Re Lotz

IN THE MATTER OF:

THE BY-LAWS OF THE INVESTMENT DEALERS ASSOCIATION OF CANADA

AND

MARK PIERRE LOTZ

2008 IIROC 2

Investment Dealers Association of Canada
Hearing Panel (Pacific District)

Heard: February 20, 2008 at Vancouver, BC
Decision: March 31, 2008
(46 paras.)

Hearing Panel:
Stephen D. Gill, Chair
L. Karen Henderson
Chris Lay

Appearances:
Lorne Herlin, for the IDA
Dana Prince, for Mark Pierre Lotz

REASONS FOR DECISION

THE PROCEEDING

1. We were constituted as a Panel of the Pacific District Council of the Investment Dealers Association of Canada (the "Association") as a result of an Amended Notice of Hearing (Exhibit 1) regarding a disciplinary action brought by the Association in respect of certain conduct of Mark Pierre Lotz (the "Respondent" or "Mr. Lotz"). The Amended Notice of Hearing is dated February 13, 2008.

2. On or about February 15, 2008 the Association and Mr. Lotz signed an Agreed Statement of Facts and Admissions (Exhibit 2) which contains thirty-three paragraphs of Facts and a further section entitled "ADMISSIONS", in which Mr. Lotz made certain admissions as a result of the conduct set out in the Agreed Statement of Facts. In the result, the matter proceeded as a penalty hearing; at the conclusion of the hearing, the Panel reserved its decision.

The Allegations

3. The Amended Notice of Hearing stated that the purpose of the hearing was to determine whether Mr. Lotz, who at all material times was the Chief Financial Officer and an Officer (Non-Trading) of Golden Capital Securities ("Golden Capital Securities"), a Member of the Association, has committed the following contraventions alleged by the Association:

Count 1

In or around April 2002, the Respondent completed and then submitted, or caused to be submitted to the Association a form 1-U-2000 Uniform Application for Registration/Approval that failed to disclose an outside business activity, contrary to Association By-law 29.1.

Count 2

Between July 2006 and November 2006, the Respondent failed to disclose to Golden Capital Securities that in July 2006 he had become the Chief Financial Officer of a publicly traded company, contrary to the Association Policy 8 and/or By-law 29.1.

4. As per the Agreement signed by the parties (Exhibit 2) the following are the Agreed Facts and Admissions including the paragraph numbers from Exhibit 2:

I. FACTS

Registration History

1. Mark Pierre Lotz's (the Respondent) registration history is set out in the following table:

Registration Issue Date	Registration Termination Date	Employer	Registration Category
June 2002	Present	Golden Capital Securities Ltd. (Golden Capital Securities)	Chief Financial Officer Officer (Non-Trading)
January 2007	January 2008	Gateway Securities Inc.	Chief Financial Officer Officer (Non-Trading) Director (Industry)
January 2008	February 2008	Gateway Securities Inc. (Gateway Securities)	Chief Financial Officer Officer (Non-Trading) Director (Industry) Alternate Designated Person Officer Title: President and Chief Financial Officer
February 2008	Present	Gateway Securities	Chief Financial Officer Officer (Non-Trading) Director (Industry) Officer Title: President and Chief Financial Officer

Application for Registration

2. The Respondent has been a chartered accountant since October 1994.

3. Between September 1995 and May 1998, the Respondent worked as an examiner for the Vancouver Stock Exchange (VSE). In his capacity as a VSE examiner he was responsible for conducting financial and sales compliance reviews of VSE member firms.

4. In May 1998 the Respondent obtained a license from the Institute of Chartered Accountants (the Accounting License) and began his own Accounting Practice (the Accounting Practice). The Respondent has continuously maintained his Accounting License and operated the Accounting Practice from May 1998 to the present. The Accounting Practice has and continues to provide

professional accounting services in relation to the preparation of tax returns to individuals and companies in return for compensation.

5. The Respondent has advised and the Association accepts that between 1998 and 2007, the Accounting Practice in total had approximately 40 clients. Of these 40 clients, approximately:

   - 5 clients were public companies whose shares are traded on a Canadian exchange;
   - 1 client was a stock promoter who later became a registered representative who was employed by Golden Capital Securities;
   - 1 client was a registered representative who was employed by Golden Capital Securities; and
   - 1 client was a registered representative who was employed by another investment dealer.

