Re Li

IN THE MATTER OF:

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

and

Yu Qiong (Kevin) Li

2016 IIROC 34

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

Heard: April 5, 2016
Decision: September 21, 2016

Hearing Panel:
Alison Narod, Chair, Lloyd Costley and Michael Johnson
Appearances:
Paul Smith, Senior Enforcement Counsel for IIROC

PENALTY DECISION

¶ 1 In a decision dated January 27, 2016, this Disciplinary Hearing Panel (the "Panel") of the Investment Industry Regulatory Organization of Canada ("IIROC") found that the Respondent engaged in the following contraventions of the IIROC Dealer Member Rules:

Count 1: From July 2011 to October 2011, the Respondent made unauthorized purchases and sales in a client account contrary to IIROC Dealer Member Rule 29.1.

Count 2: On or about October 4, 2011, the Respondent made discretionary trades in client accounts contrary to IIROC Dealer Member Rule 1300.4.

Count 3: On or about October 4, 2011, the Respondent made misrepresentations to his firm contrary to IIROC Dealer Member Rule 29.1 by marking the trade tickets for sell orders in client accounts as "*unsolicited*" when he had used his discretion to make the transactions without the knowledge of his clients.

Count 4: From November 2012 to August 2013, the Respondent refused to provide information required for an IIROC investigation into his conduct contrary to IIROC Dealer Member Rule 19.5.

¶ 2 The Panel is satisfied that a copy of their decision on the merits and that a notice of the sanction hearing were served on the Respondent in accordance with IIROC's Rules, by delivering them by registered mail to the Respondent's last known address as recorded on the National Registration Database ("NRD").

¶ 3 This decision is the Panel's findings about the appropriate sanction to be imposed on the Respondent for those contraventions.

¶ 4 IIROC Staff submit that the appropriate sanction in the instant case is:

(a) a permanent bar from approval with IIROC;

(b) a fine in the range of $75,000 to $100,000;

(c) payment of $15,000 towards IIROC's investigative and prosecution costs.

¶ 5 In making decisions as to penalty, the Panel is to be guided by IIROC Dealer Member Rules 20.33 and 20.49. Under Rule 20.33, where the Panel is of the opinion that the registrant failed to comply with the provisions of any Rule, it may impose various penalties on that person. Additionally, the Panel is authorized by Rule 20.49 to assess and order the Respondent to pay any of IIROC's investigation and prosecution costs that it deems reasonable and appropriate in the circumstances.

¶ 6 The Panel is entitled to consider, but is not bound by, IIROC's Sanction Guidelines, effective February 2, 2016, which are intended to assist hearing panels in the fair and efficient determination of appropriate sanctions. Part I of the Guidelines sets out principles that are to be considered in connection with the imposition of sanctions in all cases. The first of these principles is of relevance to the design of disciplinary sanctions and states, in part:

> **1. Disciplinary sanctions are preventative in nature and should be designed to protect the investing public, strengthen market integrity, and improve overall business standards and practices.**
>
> The purpose of sanctions in a regulatory proceeding is to protect the public interest by restraining future conduct that may harm the capital markets. In order to achieve this, sanctions should be significant enough to prevent and discourage future misconduct by the respondent (specific deterrence), and to deter others from engaging in similar misconduct (general deterrence).
>
> . . .
>
> General deterrence can be achieved if a sanction strikes an appropriate balance by addressing a Regulated Person's specific misconduct but is also in line with industry expectations. Any sanction imposed must be proportionate to the conduct at issue and should be similar to sanctions imposed on respondents for similar contraventions in similar circumstances. The sanction should be reduced or increased depending on the relevant mitigating and aggravating factors.

¶ 7 The sixth principle is particularly relevant where a permanent bar is proposed:

> A permanent bar should be considered where:
>
> - the contraventions involve significant harm to the investing public, the integrity of the market or the securities industry;
> - the misconduct had an element of criminal of quasi-criminal activity; or
> - there is reason to believe that the respondent cannot be trusted to act in an honest and fair manner in their dealings with the public, their clients, and the securities industry as a whole.
>
> A fine and/or disgorgement should be considered even where a permanent bar is imposed in egregious cases involving significant harm to investors or to the integrity of the securities industry as a whole.

¶ 8 Part II of the Guidelines lists key factors to be considered, where applicable, when determining the appropriate sanctions. The list is not exhaustive. We will return to these factors below.

Summary Description of Contraventions

¶ 9 Before proceeding to describe the various contraventions, it is significant to note that in the instant case,

the Respondent was part of a group of Registered Representatives that the Dealer Member offered to service a particular community of clients located in BC or elsewhere: clients who prefer to do business in Mandarin and Cantonese. The Respondent speaks both languages. Many of his clients were Chinese Mainlanders and were located in time zones where business hours did not overlap with the time zone of the market in which the Respondent was trading in their accounts. Some, like YX, were located in BC.

¶ 10 The Respondent's first contravention, Count 1, relates to the Respondent having made various trades in the account of the client, YX, that were not authorized by YX, contrary to IIROC Dealer Member Rule 29.1, which addresses the standards of ethics and conduct with which registrants are required to comply. Rule 29.1 states, in relevant part:

> 29.1 Dealer Members and each ... Registered Representative ... of a Dealer Member (i) shall observe high standards of ethics and conduct in the transaction of their business (ii) shall not engage in any business conduct or practice which is unbecoming or detrimental to the public interest, and (iii) shall be of such character and business repute and have such experience and training as is consistent with the standards described in clauses (i) and (ii) or as may be prescribed by the Board.
>
> For the purposes of disciplinary proceedings pursuant to the Rules, each ... Registered Representative ... shall comply with all Rules required to be complied by the Dealer Member.

¶ 11 The Respondent was authorized to engage in trading in client accounts, provided he obtained specified approval for the transactions from his clients in advance. Notably, he was not licensed to engage in discretionary trading.

