

Re Englesby and Nishimura

IN THE MATTER OF:

The Investment Dealer and Partially Consolidated Rules

and

Teymur Englesby and Cale Nishimura

2024 CIRO 63

Canadian Investment Regulatory Organization
Hearing Panel (Pacific District)

Heard: June 3 - 5 and 10 - 11, 2024 in Vancouver, British Columbia

Decision: July 22, 2024

Reasons for Decision: July 22, 2024

Hearing Panel:

John Rogers, Chair, Nigel Potts and William Wright

Appearances:

April Engelberg and David McLellan, Senior Enforcement Counsel

Owais Ahmed, McCarthy Tetrault, LLP, for Teymur Englesby and Cale Nishimura, and

Jessica Taylor Mank, Harper Grey, LLP, for Teymur Englesby and Cale Nishimura

Teymur Englesby and Cale Nishimura (present)

DECISION ON LIABILITY

I. INTRODUCTION

¶ 1 This matter was commenced pursuant to a Notice of Hearing dated September 27, 2023 (“Notice of Hearing”) issued pursuant to Rule 8200 of the Investment Dealer and Partially Consolidated Rules (the “IDPC Rules”) of the Canadian Investment Regulatory Organization (“CIRO”).

¶ 2 Accompanying the Notice of Hearing was a Statement of Allegations also dated September 27, 2023 (“Statement of Allegations”), which alleged that between December 2017 and October 2018 (the “Relevant Period”), Teymur Englesby and Cale Nishimura (collectively “the Respondents”) failed to fulfil their roles as gatekeepers to the capital markets contrary to Rule 1400 of the IDPC Rules.

¶ 3 On January 19, 2024, the Respondents responded to the Notice of Hearing and the Statement of Allegations (the “Response”) denying this alleged contravention of the IDPC Rules.

II. THE ALLEGATIONS

The Red Flags

¶ 4 The contravention of the IDPC Rules alleged in the Notice of Hearing is that during the Relevant Period, the Respondents facilitated activity for several clients (the “Clients”) in the accounts of these clients (the “Client Accounts”), which activity generated a number of indicators (“Red Flags”) suggesting the occurrence of suspicious activity.

¶ 5 The Red Flags included:

- (i) the deposit of share certificates for shares in companies (the “Subject Issuers”) listed on the Canadian Stock Exchange (the “CSE”) in the Client Accounts and the sales of the shares represented thereby in the days before or shortly after such deposits, followed by large withdrawals of the proceeds of such sales,
- (ii) the trading in the Client Accounts being often uneconomic, and
- (iii) the trading in several of the Client Accounts during the Relevant Period being out of line with the owner of that account’s normal and historical account activity and not consistent with that owner’s know-your-client (“KYC”) information.

¶ 6 It is alleged that these Red Flags should have caused the Respondents to question the Clients about this trading activity in their accounts by asking the Clients:

- (i) how the Clients obtained the shares traded in the Client Accounts,
- (ii) what was the acquisition price for such shares, and
- (iii) whether or not the Clients had any relationship with the corporation which had issued these shares.

¶ 7 To properly inform themselves of the relevant information with respect to the shares of the Subject Issuers being traded in the Client Accounts, it is alleged that prior to asking these questions, the Respondents should have reviewed the Notice of Issuance or Proposed Issuance of Listed Securities (the “Form 9”) filed on the CSE website for the shares of these Subject Issuers, which Form 9 includes:

- the name of the parties receiving the shares,
- the number of shares issued,
- the issuing price for the shares,
- the relevant prospectus exemption for the share issuance, and
- the relationship of the party receiving the shares to the issuer.

¶ 8 By not asking such questions and by simply executing the Client’s sell orders, it is alleged that the Respondents failed to fulfil their roles as gatekeepers to the capital markets and thereby breached the provisions of Rule 1400 of the IDPC Rules.

The Respondents’ Background

¶ 9 Mr. Englesby became a Registered Representative in 2005 and has been employed since 2009 at the Member Dealer, formerly named PI Financial Corp., but recently having changed its name to Ventum Financial Corp (“PI Financial”).

¶ 10 Mr. Nishimura is Mr. Englesby’s assistant and has been registered as a Registered Representative and working at PI Financial since 2012.

The Clients and the Subject Issuers

¶ 11 The Client Accounts consist of the following 9 accounts, of which, 5 are individual accounts and 4 are corporate accounts of the respective individuals:

- (i) Client CP and Client CP’s corporate account (“CP Corp”),
- (ii) Client YK and Client YK’s corporate account (“YK Corp”),
- (iii) Client JL,
- (iv) Client BB and Client BB’s corporate account (“BB Corp”), and

(v) Client VT and Client VT's corporate account ("VT Corp").

¶ 12 The Clients through the Client Accounts were involved in the trading of shares in the following Subject Issuers:

- (i) Affinor Growers Inc. ("AFI"),
- (ii) Green 2 Blue Energy Corp. ("GTBE"),
- (iii) Beleave Inc. ("BE"),
- (iv) Cryptoblok Technologies Corp. ("CRYP"),
- (v) Preveceutical Medical Inc. ("PREV"),
- (vi) Speakeasy Cannabis Club Ltd. ("EASY"),
- (vii) Kootney Zink Corp. ("ZNK"),
- (viii) Abattis Bioceuticals Corp. ("ATT"), and
- (ix) New Point Exploration Corp. ("NP").

III. EVIDENCE PRESENTED BY ENFORCEMENT STAFF

¶ 13 During the hearing, evidence was presented by a member of Enforcement Staff's investigation team (the "Investigator"), who testified that he had commenced his investigation of the Respondents in 2019 as a result of information received by him concerning the investigation by the British Columbia Securities Commission of a group of entities known collectively under the name "BridgeMark Group".

¶ 14 As part of his investigation, the Investigator stated that he had secured copies of the following documents:

- Form 9 documents relating to the shares of the Subject Issuers traded by the Clients during the Relevant Period,
- relevant account statements for the 9 Clients for the Relevant Period, together with relevant updated KYC statements for each of these Clients,
- the trading blotter maintained by PI Financial setting out the trading activity in the Client Accounts in the securities of the Subject Issuers during the Relevant Period,
- the broker performance reports for Mr. Englesby provided to him by PI Financial during the Relevant Period, and
- emails to which one or both of the Respondents was a party referencing the trading activity in the Client Accounts during the Relevant Period.

¶ 15 As well, as part of his investigation, the Investigator testified that he had interviewed Mr. Englesby on March 30, 2021 and again on May 19, 2021, and Mr. Nishimura on June 21, 2021 producing transcripts of all three interviews (the "Englesby Transcripts" and the "Nishimura Transcript", respectively).

Client CP and Client CP Corp

KYC Documentation

¶ 16 The Investigator referenced the New Client Application Form ("NCAF") for each of Client CP and Client CP Corp noting:

- Client CP's NCAF, which was dated December 17, 2015, listed CP's occupation as a "Director of Hockey Operations" for the "North Shore Winter Club" with his net worth being \$745,000 and his liquid assets being \$45,000,
- Client CP's updated NCAF, dated February 7, 2018, which stated CP's occupation was now a self

- employed “Consultant”, with his net worth being \$1,575,000 and his liquid assets being \$75,000,
- Client CP Corp’s NCAF, dated February 7, 2018, noting that CP was the President of CP Corp and owned 100% of its issued shares, with the nature of CP Corp’s business being listed as “Consultant/Entrepreneur” and having a net worth of \$55,000 and liquid assets of \$50,000, and
 - CP Corp’s updated NCAF, dated August 15, 2018 with its net worth now listed at \$1,005,000 and its liquid assets at \$1,000,000.

Red Flags

¶ 17 The Investigator testified that he had done a summary of the shares represented by the share certificates of the Subject Issuers that Client CP and Client CP Corp had deposited into the respective accounts and had subsequently sold during the Relevant Period. He confirmed that he had calculated the cumulative losses for these Clients during the Relevant Period to amount to \$1,839,274, and that this figure included gains made on the trading in the shares of PREV of \$88,381 and in ZNK of \$171,455.

