

Re Li

IN THE MATTER OF:

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

and

Yu Qiong (Kevin) Li

2016 IIROC 07

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

Heard: September 15-16, 2015

Decision: January 29, 2016

Hearing Panel:

Alison Narod, Panel Chair, Michael Johnson and Lloyd Costley

Appearances:

Paul Smith, Senior Enforcement Counsel for IIROC

DECISION ON THE MERITS

¶ 1 These are the reasons for decision of a Hearing Panel appointed by the Investment Industry Regulatory Organization of Canada (“IIROC”) to determine the following four counts alleged by IIROC staff (“IIROC Staff”) against the Respondent pursuant to an Amended Notice of Hearing dated June 29, 2015.

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 deems that the Amended Notice of Hearing was properly served on the Respondent pursuant to the applicable rules. The Respondent did not appear at the hearing. Nor was he represented at the hearing. Furthermore, he did not supply a response to the allegations in the Amended Notice of Hearing.

¶ 3 The first three counts are based on facts that arose while the Respondent was employed by TD Waterhouse. The fourth count is based on facts that occurred while IIROC was conducting an investigation into the Respondent's conduct while employed by TD Waterhouse.

¶ 4 The Respondent is a Registered Representative. He is not a licensed Portfolio Manager. He joined TD Waterhouse in June 2008 and worked at its Richmond office. None of the relevant client accounts were discretionary accounts. In October 2011 the Respondent's employment was terminated as a result of the facts giving rise to the first three of the counts. He has not been registered with an IIROC regulated firm since then.

¶ 5 After the Respondent's employment terminated, IIROC commenced an investigation into the Respondent's conduct and the Respondent's acts and omissions in the course of that investigation gave rise to the fourth count, described in more detail below.

¶ 6 We note that the standard of proof to be met by IIROC Staff in this case is proof on a balance of probabilities, based on clear, convincing and cogent evidence, set out in paragraph 33 of *McCabe (Re)*, 2014 LNBCSC 225 (affirmed by the B.C. Court of Appeal on other grounds at 2016 BCCA 7) as follows:

33 The onus of proof lies on [IIROC Staff], who must prove the allegations in the notice of hearing on a balance of probabilities, meaning that "it is more likely than not that an alleged event occurred". The evidence must be "sufficiently clear, convincing and cogent" to satisfy the balance of probabilities test." (*F.H. v. McDougall* 2008 SCC 53 at paragraphs 49 and 46).

¶ 7 The Panel has concluded that all counts have been proved. Our reasons are set out below.

Count 1

¶ 8 Count 1 alleges that the Respondent made various unauthorized transactions in the account of his client, YX, between July and October 2011 contrary to IIROC Dealer Member Rule 29.1.

¶ 9 In July 2011, YX was referred to the TD Waterhouse Richmond Branch and to the Respondent in particular, as they could conduct business in Mandarin. The Respondent opened an account for YX as his Registered Representative. This was not a discretionary account. YX deposited approximately \$100,000 into the account.

¶ 10 The Panel was provided with a transcript of a statement YX made to IIROC under affirmation. In it, YX explained that all of his communications with the Respondent were by telephone and meetings in person. All of their telephone calls, except one, were initiated by YX. All of the meetings YX had with the Respondent was at YX's request.

¶ 11 YX was able to follow the activities in his account using an online program called "Webbroker". It allowed him to log on and see all of the securities he was holding. Additionally, if there was a transaction on his account, he would receive an email alert from Webbroker, after the fact, which merely notified him that "something" had happened in his account, but not the details of that activity. He did not receive anything in the email alert indicating what had been bought or sold.

¶ 12 At their initial meeting in early July 2011, YX and the Respondent discussed examples of what the Respondent considered to be good investments. However, no specific details of investments were agreed upon. In particular, YX and the Respondent did not make any decisions to purchase any investments at their first meeting. Rather, YX suggested that the Respondent provide him with a list of recommended investments. YX then waited to receive that list so he could decide which to pick.

¶ 13 According to YX, shortly afterwards, on July 14, 2011, he discovered that the Respondent had made four purchases in his account the day after they first met. The Respondent had purchased shares of Glentel, Home Capital, Innvest, and Dundee Real Estate Investment Trust, a REIT, for a total of approximately \$40,000. YX had not authorized those purchases. Indeed, YX said he was not aware that the four transactions were going to be made until he discovered them after Webbroker alerted him that there had been activity in his account.

¶ 14 After discovering these four purchases had been made, YX met with the Respondent in his office. They

discussed the investments. The Respondent assured YX that the four stocks were very safe to buy and advised YX to hold them.

¶ 15 YX said that the Respondent's explanation for making the purchases without YX's authorization was very obscure. The Respondent said he was very busy with trading in the daytime, as he had so many clients. YX advised the Respondent that he wanted to be informed of transactions ahead of time. YX told the Respondent that he should not engage in further transactions without YX's permission and suggested that in future the Respondent provide him with detailed information before making any transaction.

