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IN THE MATTER OF THE *SECURITIES ACT*,
R.S.O. 1990, c. S.5, AS AMENDED

AND

IN THE MATTER OF
THE JUNIPER FUND MANAGEMENT CORPORATION, JUNIPER INCOME FUND, JUNIPER EQUITY GROWTH FUND and ROY BROWN (a.k.a. ROY BROWN-RODRIGUES)

REASONS AND DECISION ON SANCTIONS AND COSTS

Hearing:	October 25, 2013 and November 22, 2013	
Decision:	February 12, 2015	
Panel:	Vern Krishna, CM, QC	- Chair of the Panel
Appearances:	Derek Ferris	- For Staff of the Commission
	Roy Brown (a.k.a. Roy Brown-Rodrigues)	- For himself
	No one appeared for Juniper Fund Management Corporation, Juniper Income Fund and Juniper Equity Growth Fund	

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REASONS AND DECISION ON SANCTIONS AND COSTS

I. Background

[1] This was a hearing before the Ontario Securities Commission (the "Commission") pursuant to sections 127 and 127.1 of the *Securities Act*, R.S.O. 1990, c. S.5, as amended (the "Act"), to consider whether it is in the public interest to make an order with respect to sanctions and costs against the Juniper Fund Management Corporation ("JFM"), Juniper Income Fund ("JIF"), Juniper Equity Growth Fund ("JEGF") and Roy Brown ("Brown") (collectively, the "Respondents").

[2] The hearing on the merits in this matter took place on September 19-23, 28-29, 2011; October 5, 2011; November 9, 2011; December 21, 2011, February 14 and 22, 2012; April 4, 2012; May 28 and 30, 2012; June 8, 2012; and September 4, 2012. During the hearing on the merits, Brown represented himself and no one appeared for JFM, JIF and JEGF.

[3] The decision on the merits was issued on April 11, 2013 (*Re Juniper Fund Management Corporation* (2013), 36 O.S.C.B. 4243 (the "Merits Decision")). A separate hearing to consider sanctions and costs was scheduled for June 14, 2013 (the "Sanctions and Costs Hearing").

[4] By email dated April 13, 2013, Brown advised the Secretary's Office that he was unavailable to attend the sanctions and costs hearing on June 14, 2013 due to travel commitments and a planned vacation. An appearance was held on May 7, 2013 to consider Brown's request to adjourn the date of the Sanctions and Costs Hearing. At this appearance, Brown informed the Commission that he was making efforts through Pro Bono Law Ontario ("PBLO") to obtain counsel and Staff did not oppose a short adjournment to accommodate Brown's attempt to seek the assistance of PBLO counsel. As a result, the June 14, 2013 Sanctions and Costs Hearing date was vacated and the parties were ordered to appear before the Commission on July 4, 2013 so that Brown could provide the Commission with an update on his efforts to retain counsel.

[5] On July 4, 2013, Brown provided an update to the Commission that he was still in the process of attempting to recruit the appropriate legal counsel for this file and that this process may take another two to four weeks. Staff submitted that the Sanctions and Costs Hearing should be scheduled far enough in advance that it would provide Brown sufficient time to retain counsel and sufficient time for that counsel to prepare for the Sanctions and Costs Hearing. In the Commission's view, it was appropriate to schedule the Sanctions and Costs Hearing at the end of October (more than three and half months from the date of the July 4, 2013 and more than six months after the issuance of the Merits Decision) and that such timing would provide adequate time for Brown to retain counsel and for that counsel to prepare for the Sanctions and Costs Hearing. As result, the Commission issued an order on July 4, 2013 scheduling the Sanctions and Costs Hearing for October 25, 2013.

[6] The Sanctions and Costs Hearing was attended by Staff of the Commission ("Staff") and Brown represented himself and participated by telephone for portions of the Sanctions and Costs Hearing, described in greater detail below starting at paragraph 24 of these reasons. No one appeared on behalf of JFM, JIF and JEGF.

[7] Staff provided Written Submissions on Sanctions and Costs which included an appendix with Staff's Bill of Costs, along with a Book of Authorities, Reply Submissions and Time Costs Analysis. Brown provided Written Submission on Sanctions and Costs and two binders, Respondent's Exhibits and Submissions, which was marked as Exhibit 2 and Exhibit 8 from the Merits Hearing, which was marked as Exhibit 3 in the Sanctions and Costs Hearing. During the hearing I heard submissions from the parties about certain documents contained in Exhibit 2 which dealt with confidential matters or topics discussed on a without prejudice basis. As a result, Tabs 6 and 8 were removed from Exhibit 2 and together are marked as a confidential exhibit, Exhibit 4.

[8] These are my Reasons and Decision as to the appropriate sanctions and costs to order against Brown and JFM.

II. The Merits Decision

[9] The Merits Decision dealt with alleged breaches of various sections of the Act and National Instruments 81-102 ("NI 81-102") and 81-106 ("NI 81-106"), which can be summarized into five main areas as follows:

(a) The Respondents failed to maintain proper books and records in respect of JIF and JEGF (collectively, the "Funds") (subsections 19.1 of the Act, 18.1 of NI 81-102, and 14.2(1) and 14.4 of NI 81-106);

(b) JFM was not properly registered or exempt from the registration requirements in the Act (subsection 25(1)(a) of the Act, which was in force at the time the alleged conduct took place);

(c) The Respondents failed to provide full, true and plain disclosure of all material facts relating to the Funds and mislead Staff of the Commission (subsections 56(1) of the Act and 15.2 of NI 81-102);

(d) The Respondents engaged in inappropriate transactions within the Funds (subsections 111(1)(a), 111(2)(c)(ii), 111(3), and 112 of the Act and 2.6, 6.1(1), and 6.1(6) of NI 81-102);

(e) JFM and Brown breached the statutory standard of care required in respect of the Funds (subsection 116(1) of the Act and 9.4, and 11.1 of NI 81-102); and

(f) Brown, as an officer and director of JFM, authorized, permitted or acquiesced in the conduct referred to above and is responsible for JFM's breaches of securities law pursuant to s. 129.2 of the Act.

(Merits Decision, *supra* at paras. 3 and 4)

[10] Upon reviewing all the evidence, the applicable law and the submissions made, the Panel concluded in the Merits Decision that:

(a) The Respondents failed to keep books, records and other documents as are necessary for the proper recording of its business transactions and financial affairs and the transactions that it executes on behalf of the Funds in accordance with Ontario securities law, contrary to subsection 19(1) of the Act and section 18.1 of NI 81-102, and failed to record JEGF's daily NAV calculations contrary to subsection 14.2(1) and section 14.4 of NI 81-106;

(b) JFM acted as a mutual fund dealer for purchases and redemptions in units of the Funds without being registered as a mutual fund dealer contrary to subsection 25(1)(a) of the Act, which was in force at the time the conduct occurred;

(c) The Respondents failed to provide full, true and plain disclosure in the JEGF simplified prospectus of all material facts contrary to subsection 56(1) of the Act and the JEGF simplified prospectus, information circular and AIF contained certain inaccurate and misleading statements contrary to subsection 15.2(1) of NI 81-102;

(d) JEGF provided prohibited loans and held prohibited investments contrary to sections 111 and 112 of the Act and paragraph 2.6 of NI 81-102 and, in doing so, the Respondents breached their custodial obligations contrary to subparagraphs 6.1(1) and (6) of NI 81-102;

(e) The Respondents breached their statutory duty of care contrary to subsection 116(1) of the Act and have failed to properly settle and deposit funds in accordance with sections 9.4 and 11.1 of NI 81-102; and

(f) Brown, as an officer and director of JFM, authorized, permitted and acquiesced in breaches of subsections 19(1), 25(1)(a), 56(1), 111, 112, and 116(1) of the Act, subsections 2.6, 6.1(1), 6.1(6), 9.4, 11.1, 15.2(1) and 18.1 of NI 81-102, and subsections 14.2(1) and 14.4 of NI 81-106 and, pursuant to section 129.2 of the Act is liable for JFM's breaches of Ontario Securities law and engaged in a conduct contrary to the public interest.

(Merits Decision, *supra* at para. 192)

[11] It is this conduct that I must consider when determining the appropriate sanctions to impose in this matter.

III. Sanctions and Costs Requested

1. Staff's Position

[12] Staff has requested that the following order be made against Brown and JFM:

1. With respect to Brown:

    a. an order that Brown cease trading in securities permanently pursuant to clause 2 of subsection 127(1) of the Act;

    b. an order that the acquisition of any securities by Brown is prohibited permanently pursuant to clause 2.1 of subsection 127(1) of the Act;

    c. an order that any exemptions contained in Ontario securities law do not apply to Brown permanently pursuant to clause 3 of subsection 127(1) of the Act;

    d. an order that Brown be reprimanded pursuant to clause 6 of subsection 127(1) of the Act;

    e. an order that Brown resign all positions he holds as a director or officer of an issuer, registrant or investment fund manager pursuant to clauses 7, 8.1, and 8.3 of subsection 127(1) of the Act;

    f. an order that Brown is permanently prohibited from becoming or acting as a director or officer of any issuer, registrant or investment fund manager pursuant to clauses 8, 8.2, and 8.4 of subsection 127(1) of the Act; and

    g. an order that Brown is permanently prohibited from becoming or acting as a registrant, as an investment fund manager or as a promoter pursuant to clause 8.5 of subsection 127(1) of the Act.

2. With respect to JFM:

    a. an order that JFM cease trading in securities permanently pursuant to clause 2 of subsection 127(1) of the Act;

    b. an order that the acquisition of any securities by JFM is prohibited permanently pursuant to clause 2.1 of subsection 127(1) of the Act; and

    c. an order that any exemptions contained in Ontario securities law do not apply to JFM permanently pursuant to clause 3 of subsection 127(1) of the Act.

