

Re Chang

IN THE MATTER OF:

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

and

Lawrence Chang

2013 IIROC 48

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

Heard: October 18, 2012; February 15, 2013; April 16, 17 and 18, 2013; June 5, 25 and 26, 2013
Decision: August 26, 2013

Hearing Panel:

Catherine Esson, Chair; Bob Sutherland, Member; Brian Worth, Member

Appearances:

Paul Smith, Enforcement Counsel for IIROC

Ron Pelletier, for Lawrence Chang

DECISION ON THE MERITS

¶ 1 These are the reasons for judgment for the liability portion of a hearing held under IIROC Dealer Member Rule 20. In a Notice of Hearing dated September 28, 2012, IIROC alleged that:

- From November 2006 through March 2008, the Respondent engaged in discretionary trading in a client account without first having the account approved and accepted as a discretionary account, contrary to IDA Regulation 1300.4.
- From December 31, 2007 through March 28, 2008, the Respondent purchased a combined total of approximately \$498,160 of one security in a client account without authorization from the client, contrary to IDA Bylaw 29.1.
- From January 2008 through May 2008, the Respondent, contrary to IDA Bylaw 29.1, made misrepresentations to a client regarding the number of shares held in the client's account in order to hide the fact that he had made unauthorized purchases of a security.

¶ 2 The Respondent was represented by counsel at the hearing and attended a portion of it.

¶ 3 The allegations against the Respondent relate to his dealings with one client, GP, while the Respondent was registered and employed by Canaccord Capital Corporation (now known as Canaccord Genuity Corp. and referred to in this Decision as "Canaccord"). While GP traded through his corporation, EuroP, there is generally no significance in this proceeding to the distinction between the individual GP and his corporation EuroP or between EuroP's various accounts. The accounts at Canaccord in the name of EuroP are referred to in this Decision as "GP's account".

¶ 4 IIROC alleged that the Respondent engaged in discretionary trading in GP's account without authority from his firm. IIROC alleged that this was initially done within general parameters agreed to in emails between the Respondent and GP but that, commencing on December 31, 2007, the Respondent exceeded those general

parameters by purchasing large amounts of one stock, USSU, in GP's account without GP's consent. IIROC also alleged that the Respondent misrepresented to GP the number of USSU shares in GP's account in order to hide these purchases.

I. Standard of Proof and Evidence

¶ 5 The onus is on IIROC to prove its allegations on a balance of probabilities. In determining whether the evidence establishes that it is probable an event has occurred, we must scrutinize the evidence with care. The evidence must be clear, convincing and cogent.

¶ 6 In considering the evidence, we have been guided by the following comments from *Palmer v. Godfrey Associates Ltd.*, 2004 NBQB 176 (CanLII), (appeal dismissed, 2005 NBCA 114 (CanLII):

In deciding what is proof, the court must distinguish conjecture, suspicion or possibility from reasonable inference, deduction or probability. The law is well established that:

In civil cases an inference may be drawn if it is a reasonable deduction from the circumstances, and the court must act on a reasonable balance of probabilities. Not each piece of evidence, individually, is required to lead to the conclusion sought to be proved. Pieces of evidence, each by itself insufficient, may however, when combined, justify the inference that the fact exists.

[...]

The absence of action, no less than positive acts, can be the basis for an inference as to the existence of a fact in issue. *The Law of Evidence in Civil Cases*, Sopinka and Lederman, pages 33-34 and 37.

and by the following comments from the Alberta Securities Commission in *Re Holtby*, 2013 ABASC 45 (CanLII):

[463] To summarize, when drawing an inference from circumstantial evidence, we must ensure that the inference is grounded on proved, not hypothetical or assumed, facts and is a reasonable one – one drawn using common sense, human experience and logic having considered the totality of the evidence and any competing inferences. That said, a reasonable inference need not be the only inference that can be drawn...

¶ 7 The only witnesses who provided oral evidence at the hearing were Wes Chan, a senior investigator for IIROC, and Chris Perkins, IIROC's manager of investigations. Both were credible witnesses.

¶ 8 The Respondent did not testify at the hearing but IIROC introduced into evidence a videotape of his investigative interview and a transcript of that interview. Mr. Chan testified to statements made by GP and by the Respondent's assistant during interviews he conducted of those individuals. We also received documentary evidence, including emails between GP and the Respondent, from both parties. We have addressed the Respondent's evidence, the statements of GP and the Respondent's assistant, and the emails below.

A. The Respondent's interview evidence

¶ 9 The BC Court of Appeal said the following about assessing credibility in *Faryna v. Chorny*, [1952] 2 D.L.R. 354 (BCCA) at 357:

The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanor of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.

¶ 10 We have also found these comments from *Young Estate v. RBC Dominion Securities*, [2008] O.J. No. 5418 on assessing a witness' evidence to be helpful:

It is always well to bear in mind the probability or improbability of a witness' story and to weight it accordingly. That is a sound common sense test. Did his evidence make sense? Was it reasonable? Was it probable?

¶ 11 The Respondent was interviewed in December, 2010. There were numerous significant matters that he testified he could not recall. His testimony about matters he purported to recall was at times difficult to follow and changed in response to documents he was shown. Some was implausible or not consistent with the documentary evidence. We have referred throughout this Decision to examples of the Respondent's poor or inaccurate recollection and other difficulties with his evidence. Viewed as a whole, the Respondent's testimony was so problematic that we have generally not relied on it.

¶ 12 The Respondent's counsel suggested it is understandable that the Respondent would have a poor recollection given that two and a half to four years passed between the events in question and his interview.

¶ 13 We agree that it is often difficult for registrants to recall trades which occurred in client accounts. The passage of time exacerbates this problem. We do not consider it surprising that the Respondent would not recall the particulars of the trades which were the subject of Count 1. Those trades appear to have been routine. To our knowledge, no issue arose with respect to them until long after they had occurred.

¶ 14 We consider it implausible, however, that the Respondent would have such a poor recollection at the time of his interview of the events which gave rise to Counts 2 and 3. We do not accept that the context of these events was sufficiently routine that one would not be expected to have better recall and to give more accurate evidence than the Respondent did, particularly as it was apparent shortly after the events that there was a serious dispute with respect to them.

¶ 15 We conclude from circumstances such as the following that the purchases of USSU in the Respondent's account from December 31, 2007 through the spring 2008 were likely significant to the Respondent:

- The Respondent and his pro accounts had a large personal position in USSU by December 31, 2007 and actively traded USSU in the period leading up to the March, 2008 purchases in GP's account. They stopped buying USSU one day after the first of the March 2008 purchases in GP's account. By that time, they had about 775,000 shares worth over \$300,000.
- Another of the Respondent's clients sold a large position in USSU on or within a couple of days before December 31, 2007, the date of the first large purchase of USSU in GP's account. The Respondent's wife also bought 17,000 shares during the same few days.
- The Respondent traded USSU for his clients (including himself) actively in 2008 until April 11, 2008 and then almost completely stopped trading USSU for a month. According to the trading blotter, he entered over 300 orders for trades in USSU from January 1, 2008 to April 11, 2008. His active trading then stopped. Other than one sale for a client on April 17, he did not do any transactions in USSU until May 7, 2008. He only did three trades for clients between April 12, 2008 and May 13, 2008.
- The price of USSU was declining through the time in question. It decreased from \$0.78 on December 31, 2008 to \$0.24 on March 31, 2008.
- The purchases of USSU on December 31, 2007 and in March 2008 in GP's account were by far the largest purchases in GP's account.

¶ 16 This is not a case where the registrant had no reason to focus on the events giving rise to the allegations for many months or years after they occurred. The USSU purchases in GP's account stopped on March 28, 2008. GP took issue with the USSU position in his account, and its variance from the spreadsheet, on May 4, 2008. By June, 2008, there was a dispute between the Respondent and GP with respect to over 1 million shares of USSU. The Respondent was seeking advice from his Compliance department and wrote a letter formally setting out his position. GP said he would consult a lawyer. GP sued the Respondent over these purchases a year later. We conclude that the Respondent would have focused on the circumstances of the purchases of

USSU and on the weekly summaries when this dispute developed in the late spring, 2008 and again when he was sued.