¶ 12 The Respondent engaged in 11 trades on four occasions – 8 buys and 3 sells - in YX's account, that were not only unauthorized, but they contradicted YX's express instructions on three occasions to provide him with details of the trades in advance. YX became increasingly concerned about the Respondent's disregard of his instructions to the point that after the fourth incident of unauthorized trading on October 4, 2011, which resulted in a loss, YX escalated his complaint to the Branch Manager. After an internal investigation, the Dealer Member terminated the Respondent's employment in late October, 2011. The Respondent has not been registered with IIROC since.

¶ 13 The second contravention, Count 2, relates to numerous discretionary trades the Respondent made in many client accounts in a two hour period on or about October 4, 2011, contrary to Rule 1300.4. That Rule states in relevant part:

> 1300.4 A Registered Representative may not exercise discretionary authority over a customer account unless:
>
> . . .
>
> (b) the customer has given prior written authorization in compliance with Rule 1300.5;
>
> (c) a Supervisor designated under subsection (a) has approved the account as a discretionary account and recorded that approval; . . . .

¶ 14 The Respondent was not licensed or authorized to engage in discretionary trades. His clients' accounts were not designated as discretionary.

¶ 15 Despite this, in a two hour period on October 4, 2011 the Respondent transacted 181 sales orders in 37 client accounts. Two of these sales orders involved YX's account. The affected clients included persons who were sophisticated investors and some who were not. Many of these clients were Chinese speakers who were located in mainland China. There is some evidence that raises questions about their facility with English. For example, IIROC sent questionnaires translated into Chinese to 18 of the Respondent's clients. Only five replied, and each reply was written in Chinese. Although the clients were not asked about the fluency of their English, one client noted he or she could not read English and another noted he or she could not understand

English.

¶ 16 The Panel accepted evidence that the trades took place at a rapid pace, every minute or so (with the exception of two breaks), within a period of approximately two hours. In the circumstances, there was no credible evidence that the Respondent complied with his obligation to obtain instructions and confirm the four elements of each of the 181 trades (quantity, security, price and timing) in a manner that was adequately contemporaneous with the trades, before he entered them. Indeed, it was not physically possible for him to do so.

¶ 17 There was evidence that the Respondent told his employer, the Dealer Member, during its investigation that all the relevant clients contacted him in advance to initiate the trades and left both the timing and the price to him. On that explanation, the trading was discretionary. The evidence of YX and other clients contradicted this. They indicated that they had not initiated or approved the trades in advance. On that evidence, the discretionary trading was unauthorized.

¶ 18 The Respondent's third contravention, Count 3, related to misrepresentations he made to the Dealer Member on October 4, 2011, contrary to Rule 29.1, by marking the trade tickets for the 181 sell orders in 37 client accounts as "unsolicited", when the fact was that he had used his discretion to make the transactions without his clients' knowledge. The relevant portions of Rule 29.1 are quoted above and will not be reproduced here.

¶ 19 The term "unsolicited" has a particular meaning in the industry: it means that the idea to initiate a trade originated with a client, not a Registered Representative. As mentioned, the Panel found that the holders of the 37 client accounts did not provide unsolicited instructions to the Respondent to sell the securities at issue in advance of the two-hour period of trading on October 4, 2011. The Respondent either marked the trade tickets as "unsolicited" or allowed them to be marked, by default, as "unsolicited". His conduct was either an action of commission or omission. In either event, the designation of the 181 trades as "unsolicited" was a misrepresentation. It was the Respondent's obligation as a registered representative to refrain from misrepresentation.

¶ 20 One panel member expressed a caveat on his concurrence with the Panel's finding on Count 3:

> 70. We note that one Panel Member, Michael E. Johnson, is of the view that the Respondent's conduct may have amounted to more of an administrative "CATCH 22-like" matter (in that, in order for the Respondent to execute the discretionary trades, the trading system required that he enter a designation of "solicited" or "unsolicited" for each of the sell orders; which given our ruling as to Count 2, would be wrong either way) than a matter of misrepresentation and does not add significantly to the Respondent's overall conduct as found in Counts 1 and 2.

¶ 21 The Respondent's fourth contravention related to his non-compliance and lack of cooperation with IIROC's investigation into his conduct, contrary to Rule 19.5. In particular, he refused to provide information required for IIROC's investigation in the period November 2012 to August 2013.

¶ 22 IIROC Dealer Member Rule 19.5 states in relevant part:

> 19.5 For the purpose of any examination or investigation pursuant to this Rule 19, a ... registered representative ... may be required by the Corporation:
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> ...
>
> (c) To attend and give information respecting any such matters ... .
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> ...
>
> The person conducting the investigation may, in his or her discretion, require that any statement given by any person in the course of an investigation be recorded ... and may require that any statement be given under oath.

¶ 23 The Panel found that the Respondent had engaged in a course of conduct between November 22, 2012 and August 2013 which contravened Rule 19.5. At all relevant times, his address and telephone number listed in the National Registration Database ("NRD") remained unchanged.

¶ 24 IIROC commenced its investigation of the Respondent's trading activities and delivered a standard investigation opening letter dated March 13, 2012 to a condominium in Vancouver (the "Vancouver Condo"), which was the Respondent's address as listed on the NRD, where it was received by him. That letter notified the Respondent that IIROC had commenced an investigation of his trading activities.

¶ 25 The Respondent communicated with IIROC's investigator, Ms. T, until November 21, 2012, when IIROC commenced a telephone interview with the Respondent, who was then in Beijing. During the interview that day, the Respondent was informed of his obligation to provide information and answer IIROC's questions relating to its investigation. In the course of the interview, the Respondent claimed he was now permanently living in Beijing, but refused to provide an address where he could be reached in China, without providing reasonable justification. The telephone interview was cut short because of a poor telephone connection and because of the interviewers' views that the Respondent's command of English was inadequate for the purpose of the interview and a Mandarin translator should be retained to assist. The Respondent agreed to do a new interview and to provide his contact information to the investigator if that information changed in any way. He did neither.