¶ 18 He stated that for the purpose of his calculation, he had used the issue price of the traded shares as reflected in their respective Form 9s as the cost base for these shares.

¶ 19 The Investigator referenced the Englesby Transcripts and the Nishimura Transcript and noted that during the interviews with the Respondents, he had asked each of them if they had monitored the accounts for Client CP or Client CP Corp to determine whether or not these clients were engaged in uneconomic trading. The Investigator confirmed that, as evidenced by the Englesby Transcripts and the Nishimura Transcript, Mr. Englesby and Mr. Nishimura had responded that once the ownership of the shares evidenced by the share certificates of the respective Subject Issuers had been verified, they did not monitor these accounts for uneconomic trading.

Activity Inconsistent with Apparent Financial Standing

¶ 20 With reference to CP Corp’s original NCAF, which stated that the client had liquid assets of \$50,000, the Investigator testified that the month-end equity in CP Corp’s account for both June and July 2018 was well over \$2 million, and that these equity amounts were the monies remaining following withdrawals of over \$1 million in each of April, May and June of 2018.

¶ 21 He noted that with the NCAF update completed for CP Corp as of August 15, 2018, CP Corp had increased its stated net worth to \$1,005,000 with its liquid assets being increased to \$1 million, but that on the day following this update, August 16, 2018, it had made two withdrawals from its account totalling \$2.3 million.

¶ 22 When the Investigator asked Mr. Nishimura if it did not strike him as odd that the client on the day following a professed total of \$1,005,000 in liquid assets withdraws a total \$2.3 million, Mr. Nishimura stated that he did not find it odd and that he had not had any discussions concerning these withdrawals.

Significant Change in Activity

¶ 23 The Investigator testified that prior to February 2018, Client CP had not deposited with the Respondents any share certificates representing shares for trading in his account, that the account value for his account was maintained at under \$150,000, and that there were infrequent transactions in his account.

¶ 24 At the end of January 2018, the Investigator noted, the balance in Client CP’s account was \$53,772.96. However, in February 2018, he stated, the activity in Client CP’s account changed significantly with a month end equity totalling \$474,601.11 following the deposit of share certificates representing shares amounting to a value of \$450,000.

¶ 25 Similarly, with the account of CP Corp, the Investigator testified that at the end of February 2018, the account balance for the account of CP Corp was \$1.00. Thereafter, he stated, deposits were made into this account of share certificates representing shares of the Subject Issuers having the following values:

- \$869,999.94 in March 2018,
- \$2,155,625 in April 2018,
- \$685,714.80 in May 2018,
- \$3,700,000.06 in June 2018, and
- \$857,142.50 in July 2018.

¶ 26 These deposits were then followed by almost immediate cash withdrawals resulting from the proceeds from the trading in these shares with the month end account balances in the account varying from \$286.52 at the end of May 2018 to \$2,569,592.67 at the end of June 2018.

¶ 27 The Investigator testified that when shown this trading activity in the accounts of CP and CP Corp and when asked whether or not the Respondents had inquired into how CP and CP Corp had acquired the shares of the Subject Issuers, what the acquisition price was for these shares, or what the relationship CP had with the Subject Issuers, the Respondents stated that they did not ask these questions of CP.

¶ 28 The Respondents confirmed, he stated, that it was not their practice to monitor a client's activity against the information provided in the client's NCAF forms, and with respect to CP, the Respondents had not asked him if he was a consultant to the company of the Subject Issuers in whose shares he was trading or what was the acquisition price for the shares being traded.

¶ 29 One of the results of this significant increase in trading activity in the CP and CP Corp accounts, the Investigator testified, was the increase in gross trading revenue generated and the resulting increase in commissions earned by the Respondents.

¶ 30 He referenced the copies of the monthly commission summaries that Mr. Englesby had received from PI Financial by email, which documents highlighted the top 10 clients by revenue generated in the year to the date of the particular summary. The relevant summaries, he noted, commenced in March of 2018 and continued until the 2018-year end, and confirmed that CP Corp was listed among the top 10 revenue generators for Mr. Englesby for each month during that time period, with CP Corp being Mr. Englesby's second highest client by revenue for all of 2018.

¶ 31 The Investigator further referenced a chart compiled by him based upon information provided to him by PI Financial, which chart, he testified, demonstrated that gross trading revenue for CP's account and CP Corp's account went from a total of \$890 in 2016 to a total of \$92,352 in 2018.

Client YK and Client YK Corp

KYC Documentation

¶ 32 The Investigator testified that Client YK opened an account with the Respondents on August 8, 2017, completing their NCAF with the occupation being listed as a "Student/Homemaker", employer as "N/A", annual income at \$200,000, net worth at \$2M, and liquid assets at \$2M.

¶ 33 The Investigator stated that on November 14, 2017, Client YK opened an account for YK Corp, a company for which YK was the president, and, on the NCAF for YK Corp, stated that the nature of the company's business was an "Investment Holding Co", with its net worth at \$2.5M and liquid assets at \$2.5M.

¶ 34 When the Investigator asked Mr. Englesby, as evidenced by the Englesby Transcripts, as to whether or not he had inquired with YK as to the source of funds for these accounts or why the client held them, he was advised by Mr. Englesby that he did not so inquire.

Red Flags

¶ 35 The Investigator testified that on December 4, 2017, Client YK received 500,000 shares of ATT, one of the Subject Issuers, from the account at PI Financial owned by an unrelated company ("BC Corp"), which company was controlled by the chief executive officer of ATT. The signed transfer document, he noted, stated

that the consideration for the transfer was zero dollars, though by December 5, 2017, Client YK had sold these shares for total proceeds of \$139,235.

¶ 36 The Investigator testified that on December 5, 2017, Mr. Englesby sent by email to Client YK an Irrevocable Undertaking letter, which stated that Client YK would deliver a share certificate for 500,000 shares of ATT to BC Corp, which undertaking included a prohibition on the trading of these securities until February 13, 2018.

¶ 37 The Investigator testified that from December 13, 2017 to December 22, 2017, Client YK and Client YK Corp subsequently completed the following transactions:

- on December 15, 2017, Client YK deposited share certificates representing 1.5 million ATT shares into her account,
- on December 20, 2017, Client YK transferred these 1.5 million ATT shares to YK Corp,
- on December 21, 2017, Client YK deposited a further 700,000 ATT shares into her account,
- on December 22, 2017, Client YK transferred these 700,000 ATT shares to YK Corp, and
- from December 13, 2017 to December 20, 2017 and prior to the above referenced transfers, which totalled 2.2 million shares of ATT, YK Corp sold short 2.2 million shares of ATT.

¶ 38 The Investigator testified that when asked, as demonstrated by the Englesby Transcripts, Mr. Englesby stated that he had not questioned Client YK about any of these transactions.

Client JL

KYC Documentation

¶ 39 The Investigator testified that Client JL opened an account with the Respondents stating on the NCAF, dated June 13, 2017, that their occupation was a “Finance Consultant”, employer was “Asiata Management”, annual income was \$250,000+, net worth was \$10 million, and liquid assets were \$5 million+.

Red Flags

¶ 40 The Investigator stated that on April 3, 2018, Client JL deposited share certificates representing 4 million shares of ATT into his account. Then, between April 3, 2018 and April 5, 2018, Client JL sold a total of 1,843,500 of these shares, and then on April 5, 2018, Client JL withdrew the remaining 2,156,500 shares.

¶ 41 When asked, the Investigator stated, as demonstrated by the Englesby Transcripts, Mr. Englesby confirmed that he had not asked why Client JL withdrew the shares two days after their deposit, how Client JL had obtained the shares, what the acquisition price was for the shares, or whether or not Client JL had any relationship with ATT.

¶ 42 The Respondents also stated, the Investigator testified, that at the time of the dealings in the ATT shares by both Client YK and Client JL, that the Respondents were not aware that Client YK and Client JL were in a relationship.

Client BB and Client BB Corp

KYC Documentation

¶ 43 The Investigator testified that Client BB opened an account with the Respondents stating on the NCAF, dated April 18, 2018, that his occupation was an “Investor (Venture Capitalist)”, they were self-employed, with an annual income of \$300,000, net worth of \$1.250 million, and liquid assets of \$200,000.