¶ 17 Against this backdrop, it is surprising that the Respondent purported to have such a poor recollection of the events giving rise to his dispute with GP and that his evidence on matters he purported to recall was often unclear or not believable. We have concluded that the Respondent was not a credible witness. We have referred to some portions of his evidence in the Decision, in order to address it in the context of other evidence. However, we have not generally given it weight.

B. Statements by GP and the Respondent's assistant

¶ 18 IIROC introduced evidence of what two other individuals, GP and the Respondent's assistant, had told IIROC's investigator. In both cases the investigator had conducted an unsworn interview of the individual over the phone. The interviews were taped and the tapes were transcribed by an IIROC employee. The transcript was reviewed and, if necessary, corrected by the investigator. The tapes were not played during the hearing. Portions of the transcripts were read in at the hearing, and the investigator confirmed that it accurately represented what was said during the interview. The transcripts were not marked as exhibits.

¶ 19 Neither GP nor the assistant testified at the hearing. IIROC did not have the power to compel GP to attend but did ask him to do so. It appears that, although GP did not definitively refuse to ever attend the hearing, he did not agree to attend the hearing on the dates it proceeded. It is not known if the hearing could have been rescheduled to accommodate him.

¶ 20 IIROC's investigator tried unsuccessfully to contact the Respondent's assistant in advance of the hearing. There was evidence she was not in Canada.

¶ 21 The Respondent sought an order that no evidence of what GP told the investigator be accepted into evidence. We declined to make this order but advised the Respondent he could renew his application with respect to the admissibility of particular portions of the evidence. He declined to do so. He argued, however, that GP's evidence should not be given weight, particularly with respect to central matters. He did not object to us receiving the evidence of the Respondent's assistant but argued that it needed to be approached cautiously.

¶ 22 Rule 13 of IIROC's Rules of Practice and Procedure establishes that the unsworn evidence of a witness who is not available for cross examination should not generally be accepted in IIROC hearings. We recognize that we have the power under the Rules to make exceptions but there must be a substantial reason for doing so. Otherwise, Rule 13 becomes meaningless. It may be appropriate, for example, to allow hearsay evidence of unsworn statements where it meets the principled exception to the hearsay rule.

¶ 23 We admitted evidence of GP's statements over the Respondent's objections because IIROC could not compel GP as a witness and because the Respondent had an opportunity to discover GP with respect to those issues which relate to the purchases of USSU in December 2007 and March, 2008. The evidence arguably at least met the principled exception to the hearsay rule. We have concluded, however, that we should not rely on GP's statements to the investigator as evidence against the Respondent. In addition to the general concerns about unsworn evidence, we are concerned because, at the time of the interview, GP had sued the Respondent concerning the same matters which form the basis of Counts 2 and 3. We have on occasions considered GP's evidence where it supports the Respondent's case.

¶ 24 We have also concluded that we should not rely on the unsworn statements of the Respondent's assistant. There were many matters which she did not recall. Our main concern with her remaining evidence is that she could easily have been mistaken. She was interviewed about 30 months after the events in question. She was at a new job. We do not know when or under what circumstances she parted ways with the Respondent or Canaccord. To our knowledge, she had no particular reason to recall or focus on her dealings with GP after they occurred. We are not aware of any reason these dealings were particularly significant to her at the time or after. She was not represented by counsel at her interview. We infer from the circumstances of her interview that she likely did not do anything to refresh her memory in preparation for it. During her interview, she was not referred to documents which might assist her recollection. Although we have no basis to

believe she was not honest, we do not have confidence in the accuracy of her evidence.

¶ 25 In addition to these concerns, we note that the procedure which was followed in this case to create transcripts from these individuals' oral statements is potentially problematic. There were a number of passages where the transcriptionist was unable to discern what was said on the tape and the word "inaudible" appears. In addition, the tapes were transcribed by an IIROC employee and then reviewed and potentially changed by IIROC's investigator. In our view, this procedure does not have the hallmarks of reliability of a certified transcript created by an independent court reporter. We wish to stress that these comments are directed at the procedure, not at the actions of the transcriptionist or investigator in this case. We are not suggesting any wrongdoing on the part of these individuals. The process, however, provides an opportunity for important evidence to be lost or for the unconscious biases of IIROC personnel to be reflected in the transcript.

C. The emails

¶ 26 The Respondent's case relied to a significant degree on emails between GP and the Respondent. IIROC received and made disclosure prior to the hearing of over 550 such emails which it had compelled from Canaccord, as well as emails received from GP. A selection of these emails was introduced in evidence.

¶ 27 The Respondent stressed the need to be cautious both in interpreting the emails and in treating them as though they were the only communications between the Respondent and GP. We accept this.

¶ 28 The emails were not the only communications between GP and the Respondent. On occasion, the emails themselves refer to other communications.

¶ 29 The Respondent's counsel raised a possibility that the emails IIROC produced to him might not be all of the emails between the Respondent and GP. We understand that the Respondent received all emails compelled from Canaccord as well as all emails produced by GP in the civil action. The Respondent was also involved in the discovery process in the civil case. The Respondent's counsel's suggestion that he might not have access to all relevant emails was speculation. In any event, our task is to determine whether the evidence which was presented to us provided clear, convincing and cogent evidence that the Respondent engaged in the misconduct alleged.

¶ 30 We agree that we must be cautious about interpreting the emails. We have taken this into account generally and have addressed it below in the context of particular emails.

II. Facts

¶ 31 The Respondent was registered and worked as a retail investment advisor with member firms from 2000 until March, 2009. He is not currently working for a member firm.

¶ 32 GP was a European national and resident. The parties agreed that he was a sophisticated investor with a high risk tolerance. There was no issue of suitability raised in this hearing.

¶ 33 GP have been a client of the Respondent since about 2000. He opened his account with the Respondent at Canaccord in December, 2005. GP's account was not approved or accepted as discretionary by Canaccord.

¶ 34 In January, 2006, GP transferred numerous security positions into his account. With one exception, each position transferred in was worth \$35,000 or less at the end of January, 2006.

¶ 35 Initially, the Respondent was solely an order taker for GP. The Respondent would regularly send him commentary on securities. Over time, the Respondent became interested in the Respondent's ideas.

¶ 36 The evidence relating to how trading instructions were given is central to this case and will be considered in more detail below.

¶ 37 GP received monthly statements and trade confirmations. He entered information from those documents onto a spreadsheet he maintained of the positions in his account.

¶ 38 GP made nine purchases in his account prior to November 7, 2006. In each case, the total value of the purchase was less than \$30,000. GP sent emails which contained at least some form of instruction for seven of

the purchases. There was no evidence of emailed (or any) instructions for two of the purchases.

¶ 39 On November 7, 2006, there was a series of emails between the Respondent and GP. The initial emails concerned specific stocks, two of which GP bought that day. There is also reference to a phone call between GP and the Respondent. There is no evidence what the Respondent and GP talked about in that call.

¶ 40 The following email exchange occurred after the telephone call on November 7, 2006:

- From GP to Respondent: “Lawrence, within a limit of C\$100,000 and use the segregated account please, you can put on some long or short plays, but try to keep to max \$30,000 per position, maybe? Keep me informed on a regular basis. Thanks.”
- From the Respondent to GP: “OK, will do”.

¶ 41 There were emails in evidence which appear to be trading instructions for some trades in GP’s account after November 7, 2006 (although these emails contain varying degrees of specificity). For other trades, there were no emails in evidence which appeared to contain instructions. IIROC alleged that those trades after November 7, 2006 for which there are no emailed instructions were discretionary. The December 31, 2007 and March 2008 purchases of USSU are the subject of Count 2. The remaining allegedly discretionary trades are the subject of Count 1.