¶ 26 Unbeknownst to IIROC, on the very day of the interview, November 21, 2012, the Respondent was already in the process of transferring his ownership interest in the Vancouver Condo to his wife, thereby removing himself from title to the property and leaving title in the sole name of his wife.

¶ 27 After November 21, 2012, the Respondent was unresponsive to IIROC's subsequent attempts to contact him by telephone. Notably, the Chinese telephone number that the Respondent had provided to IIROC and where he was last reached was disconnected. The Respondent did not respond to IIROC's emails that were successfully delivered about arranging a second interview, including an IIROC letter compelling the Respondent's attendance at a second interview scheduled for August 14, 2013 (the "Compel Letter"). That letter notified the Respondent that disciplinary proceedings would be initiated against him for failure to cooperate with IIROC's investigation should he fail to attend or not attempt to reschedule the interview and that a conviction for failure to cooperate may result in a permanent ban from IIROC registration, as well as a fine. Additionally, IIROC unsuccessfully attempted on multiple occasions to deliver the Compel Letter by email, regular mail, registered mail and process service to the Vancouver Condo.

¶ 28 On August 14, 2013, the Respondent failed to attend the second interview. He provided no further contact information to IIROC despite leaving his address and telephone number unchanged in the NRD. Ultimately, his conduct frustrated IIROC's ability to complete its investigation.

¶ 29 Although the time frame of the conduct covered by Count 4 ended in August 2013, there was evidence that in 2015, the Respondent applied through the B.C. Securities Commission to reactivate his registration so that he could obtain employment with an Exempt Market Dealer located in Vancouver. IIROC Staff managed to contact him by telephone to pursue the investigation of the counts in this case and to advise him that a hearing was to be held. However, he terminated the telephone call. Their follow-up telephone calls and letters were not answered and the telephone number disconnected. Further efforts to make deliveries and serve documents on the Respondent at his NRD address were unsuccessful.

¶ 30 The Panel wrote at paragraph 83 of its decision on the merits:

> 83. It is an obligation of a Registered Representative to co-operate with IIROC's investigations. It is conduct unbecoming of a Registered Representative to evade that obligation and attempt to walk away from alleged breaches of professional responsibilities without facing the potential consequences. Moreover, it is prejudicial to the public interest and brings the investment industry into disrepute where Registered Representatives strenuously avoid and successfully frustrate such investigations while leaving open the possibility that they may try

to return to the industry some years later only to resume the complained-of conduct.

Key Factors

¶ 31 We now address our consideration of the key factors set out in Part II of the Guidelines. The key factors that are most engaged in the instant case are set out below.

2. Whether the respondent engaged in numerous acts and/or a pattern of misconduct.

¶ 32 In Count 1, the Respondent engaged in a number of unauthorized trades: 8 buy orders and 3 sell orders on 4 separate dates in the account of a single client, YX, despite YX's requests that he obtain prior approval, before the client complained to his Branch Manager. This disclosed a pattern of misconduct, *viz*, engaging in unauthorized trades in disregard of professional obligations and his client's express instructions that he obtain prior approval;

¶ 33 In Counts 2 and 3, the Respondent engaged in 181 discretionary trades in 37 client accounts over a 2 hour period in a single day (including 2 in YX's account), which he misrepresented as having been "unsolicited". This was an extension of the Respondent's pattern of misconduct of engaging in improper trades in disregard of his professional obligation to obtain prior approval of trades, of which YX's recent express instructions ought to have reminded him.

¶ 34 In Count 4, the Respondent engaged in a course of conduct over 9 months in which he failed to cooperate with IIROC's investigation of his misconduct, which included: evading contact by telephone, email and mail and personal service; leaving the country; refusing to provide information; and putting his assets out of reach of IIROC.

¶ 35 This demonstrated a repeated pattern of non-compliance, disregard for professional and regulatory obligations and conduct unbecoming a registrant. This was compounded by his deliberate evasion, dishonesty and lack of accountability, culminating in his effective refusal to cooperate with investigations.

3. Whether the respondent engaged in the misconduct over an extended period of time.

¶ 36 In Count 1, the Respondent engaged in the misconduct relating to unauthorized trading over approximately three months, which is not an extended period of time.

¶ 37 In Count 2, the Respondent engaged in the misconduct relating to discretionary trading over a two-hour period in a single day, which is a short period of time. However, that was not the end of the misconduct relating to the discretionary trading.

¶ 38 The Respondent's conduct in Court 2 led to his misrepresentations in Count 3, which had a more extended temporal impact. Although he made written misrepresentations to his employer on the same day as the trades were made that the discretionary trades were "unsolicited", he continued to maintain that they were "unsolicited" during the employer's investigation by claiming that his clients initiated the trades. This had the effect of perpetuating the misrepresentation and of interfering with his employer's investigation of the Count 2 misconduct until his employment was terminated at the end of October, 2011.

¶ 39 The Respondent engaged in the misconduct involved in Count 4 over approximately 9 months.

4. Whether the misconduct was intentional, willfully blind, or reckless with respect to regulatory requirements.

¶ 40 The Respondent's conduct was intentional, willfully blind and reckless with respect to regulatory requirements, including his failure to conform with the standards and ethics required of a registrant, his contraventions of the restrictions on his licensed activities, his deliberate disregard of client instructions and his failure to cooperate with IIROC's investigation. This indicated that he did not intend to comply with the investigation and disciplinary processes mandated by the regulatory regime.

5. Extent of harm to clients or other market participants.

¶ 41 The harm to clients and other market participants included the economic losses sustained by clients, and the damage to their perception of the integrity and trustworthiness of registrants.

