



Ontario  
Securities  
Commission

Commission des  
valeurs mobilières  
de l'Ontario

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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**

**Hearing:** 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  
September 4, 2012

**Decision:** April 11, 2013

**Panel:** Vern Krishna, QC - Chair of the Panel  
Margot C. Howard, CFA - Commissioner

**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

### I. OVERVIEW

#### A. 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 the respondents, the Juniper Fund Management Corporation (“**JFM**”), Juniper Income Fund (“**JIF**”), Juniper Equity Growth Fund (“**JEGF**”) and Roy Brown (“**Brown**”) (collectively, the “**Respondents**”) breached certain provisions of the Act and acted contrary to the public interest.

[2] A temporary cease trade order was first issued against JIF and JEGF in this matter on March 8, 2006 and was subsequently varied and extended from time to time (the “**Temporary Order**”). Pursuant to an Order of the Ontario Superior Court of Justice (Commercial List) dated May 18, 2006, Grant Thornton Limited was appointed as receiver of all the assets, undertakings and properties of JFM, JIF, and JEGF under section 129 of the Act (in such capacity, the “**Receiver**”). On February 22, 2008, the Temporary Order was revoked by Order of the Commission to permit the Receiver to distribute monies to JEGF and JIF unitholders.

[3] The merits proceeding in this matter was commenced by a Notice of Hearing issued by the Commission on March 21, 2006 pursuant to sections 127 and 127.1 of the Act in connection with a Statement of Allegations filed by Staff of the Commission (“**Staff**”) on the same day. Staff further filed an Amended Statement of Allegations on July 5, 2007 alleging that in 2005 and 2006 the Respondents breached 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); and
- (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).

[4] Staff has also alleged that 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.

[5] The hearing on the merits in this matter (the "**Merits Hearing**") was first scheduled to commence on April 7, 2008. The Merits Hearing was adjourned on March 31, 2008, June 6, 2008 and November 5, 2010. On January 24, 2011, the Commission ordered that the Merits Hearing commence on September 14, 2011 and continue for 12 days as scheduled thereafter. Ultimately, for reasons described in further detail below, the Merits Hearing was protracted, commencing on September 19, 2011 and concluding on September 4, 2012. The Merits Hearing was 17 days in total.

## **B. Summary of Findings**

[6] Staff must prove its allegations on the balance of probabilities (*Re Sunwide Finance Inc.* (2009), 32 O.S.C.B. 4671, ("*Re Sunwide*") at paragraphs 26 to 28, applying *F. H. v. McDougall*, [2008] S.C.J. No. 54 (S.C.C.) ("*F.H. v. McDougall*"). This is the civil standard of proof. We must scrutinize the evidence with care and be satisfied whether it is more likely than not that the allegations occurred (*F.H. v. McDougall*, above, at paragraph 49).

[7] We find that on a balance of probabilities, Staff satisfied their evidentiary burden at the Merits Hearing. The Respondents' conduct at issue arose when Brown decided to bring the record keeping and fund accounting tasks for the Funds in-house. Many of the Respondents' failures to comply with Ontario securities law began with the poor recording of the Funds' activities. The Respondents' failure to maintain proper books and records led to the very lack of transparency that this Commission is wary of and led to breaches of the Act and NI 81-102 and NI 81-106, as described herein.

[8] 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 minimus* 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.

[9] 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.

[10] In reaching our decision, we are mindful of some of the mitigating factors in this proceeding. At the time that Brown was concerned that the Funds might not be able to meet redemption requests by the Funds' unitholders, he contacted his counsel and the Commission in order to find a resolution to the issues that he was able to identify at that time. When the Commission indicated that the JFM, JEGF and JIF books and records were insufficient, Brown contacted his accountant to audit the Funds and create a reconciliation spreadsheet. Brown also

attended four days of voluntary interviews with Staff at the Commission, which provided a significant amount of helpful information.

[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.

### **C. Procedural History**

[12] The procedural history of this hearing has 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. The following is a summary describing the Panel's focused balancing act in reaching its decisions on the multiple adjournment requests both prior to the commencement of and throughout the Merits Hearing.

#### **a) Pre-hearing Adjournments**

[13] On August 25, 2011, approximately three weeks before the scheduled start date of the Merits Hearing, Brown brought a confidential motion before a Panel, which was held *in camera*, requesting an adjournment *sine die* based on medical grounds. That Panel denied Brown's motion (the "**Adjournment Decision**") and issued confidential reasons on September 7, 2011 in respect thereto.

[14] On September 16, 2011, Brown brought a motion before this Panel pursuant to section 144 of the Act to revoke or vary the Adjournment Decision which dismissed his motion for an adjournment. We denied Brown's section 144 motion and issued public reasons on November 24, 2011 (*Re Juniper Fund Management Corporation et al* (2011), 34 O.S.C.B. 12103 (the "**November Reasons**")).

[15] Paragraphs 40 to 43 of the November Reasons give a detailed account of the history of this proceeding and state the following:

[40] This matter has a long procedural history dating back to 2006 and there have been a number of adjournments. The following is a summary of key dates and adjournment requests and this chronology was also considered in the initial Adjournment Decision:

- The alleged violations of the Act occurred in 2005 and 2006. The Commission issued the Temporary Order on March 8, 2006, and the merits proceeding in this matter was commenced on March 21, 2006 by way of a Notice of Hearing issued in connection with the Statement of Allegations;
- Between March 8, 2006 and September 4, 2007, there were nine appearances at which the matter was adjourned because the investigation of Staff and the investigation of the Receiver were on-going. Brown opposed the adjournment of the matter at some of these appearances;
- On September 4, 2007, the Commission ordered the merits hearing to commence on April 7, 2008;

