Re Myatovic & Lowe

IN THE MATTER OF:

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

and

The By-Laws of the Investment Dealers Association of Canada

and

Marco Myatovic

and

Doreen Lowe

2013 IIROC 17

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

Heard: November 27, 2012
Decision: March 28, 2013

Hearing Panel:
John Rogers, Chair, Barbara Fraser and Michael Johnson
Appearances:
Ms. Kathryn Andrews and Mr. Milton Chan, Enforcement Counsel for IIROC
Mr. Roderick Anderson, for the Respondent, Doreen Lowe
Although represented by counsel at the disciplinary hearing, at this penalty hearing the Respondent, Marco Myatovic, was unrepresented

DECISION

Decision on Liability

¶ 1 Following seventeen days of hearing, the Respondents, Marco Myatovic ("Mr. Myatovic") and Doreen Lowe ("Ms. Lowe"), (collectively the "Respondents"), were each found to be liable for one of the allegations made against them in a Notice of Hearing dated March 4, 2011 ("Notice of Hearing")by the Enforcement Division of IIROC ("IIROC Staff") (See *Re: Marco Myatovic and Doreen Lowe* [2012] IIROC No. 47) ("Decision on Liability").

¶ 2 This hearing was held to determine what penalties, if any, should be assessed against the Respondents.

¶ 3 In the Notice of Hearing, IIROC Staff made the following allegations:

> **COUNT 1:** During April 2008 to March 2009, Mr. Myatovic failed in his role as gatekeeper by facilitating manipulative or suspicious trading activity in several client accounts by pre-arranging trades and taking instructions from an individual who was not the account holder, thereby engaging in conduct unbecoming,

contrary to IDA By law 29.1 and IIROC Dealer Member Rule 29.1.

COUNT 2: During April 2008 to March 2009, Ms. Lowe failed in her role as gatekeeper by facilitating manipulative or suspicious trading activity in several client accounts by pre-arranging trades and taking instructions from an individual who was not the account holder, thereby engaging in conduct unbecoming contrary to IDA By law 29.1 and IIROC Dealer Member Rule 29.1.

COUNT 3: From the summer of 2008 to March of 2009, Ms. Lowe engaged in unauthorized trading in client VP's account, which was conduct unbecoming contrary to IIROC Dealer Member Rule 29.1; and

COUNT 4: On or about July 2009 to November 2009, Myatovic failed to know his clients in that he opened locked in registered accounts for several clients resident in another province, without making sufficient inquiries into the circumstances of these accounts, contrary to IIROC Dealer Member Rule 1300.1 (a).

¶ 4 In the Decision on Liability, the Hearing Panel found that:

1. IIROC Staff failed to prove the allegations made against Ms. Lowe in Count 3; and
2. IIROC Staff failed to prove the allegations made against Mr. Myatovic in Count 4; but that
3. IIROC Staff did prove the allegations made against Mr. Myatovic in Count 1 and against Ms. Lowe in Count 2.

Summary of Decision on Liability

¶ 5 The Decision on Liability involved the failure of the Respondents to perform their roles as gatekeepers in the securities industry by facilitating manipulative or suspicious trading activities in seven client accounts of Mr. Mytovic and five client accounts of Ms. Lowe (the "Trading Accounts") by pre-arranging trades and taking instructions from a Mr. TSP who was not the account holder of these Trading Accounts.

¶ 6 The Hearing Panel found that the Respondents and Mr. TSP engaged in a trading scheme to promote the trading in the shares of two junior resource companies, identified as GPI and OSE, listed on the TSX Venture Exchange ("TSX-V"), which scheme, during a twelve month period from April 1, 2008 until March 31, 2009, constituted between 69.5% and 45.6% of the trading volume of the shares of GPI and between 70.9% and 36.5% of the trading volume of the shares of OSE on the TSX-V.

¶ 7 The Hearing Panel further found that this trading scheme was predominantly financed by a systematic re-aging of debits and lack of timely settlement in the Trading Accounts, and that the trading scheme continued in the face of ongoing questions from management and the compliance departments of the Respondents' Member Firms.

¶ 8 In addition, the Hearing Panel found that the Respondents appeared to be well compensated for their participation in this trading scheme by the commissions they generated from the trading of the shares of these junior resource companies through the Trading Accounts.