¶ 42 Additionally, the harm to the Respondent's employer, the Dealer Member, included the economic damage to it of having to compensate clients for his misconduct and the harm to its reputation and the integrity of its compliance systems, particularly in the Chinese-speaking community that it sought to service by offering Registered Representatives such as the Respondent who purported to meet their particular needs. This is discussed further below.

6. Extent of harm to market integrity or the reputation of the marketplace, or both.

¶ 43 The harm to market integrity or the reputation of the marketplace, or both, includes a loss of confidence in the compliance of registrants with their duties to obtain and comply with their clients' instructions in advance of trading in their accounts. It also includes a loss of confidence in the ability of Dealer Members to detect non-compliance and to supervise, investigate and ensure compliance of the registrants they employ with regulatory obligations.

¶ 44 Additionally, the harm includes a loss of confidence in IIROC to supervise, regulate and investigate as described above in connection with factor 5.

¶ 45 In particular, the Respondent's failure to cooperate with IIROC harms IIROC's ability to supervise the conduct of registrants in the market by, among other things, interfering with its ability to conduct investigations and ensure that registrants are complying with their regulatory obligations. Moreover, failure to cooperate with IIROC brings registrants, Dealer Members, and the regulatory authorities into disrepute and prejudices them in the eyes of the public.

¶ 46 The harm to the integrity and reputation of the market includes a loss of confidence by the general public in the ability of participants in this self-regulated profession to supervise and ensure that Registered Representatives offered by Dealer Members to service particular communities (for example, persons from other cultures, disparate time zones, or distant locations, who either prefer to or must conduct business in languages other than the official languages of Canada) are capable, despite such diversities, of being adequately supervised for compliance with regulatory requirements and are not able to take advantage of their clients' diversities to harm those clients and evade detection by the regulatory regime in British Columbia.

7. The level of vulnerability of the injured or affected client(s)

¶ 47 YX's level of vulnerability to injury was complicated by the fact that the Dealer Member offered Registered Representatives such as the Respondent to serve the cultural and language needs of a particular community of clients situated both locally and in the far east. YX was a member of that community. However, those features of the service have the potential to obfuscate misconduct or delay its discovery, for example, where the business relationship is conducted in the context of a different culture or language than the one in which supervision and compliance staff conduct business.

¶ 48 In the instant case, YX's vulnerability appears to have been increased by cultural norms that caused YX to accord the Respondent continued respect and forbearance because of his expertise when he repeatedly disregarded YX's instructions. This discouraged YX from escalating his complaint to the Dealer Member's management in a more timely way.

¶ 49 The vulnerability of the other injured or affected clients is similar to that of YX. Many of those clients were Chinese mainlanders who placed greater trust and reliance on the Respondent in his conduct of their trading because of their distant location in a time zone that did not overlap with the hours of the local markets. These clients included people who could not speak or read English. All of these factors – age, language, cultural, location, and time zone differences – contributed to these clients being more dependent on the Respondent than may otherwise have been the case. The vulnerability of clients in this type of relationship puts an additional burden on Member Firms in terms of operational processes and compliance oversight.

8. The respondent's relevant disciplinary history

¶ 50 The Respondent had no prior disciplinary history.

10. In the case of individuals, whether the respondent accepted responsibility for or acknowledged the misconduct to his or her employer or the regulator prior to detection and intervention by the Dealer Member or the regulator.

¶ 51 The Respondent did not accept responsibility for or acknowledge his misconduct to his employer or the Regulator before or after detection and intervention by either of those parties.

12. Whether an individual respondent was subject to internal discipline by the Dealer Member

¶ 52 The Respondent was subjected to internal discipline, in the form of termination from employment, by his employer, the Dealer Member.

16. Whether the respondent attempted to delay IIROC's investigation, to conceal information from IIROC, or intentionally provided inaccurate or misleading testimony or documentary information to IIROC.

¶ 53 In Count 4, the Respondent intentionally refused to provide IIROC with information such as his address in China and his contact information, he ceased responding to its communications, he terminated telephone contact, he disconnected his Chinese telephone, and he failed to attend a scheduled interview with IIROC Staff. In the result, his lack of cooperation delayed and frustrated IIROC's investigation.

19. Whether the respondent attempted to conceal his or her misconduct or to lull into inactivity, mislead, deceive or intimidate a client, regulatory authorities or, in the case of an individual respondent, the member firm with which he or she is/was associated.

¶ 54 This factor assumes greater consequence in connection with Counts 3 and 4. In particular, the Respondent misled a Dealer Member with which he was associated. That is, he marked all of the 181 trade tickets for sales orders as "unsolicited" in his employer's records. As mentioned, this was a misleading statement, as marking a trade order as "unsolicited" is understood to be a representation that the client originated the idea of making the trade, not the Registered Representative. In the instant case, the Panel found that the Respondent used his discretion to make 181 sell orders in 37 client accounts, without his clients' knowledge, on October 4, 2011.

¶ 55 As noted in the Panel's decision on the merits, a trade ticket is a document that forms part of an audit trail relied on by the Dealer Member in the course of business. Representations in such tickets are used to assist in monitoring compliance and in defending Dealer Members and their registered representatives against client complaints. Misrepresentation in trade tickets harms a Dealer Member's ability to discover, investigate and rectify misconduct, and may unnecessarily expose it to liability.

¶ 56 In the instant case, the Dealer Member's discovery that the Respondent had marked in the trade tickets of October 4, 2011 that the trades in YX's account were unsolicited led the Dealer Member to expand its investigation of YX's complaints to the rest of the Respondent's trade tickets that day. As a result, it found that trade tickets for 181 sell orders in the accounts of 36 other clients had similarly been marked "unsolicited". However, when the Employer asked for an explanation of this, the Respondent claimed that all of the relevant clients had called him in advance to initiate the trades and left both the timing and price to him. On that explanation, the trading was not "unsolicited", as that term is used in the industry, rather it was unauthorized, discretionary trading initiated by the Respondent.