- On March 31, 2008, the Commission heard a motion for Brown's request to adjourn the merits hearing on the grounds that he was no longer represented by counsel, he had not seen Staff's disclosure volumes which were served on his former counsel and needed additional time to prepare for the merits hearing. Staff opposed the adjournment request and indicated that Staff counsel was not available to attend on June 16, 2008. The Commission adjourned the merits hearing to June 16, 2008;
- On June 4, 2008, Staff brought a motion to adjourn the merits hearing on the basis of unavailability of Staff counsel. On June 6, 2008, the Commission ordered, on consent, that the merits hearing would commence on a date to be set by a pre-hearing conference commissioner or such other date as agreed to by the parties and confirmed by the Office of the Secretary. No pre-hearing conference dates were scheduled at that time;
- In January 2009, the Office of the Secretary tentatively scheduled the merits hearing for June 15 to 19, 2009, but Brown indicated that he could not attend the merits hearing on those dates for medical reasons;
- Throughout 2009 and during early 2010, Staff contacted Brown on various occasions to set dates for a pre-hearing conference, but Brown indicated that he would not be able to represent himself at either a pre-hearing conference or the merits hearing due to his health issues and financial situation;
- A pre-hearing conference took place on March 2, 2010. The pre-hearing conference was continued on April 30, 2010, at which the Commission scheduled the merits hearing to commence on November 15, 2010;
- Pre-hearing conferences were held on June 16, 2010, October 1 and 20, 2010 and November 1, 2010;
- By order dated November 5, 2010, the Commission adjourned the merits hearing due to Commission unavailability;
- On January 24, 2011, the Commission ordered that the merits hearing commence on September 14, 2011;
- On August 25, 2011, a confidential hearing was held to consider an adjournment request from Brown. The Adjournment Decision ordered that the merits hearing shall commence on September 16, 2011, rather than on September 14, 2011, and shall proceed on the other scheduled dates set out in the order in this matter dated January 24, 2011.

[41] To summarize, the alleged misconduct took place six years ago, and the allegations have been outstanding for five years. There have been four

adjournments. In our view, it is necessary to hear this matter and have some finality. This proceeding cannot be adjourned indefinitely.

[42] There is a cost to delaying merits hearings. The Commission's hearings calendar is busy and it would be difficult to reschedule the matter and have it heard in the near future. Staff and the Receiver have spent time and effort preparing for this merits hearing and to adjourn it again would create additional preparation costs in the future.

### III. CONCLUSION

[43] The Panel considers it in the public interest to proceed with the merits hearing. Brown's motion to vary the Adjournment Decision is dismissed. While the hearing on the merits must proceed, Brown may make requests for reasonable accommodation during the hearing. In addition, the Panel will permit Brown's doctor to testify, on a voluntary basis, solely on the issue of reasonable accommodation if Brown consents and is present (either by telephone conference or in person). In our view, Brown should have the opportunity to participate if his doctor will be providing information about his condition and reasonable accommodations.

[16] 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.

[17] 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.

#### **b) The Merits Hearing**

[18] The Merits Hearing commenced on September 19, 2011 and continued periodically for a total of 17 days. No one represented JFM, JEGF and JIF. Brown represented himself only and participated at the merits hearing for portions of the hearing day on the following dates:

- By telephone conference on: September 19, and 20, 2011; October 5, 2011; November 9, 2011; December 21, 2011; February 14 and 22, 2012; April 4, 2012; May 28, 2012; May 30, 2012; and September 4, 2012; and
- In person on: June 8, 2012.

[19] During the Merits Hearing, on several occasions Brown raised objections to the proceeding continuing and requested multiple adjournments. Although he did not comply with Rules 3 (motions) and 9 (adjournments) of the Commission's *Rules of Procedure*, we considered each objection, request and motion carefully and balanced Brown's interest and the interest of unitholders and the public interest and ruled on each objection, request and motion. The following is a summary of all of Brown's procedural request, objections and motions during the Merits Hearing.

[20] Nine days of the Merits Hearing were dedicated solely to Brown's multiple adjournment requests. At the start of the Merits Hearing, Brown indicated his inability to participate, arguing the same grounds he raised during his two previous adjournment motions (as described in detail at paragraphs 25 to 27 the November Reasons), and he did not attend any of the September 2011 hearing dates. On October 5, 2011, prior to the close of Staff's case, Brown appeared before the Panel by teleconference to request an adjournment such that he could have further time to review the transcripts of Staff's witnesses from the September 2011 hearing dates in order to prepare his defence of the allegations against him and to determine whether he would like to bring a motion to recall and cross-examine any of Staff's witnesses. We granted Brown's request for further time to respond and asked Brown to file supporting evidence of his inability to participate in the Merits Hearing going forward.

[21] On November 9, 2011 and December 21, 2011, Brown appeared before the Panel by teleconference and sought adjournments on each of these dates. Brown filed a letter dated December 20, 2011 from his doctor indicating that his condition remained unchanged since the Adjournment Decision was rendered in August. There was no indication in the letter of any timeframe for when Brown would be fit to participate in a hearing, nor was there any guideline provided setting out any manner in which Brown may be accommodated such that he could participate in the Merits Hearing. Notwithstanding the limited evidence submitted by Brown, we agreed to adjourn the Merits Hearing to February 14, 2012 at which time Brown could bring his motion to recall any of Staff's witnesses that he wished to cross-examine. Subsequent dates in February and March were booked for the conclusion of the Merits Hearing.

[22] On February 14, 2012, Brown appeared before the Panel by teleconference and made a request to adjourn the Merits Hearing for approximately 60 days on the basis that his medical condition prevented him from participating in his motion to recall Staff's witnesses as scheduled. Brown did not submit any evidence in support of his request. We withheld our decision and requested the parties to re-attend to continue the motion on February 22, 2012 in order to allow Brown time to provide the Commission with supporting evidence.

[23] On February 22, 2012, Brown submitted a confidential medical file that contained his medical test history (the "**Confidential Medical File**"). In our opinion, it was not appropriate to engage in an analysis of the Confidential Medical File as it did not contain any relevant information with respect to Brown's actual ability to participate in the Merits Hearing. Notwithstanding, on February 22, 2012, in an attempt to balance the public interest with Brown's interests, we granted Brown a final adjournment on a peremptory basis until April 4, 2012. The exchange between the Chair of the Panel and Brown at pages 10-11 of the transcript from the February 22<sup>nd</sup> appearance specifies that this was a peremptory adjournment:

THE CHAIR:

...The hearing will proceed on a preemptory [*sic*] basis, Mr. Brown. That means there'll be no further adjournments, and we will proceed with or without you participating on those dates. So you should make every effort to be present on the phone or through counsel.