6. In February 2001 the Respondent became the Acting Chief Financial Officer of Golden Capital Securities.

7. On or about April 16, 2002, the Respondent executed a Form 1-U-2000 Uniform Application for Registration/Approval (the Application for Registration) that had been prepared by the Registration Department of Golden Capital Securities in order to obtain the Association's approval to be designated as the Chief Financial officer (CFO) of Golden Capital Securities on a permanent basis. The Respondent provided the Registration Department of Golden Capital Securities with the necessary information to complete the Application for Registration.

8. Question 8 of the Application for Registration required the Respondent to, among other things, fully disclose all of his business activities, including any periods of self-employment during the 10 years prior to the date that he completed the Application for Registration.

9. In response to question 8 of the Application for Registration, the Respondent, among other things, indicated that between June 1998 and December 2000 he had operated the Accounting Practice.

10. Question 20(b) of the Application for Registration asked:

    Are you engaged in any other business or have any other employment for gain except your occupation with the firm which you are now applying?

    > If so, attach full details including the full name and address of the business, the nature of the business, your title or position and the amount of time you devote to the business.

11. The Respondent answered "No" to question 20(b) of the Application for Registration.

12. Pursuant to Member Regulation Notice # 118, "*Other Business Activities"* if the Respondent had answered question 20(b) in the affirmative, then the Respondent would have had to, among other things, disclose on a separate form any potential for confusion or conflict of interest with the Respondent's proposed activities as a registrant and the Respondent's other business activities.

13. The Application for Registration also contained the following caution:

    Filing of any false information or failure to disclose full information required by or on this application may result in its rejection or in disciplinary action taken against the applicant and/or the sponsoring firm within the provisions of the applicable securities and/or commodity futures legislation, regulations and policy statements of the securities regulatory authorities and within the terms of the by-laws, rulings, rules and/or regulations of any one of the self-regulatory organizations to which this application is submitted, or may result in a refusal to register the applicant (the Caution).

14. The Respondent deposed, among other things, that he had read and understood the questions in the Application for Registration and the Caution, and that his answers to the questions were true.

15. On June 4, 2002 the Association approved the Respondent's Application for Registration.

16. The Respondent's response to question 20(b) was incorrect because as detailed above, at the time that he executed the Uniform Application for Registration he operated the Accounting Practice which constituted a business.

17. At all material times, Golden Capital Securities knew that the Respondent operated the Accounting Practice, but it was not aware of the identity of most of its clients, nor did it enquire. Golden Capital Securities relied on the Respondent's judgment whether his Accounting Practice in any way created a conflict of interest with his Golden Capital Securities duties and responsibilities.

18. The Respondent worked at Golden Capital Securities on a full time basis from February 2001 to January 2007. The amount of time that the Accounting Practice required did not prevent the Respondent from discharging his duties and responsibilities as CFO of Golden Capital Securities.

19. The Respondent admits that he ought to have disclosed the Accounting Practice as an outside business activity in the Application for Registration and he ought to have known that this disclosure was required.

CFO of Issuer

20. On June 30, 2006 the Respondent ceased being an employee of Golden Capital Securities and on July 1, 2006 the Respondent became an independent contractor who was engaged by Golden Capital Securities. The Respondent's change in employment status occurred as a result of a decision by Golden Capital Securities to cease operations as a going concern and to sell (subject to the approval of the Association) its customer accounts and certain other assets.

21. The change in the Respondent's employment status did not result in any change to the duties and responsibilities that he fulfilled at Golden Capital Securities. Further, the change in the Respondent's employment status did not effect his obligation to adhere to all of the Association's By-laws, Rules, Regulations, and Policies.

22. Pursuant to the independent contractor agreement that the Respondent entered into with Golden Capital Securities, the Respondent was permitted to engage in other business pursuits provided that they did not conflict with his Golden Capital Securities duties and responsibilities.

23. UraniumCore Company (UraniumCore) was incorporated in the State of Delaware on or about December 7, 1992. UraniumCore's registered office is in the State of Nevada. The shares of UraniumCore are traded through the facilities of the Over-the Counter Bulletin Board. UraniumCore is in the uranium mining industry.

24. On July 3, 2006 the Board of Directors of UraniumCore elected the Respondent to serve as the CFO of UraniumCore.

25. Pursuant to Association Policy 8(A), the Respondent was required to report to Golden Capital Securities within two business days, the change to the information contained in his application for Registration.