3. With respect to both Brown and JFM:

    a. an order requiring Brown, on a joint and several basis with JFM, to pay an administrative penalty of $500,000, pursuant to paragraph 9 of

section 127(1) of the Act, which is designated for allocation or use by the Commission pursuant to subsections 3.4(2)(b)(i) or (ii) of the Act;

b. an order requiring Brown, on a joint and several basis with JFM, to disgorge to the Commission $2,331,076.71 obtained as a result of his non-compliance with Ontario securities law, pursuant to paragraph 10 of section 127(1) of the Act, which is designated for allocation or use by the Commission pursuant to subsections 3.4(2)(b)(i) or (ii) of the Act; and

c. an order requiring Brown, on a joint and several basis with JFM, to pay $669,136.76 for costs incurred in the investigation and hearing of this matter pursuant to subsection 127.1 of the Act.

[13] Staff does not seek any sanctions against the Funds as both Funds have been liquidated as the result of votes at JEGF and JIF unitholder meetings on November 15, 2007. The initial temporary cease trade order on the Funds was revoked by Commission order dated February 22, 2008 to permit the Receiver to complete a distribution of redemption proceeds to JEGF unitholders at JIF unitholders.

[14] In Staff's submission, the sanctions requested are appropriate in light of the conduct of Brown and JFM and take into account the multiple breaches of the Act that occurred. In addition, Staff submits that their proposed sanctions will both deter Brown and JFM as well as like-minded individuals from involvement in similar conduct in the future.

2. Brown's Position

[15] Brown submits that the sanctions and costs requested by Staff are extremely severe in the circumstances and lesser sanctions would be appropriate and proportionate. Considering fairness and equitable principles, coupled with mitigating factors present, such as the Respondents' cooperation with the Receiver, Staff and the fact that the Respondents have never had a prior disciplinary record, Brown submits that the following sanctions would be appropriate in the circumstances:

(a) Individual Respondent be prohibited from acting as a Director or Officer of a Reporting Issuer for a period of two years;

(b) Individual Respondent be prohibited in acting as a Director or Officer of a fund manager, promoter, or registrant for a period of seven years;

(c) exemptions available in the Act, will not be available to the Respondents for a period of two years;

(i) Respondents cease trading in securities for a two year period, except that Individual Respondent can trade on his and/or his children's own account during this two year period and only through a registered dealer;

(e) Respondents be reprimanded;

(f) that Respondents jointly and severally pay an administrative penalty of between $50,000 to $100,000;

(g) Respondents jointly and severally pay costs of $50,000.

(Brown's written submissions at page 41)

[16] To support his argument that the sanctions requested by Staff are too harsh, Brown points out that the case law Staff relied upon deals with much more egregious breaches of the Act (such as fraud) and in addition, many of the cases relied upon by Staff have even ordered lesser sanctions than those sought by Staff in this case. Brown also submits that in many cases or settlement agreements referred to by Staff, the affected respondents were provided with carve-outs concerning trading in their own account as long as the trades are done with a dealer. According to Brown, a trading carve-out should apply to him to allow him to trade on his and his children's behalf.

[17] Notwithstanding, Brown submitted that sanctions should not be ordered until he has been able to present evidence, and conduct proper and efficient cross examination of certain of Staff witnesses, in a fair merits hearing or other judicial adjudicative forum. According to Brown, the Commission will not be aware of entire, complete and full version of the facts concerning the Juniper matter.

[18] However, in his written submissions, Brown recognizes his improprieties. Brown did acknowledge his misconduct and the impact it had on the Funds and accepted that he had a responsibility to ensure proper accounting for the Funds. Specifically, in his written submissions at page 24, Brown explained:

> The Respondent acknowledges that during periods in 2005 JEGF's net asset values per unit were not always properly calculated, due to infrequent JEGF bank and security portfolio reconciliations, and the timeliness of these valuations on daily and monthly basis.
>
> JFM and Respondent employed a NAV system that was not sufficiently robust nor possessed sufficient financial accounting functionality to calculate JEGF's net asset values. JFM did take steps to remedy this matter, by installing a new system called ViewPort in late September of 2005.
>
> JFM and Respondent had a responsibility to ensure that it had efficient and functional systems to produce accurate net asset value calculations and reporting, which it did not possess at all times during 2005. Having noted this, there were mitigating factors that affected the inaccuracy of these NAV calculations which JFM and Respondent attempted to remedy and correct, leading to the installation of the ViewPort NAV calculation

> system. Nonetheless, JFM and Respondent should have been more vigilant in launching the ViewPort NAV calculation and reporting system sooner in 2005.

[19] In hindsight, Brown remarks that "…it is now clear, these account balances were not accurate, which JFM discovered after completing its reconciliation process that started in December of 2005 and was completed at the end of February 2006" (Brown's Written Submissions at page 17).

[20] Brown also submits that he always acted in the best interests of the Funds. Specifically, he explains at page 25 of his written submissions that:

> The Respondent view of this is that he at all times acted in best interest of JEGF unitholders. JFM, Respondent and Related Parties were significant unitholders of JEGF since May of 2004. The parties had much of its family's savings in JEGF; including monies it had borrowed from its personal bank to acquire units of JEGF. As such, the decisions that were undertaken by JFM during its tenure as fund manager, were at all the times for best interest of its unitholders, which included JFM, Respondent and its related Parties. So acts of dishonesty that would have hurt JEGF unitholders would of also have directly hurt JFM and individual Respondent in the same way and magnitude, and that is simply not reasonable that the Respondents would have employed dishonest tactics to hurt themselves as unitholders of JEGF, or any other unitholder for that matter.

[21] Overall, in his submissions, Brown acknowledged his misconduct and submitted that he is remorseful for his mistakes. As stated on page 2 of Brown's Written submissions:

> In delivering this submission to the Commission, the Respondent is once again expressing his continued remorse he continues to have for Juniper Equity Growth Fund ("JEGF") unitholders, as well as for the Receiver and others involved in this matter. <u>The Respondent is especially remorseful for not having adequate record keeping systems, proper monthly or quarterly reconciliations of its record keeping in – house and dealer unitholder accounts,</u> and in hindsight should have disposed of its RecordSource record keeping system earlier on in 2005, after acquiring the RecordSource software from 1276046 Ontario Ltd (operating as D- Tech Consulting) and MJC Software Inc.

IV. Preliminary Issues

1. Brown's Participation at the Sanctions and Costs Hearing

[22] While Brown was present by telephone at the commencement of the Sanctions and Costs Hearing on October 25, 2013, shortly after the start of the hearing he informed the Commission that he did not wish to listen to all of Staff's submissions and that he would prefer to make submissions first and then disconnect from the line. Brown was provided with an explanation as to how the hearing would unfold, that Staff would make submissions first, then Brown would provide submissions and then Staff would have an opportunity to make reply submissions. It was also explained to Brown that if he chose not to listen to Staff's submissions, he might be inadvertently prejudicing himself as he would be depriving himself from hearing Staff's submissions and although the choice is up to Brown to decide whether he wants to participate or not, it was recommended that he listen to Staff's submissions. Brown elected not to stay on the line and stated "Well, then you're going to have to do it, sir, respectfully, you're going to have to do it without me because I cannot listen to this" (October 25, 2013 Transcript, page 30 lines 17-19). Brown was instructed that:

> THE CHAIR: You've said so. I invite you to stay and that's all I can do.
>
> MR. BROWN: Yes, I understand that.
> …
>
> THE CHAIR: Well, we will certainly advise you when the time comes for your submissions and we would have done that whether you were present in the room or not to indicate to you that it was now your turn and we will certainly advise you of that by telephone.
>
> Once again, I repeat that you are strongly advised to stay on the line and listen to Mr. Ferris's submissions so that you can adequately respond to them with full information.
>
> (October 25, 2013 Transcript, page 38, lines 4-22)

[23] Since Brown elected to disconnect from the phone line, in order to ensure that Brown could call in anytime if he changed his mind regarding his participation in the Sanctions and Costs Hearing, the Commission kept the telephone conference line open and Brown was provided with an email providing him the dial-in number so that he could participate at any time. That email was marked as Exhibit 1 in the Sanctions and Costs Hearing.

[24] Later that morning on October 25, 2013, Brown dialed in to rejoin the Sanctions and Costs Hearing. Once Staff finished with their submissions on sanctions and costs, Brown requested an adjournment in order to prepare his closing submissions. Brown took the position that he needed the transcript of Staff's oral submissions of that same day (October 25, 2013) in order to prepare otherwise he would be prejudiced and unable

to do a good job of providing his own oral submissions. According to Brown he required the transcript for two reasons:

> One, so I can understand what's been said and the gravity of what's been said and then, secondly, so I have an opportunity to make an intelligent and appropriate and specific submission on what's been said.
>
> I can't do this on the fly right now. I just can't, I'm just not capable. I wish I could. I just don't have that proficiency.
>
> (October 25, 2013 Transcript, page 101 lines 1-8)

[25] Brown was granted his request to adjourn and bifurcate the Sanctions and Costs Hearing, in order to provide him with time to prepare his oral submissions. As a result, the Sanctions and Costs Hearing resumed on November 22, 2013 on a peremptory basis. Brown was also provided with a copy of the October 25, 2013 transcript. Brown was accommodated because he was unrepresented and this adjournment provided him with the time to prepare and to ensure he could review Staff's oral submissions.

2. Brown's Attempt to Re-litigate the Merits Decision

[26] As mentioned above, Brown objected to having sanctions imposed on him until he has been able to present their evidence and conduct proper and efficient cross examination of certain Staff witnesses.

[27] I reject Brown's argument and note that Brown was accommodated throughout the hearing on the merits and had every opportunity to participate if he so chose, including the opportunity to provide evidence.

[28] As noted in the Merits Decision at paragraph 12, this matter had a lengthy procedural history which involved:

> … a purposeful balancing of the various interests in this matter. Upon each adjournment request, the Panel weighed the Respondents' and the investors' interests in reaching its decision.

[29] The full details of the multiple adjournments are set out in the Merits Decision from paragraphs 12 to 31. I will now refer to the following important considerations which prompted us to complete the merits hearing and deny Brown's adjournment requests and requests to reopen the case to present more evidence.