¶ 57 The Dealer Member then endeavoured to contact the other affected and injured clients, with mixed success. It was Ms. T's further investigation of the October 4, 2011 events on behalf of IIROC that revealed it was physically impossible for all of the Respondent's 37 clients to have given prior approvals of each trade by telephone in an appropriately contemporaneous manner to justify making the trades when he did so. In the

result, the Panel found that the trades were discretionary, and therefore the marking of such trades as "unsolicited" was untrue and misleading.

¶ 58 In Count 4, the Respondent, by his failure to cooperate, attempted to conceal his misconduct or lull into inactivity, mislead and deceive IIROC in the manner described in connection with factor 16, above.

> **21. Whether the respondent engaged in the conduct at issue notwithstanding proper warnings from IIROC…that the conduct contravened…IIROC rules or applicable securities law or regulations or was not in the best interest of the client or public.**

¶ 59 The Respondent continued to engage in the conduct involved in Count 4, failure to cooperate with IIROC's investigation, despite IIROC's prior warnings that:

(a) he was obliged to provide information and answer IIROC's questions relating to its investigation;

(b) disciplinary proceedings would be initiated against him for failure to cooperate with IIROC's investigation should he fail to attend or not attempt to reschedule the interview; and,

(c) a conviction for failure to cooperate may result in a permanent ban from IIROC registration, as well as a fine.

Other Mitigating Considerations

¶ 60 Although there is not a separate principle or factor for mitigation in the Sanction Guidelines, it is implicit that mitigating circumstances should be taken into account in fashioning sanctions. In addition to the foregoing, we have taken into consideration the following:

(a) there was no allegation that the trading at issue was unsuitable or raised "know your client" concerns; and

(b) there was no allegation that the trading activity was motivated by generation of commissions.

Sanctions

¶ 61 Counsel for IIROC Staff supplied the Panel with a number of IIROC decisions which are said to be comparable to the instant case. Below, we will reference the most comparable cases in the context of each contravention.

(a) Count 1

¶ 62 As mentioned, Count 1 relates to unauthorized trading in the account of YX, despite YX's repeated instructions that the Respondent obtained his instructions before trading. The case law supports the conclusion that this is a serious offence warranting a severe sanction, especially where the affected clients are vulnerable.

¶ 63 In *Re Armstrong* [2015] IIROC 34, the respondent was found to have engaged in unauthorised discretionary trading and to have refused to fully cooperate in an IIROC investigation. Among other things, the respondent engaged in trading in a client's account that was not designated as discretionary without first obtaining the client's consent on 18 occasions over a period of approximately three years.

¶ 64 The panel observed that disciplinary measures for this type of unauthorized discretionary trading are appropriately severe. It found that such trading constitutes conduct unbecoming contrary to Dealer Member Rule 29.1 and is a serious violation. The sanctions imposed were a permanent bar on approval with IIROC, a fine of $50,000 for unauthorized trading and failure to cooperate, disgorgement of commissions of approximately $4,000, and costs payable to IIROC of $50,000.

¶ 65 In *Re Phillips*, 2001 IIROC 60, the respondent engaged in various contraventions, which most notably involved unsuitable trading. The Respondent had purchased securities in the accounts of two clients over a period of 8 months that were not suitable for them, causing them substantial loss. Of relevance to the instant case is the finding that a number of the unsuitable purchases in one client's account were facilitated by

unauthorized, discretionary trades. In considering sanctions, among other things, the Panel found that the clients were vulnerable, because they were unsophisticated investors and were trusting and completely reliant on the Respondent's advice. Moreover, they could ill afford their losses. Their vulnerability aggravated the penalty in the case.

¶ 66 The Panel's comments about the applicable principles are apt. It wrote, at paragraph 8:

> A registrant's most basic duty is to make suitable recommendations in accordance with the client's objectives and risk factors and to properly obtain instructions before implementing trades.

¶ 67 The Panel wrote at paragraph 30:

> As an Investment Advisor, the Respondent is on the front-line of the client relationship and is expected to conduct herself with trustworthiness and integrity, and act in an honest, fair and efficient manner in all dealings with the public, her clients and the securities industry as a whole.

¶ 68 In a separate, concurring, reasons, one Panel Member wrote, at paragraph 44:

> The unsuitable purchases in this case were in part accomplished by unauthorized discretionary trading. It is a fundamental requirement, and known to every registrant, that trades be specifically authorized by the client, unless specialized licensing is in place. Unauthorized discretionary trading and its use in facilitating the purchase of unsuitable securities cannot be tolerated by the industry.

¶ 69 In the result, the Panel imposed a fine of $290,000, disgorgement of profits of approximately $10,000, a ban on registration for 3 years, a payment to IIROC of costs of $15,000, a requirement for full payment of the fine, disgorgement and costs prior to re-registration, an obligation to successfully retake and complete certain courses and strict supervision for the first two years of re-entry into the industry.

¶ 70 We observe that the fine imposed in *Re: Phillips* was substantially more significant than in the other cases brought to this Panel's attention. Although the panel in that case did not impose a permanent ban on approval, we note a three year ban often results, in practice, in a permanent ban, because by the time the ban expires, respondents will typically have lost their entire book of business and their reputation in the industry will have been irreparably damaged by publication of misconduct that attracted such a significant sanction.

¶ 71 In the instant case, the Respondent's repeated disregard of express instructions that he obtain YX's instructions in advance of trading makes his conduct particularly egregious. The Respondent already knew or ought to have known that he was obliged to obtain the client's prior approval. As noted in *Re Armstrong*, *supra*, at paragraph 10, the Conduct and Practices Handbook which all registrants are required to read, specifically states that "Every client order must be entered only at the client's direction unless the account has been properly constituted as a discretionary or managed account". The Handbook specifically requires that a registered representative "obtain the specifics of price, quantity, security and timing of the order from the client".