¶ 16 YX recalled that this was a very polite conversation and said that the Respondent probably misunderstood him at that point, because YX did not specifically tell him he was doing something wrong. Nor did YX ask for the unauthorized trades to be reversed. YX said he did not make a complaint at that time, because the Respondent appeared to be very competent. He had shown YX some examples of good investments and he had a good reputation, so YX trusted him.

¶ 17 According to YX, on August 9, 2011, the Respondent made three transactions. He purchased shares of Domtar and Teck Corp. for a total of approximately \$33,000. He also sold shares of Dundee REIT for approximately \$9,000. This time, the Respondent telephoned YX on the date of the transaction, but YX was not certain whether this was before or after the trades were made. YX noted that this was the only telephone call the Respondent made to YX during the entire time YX had an account with him. YX recalled that the Respondent said he wanted to make changes in YX's portfolio and recommended purchasing two stocks. He said the timing was good, the price was going to rise imminently and YX should buy it right away. He said the whole market was going to rise and was moving fast. However, YX also recalled that the Respondent did not specify what changes he was going to make to YX's account, including what stocks he was going to trade. Nor did he advise when he planned on making these changes. The Respondent did not provide the details of the trades to YX before making them.

¶ 18 According to YX, on August 31, 2011, the Respondent made two purchases in YX's account of shares in Saputto and IGM Financial for a total of approximately \$30,000. YX said he did not authorize these trades in advance. He received an email alert advising him of trading activities in his account, after the fact. He called the Respondent to inquire about these trades. The Respondent advised that these were two strong stocks that the Respondent could hold for a long time. This time, YX told the Respondent, in a more serious manner, not to do any transactions in his accounts without his permission. YX said he did not complain about these unauthorized transactions at the time because the Respondent had made good choices based on good decisions and YX did not feel it was urgent. YX believed the Respondent had a strategy and was not doing a bad job.

¶ 19 Then, on October 4, 2011, the Respondent made two further sales in YX's account; he sold shares in Domtar and Teck at a loss. Again, these trades were not authorized by YX in advance. YX discovered that trades had taken place from the email alerts he received from Webbroker. On the morning of October 5, 2011, YX contacted the Respondent, but this time the Respondent's response was very different. YX's impression was that the Respondent was in a very unstable state. He seemed sad or confused and acted very nervously. He offered no explanation for the trades. He said he did not know what had happened. He also said this was a common and usual mistake made in trading. He said he would investigate and call YX back.

¶ 20 This time, YX did not wait. He was fed up with the Respondent. He contacted the branch manager, SR, at about noon the same day and met with him the following day, October 6, 2011. He did this because he suspected the Respondent was doing something seriously wrong and he could not rely on the Respondent's responses. He thought it was unreasonable that the stocks were sold at a sizeable loss to him. In this regard, we note that YX sustained an overall loss of about \$15,000 over the few months that he was the Respondent's client. About \$6,000 of this was due to the Respondent's trading and the balance resulted when TD Waterhouse closed YX's account in late October 2011.

¶ 21 As a consequence of his meeting with SR, YX prepared a letter of complaint with SR's assistance and signed it. The letter includes the following comments:

(a) "Throughout this experience I have mentioned to [the Respondent] a number of times

that I expected to be called before any trade is entered. On one occasion he said ... sometimes I have to trade very early in the morning before you are up.”

- (b) “I have told him [the Respondent] a number of times that I expected to be spoken to before a trade were to be done and when challenged he said he was too busy, markets moved quickly and not all of his clients, especially Chinese resident clients, expected a call to confirm.”

¶ 22 In the transcript of YX’s interview of May 8, 2013, an IIROC investigator, KT, referred to YX’s email to SR dated October 11, 2011 at 12:28 pm, where YX stated:

“Furthermore, he said that some of his clients (Chinese) never request any trading details from him, that is why he did not inform me every time.”

¶ 23 According to YX’s description of his general dealings with the Respondent, YX did not choose any securities to buy or sell. All such choices for his account were made by the Respondent. Whenever YX challenged the Respondent about unauthorized trading, the Respondent was evasive and very passive. He had many excuses. For example, he said he was busy, the market was moving fast or he had some other opinion about trading. YX said that the Respondent did not apologize or provide him with any explanation for the October 4, 2011 transaction. He refused to give YX information and confirmations.

¶ 24 YX explained that the type of trading details he was not provided with in advance included the name of the stock, the quantity to be traded, the time of the trading and the price at which the trade was to take place. YX also said he did not remember, however, whether the Respondent said he would do trades for him at “market price”.

¶ 25 IIROC supplied the Panel with a Branch Manager’s Report recording trading activity as of October 4, 2011. Counsel for IIROC Staff submitted that the entries respecting the trades made for YX indicated that they were sell orders. Notably, they also note that the trades were “unsolicited”. An unsolicited trade is one initiated by the client, not by the registered representative. The characterization of the trades as unsolicited conflicts with YX’s sworn statement that the trades were initiated by the Respondent and took place without YX’s prior authorization.