¶ 9 Rather than recognizing and carrying out their duties as gatekeepers to the securities industry, the Hearing Panel found that between April 1, 2008 and March 31, 2009, the Respondents performed in the direct polar opposite manner by actively assisting in and facilitating Mr. TSP in the trading scheme, such egregious conduct being a total repudiation of their gatekeeper responsibilities.

Submissions on Penalty & Costs

Submission of IIROC Staff on Penalty

¶ 10 IIROC Staff submits that the Respondents should have the same sanctions imposed against each of them and that the appropriate sanctions which should be imposed against each of them for their breaches of Dealer Member Rule 29.1 as set out in Count 1 and Count 2 above should be the following:

1. A permanent ban from registration in any capacity;
2. A fine of $250,000; and
3. Costs of $50,000.

¶ 11 IIROC Staff's recommendation for sanctions is based upon the following five aspects of the breaches of Dealer Member Rules found by the Hearing Panel in the Decision on Liability:

1. ***Intentional Nature of the Respondents' Misconduct.*** IIROC Staff points to the finding of the Hearing Panel in the Decision on Liability that the Respondents were "willing and active participants" in the trading scheme to promote the shares of GPI and OSE;
2. ***Intent and Scope of the Involvement of the Respondents.*** The Hearing Panel found in the Decision on Liability that the Respondents and Mr. TSP were in regular communication to coordinate the trading activity in the Trading Accounts and that this trading activity affected both the price and the volume of the shares of both GPI and OSE on the TSX-V and, further, accounted for a significant source of the trading on the TSX-V for these shares;
3. ***Not an Isolated Incident.*** In the Decision on Liability, the Hearing Panel found that there was a "rolling" activity and ongoing uneconomic trading patterns in the shares of GPI and OSE in the Trading Accounts orchestrated by the Respondents under the controlling mind of Mr. TSP between April 1, 2008 and March 31, 2009.
4. ***The Respondents Benefited Financially.*** IIROC Staff points out that in the Decision on Liability, the Hearing Panel found that during calendar 2008 more than 50% of Mr. Myatovic's gross commissions and 42% of Ms. Lowe's gross commissions were generated from trading in the shares of GPI and OSE.
5. ***Harm to the Integrity of the Capital Markets.*** In the Decision on Liability, the Hearing Panel found that the trading of the shares of GPI and OSE through the Trading Accounts "led to the false or misleading appearance of trading activity in or interest in the purchase and sale of the shares of OSE and GPI" clearly causing harm to the integrity of the capital markets.

¶ 12 It is the submission of IIROC Staff that the Respondents' are experienced registrants who occupy privileged roles in the securities industry. Their conduct greatly undermines the principles of integrity and confidence in the capital markets and the sanctions imposed on them, therefore, must reflect the gravity of their misconduct.

¶ 13 IIROC Staff submits that the sanctions recommended by them will serve as both a general deterrent to the industry and a specific deterrent to the Respondents in keeping with the protection of the public interest, relevant precedents of other sanctions imposed on similar breaches of Dealer Member Rules, the expectations of the industry, and the overall gravity of the Respondents' misconduct.

¶ 14 With respect to the submission by Ms. Lowe's counsel referred to below, that Ms. Lowe's ability to pay should be a mitigating factor in the Hearing Panel's determination of an appropriate fine and allocation of costs against her, IIROC Staff cautions that consideration of ability to pay should not be outweighed by the egregious misconduct in this case or the importance of general deterrence when fashioning an appropriate penalty.

¶ 15 The concern is that an over reliance on ability to pay as a mitigating factor in determining an appropriate penalty might have the perverse effect of encouraging potential perpetrators with difficult financial circumstances to engage in misconduct under the belief that they will face no real sanction.

¶ 16 In any event, IIROC Staff cautions that the Hearing Panel carefully peruse the evidence submitted by the Respondents of lack of ability to pay if the Hearing Panel believes that such a mitigating factor is applicable in the present instance.