¶ 44 On the same date, the Inspector stated, Client BB opened an account for BB Corp, a company for which he was the sole officer and president. The NCAF stated that the nature of BB Corp’s business was that of an “Investor”, its net worth was \$1.250 million, and its liquid assets were \$200,000.

Red Flags

¶ 45 The Investigator noted that Client BB sought the assistance of Mr. Englesby with respect to the printing of the following documents:

- on May 17, 2018, a copy of the stock option plan of NP, one of the Securities Issuers,
- on June 4, 2018, a copy of a consulting agreement between BB Corp and NP, which Mr. Englesby was asked to leave at the front office desk after printing, and
- on June 5, 2018, a copy of a Notice of Exercise of Option between BB Corp and NP, specifically referencing the printing of the signatory page.

¶ 46 The Investigator testified that on August 9, 2018, BB Corp deposited share certificates representing 1,208,000 shares of NP into the BB Corp account. Then, on August 10, 2018, BB Corp transferred 325,000 of these NP shares for zero consideration to another account at PI Financial, which account was owned by CF Corp, also a client of the Respondents. Upon receipt of these 325,000 shares of NP, CF Corp sold them for proceeds of \$22,450, none of which proceeds was paid to BB Corp.

¶ 47 The remaining 833,000 share of NP owned by BB Corp were sold by August 23, 2018, the Investigator stated, for total gross sale proceeds of \$44,736, which, he noted, represented a loss of \$65,639 based upon the issue price as reported in the Form 9 relative to their issuance.

¶ 48 When he was asked if he had had any discussions with Client BB concerning the documents Client BB sought to have printed due to these documents possibly being relevant to Client BB's relationship with NP, how BB acquired the options for the shares of BB, or if BB was consulting for any companies other than NP, the Inspector testified that Mr. Englesby, as evidenced by the Englesby Transcripts, responded that he had not.

¶ 49 Similarly, the Investigator testified, as also evidenced by the Englesby Transcripts, when Mr. Englesby was asked if he knew what the relationship was between Client BB, BB Corp, and CF Corp, or the reasons for the transfer of the NP shares, the Investigator testified that Mr. Englesby had responded that he had no idea.

Client VT and Client VT Corp

KYC Documentation

¶ 50 The Investigator testified that Client VT originally opened an account with a Registered Representative at PI Financial other than the Respondents, completing at that time an NCAF, dated December 7, 2017. This NCAF stated that Client VT's occupation was a "Corporate Secretary", their employer was "Self Employed/Jackson Company", net worth was \$1M, and liquid assets were \$500,000.

¶ 51 The Investigator stated that on June 14, 2018, the Respondents took over Client VT's account and updated the NCAF for Client VT to now reflect a net worth of \$3.05 million and liquid assets of \$3 million. At the same time, an account was opened for VT Corp, a company for which Client VT was the director. The NCAF for the VT Corp account stated that the nature of the company's business was "Hold Co Provides Corporate Services", its net worth was \$2 million and its liquid assets were \$2 million.

Red Flags

¶ 52 The Investigator testified that on June 15, 2018, VT Corp deposited share certificates representing 7,066,667 shares of CRYP, one of the Security Issuers, into its account. From June 15, 2018 to June 21, 2018, VT Corp sold all these CRYP shares for total gross sale proceeds of \$606,578. The Investigator stated that based upon the relevant Form 9, which he had used to establish the cost for these shares, these transactions represented a cumulative loss to VT Corp of \$453,422.

¶ 53 The Investigator then referenced the Englesby Transcripts and noted that:

- when asked if he had noticed the increase in VT Corp's liquid assets from \$500,000 in December 2017 to \$3 million in June 2018, Mr. Englesby responded that he "didn't notice" this increase and did not know the reason behind it,
- Mr. Englesby had not inquired about how VT Corp obtained the CRYP shares or what was the

acquisition price for these shares, and

- Mr. Englesby had not inquired whether or not Client VT had any relationship with CRYP.

Commissions Earned by the Respondents

¶ 54 During the Relevant Period, the Investigator testified, the total gross commissions generated by the Clients through the sales of shares of the Subject Issuers in the Client Accounts amounted to \$103,332, of which, 50% or \$51,666, was paid to Mr. Englesby and the sum of \$2,066 was paid to Mr. Nishimura.

PI Financial's Sales Procedure Manual

¶ 55 The Investigator referenced the Sales Procedure Manual of PI Financial (the "PI Manual") and specifically Section 8.2 thereof entitled "Standard of Conduct – The RR as Gatekeeper", which includes a copy of a directive from the Vancouver Stock Exchange prior to it being incorporated into the TSXV. He noted that the PI Manual states that this directive is very important in that it "lays out the standard of conduct expected of Investment Advisors".

¶ 56 This directive states:

"The Vancouver Stock Exchange and its Members are committed to being 'an honest, fair and efficient market for venture capital.' The support of all industry participants is key to the achievement of this mission. In particular, the role of the Member and its employees in upholding the integrity of the marketplace (the role of 'Gatekeeper') is of major importance.

The Know Your Client rule is one of the fundamental rules of the securities industry. It is incumbent upon any RR to have as full a knowledge as possible of the personal circumstances and investment objectives of all clients, both on an initial and an ongoing basis. It follows that it is the duty of RR's to act in the best interests of their clients.

However, RR's must also act in the best interests of their employers and through them the whole securities industry. From this it follows that if the RR becomes aware, through knowledge of the client or otherwise, that the intention or effect of the trading by a client would be in breach of the Securities Act or impugn the integrity of the market place, then it is incumbent on the RR in the capacity of 'Gatekeeper' within the securities industry, to draw the matter to the attention of Management of the firm. The member shall draw the situation to the attention of the Exchange. Further, willful blindness on the part of RRs may equally be construed as failure to meet their responsibilities.

Each RR must be aware of potential signs of market manipulation. These would include such characteristics as market dominance, price leadership, high closing, use of jitneys to multiple firms, etc. RR's are in fact in the best position to be aware of any market scheme at its outset, because of their knowledge of their clients and their trading patterns."

¶ 57 The Investigator then made reference to Appendix H in the PI Manual entitled "Suspicious Transactions Indicators" under the heading "Examples of Common Indicators" and under the subheading "Economic Purpose" with respect to the following four bullet points:

- transaction seems to be inconsistent with the client's apparent financial standing or usual pattern of activities,
- transaction appears to be out of the ordinary course for industry practice or does not appear to be economically viable for the client,
- transaction is unnecessarily complex for its stated purpose, and
- activity is inconsistent with what would be expected from declared business.

¶ 58 The Investigator made further reference to the wording, also in this Appendix H, under the heading "Examples of Industry-Specific Indicators" and the subheading "Personal Transactions" and to the following two bullet points:

- client has no employment history but makes frequent large transactions or maintains a large account balance, and
- client acquires significant assets and liquidates them quickly with no explanation.

¶ 59 And then, finally, in this Appendix H, under the same heading “Examples of Industry-Specific Indicators” as previously set out, but under the subheading “Securities Dealers”, the Investigator made reference to the following three bullet points:

- accounts that have been inactive suddenly experience large investments that are inconsistent with the normal investment practice of the client or their financial ability,
- transfers of funds or securities between accounts not known to be related to the client, and
- transaction of very large dollar size.

¶ 60 The Investigator noted that these provisions in the PI Manual appeared to clearly set out the obligations on the Respondents as gatekeepers to ask questions of the Clients and not to simply execute the client’s sell orders.

IV. THE RESPONSE

¶ 61 In the Response, the Respondents stated that they had been following the policies of PI Financial, their employer, and that they had asked the requisite, appropriate questions at all material times.

¶ 62 With respect to the allegation that the transactions in issue were uneconomic, the Respondents submitted that although the trades referenced in the Statement of Allegations might have been unprofitable for the Clients, such trading was not uneconomic. The Respondents further noted in the Response that there was no suggestion that during the Relevant Period that the trades in question were in any manner abusive to the capital markets or otherwise improper.