¶ 26 We repeat that the Respondent has made no submissions in response to the counts alleged.

¶ 27 As mentioned, Count 1 relates to the allegation that the Respondent made various trades on four specific dates that were not authorized by the client, contrary to IIROC Dealer Member Rule 29.1. IIROC Dealer Member 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.

¶ 28 The Respondent was authorized to engage in trading in client accounts, provided he obtained specified approval for the transactions from the client in advance. If the Respondent failed to obtain approval of the details of the transaction, which are also referred to as the “four elements” of the transaction, the transaction will be viewed as discretionary. At no relevant time was the Respondent authorized to engage in discretionary trading on behalf of his clients.

¶ 29 In the case of *Re: Shamseer* [2011] IIROC No. 5, a Hearing Panel described the meaning of discretionary trading, as follows:

In *Re: Wenzel* ... the Alberta Securities Commission stated that “when a person effects a securities transaction for a client without obtaining from the client, in advance, specifics as to four elements of the transaction – quantity, security, price and timing – that person is exercising “discretion”.

¶ 30 The history of the trading in YX’s account discloses that the Respondent conducted trading in YX’s account without confirming each and every one of the four elements of the trades with YX in advance. Although the evidence is equivocal on whether the trades on August 9, 2011 were discussed with YX in advance, it is clear that the elements of the trades were not confirmed with him in advance. Therefore, the trades were not authorized.

¶ 31 With respect to each unauthorized trade, except the last, YX informed the Respondent that he wanted detailed information before any transaction occurred. Indeed, he did this in a polite way, at first, and then he became more serious and emphatic as his instructions continued to be ignored. After the last trades on October 4, 2011, he escalated his complaint to the Branch Manager, SR.

¶ 32 The fact that YX did not escalate his complaints to the Respondent’s superiors until his instructions had been disregarded again and he suffered what he considered to be a significant loss on October 4, 2011 does not exonerate the Respondent. Given that he was not licensed to engage in discretionary trading, whenever the Respondent made a trade without YX’s prior authorization and confirmation of all four elements, the Respondent acted in breach of his obligations. Any apparent condonation by a client after the fact does not relieve him of the consequences of this misconduct.

¶ 33 Accordingly, we find that the Respondent engaged in unauthorized trading and therefore conducted himself in a manner that was contrary to IIROC Dealer Member Rule 29.1.

¶ 34 In reaching this conclusion, we note that employers of registered representatives rely on the documentation completed by those persons and the representations they make in that documentation as part of the employer’s obligation to manage client relationships, to ensure compliance with all of their respective obligations, and to defend against client allegations of wrong-doing. The veracity and reliability of record-keeping is particularly important where the persons who supervise and manage registered representatives do not speak or read the language in which the registered representatives deal with their clients. It may be more onerous for Dealer Members to supervise and ensure compliance in such cases. Cultural and language barriers may impede an employer from effectively supervising the registered representative who might be able to use the communication barrier to cloak misconduct. Indeed, communication barriers of this nature may require supervisors and managers to exercise additional diligence when monitoring for and ensuring compliance. **Count 2**

¶ 35 As noted above, Count 2 relates to the allegation that on or about October 4, 2011, the Respondent made discretionary trades in client accounts contrary to IIROC Dealer Member Rule 1300.4.

¶ 36 As part of its investigation, IIROC learned from TD Waterhouse that when it investigated YX’s complaints, it discovered that the Respondent made a large number of apparently discretionary sales in the accounts of various of his other clients on October 4, 2011 that were recorded in the same manner as were the sales in YX’s account on October 4, 2011. Most notably, they were each recorded as being “unsolicited” and they all occurred in the morning of October 4, 2011.

¶ 37 IIROC supplied the Panel with particulars of 37 client accounts for which the Respondent was the Registered Representative and in which 181 sale orders were made on October 4, 2011. These included two sale orders in YX’s account.

¶ 38 In the course of its investigation, TD Waterhouse obtained written complaints from 18 clients. The Panel was not provided copies of these complaints. IIROC investigator, KT, testified that she prepared a questionnaire, which was translated into Chinese, and sent it to the 18 clients who provided written complaints to TD Waterhouse about the trades in their accounts on October 4, 2011. Only five questionnaires were completed and returned. YX was one of the persons who responded to the questionnaire. IIROC obtained

information from TD Waterhouse confirming that none of these 18 client accounts were discretionary accounts.

¶ 39 The Panel was provided with copies of four of the returned questionnaires. These questionnaires were consistent insofar as each indicated that the Respondent had not contacted these clients prior to making trades in their accounts on October 4, 2011. Each of the four clients who responded indicated that they had contacted the Respondent after the trades were made. One said that the Respondent told him the trade was a normal adjustment to his stocks. Another said that when he asked the Respondent why 60% of his investments were sold, the Respondent did not provide him with a definite answer. Another had reprimanded the Respondent for not discussing the trade with him beforehand and not telling him about it afterwards. One said that a brother called the Respondent before the transaction, when the market was falling, and told him not to sell any securities.