¶ 72 YX's account was not discretionary and the nature of his repeated instructions to provide details of transactions in advance clearly conveyed that he did not grant discretionary authority to the Respondent. Moreover, the Respondent was not licensed to conduct discretionary trades. Accordingly, the Respondent ignored YX's instructions at his peril.

¶ 73 There is little in the facts to mitigate against this contravention except that the Respondent had no prior disciplinary record and was dismissed from his position with the Dealer Member. On the other hand, the Respondent's conduct was deliberate, wilful and repeatedly dismissive of the client's specific instructions. It is this factor which, in our view, attracts a sanction on the extreme edge of the scale. In our view, this conduct was a clear demonstration that the Respondent cannot be trusted to act in an honest and fair manner in his

dealings with clients and, in itself, warrants a permanent ban plus a substantial fine.

¶ 74 Under the predecessor to the Sanctions Guidelines now in force, the minimum fine suggested for unauthorized trading was $15,000. The new Sanctions Guidelines gives greater recognition to the discretion of a panel in fashioning sanctions. In our view, the misconduct in Count 1, which involved 11 trades conducted on four separate days in repeated and deliberate disregard of a client's express instructions, is very serious. It warrants more than a minimal fine and should attract a fine in the range of $70,000 to $100,000.

(b) Count 2

¶ 75 With respect to Count 2, regarding discretionary trading, we note that the facts include discretionary trading in 37 client accounts, involving 181 sell orders in a two hour period October 3, 2011. If we exclude the trades in YX's account, which are accounted for by the penalty addressed under Count 1, this brings the statistics to 36 client accounts and 179 sell orders.

¶ 76 This Panel's comments respecting Count 1 are largely applicable to its views respecting Count 2. The Respondent was not authorized to engage in discretionary trading. He knew or ought to have known that if he had no discretion, he was required to obtain the express approval of clients to sales in their accounts before engaging in trading in their accounts. Not only did the Respondent represent to the Dealer Member that the clients had given him advance instructions, but he maintained they left it to him to determine timing and pricing, which meant that there were discretionary elements of the trades, in which he was not licensed to engage. Moreover, despite this explanation, the evidence showed that he could not have received these advance instructions at a time sufficiently proximate to the trades themselves to comply with the Rules, as it was physically impossible to do so at the time.

¶ 77 It might be argued that the Respondent had some altruistic motive by engaging in a "convert to cash" defensive strategy in the face of the declining market he encountered that morning. However, that did not relieve him of his obligation to act within the limitations of his licensed activities and his client's non-discretionary accounts. Notably, no one has a crystal ball about the future and the market decline on October 4, 2011 proved temporary. In any event, the Respondent had his chance to provide exculpatory explanations to IIROC, but declined to cooperate with its investigation. In the circumstances, we cannot infer such explanations for him.

¶ 78 We note that the old Sanction Guidelines recommended a minimum fine of $5,000 for discretionary trading. The Panel is not limited by such minimums. There were 179 trades in the 36 client accounts. The fine could be $180,000 or more. Although this amount appears to be high, the contraventions of October 4, 2011 were serious. Again, we note that the misconduct was aggravated by the fact that the Respondent knew or ought to have known that he required client approval in advance of making these trades and that he provided disingenuous explanations for it. It was also aggravated by the fact that the many clients in the community he serviced were vulnerable, as described elsewhere.

(c) Count 3

¶ 79 With respect to Count 3, regarding the Respondent's misrepresentation of numerous sell orders as "unsolicited", this count related exclusively to the 181 sell orders on October 4, 2011. Although this misrepresentation had little or no effect on clients, it had significance insofar as it interfered with the Dealer Member's supervision of the Respondent to ensure that trades in his clients' accounts were in compliance with regulatory requirements.

¶ 80 As mentioned elsewhere, Dealer Members rely on the representations that registrants make in documents such as trade tickets for compliance purposes, as well as to assist in defending against complaints by clients. There may be circumstances where clients are vulnerable because of age, cultural, language, geography and time zone constraints or barriers. In such cases, the ability of a Dealer Member to supervise for compliance and investigate potential misconduct is made more difficult because of these factors. Nonetheless, it is the Dealer Member's responsibility.

¶ 81 In the case of *Re Jones*, 2013 IIROC 58, the Panel imposed a suspension of three months, a fine of $48,000, strict supervision for one year, and costs payable to IIROC of $15,000. One of the proven counts in that case was misrepresenting approximately 50 trades in one client's account that she recorded on trade tickets as "unsolicited". The other proven counts included such misconduct as engaging in discretionary trading and trading in unsuitable investments.

¶ 82 Accordingly, the comparable aspect of that case to the instant one suggests that an appropriate sanction for this offence would include a fine reflecting the number of trades. Had we found a fine of $1,000 per trade was appropriate for each misrepresentation, the total fine for 181 trades would result in a total fine of $181,000. We are of the view that the misconduct at issue is not merely one of administrative efficiency, but it is less egregious than a fine this large would warrant, given that the primary victim of the misconduct was the Dealer Member, which has already penalized the Respondent by terminating his employment. Accordingly, a reasonable fine would fall in the range of $20,000 to $25,000.

(d) Count 4

¶ 83 IIROC hearing panels have viewed the failure to cooperate with IIROC investigations as conduct unbecoming a registrant and a serious violation of the Rule 29.1. Such circumstances warrant severe sanctions, irrespective of whether the respondent continues in the industry and irrespective of whether the underlying allegations being investigated were serious or proved (*Re Armstrong*, *supra*, *Re Jaques* [2014] IIROC 28).