26. In turn, pursuant to Association Policy 8(B), Golden Capital Securities was required to report to the Association the change to the information contained in the Respondent's Application for Registration.

27. At all material times the Respondent did not inform Golden Capital Securities that he had become the CFO of UraniumCore.

28. On November 20, 2006 Association staff first learned that the Respondent had become the CFO of UraniumCore.

29. On November 21, 2006 the Respondent voluntarily met with Association staff. In the course of the meeting the Respondent, among other things, confirmed that he had been appointed as the CFO of UraniumCore and he disclosed the existence of the Accounting Practice.

30. On or about November 22, 2006 the Respondent on his own initiative resigned his position as the CFO of UraniumCore.

31. Shortly after the Respondent's November 21, 2006 meeting with Association staff, Golden Capital Securities first learned that the Respondent had become the CFO of UraniumCore.

32. The Respondent has advised and the Association accepts that in his capacity as CFO of UraniumCore the only functions that he agreed to perform and in fact performed was the preparation of quarterly financial statements for which he was to be paid $3,000 per quarterly statement. Prior to his resignation as CFO, the Respondent had prepared two sets of quarterly financial statements for UraniumCore. Since UraniumCore was incorporated in the United States, the Respondent could not and did not prepare tax returns for it.

33. The Respondent admits that he ought to have disclosed to Golden Capital Securities that in July 2006 he had become the Chief Financial Officer of UraniumCore and that he ought to have known that this disclosure was required.

II. ADMISSIONS

34. As a result of the conduct that is set out in this Agreed Statement of Facts and Admissions, the Respondent admits as follows:

> **Count 1**
>
> In or around April, 2002, the Respondent completed and then caused to be submitted to the Association a Form 1-U-2000 Uniform Application for Registration/Approval that failed to disclose an outside business activity, contrary to Association By-law 29.1.
>
> **Count 2**
>
> Between July 2006 and November 2006, the Respondent failed to disclose to Golden Capital Securities that in July 2006 he had become the Chief Financial Officer of a publicly traded company, contrary to Association Policy 9 and/or Association By-law 29.1.

ANALYSIS

5. We note that the Respondent has been a chartered accountant since October, 1994, and that for almost three years he worked as an Examiner for the Vancouver Stock Exchange ("VSE"). As a VSE Examiner he was responsible for conducting financial and sales compliance reviews of VSE Members. In our view, this experience, plus his additional experience in the industry, ought to have caused the Respondent, in April, 2002, to appreciate the significance and importance of the Uniform Application for Registration/Approval that he signed. We note that although the application form was prepared by staff at Golden Capital Securities, the Respondent provided staff at Golden Capital Securities "with the necessary information to complete the application for registration." (Agreed Facts, paragraph 7).

6. Exhibit 3 in these proceedings was a sample of the Uniform Application for Registration/Approval form, which form was completed by the Respondent in April, 2002. Paragraph 8 thereof, entitled "**Employment History**", states:

> "(A) The following information constitutes full disclosure of your business activities, including any periods of self-employment and unemployment, for ten years immediately prior to the date of this application, …".

The form requires the applicant to provide the name and address of the employer, nature of employment and duties of the applicant, and to stipulate the time period from the starting month and year, to the ending month and year, or for continuing employment to the "present". According to the Agreed Facts, in response to Question 8, the Respondent indicated that between June, 1998 and December, 2000 he had operated the Accounting Practice, whereas in fact the Respondent admits he has continuously operated the Accounting Practice from May, 1998 to the present (Agreed Facts, paragraphs 4 and 9). In the view of the Panel, this is a very significant omission, especially in view of the "**Caution**" that appears on page 9 of the Application for Registration form which states:

> **CAUTION**
>
> FILING OF ANY FALSE INFORMATION OR FAILURE TO DISCLOSE FULL INFORMATION REQUIRED BY OR ON THIS APPLICATION MAY RESULT IN ITS REJECTION OR IN DISCIPLINARY ACTION TAKEN AGAINST THE APPLICANT AND/OR THE SPONSORING FIRM WITHIN THE PROVISIONS OF THE APPLICABLE SECURITIES AND/OR COMMODITY FUTURES LEGISLATION, REGULATIONS AND POLICY STATEMENTS OF THE SECURITIES REGULATORY AUTHORITIES AND WITHIN THE TERMS OF THE BY-LAWS, RULINGS, RULES AND/OR REGULATIONS OF ANY ONE OF THE SELF-REGULATORY ORGANIZATIONS TO WHICH THIS APPLICATION IS SUBMITTED, OR MAY RESULT IN A REFUSAL TO REGISTER THE APPLICANT.