[30] Firstly, the Merits Decision took into account the balancing of interests of Brown and the unitholders. To justify the denial of Brown's adjournment requests, the Merits Decision explains at paragraphs 16 and 17 that:

> Ultimately, we determined that the JEGF and JIF unitholders would be prejudiced by a further adjournment of the Merits Hearing. Staff was

> prepared to proceed and arranged for many witnesses to give evidence. In addition to scheduling inconveniences caused to these witnesses, we were mindful that the memories of witnesses may fade over time and further delay may affect the quality of their oral testimony. In terms of costs incurred, the Receiver gave evidence that 95% of JEGF assets have been distributed and there remains approximately $450,000 in trust to cover professional fees and final distributions. Each time the matter is adjourned the Receiver has to prepare for the case, which work is billed to the Funds, which reduces the amount available for distribution to the unitholders. We found this to be an unfair burden to the unitholders at this point in time. Further, the Receiver cannot wind up the Funds until this proceeding is completed, which means that unitholders will have to wait longer to get any amounts owing to them and to have this matter resolved if an adjournment was granted.
>
> For all of these reasons, we determined that the balance tipped in favour of investor interests and, as such, an adjournment was denied subject to Brown's requests for reasonable accommodations during the course of the hearing. [emphasis added]

[31] During the merits hearing Brown was accommodated and was provided options to enable him to participate in the hearing on the merits. Specifically, as stated in paragraph 30 of the Merits Decision:

> Throughout the Merits Hearing we balanced all of the interests affected by this proceeding. In particular, we were mindful of Brown's right to a fair hearing, the rights of the Funds' unitholders, and the public interest at large. After the Merits Hearing commenced, we granted Brown a number of adjournments to accommodate him. Notwithstanding that Brown provided minimal evidence of his inability to participate in the Merits Hearing, we repeatedly deferred to his interests and offered him numerous accommodations including the ability to participate by teleconference, videoconference, and in-writing. On April 4, 2012, we advised Brown that his request for an adjournment was being granted for the last time subject to any further evidence of his ability to participate. He indicated his understanding of the Panel's decision. On May 30, 2012, however, Brown requested a further adjournment without any new evidence. [emphasis added]

[32] For example, during the merits hearing, Brown was provided with the following instructions and opportunities to provide evidence to defend his case:

- we dispensed with the requirement for Brown to bring a motion to recall Staff's witnesses and ordered, among other things, that Brown need only provide a list of those witnesses that he wished to recall in advance of the next appearance (Merits Decision, *supra* at para. 24);

- prior to the April 4, 2012 hearing date, Brown served Staff with a list of witnesses whom he wished to recall for cross-examination but at the same time requested another adjournment (Merits Decision, *supra* at para. 25);

- Brown's request for an adjournment was denied, but he was granted his request to submit written interrogatories for Staff's witnesses by May 30, 2012, in accordance with the previously scheduled Merits Hearing dates (Merits Decision, *supra* at para. 26);

- Brown brought additional adjournment requests which were denied, but Brown was granted his request to submit his defence by way of affidavit evidence by no later than June 8, 2012 in accordance with the previously scheduled Merits Hearing dates (Merits Decision, *supra* at para. 27);

- Brown was permitted to testify by way of videoconference on June 8, 2012 instead of by affidavit if he chose to do so and further ordered that Staff could cross-examine Brown by videoconference in order to accommodate Brown (Merits Decision, *supra* at para. 27);

- On June 8, 2012, instead of being ready to testify and present evidence, Brown requested another adjournment and did not provide any evidence to support this adjournment motion. At this point, the panel for the hearing on the merits denied Brown's adjournment request, and in light of Brown's submissions, determined that the defence's case was closed and set dates for closing submissions (Merits Decision, *supra* at para. 28).

[33] Ultimately, it was determined that the balance of interest tipped in favour of concluding the merits hearing in order to bring finality to this matter and to provide closure to the Funds' unitholders and protect the public interest. (Merits Decision, *supra* at para. 31)

[34] Now at the sanctions stage, Brown is seeking to have the opportunity to present evidence and cross-examine Staff's witnesses. Brown was provided with these opportunities during the course of the merits hearing but he chose not to act on them. In fact, Staff kept Brown advised of the witnesses as they testified and offered to recall any Staff witnesses for cross-examination as requested by Brown. The Commission also provided Brown with transcripts of the evidence of Staff witnesses, opportunities to present oral evidence or file affidavit evidence.

[35] If Brown were permitted to provide evidence at this stage and cross-examine Staff's witnesses, this would be tantamount to re-opening the merits and the re-litigation of the findings on the merits in this matter. The Sanctions and Costs Hearing is not the appropriate forum to present evidence on the merits and argue and re-litigate the merits findings. That should be addressed as part of any appeal, if any. Further, Brown was accommodated and provided with ample time and instructions from the merits panel as to how to provide evidence during the merits hearing if he so chose to do so. Brown cannot

assert now that he has been prejudiced by not providing evidence because he was provided with every opportunity to do so during the merits hearing.

V. The Law on Sanctions

[36] Pursuant to section 1.1 of the Act, the Commission has the mandate to: (i) provide protection to investors from unfair, improper or fraudulent practices; and (ii) foster fair and efficient capital markets and confidence in capital markets. As stated by the Supreme Court of Canada in *Committee for Equal Treatment of Asbestos Minority Shareholders v. Ontario Securities Commission*, [2001] 2 S.C.R. 132 ("*Asbestos*"), the Commission's public interest mandate is neither remedial nor punitive; instead, it is protective and preventive, and it is intended to prevent future harm to Ontario's capital markets (at para. 42). Specifically:

> … the above interpretation is consistent with the scheme of enforcement in the Act. The enforcement techniques in the Act span a broad spectrum from purely regulatory or administrative sanctions to serious criminal penalties. The administrative sanctions are the most frequently used sanctions and are grouped together in s. 127 as "Orders in the public interest". Such orders are not punitive: *Re Albino* (1991), 14 O.S.C.B. 365. Rather, the purpose of an order under s. 127 is to restrain future conduct that is likely to be prejudicial to the public interest in fair and efficient capital markets. The role of the OSC under s. 127 is to protect the public interest by removing from the capital markets those whose past conduct is so abusive as to warrant apprehension of future conduct detrimental to the integrity of the capital markets: *Re Mithras Management Ltd.* (1990), 13 O.S.C.B. 1600. In contradistinction, it is for the courts to punish or remedy past conduct under ss. 122 and 128 of the Act respectively: see D. Johnston and K. Doyle Rockwell, *Canadian Securities Regulation* (2nd ed. 1998), at pp. 209-11.
>
> …
>
> … pursuant to s. 127(1), the OSC has the jurisdiction and a broad discretion to intervene in Ontario capital markets if it is in the public interest to do so. … In exercising its discretion, the OSC should consider the protection of investors and the efficiency of, and public confidence in, capital markets generally. In addition, s. 127(1) is a regulatory provision. The sanctions under the section are preventive in nature and prospective in orientation.
>
> (*Asbestos*, *supra* at paras. 43 and 45 [emphasis added])

[37] In determining the appropriate sanctions to order in this matter, I must keep in mind the Commission's preventive and protective mandate set out in section 1.1 of the Act, and I must also consider the specific circumstances in this case and ensure that the sanctions are proportionate (*Re M.C.J.C. Holdings*, (2002), 25 O.S.C.B. 1133 at 1134).

[38] The case law sets out the following list of non-exhaustive factors that are important to consider when imposing sanctions:

(a) the seriousness of the allegations;

(b) the respondent's experience in the marketplace;

(c) the level of a respondent's activity in the marketplace;

(d) whether or not there has been a recognition of the seriousness of the improprieties;

(e) the need to deter a respondent, and other like-minded individuals, from engaging in similar abuses of the capital markets in the future;

(f) whether the violations are isolated or recurrent;

(g) the size of any profit gained or loss avoided from the illegal conduct;

(h) any mitigating factors, including the remorse of the respondent;

(i) the effect any sanction might have on the livelihood of the respondent;

(j) the effect any sanction might have on the ability of a respondent to participate without check in the capital markets;

(k) in light of the reputation and prestige of the respondent, whether a particular sanction will have an impact on the respondent and be effective;

(l) the size of any financial sanctions or voluntary payment when considering other factors.

(*Re M.C.J.C. Holdings*, (2002), 25 O.S.C.B. 1133 at 1136 and *Re Belteco Holdings Inc.* (1998), 21 O.S.C.B. 7743 at 7746)

[39] The applicability and importance of each factor will vary according to the facts and circumstances of each case.

[40] Deterrence is another important factor that the Commission could consider when determining appropriate sanctions. In *Re Cartaway Resources Corp.*, [2004] 1 S.C.R. 672 ("*Cartaway*"), the Supreme Court of Canada explained that deterrence is "…an appropriate, and perhaps necessary, consideration in making orders that are both protective and preventive" (at para. 60). Further, the Supreme Court emphasized that deterrence may be specific to the respondent or general to deter the public at large:

> Deterrent penalties work on two levels. They may target society generally, including potential wrongdoers, in an effort to demonstrate the negative

> consequences of wrongdoing. They may also target the individual wrongdoer in an attempt to show the unprofitability of repeated wrongdoing. The first is general deterrence; the second is specific or individual deterrence: see C. C. Ruby, *Sentencing* (5th ed. 1999). In both cases deterrence is prospective in orientation and aims at preventing future conduct.
>
> (*Cartaway*, *supra* at para. 52)

[41] As stated above, the sanctions imposed must be protective and preventive. The role of the Commission is to impose sanctions that will protect investors and the capital markets from exposure to similar conduct in the future. As articulated by the Commission in *Re Mithras Management Inc.* (1990), 13 O.S.C.B. 1600:

> … the role of this Commission is to protect the public interest by removing from the capital markets -- wholly or partially, permanently or temporarily, as the circumstances may warrant -- those whose conduct in the past leads us to conclude that their conduct in the future may well be detrimental to the integrity of those capital markets. We are not here to punish past conduct; that is the role of the courts, particularly under section 118 [now 122] of the Act. We are here to restrain, as best we can, future conduct that is likely to be prejudicial to the public interest in having capital markets that are both fair and efficient. In so doing we must, of necessity, look to past conduct as a guide to what we believe a person's future conduct might reasonably be expected to be; we are not prescient, after all.
>
> (*Mithras*, *supra* at 1610 and 1611)

VI. Appropriate Sanctions in this Case

1. Specific Sanctioning Factors Applicable in this Matter

[42] Overall, the sanctions I impose must protect investors and Ontario capital markets by barring or restricting Brown and JFM from participating in those markets in the future.