¶ 63 With respect to the allegation that the trading was out of line with the normal and historical account activity of a client and was not consistent with a client’s KYC information, the Respondents stated that once the Respondents became aware of a change in a client’s liquid assets and net worth that the client’s NCAF form was updated in a timely manner. In any event, the Respondents submitted, a change in a client’s financial standing should not, standing alone, be considered a red flag.

V. EVIDENCE PRESENTED BY THE RESPONDENTS

¶ 64 The Respondents called to give evidence the Vice President Compliance, Corporate Secretary, and Chief Compliance Officer of PI Financial (“PI’s CCO”), the person who was the Chief Compliance Officer at PI Financial during the Relevant Period. PI’s CCO testified that during his career, he had had extensive experience in the area of compliance, including ensuring that Registered Representatives operated in full compliance with the IDPC Rules.

¶ 65 PI’s CCO confirmed that he had reviewed the documents in evidence before the Panel prior to coming to testify.

Registered Representative’s Primary Responsibility

¶ 66 When asked, PI’s CCO testified that in his opinion PI Financial’s Registered Representatives are the front line when it comes to compliance matters as they have the direct relationship with the clients.

¶ 67 However, he stated, these Registered Representatives’ primary responsibility is to deal with KYC matters involving their clients. To that end, the gatekeeper role referenced in the PI Manual is mainly an offshoot of this KYC responsibility.

¶ 68 In the KYC context, he testified, the Registered Representatives have a responsibility to identify suspicious activities other than market related activities, but that this obligation is fact specific and very dependent upon a particular situation. As well, he added, what a particular Registered Representative considers

to be suspicious can be very subjective.

PI Financial's Sales Procedure Manual

¶ 69 PI's CCO referenced the PI Manual and confirmed that he was responsible for much of its contents, including the insertion of the directive from the Vancouver Stock Exchange referenced by the Investigator.

¶ 70 However, he suggested, this directive references more the responsibility of a Registered Representative to be aware of client trading activities, which might be in breach of securities law or impinging on the integrity of the capital markets. He noted that such trading activities were not referenced in the Statement of Allegations and that the Red Flags set out in the Statement of Allegations were not related to market manipulation or insider trading.

¶ 71 PI's CCO noted, as well, that the PI Manual included Appendix G, which is a copy of a document that he authored in 2017 dealing with PI Financial's policy to prohibit and actively prevent money laundering and any activities that might facilitate the carrying out of money laundering.

¶ 72 He stated that the reference therein to "Suspicious Transactions Indicators" and the balance of the provisions of Appendix H were set out in the context of this money laundering concern and were not intended as an attempt to more clearly define the Respondents' overall role as gatekeepers as suggested by the Investigator.

¶ 73 PI's CCO testified that in his opinion, the allegations made in the Statement of Allegations did not involve money laundering so that these provisions of the PI Manual, which focused on money laundering, were not necessarily directly applicable to the matter at hand.

Red Flags

Large Deposit of Shares

¶ 74 With respect to a situation where there has been a deposit of share certificates representing a large number of shares into a client's account, PI's CCO testified that he did not believe that this activity alone should have raised red flags for the Respondents.

¶ 75 He stated that it was not unusual that investors in venture companies made a determination to divest themselves of their entire shareholdings when they wished to exit their investment. The obligation on the Registered Representative when a share certificate is deposited, he testified, is to confirm the validity of the ownership of the shares represented thereby and not to inquire with the client as to the origin of the shares, when they were acquired, or their acquisition price.

Trading Activity in Client CP and Client CP Corp's Accounts

¶ 76 PI's CCO testified that after reviewing the dealings of the Respondents with the accounts of Client CP and Client CP Corp, he did not see any activities which should have triggered alarm bells for the Respondents. With respect to the trading of Client CP, PI's CCO noted, as Client CP listed his business activity as being that of a consultant, it was not unusual for consultants to receive shares in the companies for which they were consulting and then to sell these shares into the market.

NCAF Information

¶ 77 With respect to the NCAF of CP, PI's CCO testified that in his opinion, the responsibility of a Registered Representative is to ensure that when a new account is opened that a new NCAF is completed. Similarly, if there has been a significant change in a client's situation, the client's NCAF should be amended. However, he stated, the Registered Representative's obligation is to ensure that an NCAF is completed in full. The Registered Representative is not required to assure the accuracy of the information that the client has provided. And, he added, the onus is clearly on the client to advise the Registered Representative of changes to the client's situation which require an amendment to the client's NCAF.

¶ 78 In support of this obligation on the client, PI's CCO pointed to the statement in CP's NCAF, which states:

1.4 Account Information

The Client warrants that, to the best of the knowledge of the Client, the information set out on all Client's Information Forms relating to the Account is correct, and acknowledges that the Agent and his representatives may rely on that information in providing advice or recommendations to the Client in respect of the Account. The Client agrees to notify the Agent immediately of any change in such information which might be expected to affect the advice of the Agent where sought or given.

¶ 79 In any event, PI's CCO noted, the question of the completion of a client's NCAF is a KYC issue and is not an issue involving uneconomic trading. And, he observed, the client has the obligation to advise the Registered Representative of such issues as insider information or a control position in the company whose shares are being traded. There is no obligation on the Registered Representative to make inquiries in this respect.

¶ 80 With reference to the changes in CP Corp's NCAF, which demonstrated CP Corp's liquid assets increasing from \$50,000 at the time of the opening of the account to \$1 million in August of 2018 after sizeable trading activities in the account, PI's CCO testified that this was more of a KYC issue than a gatekeeper issue and that, at the most, CP Corp's NCAF should have been updated earlier than August 2018.

Cost of Shares

¶ 81 As to whether or not PI Financial required their Registered Representatives to determine the acquisition price of shares that a client wished to trade or imposed an obligation on a Registered Representative to examine a Form 9 for such shares prior to executing the client's trading instructions, PI's CCO testified that PI Financial did not have such policies.

¶ 82 PI's CCO confirmed that it was his understanding that there was no requirement on a Registered Representative to inquire as to the acquisition price of a client's shares, even when there appeared to be a series of sales of these shares into a declining market resulting in a reduced price received for these shares and a resulting overall loss to the client.

Gypsy Swaps

¶ 83 PI's CCO was referred to evidence before the Panel of the Respondents permitting shares to be transferred from one client of PI Financial to another client of the firm without the Respondents asking either the transferee or the transferor about the relationship between the transferring parties, the reason for the transfer, the acquisition price of the shares for the transferor, or the cost of the shares transferred to the transferee. PI's CCO responded by referring to such transactions as "Gypsy Swaps" and testified that there was no requirement on PI Financial's Registered Representatives to ask these questions. And, he noted, there was no prohibition on clients transferring restricted trading shares in such transactions, nor were such transactions contrary to PI Financial's policies.

¶ 84 With respect to the evidence before the Panel referencing Gypsy Swaps involving:

- the transfer of 500,000 shares of ATT from the Chief Executive Officer of ATT to YK on December 4, 2017 and the subsequent sale by YK of all of these share by December 5, 2017, and
- the transfer of 325,000 shares by BB Corp to CF Corp on August 10, 2018, and their subsequent sale for \$22,450.

¶ 85 PI's CCO testified that these Gypsy Swaps appeared to have been effected in compliance with PI Financial's policies.

Obligation on Registered Representatives to Ask Questions

¶ 86 PI's CCO testified that in his opinion the only requirement on a Registered Representative to ask questions about a client's trading activities occurred if such trading activities clearly involved concerns around items such as market manipulation or money laundering, or when such activities were clearly out of line with the information provided by the client in the client's NCAF.

¶ 87 He testified that upon reviewing the evidence before the Panel, apart from the Respondents having failed to have ensured that some of the NCAF's of the Clients were updated on a more timely basis, which he noted were KYC issues and not gatekeeper issues, he did not see that the Respondents had failed in their roles as gatekeepers in not asking questions of the Clients and that, therefore, he did not believe that the Respondents were in breach of IDPC Rule 1400 as alleged in the Notice of Hearing.