(Agreed Facts, paragraph 13).

7. Further, it is a very serious omission in view of the affidavit contained at the end of the Application form, that the applicant is required to sign, which was page 10 of Exhibit 3. The affidavit states:

> "I, the undersigned applicant, do hereby depose and state that I have read and understand the questions in this application form as well as the answers made by myself thereto, and the Caution set out above, **and that the statements of fact made therein and in the attachments, if any, are true.**" (emph. added)

The affidavit must be sworn before a commissioner for oaths or a notary public.

8. Question 20 of the Application for Registration form is entitled "**Business Activities**" and Questions 20(A) and (B) are significant. Question 20(A) is, "Will you be actively engaged in the business of the firm with which you are now applying and devote the major portion of your time thereto?" Given that the Respondent was applying to be designated as Chief Financial Officer of Golden Capital Securities on a permanent basis, and that his Accounting Practice was ongoing, this question ought to have caused the Respondent to consider what portion of his time he would be devoting to his CFO duties, and what portion of his time he would be devoting to his Accounting Practice.

9. Following upon the Question at 20(A), is Question 20(B), which is: "Are you engaged in **any other business or have you any other employment for gain** except your occupation with the firm with which you are now applying?" (emph. added). The Respondent answered **NO** to this question (Agreed Facts, paragraph 11). At the time the Respondent swore the affidavit required for the Application for Registration form, he was engaged in another business, namely the Accounting Practice, and he did have employment for gain from that Accounting Practice. The Respondent's answer was not only wrong, it was misleading. As is stated in the Agreed Facts: "… if the Respondent had answered question 20(b) in the affirmative, then the Respondent would have had to, among other things, disclose on a separate form, any potential for confusion or conflict of interest with the Respondent's proposed activities as a registrant and the Respondent's other business activities." (Agreed Facts, paragraph 12).

10. As the Respondent's true circumstances were not disclosed, on June 4, 2002, the Association approved the Respondent's application for registration. There is no evidence that subsequent to June 4, 2002 the Respondent made any effort to correct the misrepresentations made in his sworn application, until the meeting of November 21, 2006 with Association staff.

11. As is stated in the Agreed Facts, the Respondent was conducting his Accounting Practice and between 1998 and 2007 he had approximately 40 clients. Of those 40 clients, 5 clients were public companies whose shares are traded on a Canadian Exchange; 1 client was a stock promoter who later became a registered representative who was employed by Golden Capital Securities; 1 client was a registered representative who was employed by Golden Capital Securities, and 1 client was a registered representative who was employed by another investment dealer. Clearly there was the possibility of conflicts.

12. The Respondent admits that he ought to have disclosed the Accounting Practice as an outside business activity in the application for registration and he ought to have known that this disclosure was required (Agreed Facts, paragraph 19).

13. The Panel does not accept that the Respondent was not aware of the false and misleading answers he gave to question 8 and question 20(b) of the Application for Registration. Alternatively, his false answers show a callous disregard for the Association Policies and By-laws. The erroneous Application form he swore was true permitted him to be designated as the Chief Financial Officer of Golden Capital Securities. We have no doubt that as a Chartered Accountant, and from his experience in the industry generally and as a VSE Examiner, he was fully aware of and appreciated the significance of truthful answers to the questions in the Application form. The Application form is required to be sworn as an affidavit, again emphasizing the importance of correct, truthful answers.

14. We conclude that for whatever reason, the Respondent did not disclose to the Association his ongoing accounting practice. The misrepresentation continued from April, 2002 to November 21, 2006, when the Association learned of it.

15. UraniumCore Company ("UraniumCore") a U.S. public company with a registered office in the State of Nevada, whose shares are traded through the facilities of the over the counter bulletin board. On July 3, 2006 the board of directors of UraniumCore elected the Respondent to serve as the Chief Financial Officer of UraniumCore. In his capacity as CFO of UraniumCore the only functions that he agreed to perform, and in fact performed, were the preparation of quarterly financial statements for which he was to be paid $3,000 per quarterly statement. Prior to his resignation as CFO of UraniumCore, the Respondent had prepared two sets of quarterly financial statements for UraniumCore. (Agreed Facts, paragraphs 23, 24 and 32).