¶ 42 The purchases in GP’s account were generally in amounts of about \$35,000 or less. There were a few purchases for between about \$35,000 and about \$100,000. The only purchases over this amount were the USSU purchases referred to in Count 2. There were also a small number of very large short sales.

¶ 43 The value of at least three of the positions (including USSU) which IIROC alleged were purchased on a discretionary basis substantially exceeded the \$30,000 per position value referred to in the November 7, 2006 email.

¶ 44 At the end of September, 2007, the positions held in the account which IIROC alleged resulted from discretionary purchases had a total purchase price of over \$350,000.

¶ 45 On January 22, 2007 GP sent an email to the Respondent which said: “I suppose all your discretionary purchases / sales are in that segregated account, right?”. The Respondent responded by email that “All of the purchases that I recommend to you go into the appropriate accounts...”. The email did not expressly address GP’s use of the term “discretionary”.

¶ 46 Prior to December 31, 2007, there were 30,000 shares of USSU in GP’s account. On December 31, 2007, an additional 250,000 shares of USSU were purchased. The purchase price was \$216,000. The Respondent testified that he did not recall this transaction or whether there were telephone calls or emails associated with it. This transaction was, by dollar value, over twice as large as any other purchase that had occurred in GP’s account at Canaccord.

¶ 47 There was a reference during IIROC’s interview of the Respondent to there being a note on one or both of the trade tickets for the December 31, 2007 purchase that the order was contracted at 16:01. The trade tickets were not in evidence and there was no additional evidence relating to this, or to its significance.

¶ 48 On January 7, 2008 GP requested by email “the 31 12 2007 position of the account rather than waiting for mail receipt”. That day, the Respondent prepared and emailed to the Respondent a list of the stocks in GP’s account and the quantity of each stock.

¶ 49 The list the Respondent prepared accurately set out the quantity of each security held in GP’s account on December 31, 2007, except that it included 6500 shares of Finavera, a position which was purchased on January 3, 2008 (and settled on January 8), but did not include the 250,000 shares of USSU purchased on December 31, 2008. It listed the quantity of USSU as being 30,000 shares, rather than 280,000 shares.

¶ 50 The Respondent testified he would have obtained the information from Canaccord’s order management system (OMS) and that he likely typed it out. The Respondent did not recall what computer screen he used to create the list or why he included the Finavera but not the December 31, 2007 purchases of USSU.

¶ 51 On January 8, 2008, GP advised the Respondent by email that he wanted the monthly statement, not the typed list of stock names and quantities.

¶ 52 On January 14, 2008 GP sent the Respondent an email in which he said that he did not have time throughout 2007 to follow closely the deals the Respondent had traded for his account. He listed 17 stocks, including USSU, whose performance he wanted to review. He also asked whether the Respondent had sent him the December 31, 2007 statement.

¶ 53 The Respondent testified that the stocks listed in this email were the ones he had profiled or written commentary on. There was other evidence in the proceeding that suggests that two of the stocks were not profiled by the Respondent.

¶ 54 On January 18, 2008 the Respondent sent GP an email which provided an update on the securities listed in GP's January 14 email. It included a profile of USSU which said in part:

USA Superior Energy average price 0.86

"...I remain bullish on the stock...I remain bullish on it and would look to add on a dip. Technicals setting up nicely for a move higher."

¶ 55 On Jan 29, 2008, GP emailed the Respondent that:

I was not very happy when I saw some of the results of those positions; lets follow the market closely and close them out at some point;

Please provide me with a table every Monday for those positions you created showing Number Average Cost Market Price Value and Loss (Profit).

¶ 56 On February 4, 2008, the Respondent sent GP an email attaching a spreadsheet entitled "Europhorics positions 02.04.08". The covering email described it as "a spreadsheet of the positions". The Respondent did not recall how he prepared the spreadsheet, although he said it appeared to be a cut and paste from OMS to an Excel spreadsheet.

¶ 57 The spreadsheet included 14 securities, including USSU. The Respondent's evidence on how he had chosen these stocks was that, "if [GP] asked specifically for the ones that we had outlined then those are the ones that I would have cut and pasted". For each one, the spreadsheet listed the Security Name, Quantity, Avg Cost, Price, Fds, and Market Value. It did not include the "Loss (Profit)" column GP had requested.

¶ 58 The February 4, 2008 spreadsheet correctly reflected the details of the stocks which were listed, with one exception. The spreadsheet stated that GP's account held only 30,000 shares of USSU when in fact it held 280,000 shares. The market value of the holdings of USSU was based on 30,000 shares, but the average cost was based on the purchases of all 280,000 shares. The Respondent testified that he had no idea why there was a discrepancy in the spreadsheet.

¶ 59 The Respondent sent a similar email and spreadsheet almost every week until at least May 19, 2008. The number and the average cost of USSU listed on the spreadsheets were never changed, despite the large purchases of USSU in March.

¶ 60 There were no purchases of shares in the other securities listed on the spreadsheet, although there were sales. The position of other shares changed to reflect the sales, although not all sales were reflected entirely accurately in a timely fashion. There were therefore inaccuracies in the schedule from time to time in addition to the inaccuracy relating to USSU although, over time, all of the inaccuracies other than the USSU were corrected.

¶ 61 The Respondent's testimony regarding his practice in updating the weekly spreadsheets changed throughout the interview. He initially agreed that he would update price and quantity on the spreadsheet. When shown that he did not update the quantity of USSU, he said he only updated price, not quantity. When shown he updated the quantity of stocks which were sold, he testified he updated price and sometimes quantity to show sales but not purchases. He provided no rationale for this. We conclude that, in giving this testimony,

the Respondent was offering explanations he thought explained the documents he was shown, rather than testifying to facts he recalled.

¶ 62 The Respondent admitted he did not know if GP's only concern in obtaining the spreadsheets was to monitor price.

¶ 63 When asked if he intentionally misled his client, the Respondent did not expressly deny it. He said, in essence, "how could I, when he received his monthly statements and confirmations?"

¶ 64 On Feb 18, 2008 the email the Respondent sent to GP with the weekly spreadsheet included an update on the companies listed on the spreadsheet. With respect to USSU, the Respondent said:

USA Superior has been experiencing good success with its reworking of its wells and cashflow is increasing. I hear they are going to bring a few new people to their team and some new projects that fall into their business model. I would also hold and let it develop.

¶ 65 On February 24, 2008, the email the Respondent sent to GP with the spreadsheet said in part "positions overall improving in price from prior week...with exception to ICP Solar. I think we hold most for what I anticipate will be an upcoming rally in the next months and sell pre May". In fact, the price of a number of the positions, including USSU, was lower than on the weekly spreadsheet the week before.

¶ 66 The Respondent and his "pro" accounts held 385,000 shares of USSU at the end of December, 2007, worth about \$275,000. They increased that position by 150,000 shares in January, 2008 and by a further 241,000 shares to March 13, 2008. By March, 13, 2007 the Respondent and his pro accounts held 776,000 shares worth about \$310,000.

¶ 67 There were additional purchases for GP's account of 924,000 shares of USSU for a total of \$277,148.50 on five days from March 12, 2008 to March 28, 2008:

- March 12 - 125,000 shares for \$48,641
- March 13 - 55,000 shares for \$17,975
- March 20 - 230,000 shares for \$84,632
- March 26 - 189,000 shares for \$42,260
- March 28 - 325,000 shares for \$83,640.50

¶ 68 During this time period, there were also sales of ICP Solar in GP's account.

¶ 69 There are references in emails sent by the Respondent in March, 2008 to the sales of ICP Solar but not to the purchases of USSU. The March 18 email attaching the spreadsheet said:

We just have a few shares of ICP Solar left to sell. I am working them best offer. Crazy market recently with the Bear Stearns buyout and gold over 1,000 and oil over 105.