Submission of IIROC Staff on Costs

¶ 17 With respect to the recommendation to the Hearing Panel as to what might be an appropriate contribution that the Respondents should make to the costs of this matter, IIROC Staff produced the affidavit of Ricki Ann Newmarch, a Litigation Administrative Assistant in the Enforcement Department of IIROC Staff. In her affidavit, Ms. Newmarch deposes that:

- The IIROC Staff Senior Investigator, Ms. Bean, expended a total of 2,344.50 hours in her role in the investigation of the matter at hand at a cost of $248,517.00;
- The IIROC Staff Senior Investigator, Ms. Gerada, expended a total of 3,186 hours in her role in the

investigation of the matter at hand at a cost of $337,716.00;

- IIROC Staff Counsel expended a total of 2,160.25 hours on this matter at a cost of $307,398.25; and
- None of these costs, totaling $893,631.25, included the costs of other IIROC Staff employees who might have worked on this matter.

¶ 18 In their submission on costs, IIROC Staff made the following recommendation:

> In this case, IIROC Staff succeeded on two of four counts. There was a lengthy hearing, extensive written argument and voluminous documentary evidence adduced at the hearing, most of which was required in support of Counts 1 and 2. Taking into consideration all of the above factors, IIROC Staff submit that a costs award of $50,000 as against each Respondent is eminently reasonable.

Submission of the Respondents

¶ 19 ***Mr. Myatovic***. Mr. Myatovic appeared at the Penalty Hearing on his own behalf and not represented by counsel.

His submissions on penalty were that:

1. he has been employed in the securities industry for over 25 years and during that time he has had no client complaints or any previous disciplinary history;
2. although he has attempted on several occasions to secure employment, he has been unemployed since June of 2011 following the issuance of the Notice of Hearing and has earned no income since that time;
3. neither his employer nor any of his clients incurred losses as a result of the trading of the shares of GPI and OSE for which he was responsible;
4. this matter has severely affected his financial situation in that;
    a. he has lost his book of client business built up over the 25 years of work which he values at about $150,000,
    b. he has suffered substantial financial losses from his personal investment in the shares of GPI;
    c. he has incurred legal costs amounting to in excess of $100,000 preventing him from retaining continued legal representation; and
    d. he has fully participated in this disciplinary process, including coming to Vancouver seven times to attend interviews with IIROC Staff and to attend hearings, and fulfilled undertakings which involved large out of pocket costs;
5. as he lives and works in the city of Prince George, the publicity of this matter has greatly affected him, his wife and their two small sons in this small community; and
6. he agrees that public trust and the protection of the investing public is very important for registrants in the industry and he has learned from the mistakes he committed in the trading in the shares of GPI and OSE and will in the future be much more wary and cautious about people coming to him and clients being referred to him.

¶ 20 Mr. Myatovic submitted that as he has already been penalized sufficiently through the loss of a 25 year career in the investment industry, being unemployed for eighteen months, the loss of his book of client business, the investment losses suffered, and the costs incurred by him to date that a reasonable penalty would be:

1. a one year suspension;
2. a fine of $25,000; and
3. an award of costs against him not to exceed $10,000.

¶ 21 ***Ms. Lowe.*** Among the factors which counsel for Ms. Lowe submitted as being relevant for the Hearing Panel to consider in its decision on penalty with respect to Ms. Lowe were the following:

1. she has spent her entire working life of over 34 years in the investment industry, 15 years of which she has been an Approved Person, and during this time she has had no previous disciplinary history;

2. she is single, lives in rental accommodation, and due to her financial hardship is unable to pay any significant fine or order of costs;
3. she has been on strict supervision since January 10, 2011 and according to her present employer, Global Securities Corporation, she has complied with the strict supervision conditions imposed upon her and "has not done any act prohibited under, or omitted to do any act required by these conditions";
4. in the Decision on Liability, the Hearing Panel found only 45 pre-arranged trades for the shares of GPI and 15 pre-arranged trades for the shares of OSE out of all of the trading in the shares of GPI and OSE through the Trading Accounts. Of these pre-arranged trades, Ms. Lowe's Trading Accounts accounted for only 5 of the 15 pre-arranged trades in the shares of OSE and 17 of the 45 pre-arranged trades in the shares of GPI;
5. there was no attempt by Ms. Lowe to conceal her activities either from her employer or IIROC Staff and the Decision on Liability does not find any evidence of specific harm to any client or her employer, nor is there evidence of any loss or complaint by any client or her employer; and
6. Ms. Lowe has fully cooperated with IIROC Staff's investigation in a timely manner.