[43] In considering the sanctioning factors set out above in the case law, I find the following specific factors and circumstances to be relevant in this matter:

(a) <u>The seriousness of the allegations:</u> The Respondents breached a number of key provisions of the Act. When Respondents breach multiple sections of the Act, the Commission may consider the seriousness of the breaches both individually and collectively.

In particular, the Commission found that Brown and JFM failed to uphold their statutory duty of care toward unitholders. Brown and JFM did not act in the best interests of the Funds, and thereby breached their statutory duty

of care under section 116 of the Act by engaging in the following conduct (see paras. 184 to 189 of the Merits Decision):

(i) failing to record the off-book purchases;

(ii) failing to maintain proper daily NAV calculations;

(iii) borrowing against JEGF's assets through the JEGF custodial account;

(iv) engaging in prohibited investments;

(v) failing to maintain account books and records;

(vi) failing to advise NBCN of incorrect transfers and purchases of JEGF units;

(vii) failing to require Brown, JFM and related parties to settle trades with T+3 business days; and

(viii) failing to be properly registered as a mutual fund dealer.

Specifically, with respect to the failure to maintain proper records, Brown admitted during his voluntary interview with Staff that he not only failed to maintain proper records for Juniper, but took active steps not to correct inaccuracies with NBCN in order to avoid looking foolish to NBCN (Merits Decision, *supra* at para. 147).

When Brown did provide NBCN with a reconciliation spreadsheet, he was unable to explain the reason for not reconciling errors in his records (Merits Decision, *supra* at para. 151). In my view, Brown's failure to maintain proper books and records led to the very type of lack of transparency that this Commission is wary of and led to breaches of subsection 19(1) of the Act and NI 81-102 and NI 81-106.

The Merits Decision also outlined a number of inaccurate statements, made in the simplified prospectus, information circular and AIF, contrary to subsection 56(1) of the Act and subsection 15.2(1) of NI 81-102. These statements were misleading, breached the disclosure obligations in the Act and amounted to serious misconduct by the Respondents. For example, the Respondents materially overstated the asset value of the funds managed by JFM. JFM represented that it managed assets of $130 million when in fact it managed only $15 million worth of assets (Merits Decision, *supra* at para. 171).

I agree with Staff's submission that the conduct in this matter is serious and undermines investor protection and confidence and the integrity of the Ontario capital market.

(b) Whether the Respondents' violations are isolated or recurrent: Brown's record keeping mistakes were a reoccurring problem and he failed to fix these mistakes once they came to his knowledge. This was not an isolated event. For example, as stated in paragraph 152 of the Merits Decision:

> During the Brown Interviews, Brown explained that he recorded certain transactions as "buys" instead of "transfers" by his own mistake but that he did not correct these transactions with NBCN. His reason was simply that he failed to understand any need to make any corrections. [emphasis added]

Both the Receiver and Staff concluded that material errors were made in respect of the Funds' records as a result of these ongoing record keeping mistakes (Merits Decision, *supra* at para. 154).

(c) The Respondents' experience in the marketplace: The Commission has found that a registrant is expected to have a higher level of awareness of their duties than a non-registrant and that, consequently, a registrant's breach of Ontario securities law is very serious as they ought to have known to comply with Ontario securities law.

In the case before me, Brown was the president of JFM, the fund manager, trustee and fund administrator of the Funds since approximately May 2004 when he acquired all shares of JFM. Brown was also the president of Polysecurities Inc., which was registered as a limited market dealer with the Commission. As for Brown's registration history with the Commission, evidence of section 139 certificates showed that Brown was registered as a trading officer and was also officer, director and designated compliance officer of Polysecurities Inc. from August 22, 2002 until approximately the end of December 2005.

JFM was not registered with the Commission but was a market participant by virtue of being a fund manager for the Funds (I note the requirement for fund managers to be registered with the Commission only came into force on September 28, 2009).

The Merits Decision found that Brown and JFM failed to exercise the degree of care, diligence and skill that a reasonably prudent person would exercise in the circumstances in those positions held by these respondents. As a result, the Merits Decision concluded that Brown and JMF breached their statutory duty of care and acted contrary to subsection 116(10) of the Act (Merits Decision, *supra* at paras. 185-186)

(d) The Respondents' activity in the marketplace: Investor funds invested into the Funds was significant. JEGF was a mutual fund which had approximately $15 million in assets under administration and as of December 31, 2005, it had approximately 110 unitholders. JIF had approximately $350,000 in assets under administration and as of December 31, 2005 it had approximately 40 unitholders.

(e) Investor harm and impact on value of the Funds: The nature of Brown and JFM's misconduct impacted the value of the Funds, caused significant losses to the Funds' unitholders and compromised the integrity of and the confidence in, the capital markets. As found by the Commission in the Merits Decision at para. 156:

> The Respondents' poor recordkeeping has a significant impact on the Funds, resulting in a trail of miscalculations and errors throughout their history with RBCDS, Felcom, and NBCN and was likewise a trigger for both (1) NBCN to come to the Commission with their concerns; and (2) Chak to recommend a freeze on the bank accounts. Recordkeeping is vital for the proper, transparent maintenance of a fund and proper participation in the capital markets and the Respondents have failed to act responsibly and within the standards required in accordance with the Act and NI 81-102 and NI 81-106. [emphasis added]

Further, the Commission found that without proper unitholder records relation to the issue and redemption of and distributions of the Funds, it is impossible to calculate the proper NAV of the units and therefore the proper records of the funds (Merits Decision, *supra* at para. 155).

In addition, at paragraph 154 of the Merits Decision, the Commission found the following detrimental impact on the Funds was as follows:

> … The NAV statements for JEGF were overstated in value with respect to its 10% investment in PAM, which the Receiver determined did not have any assets. Further, the JEGF assets were encumbered in the NBCN JFM Custodial Account in order to borrow funds for non-equity related uses, and which encumbrances were not disclosed to the unitholders.

Furthermore, the Merits Decision found that JEGF held 88% of the shares in PAM, which investment was contrary to subsections 111(2) and 111(3) of the Act (Merits Decision, *supra* at para. 180). Investors were harmed by the fact that this illegal investment was made. PAM was a private company whose securities were not exchange traded and thus had an

illiquid market and in addition PAM had no assets (see Mertis Decision, *supra* at paras. 10, 88 and 119).

Moreover, the borrowing practice engaged in by the Funds put the Funds at risk. Specifically, Brown borrowed up to $1,248,000 from the NBCN JEGF Custodial Account (Merits Decision, *supra* at para. 179). This money was ultimately applied against the mortgage of Brown's residential property. A debit in the NBCN JEGF Custodial Account would first be covered by liquidating JEGF's assets and then claiming against JFM. As explained in the Merits Decision at paragraph 180:

> We find that JEGF made an investment by way of loan to Brown and JFM contrary to subsections 111(1) and 112 of the Act, and section 2.6 of NI 81-102. JFM caused JEGF to knowingly enter into a prohibited arrangement resulting in JEGF being liable in respect of JFM's actions. The borrowing that occurred in this account was not *de minimus* and was not used for short term cash management of redemptions. Although JFM was permitted to borrow against the JEGF assets in the NBCN JEGF Custodial Account for specific purposes, JFM and Brown used borrowed funds from that account for purposes contrary to the Act and, in doing so, placed the JEGF assets at risk. Further, JFM was prohibited from making an investment in PAM, contrary to subsections 111(2) and 111(3) of the Act.

Overall, the Merits Decision found that the evidence presented demonstrated that Brown and JFM breached their statutory obligations under section 116 of the Act by failing to exercise the degree of care, diligence and skill that a reasonably prudent person would exercise by specifically:

> (i) Failing to advise NBCN of incorrect transfers-in and purchases of JEGF units when the Respondents knew they had given NBCN incorrect information;
>
> (ii) Failing to record the Off-Book Purchases;
>
> (iii) Failing to maintain proper daily NAV calculations for the units in the Funds;
>
> (iv) Borrowing against JEGF's assets through the NBCN JEGF Custodial Account for purposes that were not related to JEGF;
>
> (v) Failing to require related parties to settle purchases and redemptions within three business days of the trade date;

(vi) Engaging in prohibited investments;

(vii) Failing to maintain proper and accurate books and records of the Funds; and

(viii) JFM failing to be properly registered as a mutual fund dealer.

(Merits Decision, *supra* at para. 186)

(f) The size of any profit gained or loss avoided from the illegal conduct: As a result of their non-compliance of Ontario securities law, Brown and JFM obtained the following amounts:

i. As a result of the off-book transactions, JMF and Brown obtained $2,247,998.74 from JFM's margin account and Brown's margin account;

ii. Brown and related parties benefitted in the amount of $83,077.97 through the settlement of approximately 16 trades in JEGF units outside the statutory T+3 time frame as set out in the Receiver's Fifth Report;

iii. As a result of the above debit balances, NBFL filed a proof of claim in the Juniper receivership in the amount of $451,557.56 and NBCN filed a proof of claim in the amount of $2,291,043.38 and the Receiver agreed to a payment of $2,154,389 to settle these proof of claims, which resulted in an aggregate loss to NBCN and NBFL (including interest) of $588,212; and

iv. As set out in the Agreed Statement of Facts filed by the parites. JFM received $1,840,063.89 from JFM's NBCN margin account and Brown received $407,934,85 from Brown's NBFL margin account, for a total margin debit of $2,247,988.74.

(g) Deterrence: As set out in the case law, both specific and general deterrence are very important considerations. I agree with Staff's submission that any sanctions imposed must be proportionate to Brown's and JFM's egregious conduct and will serve as a specific and general deterrent.

(g) Mitigating factors: I note that Brown did try to cooperate with Staff in this matter. Specifically, Brown reached a 19 page agreed statement of facts with Staff. In addition, after the OSC investigation commenced, and after the initial cease trade order was issued, the Respondent met voluntarily

with Staff on four different instances to answer Staff's questions and assist in Staff's investigation. Brown also submitted that during the period April to June 2008, Staff and Respondent met to discuss and negotiate a settlement and that while unsuccessful, Brown should still get credit for his attempt to cooperate and resolve the matter.