VI. SUBMISSIONS OF ENFORCEMENT COUNSEL

¶ 88 Enforcement Counsel submitted that based upon the evidence before the Panel, it was clear that during the Relevant Period, the Respondents facilitated activities for the Clients in the Client Accounts, which activities generated a number of Red Flags clearing suggesting that the Clients through the Client Accounts may have engaged in suspicious activity.

¶ 89 The Red Flags raised, Enforcement Counsel submitted, included:

- the deposit in the Client Accounts of share certificates representing shares of the Subject Issuers and the sale of these shares in the days before or shortly after these deposits were made followed by large withdrawals of the sales proceeds from such sales,
- the fact that the trading in the Client Accounts was often uneconomic, and
- the activity in the Client Accounts during the Relevant Period that was out of line with the historical trading activity in the Client Accounts and the relevant KYC information for the Clients involved in the trading in the Client Accounts.

¶ 90 When these Red Flags were raised, Enforcement Counsel submitted, as the Respondents failed to question the Clients with respect to the activities in the Client Accounts, the Respondents, during the Relevant Period, were in clear contravention of IDPC Rule 1400 in not adequately fulfilling their responsibilities as gatekeepers to the capital markets.

Relevant KYC Information

¶ 91 The submissions of Enforcement Counsel on the relevant evidence before the Panel for the Clients with respect to their KYC information might be summarized as follows:

- the change in occupation for Client CP from that of an employee to that of a self-employed consultant with his net worth and liquid assets increasing from \$745,000 and \$45,000 to \$1,575,000 and \$75,000,
- the change in the net worth and liquid assets for CP Corp over a 6-month period from \$55,000 and \$50,000 to \$1,005,000 and \$1,000,000,
- the occupation of Client YK as a "Student/Homemaker" with an annual income of \$200,000, a net worth of \$2,000,000 and liquid assets of \$2,000,000, followed three months later by Client YK opening an account for YK Corp with a net worth of \$2,500,000 and liquid assets of \$2,500,000,
- the occupation of Client JL as a "Financial Consultant" with an annual income of \$250,000+, net worth of \$10,000,000+, and liquid assets of \$5,000,000+,
- the occupation of Client BB as a self employed "Investor (Venture Capitalist)" with an annual income of \$300,000, net worth of \$1,250,000, and liquid assets of \$200,000, with BB Corp, of which he was the principal, as having a net worth of \$1,250,000 and liquid assets of \$200,000+, and
- the change in the net worth and liquid assets of Client VT from \$1,000,000 and \$500,000 when the account was originally opened to \$3,050,000 and \$3,000,000 when the account was taken over by the Respondents six months later, at which time the account for VT Corp was opened listing its new worth at \$2,000,000 and liquid assets at \$2,000,000.

Red Flags

¶ 92 Similarly, the submissions of Enforcement Counsel on the evidence before the Panel with respect to the Red Flags raised might be summarized as set out below:

Uneconomic Trading

¶ 93 During the Relevant Period, the evidence demonstrated that Client CP and Client CP Corp engaged in uneconomic trading in the shares of the Subject Issuers resulting in cumulative losses of \$1,839,274.

¶ 94 On June 15, 2018, VT Corp deposited 7,066,667 shares of CRYP into its accounts and by June 21, 2018, it had sold all these shares for a loss of \$453,422.

Activity Inconsistent with Apparent Financial Standing

¶ 95 With respect to CP Corp, CP Corp's month-end equity was over \$2 million in both June and July 2018, with \$1 million in withdrawals in each of April, May, and June when its NCAF stated that its net worth to be \$55,000 and liquid assets to be \$50,000.

¶ 96 After it had updated its NCAF on August 15, 2018 to a net worth of \$1,005,000 and liquid assets of \$1,000,000, the following day, two withdrawals were made totalling \$2.3 million.

Significant Change in Activity

¶ 97 For Client CP, the market value of the shares in the CP's account increased from a deposit of shares valued at \$450,000 in February 2018 to a value of \$1,061,666.84 in May of 2018.

¶ 98 For CP Corp, the market value of the shares deposited in the CP Corp account in March of 2018 was \$869,999.94 and in June 2018, it was \$3,700,000.06.

¶ 99 This change in activity resulted in the increase in the gross revenue generated by trading in the Client CP and Client CP Corp accounts from \$890 for the Client CP account in 2016 to \$12,960 in 2018 for the Client CP account and \$79,392 for the CP Corp account.

Relationship Questions

¶ 100 The transfer of the 2,200,000 shares of ATT to YK and YK Corp and the subsequent trading in these shares by YK and YK Corp.

¶ 101 The deposit of the 4,000,000 shares of ATT to JL and the subsequent trading in and withdrawal of these shares by JL.

¶ 102 The deposit of 1,208,000 shares of NP by Client BB to the account of BB Corp, the subsequent transfer of 325,000 shares of NP to CF Corp by BB Corp, and the sale of the remaining shares of NP for a loss of \$65,639.

Commissions

¶ 103 During the Relevant Period, the total gross commissions generated by the Clients through the sales of shares of the Subject Issuers amounted to \$103,332, with Mr. Englesby's payout being 50%, or \$51,666, and Mr. Nishimura's being \$2,066.

PI's CCO's Evidence

¶ 104 Enforcement Counsel submitted that in his testimony, PI's CCO acknowledged that Registered Representatives are the ones most able to identify suspicious activities, they have a primary responsibility to know their client, and that the gatekeeper responsibility is an offshoot of this responsibility. To this end, Registered Representatives must be inquisitive and proactive.

¶ 105 In this context, PI's CCO acknowledged, Enforcement Counsel submitted, given the dollar value of trading by CP Corp during the Relevant Period, there should have been an update of CP Corp's NCAF.

¶ 106 Enforcement Counsel submitted that the Panel as a specialized tribunal having heard all the evidence in this matter is in much better positioned than PI's CCO to determine if the evidence before the Panel amounted

to an obligation on the Respondents as gatekeepers to ask the relevant questions.

Enforcement Staff's Submissions on the Respondents' Liability

¶ 107 In citing the Supreme Court of Canada case of *F.H. v. McDougall* [2008] S.C.J. No. 54, Enforcement Counsel submitted that the burden of proof on Enforcement Staff in this matter was to establish on a balance of probabilities that the Respondents had not met their regulatory obligations under IDPC Rule 1400 in failing to act as gatekeepers to the capital markets.

¶ 108 These regulatory obligations, Enforcement Counsel noted, were referenced by the Alberta Securities Commission (ASC) in *Re Wenzel* [2005] ASCD No. 153, where the "ASC" stated that the role of a registrant was a key one in the system of securities regulation and involves the responsibilities imposed upon a registrant to both protect the client and to act as a gatekeeper for the integrity of the capital markets.

¶ 109 In this gatekeeper role, Enforcement Counsel submitted, a registrant who was sitting in an educated position with a unique view between clients and the capital markets was obligated to ask questions when it was reasonably necessary to protect the investing public and the integrity of the capital markets and, as well, to protect both the registrant and a Dealer Member from being unwittingly used by bad actors to further potential fraudulent, illegal or inappropriate activities.

¶ 110 In determining when such questioning was necessary, Enforcement Counsel submitted, the collective activity in a client's account was an important consideration and, included, ongoing activities such as the deposits of shares into an account followed shortly thereafter by liquidating trades in these shares, large withdrawals of either cash or shares from the account, and activity in the account inconsistent with the client's KYC information.

¶ 111 Enforcement Counsel submitted that this broad gatekeeper role and the obligations on a registrant resulting therefrom had been considered and confirmed in a number of decisions by the British Columbia Securities Commission ("BCSC"), including *Re LOM (Holdings) Ltd.* 2005 BCSECCOM 144, *Re Pacific International Securities Inc.* 2006 BCSECCOM 532 and *Re Lowe* 2014 BCSECCOM 458, and in the decisions of IIROC and CIRO panels, including *Re Trenholm* 2019 IIROC 40, *Re Myatovic & Lowe* 2012 IIROC 47, *Re Rowlatt* 2020 IIROC 32, *Re Bealer* 2022 IIROC 30, *Re Sweeney* 2022 IIROC 22, and *Re Moore* 2024 CIRO 26.