¶ 22 Based upon the above factors, counsel for Ms. Lowe submitted that due to her limited ability to pay any fines and costs which might be imposed by the Hearing Panel, that an appropriate penalty to be imposed on Ms. Lowe would be a period of suspension of between two and three years, a fine in the amount of $25,000 to be payable by not later than the date upon which her suspension expires, costs of $10,000, and the requirement of Ms. Lowe to rewrite and pass the *Conduct and Practices Handbook Course* prior to the end of such suspension.

Decision on Penalty & Costs

¶ 23 Dealer Member Rule 20.33 grants to a hearing panel, once a finding of liability has been made against an Approved Person, the authority to impose sanctions against that Approved Person. Such sanctions include a fine or suspension from registration. Similarly, Dealer Member Rule 20.49 grants a hearing panel, once it has made such a finding of liability, the authority to assess and order contribution by that Approved Person to any IIROC Staff investigation and prosecution costs determined to be appropriate and reasonable in the circumstances.

Mr. Myatovic.

¶ 24 Pursuant to the authority granted to the Hearing Panel by Rule 20.33 of the Dealer Member Rules, the Hearing Panel hereby imposes upon Mr. Myatovic for his breach of Dealer Member Rule 29.1 as set out in Count 1 above the following penalties:

1. A permanent ban from registration in any capacity; and
2. A fine of $500,000.

¶ 25 Pursuant to the authority granted to the Hearing Panel by Rule 20.49 of the Dealer Member Rules, the Hearing Panel does not assess any costs against Mr. Myatovic for his breach of Dealer Member Rule 29.1 as set out in Count 1 above.

Ms. Lowe.

¶ 26 Pursuant to the authority granted to the Hearing Panel by Rule 20.33 of the Dealer Member Rules, the Hearing Panel hereby imposes upon Ms. Lowe for her breach of Dealer Member Rule 29.1 as set out in Count 1 above the following penalties:

1. A 3 year ban from registration in any capacity;
2. A fine of $100,000, payable prior to being granting registration in any capacity;
3. That prior to being granted registration in any capacity, she shall have successfully completed the *Conduct and Practices Handbook Course*; and
4. If, following the 3 year ban from registration as above imposed, she seeks to be granted registration in any capacity, such registration shall include the following conditions:
    a. Commencing upon such registration, Ms. Lowe shall be subject to a one year period of strict supervision;

and

b. Commencing upon the first anniversary of such registration, Ms. Lowe shall be subject to a one year period of close supervision.

¶ 27 Pursuant to the authority granted to the Hearing Panel by Rule 20.49 of the Dealer Member Rules, the Hearing Panel does not assess any costs against Ms. Lowe for her breach of Dealer Member Rule 29.1 as set out in Count 1 above.

Reasons on Penalties

The Disciplinary Sanction Guidelines

¶ 28 The IIROC Dealer Member Disciplinary Sanction Guidelines – March 2009 (the "Guidelines") set out that a hearing panel's main concern in determining an appropriate penalty in the context of a disciplinary hearing such as this are the following:

(a) protection of the investing public;

(b) protection of IIROC's Membership;

(c) protection of the integrity of IIROC's process;

(d) protection of the integrity of the securities markets; and

(e) prevention of repetition of conduct of the type under consideration.

¶ 29 The Respondents by ignoring their roles as gatekeepers to the securities markets through their participation in the scheme to promote the shares of GPI and OSE under the direction of Mr. TSP as found in the Decision on Liability, adversely impacted the interests of the investing public and the securities markets. This participation was egregious, intentional, involved a large volume of trading in uneconomic trading patterns, and led to the false or misleading appearance of trading activity in the shares of GPI and OSE, all of which clearly affected the integrity of the securities market and was contrary to the public interest.

¶ 30 Without the willing participation of the Respondents, including the re-aging of overdue debit balances to evade detection by their Member Firms' credit and compliance personnel, the trading scheme to promote the shares of GPI and OSE most likely would not have been possible. This trading scheme was not an isolated incident. It extended over a 12 month period, and the Respondents benefited financially from their participation in it.

¶ 31 In considering what might be an appropriate penalty to accomplish the five elements above listed, a hearing panel is to consider the element of specific deterrence to ensure that a message is given to the individuals involved to encourage them to mend their ways in their future activities or to prevent a potential reoccurrence of the conduct by suspension or prohibition from registration; and a hearing panel is to consider the element of general deterrence to ensure that a message is sent to the investment industry that such activity is not tolerated and the consequences that will result if such activity does occur.