MR. BROWN: That's my question. What is the protocol for the Commission in a situation like this? Can I do a hearing or my Respondents hearing in person and by phone or just in person?

THE CHAIR: We will allow you to do it by phone...

[24] Further, 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.

[25] Prior to the April 4, 2012 hearing date, Brown served Staff with a list of witnesses whom he wished to recall for cross-examination; however, on April 4<sup>th</sup> Brown requested a further adjournment on medical grounds. Brown did not provide any supporting evidence. In balancing the public interest with Brown's interests, we agreed to grant Brown one final adjournment and set the concluding hearing dates for May 28, 29, 30, 31, and June 1, 8, 20, and 22, 2012.

[26] On May 28, 2012, Brown sought an adjournment of the Merits Hearing on medical grounds and requested that he be allowed until September to enter his defence by way of written interrogatories to Staff's witnesses and by way of affidavit evidence. Brown did not submit any evidence to support his motion. We denied Brown's request for an adjournment but granted his request to submit written interrogatories for Staff's witnesses by May 30, 2012, in accordance with the previously scheduled Merits Hearing dates.

[27] On May 30, 2012, Brown brought another motion to adjourn the Merits Hearing on the basis that he was not able to submit written interrogatories in the time prescribed and indicated that he would not be able to do so in the coming days due to his medical condition. Brown did not submit any evidence to support his motion. We denied Brown's request to adjourn the Merits Hearing but granted Brown 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. At that time, Staff closed its case. We ordered that 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.

[28] On June 8, 2012, Brown appeared before the Commission in-person to bring another motion to adjourn the Merits Hearing based on medical grounds. He did not submit any evidence to support his motion. Brown advised that if his request for an adjournment was not granted he would not be able to participate in the Merits Hearing. We denied Brown's request for an adjournment and, in light of Brown's submissions, we determined that the defence's case was closed and set dates for closing submissions as follows: Staff were to serve and file written closing submissions by June 22, 2012, Brown was to file responding submissions on August 20,

2012, and Staff was to file a reply by August 31, 2012. The parties were ordered to attend before the Commission for oral closing submissions on September 4, 2012.

[29] On August 22, 2012, Brown sent an email to the Registrar of the Commission advising that he would not be filing any closing submissions. On September 4, 2012, Brown briefly appeared before the Panel by teleconference to ask about the process going forward. Brown did not make any submissions and did not stay on the telephone to listen to Staff's closing submissions. After Brown asked his procedural questions he terminated the conference call. Staff then delivered their closing submissions and the Merits Hearing was concluded.

[30] 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. Commissioner Krishna reminded Brown of his previous exchange with the Panel:

We have once again gone through the exercise of balancing of the various interests that we did earlier on April the 4th. And at that time I said at page 35 of the same transcript where I render the decision at line 12, I can only repeat now what I said at that time that there are various interests, including your own private interest, Mr. Brown, and your medical condition but that there are other interests that we must also take into account, other interests being those of investors, witnesses, and generally the public interest to have proceedings proceed on a timely basis.

At that time I said in the decision, "In balancing these various interests, we have decided once again to tip the scales in your favour, Mr. Brown. We will grant you one final adjournment in respect of this matter and let your private interests outweigh those of all the other interests that we have considered. But I think you have indicated and should understand there is a limit to how many times the Commission will consider your interest over and above those of the public interest."

And when I asked you, "Mr. Brown, do you understand what I have just said?" You said, "Yes, I do." And I asked you, "Yes. You have made that clear and you indicated your willingness to proceed and you understand we will proceed then on the dates indicated with the witnesses that you have indicated."

And at page 36 of that transcript at line 24 I say, "Do you understand that?" And you answer, "Yes. I understand that. I agree and I agree there is a limit to all of this and for me. So, I understand all of that." And I said, "Good." And you said, "All too clearly."

Well, there is nothing further that I can add to those reasons of April the 4th. We have had to consider exactly the same -- the same interests, the same balancing process that we always do, and that is your own private interests versus the public interest. And we have now reached the limit that I spoke about on April the 4th.

And so it is our decision that the motion to vary the decision is denied because it would be prejudicial to the public interest.

(Transcript of Merits Hearing, May 30, 2012 at pages 29 and 30)

[31] Ultimately, as stated above, we determined that the balance of interest tipped in favour of concluding the Merits Hearing in order to bring finality to this matter, provide closure to the Funds' unitholders and protect the public interest.

## **D. Background**

### **a) The Respondents**

#### *JFM*

[32] JFM is the fund manager, trustee and fund administrator of the Funds. JFM is not registered in any capacity with the Commission but is a market participant by virtue of being a fund manager for the Funds.

#### *JEGF*

[33] JEGF is a mutual fund trust that was originally established on November 15, 1985. According to its simplified prospectus dated July 5, 2005, as amended, JEGF invests in equity and equity-related securities of companies listed on Canadian and foreign stock exchanges. Effective October 7, 2005, JEGF merged with three funds: The Capstone Balanced Fund, the Capstone Canadian Equity Fund and the Capstone Global Equity Fund (the "**Merged Capstone Funds**"). As a result of the merger, unitholders of the Merged Capstone Funds received units in JEGF equivalent in value to their holdings in the Merged Capstone Funds. As of February 26, 2006, the total value of net assets of JEGF was approximately CAD \$12,300,000.

#### *JIF*

[34] JIF was formerly called the Capstone Cash Management Fund, a Canadian money market fund organized as a mutual fund trust. The Capstone Cash Management Fund was renamed JIF and its investment objectives were changed to those of an income fund. As of February 26, 2006, the total value of net assets of JIF was approximately \$350,000.