¶ 70 The Respondent testified that he could not recall receiving instructions for the March, 2008 purchases of USSU. While at times his testimony suggested he had received instructions, we conclude that he did not recall this. The Respondent testified that *if* there were no emails regarding these trades, there *would have been* phone calls and he agreed that those calls *would have* been from either his home or office. He did not, however, recall any discussions.

¶ 71 The telephone records for the Respondent's home office and his office at Canaccord do not show any phone calls from the Respondent to GP from those phones around the time of these purchases.

¶ 72 The Respondent could not recall the theory behind building up such a large position of USSU, or what GP's thoughts were about USSU at this time. He also could not recall any discussions he may have had with GP about USSU during the time GP's stake in it increased from 30,000 shares to over a million shares. When asked what the rationale was for the purchases, the following exchange occurred:

Q. But you don't recall any rationale behind the purchase for those securities?

A. I don't – I didn't ask – when people put orders in I don't ask what their rationale is.

Q. So he was placing those purchases independent from your recommendations?

A. Right, based on the information he receives.

Q. From someone other than you?

A. Or including the updates that I give him, right?

¶ 73 On March 31, 2008, the Respondent sent GP the “Europhorics positions 033108” spreadsheet. The covering email said:

Most of the positions are just hovering and I expect them to improve.

¶ 74 Later that day, GP sent an email to the Respondent which said:

Lawrence, do I see you buying even more of them?

Should we really continue to do so or liquidate some of them?

Revisit your earlier memo with rationale for keeping rather than adding?

¶ 75 The Respondent testified he did not know what stock or stocks GP was referring to in the March 31, 2008 email and did not know if it was USSU.

¶ 76 On April 1, 2008, the Respondent sent GP an email which started as follows:

I cut the ICP Solar position and am working out the Park Place positions as I type this...there are a few stocks I would consider adding too...the commentary is below...

¶ 77 In the remainder of the email, he reviewed the status of a number of companies. He included an update with respect to USSU which said in part:

The stock has pulled back to its old lows, the company is completing a debt financing with a Texas bank to increase oil production and JV with the bank on existing properties the bank has acquired. I think many people were anticipating the close of this deal months ago and got impatient with the stock...technically it can move very quickly back to \$0.70 on an announcement of the financing and new fields.

¶ 78 On April 4 GP emailed the Respondent that:

I would like you to close out 50% of the positions you've referred to, over the next 10 days, and no longer buy any shares without my prior approval.

However, Helio...you can double.

¶ 79 The Respondent replied by email “OK will do...”. The Respondent testified that he had a conversation with GP about the wording because he bought stock based on GP's criteria. He testified that that conversation was likely following this email.

¶ 80 On April 8, 2008, the Respondent's covering email attaching the Europhorics positions 041408 document said that:

I am trimming positions in half as you requested ... We are working best offer on all the positions that have not already been trimmed.

¶ 81 On April 15, 2008, the Respondent's covering email attaching the Europhorics positions 041415 spreadsheet said that:

I have trimmed the majority of positions in half as requested and am completing the rest, attached is the spreadsheet with the reduced quantities. Still working on IWWI, USSU, DUSS and SV.

¶ 82 On April 22, 2008, the Respondent's covering email attaching the Europhorics positions 041422

spreadsheet said that:

Attached are the current positions. all the positions have been trimmed in half with exception to SV, IWWI, USSU and BEE. BEE is halted and the other positions are on best offer at the moment, they are trading thin. I remain bullish on oil and gas stock with oil at all time highs, I think we will see a move north on oil plays in the coming weeks.

¶ 83 On April 29, 2008 GP received a further spreadsheet. His email sent in response said in part:

Will review but intention is to get rid of those, indeed.

¶ 84 On May 4, 2008 GP sent an email to the Respondent entitled “Positions > USA Superior” in reply to the April 22 email from Mr. Chang enclosing the weekly spreadsheet. The Respondent referenced the March 31 statement and the weekly spreadsheet and questioned whether the Respondent had bought 879,000 shares of USSU.

¶ 85 The Respondent did not recall receiving this email although when he was shown he responded to it, he agreed he must have received it.

¶ 86 The Respondent testified that around this time he had a telephone conversation with GP. His evidence concerning this call and our reason for not putting weight on this evidence are considered elsewhere in this Decision.

¶ 87 On May 5, 2008, the Respondent sent GP an email which said:

There must be an error in where orders were keyed. [My assistant] is away until Wednesday but I will ask her when she gets in.

¶ 88 Later that day, he sent GP an email which attached the “Europhorics positions 050508” spreadsheet and said:

Attached is a spreadsheet of your current positions. I will figure out on Wednesday what happened when I speak to [my assistant].

¶ 89 The Respondent testified that he asked his assistant to ensure she had not keyed in orders wrong. He testified she did that and told him she did not do anything wrong, after which he telephoned GP who continued to insist the position size was wrong.

¶ 90 The Respondent testified that he went through the order book himself and then talked to BST, another client who was actively trading USSU at the time, to determine if BST had placed orders which might have improperly been credited to GP (there was evidence that the name of GP’s account was similar to the name by which the Respondent referred to BST).

¶ 91 BST was not actively trading USSU at the time. BST had not purchased USSU in 2008 and had not sold it since February 1, 2008. BST had sold 310,500 shares around the same time GP had purchased 250,000 USSU at the end of December, 2007.

¶ 92 On May 12, 2008, the Respondent sent an email attaching the “Europhorics positions 051208 and saying “Attached is a spreadsheet of your current positions.” When asked why he did not change the number of USSU shares on this occasion, he said “I didn’t want to represent something that we were arguing about. Plus, I never changed it prior, so I changed the price.”

¶ 93 On May 15, 2008, the Respondent sent GP an email which said:

I tried call you this morning, I got in touch with the client and am having everything fixed.

¶ 94 The Respondent testified that he did everything he could think of to check whether the orders were GP’s and that he discussed with Compliance how to handle this situation. He said:

I said to him like basically one guy’s adamant it’s not his; another guy’s adamant it’s not his; I’m in the middle here...I explained to him we’ve checked through everything.

¶ 95 On May 20, the Respondent sent another email attaching the “Europhorics positions 051908” spreadsheet and saying “Attached is the spreadsheet of current positions”.

¶ 96 On June 2, 2008, GP sent the Respondent an email which included, in the subject line, instructions to purchase a stock and said:

Please can you fax me ...or email me, as pdf, as soon as possible, the Statement of May 31 so that I can see the corrected situation after two months of incorrect reporting

¶ 97 The Respondent responded by email “ok, will do”.

¶ 98 On June 7, 2008, GP emailed the Respondent that “I urgently need your 31 May corrected position by the way. Please pdf email it”

¶ 99 On June 9, 2008, the Respondent sent an email on June 9, 2008 which said:

Attached is the spreadsheet of positions. I am getting a pdf of your March statements processed and will email it to you tomorrow. ...

The June 9, 2008 email did not attach a spreadsheet.

¶ 100 On June 11, 2009, the Respondent sent an email attaching the May statement and saying:

Attached is the May 31, 2008 statement which you should have received by now, please confirm you have also received it by mail.

¶ 101 The Respondent said there were no discussions following this. In an email dated June 13, 2008, GP said he did not yet have the May 31, 2008 statement by mail.

¶ 102 On June 14, 2008, GP emailed the Respondent that:

I’ve looked at this now. The correction we discussed has never been executed. There are still those many USA Superior that should not have concerned my account at all.

¶ 103 According to the Respondent, GP was referring back to when there was discussion of the stock belonging to the other client. The Respondent also testified that at some stage he said he would check again because GP was a sizable client who the Respondent did not want to upset.

¶ 104 On June 17, 2008, the Respondent sent an email which addressed an issue raised in the June 14, 2008 email concerning another stock and said:

I am also working on the statement issue and will have it dealt with shortly.