¶ 32 As was pointed out in *Re Mills* [2001] I.D.A.C.D. No. 7, securities industry expectations and understanding are particularly relevant when a hearing panel considers an appropriate penalty in the context of general deterrence. If a penalty is less than industry expectations, it might undermine IIROC's disciplinary process. Similarly, if a penalty is excessive, it might reduce respect for the process and diminish its sought for general deterrence effect.

¶ 33 The Guidelines set out 14 "key considerations" as an illustrative list to assist a hearing panel in determining an appropriate penalty. From that list, the following considerations are relevant to the matter at hand:

1. 3.1 – Harm to Clients, Employer and/or the Securities Market. There was clearly harm to the securities market in the trading scheme in the shares of GPI and OSE over the Trading Period. And, although there was no direct evidence to that effect presented at the hearing, there was most likely harm to clients at other Member Firms. With respect to harm to clients of the Respondents and their Member Firms, there was no

evidence of any client complaints with respect to the trading in the Trading Accounts relating to issues such as uneconomic trading or concentration. However, as the account holders of the Trading Accounts appeared to be complicit in the trading scheme as was set out in the Decision on Liability, complaints from such clients would not have been expected.

2. 3.2 – Blameworthiness. The conduct of the Respondents was intentional and evidenced an ongoing contravention of the Dealer Member Rules.

3. 3.3 – Degree of Participation. The Respondents were fully immersed in the overall trading scheme and were active participants.

4. 3.4 – Extent to which the Respondents were Enriched by the Misconduct. Both the Respondents benefited financially from the overall trading scheme in the shares of GPI and OSE. The commissions from this trading scheme accounted for a significant portion of their income during the time the scheme was carried out.

5. 3.5 - Prior Disciplinary Record. Neither Respondent has a prior disciplinary record.

6. 3.6 – Acceptance of Responsibilities, Acknowledgement of Misconduct and Remorse. As is their right to do, both Respondents disputed the allegations made by IIROC Staff. However, following the Decision on Liability both Respondents have accepted the finding of the Hearing Panel and have expressed remorse. Mr. Myatovic specifically commented on the lessons he has learned from this disciplinary process.

7. 3.10 - Planning and Organization. The Decision on Liability finds that there was an overall trading scheme to promote the shares of GPI and OSE in which the Respondents were, to varying degrees, active participants in its planning, organization and execution.

8. 3.11 – Multiple Incidents of Misconduct Over an Extended Period of Time. The matter before the Hearing Panel was not an isolated incident or a collection of isolated incidents. Rather the matter involved a sophisticated trading scheme which extended for at least twelve months from April 1, 2008 until March 31, 2009 and involved many examples in which the Respondents repeatedly failed in their roles as gatekeepers.

¶ 34 In addition, the Guidelines set out the following four items a hearing panel might wish to consider when determining whether or not to impose the sanction of a permanent ban from approval as is recommended by IIROC Staff in this matter:

- the public itself has been abused;
- where it is clear that a respondent's conduct is indicative of a resistance to governance;
- the misconduct has an element of criminal or quasi-criminal activity; or
- there is reason to believe that the respondent could not be trusted to act in an honest and fair manner in all their dealings with the public, their clients, and the securities industry as a whole.

Relevant Precedents

¶ 35 In *Re: Toban* [2007] I.D.A.C.D. No. 9, following a disciplinary hearing the IIROC hearing panel found that Mr. Toban had failed to properly perform his role as a gatekeeper to the capital markets by, among other activities, facilitating certain transactional activities which appeared to be consistent with market manipulation, deception or other improper market related activity. The discipline penalties and costs assessed against Mr. Toban by the hearing panel was a permanent ban from approval; a fine of $100,000; disgorgement of commissions of $20,900; and $25,000 for costs. In making this assessment, the hearing panel noted that Mr. Toban had a previous disciplinary history and expressed the view that Mr. Toban was not credible.

¶ 36 A similar example of a failure of the gatekeeper role occurred in *Re: Taub* 2010 IIROC 2, where an IIROC hearing panel accepted a settlement agreement in which Mr. Taub agreed that he had failed in his role as a gatekeeper by facilitating certain trading activity that was a possible indicator of manipulative or deceptive conduct. The agreed upon penalty was a permanent ban from registration, a fine of $50,000, and costs of $25,000.