¶ 40 KT was able to conduct a partial interview of the Respondent, as explained in more detail below. The Panel was provided with a transcript of that interview. During that interview, the Respondent said he was assigned to his employer's Richmond branch because of the demand at that branch for Registered Representatives who spoke either Cantonese or Mandarin. He could speak both. Most of the Respondent's clients were seeking representatives who could speak either Cantonese or Mandarin. He indicated that some of these clients were sophisticated investors and some did not have a lot of investment knowledge.

¶ 41 As mentioned above, IIROC supplied the Panel with a Branch Manager's Report from TD Waterhouse for trading activities in the Respondent's accounts on October 4, 2011. It contains details of 181 sell orders in 37 accounts of the Respondent's clients, including YX's account and two sell orders in that account. Each sell order was marked as "unsolicited". KT testified that she did not know if all of these clients were Chinese residents, but that the Respondent had said many were. This is relevant to the facts of this case, as clients located in the Asia were in significantly different time zones.

¶ 42 As part of IIROC's investigation, KT created a spreadsheet that shows the relative timing of the 181 transactions. We do not have the documentation on which it is based. However, the spreadsheet indicated that for the two hours from approximately 10:30 am to 12:30 pm PT, the Respondent entered 181 sell orders with notable frequency - about an order every minute or less, on average. It appeared that the Respondent placed orders at a very rapid pace.

¶ 43 A striking result of sorting the sell orders in chronological order (in order of time of sale) was the resulting list of trades matched the alpha-numeric order of the accounts in which the sell orders were made (with perhaps one exception). These results suggest that on October 4, 2011, the Respondent retrieved his client accounts on his computer in alpha-numeric order and went through them, one by one, placing orders every minute or so in the two hour period.

¶ 44 KT expressed the view that it would have been next to impossible to place the orders and make the calls to satisfy the timing, security, price and volume of each order before the order was submitted, within the two hour time period. She acknowledged that it was possible that the Respondent contacted his clients beforehand, but asserted that the applicable rules say that if a Registrant takes an order outside market hours, the Registrant must enter it at the opening of the market, which the Respondent did not do.

¶ 45 As mentioned, TD Waterhouse conducted an investigation of the October 4, 2011 transactions. Notes of its interview with the Respondent indicate that, among other things, the Respondent confirmed that he had a good working knowledge of the English language. He also acknowledged familiarity with TD Waterhouse's Code of Conduct. He was asked how he was able to confirm 171 trades within the aforementioned two hour period. He said that clients called him the night before with instructions to sell when it was best for them. It was put to him that he understood that in doing this he was engaging in discretionary trading. His response was that due to the different time zones, clients left it to his discretion to pick the time and price of the trades. He also said that he was given discretion to sell at market price, and he acknowledged that he did not discuss price with them.

¶ 46 IIROC Dealer Member Rule 1300.4 states:

- 1300.4 A Registered Representative may not exercise discretionary authority over a customer account unless
- (a) the Dealer Member has designated a Supervisor or Supervisors to be responsible for discretionary accounts;
 - (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;
 - (d) the Registered Representative authorized to effect discretionary trades for the account has actively dealt in, advised on or performed analysis for a period of two years with respect to all types of products which are to be traded on a discretionary basis; and
 - (e) the account is maintained at the Dealer Member of the Registered Representative.

¶ 47 For convenience, we repeat the passage quoted above from *Re: Shamseer, supra*, with respect to discretionary transactions.

In *Re: Wenzel* ... the Alberta Securities Commission stated that “when a person effects a securities transaction for a client without obtaining from the client, in advance, specifics as to four elements of the transaction – quantity, security, price and timing – that person is exercising “discretion”.

¶ 48 With respect to unauthorized transactions, in *Re: Phillips* [2011] IIROC 6(d), one panel member, speaking for himself, emphasized the importance of the requirement of prior authorization in the following comment, in an Addendum to that decision, at paragraph 44:

It is a fundamental requirement, and known to every registrant, that trades be specifically authorized by the client, unless specialized licensing is in place.

¶ 49 It is clear from the foregoing that the Respondent lacked specialized licensing and therefore was not authorized to exercise discretionary authority over a customer account as required by IIROC Dealer Member Rule 1300.4 and in particular subparagraphs (b), (c) and (e) of that Rule. The question under Count 2 is whether the trades at issue were discretionary trades.

¶ 50 The Panel finds that the trades the Respondent made in the 37 client accounts on October 4, 2011 were discretionary trades, insofar as the client accounts were not discretionary, and there is no credible evidence that the clients authorized the trades and confirmed each of the four elements of the trades before the Respondent executed them.

¶ 51 In this regard, on the basis of the evidence before us and, in particular, the contradictions in the evidence we have of the Respondent’s description of his trading on October 4, 2011, we prefer the evidence of IIROC Staff and KT over the evidence on hand from the Respondent, where they conflict.

