cannot get its costs from the IDA. Since the power to award costs is one-sided, we think that a conservative approach to costs is not unwarranted."

¶ 253 Similarly in Re Ng, 2007 CarswellNat 6452, the panel stated:

> "While costs are a legitimate part of the sanction imposed upon an offending Member or registered representative, we think that they should not, particularly in the case of a registered representative, be so great that they could intimidate a person from exercising the right to an impartial hearing of the complaint filed against him/ her. Costs in the neighbourhood of those sought in this case could have an "in terrorem" effect upon an individual who wants to have his or her day in court. While we found against Mr. Ng, he was entitled to have the charges made against him aired in an open, impartial hearing. We do not think that the fear of large costs should have a bearing upon a person's decision whether or not to exercise such a right."

¶ 254 This Panel agrees with the principles stated in these cases.

¶ 255 Given the fact that the Respondent was successful on Counts 1 and 3 which took up the large majority of investigative and hearing time, the substantial costs which he has incurred in conducting his defence, and the principles stated in Ng, Octagon and Credifinance, this Panel has decided that no costs should be awarded to IIROC.

Dated this 20th day of February 2013.

Frederick H. Webber- Chair

Selwyn Kossuth- Member

Sandy Grant- Member

APPENDIX A

OTHER TRANSACTIONS WITH REGULATORY CONCERNS

Dates	Security	Description of the Regulatory Concern
November 12 and November 13, 2008	ProShares Ultra Financials (UYG)	On November 12, Hampton's average price account bought 131,700 UYG at $7.03. 110,000 UYG was sold from Hampton's average price account at $6.75 (generating losses of $30,800). 21,700 shares remained in Hampton's average price account. On November 13, the remaining 21,700 shares are allocated to various client accounts @ $7.79 (a $0.76 premium from the day before). UYG did not trade at $7.79 on November 13, 2009. **Clients ought to have been allocated fills at $7.03.**
April 20, 2009 and April 22, 2009	Las Vegas Sands (LVS)	On April 20, Hampton's average price account bought 15,000 LVS @ $5.06. One retail client bought 800 LVS @ $4.67. On April 22, Hampton's average price account crossed 15,000 LVS to Hampton's inventory account @ $5.06. Hampton's inventory account then sold 15,000 LVS @ $ 5.43 (Profit of $5,500) **Staff cannot verify for whom the initial purchases on April 20 were made and whether the profits earned in Hampton's inventory account ought to have been made by those clients.**
September 16, 2009	Las Vegas Sands (LVS)	Hampton's inventory account bought 5,000 LVS @ $20.20 and sold those shares for $20.50 (profit of $1,500) 9 client accounts (2 PRO and 7 arm's length retail clients) sold between 500 and 1,500 LVS @ prices ranging from $18.83 - $19.69. **No other client sold at the price obtained by the Hampton inventory account sale - the Respondent did not "work the order" to the clients' benefit as he alleges is his practice.**
October 23, 2009	Las Vegas Sands (LVS)	Clients (RA and RW) bought 4,000 and 3,000 shares of LVS @ $17.26 respectively. O Holdings (PRO account) also bought 3,000 shares of LVS @ $17.26. **Regulatory Staff cannot verify whose order should have been "first" and whether clients are receiving priority.**

Dates	Security	Description of the Regulatory Concern
December 10, 2009 and December 11, 2009	Las Vegas Sands (LVS)	On December 10, Hampton's average price account bought 15,000 LVS @ $15.26 and sold 5,000 LVS @$15.00. Hampton's average price account remained long 10,000 LVS shares and lost $1,300 on the sale of 5,000 LVS. On December 11, Hampton's inventory account bought 5,000 LVS @ $15.17. Hampton's average price account crossed 10,000 LVS @ $15.39 into RA's (retail client) account. **RA paid $15.39 ($0.13 more than the purchases in the average price account the day before). Hampton's average price account made $1,300 on the cross to RA - equal to losses from prior trading day.**
December 15, 2009	Las Vegas Sands (LVS)	Hampton inventory account bought 3,000 LVS @ $16.30 followed by a further purchase of 20,000 LVS @ $16.01. Hampton inventory account sold 12,000 LVS @ $15.81. RA (client) bought 2,000 LVS @ $16.30 and Hampton's average price account bought 5,000 LVS @ $16.01. **Staff cannot verify why RA paid $16.30 when Hampton's average price account paid $16.01.**

APPENDIX B

TRANSACTIONS IN RRSP ACCOUNT

Trade Date	Security	Debit Balance caused by the transaction	Profit
Feb. 1, 2009	100 contracts of DIA expiring in Feb @ US$85	$9,795	Expired worthless
Feb. 1, 2009	100 contracts of DIA expiring in Feb @ US$82	$46,625	Expired worthless
Mar. 6, 2009	100 contracts of DIA expiring in Mar @ US$70	$9,565	$35,053
Mar. 24, 2009	5,000 shares of Las Vegas Sands	$16,934	$6,870
Apr. 3, 2009	50 contracts of DIA expiring in May @ US$80	$1,042	$417
Apr. 7, 2009	5 contracts of RIM call options in Jun @ US$50 (buy to close)	$13,450	Loss
Apr. 14, 2009 @ 9:42 AM	5,000 shares of Bank of America	$27,081	$1,469
Apr. 14, 2009 @ 1:20 PM	1,500 shares of Bank of America	$12,897	$310
Apr. 14, 2009 @ 2:12 PM	1,500 shares of Bank of America	$18,691	Loss
	TOTAL PROFIT		**$44,119**

APPENDIX C

TRANSACTIONS IN TFSA

Trade Date	Security	Debit Balance caused by the transaction	Profit
Apr. 16, 2009	US call option on DIA April @ 80 expiring on April 18, 2009	$721	$3,935
Apr. 22, 2009	Bank of America	$1,619	$479
Apr. 24, 2009	US call option on DIA May @ 80, expiring on May 16, 2009	$5,130	$4,116
	TOTAL PROFIT		**$8,530**

APPENDIX D

ATTEMPTED TRANSACTIONS IN TFSA

Trade Date	Security	Cost of proposed purchase	Proceeds of proposed sale	Notional Profit (before cancellation)
Mar. 31, 2009	Bank of America	$40,068.00	$43,028.75	$2,960.75
Apr. 1, 2009	Las Vegas Sands	$30,540.23	$30,996.12	$455.89
Apr. 1, 2009	Bank of America	$41,853.19	$44,044.46	$2,191.27
Apr. 1, 2009	US call option on DIA May @ 80, Expiring on May 16, 2009	$26,613.24	$28,300.80	$1,687.56
	TOTAL PROFIT			**$7,295.47**

N.B. – All transactions cancelled on April 2, 2009