¶ 84 This type of conduct has attracted permanent bars on approval and significant fines ranging from $25,000 to $75,000 in cases where the uncooperative conduct at issue has been more egregious than the misconduct in the instant case. For example, in *Re Armstrong, supra,* the facts of the failure to co-operate charge were similar to the instant case. The respondent had initially participated in IIROC's investigation. He attended an interview, which was terminated early when the respondent advised that he wanted to consult counsel. The next day he resigned his employment and left the industry. With one exception, further efforts by IIROC to communicate with the respondent by registered mail were unsuccessful. Ultimately, the IIROC investigator was unable to complete the investigation.

¶ 85 The panel concluded that the respondent contravened IIROC Dealer Member Rule 19.5, which required the respondent to produce documents and attend and give information to IIROC. The panel found that this type of failure to cooperate, particularly after a respondent has been given a number of opportunities to do so, is serious for several reasons, particularly the importance of regulating registered representatives in the public interest. As a result, the panel imposed a permanent bar on the approval with IIROC, a fine of $50,000 for unauthorized trading and failure to cooperate, disgorgement of commissions of approximately $4,000 and costs payable to IIROC of $50,000.

¶ 86 In *Re Jaques, supra*, one of the offences proved was that the respondent failed to attend and give information respecting an IIROC investigation into his conduct. The respondent's participation in IIROC's investigation of the underlying complaint was minimal. When initially contacted at home, he advised that he would provide a written response to the complaint, but he never did so. He failed to respond to letters. He said in voicemail exchanges that he would take steps that he never took. He was personally served with letters to which he did not respond, including one in which he was advised that an investigatory interview had been scheduled and that if he failed to cooperate with IIROC's investigation, disciplinary proceedings may be commenced against him. He failed to attend the scheduled interview and that failure, as well as the failure to provide information, prevented IIROC from completing its investigation.

¶ 87 IIROC counsel in that case summarized numerous cases in which a finding of failure to cooperate was made after a Registered Representative failed to attend an interview. In each of those, a $50,000 fine was imposed, as was a permanent ban on registration in any capacity (see paragraphs 36 and 37).

¶ 88 At paragraph 38, the panel stated that the requirement to cooperate in any investigation conducted by the regulator is fundamental to maintaining the integrity of the securities system and to ensure public protection and confidence. The breach of this obligation is a serious form of misconduct because it undermines IIROC's

ability to perform its public interest mandate. The panel imposed a fine of $50,000 and permanently banned the respondent from registration in any capacity in connection with its non-cooperation finding. Additionally, it ordered costs to IIROC in the amount of $20,000.

¶ 89 In *Re Trites* [2010] IIROC 48, an IIROC panel found that the respondent had failed to attend an IIROC interview without any excuse, despite having notice that he was compelled to attend, in breach of his obligation under IIROC Rule 19.5. IIROC had informed the respondent by letter that it was investigating complaints from four of his clients. The respondent agreed to attend an interview, but then advised that he would not be able to do so. Efforts to reschedule the interview were unsuccessful. IIROC advised the respondent that he was obliged to attend the interview even though he was no longer registered with IIROC. Subsequent efforts to contact him, including by email and telephone, were unsuccessful. The respondent signed for receipt of an IIROC letter advising that he was compelled to attend an interview, and if he failed to do so, his conduct would be referred to enforcement counsel to initiate disciplinary proceedings. Despite this, he did not respond, and failed to attend the rescheduled interview. As a result, IIROC was unable to complete its investigation.

¶ 90 IIROC counsel, in that case, provided four decisions in which the only allegation was failure of an Approved Person to attend an interview in an investigation into his conduct and in each decision, the respondent received a permanent ban from approval in any capacity and was ordered to pay a fine of $50,000 plus costs (see paragraph 10).

¶ 91 The panel wrote, at paragraphs 12 and 13:

> 12. .... It is of vital importance to the integrity of the system for regulating approved persons that approved persons cooperate with reasonable demands made on them during an investigation of their conduct. This obligation does not end when an Approved Person ceases to be registered.
>
> 13. We consider Mr. Trites' failure to attend IIROC's interview to be a serious matter, which warrants a penalty which will prevent Mr. Trites from participating in IIROC in the future and will discourage others, including others who have already resigned from IIROC, from ignoring their regulatory obligations.

¶ 92 The panel observed that the fact that the underlying allegations in the case before it were not proved was not relevant to the non-cooperation sanction; the gravamen of the respondent's misconduct was failing to respect that as a participant or former participant in a regulated industry, one must comply with the obligation to cooperate with the regulator's investigation, regardless of the underlying allegations. It concluded that the most significant factors in determining penalty were that the respondent's failure to cooperate was with respect to a substantial step in the investigation (i.e. failure to attend an interview with IIROC Staff), his failure was intentional and his failure was without reasonable cause. It imposed a permanent ban from approval by IIROC in any capacity, a fine of $25,000, and costs to IIROC of $4,500.

¶ 93 The panel in the instant case agrees that it is critical to IIROC's regulatory mandate that registered representatives cooperate with reasonable demands made by IIROC during investigations into their conduct, regardless of the merit of the underlying allegations. That obligation does not end when they cease to be registered. A failure to cooperate in an investigation undermines the confidence of the public and other participants in the securities industry and harms the integrity of the regulatory process. A breach of the obligation to cooperate is a serious form of misconduct because it subverts IIROC's ability to perform its regulatory function and discharge its mandate to protect the public interest. It is clear from the case law that a failure to cooperate is viewed as so egregious that it frequently attracts the ultimate sanction of a permanent bar from the industry and a significant fine.

¶ 94 Here, the Respondent's conduct in failing to co-operate with IIROC was egregious in and of itself. His conduct was exacerbated by the fact it was deliberate, wilful and continued for many months. Moreover, it gives the Panel no confidence that he will comply with his regulatory obligations if he returned to the industry in future.