¶ 52 We accept KT’s observations about the rapid pace of the sell orders made on October 4, 2011. The fact that the trades took place, a minute or so (with the exception of the two breaks), also suggests that the Respondent could not have complied with his obligation to obtain instructions and confirm the four elements of each of the orders and resulting trades with each client in the brief intervals between the trades, before he entered them. This is because, on the balance of probabilities, we find that it would be physically impossible that the Respondent could have contacted each of 37 clients in the two-hour period in which he placed these orders.

¶ 53 More importantly, the records of the Respondent’s admissions to his employer support the conclusion that the Respondent engaged in discretionary trading in client accounts on October 4, 2011. His claim, if

believed, was that all of the relevant clients left both the timing and the price to him, in which case his trading in their accounts was discretionary. On the other hand, if his claim is disbelieved, the Panel is able to rely on the clear and cogent evidence of YX and the other four clients who returned KT's questionnaires to establish that the Respondent did not confirm the elements of October 4, 2011 trades in their accounts in advance.

¶ 54 In either event, the Respondent engaged in conduct contrary to IIROC Dealer Member Rule 1300.4, namely discretionary trading.

Count 3

¶ 55 Count 3 relates to the allegation that on 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.

¶ 56 Paragraphs 2 and 27 of the Amended Notice of Hearing state:

2. ... The Respondent also misrepresented the true nature of these discretionary trades by indicating on the trade tickets that the orders were "*unsolicited*" in order to disguise the fact that they were discretionary.

27. The Respondent marked each of the trade tickets for these sell orders as "unsolicited" to represent to his firm that the sales were initiated by the client, when the fact is the clients were not even aware the transactions were being made.

¶ 57 The trade ticket is a document that forms part of an audit trail relied on by the Dealer Member in the course of business. It can be used, as here, to assist in monitoring compliance and in defending Dealer Members against client complaints. For instance, Dealer Members may rely on representations in trade tickets about whether a trade is or is not solicited as an indicator as to whether the trading practices of Registered Representatives are consistent with the scope of their licensed authority to trade or compliant with the governing regulatory regime.

¶ 58 The details of the sell orders provided in TD Waterhouse's Branch Manager Report confirm that 181 sell orders made in 37 of the Respondent's client accounts within a two hour period on October 4, 2011 were recorded in trade tickets as "unsolicited". These facts ought to have, and apparently did, flag the need for inquiry. As mentioned, when asked by TD Waterhouse how he was able to confirm the sell orders made in the two hour period on October 4, 2011 in which he did that trading, the Respondent claimed that his clients had called him in advance and given him discretion to pick the time and price of the transactions. He also claimed they gave him discretion for market orders, but he did not discuss price with them. As found above, regardless of the issue of whether the clients called him, it is clear that the Respondent engaged in discretionary trading when he was not licensed or authorized to do so.

¶ 59 We observe that the Respondent initially took the position with TD Waterhouse that the trades were unsolicited. The notes of TD Waterhouse's interview with him state:

19) According to the records on October 4th, you entered 171 unsolicited sells between 10:37 am and 12:36 pm, less than 2 hours. Can you walk me through how you were able to confirm 171 trades and enter them on the system, all within a 2 hour time frame.

Kevin Li: "Clients called the night before with instructions that when it's best for them, to sell"

Jessie – you understand that in doing this, you are discretionary trading?

Kevin Li: Due to different time zone, clients left time & price to my discretion.

¶ 60 Clearly, the Respondent defended the trades as being "unsolicited" by asserting, after the fact, that the clients had initiated contact with him to give him instructions. However, the employer's inquiry did not explore the question of misrepresentation in its records by designating the trades as unsolicited. Rather, it focussed on the issue of discretion: and, in particular, whether the Respondent had acted beyond the scope of his authority as a Registered Representative by engaging in discretionary trading, regardless of his customers' instructions.

¶ 61 The issue under Count 3, however, is whether the Respondent “misrepresented” these sell orders to his firm as “unsolicited” on the firm’s trade tickets.

¶ 62 Misrepresentation has been found to be conduct unbecoming of an approved person, contrary to the professional rules of the brokerage industry. IIROC Dealer Member Rule 29.1 is quoted above, and will not be reproduced here.

¶ 63 Counsel for IIROC staff referred the Panel to *Re: Jones* [2013] IIROC 58. There, one of the counts related to misrepresenting the nature of certain solicited orders by marking them as “unsolicited” in the trade tickets, contrary to Rule 29.1. In that case, the Panel wrote, at paragraph 61:

This allegation relates to an alleged representation by Ms. Jones as to the source of a large number of trades in this account. A trade ticket may be a computer placed order, or a manual form which among other data is a field to indicate whether or not the trade was solicited or unsolicited. There is a definite purpose for the broker to indicate whether or not the order was solicited or unsolicited. Solicited indicates that the recommendation for the trade originated with the broker and unsolicited indicates that the trade was requested by the client.