16. As is admitted in the Agreed Facts, pursuant to Association Policy 8(A), the Respondent was required to report the change to the information contained in his Application for Registration to Golden Capital Securities within two business days. In turn, pursuant to Association Policy 8(B), Golden Capital Securities was required to report to the Association the change to the information contained in the Respondent's Application for Registration. (Agreed Facts, paragraph 25 and 26).

17. At all material times the Respondent **did not** inform Golden Capital Securities that he had become the CFO of UraniumCore. He occupied that position from July 3, 2006 to November 22, 2006. The Respondent resigned his position as CFO of UraniumCore on November 22 as a result of contact from Association staff on November 20, 2006, when Association staff first learned that he had become CFO of UraniumCore, and pursuant to a meeting between the Respondent and Association staff on November 21, 2006. (Agreed Facts, paragraphs 28 and 29).

18. At the meeting with Association staff on November 21, 2006, the Respondent also disclosed the existence of the Accounting Practice. (Agreed Facts, paragraph 29).

19. The Respondent admits he ought to have disclosed to Golden Capital Securities that in July, 2006 he had become the Chief Financial Officer of UraniumCore and that he ought to have known that this disclosure was required. (Agreed Facts, paragraph 33).

20. There is no evidence that the Respondent, between July 3 and November 20, 2006, attempted to correct the information contained in his application for registration to reflect his new position as Chief Financial

Officer of UraniumCore. Once again, the Respondent failed to abide by Association Policies and By-laws requiring disclosure of "other" business activities.

Association's Position

21. Counsel for the Association submitted that in respect of Count 1, a fine of $5,000 was appropriate, and with respect to Count 2, that a fine of $15,000 was appropriate; that the Respondent successfully complete the Partners, Directors and Senior Officers Course (the "PDO") within six months of the Panel's decision, and that the Respondent pay a portion of the investigation/hearing costs.

22. Counsel for the Association referred to the materials in respect of the PDO Course (Association Authorities, Tab 7). Counsel for the Association also reviewed a number of decisions which he submitted may assist us in our deliberations. They included in *Re Graham* (2005) I.D.A.C.D. No. 21 (May 26, 2005); *Re Rahmani* (2004) I.D.A.C.D. No. 48 (August 9, 2004); *Re Furevick* (2007) I.D.A.C.D. No. 30 (Settlement Agreement July 25, 2007), and *Re Cathcart* (2004) I.D.A.C.D. No. 13 (March 23 2004); and he referred to the Association's Disciplinary Sanction Guidelines including the General Principles (pages 6 to 13) and paragraph 3.10 Outside Business Activities – By-law 29.1, and paragraph 5.2 Misrepresenting Credentials to Association Upon Registration/Transfer.

23. In respect of Misrepresenting Credentials, the Guidelines state:

> … When a registrant has misrepresented his or her credentials to the Association, this amounts to conduct unbecoming, contrary to Association By-law 29.1, and disciplinary sanctions should be imposed.
>
> Any intentional misrepresentation on an application for registration or transfer should be treated severely, and a substantial fine, suspension or permanent bar from approval in any capacity should be considered.

The minimum recommended fine for misrepresenting credentials is $5,000 (Guidelines, Association Authorities, Tab 6). We note that counsel for the IDA did not allege that the Respondent's failure to disclose his outside business activities, as admitted in Count 1, was intentional, but did not point to the evidence that led to this conclusion. The Association pointed out that the Member firm, Golden Capital Securities, at all material times knew about the Accounting Practice, and the Member firm also signed the Application. While the Member firm knew about the Accounting Practice, it was not aware of the identity of most of its clients, nor did it inquire. (Agreed Facts, paragraph 17).

24. With reference to Count 2, counsel for the Association referred to the Guidelines, paragraph 3.10 Outside Business Activities and pointed out that the Guidelines state:

> … Outside business activities that are not known or consented to by the Member firm, does not merit public confidence or respect.

The minimum recommended fine under this heading is $10,000 (Association Authorities, Tab 6). The Association suggests a fine of $15,000 is appropriate.