¶ 95 Although the Respondent appeared to be willing to participate in IIROC's investigation initially, it is now clear that he had no intention of cooperating. The evidence gleaned by IIROC shows that after his employer terminated his employment, after he received the IIROC's investigation opening letter and on the day before his first interview, he endeavored to judgment-proof himself by transferring title to his interest in the home he jointly owned with his wife to his wife. He left Canada and claimed he permanently moved to Beijing. He made himself difficult to contact and serve. During the first interview, he refused to give IIROC his address in Beijing and then failed to give contact information that he had agreed in the interview to supply. Later, he cut off his Beijing phone. He then evaded and failed to respond to IIROC's valiant efforts to contact him by regular mail, registered mail and personal service at the Vancouver Condo to continue the investigative process.

¶ 96 In addition, the Respondent's failure to cooperate was more egregious because it made IIROC's ability to investigate more difficult than in the typical case. As mentioned above, the complaints being investigated involved clients who were vulnerable to the Respondent's misconduct because of language, cultural, geographic and time zone constraints. Many were residents of Mainland China and were located in distant geographic locations and time zones. Many, and perhaps all, had specifically sought a registered representative with whom they could conduct business in a language other than one of the official languages of Canada, either because they preferred this or could not do otherwise. This made it more difficult for the clients to pursue complaints both with the Respondent's employer and IIROC and it made it more difficult for the employer and IIROC to communicate with and obtain cooperation from clients in the course of their investigations into the Respondent's misconduct.

¶ 97 Such circumstances can interfere with IIROC's ability to investigate the conduct of a registrant. For instance, this can make it difficult to find and communicate with clients about that misconduct and obtain clear, cogent and admissible evidence about that misconduct to adduce at a disciplinary hearing. This was demonstrated in the instant case. IIROC sent questionnaires translated into Chinese to the 18 clients who the Dealer Member obtained complaints from during its investigation, but received only five completed questionnaires in response, including one from YX.

¶ 98 As mentioned above, disciplinary sanctions are preventative and protective. They should be sufficiently significant to prevent and discourage future misconduct by respondents and deter others from similar misconduct. We agree with the comments in cases referenced above, such as that a permanent bar is the equivalent of the "death penalty" in the securities industry (see *Re Trites*). In an egregious case, such as the instant one, an extreme penalty of that magnitude will meet the objective of specific deterrence. It will prohibit respondents who have successfully evaded the consequences of non-compliance, and provide no reason to believe they will comply with regulatory requirements in future, from returning to the industry.

¶ 99 A permanent bar will also meet the objective of general deterrence. It will discourage others, including registered representatives who have left the industry, from engaging in similar conduct and from ignoring the obligation to cooperate with IIROC. Moreover, it will send a strong message to the securities community and the public that failure to abide by regulatory obligations to cooperate with IIROC will not be tolerated.

¶ 100 As a result, we agree that in respect of Count 4 the Respondent should be sanctioned with a permanent bar from approval by IIROC in any capacity and a very substantial fine. The cases we have reviewed indicate that fines in the range of $50,000 have often been ordered in conjunction with a permanent bar. In our view, the applicable fine ought to be on the higher side, given the Respondent's deliberate efforts to make himself judgment-proof and to make himself and his assets unavailable to IIROC, as well as his refusals to provide contact information specifically requested by IIROC Staff. He deliberately frustrated IIROC's ability to complete its investigation. In the circumstances, we would award a fine in the range of $75,000 in addition to the permanent ban.

Global Sanctions

¶ 101 As noted above, the Panel finds that a permanent bar, plus a substantial fine, is warranted by each of Counts 1 and 4.

¶ 102 With respect to fines, we note that the cumulative total range of fines supported by the cases suggest that a total fine for the Respondent's misconduct could be as much as $380,000. The fines we canvassed above for each count are:

Count 1	$70,000 to $100,000
Count 2	$180,000
Count 3	$20,000 to $25,000
Count 4	$75,000

¶ 103 However, Principle 3 of the Sanction Guidelines indicates that where there are multiple violations, the total sanction should reflect and be proportionate to the totality of the misconduct. The sanction imposed in *Re Phillips* was a 3 year suspension and a $290,000 fine. In *Re Phillips*, a permanent bar was considered and rejected. We have noted at paragraph 70 above that a 3 year suspension is almost akin to a permanent bar. When the Respondent's overall conduct is compared to the sanction imposed in the *Phillips* case, it is our view that the Respondent's trading misconduct was not as egregious as the trading misconduct in that case. Here, the range of sanctions we addressed above for the trading misconduct on Counts 1, 2 and 3 is $270,000 to $305,000. In our view, the total fines for these three counts should be approximately $175,000.

¶ 104 Moreover, in our view, it is appropriate to lean further towards a permanent bar from the industry in this case and, in that light, a lesser global fine than in *Re Phillips* is reasonable. However, it is also our view that the Respondent's misconduct, including for failure to cooperate, warrants a more severe fine than IIROC proposes, for the reasons set out above. Accordingly, we find that a permanent bar and a fine of $250,000 is an appropriate and proportionate sanction in light of the gravity of the misconduct in this case.

Costs

¶ 105 With respect to costs, we have been provided with a bill of costs by IIROC staff in support of its claim for costs of $15,000. There is substantial evidence in support of the costs sought by IIROC. Accordingly, we have decided to impose an award of costs payable to IIROC of $15,000.

¶ 106 In summary, we order that the Respondent must:

(1) be permanently barred from approval by IIROC;

(2) pay a fine of $250,000; and

(3) pay costs to IIROC of $15,000.

Dated this 21st day of September, 2016.

Alison Narod, Panel Chair

Lloyd Costley, Panel Member

Michael Johnson, Panel Member