¶ 112 In the matter at hand, Enforcement Counsel submitted, the evidence before the Panel clearly demonstrated that, during the Relevant Period, there were numerous Red Flags obvious in activities within the Client Accounts, but that despite the presence of these Red Flags, the Respondents had failed to take any steps to make any inquiries regarding such activities.

¶ 113 These inquiries should have included, Enforcement Counsel submitted, the Respondents asking a client as to how the particular client acquired the shares represented by the share certificates being deposited into the account, asking the client about the acquisition price for shares deposited into an account, and asking as to whether or not the client had a relationship with one of the Subject Issuers.

¶ 114 As well, as the shares of the Subject Issuers were traded on the CSE, the Respondents should have reviewed the relevant Form 9 connected with the issuance of the shares to be traded to understand the acquisition cost of these shares.

¶ 115 By this failure to ask questions, Enforcement Counsel submitted, the Respondents functioned merely as order takers and thereby failed to fulfil their role as gatekeepers to the capital markets.

¶ 116 Enforcement Counsel submitted that the Respondents had an obligation to observe high standards of ethics and conduct and to not engage in business conduct that was unbecoming or detrimental to the public interest.

¶ 117 These standards, Enforcement Counsel submitted, included the paramount obligation to act as a gatekeeper to the capital markets by being inquisitive and pro-active in identifying and addressing Red Flags, which were reasonably apparent. By failing to do so, Enforcement Counsel submitted, the Respondents failed to meet the standards required of them and contravened IDPC Rule 1400.

VII. SUBMISSIONS OF RESPONDENTS' COUNSEL

Review of the Evidence Presented

¶ 118 In their closing submissions, Respondents' Counsel referenced the evidence before the Panel and noted:

- there was no question of ownership or validity with respect to the shares or certificates deposited into the Client Accounts,
- there was no question that the Clients had the authority to instruct the Respondents to trade the shares deposited into their accounts,
- the fact that CP began acquiring shares in Security Issuers, depositing these shares in the Client CP and Client CP Corp accounts and immediately selling these shares, was entirely consistent with CP's change of occupation to that of a consultant for public companies, as disclosed in his amended NCAF. Consultants to public companies are often paid by way of the issuance to them of shares in the public venture companies to which they are consulting, which shares the consultants then sell to monetize their consulting fee,
- the shares sold by the Clients were sold at market prices and in circumstances where the market was declining making it more economic for these shares to be sold rather than to delay and thereby incur greater losses,
- The Respondents operated in compliance with PI Financial's policies in that they:
 - updated the NCAFs within a reasonable time period,
 - completed the Gypsy Swaps following the approval by PI Financial's compliance department,
 - did not hide any information from PI Financial's compliance department, nor did the compliance department identify any Red Flags for the Client Accounts during the Relevant Period when the compliance department had access to the same information as did the Respondents,
- the commissions earned by the Respondents, as referenced in the evidence, represented roughly only 5% of the total commissions earned by the Respondents during the Relevant Period, clearly indicating no financial incentive for the Respondents to knowingly engage in improper behaviour, and
- there is no suggestion that any of the Clients were nominees for anyone else, that the Respondents took instructions from a party other than the Clients in carrying out the trading in the shares of the Security Issuers, or that any of the funds withdrawn from the Client accounts went to third parties or were sent to off-shore jurisdictions.

¶ 119 Respondents' Counsel submitted that the evidence before the Panel clearly does not give rise to a finding that the Respondents failed to discharge their gatekeeper obligations by not questioning the Clients in the manner as submitted by Enforcement Counsel. To do so, Respondents' Counsel submitted, would mean that the Panel was willing to expand the obligation of gatekeeper on a Registered Representative beyond that as currently understood by the investment industry and as is set forth in the case law presented to the Panel.

¶ 120 With reference to the decision of the BCSC in *Re Pacific International Securities Inc.*, as cited by Enforcement Counsel, Respondents' Counsel noted the reasoning of the Vice Chair who, in her dissenting reasons at paragraphs 590-592, noted that:

One of the essential facts a registrant needs to know about a client is whether the client is using his account as part of a broader illegal scheme.

If the registrant learns of something that raises a concern in this regard, the registrant must make inquiries, using all sources of information available to it. The registrant must then exercise its judgment on the basis of that information.

¶ 121 This decision and a similar decision in *Re Kasman*, IDA November 13, 2007, Respondents' Counsel submitted, clearly demonstrate that the gatekeeper role is not that of an investigator. Rather the obligation on a registrant only arises and requires that the Registered Representative ask questions if the Registered Representative learns something which raises a concern.

¶ 122 The only item which, it is alleged in the Statement of Allegations, that should have raised concerns for the Respondents and caused them to ask questions, Respondents' Counsel submitted, was the Red Flag of uneconomic trading. However, as acknowledged by the Investigator, there is an important difference between unprofitable trading and uneconomic trading. The evidence before the Panel demonstrated a very real economic purpose for the sale of shares in the Subject Issuers by some of the Clients and that this economic purpose was to liquidate shareholdings in a falling market. This, Respondents' Counsel submitted, was not a hallmark of suspicious trading.

¶ 123 Nor, Respondents' Counsel submitted, is there evidence before the Panel that any of the Clients who sold their shares at a loss lacked a genuine intent in selling out their positions or that their trading created the artificial appearance of volume or effected an artificial price. These factors were entirely absent in this case.

¶ 124 As testified by PI's CCO, Respondents' Counsel noted, there was not a requirement pursuant to PI Financial's policies for the Respondents to have determined the cost to the Clients of the shares sold or to have reviewed the relevant Form 9s for the shares deposited and then sold. In other words, the Respondents' Counsel submitted, as the Respondents were not obligated to have been aware of the cost to the Clients of the shares sold, the Respondents would not have known whether or not the trading in these shares was uneconomic and, therefore, the selling of these shares at a loss to the Clients should not be considered a Red Flag that should have prompted the Respondents to have asked further questions or to have taken further steps.

¶ 125 Respondents' Counsel submitted that the referencing of factors other than uneconomic trading as being Red Flags and therefore imposing on the Respondents an obligation to make inquiries is improperly seeking to expand the scope of conduct captured in the gatekeeper standard to extend far beyond the existing case law. Indeed, Respondents' Counsel emphasized, there is not a decision before the Panel where the Red Flags alleged in the Statement of Allegations have been found to have constituted Red Flags upon which a gatekeeper ought to have acted.

¶ 126 As the evidence does not support the allegation of a contravention of IDPC Rule 1400 as set out in the Notice of Hearing, Respondents' Counsel submitted that the case against the Respondents should be dismissed in its entirety.

VIII. PANEL'S DECISION

¶ 127 From the submissions of Enforcement Counsel and the Respondents' Counsel, it is clear to the Panel that there is no disagreement between the parties as to the facts included in the evidence before the Panel.

¶ 128 Rather, the disagreement between the parties and the core issue before the Panel for its decision is whether or not the activities of the Respondents over the Relevant Period, as set forth in this evidence, were sufficiently egregious to have breached the high standards of ethics and conduct expected of them as Registered Representatives in that they engaged in business conduct that was unbecoming or detrimental to the public interest and thereby were in contravention of IDPC Rule 1400.

What is not in Issue

¶ 129 From the closing submissions of both Enforcement Counsel and the Respondents' Counsel, it would appear that both parties acknowledge that, from the evidence before the Panel, what is not in issue is:

- (i) the validity of the share certificates deposited in the Client Accounts, the ownership of the shares represented thereby, or the entitlement of the Clients to trade in such shares,
- (ii) that any of the Clients were nominees for a third party,
- (iii) that the trading in such shares were indicative of a market manipulation or money laundering

scheme,

- (iv) the suitability of the trading for the Clients, even though the trading of the shares in most instances led to a loss when the sales proceeds were compared to the issue price of the shares in the respective Form 9s,
- (v) the failure by the Respondents to advise PI Financial's compliance department of requisite information concerning the Clients or intentionally keeping such information from PI Financial's compliance department, or
- (vi) any concern expressed by PI Financial to the Respondents about either the trading in the Client Accounts or in the KYC's of the Clients.