¶ 105 The Respondent testified that the “statement issue” was that GP had not received his monthly statement. It appears, however, that he was basing this testimony not on his recollection of what the email meant, but on having seen another email that “shows that I once sent him the statement and he said there was nothing attached to it or something”. Later in the interview, the Respondent agreed this was the June 24, 2008 email. There is evidence GP’s received version of the June 11, 2008 email, with the statement attached. Read in context with the other emails of the period, we conclude that the “statement issue” was GP’s ongoing concern that his monthly statement showed him having the wrong number of USSU shares.

¶ 106 The Respondent agreed during his interview that the obvious inference from his June 17, 2008 email is that there would be a correction and the Respondent was working on it.

¶ 107 On June 20, 2008, GP sent an email asking the Respondent to “please solve this issue immediately”. According to the Respondent, GP was still adamant the statement was incorrect.

¶ 108 On June 24, 2008 the Respondent sent an email to GP in which he advised GP that:

Further to our recent communications by email, I have now reviewed all of our records. I have determined that all of the trades credited to account accorded to the orders made on the account.

¶ 109 On June 24, 2008 GP sent an email to the Respondent which said:

Just send me the exact position, Lawrence. There was no attachment to your email of just now.

¶ 110 In reply to this, the Respondent emailed GP a copy of the May 31, 2008 statement.

¶ 111 On June 25, 2008, GP sent the Respondent an email with the re line “Please call me back”. The Respondent replied that:

Just tried you back, the positions I sent you on you May 31, 2008 are the most recent. I will be able to send you a pdf of you June statement on July 1st.

¶ 112 The Respondent testified he did not recall anything about the telephone conversation referenced in the email.

¶ 113 On June 25, GP sent an email to Respondent which said in part:

Let me be very frank, since I have brought up this anomaly of USA SUPERIOR ENERGY HOLDINGS INC you have consistently maintained that this was a mistake and that it should have been booked into a different account starting with the same letters. But as the months of this year passed by, the correction was never executed on the end of month statements.

Let me be very clear that I am not going to accept a position of 1,204,000 shares, after 4 months during which you have sent me your regular “position” updates which show the correct – and in line with what you are authorized to do for my account, and have been doing – 30,000 USA Superior Engy Hldgs shares.

¶ 114 He stated that, if the matter was not resolved, he would pass it on to his lawyers the next day and concluded that “Meanwhile I maintain my previous instructions not to trade at all for my account any longer unless explicitly instructed by me.”

¶ 115 On June 26, the Respondent responded by email. He said in part that:

My position and that of the firm is that all of the trades that were posted to your account were based on market orders that you placed with me. We dutifully carried out the instructions that you conveyed to me.

Your most recent email to me contains some inaccuracies. There is no other client that no longer wants to accept this position. The position was ordered by you and was yours at all times. Based on your assertion that the balances in your account were not correct, I did check to ensure that these were your orders. I am now confident that all of the transactions in your account were as a result of orders that you made. It is not correct to say that another client no longer wants to accept this position. It is correct to say that at your request I reviewed these transactions and found that no other client placed an order for this position.

Further I have to state my surprise at you taking issue with trades that were posted to your accounts months ago. You received a trade confirmation for each transaction in your account and saw those positions on your monthly statements for a few months before you made any objections. Clients do have a responsibility to read their statements and inform the firm of any discrepancies on a timely basis, which it seems you have not done.

¶ 116 While GP’s account remained open until at least May, 2009, there were no purchases or sales in the account after June 20, 2008.

¶ 117 On June 15, 2009, GP commenced a civil action against the Respondent and Canaccord based on substantially the same allegations as Counts 2 and 3. The Respondent’s counsel examined GP for discovery in the civil case. The Respondent made, but did not pursue, an application for a court order that evidence from the examination for discovery could be used in these proceedings.

III. Count 1

A. The discretionary trading allegation in Count 1

¶ 118 According to the Respondent, GP's practice in giving instructions was to provide him with dollar limits and a price limit on a security, but not the quantity. There are emails which suggest that there were numerous transactions which were authorized on the basis that GP gave specific instructions for the Respondent to buy, for example, a specified dollar amount of a particular stock. The instruction might specify that it was open, or not specify the timing. IIROC did not allege wrongdoing with respect to these types of instructions in this proceeding. IIROC also did not, however, concede that these transactions were properly authorized by the client in accordance with IIROC's Rules.

¶ 119 IIROC's allegations in Count 1 relate to transactions for which it asserted GP did not provide any specific direction as to the particulars of what to buy or sell. Given the manner in which the case unfolded, the only question for these transactions is whether the evidence establishes on a balance of probabilities that one or more of these transactions was done without instructions from GP, other than those in the general grant of discretion given in the November 7, 2006 email.

¶ 120 Given the particulars provided to the Respondent and IIROC's position throughout this hearing, we have not considered the adequacy of instructions for transactions other than those particularized in the Notice of Hearing. We wish to emphasize, however, that in our view for a trade not to be considered discretionary, the parties must *explicitly* agree on each of the criteria of security, quantity, price and timing. Partial instructions which leave room for ambiguity about any of these criteria are not sufficient.

B. Count 1 Analysis

¶ 121 IIROC alleged that the November 7, 2006 email was GP's authority for the Respondent to buy without further instructions any securities up to the limits in the email of about \$30,000 per position and \$100,000 total and that the Respondent acted pursuant to this authority in conducting transactions. IIROC itemized in the Notice of Hearing 16 stocks which it alleged were traded pursuant to this discretion. The USSU purchases which are the subject matter of Count 2 are not included in Count 1.

¶ 122 There was very little evidence regarding the specific trades particularized in Count 1. To a significant degree, IIROC's argument hinges on the lack of emailed instructions for them. In essence, IIROC asserted that it is reasonable to infer from the evidence that, if there was no email instruction for a transaction which occurred after November 7, 2006, then there were no instructions for it beyond those given in the Nov. 7, 2007 email. We have concluded that the evidence does not support this inference.

¶ 123 The November 7, 2006 email exchange does, on its face, suggest that GP gave the Respondent discretion to make trades in the account, within the parameters set out in that email. Numerous other emails from GP are consistent with this theory. Other evidence convinces us, however, that we must be particularly cautious about the meaning of these emails.

¶ 124 GP's description to the investigator of what he meant by "discretion" and by other wording in the emails such as "[the Respondent's] traded positions" leaves us concerned whether GP distinguished in using these words between trades for which he did not give instructions and trades which were not his idea.

¶ 125 In his Statement of Claim in the civil proceeding, GP alleged that he gave the Respondent discretion, but the description of the discretion is somewhat different from what the November 7, 2006 email appears to describe.

¶ 126 We also note that the Respondent did, in his January 22, 2007 email, take issue with GP's characterization that the Respondent was exercising discretion.

¶ 127 Given this evidence and the fact that GP did not testify before us, we have concluded that we cannot rely on GP's emails alone to establish that GP gave the Respondent discretion to trade without instructions.

¶ 128 IIROC also argued that there was a pattern of emailed instructions which both confirms that the November 7, 2006 email was acted on by the Respondent to trade without specific instructions and allows us to determine which transactions were done without instructions. As noted above, IIROC urged us to draw an inference that trades for which there were no emailed instructions were done pursuant to a general grant of

authority by GP given in the November 7, 2006 email.