¶ 64 In *J.C. Dixon Davidson Partners Ltd.* [1989] T.S.E.D.D. No. 10, a hearing committee of the Toronto Stock Exchange said the following with respect to the term misrepresentation, at page 4 of 9:

A misrepresentation is an assertion not in accordance with the fact. Misrepresentation embraces a wide spectrum ranging from:

- (1) A false or fraudulent misrepresentation made by a person with knowledge of falsehood or recklessly without belief in its truth, not caring whether it is true or false.
- (2) Negligent misrepresentation that is untrue made by a person who has no reasonable grounds for believing it to be true, even though he believes it to be true.
- (3) Innocent misrepresentation which occurs when the person making the representation has reasonable grounds for believing it to be true.

¶ 65 In that case, the panel found that the respondent was not actuated by dishonest or improper motives and it was unable to say that, in the particular circumstances, his negligence was of such a character as to fall within the description of “conduct that is unbecoming” within the applicable rule, thereby attracting disciplinary sanction.

¶ 66 The instant case involves the transaction of 181 allegedly “unsolicited” sell orders in 37 client accounts in a two hour period. There is no evidence, other than the notes of TD Waterhouse’s interview with the Respondent, that clients had spoken to the Respondent in advance of placing the orders. Against that, we are told by KT that there were 18 complaints from clients that the trades were not authorized in advance (although no copies of the complaints were put in evidence). We have copies of questionnaires received from four clients making the same assertion. Additionally, we have other evidence of YX, described above, that the Respondent’s practice was not to obtain prior approval of all elements of trades in his account.

¶ 67 Therefore, there is clear and cogent evidence that the October 4, 2011 sell orders in five accounts (including YX’s account) were unsolicited. There is some evidence of lesser weight that sell orders in 18 accounts were unsolicited. In all of the circumstances, we draw the inference from the evidence that it is more likely than not that the holders of the 37 client accounts did not initiate unsolicited instructions to the Respondent, during or shortly before the two hour period of trading, to sell the securities traded in that period.

¶ 68 As mentioned above, each trade is recorded in the Branch Manager’s Report as having been “unsolicited”. We observe that there is no evidence whether the designation “unsolicited” had to be deliberately entered in the applicable order management software program, or whether it was a default setting. The Respondent either marked the trades as “unsolicited” or allowed them to be marked, by default, as “unsolicited”. His conduct was either an action of commission or of 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.

¶ 69 Accordingly, we find that Count 3 has been proved.

¶ 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.

Count 4

¶ 71 Count 4 relates to the allegations that, 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. The Panel notes that the facts that form the basis of this complaint are limited to the November 2012 to August 2013 period and do not include more recent facts.

¶ 72 Many of the relevant facts are described in the Panel's Interim Decision reported as 2015 IIROC 18, at paragraphs 8 to 19, reproduced below:

8. At all times during and after his employment with TD Waterhouse, the Respondent's residential address listed on the National Registration Database ("NRD") has been Suite A – XYZ Street, Vancouver BC (the "Vancouver Condo"). The NRD also listed the Respondent's residential telephone number (the "Listed Phone Number"). We are satisfied on the evidence supplied by IIROC that the Respondent lived at that address with his wife or common-law partner for at least part of the time he worked at TD Waterhouse. We are also satisfied that the Vancouver Condo is the Respondent's "last known address" as recorded on the NRD.
9. TD Waterhouse conducted an investigation of the trading allegations in October, 2011 with the result that the Respondent left its employ.
10. IIROC commenced an investigation of the Respondent's trading activities and sent a standard investigation opening letter dated March 13, 2012 by Canada Post Registered Mail to the Respondent at the Vancouver Condo. Tracking information from Canada Post confirmed that the letter was delivered to the Vancouver Condo on March 19, 2012 and that it was signed for by a person using the name "Yu Li".
11. Ms. T., an IIROC investigator assigned to this case, indicates that the Respondent's Chinese name is "Yu Qiong Li" and that, although she is not a handwriting expert, the signature on the Canada Post tracking confirmation appears to be the same as the Respondent's signature on his TD Waterhouse client account documentation.
12. The March 13, 2012 letter notifies the Respondent that IIROC has commenced an investigation into the Respondent's conduct relating to trades in several accounts while registered with TD Waterhouse.
13. After sending the March 13, 2012 letter, IIROC, through Ms. T., communicated with the Respondent about its investigation. Ms. T. has supplied a string of emails dated November 4, to November 21, 2012 showing that she communicated with him by email to a yahoo email address (the "Yahoo Email"). The last date that Ms. T. received an email from the Respondent was November 21, 2012.
14. Ultimately, IIROC arranged a telephone interview with the Respondent, who was then in Beijing. The interview was scheduled for 3:00 pm on November 21, 2012, Vancouver time, which was 7:00 am Beijing time. The Respondent provided a Chinese telephone number at which he could be reached (the "Chinese Number"). IIROC supplied the

Respondent with a number of exhibits to address in the interview, by email. The interview was held on November 22, 2012.