¶ 37 *Re: Bortolin* 2012 IIROC 13 involved a finding by the IIROC hearing panel that Mr. Bortolin over a number of years facilitated suspicious transactions which appeared to amount to insider trading and money

laundering; that he engaged in personal financial dealings with his clients; that he carried on outside business activities without the knowledge of his Member Firm; and that he misled IIROC Staff during their investigation. Mr. Bortolin was permanently banned from the industry, was fined $500,000, and had costs assessed against him amounting to $100,000.

¶ 38 In the disciplinary hearing in *Re:Vitug* 2009 IIROC 31, the hearing panel found that Mr. Vitug had engaged in conduct unbecoming in that he had undisclosed financial interests and undisclosed financial dealings in certain accounts. The hearing panel noted that the respondent's misconduct was serious and demonstrated a clear disregard for industry standards and his employer's policies and procedures and commented that Mr. Vitug appeared to be someone who did not "appear to be concerned about the truth". The hearing panel therefore believing it necessary that in order to protect the public that Mr. Vitug be kept out of the investment industry, imposed a penalty consisting of a permanent ban from registration, a fine of $350,000, and a contribution to IIROC costs in the amount of $80,000.

¶ 39 In *Re:Georgakopoulos* 2009 IIROC 41, the IIROC hearing panel found that Mr. Georgakopoulos had failed in his gatekeeper duty by facilitating certain transactional activities in client accounts without making diligent inquiries in the circumstances where such activities appeared to be consistent with market manipulation. Similar to the matter before us, this misconduct took place over a year and Mr. Georgakopoulos had no disciplinary history. The hearing panel noted that there was no financial loss to clients, third parties or his Member Firm, he cooperated with the investigation and that Mr. Georgakopoulos' conduct following IIROC's investigation had been "exemplary", working under close supervision with his Member Firm without incident. The hearing panel suspended Mr. Georgakopoulos from registration for a period of 3 years; imposed a fine of $50,000; ordered him to disgorge commissions in the amount of $24,576; ordered him to contribute to costs in the amount of $40,000; and imposed as a condition of his re-approval for registration that he successfully re-write the *Conduct and Practices Handbook Examination.*

Separate Penalties

¶ 40 IIROC Staff in their submissions on penalties recognizes no difference in culpability between the Respondents and recommends that the Hearing Panel impose the same penalties on both the Respondents. We have not done so. We believe that the evidence before us demonstrates that the Respondents had differing degrees of culpability and that the penalties imposed upon them should reflect this difference.

¶ 41 These degrees of culpability result from the different roles the Respondents had in the trading scheme with Mr. TSP to promote the shares of GPI and OSE and how each of Mr. Myatovic and Ms. Lowe responded in their dealings with IIROC Staff and the ongoing investigation. These differences are reflected in the following four areas:

1. Volume of Trades: In his role in the trading scheme of the shares of GPI and OSE, the Decision on Liability observed that Mr. Myatovic was responsible for many more trades in these securities than Ms. Lowe and, therefore, benefited financially to a greater extent.

   For example, the Decision on Liability found that the total number of GPI shares traded during the period from April 1, 2008 until March 31, 2009 on the TSX-V was 26,281,200 shares. The total number of shares of OSE traded during that period was 17,923,000 shares. The account statements for the 12 Trading Accounts for that period revealed that 18,264,200 shares of GPI and 12,703,700 shares of OSE were traded through these accounts during this period.

   Similarly, the Decision on Liability found that that for the calendar year 2008 the Trading Accounts for which Mr. Myatovic had responsibility (the "Myatovic Trading Accounts") were responsible for 30.85% of the purchases of GPI shares and 14.09% of the sales, while the Trading Accounts for which Ms. Lowe had responsibility (the "Lowe Trading Accounts") were responsible for 14.49% of the GPI shares purchased and 4.18% of the shares sold. While during the same time period, the Myatovic Trading Accounts were responsible for 22.87% of the purchases of OSE shares and 27.42% of the sales and the Lowe Trading Accounts were responsible for 6.56% of the purchases of OSE shares and 7.72% of all sales.