#### *Brown*

[35] Until the Court appointment of the Receiver, Brown was a director of JFM. Brown is president, chief executive officer and sole shareholder of JFM and is also known by his legal name of Roy Brown-Rodrigues. Brown was the principal administrator and controlled the daily operations of JFM. Brown was the direct contact with Staff during the compliance review of JFM and the Funds.

## **b) Other Relevant Entities**

### *NBCN Inc.*

[36] NBCN Inc. (“NBCN”) was the custodian of the portfolio assets for the Funds. As custodian, NBCN held the underlying securities of the Funds. NBCN’s role as custodian was to provide portfolio settlement services and to safeguard the portfolio assets. NBCN is registered with the Commission as a broker and investment dealer. NBCN’s custodial accounts for the Funds were: 27R000A/E (referred to interchangeably in the evidence as 27R000 or 27R000E and referred to herein as the “NBCN JEGF Custodial Account”) and 27R003E for JEGF, and 27R002E for JIF. The NBCN JEGF Custodial Account was opened as a cash account and later converted to a margin account in the name of JFM, in trust for JEGF, collateralized by JEGF’s assets as described further in NBCN’s evidence herein.

[37] The custodial agreement executed between NBCN and JFM dated August 19, 2004 was amended and revised by the Amended and Revised Custodial Agreement dated December 22, 2005 (the “Custodial Agreement”). The Custodial Agreement stipulated that NBCN would provide JEGF with custodial services related to portfolio safe keeping and transaction settlement services. NBCN did not provide JFM with fund accounting, payment services for fund expenses, unitholder recording, transfer agent services, or NAV calculation services.

[38] JFM had two margin accounts with NBCN: 27R001E (the “NBCN JFM 27R001E Margin Account”) and 27R005E. The NBCN JFM 27R001E Margin Account was ultimately the subject of discussions between Brown and NBCN due to a disparity between their records of the amount of JEGF units held in that account.

### *National Bank Financial Ltd.*

[39] National Bank Financial Ltd. (“NBFL”) is a Canadian investment dealer. NBFL operated one margin account for Brown numbered 116KRZ-E (“Brown’s NBFL Margin Account”). NBFL is registered with the Commission.

### *RBC Dominion Securities Inc.*

[40] RBC Dominion Securities Inc. (“RBCDS”) is a Canadian investment dealer. RBCDS operated a personal margin account for Brown from approximately 2000 to November 2005 numbered 537-05421-27 (Brown’s “RBCDS Account”). In November 2005, Brown’s RBCDS Account was closed and the account was transferred to NBFL. RBCDS is registered with the Commission.

### *PolySecurities Asset Management Corp.*

[41] PolySecurities Asset Management Corp. (“PAM”) is a private Ontario company incorporated on June 23, 2003. Brown is a 3% shareholder of PAM and a former president and a director of PAM but he resigned in December 2003. Les Kobli, an individual that represented himself as Senior Vice-President Operations of JFM and was listed as the President of PAM in its corporate profile report dated December 2005, held 88% of the shares in PAM. PAM’s series B preference shares are portfolio assets of JEGF. PAM is not an equity or equity-related exchange traded security. JEGF’s investment in PAM took place in February 2004, prior to

Brown's acquisition of all shares of JFM in May 2004 and after his resignation as officer of PAM. Brown was a principal shareholder, officer and director of an affiliated company, Polysecurities Inc. ("**Poly Inc.**"), which was a registered limited market dealer that was inactive through the compliance period in 2005 and that voluntarily surrendered its registration on January 1, 2006.

### *CIBC*

[42] There were a number of bank accounts opened at Canadian Imperial Bank of Commerce ("**CIBC**") in relation to Brown, some of which included the following:

- (a) In February 2005, Brown and his wife, Marnie-Brown Rodrigues ("**Marnie Brown**"), opened an account at CIBC in the name of Southgate Mortgage and Income Trust (the "**Southgate Trust**").
- (b) In March 2005, Brown opened an account at CIBC for the Juniper Pooled Income and Property Fund and was the authorized signing authority for this account.
- (c) In 2005, JIF held an account at CIBC and Brown, as trustee, was the authorized signatory for the JIF account. Jennifer Purves ("**Purves**") and Jennifer Bryl ("**Bryl**"), were employees of JFM and were delegated deposit inquiry authorities in December 2005 and February 2006 respectively.
- (d) JEGF held a series of accounts at CIBC starting in February 2005, all of which were set up by Brown.

### *Southgate Mortgage and Income Trust*

[43] The Southgate Trust is a trust held for the benefit of Brown. As mentioned above, the Southgate Trust has an account at CIBC, the signatories for which are Brown and Marnie Brown. The trustees of the Southgate Trust are Marnie Brown, Tony Rodrigues and Bonnie Burgess.

### *Felcom Data Services*

[44] Felcom Data Services ("**Felcom**") was a mutual fund services provider that provided clients a range of back office services including fund valuation, fund accounting, unit holder record keeping, and transferring services to mutual fund companies. In or around July 2005, Felcom entered into a Security Holder Services Agreement with JFM which provided that Felcom would act as registrar, transfer agent, order processing and distribution/disbursement agent for JFM. Felcom and JFM terminated their relationship in or around the end of 2005. Felcom was acquired by CIBC Mellon in October 2009.

## **II. ALLEGATIONS**

[45] There was a long list of allegations presented by Staff in the Merits Hearing, which can be summarized into five main areas as follows. Staff allege that:

- (a) The Respondents failed to maintain proper books and records in respect of the Funds;

- (b) JFM was not properly registered or exempt from the registration requirements in the Act;
- (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;
- (d) The Respondents engaged in inappropriate transactions within the Funds; and
- (e) JFM and Brown breached the statutory standard of care required in respect of the Funds.