2. Trading and Other Prohibitions

Trading

[44] Staff takes the position that in the circumstances of this case, it would be appropriate to order that Brown and JFM should be subject to permanent trading, acquisition, exemption and D&O bans based on their conduct. Staff referred us to the case *Re St. John* (1998) 32 O.S.C.B. 3851 at page 38 which sets out the principle that individuals who engage in abusive conduct in the capital markets should be permanently banned from participating in those capital markets and Staff submitted that this principle should apply in the present case as well:

> In our view [the respondent] is not a person whom we can safely trust to participate in the capital markets in any way. We have no confidence whatsoever that if [the respondent] is permitted to participate as an investor for [their] own account, [the respondent] will not once again push the envelope by engaging in conduct which is detrimental to other and abusive of our capital markets. Accordingly, we order that trading in any securities by [the respondent] cease permanently.

[45] Staff also submitted that participation in the capital markets is a privilege, not a right (*Erikson v. Ontario (Securities Commission)*, [2003] O.J. No. 593 (Sup. Ct.) at para. 56). As stated in *Manning v. Ontario (Securities Commission)*, [1996] O.J. No. 3414 at para. 47:

> There is no right of any individual to participate in the capital markets in Ontario. … the Act provides certain exemptions which allows individuals to make certain trades without being registered, however, the OSC has explicit jurisdiction to remove the exemptions if an individual engages in conduct contrary to the letter or spirit of the Act, whether such conduct causes damage to investors or is detrimental to the integrity of the capital markets.

[46] Brown disagreed with Staff's submission that a permanent trading ban is necessary. In his view, a trading ban of two years with a carve-out to permit him to trade in his own account and children's accounts through a registered dealer would be appropriate.

[47] In Staff's view, such a carve-out should not be granted in situations where the respondent cannot be trusted to govern themselves appropriately in the capital markets. Brown's misconduct shows a pattern of refusing to follow rules and correct errors he made with the Funds. Staff argues in the alternative that if a limited carve-out is

provided to permit Brown to trade securities listed on a defined stock exchange within his RRSP and children's RESPs, then the Commission should follow its practice and order that any carve-out only becomes effective once the monetary sanctions and costs imposed have been paid.

[48] With respect to the appropriate length of a trading ban, I am mindful that there was harm to the Funds' unitholders. As set out in the Merits Decision at paragraph 11, "Ultimately, however, the Respondents were not competent to participate in the capital markets and, as a result, caused financial harm to the Funds' unitholders". To summarize,

> Brown and JFM engaged in improper encumbrances of the Funds by permitting JEGF to guarantee JFM's balances in its NBCN margin accounts. The Respondents encumbered the JEGF assets when funds were borrowed for non-JEGF purposes. While JFM, as trustee, would have been permitted to use borrowed funds on a *de minimis* basis for purposes of short term cash management of JEGF redemptions and to settle securities transactions, they did not borrow for these purposes. The encumbrances were improper, not disclosed to the JEGF unitholders and contrary to the public interest.
>
> The Respondents also diverted funds by using the margin available in the NBCN JEGF Custodial Account (defined below) for their personal benefit. The Respondents borrowed funds from that account for purposes contrary to the Act and, in doing so, placed the JEGF assets at risk. The assets in the NBCN JEGF Custodial Account were assets belonging to JEGF and not to the Respondents. [emphasis added]
>
> (Merits Decision, *supra* at paras. 8 and 9)

[49] As, well, the Respondents breached multiple provisions of the Act and National Instruments, including:

(a) The Respondents failed to keep books, records and other documents as are necessary for the proper recording of its business transactions and financial affairs and the transactions that it executes on behalf of the Funds in accordance with Ontario securities law, contrary to subsection 19(1) of the Act and section 18.1 of NI 81-102, and failed to record JEGF's daily NAV calculations contrary to subsection 14.2(1) and section 14.4 of NI 81-106;

(b) JFM acted as a mutual fund dealer for purchases and redemptions in units of the Funds without being registered as a mutual fund dealer contrary to subsection 25(1)(a) of the Act, which was in force at the time the conduct occurred;

(c) The Respondents failed to provide full, true and plain disclosure in the JEGF simplified prospectus of all material facts contrary to subsection 56(1) of the Act and the JEGF simplified prospectus, information circular and AIF contained

certain inaccurate and misleading statements contrary to subsection 15.2(1) of NI 81-102;

(d) JEGF provided prohibited loans and held prohibited investments contrary to sections 111 and 112 of the Act and paragraph 2.6 of NI 81-102 and, in doing so, the Respondents breached their custodial obligations contrary to subparagraphs 6.1(1) and (6) of NI 81-102;

(e) The Respondents breached their statutory duty of care contrary to subsection 116(1) of the Act and have failed to properly settle and deposit funds in accordance with sections 9.4 and 11.1 of NI 81-102; and

(f) Brown, as an officer and director of JFM, authorized, permitted and acquiesced in breaches of subsections 19(1), 25(1)(a), 56(1), 111, 112, and 116(1) of the Act, subsections 2.6, 6.1(1), 6.1(6), 9.4, 11.1, 15.2(1) and 18.1 of NI 81-102, and subsections 14.2(1) and 14.4 of NI 81-106 and, pursuant to section 129.2 of the Act is liable for JFM's breaches of Ontario Securities law and engaged in a conduct contrary to the public interest.

(Merits Decision, *supra* at para. 192)

[50] Considering the multiple breaches, the harm to the Funds' unitholders, the seriousness of the conduct in this matter as described above, I find it appropriate to order that both Brown and JFM shall cease trading and acquiring securities permanently and any exemptions in Ontario securities law do not apply to them permanently.

[51] With respect to any trading carve-out, I find that a trading carve-out is only appropriate once Brown has paid in full the administrative penalty, disgorgement and costs amounts ordered in this decision. Once these amounts are paid, the following carve-out shall be available to Brown:

> Upon payment in full of the administrative penalty, disgorgement and costs ordered in this matter, Brown is permitted to acquire for the account of any registered retirement savings plan, registered pension plan, tax free savings accounts, self-directed retirement savings plans, and Registered Education Savings Plan as defined in the Income Tax Act, R.S.C. 1985, c.1, as amended, and/or for any RESP accounts for which Brown and/or his spouse have sole legal and beneficial ownership or are a sponsor, and such trading shall be carried out solely through an appropriately registered dealer in Canada (which dealer must be given a copy of this Order):(i) any "exchange-traded security" or "foreign exchange-traded security" within the meaning of National Instrument 21-101-Marketplace Operation provided that he does not own beneficially or exercise control or direction over more than 5 percent of the voting or equity securities of the issuer(s) of any such securities, or (ii) any security issued by a mutual fund that is a reporting issuer; (iii) and exemptions are permitted for the purpose of trades described herein.

Director and Officer Bans

[52] Staff also requested that Brown resign from any position that he may hold as a director or officer of any issuer, registrant or investment fund manager and that he be prohibited from becoming or acting as a director or officer of any issuer, registrant or investment fund manager permanently. Further, Staff requested that Brown be prohibited from becoming or acting as a registrant, an investment fund manager or as a promoter.

[53] Brown objected to such a broad ban on his activities in the capital markets. Specifically, Brown submitted that:

> To say that I cannot be a director or officer ever again, again is completely unfair and affects livelihood and income-related livelihood. I think something more along the lines of not being a director or officer of a reporting issuer or a public company participating in the capital markets in Ontario for a period of time is more consistent with what I've read in other sanctions.
>
> (November 22, 2013 Transcript, page 20, lines 8-15)

[54] Staff submitted in reply that a carve-out to permit Brown to be an officer and director of a non-reporting issuer is difficult to permit when there are currently no details about the type of private company and its activities. Staff pointed out that such carve-outs have been provided to respondents in the past for their private businesses, but only when there was sufficient detail to understand the activity that the business would be involved in. For example, in a settlement in the *Re Sbaraglia* (2013), 36 O.S.C.B. 2572 the respondent was dentist and was permitted to remain an officer and director of his dentistry company.

[55] In *Mithras*, the Commission explained that the removal of individuals from the capital markets is an effective mechanism for protecting the public. One such method is to ban individuals from becoming officers or directors and holding other positions as registrants. This prevents such persons from participating in the capital markets through positions of control or direction within an issuer, registrant or investment fund manager.

[56] I find that it is appropriate that Brown resign from any positions he holds as a director or officer of any issuer, registrant or investment fund manager and that he be prohibited from becoming or acting as a director or officer of any issuer, registrant or investment fund manager permanently. In addition, Brown shall be prohibited from becoming or acting as a registrant, an investment fund manager or as a promoter.

[57] In my view, the use of such bans will ensure that Brown will not be put in a position of direction or trust with any issuer, registrant or investment fund manager. This is important because the misconduct in this matter took place when Brown was a director of JFM (the fund manager, trustee and fund administrator of the Funds) and is president, chief executive officer and sole shareholder of JFM. Brown was the principal administrator and controlled the daily operations of JFM (Merits Decision, *supra* at paras.

32 and 35). By his own admission, Brown was the primary person in charge of all aspects of JFM and the Funds and it was found in the Merits Decision that Brown and JFM breached their statutory duty of care owed to the Funds and unitholders (Merits Decision, *supra* at paras. 189 and 190).