Respondent's Position

25. On behalf of the Respondent, Mr. Prince argued that the appropriate penalty was a reprimand, or a nominal fine. After reviewing the Agreed Statement of Facts and Admissions, Mr. Prince referred to the Guidelines and submitted that the Panel had an overall discretion re penalty as per the preamble to the Guidelines (page 14) which states:

> Preamble: The minimum fines suggested within the individual guidelines are intended to establish the "baseline" fine for specific offences – in other words, the lowest fine that can be expected by a respondent where there are no aggravating factors and all mitigating factors have already been taken into account.

> However, **nothing in these guidelines shall fetter the discretion of a Hearing Panel to impose a lesser or greater penalty in specific circumstances**. (emph. added).

Mr. Prince noted that there was no reference to a reprimand in the Guidelines but submitted that it was a penalty that was appropriate in this case.

26. Further, Mr. Prince submitted that the Panel should refer to the General Principles as set out in the Guidelines, and pointed out that under paragraph 3.2 Blameworthiness, the Guidelines stipulate that "in appropriate cases, distinction should be drawn between conduct that was unintentional or negligent, and conduct that involves manipulation, fraudulent, or deceptive conduct." He urged that the Respondent's conduct as per the admissions of Count 1 and Count 2 was negligent conduct. He also pointed out that the Respondent had no prior disciplinary record; the Respondent has accepted responsibility, especially as per the Agreed Statement and Admissions, and that he cooperated fully with the Association. The Panel acknowledges these mitigating factors.

27. Mr. Prince also made submissions with respect to the application of various cases, including *Re Rahmani, Re Gillani, Re Kim, Re Nyren, Re Mu, Re Steinhoff, Re Cathcart,* and referred to the Conduct and Practices Handbook.

28. Mr. Prince also took issue with the applicability of some provisions in the Guidelines in that they did not appear to fit the Agreed Facts and Admissions in this case. For example, he referred to Guidelines paragraph 3.10, Outside Business Activities, and noted that the example referred to dealing in securities outside the normal business of the firm. He submitted that Outside Business Activities, such as the Respondent's Accounting Practice, aren't the focus of the Guidelines or the Conduct and Practices Handbook.

29. Further, he submitted that notwithstanding it had knowledge on or after November 21, 2006 of the alleged offences, the Association has approved the Respondent to become President and CFO of a Member. He submitted the Respondent was a senior member of the industry, and was setting an example by cooperating and admitting to his mistakes. He pointed out that the circumstances here were less egregious than a number of other cases because the Member firm was aware of the Respondent's accounting practice. Mr. Prince put considerable emphasis on the fact that for the past few years the securities industry has changed and become stricter, and there has been the imposition of stiffer penalties, and he pointed out that the Respondent's principal error occurred in April, 2002. The Panel notes, however, that the Respondent's violation was a continuous one.

30. We are indebted to counsel for their able assistance, and review of the cases presented in their respective books of authorities, and their references to the Guidelines. However, we do not propose to review in detail the many cases that were cited during argument as we do not believe they are decisive in respect of the particular facts of this case.

31. The Agreed Statement of Facts and Admissions detail the failure by a knowledgeable, experienced professional, holding a senior position in the industry, to comply with the Policies, Rules and By-laws of the Association. In respect of Count 1, in the Application Form the Respondent gave erroneous answers to two significant questions; his counsel submits he did so negligently. With respect to Count 2, he again failed to voluntarily follow the Association's Policies and By-laws and did not inform his Member firm, and thus consequently the Association, of the additional new Chief Financial Officer position he had accepted. The Member firm had no knowledge of this new appointment; the Respondent's counsel suggests the Respondent was engaged in a stressful industry, requiring quick decisions. We are not persuaded this is any excuse for his conduct as detailed herein.

32. In Re Rahmani, the Panel had occasion to consider a situation where the RR knowingly failed to disclose criminal charges as he was obliged to do by the Association's By-laws and Rules. On that occasion the Panel stated:

> 46. The investment industry is founded upon trust and responsibility. Trust between client and registered representative, trust between the registered representative and his or her employer, and trust between the registered representative and the Association. To ensure that these trust relationships exist the registered representative, his or her employer, and the Association all must assume specific responsibilities. For the registered representative, one of those specific responsibilities is complete and timely disclosure to the Association of all matters which might affect the registered representative's ability to operate within the industry. **Without such disclosure the Association is not able to carry out its responsibility of regulating the industry**.
>
> 47. This process of disclosure starts for the registered representative when he or she applies to enter the investment industry. The application form the registered representative is required to complete is not a single page document containing relevant contact information, but rather a complete disclosure document setting forth all information concerning the applicant which might be relevant to his or her performance in the industry.
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> 48. However, the disclosure does not stop there. The registered representative is required to renew his or her registration on a regular basis through the filing of renewal forms updating his or her disclosure information on file with the Association.
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> 49. In addition, and to ensure that relevant information concerning the registered representative on file with the Association is current, Regulation 18.11 required the registered representative to notify the Association in writing within 10 days if certain relevant information concerning the registered representative changes.
>
> 50. **As full disclosure of relevant information is so essential to this process**, the application forms completed by the registered representatives contain instructions assisting the applicant in the completion of the forms and recommending the seeking of professional advice if there is any doubt as to the disclosure required. As well, the application forms contain **cautions** and warnings, often in bold type or capitalized lettering, stressing the importance of the information being sought and the consequences of not providing full disclosure. Finally, the disclosure forms contain certificates, often **supported by affidavits**, confirming that the signatories understand what is being asked of them and that there is complete and accurate disclosure.
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> 51. By their very nature, the requisite disclosure forms stress the importance that true and timely disclosure has to the investment industry. (emph. added)

33. Those comments, in our view, are equally applicable to this case, and to the conduct of the Respondent. Full and truthful disclosure is essential to the process. In respect of the conduct admitted in Count 1, the Respondent admits that he gave the information necessary to complete the Application for Registration to the staff at Golden Capital Securities, which information was incorrect. He had an obligation to review the completed Application Form and to ensure that it was correct, before he swore that it was true. His failure to ensure the Application Form was correct resulted in a serious misrepresentation, which is at best gross negligence, which does not absolve the Respondent from responsibility.

34. Similarly, the Respondent's conduct admitted in Count 2, again displays what can only be a complete disregard for the Association's Rules and By-laws. This is clearly a second, unrelated offence, coming some years after his initial misrepresentations in his Application Form. Again the Respondent's conduct appears to indicate a callous disregard for the Association's Rules.

35. We note that the Association does not allege an intentional misrepresentation, and Respondent's counsel characterizes it as a negligent misrepresentation. Be that as it may, the requirement for accurate, timely, complete and truthful information is essential to the continued operation of the Association, and indeed the continued operation of the securities industry. The Respondent occupied a senior position at the time of the events which form the basis for Count 1 and Count 2. The Canadian Securities Institute materials for the PDO course states:

> Becoming a PDO means taking on more "responsibility", including the responsibility to maintain the integrity of the securities industry, the responsibility to act in the best interests of one's firm and the responsibility that one has to service clients to the best of their ability (if applicable).

(Association Authorities Tab 7).

36. We have carefully considered the Disciplinary Guidelines, both as to General Principles, and as to specific paragraphs relating to Count 1 and Count 2. Under General Principles, the Guidelines state:

> 2. Disciplinary Sanctions as Deterrence
>
> Registrants and Member firms have significant responsibilities that they must meet if investors are to be protected and market integrity maintained. Registrants who choose to act in ways that threaten the integrity of the capital markets must have the expectation that they will be held accountable through enforcement action by regulators. Sanctions should be based on the circumstances of the particular misconduct by a respondent with an aim at general deterrence.
>
> General deterrence will follow from an appropriate decision and deter others from engaging in similar misconduct and improve overall business standards in the securities industry. This can be achieved if a sanction strikes an appropriate balance by addressing a registrant's specific misconduct, but also being in line with industry expectations. As was observed by the Hearing Panel in *Re Mills,* [2001] I.D.A.C.D. No. 7, April 17,2 001, at p. 3:
>
> > *Industry expectations and understandings are particularly relevant to general deterrence. If a penalty is less than industry understandings would lead its Members to expect for the conduct under consideration, it may undermine the goals of the Association's disciplinary process; similarly, excessive penalties may reduce respect for the process and concomitantly diminish its deterrent effect. Thus the responsibility of the District Council in a penalty hearing is to determine a penalty appropriate to the conduct and respondent before it, reflecting that its primary purpose is prevention rather than punishment.*

(Association Authorities Tab 6, page 6).

37. The Respondent's conduct, in failing to make proper disclosure, on two occasions, over a significant period of time, is in our view a serious transgression. In our view this is not an appropriate case for a reprimand or nominal fine. We have two distinct instances where the Respondent breached the Association's Rules and By-laws, and in both cases, given the Respondent's training, experience, and position, in our view, those breaches were egregious. This is not a case of one simple mistake. However, we have also taken into account the submissions of counsel with respect to the mitigating factors that are present; but for those factors, in our view the penalties could have been significantly higher.