[46] It is the conduct of the Respondents, as described above, that Staff allege resulted in the breach of various sections of the Act and NI 81-102 and NI 81-106. Specifically, in the Amended Statement of Allegations filed on July 5, 2007, Staff allege that:

- (a) JFM and/or Brown has/have misrepresented its/his/their ownership interests in JEGF units to RBCDS, NBCN, NBFL, and Staff.
- (b) From February to May 2005 inclusive, Brown and JFM made four purchases totaling \$4,450,000 of JEGF units on margin through RBCDS and NBCN and kept the proceeds for his/its/their own use and did not ensure that the purchase monies were paid to JEGF (the “**Off-Book Purchases**”). The alleged Off-Book Purchases were:
  - (i) On February 7, 2005, Brown purchased 143,143.706 JEGF units for \$900,000 in Brown's RBCDS Account. The RBCDS cheque in the amount of \$900,000 was deposited into JEGF's Bank of Montreal account 1029-480 which account was not included in JEGF's accounting records.
  - (ii) On March 1, 2005, Brown purchased 220,025.46 JEGF units for \$1,400,000 through Brown's RBCDS Account. RBCDS settled the purchase through a wire transfer to JEGF's BMO account 1029-499 which was an account listed on JEGF's accounting records. On March 8, 2005, \$1,400,000 was wired out immediately to JEGF's CIBC bank account 68-04519 which account was not included in JEGF's accounting records.
  - (iii) On March 11, 2005, Brown purchased 110,733.212 JEGF units for \$700,000 through JFM's NBCN Account. At the request of Brown, a manual cheque in the amount of \$700,000 payable to JEGF was provided to JFM. The NBCN cheque in the amount of \$700,000 was deposited to JEGF's CIBC account 68-04519 which account was not included in JEGF's accounting records.
  - (iv) On May 19, 2005, Brown purchased 220,503.0073 JEGF units through JFM's NBCN Account. On the instructions of Brown, NBCN wire transferred \$1,450,000 to JEGF's CIBC bank account 68-04519 which account was not included in JEGF's accounting records.
- (c) The JEGF units that were the subject of the Off-Book Purchases were:

- (i) Not recorded in JEGF's books and records maintained by JFM and provided to Staff contrary to the record-keeping requirements in subsection 19(1) of the Act and section 18.1 of NI 81-102 and contrary to the public interest;
- (ii) Not recorded in JEGF's daily NAV calculations contrary to section 14.4 of NI 81-106; and
- (iii) Not deposited and retained in the NBCN JEGF Custodial Account contrary to section 11.1 of NI 81-102 and subsection 116(1) of the Act.

Brown and JFM's failure to deposit the funds from the Off-Book Purchases of JEGF units to the NBCN JEGF Custodial Account was conduct contrary to section 11.1 of NI 81-102 and contrary to subsection 116(1) of the Act.

- (d) Brown and JFM maintained two sets of records for JEGF in order to (a) mislead RBCDS and NBCN as to the balance of JEGF units held in Browns' RBCDS Account and in JFM's NBCN account; and (b) redeem units "acquired" in the Off-Book Purchases.
- (e) The redemptions of units not owned or paid for at the time by JFM and/or Brown was conduct contrary to subsection 9.4 of NI 81-102 and contrary to the public interest.
- (f) The redemptions of JEGF units by Brown and related parties amounted to interest-free loans to JFM from the JEGF unitholders and as such JFM's and Brown's conduct was a breach of their fiduciary duty to JEGF and the JEGF unitholders and a breach of their statutory duty of care owed to JEGF pursuant to subsection 116(1) of the Act.
- (g) Brown used the margin available from the transfer of JEGF units to its NBCN margin account for his own benefit including (a) a payment to Brown's and Marnie Brown's line of credit and (b) a purchase of JEGF units in the names of JFM and the Southgate Trust. Accordingly, JFM's and Brown's use of JEGF's NBCN custodial account was contrary to section 2.6 of NI 81-102 by borrowing cash or providing a security interest over JEGF's portfolio assets.
- (h) JFM and/or Brown has/have improperly permitted JEGF to guarantee JFM's outstanding cash balances in accounts including both of JFM's margin account at NBCN contrary to section 112 of the Act and section 2.6 of NI 81-102.
- (i) Brown mislead Staff during his interviews on April 18, 25, 26 and May 2, 2006 (the "**Brown Interviews**") concerning the following:
  - (i) That any discrepancy in the number of JEGF units in JFM's NBCN Account and Brown's NBFL Account was due to problems with JFM's record keeping system;
  - (ii) The existence of units of Juniper Equity Growth (Private Class Series) Fund;
  - (iii) The relationship between Brown and Windrush Abbey Leasing Limited ("**Windrush**");

- (iv) The relationship between Brown and PAM;
  - (v) The relationship between Brown and the Southgate Trust;
  - (vi) Brown failed to identify all of JEGF's and JFM's bank accounts and advised Staff that all such past and present bank accounts had been identified;
  - (vii) The role of Felcom as JFM's transfer agent and the services provided to JFM by Felcom;
  - (viii) The number of JEGF units transferred in-kind to NBCN; and
  - (ix) The transfers of JEGF units to Stonewall Landscape Ltd. and D-Tech Consulting.
- (j) JEGF provided prohibited loans to JFM contrary to subsection 111(1)(a) and section 112 of the Act and contrary to the public interest.
- (k) 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 and contrary to the public interest.
- (l) JFM and Brown did not exercise its powers and discharge their duties honestly, in good faith and in the best interests of the Funds and did not exercise the degree of care, diligence and skill that a reasonably prudent person would exercise in the circumstances, contrary to subsection 116(1) of the Act and contrary to the public interest. JFM and Brown breached their statutory duty of care to the Funds by:
- (i) Failing to ensure that the proceeds from the sale of units were paid to JEGF;
  - (ii) Maintaining two sets of unitholder records for JEGF;
  - (iii) Redeeming JEGF units which had not yet been paid for;
  - (iv) Making in-kind transfer of JEGF units which units had not been recorded on JEGF's books and records maintained by JFM;
  - (v) Improperly issuing or transferring JEGF units in the names of JFM and Brown which were not properly issued JEGF units or which were not owned by either JFM or Brown;
  - (vi) Borrowing amounts secured by JEGF's Custodial Account;
  - (vii) Failing to prepare accurate NAV calculations for the Funds which resulted in material NAV errors;
  - (viii) Failing to keep proper books and records contrary to subsection 19(1) of the Act; and