¶ 129 Such an inference might be reasonable if the evidence established the pattern on which it is based - that prior to the November 7, 2006 email there were emailed instructions for each trade; that there were emailed instructions for all trades in stock GP picked after the November 7, 2006 email but not for any trades in stock the Respondent picked; and that the trades for which there were no emailed instructions fit the parameters of the November 7, 2006 email. However, the evidence does not establish this pattern:

- There are transactions both before and after the Nov 7, 2006 email for which there are no emailed instructions in evidence. On the evidence available to us, we cannot conclude that there was a clear change of practice as of that date.
- It is not clear on the evidence who picked a number of the securities bought after November 7, 2006.
- The discretion allegedly granted was for a total value of \$100,000 and a maximum per position purchase price of about \$30,000. The positions allegedly acquired pursuant to this discretion exceeded these limits. There are plausible explanations for this which are inconsistent with IIROC's allegation, such as that there was no agreement that the Respondent would make discretionary purchases within these limits or that the Respondent had instructions for some of the trades IIROC alleged were done pursuant to the alleged discretionary trading agreement.

¶ 130 In our view, therefore, we cannot draw the inference IIROC suggested.

¶ 131 We have considered whether there is other evidence from which we could conclude that trades for which there were not emailed instructions were done on a discretionary basis. We have not put weight on GP's evidence against the Respondent generally or with respect to the meaning of the November 7, 2006 email for the reasons described above. In addition to these concerns, his evidence relating to the giving of instructions was very general. With one exception, he was not directed to the transactions particularized in Count 1. Even if we were otherwise prepared to put weight on GP's evidence, we would be concerned about relying on such general statements as proof that there were not instructions with respect to any particular transaction without the Respondent having the opportunity to probe this.

¶ 132 We received phone records showing outgoing calls from the Respondent's phone at Canaccord from December 3, 2007 to June 10, 2008 and outgoing calls from the Respondent's home office from October, 2007 to May, 2008. We did not receive phone records for the Respondent's cell phone, which the phone company apparently could not provide, or any phone records which would show calls from GP to the Respondent. The phone records we did receive show only one call to GP, a call from the home office on October 12, 2007.

¶ 133 These incomplete phone records have no probative value prior to October, 2007 and limited probative value after that. The fact that there were no phone calls from the Respondent's office or home office to GP from December 3, 2007 to May, 2008 is relevant with respect to the credibility of the Respondent's evidence concerning the frequency of phone calls to GP and whether he called GP from his home or office with respect to the USSU trades in March, 2008. This is discussed below in relation to Count 2. However, the lack of phone calls on these phone lines during this period does not prove that instructions were not provided by phone for any trade particularized in Count 1. The transactions particularized in Count 1 for which instructions should have been given during this period could have been authorized in a relatively small number of calls. At best, the phone records create some doubt whether this occurred.

¶ 134 In its final argument, IIROC reviewed the circumstances of some of the specific transactions which are alleged to have been done without instructions. In some cases, IIROC's only evidence about a particular transaction was that there was no email providing instructions. For the reasons given above, we have concluded that the lack of emails is not sufficient to establish that no instructions were given. There were other transactions for which IIROC pointed to additional evidence. We have concluded that IIROC has not established that any of the specific transactions were done without instructions. For example:

- IIROC contrasted the purchase of Intralese to the short sale of MegaUranium which occurred at the same time and about which there were many emails. IIROC argued that because none of the emails

refer to Intralese, it is reasonable to conclude Intralese was purchased without instructions. We do not agree that this establishes instructions were not given in another way.

- IIROC argued that emails relating to the purchase of Southampton in March, 2007 establish that the trade was done on the basis of insufficient instructions. On March 12, 2007, the Respondent said in an email with respect to a potential purchase of Southampton that “I think open market in the 1.50 area will represent good value”. GP responded that “If you like it Lawrence, go ahead”. Southampton was purchased in the account on March 13 at \$1.57, March 22 at \$1.64 and March 27 at \$1.45. We do not conclude from this evidence that there were no telephone conversations regarding these transactions. This is particularly so given that there was evidence GP was having email problems on March 13, the first two transactions did not occur at the price GP and the Respondent emailed about, and the second and third transactions occurred significantly after the March 12 email.
- IIROC alleged that a July, 2007 short sale of Amazon was discretionary. IIROC argued that an email exchange from October, 2007 in which GP questioned a September, 2007 purchase and asked for information about the sale which preceded it suggested that GP had not known about that sale. When interviewed by IIROC, GP could not recall this incident, but suggested it could have been a mistake or a misunderstanding. This evidence does not prove that the July 2007 trade was done without instructions.

¶ 135 While the emails between the parties and the lack of phone calls on the limited phone records in evidence concern us, we have concluded that there is not clear, convincing and cogent evidence which satisfies us on a balance of probabilities that any of the trades particularized for Count 1 were done without instructions.

IV. Counts 2 and 3

¶ 136 IIROC alleged in Count 2 that the purchases of USSU from December 31, 2007 on exceeded any general discretion GP had given and were done without his authorization. IIROC alleged in Count 3 that the Respondent intentionally did not show these purchases on either his January 7, 2008 schedule or his weekly spreadsheets in order to hide them from GP. IIROC’s theory was that the Respondent was buying time, hoping that a potential business deal referred to in his updates on USSU would occur, leading to a rise in the share price.

¶ 137 The Respondent denied the allegations. He argued that there were circumstances which made it unlikely that the allegations were true, such as that GP was a sophisticated client who kept track of his trades and would not likely have been deceived, and that GP remained a client until the Respondent voluntarily resigned in February 2009. He also focused on what he asserted were shortcomings in the evidence, such as the possibility that the emails might not be complete and, in any event, were ambiguous and subject to interpretation and the lack of complete phone records.

¶ 138 The Respondent testified that he received or confirmed all instructions for trades by GP by phone, using one of his office phone at Canaccord, the phone in his home office or his cell phone. He also testified that there were definitely more phone calls than emails between the Respondent and GP. He did not recall any phone calls or emails concerning the USSU purchase on December 31, 2007 or in March, 2008.

¶ 139 We have described elsewhere our general concern with the Respondent’s evidence. We have concluded that his evidence that he received or confirmed all trading instructions by phone and that there were more phone calls than emails is at best an exaggeration and not probative of whether the Respondent had instructions for the purchases of USSU.

¶ 140 There were a number of transactions (which are not the subject of the Notice of Hearing) for which the emailed communications appear to be complete “conversations” concerning the transactions. For these transactions, we consider it unlikely that there was also a phone call and conclude that the emailed instructions formed the entire instructions.

¶ 141 We heard evidence that Canaccord provided over 550 emails between GP and the Respondent. The

emails in evidence refer to only a handful of calls. While there were probably some calls which were not reflected in these emails, it is also likely that, if the Respondent and GP spoke by phone more than 550 times during the three years that GP was a client of the Respondent at Canaccord, there would be more indications of this in the emails.

¶ 142 Similarly, if the parties were speaking by phone this frequently, we would expect there to be more than one phone call from Canaccord or the Respondent's home office during the period of time covered by the phone records.

¶ 143 Having concluded that we should not put weight on the Respondent's interview evidence or on GP's statements to the investigator regarding whether there were instructions for the USSU purchases, we must decide whether the remaining evidence establishes that the Respondent did not have instructions for these trades. The evidence relating to this question also relates to whether the Respondent tried to hide these transactions from GP. For this reason, although the allegations in Count 2 and 3 are different, and each must be proved, we have considered the evidence relating to these Counts together.

A. The Weekly Summaries

¶ 144 The Respondent admitted that he prepared and sent to GP the weekly summaries and that those weekly statements showed the wrong number of USSU shares. The market value was also incorrect, as it was calculated based on the incorrect quantity of shares.

¶ 145 The Respondent offered no explanation of why the initial weekly summary on February 4, 2008 did not disclose the correct number of USSU shares. He testified that, apart from the price entry, the spreadsheets were a "cut and paste" from the OMS system. While we accept that the spreadsheets generally may have been copied from the OMS system, we do not accept this would have shown 30,000 USSU shares on February 4, 2008, as there had been 280,000 shares of USSU in GP's account since the December 31, 2007 purchase. It is even less likely that the OMS system would show the quantity of USSU shares as 30,000 but then show the average cost for USSU based on all 280,000 shares, as the spreadsheet does. We conclude that, in preparing the February 4 spreadsheet, the Respondent manually changed the number of USSU shares from what the OMS system showed to 30,000 shares, the number prior to the December 31, 2008 purchase.