15. During the interview, among other things,
 - (a) The Respondent was informed that he was required by Dealer Member Rule 19.5 to give IIROC information respecting the investigation and to answer IIROC's questions.
 - (b) The Respondent confirmed that he was currently in Beijing, China.
 - (c) The Respondent said he had moved from Vancouver to China and was now permanently living in Beijing.
 - (d) The Respondent declined to provide an address where he could be reached in China. He said that he could not provide his address. He said he might move from it. He confirmed that he had no reason for not providing an address where he could be reached. He said he did not want to provide his address.
 - (e) Once the discussion turned to the subject matter of the client complaints, the IIROC participants decided to reschedule the balance of the interview because of the poor telephone connection and their view that the interview would be assisted by the use of a Mandarin translator.
 - (f) The Respondent agreed to do a new interview.
 - (g) The Respondent agreed that if his contact information changed in any way he would inform Ms. T.
 - (h) Ms. T. advised that she would be in touch with the Respondent, probably through email.
16. Unbeknownst to IIROC until February, 2015 was that, on November 21, 2012, an application was received by the Land Title Office in Vancouver to transfer title to the Vancouver Condo, which was formerly in the names of the Respondent and his wife, as joint tenants, into the name of the Respondent's wife, alone. According to documents supplied by IIROC, this application was entered on November 30, 2012. As of February, 2015, the Vancouver Condo remained in the wife's name.

¶ 73 In addition, KT arranged for a Mandarin interpreter to attend at the second interview. On April 19 and 30, 2013, she sent emails to the Respondent's Yahoo email address. Although both were successfully delivered, the Respondent did not respond to either one. So KT set August 14, 2013 as the date for the second interview. On July 18 and 30, 2013, she sent emails to the Respondent's Yahoo email address with details of the time, date and location of the interview, as well as an attached copy of a letter compelling the Respondent's attendance at the interview (the "Compel Letter").

¶ 74 The Compel Letter stated that disciplinary proceedings would be initiated against the Respondent 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. The July 2013 emails were sent with a delivery tracker which confirmed that each was delivered.

¶ 75 On August 14, 2013, the Respondent failed to attend the second interview. KT's call to the Chinese Number prompted a message indicating that the number was no longer in service. KT's call to the Respondent's phone number as listed on the NRD elicited a busy signal.

¶ 76 On July 18, 2013, the Compel Letter was sent to the Vancouver Condo by Canada Post Registered Mail and Regular Mail. Despite two notice cards being left indicating where the letter sent by Registered Mail could be picked up, the letter was not claimed and was ultimately returned to the sender, IIROC. The letter sent by

Regular Mail was returned to IIROC.

¶ 77 KT hired a process server to deliver the Compel Letter to the Vancouver Condo. The process server attended at the Vancouver Condo, but found it was a secure building with an intercom system that could not be accessed without being “buzzed in”. The process server made nine unsuccessful attempts to contact someone in the Vancouver Condo by intercom from July 20 to 27, 2013 and was unable to serve the Compel Letter.

¶ 78 The following additional facts are reproduced from the Panel’s Interim Decision (reported as 2015 IIROC 18) for the purposes of background only, as they do not fall within the timeframe of the conduct described in Count 4.

20. In late January, 2015, Ms. T. was contacted by Ms. M., a Senior Registration Administrator with the B.C. Securities Commission (the “Commission”). Between January 26 and 30, 2015, Ms. M. advised Ms. T., in a series of telephone calls, that the Respondent had applied for reactivation of his registration through the Commission to work for Sloane Capital Corp., an Exempt Market Dealer. Ms. M. also conveyed that the Respondent’s residential address listed on his registration application form was the Vancouver Condo, that his telephone number listed on the NRD was the Listed Phone Number, that he could be reached at a certain cell phone number (the “New Cell Number”) and that he could be emailed at a Google email address (the “Google Email”).
21. On January 30, 2015, Ms. T. was present when Mr. S., an IIROC Enforcement Counsel, called the New Cell Number. Mr. S. introduced himself as a lawyer from IIROC and asked if he was speaking with Kevin Li. He received an affirmative answer. Mr. S. then advised the Respondent that IIROC had been sending him emails and endeavouring to interview him, but had been unsuccessful because the phone number he provided no longer worked and he had not supplied a new one. Mr. S. said he needed to address the IIROC investigation now that it had his new number and asked where the Respondent was located. Mr. S. then put the phone call on speaker so that Ms. T. could listen.
22. After a significant pause, the Respondent denied knowing what Mr. S. was talking about and denied recollection of an investigation. When Mr. S. asked the Respondent where he was located so that he (Mr. S.) could send him a Notice of Hearing, the Respondent terminated the telephone call. Mr. S. immediately called back on the same phone number, but there was no answer.
23. Mr. S. contends that his advice to the Respondent about a Notice of Hearing put him on notice of the instant hearing.
24. The Notice of Hearing was issued on February 4, 2015. The next day, Ms. T. and Mr. S. again called the New Cell Number, this time on speakerphone, and both heard a recorded message stating, “The cellular number you have called is not assigned. Please check the number and try your call again.” A repeat call to this number received the same message. Mr. S. then tried calling the Respondent’s Listed Number and received a busy signal.
25. Mr. S. prepared a package comprised of a letter to the Respondent dated February 5, 2015, advising that an IIROC disciplinary hearing was scheduled for March 3, 2015 and enclosing the February 4, 2015 Notice of Hearing and a copy of the procedural rules which govern IIROC hearings (the “Package”).
26. Mr. S.’s letter warned that if the Respondent failed to file a Response within the stipulated time of 20 days, IIROC may proceed with the disciplinary hearing and that the alleged facts may be accepted as proven and penalties and costs imposed, all in his absence. Additionally, it warned that failure to provide grounds for denial of an alleged fact may result in that alleged fact being accepted as proven. It also stated that IIROC still wished to conduct an interview and asked that the Respondent contact its office