- (ix) Failing to ensure that the Funds' portfolio holdings complied with the fundamental investment objectives of the Funds and with Ontario securities law.
- (m) JEGF's investment of \$400,000 in preferred shares of PAM is contrary to subsections 111(2)(c)(ii) and 111(3) of the Act and contrary to the public interest. After its merger, JEGF held securities that were inconsistent with its fundamental investment objectives contrary to the public interest.
- (n) JFM has acted as custodian or sub-custodian of assets of JEGF in the investment in PAM, and cash and GICs of JEGF were not properly held with the custodian of JEGF contrary to subsection 6.1(1) of NI 81-102.
- (o) JEGF's simplified prospectus, information circular and annual information form ("AIF") contained misleading or untrue statements contrary to subsections 56(1) and/or 122(1) of the Act and contrary to the public interest.
- (p) The Funds' website at [www.juniperfund.ca](http://www.juniperfund.ca) and press releases contained untrue or misleading sales communications contrary to subsection 15.2(1) of NI 81-102 and contrary to the public interest.
- (q) Brown, as an officer and director of JFM, has authorized, permitted or acquiesced in breaches of subsections 19(1), 25(1)(a), 56(1), 111(1)(a), 111(2)(c)(ii), 111(3), 112, 116(1) and 122(1) of the Act and in breaches of 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 in doing so has acted contrary to section 129.2 of the Act and engaged in a conduct contrary to the public interest.

### III. EVIDENCE

#### A. The Agreed Statement of Facts

[47] On or around September 14, 2011, the Respondents and Staff entered into an Agreed Statement of Facts (the "**Agreed Facts**"), which was marked as exhibit 10 at the Merits Hearing. The Agreed Facts relate to some of the factual background of the allegations in issue. The Respondents did not admit any of Staff's allegations in the Agreed Facts.

#### B. Staff's Evidence

[48] Staff called the following eleven witnesses at the Merits Hearing:

- (a) Trevor Walz and Naomi Chak on behalf of Staff;
- (b) Cindy Phillips and Richard Walkowiak as representatives of NBCN;
- (c) Ronald Landry and John Nyssen as representatives of Felcom;
- (d) Jody Coulson, Karen Anderson, and Gary Tamura as representatives of RBCDS;

- (e) Goretta Moniz as a representative of CIBC; and
- (f) Daniel Wootton as a representative of the Receiver.

**a) Trevor Walz**

[49] At the time of the Merits Hearing, Trevor Walz (“**Walz**”) was a senior accountant with the Compliance and Registrant Regulation branch of the Commission. Walz was asked to perform a compliance review of JFM, in its capacity as fund manager for the Funds, as a result of discussions in November 2005 between Brown, his counsel, and the Commission.

[50] On or about November 12, 2005, Brown and JFM’s legal counsel contacted Staff to request either a temporary cease trade order or an extension of the settlement period required for paying redemptions beyond the legal requirement under NI 81-102 from trade date plus three days (“**T+3**”) to plus five days. The request was made in order to address the redemptions in the Autumn of 2005 by the Merged Capstone Funds’ unitholders. Brown advised Walz that a significant number of these redemptions were attributable to a letter by Capstone Consultants Ltd. (“**Capstone Consultants**”) dated October 31, 2005 which was mailed to certain Merged Capstone Funds’ unitholders.

[51] Capstone Consultants was established by Morgan Meighen & Associates Limited (“**MMA**”) to execute trades in the Merged Capstone Funds. Capstone Consultants’ letter dated October 31, 2005 stated that since management of the Merged Capstone Funds had been transferred from MMA to JFM, Capstone Consultants would be ceasing operations as a mutual fund dealer effective November 30, 2005. The letter advised that account holders could make arrangements with JFM to transfer their accounts to another mutual fund dealer to effect Juniper trades on their behalf. Walz testified that Brown advised him that he believed that the Capstone Consultants letter caused a large amount of redemption requests soon thereafter. Brown also pointed out that the Funds had different investment objectives than the original Capstone Merged Funds. In the end, JFM did not file an application to amend its settlement requirements; however, Staff became concerned about whether JFM was meeting its standard of care to the Funds and whether the Funds were able to meet redemption requests by investors within the T+3 legal requirement.

[52] Walz testified that he conducted an on-site visit at JFM’s offices commencing on December 13, 2005 for two and a half days. The compliance review extended into early 2006 through phone, email and fax. In preparation for the compliance review, Walz examined:

- (a) The Commission database and determined that Brown was the principal, shareholder, officer and director of a company called Poly Inc., a limited market dealer;
- (b) Articles on SEDAR describing the merger with the Capstone Merged Funds;
- (c) The JEGF simplified prospectus dated July 5, 2005 wherein he learned there were A and F class series of units available for purchase in JEGF and that, effective August 1, 2005, there would be a private class series of units offered

only to accredited investors in Toronto. During the on-site review, however, Brown advised Walz that only the A class series of units had been sold;

- (d) The JEGF AIF listing JFM as trustee, manager, registrar and transfer agent for JEGF.

[53] Walz outlined the objectives of the compliance review as follows:

- (a) To obtain comfort that the portfolio assets of the Funds existed and were of good quality;
- (b) To make sure that JFM, and the Funds were in good financial condition;
- (c) To investigate the JEGF holdings in PAM given its similar name to Poly Inc.; and
- (d) To make sure JFM was operating at an appropriate standard for managers of public mutual funds, keeping proper books and records.

[54] Walz testified that during the on-site review in December 2005 he discovered that JFM's most recent bank reconciliation statements and custodian statements regarding the Funds were dated as of June 30, 2005 notwithstanding that the Funds were priced daily. Walz determined that JFM was calculating a net asset value for the Funds using third party records – the amounts shown per the custodial statements for securities and the bank statements for the cash balances – and not their own reconciliations.