The Position of Enforcement Staff

¶ 130 Rather, the submission of Enforcement Counsel is that IDPC Rule 1400 is a regulatory requirement, which includes the obligation on a Registered Representative to act as a gatekeeper to the capital markets. This obligation is broad in scope, is not restricted to situations of manipulative or abusive trading in the capital markets and extends to the obligation on a Registered Representative to be alert to the collective activities in a client's account.

¶ 131 This obligation concerning the collective activities in a client's account, Enforcement Counsel submitted, requires a Registered Representative to identify Red Flags raised by such activities, and is not restricted to specific market manipulation Red Flags.

¶ 132 These additional Red Flags, Enforcement Counsel submitted, include:

- uneconomic trading activity,
- activity inconsistent with apparent financial standing of the account owner,
- the deposit of share certificates representing a large number of shares and the sale of these shares shortly thereafter followed by large withdrawals of the sales proceeds, and
- that the activity being out of line with the historical trading activity in the accounts and the relevant KYC information relating to the accounts.

¶ 133 Enforcement Counsel submitted that the occurrence of these additional Red Flags imposed an obligation on the Respondents to question the relevant client as to the reasoning behind the trading activities. The fact that the Respondents did not make such inquiries, Enforcement Counsel submitted, constituted a failure on the part of the Respondents to perform their roles as gatekeepers and thereby, contravened the provisions of IDPC Rule 1400.

The Position of the Respondents

¶ 134 The Respondents' Counsel submitted that the collective activities identified by Enforcement Counsel as Red Flags were not actual Red Flags, but rather trading activities which were not unusual in the trading in the shares of venture issuers listed on the CSE, such as the Subject Issuers.

¶ 135 With specific reference to the Red Flags enumerated by Enforcement Counsel, Respondents' Counsel submitted:

- the sale of shares by the Clients into a falling market was not a Red Flag of uneconomic trading, but rather an attempt by the owner of the shares to liquidate the share position and then to withdraw the proceeds,
- as testified by PI's CCO, during the Relevant Period, PI Financial did not impose upon its Registered Representatives an obligation to review the relevant Form 9 for the shares being traded and, therefore, there was no obligation on the Respondents to be aware of the owner's cost of the shares traded, and thereby an obligation on the Respondents to be aware of whether

or not a loss was being incurred, and

- as CP during the Relevant Period became a consultant, as it is not unusual for parties consulting to public issuers, such as the Subject Issuers, to issue shares in compensation for such consulting services, and for the consultant to subsequently monetize these issued shares by selling them in the public markets, the activities of CP and CP Corp should not have raised Red Flags imposing an obligation on the Respondent to make inquiries.

¶ 136 As the activities focused on by Enforcement Counsel were ones that were explainable in the particular fact situation for the Clients involved, Respondents' Counsel submitted that there was no obligation on the Respondents to make the inquiries as submitted by Enforcement Counsel, and that, therefore, there was no breach of IDPC Rule 1400 by the Respondents.

The Gatekeeper Obligation

¶ 137 It is clear to the Panel that what is required of it in making its decision is to firstly define the gatekeeper obligation which was facing the Respondents during the Relevant Period with respect to the activities of the Clients and the trading in the Client Accounts and, based upon this definition, to determine whether, as alleged in the Notice of Hearing, the failure by the Respondents to make the relevant inquiries with respect to such activities constituted a breach of such a gatekeeper obligation.

¶ 138 In determining what was the relevant gatekeeper obligation facing the Respondents during the Relevant Period, the Panel is aware that it appears that the gatekeeper role has in past decisions, such as those cited by Enforcement Counsel and the Respondents' Counsel set out above, normally has been considered in situations where the evidence is of activities involving market manipulation, money laundering, or more clearly defined suspicious behaviour, usually involving some form of improper market activity, the occurrence of which on coming to the attention of a Registered Representative requires the Registered Representative to be proactive and to make inquiries.

¶ 139 In the matter at hand, Enforcement Counsel have submitted that based upon the evidence before the Panel, the gatekeeper role should be expanded to include the activities around the trading in the Client Accounts. In this expanded definition, it is submitted, these suspicious activities were sufficient and clearly required inquiries to be made by the Respondents.

¶ 140 Taking an opposing view, the Respondents' Counsel submitted that the Panel's role is to operate within the confines of the existing IDPC Rules and to not to make any new ones. In any event, Respondents' Counsel submitted, the referenced activities are all very explainable in their context and, as such, did not require the Respondents to make the inquiries as submitted by Enforcement Counsel.

¶ 141 The Panel has determined that instead of attempting to expand the boundary of the gatekeeper role as requested of it by Enforcement Counsel, in making its decision the Panel is focusing on the particular fact situation facing the Respondents as set forth in the evidence before the Panel and to make its decision based upon these facts applying the Panel's specialized knowledge of the investment industry.

¶ 142 In general terms, the approach being taken by the Panel might be described as a three-step approach. The first of these steps is for the Panel to consider whether or not the particular fact situation presented by the evidence before the Panel involves activities to which a party, acting as a duly diligent person who is active in the investment industry and who serves in a gatekeeper role, might reasonably be considered to be a triggering event or a set of triggering events and of a nature which would require this party to make inquiries of the participants in these activities.

¶ 143 If the Panel finds that in its opinion the evidence before it discloses that such a triggering event or set of triggering events did occur, then the Panel's next step is to determine whether or not this party in performing a gatekeeper role made the necessary inquiries from all sources of information at the time reasonably available to the party.

¶ 144 And, if the Panel does find based on the evidence before it that such reasonable inquiries had been

made, the final step in this process is for the Panel to determine whether or not this party acted reasonably based upon the information uncovered by these inquiries.

¶ 145 The Panel has selected this approach as it fully acknowledges that wilful blindness or wilful ignorance on the part of a participant in the investment industry is not acceptable if that participant has a gatekeeper's role, especially if that role is client facing. But in order to impose upon this participant the obligation to commence the inquiry process, the Panel believes that there must be one or more triggering events which, in the mind of a party active in the investment industry, would reasonably raise a concern and, therefore, impose the requirement to act, to make the requisite inquiries, and to properly follow up based upon results of such inquiries.

¶ 146 To apply this three-step approach to the matter at hand, the Panel firstly has to consider whether or not the evidence before it involving activities in which the Respondents were participants is sufficient to constitute what the Panel considers to be a triggering event or set of triggering events which, in the Panel's opinion, ought reasonably to have raised a concern on the part of the Respondents.

Application of the First Step

Relevant KYC Information

¶ 147 In applying the first step of this approach to the evidence before the Panel with reference to the relevant KYC information, in the Panel's opinion, the disclosed increase in CP's net worth and liquid assets over the Relevant Period might well have resulted from the change in the occupation from that of an employee to a self-employed consultant. Therefore, in and of itself, this change does not appear to constitute a triggering event.

¶ 148 Similarly, the KYC information and changes thereto for Client YK, Client JL, Client BB, Client VT, and the companies related to these clients, other than Client JL, might be considered to have reasonable explanations and, again, in and of themselves, do not appear to be triggering events.

¶ 149 Therefore, the Panel finds that on the evidence before us, the trading activities of the Clients which might otherwise have been considered to have been contrary to the KYC information in the relevant party's NCAF all appear to have possible reasonable explanations, and therefore that Enforcement Staff has not demonstrated on a balance of probabilities one or more triggering events with respect to possible inconsistencies between the Clients' trading activities and their KYC information.

Red Flags

¶ 150 Similarly with respect to the Red Flag of uneconomic trading as a result of the cumulative losses of Client CP and Client CP Corp which were calculated by the Investigator to be \$1,839,274 based upon the proceeds of the share sales and the acquisition cost as set out in the relevant Form 9s or for the sale of CRYP shares by VT Corp resulting in a similarly calculated loss of \$453,422.