2. Role in the Scheme: Although the overall guiding hand behind the scheme to promote the shares of GPI and OSE was Mr. TSP, on the evidence before us Mr. Myatovic appeared to be directly aiding Mr. TSP by

organizing the trading strategy and arrangement, volume and price of trades between himself and Ms. Lowe. Ms. Lowe, on the other hand, fit more the role of an order taker acting on instructions received from Mr. TSP and Mr. Myatovic.

The Decision on Liability sets out a number of examples whereby Ms. Lowe appears to be acting on instructions. For example, a July 11, 2008 email from Mr. TSP to Mr. Myatovic includes the following instruction "…call doreen as she needs to do a bunch today…". And in a text message string between Ms. Lowe and Mr. Myatovic on February 5, 2009, Mr. Myatovic instructs Ms. Lowe "please go to .48 this good be our friend who is trying to get some off" and later "please change to .48 if u can".

3. Truthfulness: While both of the Respondents were somewhat free with their interpretation of various relationships and the details of what activities had in fact occurred, Ms. Lowe was more credible than Mr. Myatovic.

   For example, as set out in the Decision on Liability, in his interview with IIROC Staff, Mr. Myatovic testified that he met with Ms. Lowe no more than once a year and only called her on occasion. In addition, he specifically denied texting Ms. Lowe for business purposes and could not recall having had any discussions with Ms. Lowe with respect to trading in the shares of GPI or OSE.

   As set out in the Decision on Liability, the evidence clearly demonstrated that the communication between Ms. Lowe and Mr. Myatovic was much closer to Ms. Lowe's evidence – namely that they would speak on a regular basis and that she and Mr. Myatovic would meet every time Mr. Myatovic travelled to Vancouver from his home in Prince George, an event that occurred once or twice a month.

   In a similar vein, when asked by IIROC Staff in his interview under oath whether or not he had knowledge that Mr. TSP might have been attempting to influence the price or volume of the trading in the shares of GPI or OSE, Mr. Myatovic claimed that he had no knowledge of Mr. TSP's actions in this regard, a statement the Hearing Panel found in the Decision on Liability not to be credible.

4. Disclosure: The evidence before us shows that in her dealings with IIROC Staff, Ms. Lowe made full and complete disclosure when asked to do so. Mr. Myatovic, unfortunately, did not take the same position. Indeed, it was not until the middle of the hearing in this matter that he produced cell phone records which he claimed were relevant to the proceedings and at that point sought to introduce them into evidence.

   This approach to disclosure was particularly evident in the interviews of the Respondents with IIROC Staff. In her interviews, Ms. Lowe was cooperative and responded to questions when asked. However, in his interviews, many of Mr. Myatovic's answers were more an attempt to deflect and obfuscate rather than to provide proper disclosure.

Penalties Imposed Upon Mr. Myatovic

¶ 42 IIROC Staff recommends that the Hearing Panel impose upon Mr. Myatovic a permanent ban from approval from registration in the securities industry. As referred to above, the Guidelines recommend that in determining whether or not such a penalty is appropriate that a hearing panel should "consider whether there is reason to believe that the respondent could not be trusted to act in an honest and fair manner in all their dealings with the public, their clients, and the securities industry as a whole"

¶ 43 From the evidence in the Decision on Liability, it is clear that Mr. Myatovic's actions throughout this matter has been similar to those of the respondents in the *Taub, Toban, Borotilin* and *Vitug* matters above described. Therefore, as with the IIROC hearing panel in *Vitug*, we believe that it is necessary to protect the public against Mr. Myatovic in the future by keeping him out of the investment industry. Consequently, we have imposed upon him a permanent ban from registration.

¶ 44 Similarly, we do not believe that the fine of $250,000 recommended by IIROC Staff is sufficient to send the necessary message to the industry that Mr. Myatovic's conduct was egregious.

¶ 45 When we inquired of IIROC Staff as to why in their recommendations on penalties there was no recommendation for disgorgement of commissions earned by the Respondents, IIROC Staff advised us that it was not possible from the evidence to accurately calculate the amount of commissions earned by the Respondents from trading in the shares of GPI and OSE over the Trading Period to make such a recommendation and that, therefore, they were not proposing an order for disgorgement.

¶ 46 We believe that an element of the penalty against Mr. Myatovic should be a requirement on his part to be held to account for the benefit he received from the breaches of the Dealer Member Rules he has been found to have committed in the Decision on Liability. We have taken this principle into account in assessing the amount of the fine imposed on Mr. Myatovic.