[55] During his testimony, Walz referred to a “Compliance Field Review Books and Records Request” that he sent to Brown on December 5, 2005, prior to his on-site visit, and which contained numerous documentary requests. He testified that the responses he received from JFM to some of the requests were as follows:

- (a) Request #12: Offering Memorandum and Subscription Agreement for any non-prospectus funds – JFM said that none existed.
- (b) Request #18: A log of all manual adjustments to fund prices – JFM advised that there were no manual adjustments.
- (c) Request #20: List of NAV pricing errors, including the date, amount, and nature of the error – JFM advised that there were no NAV pricing errors.
- (d) Request #19: List of fund securities written down, or those with stale prices – JFM advised that there were no such securities written down or with stale prices.
- (e) Request #23: Copies of marketing materials for the Funds: JFM advised that there were no marketing materials other than JFM's website.

[56] At the end of the on-site review, Walz concluded that redemptions in the Funds had stabilized and all redemption requests had been met and were up to date. Further, the portfolio investments of the Funds were liquid and were of blue chip quality except for the investment in PAM. However, the findings from the balance of the compliance review caused Walz concern that:

- (a) The cash and bank reconciliations for the Funds were not available and as such he was not able to find comfort with the existence and/or accuracy of the cash and security balances for the Funds;
- (b) There was an issue with the suitability of the portfolio assets in JEGF in that approximately \$1.4 million (11%) of JEGF's net assets were offside the investment objectives of JEGF because they were made up of securities in debentures that were not equity or equity-related securities trading on an exchange; and
- (c) The investment in PAM was (a) in preferred shares of a private company, which was also offside for not being on an exchange, and (b) Les Kobli, an individual appearing to be an officer or director of JEGF, held 88% of the shares in PAM, contrary to section 111 of the Act, which prohibits a mutual fund from investing in a company in which an officer or director of the fund's management company owns more than 10% of the shares.

[57] Walz testified that the preliminary findings also found that there was an unreconciled \$1.2 million on the JFM books, \$676,744 of which was the difference in the various security positions for JEGF that were on the JFM accounting records for JEGF but not on the custodial statements at NBCN, and which included the PAM preferred shares and a CIBC GIC. In attempting to reconcile the JFM records with the NBCN records, Walz found there was a shortfall where the accounting records of JFM showed higher values than the custodial records, including a cash difference of \$536,000 greater shown on the Funds' financial statements than what was shown by the bank and custodial statements for the Funds.

[58] Following the conclusion of the preliminary compliance review, Brown hired a chartered accountant to prepare proper reconciliations, which provided Walz with comfort that as of the end of 2005 there existed a proper valuation of JEGF's portfolio of securities. With respect to the debentures in the JEGF portfolio, Walz was satisfied that two of the debenture holdings were convertible debentures that could be converted to common shares of their respective issuers that do trade on an exchange and as such were acceptable holdings for JEGF. Brown committed to having the other debenture holdings disposed of by April 30, 2006, which was acceptable to Walz. With respect to PAM, due to the illiquid market, Brown was concerned about how quickly he could dispose of these holdings. Ultimately, Walz agreed to allow JFM until June 30, 2006 to dispose of the PAM shares or to otherwise make JEGF whole.

[59] Going forward with the compliance review, Walz found discrepancies in the JEGF, NBCN and CIBC reconciliations as of December 31, 2005. In comparing cash balances, Walz found a shortfall of \$206,521.87, affecting the calculation of the NAV value of JEGF. Accordingly, Walz's position changed from the on-site visit as at December 13, 2005 when it was determined that there was an unreconciled cash balance of \$536,341.63 to there being an unreconciled cash

balance of \$206,521.97 as at December 31, 2005. Likewise, Walz found discrepancies in the same reconciliations for JIF that amounted to a shortfall of \$19,211.57. In the case of both JEGF and JIF, the shortfall amounted to a material error in the NAV calculations for the Funds within the standards of the Investment Funds Institute of Canada.

[60] Walz reviewed the JEGF account opening documents that he received from NBCN, which included a cash account opened on October 21, 2004 and ultimately changed on February 18, 2005 to a margin account held in the name of JFM in trust for JEGF numbered 27R000 being the NBCN JEGF Custodial Account. Walz reviewed a number of transfers by JFM that appeared to navigate money intended for JEGF through the BMO JFM account. Walz said that it was not until March 1, 2006, after speaking with NBCN, that he discovered the NBCN JFM 27R001E Margin Account that NBCN claimed held 600,000 JEGF units as of January 31, 2006. Brown had not mentioned the NBCN JFM 27R001E Margin Account to him notwithstanding his direct requests for this kind of information. Within the NBCN JFM 27R001E Margin Account, JFM appeared to have borrowed approximately \$1.8 million leveraged against its JEGF units. Further, Walz learned of Brown's NBFL Margin Account that held \$800,000 in the form of 100,000 JEGF units and with \$350,000 borrowed against those. Prior to this conversation with NBCN, Walz believed that Brown held no units in JEGF and that JFM held 94,000-95,000 JEGF units. Upon conducting the proper reconciliation, however, Walz determined that the 600,000 JEGF units held in the NBCN JFM 27R001E Margin Account did not in fact exist, significantly diminishing NBCN's security interest and making the NAV calculations of the JEGF units materially incorrect. It was at this point that a cease trade order was contemplated.

#### **b) Cindy Phillips**

[61] At the time of the Merits Hearing, Cindy Phillips ("**Phillips**") was Vice President of Finance at NBCN. She testified that she became involved with the Respondents when, on February 14, 2006, she was asked by her colleagues to discuss the reconciliations on the JFM accounts and Brown's NBFL Margin Account. Phillips' evidence was that at a meeting with Brown on February 24, 2006, Brown provided her with a draft reconciliation that he had prepared and that showed the discrepancy in the number of units in his records in the NBCN JFM 27R001E Margin Account from NBCN's records. Brown's draft reconciliation showed approximately 67,600.06 units in the NBCN JFM 27R001E Margin Account in contrast to NBCN's records which showed 591,335 units in that account. Phillips stated that in NBCN's opinion, Brown's records showed an understatement of approximately 520,000 units and that Brown did not provide any supporting information for his draft reconciliation.