¶ 146 The spreadsheet continued, week after week, to show the quantity of USSU shares as 30,000. Even when over 900,000 additional USSU shares were purchased in a two week period in March, the Respondent did not update the quantity of USSU on the spreadsheet.

¶ 147 The Respondent offered no reasonable explanation for this. At times, the Respondent appeared to suggest he simply overlooked these purchases. We consider this unlikely, given the size and significance of these purchases and that the spreadsheets were changed (albeit not always immediately) to reflect much smaller sales of other securities. At other points in his evidence, the Respondent appeared to suggest that there was a rationale for not updating the quantity of USSU shares to reflect the March purchases but, as noted above, we have concluded he was offering whatever explanations he thought might explain the documents he was being shown at the interview rather than testifying to facts he recalled.

¶ 148 There was no credible evidence GP wanted spreadsheets which tracked only price or only price and sales, or that GP knew the spreadsheets were inaccurate. GP's request for information was straightforward. He said he wanted, among other things, the number of shares, the average cost, and the position's value. These numbers are meaningless if the number of shares is not accurate.

¶ 149 The Respondent's suggestion that the spreadsheets were only intended as a price update or to show price and sales is not supported by the manner in which the Respondent described the spreadsheets at the time. The Respondent did not advise GP when he sent the spreadsheets that they were only partially accurate. In fact, his emails suggest otherwise. The Respondent labeled the spreadsheets "[GP] positions [date]". On a number of occasions, his covering email referred to the attachment being a spreadsheet of "your current positions". On April 8, 15 and 22, the covering memos expressly focused on the quantity of securities in the accounts as the Respondent reported on his efforts to reduce the positions.

¶ 150 The Respondent's own evidence suggests he knew or at best did not care if he was sending out inaccurate information to GP and that he recognized, at least at the time he testified, that providing incorrect information could affect GP. For example, he testified that he only updated price, or price and sales, but admitted that he did not know if GP's concern in getting the spreadsheets was just to keep an eye on price. The Respondent agreed that GP requested the spreadsheets to be informed of his positions and that sending incorrect information could affect how GP conducted his affairs.

¶ 151 Respondent's counsel suggested that GP's statements established that he did not in fact rely on the weekly spreadsheets or on the portion of the spreadsheets concerning the quantity of shares. We do not agree that this is a fair characterization of GP's evidence or that, even if GP had not relied on the spreadsheets, it would provide a defense to IIROC's allegations.

¶ 152 We have concluded that the Respondent intentionally misrepresented the number of USSU shares in the spreadsheets he sent to GP.

B. The January 7, 2008 list of stocks

¶ 153 The Respondent prepared and sent the January 7, 2008 list of stocks in response to GP's request for the December 31, 2007 position of his account. On December 31, 2007, GP held 280,000 shares of USSU (although the purchase of 250,000 had not yet settled) and no shares of Finavera. On January 7, 2008, the date the list was sent, GP held 280,000 shares of USSU and 6500 shares of Finavera. The list said GP held 30,000 shares of USSU and 6500 shares of Finavera. There was no point in time when this was correct. Regardless of what exactly the list was intended to represent, it was incorrect.

¶ 154 It is possible that the Respondent created this list from information on the OMS system which did not show the 250,000 shares purchased on December 31, 2007 because, for example, the screen showed only trades which had settled by December 31, 2007 or because the transaction may not have been contracted until after the market closed on December 31. We consider this possibility to be unlikely, however. It would not explain why the list included the Finavera shares purchased on January 3 (which had not settled by the time the list was created).

¶ 155 The inclusion of Finavera is evidence that the Respondent was not intending to send a list which only reflected December 31, 2007 settlement. It is also evidence that the Respondent did not make the list from an OMS screen which showed only transactions which had settled by December 31, for example, without considering whether this was accurate. When considered in the context of the other evidence, we conclude that the Respondent intentionally misrepresented the number of USSU shares on this list.

C. The emails between the Respondent and GP in the period prior to GP questioning the USSU purchases on May 4

¶ 156 Neither the purchases of USSU nor GP's large position in USSU was mentioned or alluded to in any of the emails between the Respondent and GP prior to May, 2008. The emails, viewed as a whole, are inconsistent with GP choosing to buy a very large position in USSU or being aware he had a large position in USSU.

¶ 157 We recognize that the emails in evidence do not necessarily reflect all of the communications between the Respondent and GP and that we must be cautious in interpreting the emails. We are, however, satisfied that in the emails which commenced on January 14, 2008, the Respondent and GP treated USSU as part of a group of stocks the Respondent had recommended and which GP was concerned about and, from January 29, 2008, wanted to reduce in size. USSU is consistently treated as part of this group in the emails, including in the Respondent's updates on companies, in the spreadsheets, and in the emails regarding reducing position sizes. It is never, prior to May 4, singled out in the emails in evidence.

¶ 158 These emails are not consistent with GP having chosen to buy large amounts of USSU in March, 2008 or having known at any time prior to May 4 that his position in USSU was many times larger, by both number of shares and value, than any other position in the group.

D. GP's May 4, 2008 email and the emails which follow it

¶ 159 GP first questioned something in his account on March 31. The evidence does not allow us to determine whether this related to USSU.

¶ 160 On May 4, 2008, GP sent an email questioning the purchases of USSU in the account. We conclude that GP had by this time received the March 31, 2008 statement and compared the holdings in USSU to those shown on the weekly spreadsheets.

¶ 161 The Respondent argued that one cannot conclude from this email that GP was outraged. We agree. However we do conclude that GP was concerned that the size of the USSU position shown on his monthly statement was wrong. This conclusion is supported by the email itself, by subsequent emails and by the Respondent's actions in telling GP he was checking with another client about the position and in discussing the matter with his Compliance department. If GP was not overly concerned or upset at that stage, it may have been because, for example, he trusted the Respondent would rectify the problem.

¶ 162 The emails the Respondent sent after receiving GP's May 4 email are not consistent with the Respondent having known at this time that GP authorized the USSU purchases. He did not refer to GP having authorized the purchases. Rather, he sent emails suggesting he was investigating it and that he had contacted another client and was having it fixed.

¶ 163 We consider it unlikely that the Respondent did not know on May 4, 2008 whether or not he had instructions from GP for the USSU trades, given the circumstances surrounding this trading which are set out above. This is particularly true for the March 2008 purchases which had concluded just over a month prior.

¶ 164 We recognize the possibility that, even if the Respondent knew he had orders for the trades, he may have tried to get another client to take the trades and led GP to believe another client was taking the trades in order to satisfy GP. However, even when the Respondent finally took the position in his June 24 emails that the trades were GP's responsibility, the Respondent did not say he recalled GP placing orders. Rather, he said that, having looked into it, he had determined that the trades accorded with orders.

¶ 165 Similarly, the Respondent's evidence that he told Compliance he was stuck in the middle between two clients who said the stock was not theirs suggests that he did not know GP had authorized the transactions. If he knew GP authorized the transactions, he would have no reason to think the stock might belong to another client.

¶ 166 The Respondent testified that around the time he got the May 4 email (which he did not recall getting), he had a telephone call with GP in which he reminded GP that GP had placed separate orders for the first 800,000 USSU shares purchased and that GP accepted this. However, the Respondent's description of this call was not credible. It was difficult to follow and appeared to change during the interview. In addition to his testimony that he told GP and GP accepted that GP had placed separate orders for the first 800,000 trades, he gave other accounts of this conversation, including that:

- GP did not say what his position size should be and that the Respondent did not know and did not ask during the conversation;
- the Respondent would have told GP the position size was what he could see in the account; and
- GP told the Respondent he should only have 800,000 to 900,000 shares of USSU.