[58] The positions of officers and directors carry with them the responsibility to act in the best interests of the shareholders and/or unitholders. I refer to Staff's submissions on this point that are set out in paragraph 184 of the Merits Decision:

[59] Staff rely on the jurisprudence developed under fiduciary duty provisions found in section 134 of the Ontario *Business Corporations Act*, R.S.O. 1990, c. B.16 and section 122(1) of the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44. Staff submits that the principles developed in regard to fiduciary duties owed by directors to corporations are applicable by analogy to the fiduciary duty owed by mutual fund managers to the mutual fund unitholders. Staff rely on one of the seminal cases regarding fiduciary duty:

> Staff rely on the jurisprudence developed under fiduciary duty provisions found in section 134 of the Ontario *Business Corporations Act*, R.S.O. 1990, c. B.16 and section 122(1) of the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44. Staff submits that the principles developed in regard to fiduciary duties owed by directors to corporations are applicable by analogy to the fiduciary duty owed by mutual fund managers to the mutual fund unitholders. Staff rely on one of the seminal cases regarding fiduciary duty:
>
> > The statutory fiduciary duty requires directors and officers to act honestly and in good faith vis-à-vis the corporation. They must respect the trust and confidence that have been reposed in them to manage the assets of the corporation in pursuit of the realization of the objects of the corporation. They must avoid conflicts of interest with the corporation. They must avoid abusing their position to gain personal benefit. They must maintain the confidentiality of information they acquire by virtue of their position. Directors and officers must serve the corporation selflessly, honestly and loyally: see K. P. McGuinness, *The Law and Practice of Canadian Business Corporations* (1999), at p. 715. (*Peoples Department Stores Inc. (Trustee of) v. Wise*, 2004 SCC 68, [2004] 3 SCR 461 at para. 35)

[60] Brown's conduct in this matter fell short of what is expected of an officer and director of an issuer, registrant and/or investment fund manager. Also, his conduct was only possible by virtue of the fact that Brown was the principal administrator and controlled the daily operations of JFM. In particular, his position enabled him to divert funds by using margin available in a custodial account for his personal benefit and borrowed funds for purposes contrary to the Act and in doing so put the assets of JEGF at risk. As a result, Brown should be permanently banned from acting as a director or

officer of any issuer, registrant or investment fund manager and becoming a registrant, an investment fund manager or as a promoter.

[61] At this time I agree with Staff that there is insufficient information to provide Brown with a carve-out to permit him to be an officer and director of a private company. There is also the risk that Brown would use any such private company to participate in the capital markets and that would not be acceptable to the Commission.

[62] The combined sanctions of trading bans and prohibitions on participating in the Ontario capital markets is intended to provide general and specific deterrence to help ensure that similar conduct does not take place in the future.

Reprimand

[63] As stated above, Brown breached multiple provisions of the Act and National Instruments. This conduct was contrary to the public interest.

[64] I find it appropriate that Brown be reprimanded. The reprimand is intended to provide strong censure of his misconduct and to impress on the public the importance of complying with the Act and National Instruments. Brown is hereby reprimanded for the conduct set out in the Merits Decision.

3. Administrative Penalty

[65] Paragraph 9 of subsection 127(1) of the Act provides that a person or company that has not complied with Ontario securities law can be ordered to "pay an administrative penalty of not more than $1 million for each failure to comply".

[66] The Commission has held that an administrative penalty should be of a magnitude sufficient to ensure effective specific and general deterrence. The goals of specific and general deterrence are most effectively met by administrative penalties that are proportional to each respondent's culpability in the matter. Important considerations in determining an administrative penalty may include: the scope and seriousness of a respondent's misconduct; whether there were multiple and/or repeated breaches of the Act; whether the respondent realized any profit as a result of his or her misconduct; the amount of money raised from investors; the harm caused to investors; and the level of administrative penalties imposed in other cases (*Re Goldpoint Resources Corporation et al* (2013), 36 O.S.C.B. 1464 at para. 75; and *Limelight, supra* at paras. 71 and 78).

[67] The significance of the quantum of an administrative penalty to be an effective deterrent was also emphasized by the Commission in *Re Rowan* (2010), 33 O.S.C.B. 91 at paragraph 74*:*

> An administrative monetary penalty may not act as a sufficient deterrent if its magnitude is inadequate compared with the benefit obtained by non-compliance. In some instances, even a $1 million administrative penalty may not act as a sufficient deterrent if the benefit of non compliance exceeded $1 million or if the probability of detection was very low. As

such, there is a need for regulatory sanctions to create economic incentives to foster compliance or alternatively, remove economic incentives for non-compliance.

[68] Staff submits that Brown and JFM should be subject to a $500,000 administrative penalty on a joint and several basis. Brown objects and submits that he should only be ordered to pay an administrative penalty in the range of $50,000 to $100,000. He submits that the cases relied on by Staff are not analogous to the facts in this case and that there is case law where much lower administrative penalties were imposed.

[69] In looking at the criteria to impose an administrative penalty set out above, I am influenced by the following:

- The misconduct in this matter is serious and was not an isolated occurrence described in paragraph 43 of these reasons.

- On a repeated basis, Brown did not rectify errors in the Funds' records. Specifically, the problems with the Funds' records are described as follows at paragraphs 154 to 164 of the Merits Decision:

  > We find that the activity in the Funds was inaccurately recorded. Both the Receiver and Staff concluded material errors in this regard. The NAV statements for JEGF were overstated in value with respect to its 10% investment in PAM, which the Receiver determined did not have any assets. Further, the JEGF assets were encumbered in the NBCN JFM Custodial Account in order to borrow funds for non-equity related uses, and which encumbrances were not disclosed to the unitholders.
  >
  > We find that the Respondents breached subsections 14.2(1) and 14.4 of NI 81-106 by failing to maintain proper books and records. Without proper unitholder records relating to the issue and redemption of securities and distributions of the Funds, it is impossible to calculate the proper NAV of the units and therefore the proper records of the Funds.
  >
  > The Respondents' poor recordkeeping had a significant impact on the Funds, resulting in a trail of miscalculations and errors throughout their history with RBCDS, Felcom, and NBCN and was likewise a trigger for both (1) NBCN to come to the Commission with their concerns; and (2) Chak to recommend a freeze on the bank accounts. Recordkeeping is vital for the proper, transparent maintenance of a fund and proper participation in the capital markets and the Respondents have failed to act responsibly and within the standards required in accordance with the Act and NI 81-102 and NI 81-106.

- As set out in paragraph 49 of these reasons, Brown and JFM breached multiple sections of the Act and National Instruments.

- Unitholders were harmed as described in paragraphs 43 and 48 of these reasons.

[70] In my view the imposition of an administrative penalty in the amount of $500,000 on Brown and JFM on a joint and several basis is in the range of administrative penalties imposed in other Commission cases dealing with fund managers.

[71] For example, in *Re Sextant Capital Management Inc.* (2011), 34 O.S.C.B. 5863, a case which also dealt with a fund manager breaching their statutory duties, the following administrative penalties were ordered against the respondents in that case: $1 million for Otto Spork, $250,000 for Ekonomidis and $50,000 for Natalie Spork. Like Brown, Otto Spork managed the Sextant Funds through companies he controlled. As a person in control who held the responsibility for the funds at issue, it was deemed appropriate that he pay the highest administrative penalty of $1 million. A distinguishing factor in this case is that Otto Spork was also found to commit fraud, and in general when fraud is committed, the seriousness of that misconduct merits higher sanctions. There are no allegations or findings of fraud against Brown and JFM in this case, although as discussed above, they still engaged in very serious misconduct. As a result, an administrative penalty of $500,000 is appropriate.

[72] In *Re Norshield Asset Management (Canada) Ltd.* (2010) 33 O.S.C.B. 2139 ("Norshield"), the Commission dealt with conduct related to the collapse of a hedge fund and investor losses of approximately $159 million. It was found that these respondents materially misled Staff, failed to safeguard Norshield's records and failed to deal fairly and honestly with clients. Given the loss of almost all of the $159 million invested by close to 2000 retail investors, the Commission ordered each of Smith and Xanthoudakis to pay administrative penalties of (i) $1 million for their breaches of section 2.1 of OSC Rule 31-505; (ii) $1 million for their breaches of section 19 of the Act; and (iii) $125,000 for misleading Staff contrary to subsection 122(1)(a) of the Act. In the present case, the losses were not as high as in *Norshield* and in the present case the Receiver did distribute monies to JEGF and JIF unitholders. As set out in paragraph 16 of the Merits Decision, "the Receiver gave evidence that 95% of JEGF assets have been distributed and there remains approximately $450,000 in trust to cover professional fees and final distributions". As a result, the administrative penalties imposed should be less than those in *Norshield*, and $500,000 is a more appropriate amount in the present case.

[73] Considering the amount ordered to be disgorged (discussed below) together with the totality of the sanctions imposed including permanent bans, and balancing the magnitude of the harm committed by Brown and JFM, the quantum of $500,000 (joint and several against Brown and JFM) will serve the necessary specific and general deterrent purposes.

[74] Therefore, the Brown and JFM shall pay an administrative penalty in the amount of $500,000 on a joint and several basis and this amount shall be designated for allocation or use by the Commission pursuant to subsection 3.4(2)(b)(i) or (ii) of the Act.

4. Disgorgement

[75] Paragraph 10 of subsection 127(1) of the Act provides that a person or company that has not complied with Ontario securities law can be ordered to disgorge to the Commission "any amounts obtained" as a result of the non-compliance.

[76] The Commission has previously held that "all money illegally obtained from investors can be ordered to be disgorged, not just the 'profit' made as a result of the activity". As explained in *Limelight*, *supra* at paragraph 49:

> We note that paragraph 10 of subsection 127(1) of the Act provides that disgorgement can be ordered with respect to "any amounts obtained" as a result of non-compliance with the Act. Thus, the legal question is not whether a respondent "profited" from the illegal activity but whether the respondent "obtained amounts" as a result of that activity. In our view, this distinction is made in the Act to make clear that all money illegally obtained from investors can be ordered to be disgorged, not just the "profit" made as a result of the activity. This approach also avoids the Commission having to determine how "profit" should be calculated in any particular circumstance. Establishing how much a respondent obtained as a result of his or her misconduct is a much more straightforward test. In our view, where there is a breach of Ontario securities law that involves the widespread and illegal distribution of securities to members of the public, it is appropriate that a respondent disgorge all the funds that were obtained from investors as a result of that illegal activity. In our view, such a disgorgement order is authorized under paragraph 10 of subsection 127(1) of the Act.

[77] *Re Limelight Entertainment Inc.*, (2008), 31 O.S.C.B. 12030 ("*Limelight*"), sets out a non-exhaustive list of disgorgement factors to consider at paragraph 52, which include:

> (a) whether an amount was obtained by a respondent as a result of non-compliance with the Act;
>
> (b) the seriousness of the misconduct and the breaches of the Act and whether investors were seriously harmed;
>
> (c) whether the amount that a respondent obtained as a result of non-compliance with the Act is reasonably ascertainable;
>
> (d) whether the individuals who suffered losses are likely to be able to obtain redress; and
>
> (e) the deterrent effect of a disgorgement order on the respondents and other market participants.