¶ 47 To reflect what we have found in the Decision on Liability to be Mr. Myatovic's egregious conduct in his complete failure to act in his role as gatekeeper; to reflect an element of disgorgement; and to take into account the fact that the hearing panel in *Vitug* imposed a fine of $350,000; we have imposed a fine of $500,000 on Mr. Myatovic.

Penalties Imposed Upon Ms. Lowe

¶ 48 However, we believe that Ms. Lowe's situation is different. Her participation in the trading scheme was materially less. She took instructions from people whom she trusted, although she knew or ought to have known that her trust was misplaced. And she was more forthcoming in the interviews with and disclosure to IIROC Staff. In summary, her involvement in the trading scheme was more akin to the *Georgakopoulos* matter referred to above.

¶ 49 As in *Georgakopoulous*, Ms. Lowe has been in the industry for many years and has no disciplinary history. There were no client complaints as to financial losses from the uneconomic and rolling pattern of trading in the shares of GPI and OSE, although, as noted above, these clients were willing participants in the trading scheme. The evidence before us is that she cooperated with IIROC Staff in their investigation and that since the commencement of this matter has been on strict supervision and has conducted herself in a manner satisfactory to her present employer. We have therefore imposed a 3 year ban from registration coupled with two years of supervision rather than the permanent ban as recommended by IIROC Staff.

¶ 50 With respect to the fine we have imposed on Ms. Lowe, to reflect an element of disgorgement and the fine of $50,000 imposed by the hearing panel in *Georgakopoulous*, we have imposed a fine of $100,000 rather than the $250,000 recommended by IIROC Staff. This fine is to be paid by Ms. Lowe prior to her being granted registration in any capacity.

¶ 51 This reduction from the fine recommended by IIROC Staff is not based upon Ms. Lowe's ability to pay as urged upon us by her counsel, but is rather based upon her lesser involvement with and lesser culpability in the trading scheme and her greater willingness to cooperate with IIROC Staff all as above detailed.

Reasons on Costs

¶ 52 We have before us a bill of costs provided by IIROC Staff outlining that IIROC Staff investigators spent over 5,500 hours in the investigation of this matter and IIROC enforcement counsel spent over 2,100 hours in its prosecution. This bill of costs sets out that the total of the investigator and enforcement counsel costs incurred by IIROC amounted to $893,631.25. These costs do not include all of IIROC Staff costs, nor do they include all of the costs of the penalty hearing or the hearing on liability.

¶ 53 As above set out, IIROC Staff appears to be sensitive to the position that these costs may be excessive in that they recommend that we award costs against Mr. Myatovic in the amount of $50,000 and against Ms. Lowe in the amount of $50,000. Such an award would represent only a small fraction of the total costs expended by IIROC in this matter.

¶ 54 Notwithstanding the fact that we have found the Respondents liable on Counts 1 and 2, we have determined not to make any order of costs against the Respondents.

¶ 55 We are choosing this course of action to highlight our concern with the manner in which IIROC Staff has investigated and prosecuted this matter. We acknowledge that the issues under investigation and subsequently prosecuted by IIROC Staff in the trading scheme were difficult ones, ones that encompassed a number of jurisdictions and different regulatory bodies, and ones that introduced new elements of investigation and proof into the process. However we do not feel that the Respondents should be required to contribute towards these IIROC costs.

Conclusion

¶ 56 In the Decision on Liability, we quoted with approval the decision of the Alberta Securities Commission in *Re Wenzel* [2005] A.S.C.D. No 153 at paragraphs 52 and 53 in which the Alberta Securities Commission observed that a securities salesperson is "in a position to spot suspicious or unusual circumstances that could have an effect on the integrity of trading and the capital market" and, as such, such salesperson can alert the "firm, to potential improprieties, inadvertent or otherwise, and decline to participate in or facilitate improper activity. In this way, the registered salesperson is a gatekeeper for the broader public interest".

¶ 57 In the matter before us, the Respondents, with different degrees of culpability, clearly failed in their obligations as gatekeepers for this broader public interest. To reflect the gravamen of this misconduct, we have imposed the penalties above set out.

Dated at the City of Vancouver, Province of British Columbia, this 28th day of March, 2013.

R. John Rogers

Barbara Fraser

Michael Johnson