¶ 167 Some aspects of the Respondent's description of the telephone call are at odds with other evidence. For example, the Respondent's evidence that he reminded GP of the separate orders he had placed for some 800,000 shares is difficult to reconcile with the Respondent inability to recall at the interview anything about orders for the March trades. It is not reflected in any of the contemporaneous emails. Even on June 24 and 26, 2008 when the Respondent set out his more formal position, the Respondent did not say he recalled some or all of the orders. He said that when GP raised an issue, he checked to ensure they were GP's orders and that he was now confident they were.

¶ 168 The Respondent's testimony concerning this call is also inconsistent with him stating in the covering note for the May 5 spreadsheet that:

Attached is a spreadsheet of your current positions [showing 30,000 USSU shares]. I will figure out on Wednesday what happened when I speak to [my assistant].

¶ 169 In our view, this email, which was sent the day after GP's email about the USSU position size, suggests that the Respondent believed that GP's then current position of USSU was (or at least might be) 30,000 shares. It is not consistent with the Respondent having known the correct position was at least some 800,000 shares.

¶ 170 The Respondent also testified that from the time of this conversation, GP's concern related only to the last 200,000 to 400,000 shares purchased. This is difficult to reconcile with the emails, particularly the June 25th and 26th emails. GP clearly stated in his June 25 email that he should only have 30,000 shares. In his June 26 response, the Respondent does not make any reference to GP having agreed the issue related only to the last 200,000 to 400,000 shares purchased.

¶ 171 We have not put any weight on the Respondent's testimony about this conversation.

¶ 172 We conclude that the emails from May 4, 2008 support the conclusion that GP was not aware prior to that date of the USSU purchases.

E. The communications at the time of the purchases.

¶ 173 There is no evidence that GP and the Respondent were in contact around the time of the December 31, 2007 purchase. There is, however, some evidence that they were not in contact. There is no evidence of emails between the Respondent and GP between December 22 and January 7, 2008. In the last email in evidence from 2007, the Respondent wished GP happy holidays. In emails on January 7, 2008, GP and the Respondents wished each other Happy New Year. The only transaction done for GP's account during those dates (other than the purchase of USSU) was the Finavera purchase which GP had authorized earlier in December, 2007. There were also no phone calls from the Respondent's home office or Canaccord phone to GP during those dates.

¶ 174 There are also very few emails in evidence between the Respondent and GP around the time of the March, 2008 purchases (other than the Respondent sending the weekly spreadsheets) and none in relation to USSU. The Respondent testified that every purchase of USSU would have been preceded by him phoning GP from his office or his home. There were no phone calls from the Respondent's phone line at Canaccord or the Respondent's home office to GP during the time period of the March USSU purchases. While it is possible that the Respondent called GP from his office or his home on his cell phone, we consider it unlikely this would have occurred regularly, or for every USSU purchase.

¶ 175 Given the limitations of the phone records and our general concerns about the reliability of the Respondent's evidence, we would not conclude from this evidence alone that there were no communications concerning the USSU purchases. However, in combination with the other evidence discussed, we consider the lack of evidence of communications to support the conclusion that the Respondent and GP did not communicate about these purchases.

F. The Respondent's inability to recall instructions for the USSU transactions

¶ 176 In our view, given the backdrop of the USSU purchases we have described earlier, it is likely that if the Respondent had instructions for these transactions he could have recalled at least some aspects of the circumstances of this when asked about them at his interview.

¶ 177 Similarly, there was a suggestion that it was possible that the Respondent's assistant could have taken the instructions for at least the December 31, 2007 trade. In our view, given the particular circumstances of this trade and the fact that there was a dispute about these transactions by June, 2008, it is likely that the Respondent would have recalled some aspect of this at the time of his interview. The suggestion that the Respondent's assistant took the order is also contrary to the Respondent's assertion in his June 26 email that GP placed all orders with him.

¶ 178 The explanation the Respondent gave for why GP purchased shares in March, 2008 – that the Respondent did not know and did not ask the reason but that GP was bullish on resource stocks such as this at the time – was in our view, not reasonable on the evidence. We consider it unlikely that the Respondent simply

took orders for these trades.

¶ 179 In our view, the circumstances are inconsistent with the Respondent having received unsolicited and unexplained orders to buy about 900,000 shares of USSU in March. The Respondent had provided a positive update about USSU about a month before these trades commenced. He had been purchasing a large amount of USSU personally right up to the time the purchases started in GP's account. A few days after the last of GP's purchases of USSU, the Respondent sent him an update which stated "there are a few stocks I would consider adding to...the commentary is below". The email included a summary of USSU which did not make any reference to the Respondent being knowledgeable about USSU or to GP having recently instructed the Respondent to buy almost one million shares of it. His suggestion that the trades were unsolicited is also difficult to reconcile with his evidence that he would have called GP before each of the purchases of USSU (rather than GP calling him).

G. GP's failure to complain earlier of the December 31, 2007 purchase

¶ 180 The Respondent pointed to the lack of timely objection by GP to the trades as evidence he was aware of them. GP was a sophisticated investor who received monthly statements and confirmation slips. He tracked the positions in his account on his own spreadsheet. There is no evidence GP objected in a timely way to the December 31, 2007 purchase of USSU, although he did raise an issue in a reasonably timely way to the March, 2008 trades.

¶ 181 It is possible that GP did not object more quickly to the December 31, 2007 purchases because he was aware of it at the time it was made. However, it is equally plausible that he did not review his confirmations and statements in a timely way during this period. There are emails in evidence which suggest that GP only focussed on this account sporadically. In any event, the fact that GP would have received monthly statements and confirmations evidencing the transactions does not, in our view, overcome the substantial evidence that GP was not aware of the purchases or that the Respondent misrepresented the USSU position.

H. GP's continued status as a client

¶ 182 The Respondent argued that it was inconsistent with IIROC's allegations that GP remained a client of the Respondent until the Respondent left Canaccord in early 2009. In fact, while GP's account stayed open, there were no purchases and sales in the account after June 22, 2008. This is consistent with the dispute between the Respondent and GP having crystallized in the June 24 to 26 period, as suggested by the emails.

I. Conclusion on Counts 2 and 3

¶ 183 We have concluded on a balance of probabilities that GP did not authorize the Respondent to purchase the large amounts of USSU which were purchased for his account on December 31, 2007 and in March, 2008. We also conclude that the Respondent intentionally misrepresented the number of USSU shares in GP's account in the January 7 list and the weekly summaries to hide from GP the number of USSU shares in his account.

¶ 184 We recognize that it was unlikely that the Respondent could hide the true position of USSU from GP for long by sending him incorrect information. It was probable that GP would (as he did) review his documentation at some point and see the large position of USSU. Perhaps the Respondent, who appears to have believed USSU would increase in price, was hoping the price would rise before GP made this discovery. This would at least have made the shares in GP's account easier to deal with.

¶ 185 Even accepting that it was a plan which was likely to ultimately fail, we conclude that there is no other reasonable explanation for the evidence other than that the Respondent intended to hide from GP purchases of USSU that GP had not authorized.

¶ 186 Both the unauthorized purchases of USSU and the misrepresentations of what was in GP's account were substantial departures from the conduct expected of registrants and the level of financial probity which is essential for registrants. The transgressions occurred repeatedly and over a number of months. They involved a large amount of money. In engaging in each of the unauthorized trading and the misrepresentations, the Respondent failed to observe high standards of ethics and conduct in the transaction of his business and

engaged in business conduct or practice unbecoming and detrimental to the public interest, contrary to IDA Bylaw 29.1.

V. Summary of Findings

¶ 187 We have concluded that IIROC has not proven the allegations in Count 1, but we have concluded that IIROC has proven the allegations in Count 2 and 3.

Dated at Vancouver, BC, this 26th day of August, 2013.

Catherine Esson, Chair

Mr. Bob Sutherland, Member

Mr. Brian Worth, Member

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