¶ 151 In making the determination of these sales as being uneconomic, the Investigator did his calculations based upon the cost base of these shares as being those set forth in the respective Form 9s. However, there is no evidence before the Panel to suggest that the Respondents had an obligation to investigate the relevant Form 9s to determine this cost base prior to enabling the trading of these shares.

¶ 152 Indeed, PI's CCO testified that he had only once reviewed a Form 9 during his years in the investment industry, and, although PI's CCO's opinion might not be considered to be an unbiased observation, based upon the Panel's experience it is not common practice for Registered Representatives to conduct a review of relevant Form 9's prior to effecting the trading in the shares referenced therein.

¶ 153 These trades, especially in the case of CP and CP Corp, suggest rather than uneconomic trading the monetization of shares earned as consulting fees being sold into a limited and falling market for the shares. And, similarly, with the disposition of the CRYP shares, the trading in these shares appear to be a monetization of the shares into a falling market.

¶ 154 As well, with respect to the Red Flag of a significant change in the account activity for CP and CP Corp, the evidence shows that there was obviously a marked change in the affairs of CP during the Relevant Period and the trading activity in the CP and CP Corp accounts reflected this change.

¶ 155 The Panel therefore finds that the trading in the Client Accounts might have the perfectly reasonable explanation as set out above, and, therefore, does not constitute a triggering event.

Relationship Questions

¶ 156 Apart from the relationship between YK and JL of which the Respondents subsequently became aware, the Panel finds nothing in the evidence before it which suggests that there was an ongoing relationship among the Clients resulting in the trading activities in the Client Accounts and which should have constituted a triggering event for an obligation on the Respondents to make inquiries with respect to the relationship among the Clients.

Commissions

¶ 157 The evidence before the Panel is that, during the Relevant Period, the gross commissions earned from the trading in the Client Accounts was \$103,332, of which 50%, or \$51,666 was paid to Mr. Englesby and \$2,066 to Mr. Nishimura.

¶ 158 The Respondents' Counsel submitted that these commissions represented roughly only 5% of the total commissions earned by the Respondents as employees of PI Financial during the Relevant Period.

¶ 159 Based upon this submission, the trading activities reflected in the Statement of Allegations represented a very small portion of the trading activities undertaken by the Respondents during the Relevant Period and makes it difficult for the Panel to accept that the trading activities conducted by the Respondents in the Client Accounts were as a result of improper activities to earn these commissions, were part of a larger collective effort, or, at least, should have raised Red Flags.

¶ 160 The Panel therefore finds that the commissions earned by the Respondents during the Relevant period as referenced by Enforcement Staff did not constitute triggering event requiring the Respondents to make further inquiries.

Final Determination

Lack of Triggering Events

¶ 161 On the evidence before the Panel, the Panel finds that Enforcement Staff have not proved factors which, on the balance of probabilities, should be considered one or more triggering events which should have reasonably raised a concern to the Respondents as Registered Representatives active in the investment industry and which, therefore, would have imposed upon them the obligation to make further inquiries of the Clients.

¶ 162 Having not found one or more such triggering events, the Panel does not need to explore the two other steps of its approach as described above.

Collective Activity

¶ 163 Although the evidence before the Panel in its context does demonstrate what Enforcement Counsel submits is a collective activity by the Clients in the Client Accounts involving the trading in the shares of the Subject Issuers, the Panel notes that based upon the submission of the Respondents' Counsel of the total commissions earned by the Respondents during the Relevant Period, this trading appears to be a very small part of the overall business activity of the Respondents during the Relevant Period.

¶ 164 In any event, the Panel finds that each of the individual activities forming the collective action alleged has what might be considered a reasonable explanation for that activity to stand alone.

Dismissal of the Disciplinary Action

¶ 165 The Panel firmly believes that, based on our collective experience in the investment industry, a Registered Representative as the most direct client facing player must be proactive and must fully understand a

client's financial situation and the client's motivation for conducting trading activities. In other words, that a Registered Representative is not merely an order taker and has a definite obligation to ensure that with respect to such trading activities relevant investment industry rules and standards are maintained.

¶ 166 However, the Panel agrees with the Respondents' Counsel, it is not the Panel's role to make new rules, but rather to determine whether or not from the facts before it, a particular rule or a clearly established standard has been contravened as alleged.

¶ 167 In the evidence before the Panel, the Panel finds no evidence of the specific activities involving the Clients, the Client Accounts or the trading in the shares of the Subject Issuers during the Relevant Period for which there might not have been a plausible explanation and which should have raised a concern, as a triggering event, and, therefore, should have caused the Respondents to make inquiries.

¶ 168 As the Panel has not found in the evidence before it a breach of their gatekeeper's obligations by the Respondents as alleged in the Notice of Hearing and the Statement of Allegations, the Panel finds that the Respondents did not contravene IDPC Rule 1400 as alleged and, therefore, dismisses this disciplinary action against the Respondents.

DEFICIENCIES IN THE STATEMENT OF ALLEGATIONS

¶ 169 In their closing submissions, the Respondents referenced the Statement of Allegations and submitted that the disclosure made by Enforcement Staff in this document in setting out the facts leading to the allegation of the breach of IDPC Rule 1400 by the Respondents was deficient. The Respondents submitted that although the allegation of the breach of Rule 1400 relates to the professional relationship with the nine identified accounts, the particulars of these relationships in the Statement of Allegations mainly referenced those relating to Client CP and Client CP Corp.

¶ 170 The Respondents submitted that a notice of hearing in a particular matter and the accompanying statement of allegations provided by Enforcement Staff not only provide the relevant respondent with notice of the case it has to meet, but, as well, clearly circumscribes the jurisdiction of the panel hearing the matter and restricts this panel to making findings only with respect to the allegations contained in the notice of hearing and accompanying statement of allegations. In support of this position, the Respondents referenced the BCSC decision in *Re Blackmont Capital Inc.* 2011 BCSCCOM 490 and a very recent decision of the ASC in *Re Impact Analytics Inc.* 2024 ABSC 94.

¶ 171 In the matter at hand, the Respondents submitted, the Statement of Allegations referenced numerous facts and activities carried out or not carried out by the Respondents to support Enforcement Staff's allegations pertaining to the Respondent's conduct during the Relevant Period. But with the exception of the references to the relationships with Client CP and Client CP Corp, the Respondents submitted that these activities were relevant to an allegation of a breach of the IDPC Rule 3202 dealing with the KYC obligation rather than a breach of IDPC Rule 1400, which is the allegation contained in the Notice of Hearing and Statement of Allegations. Given this, the Respondents submitted, in coming to its decision the Panel was restricted to considering only those facts and activities which related to the allegation of the breach of IDPC Rule 1400 and not to a possible breach of IDPC Rule 3202.

¶ 172 Although in the matter at hand, with the Panel's finding that Enforcement Staff has not met the burden of proof on it to demonstrate, on a balance of probabilities, a breach of IDPC Rule 1400 by the Respondents, it is not necessary for the Panel to make a decision with respect to the Respondents' submissions on deficiencies in the Statement of Allegations, the Panel wanted to make the following observation.

¶ 173 As is clearly stated in the *Blackmont Capital* and *Impact Analytics* cases cited by the Respondents and referenced above, the notice of hearing and statement of allegations clearly define the resulting panel's jurisdiction in coming to a decision on whether or not the breaches of the IDPC Rules alleged in the notice of hearing occurred. As well, as these documents enable the respondent to properly understand and prepare for the case to be met, procedural fairness dictates that these documents clearly reveal the specific allegations against the respondent and the facts as alleged in support of these allegations.

¶ 174 To this end, although the Panel acknowledges and agrees with the position of Enforcement Staff that the relevant standard for disclosure in a notice of hearing and accompanying statement of allegations is one of adequacy and not of perfection, the Panel would recommend that Enforcement Staff ensures that, as a basic principle in the issuance of a notice of hearing and supporting statement of allegations, the alleged breaches of the IDPC Rules are fully and clearly set out in these documents together with the facts the Enforcement Staff are referencing in support of the allegations contained therein.

Dated at Vancouver, British Columbia this 22nd day of July 2024.

“John Rogers”

John Rogers, Chair

“Nigel Potts”

Nigel Potts

“William Wright”

William Wright

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