[78] The *Limelight* case also states that Staff has the onus to prove on a balance of probabilities the amount obtained by a respondent as a result of his or her non-compliance with the Act. Subject to that onus, any risk of uncertainty in calculating disgorgement should fall on the wrongdoer whose non-compliance with the Act gave rise to the uncertainty (*Limelight*, *supra* at para. 53).

[79] In addition, in *Re Maple Leaf Investment Fund Corp.* (2012), 35, O.S.C.B. 3075, the Commission recognized that where appropriate, disgorgement ordered should be tailored to amounts specifically obtained by individuals and calculated net of repayments. For example, at paragraphs 34 to 36 of that decision, the Commission explained:

> We note that of the total amount of $4,475,000 that was raised, $1,342,894 was returned to investors. More specifically, $1,275,000 was returned to investors and $67,894 was paid out as purported interest to holders of the MLIF bonds (Merits Decision, *supra*, at para. 201). To avoid double counting, in our determination of the disgorgement order to be made, we find it appropriate to take into account that some of the funds have been returned to investors in the form of purported redemptions or interest payments.
>
> The evidence shows that Tulsiani and Tulsiani Investments obtained $70,000 in commissions (Merits Reasons, *supra*, at para. 195). We find that it is appropriate to require Tulsiani and Tulsiani Investments to disgorge the $70,000 that they received to ensure that they do not retain any financial benefit from their respective breaches of the Act and to provide general and specific deterrence. As the role of Tulsiani and Tulsiani Investments was limited to the solicitation of funds and not their application, we do not find it appropriate to order that they jointly and severally disgorge $1,712,082 as requested by Staff.
>
> In our view, Chau and MLIF should jointly and severally disgorge the net amount that they obtained through the scheme, being $3,132,106, and that Tulsiani and Tulsiani Investments should be jointly and severally liable with Chau and MLIF to disgorge the commissions that they obtained, being $70,000. Accordingly, we make an order to that effect, namely, that Chau and MLIF jointly and severally disgorge $3,062,106 and MLIF, Chau, Tulsiani and Tulsiani Investments jointly and severally disgorge $70,000.

[80] Staff takes the position that Brown and JFM should be ordered to disgorge $2,331,076.71 on a joint and several basis. No other regulatory or civil order has been made in respect of these amounts. According to Staff the amount to be disgorged is based on the following factors:

- investors received $2,154,389 less as a result of the Receiver's payment to NBFL/NBLN in settlement of the proof of claims,

- the Receiver concluded that NBCN and RBCDS were entitled to assume that valid JEGF units were being created,

- the Respondents' breaches of securities law are serious as discussed in detail in these reasons,

- most importantly, the amounts gained by the Respondents have been agreed upon by the parties and established by the evidence,

- the JEGF and JIF unitholders did not approve any holdback for a claim against JFM and/or Brown and therefore no civil claims have been advanced for these amounts, and

- a disgorgement order is needed to ensure that Brown and JFM do not benefit from their serious breaches of Ontario securities law.

[81] Staff also points out that unitholders bore the costs of the Receivership, however these amounts have not been included in the requested disgorgement order as they were not amounts obtained by the Respondents.

[82] Brown submits that he should not be held to disgorge any funds. According to the funds he received from the NBCN margin account were appropriate under the terms of the margin agreement and Brown did intend to pay them back but was prevented from doing so. As explained by Brown in his written submissions at pages 39 and 40:

> Concerning disgorgement, the Respondent borrowed monies from NBCN under its margin account terms and conditions as per the account agreement. It did not obtain monies from NBCN. NBCN loaned JFM monies as per the NBCN-JFM Margin Accountholder agreement. Furthermore, the Respondent along with one of JFM's Directors visited and voluntarily informed NBCN that the pledged security in the JFM margin account was deficient, and that it was JFM's intention and objective, to either make arrangements to repay the loan, or simply replace the amount of the JEGF unit deficiency with other tangible financial or real assets, which NBCN initially and in the first instance agreed to with the Respondent.
>
> When the Respondents had the financial resources to repay NBCN, they were denied a fundamental right in the first instance by NBCN, and thereafter by Staff, under the Margin Account terms and conditions to remedy any margin account deficiencies. Now some seven years later, and after the Respondents have been left financially in distress by this entire ordeal, Staff is seeking a disgorgement for monies the Respondent has been found to have obtained. First off, and as noted herein already, the Respondent did not obtain these monies, it borrowed these monies based

> on what it thought was an NBCN margin account that was in good standing.

[83] In addition, Brown submits that the Commission should take into account his financial status and his own economic losses he experienced in this matter. Specially, as hesubmits at page 40 of Brown's written submissions:

> Furthermore, the type of disgorgement that Staff is seeking does not consider the economic losses suffered by the Respondent which in other Security Commission jurisdictions are used and balanced against monies Respondents have been found to have received through security Act breaches. It is the view of the Respondents, that due to the uniqueness of the JFM and JEGF matter, and financial losses incurred by the Respondents as a JEGF unitholder and as shareholders of JFM, these quantifiable losses must be factored and balanced against the disgorgement amount that Staff is seeking.

[84] I find it is appropriate for Brown and JFM to disgorge $2,331,076.71 on a joint and several basis. In my view, an order for disgorgement of the entire amount of the margin debit balances incurred by Brown and JFM (an amount which is ascertainable and agreed by the parties) acknowledges the objective of general and specific deterrence. This amount was obtained through conduct that did not comply with the Act and as discussed about this conduct was very serious in nature and involved multiple breaches of provisions of the Act and National Instruments. There are also no other civil claims relating to this amount.

[85] It is also appropriate that the entire amount of $2,331,076.71 be disgorged on a joint and several basis since Brown essentially ran JFM and was the principal administrator and controlled the daily operations of JFM.

[86] Therefore, Brown and JFM shall disgorge, on a joint and several basis the amount of $2,331,076.71 and this amount shall be designated for allocation or use by the Commission pursuant to subsection 3.4(2)(b)(i) or (ii) of the Act.

VII. Costs

[87] Pursuant to section 127.1 of the Act, the Commission has the discretion to order a person or company to pay the costs of the investigation and hearing if the Commission is satisfied that the person or company has not complied with the Act or has not acted in the public interest. Rule 18.2 of the Commission's *Rules of Procedure* (2010), 33 O.S.C.B. 8017 sets out a number of factors a Panel may consider in exercising its discretion to order costs.

[88] Staff requested, pursuant to subsection 127.1(1) and (2) of the Act, that Brown and JFM be ordered to pay, jointly and severally, $669,136.76 to cover the costs related to the investigations and merits hearing in this matter and disbursements. Staff submits that they took a conservative approach as they have only claimed costs for two Staff

members on this file, Mr. Ferris (the senior litigator) and Ms. Chak (the senior forensic accountant). Staff points out that they did not claim costs for five other enforcement staff employees who worked on the file, whose costs totalled an aggregate of $155,885.

[89] Staff submits that the costs claimed in this case as a result of the following factors:

(a) comprehensive investigation resulted in 45 large binders of disclosure;

(b) the need to obtain a Temporary Cease Trade Order given the issues raised by NBCN about the accuracy of the Funds' NAV and the number of JEGF units;

(c) the need for nine attendances to extend the temporary order, one appearance to vary the cease trade order and seven appearances to schedule dates for the hearing on the merits;

(d) requests for two Commission Directions to freeze eight separate accounts of Brown and JFM bank accounts when Brown failed to disclose all JEGF bank accounts;

(e) the appointment of Grant Thornton Ltd. as receiver on May 18, 2006 when Brown would not provide Staff with information on the purchase proceeds of the off-book transactions;

(f) following up on Felcom documents once further records were received;

(g) multiple adjournment requests made by Brown;

(h) Brown's unwillingness to admit breaches of Ontario securities law;

(i) Brown's failure to provide complete information to Staff when initially requested; and

(j) ten appearances after the conclusion of Staff's evidence during the merits hearing to schedule dates for Brown to call witnesses and testify himself and then his failure to do so.

[90] In support of the costs request, Staff provided a Bill of Costs and detailed dockets (as required by Rule 18.1(2)(b) of the Commission's *Rules of Procedure*). These timesheets provided dates, numbers of hours worked and details of the tasks performed by each of the individuals listed in the Bill of Costs. The Bill of costs was broken down to show the costs claimed over seven distinction time periods:

Time period	Event that triggered the new time period	Costs incurred
Feb. 2, 2006 to May 18, 2006	Juniper file opened on Feb. 6, 2006	$83,210.00
May 19, 2006 to March 31, 2008	Appointment of Receiver on May 18, 2006	$271,200.00
April 1, 2008 to June 6, 2008	First adjournment request by Brown on March 31, 2008	$41,042.50
June 7, 2008 to April 30, 2010	Staff's adjournment request on June 6, 2008	$35,836.25
May 1, 2010 to Nov. 5, 2010	New hearing dates scheduled on April 30, 2010	$59,285.00
Nov. 6, 2010 to Sept. 29, 2011	Hearing dates adjourned due to Commissioner availability on November 5, 2010	$85,677.50
Sept. 30, 2011 to Sept. 4, 2012	Conclusion of Staff's evidence in the merits hearing on September 29, 2011 and oral submissions in the merits hearing on September 4, 2012	$82,792.50
TOTAL COSTS		$659,043.75
DISBURSEMENTS		$10,093.01
GRAND TOTAL		$669,136.76

[91] Staff explained that its costs were calculated in accordance with Staff's schedule of hourly rates for various members of Staff of the Enforcement Branch ($205 an hour for Litigation Staff and $185 for Investigation Staff).

[92] Brown objected to the costs requested by Staff. In his written submissions, Brown stated that costs ought to be capped at $50,000.