immediately to arrange one.

27. IIROC made a number of attempts to serve the Notice of Hearing on or otherwise give notice of the hearing to the Respondent:

- (a) An attempt was made to deliver the Package to the Respondent at the Vancouver Condo by registered mail. The Package was accepted by Canada Post on February 6, 2015, an unsuccessful attempt at delivery was made on February 10, 2015 and a notice card was left at the building indicating where the item could be picked up. On February 26, 2015, a final notice card was left at the building indicating where the item could be picked up and advising that it would be returned to sender if not collected within 10 days. The item was ultimately returned to sender.
- (b) An attempt was made on February 5, 2015, to deliver the Package to the Respondent at the Google Email, which was the email address supplied by his proposed new employer to the Commission. IIROC received an email notification that the delivery of the email to the Google Email was “complete”. However, it has no record that the email was opened.
- (c) An attempt was made on February 18, 2015 to deliver the Package to the Respondent at the Yahoo Email. IIROC received an email notification that the delivery of the email to the Yahoo Email was “complete”. It has no record that the email was opened.
- (d) An attempt was made to deliver the Package to the Respondent at the Vancouver Condo by regular mail. It was returned to sender and received by IIROC on February 16, 2015
- (e) IIROC posted a Notice/News Release dated February 18, 2015 on its website, as it does in the normal course, advising that the hearing was scheduled for March 3, 2015 and including a link to the Notice of Hearing.
- (f) According to IIROC’s verbal advice, on February 18, 2015, Mr. P., an IIROC employee, attempted to personally serve the Package on the Respondent at the Vancouver Condo. When Mr. P. attended at the building, he twice attempted to enter by pressing the buttons on the intercom system associated with the Vancouver Condo, but could not gain entry to deliver the Package.

28. In the result, IIROC was unable to confirm that the Respondent actually received the Notice of Hearing. We find that the Respondent was notified verbally by Mr. S. that IIROC wanted to send a Notice of Hearing to him. However, at the time of this conversation, the Notice of Hearing had not been issued.

¶ 79 During all of the events described above, no change was made to the Respondent’s address or telephone number listed in the NRD.

¶ 80 As mentioned above, the Amended Notice of Hearing, dated June 29, 2015, was deemed to be served on the Respondent in accordance with IIROC’s requirements. The Respondent has made no response.

¶ 81 IIROC Dealer Member Rule 19.5 states:

19.15 For the purpose of any examination for investigation pursuant to this Rule 19, a ... Registered Representative may be required by the Corporation.

...

(c) to attend and give information respecting any such matters ...

¶ 82 The Panel finds that, commencing with the IIROC interview on November 22, 2012 and concluding

with the events of 2013 described above, the Respondent engaged in a course of conduct that amounted to a failure to cooperate with the IIROC investigation of his trading. He was informed of his obligation to provide information and answer IIROC's questions relating to its investigation. He refused to provide an address where he could be reached in China without providing reasonable justification. He agreed to engage in a new interview and to provide his contact information to the investigator if it changed in any way. He was already in the process of transferring his interest in his family home to his wife, thereby removing himself from title to the property. He was unresponsive to phone calls, emails, and attempts to deliver or serve him with IIROC communications. He failed to attend at the second interview scheduled by the investigator. He provided no further change in his contact information to IIROC or its investigator despite leaving his address and telephone number unchanged in the NRD. Ultimately, his conduct frustrated IIROC's ability to engage him in the balance of its investigation.

¶ 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.

¶ 84 On the basis of the evidence presented to this Panel, we find that the Respondent's acts and omissions were contrary to IIROC Dealer Member Rule 19.5.

Summary of Findings

¶ 85 The Panel finds that Counts 1, 2, 3 and 4 are proven.

Dated this 29th day of January, 2016.

Alison Narod

Panel Chair

Michael Johnson

Panel Member

Lloyd Costley

Panel Member

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