38. Having considered all of the evidence, and the authorities, and the submissions of counsel, we hereby order:

a) That with respect to Count 1, the Respondent pay a fine of $15,000;

b) That with respect to Count 2, the Respondent pay a fine of $10,000; and

c) Within six months of these Reasons, the Respondent write and pass the examination based on the Partners, Directors and Officers Course administered by the Canadian Securities Institute.

COSTS

39. Counsel for the Association presented a Bill of Costs (Exhibit 5) that set forth investigation costs with respect to the activities of Mr. Zwarich, senior investigator, and Mr. Baxter, investigations assistant, of $13,941.00 representing, in total, 138 hours of investigation activity. That included obtaining documents from Global Capital Securities and the Respondent; arranging and conducting an interview of the Respondent on January 12, 2007; an interview of the Chief Compliance Officer of Global Capital Securities on February 13, 2007; an interview with a former officer of Golden Capital Securities on November 14, 2007; conducting research regarding the issuers for which the Respondent provided accounting services; conducting research regarding UraniumCore; and transcripts of interviews, etc. Counsel for the Respondent pointed out that there was a significant unexplained gap in the investigation conducted by the Association between February, 2007 and November, 2007. The Bill of Costs also included counsel costs of $7,560.00 and estimated hearing costs of $861.00, for a total cost of $22,362.00.

40. Counsel for the Association referred the Panel to By-law 20.49 that empowers the Panel, in addition to the penalties provided for in other by-laws, to " … assess and order any Association Staff investigation and prosecution costs, determined to be appropriate and reasonable in the circumstances." Association counsel also refers to the *Re Strocen* decision (2002) I.D.A.C.D. No. 6 (January 16, 2002) with reference to the discretionary aspects of a Panel's decision on costs. Counsel for the Association submitted that the Respondent be assessed $5,000 on account of costs, which were approximately 22% of the total costs.

41. Association counsel also referred to the decisions of *Re Furevick* and *Re Graham* where the awards of costs were 60% and 50% of the claimed costs. Counsel for the Association submitted $5,000 was appropriate in this case inasmuch as the Respondent had cooperated, and there was an Agreed Statement of Facts and Admissions.

42. Counsel for the Respondent pointed out that the Association's Bill of Costs was only received by him on the day of the hearing; that there was no breakdown given of the hours claimed; and there was no supporting documents from the Association in respect of the Bill of Costs. He submitted that the Bill of Costs as presented by the Association left the Panel to speculate on what the Association spent their time on, and why there was such a delay. He emphasized on the need for the Panel, in exercising its discretion on costs, to consider proportionality. He also referred to the decision of *Re Brooks*, IDA Bulletin No. 2767 (September 29, 2000) and *Re Chan* (December 12, 2002). Counsel for the Respondent also pointed out that without the Agreed Statement of Facts and Admissions, the contested hearing could have taken a week.

43. There is no question here that given the facts that came to light in November, 2006, and the fact that the Respondent was carrying on his Accounting Practice with clients that were active in the industry, and that he was CFO of a publicly-traded company, that the Association was required to conduct a thorough investigation. However, the Bill of Costs, as presented, does not permit counsel for the Respondent, or the Panel, to make any analysis of the appropriateness of the steps taken in the investigation, the efficiency of the Association, etc. We agree with counsel for the Respondent: the Association should present its proposed Bill of Costs, supported by records and documentation, to counsel for the

Respondent well in advance of the proposed hearing, and that evidence should also be available to the Panel.

44. Having considered the evidence, the authorities and the submissions of counsel, we hereby order that the Respondent pay the sum of $10,000 on account of the Association's investigation and prosecution costs.

SUMMARY

45. We hereby order:

a) That with respect to Count 1, the Respondent, Mark Pierre Lotz, pay a fine of $15,000;

b) That with respect to Count 2, the Respondent pay a fine of $10,000;

c) Within six months of these Reasons, the Respondent write and pass the examination based on the Partners, Directors and Officers Course administered by the Canadian Securities Institute; and

d) The Respondent pay the sum of $10,000 on account of costs.

46. These reasons may be signed in counterpart.

Dated this 31st day of March, 2008.

Stephen D. Gill
L. Karen Henderson
Chris Lay