[93] First of all, Brown submitted that there is no way for him to verify the times and activities recorded on Staff's Bill of Costs, which in his view seem excessive and exaggerated. Further, Brown submits that extra costs were incurred as a result of adjournments that were granted for Staff and because the Commission did not have availability. As stated by Brown on page 36 of his written submissions:

> It is the Respondent's view that the docket entries for Staff and its Legal team are skewed and excessive, and there is no means to validate these dockets.
>
> The Respondents are of the view that the excessive hours spent by Staff were done at its own discretion, to their own demise, when two pre-emptive merit Hearings, were adjourned: one in June 2008, by Staff, and the other in November 2010 by Staff and Commission, which are clearly circumstances outside the Respondent's control, but to which Staff is still seeking punishment against the Respondent's for these adjournments.
>
> Naturally, both adjournments have severely prejudiced the Respondent, causing them to incur additional and unnecessary costs related to this matter, which Staff is now attempting to recover. How can that be deemed fair and equitable?

[94] Brown emphasized that he was prejudiced by the adjournments as he was ready to proceed with the hearing on the merits in 2008. Therefore, in his view, at a minimum, he should not be responsible for any of the costs incurred after June 7, 2008. Referring back to the costs table in paragraph 90, costs incurred from February 2, 2006 up until June 6, 2008 covered costs in the first three time periods totalling $395,452.50 ($83,210.00 + $271,200.00 + $41,042.50).

[95] Brown also submitted that this matter was not all that complicated and Staff's costs should have been less. As submitted at page 37 of his written submissions:

> Other matters before the Commission, with much more complexity, and in certain cases, requiring other enforcement measures, have been heard and adjudicated by the Commission resulting, in substantially lesser costs ordered against that respective Respondent(s).
>
> In the Respondent's view, the costs being sought by Staff is outrageous and terribly excessive and does not account for any the prejudices that have been imposed on the Respondents due to the two (2) adjourned merit Hearings, outside of the Respondent's control. Furthermore, there is no way the Respondents can audit or validate the docket sheets of Staff or that of its legal team, to ensure accuracy and legitimacy.

[96] Brown also pointed out that he did try to settle with Staff and that he did enter into a lengthy Agreed Statement of Facts which contributed to a shorter hearing. According to Brown, he should also not be held responsible for costs incurred while engaging in good faith negotiations to settle and enter into an Agreed Statement of Facts.

[97] In reply oral submission, Staff provided a breakdown of the costs incurred during the time period of November 6, 2010 to September 29, 2011. The costs incurred in this time period were after the Commission informed the parties that due to Commissioner

availability the hearing on the merits has to be rescheduled. Staff broke down those costs as follows:

Costs incurred from Nov. 5, 2010 to Sept. 18, 2011	$53,775.00
Costs incurred from Sept. 19, 2011 to Sept. 29, 2011	$31,902.50

[98] Staff had this to say about the breakdown of those costs:

> So from November 5, 2010 to September 18, 2011, which was the day before the hearing commenced, there's $53,775 in time, so the theory would be if the hearing got started on November 6th or thereabouts, we wouldn't have incurred that time or those costs and, therefore, we wouldn't be claiming them against Mr. Brown.
>
> (November 22, 2013 Transcript, page 7 line 25 to page 8 line 6)
>
> Obviously, the time under that 31,902.50, that's the amount of time necessary to put the case in, and we were going to incur that cost in either event, whenever the hearing got started.
>
> (November 22, 2013 Transcript, page 8, lines 18-21)

[99] In my view, it is inappropriate to expect a respondent to incur costs due to rescheduling the hearing on the merits that was a result of Commissioner availability. Staff has informed us that $53,775.00 was incurred in costs that would not have been incurred otherwise because of this rescheduling, so as a result I will subtract $53,775.00 from the total costs claimed by Staff and reduce the costs to $615,361.76.

[100] With respect to the adjournment requested by Staff on June 6, 2008, I note that while this did create some delay and extra cost, however, Brown also requested multiple adjournments which added to the delays and costs in this matter prior to the merits hearing, during the merits hearing, prior to the Sanctions and Costs Hearing and even during the Sanctions and Costs Hearing. Nevertheless, in addition, I also find that it is appropriate to reduce costs by $31,902.50 upon considering Brown's submissions and personal circumstances. As a result, the total costs payable are reduced to $583,459.26.

[101] Rule 18.2 of the *Commission Rules of Procedure* sets out a non-exhaustive list of factors to consider when exercising discretion to order costs. In the case before me the following factors are highly relevant:

- whether the respondent contributed to a shorter, more efficient, and more effective hearing, or whether the conduct of the respondent unnecessarily lengthened the duration of the proceeding;

- whether the respondent participated in the proceeding in a way that helped the Commission understand the issues before it;

- whether the respondent participated in a responsible, informed and well-prepared manner; and

- whether the respondent co-operated with Staff and disclosed all relevant information.

[102] While Brown did enter into an Agreed Statement of Facts, other actions of Brown lengthened the duration of this proceeding. Specifically, as set out in the Merits Decision at paragraphs 12 to 31, Brown requested multiple adjournments which led to cost and delay.

[103] Further, Brown was accommodated during the merits hearing and provided with the opportunity to provide: witness lists (Merits Decision, *supra* at para. 24), written interrogatories for Staff's witnesses (Merits Decision, *supra* at para. 26), affidavit evidence (Merits Decision, *supra* at para. 27), testimony by way of videoconference or by affidavit if he so chose (Merits Decision, *supra* at para. 27) in order to assist the Commission understand the issues before it. Although he requested such accommodation, in the end Brown did not provide witness lists, written interrogatories, or affidavits.

[104] Brown also did not cooperate with Staff and disclose all relevant information. As stated in paragraph 123 of the Merits Decision, "Staff decided to seek the appointment of a Receiver on the basis that $3,000,000 was unaccounted for, bank accounts were not being disclosed to Staff and Brown had continuously failed to explain where the missing funds had gone." This of course contributed to the length and costs of the investigation.

[105] Therefore, in the circumstances, I find that Brown and JFM shall pay costs, jointly and severally, in the amount of $583,459.26.

VIII. Decision on Sanctions and Costs

[106] In my view, it is important in this case to: (1) impose sanctions that reflect the seriousness of the securities law violations that occurred in this matter; and (2) impose sanctions that not only deter the Respondents but also like-minded people from engaging in future conduct that violates securities law.

[107] In my view, an order permanently removing Brown and JFM from the capital markets, requiring disgorgement of all funds obtained in breach of Ontario securities law and requiring JFM and Brown to pay a significant administrative monetary penalty is appropriate. Such an order will signal both to the Respondents and to like-minded individuals who engage in similar conduct will be dealt with severely by the Commission.

[108] I will issue a separate order giving effect to my decision on sanctions and costs and I order that:

(i) With respect to Brown:

(a) an order that Brown cease trading in securities permanently from the date of this order pursuant to clause 2 of subsection 127(1) of the Act;

(b) an order that the acquisition of any securities by Brown is prohibited permanently, pursuant to clause 2.1 of subsection 127(1) of the Act;

(c) an order that any exemptions contained in Ontario securities law do not apply to Brown permanently, pursuant to clause 3 of subsection 127(1) of the Act;

(d) an order that Brown be reprimanded pursuant to clause 6 of subsection 127(1) of the Act;

(e) an order that Brown resign all positions he holds as a director or officer of an issuer, registrant or investment fund manager pursuant to clauses 7, 8.1, and 8.3 of subsection 127(1) of the Act;

(f) an order that Brown is permanently prohibited from becoming or acting as a director or officer of any issuer, registrant or investment fund manager pursuant to clauses 8, 8.2, and 8.4 of subsection 127(1) of the Act; and

(g) an order that Brown is permanently prohibited from becoming or acting as a registrant, as an investment fund manager or as a promoter pursuant to clause 8.5 of subsection 127(1) of the Act.

(ii) With respect to JFM:

(a) an order that JFM cease trading in securities permanently pursuant to clause 2 of subsection 127(1) of the Act;

(b) an order that the acquisition of any securities by JFM is prohibited permanently pursuant to clause 2.1 of subsection 127(1) of the Act; and

(c) an order that any exemptions contained in Ontario securities law do not apply to JFM permanently pursuant to clause 3 of subsection 127(1) of the Act.

(iii) With respect to both Brown and JFM:

(a) an order requiring Brown, on a joint and several basis with JFM, to pay an administrative penalty of $500,000, pursuant to paragraph 9 of section 127(1) of the Act, which is designated for allocation or use by the Commission pursuant to subsections 3.4(2)(b)(i) or (ii) of the Act;

(b) an order requiring Brown, on a joint and several basis with JFM, to disgorge to the Commission $2,331,076.71 obtained as a result of his non-compliance with Ontario securities law, pursuant to paragraph 10 of section 127(1) of the Act, which is designated for allocation or use by the Commission pursuant to subsections 3.4(2)(b)(i) or (ii) of the Act; and

(c) an order requiring Brown, on a joint and several basis with JFM, to pay $583,459.26 for costs incurred in the investigation and hearing of this matter pursuant to subsection 127.1 of the Act.

(iv) After the payments set out in subparagraphs (iii)(a), (iii)(b) and (iii)(c) are made in full, as an exception to the provisions of paragraphs (i)(a), (i)(b) and (i)(c) of this Order above, Brown is permitted to acquire for the account of any registered retirement savings plan, registered pension plan, tax free savings accounts, self-directed retirement savings plans as defined in the Income Tax Act, R.S.C. 1985, c.1, as amended, and/or for any RESP accounts for which Brown and/or his spouse have sole legal and beneficial ownership or are a sponsor, and such trading shall be carried out solely through an appropriately registered dealer in Canada (which dealer must be given a copy of this Order): (1) any "exchange-traded security" or "foreign exchange-traded security" within the meaning of National Instrument 21-101- Marketplace Operation provided that he does not own beneficially or exercise control or direction over more than 5 percent of the voting or equity securities of the issuer(s) of any such securities, or (2) any security issued by a mutual fund that is a reporting issuer; (3) and exemptions are permitted for the purpose of trades described in this subparagraph. Until the entire amount of the payments set out in subparagraphs (iii)(a), (iii)(b) and (iii)(c) of this Order above, are paid in full, the prohibitions set out in subparagraphs (i)(a), (i)(b) and (i)(c) shall continue in force without any limitation as to time period.

Dated at Toronto this 12th day of February 2015.

"Vern Krishna"

Vern Krishna, CM, QC