[62] Phillips' personal notes from the February 24<sup>th</sup> meeting state that the discrepancy appears to have started in September 2005 when NBCN recorded a transfer-in of 171,430 JEGF units per instructions received from Brown, however, Brown's reconciliation only shows 71,430 units transferred-in. Further, on November 29, 2005, NBCN received instructions from Brown to transfer-in 246,964 units but Brown's reconciliation shows a transfer-in of only 24,696.45 units.

[63] Phillips stated that she also talked to Brown at that time about Brown's Personal NBFL Margin Account, which held approximately 120,000 JEGF units. The security position on this account as of December 31, 2005 was a market value of \$858,027 and a debit balance of \$407,934, leaving equity of approximately \$450,000. Phillips asked if Brown would liquidate the assets in Brown's NBFL Margin Account to cover the debit cash balances in the NBCN JFM

27R001E Margin Account but Brown refused, suggesting that any such liquidation would affect the net asset value of JEGF. Phillips testified that his reasoning did not make sense to her.

[64] Phillips described a further reconciliation that she conducted between Brown's document and the bank's records and determined that there should be 591,335 units in the NBCN JFM 27R001E Margin Account. When asked about where Phillips believed the missing units went on the JFM records, she gave two responses: 1. Brown claimed that these transfers never took place and 2. Brown cancelled the missing units.

[65] Phillips reviewed NBCN's documents which show a transfer-in of 171,430 units to the NBCN JFM 27R001E Margin Account on September 8, 2005, where the transferor is identified as JEGF. She could not provide evidence that the units being transferred into the NBCN JFM 27R001E Margin Account did in fact exist at the time; however, she gave evidence that the Authorization to Transfer form was filled out and signed by Brown on behalf of JEGF, and that the bank did not fill out the document itself. She explained that the transfer department at NBCN would validate the units with an independent record keeper such as FundSERV ("**FundSERV**") or Felcom but in some instances JFM was acting as its own record keeper and in those cases the bank would do a reconciliation at the end of the month. She stated that for NBFL, the total number of units outstanding for all clients at NBFL would be confirmed with the unitholder record-keeper. NBFL would receive a third-party reconciliation at the end of the month of total units outstanding.

[66] Phillips reviewed her understanding of the NBCN JEGF Custodial Account and confirmed that if a debit in this margin account were created, the amounts owing would first be covered by liquidating the assets in the account, which belong to JEGF, and if the assets were not sufficient to cover that debit, NBCN would look to JFM, the trustee of the account, to obtain assets to settle the debit.

[67] Phillips also referred to a transaction record of the NBCN JFM 27R001E Margin Account dated March 16, 2005 where 110,733 units of JEGF were purchased for \$700,000, which was paid for by \$400,000 cash from the JFM funds and \$300,000 in debit – both amounts were paid from the NBCN JFM 27R001E Margin Account. The Brown reconciliation states that this was a transfer-in of units and not a "buy"; however, there was no evidence to support Brown's reconciliation.

[68] After the February 24<sup>th</sup> meeting, a number of follow-up steps were planned at NBCN and Brown was to provide Phillips with further reconciliation information. After reviewing the information received from Brown, NBCN decided to contact the Commission, which conversation ultimately led to the cease trade order dated March 8, 2006.

[69] Phillips described two Statement of Claims that were issued as against JFM and Brown for the debit cash balance in the NBCN JFM 27R001E Margin Account and Brown's NBFL Margin Account, respectively. Ultimately these claims were entered as proof of claims in the Funds' receivership proceedings and were settled by the Receiver for a combined total of \$2,154,389 from JEGF's assets for both claims, resulting in a loss of \$588,212 for NBCN.

**c) Richard Walkowiak**

[70] At the time of the Merits Hearing, Richard Walkowiak (“**Walkowiak**”) was a Senior Facilitator at NBCN. His job description included providing services such as trade execution, trade settlement, and custodial services to independent portfolio managers like Brown. At the Merits Hearing, Walkowiak referred to a spreadsheet created by NBCN that he called a “gap analysis” that is essentially a chart showing the discrepancies in the historical activity in the JFM accounts as per NBCN’s books and records with the information provided to NBCN by Brown (the “**NBCN Spreadsheet**”).

[71] One of the appendices to the NBCN Spreadsheet is an email from Brown to Walkowiak wherein Brown requested to deposit \$420,000 into the NBCN JFM 27R001E Margin Account and then to use that account to purchase \$700,000 worth of JEGF units. In this same email, Brown indicates that the JEFG FundSERV account is offline at the time. Walkowiak also identified a screen print of Brown placing the \$700,000 order for 110,773.2121 units. Walkowiak testified that he never found any evidence of this being a transfer-in rather than a purchase.

[72] Walkowiak testified that in his experience most funds hire an independent company to do their record keeping. JFM had hired Felcom but ultimately JFM took on the record keeping task itself such that JFM wore the hat of fund manager and unitholder record keeper. Walkowiak testified that, in his experience, this is extremely rare.

[73] Walkowiak referred to an NBCN form that was filled out by JFM called “Authorization to Transfer Non-Registered Account,” which was a request by JFM to transfer 171,430 JEGF units into the NBCN JFM 27R001E Margin Account. Walkowiak explained that originally, on September 14, 2005, NBCN incorrectly booked the transfer-in for 171.430 JEGF units but that this was adjusted to the correct amount of 171,430 units on September 16, 2005.

[74] Walkowiak also identified an in-kind transfer request by JFM of 246,964.00 JEGF units to the NBCN JFM 27R001E Margin Account dated November 25, 2005. He noted that NBCN initially booked the transfer-in for 246.964 JEGF units and referred to an email from him to Brown dated November 30, 2005 whereby he asked for clarification of whether it should have been 246,964.00 units. Brown’s response in the email was that it should have been for 246,964.00 units and, in response, NBCN booked the corrected entry. Notwithstanding this email correspondence, Brown’s own reconciliation states that the number of units transferred in was 24,696.45, which is inconsistent with his point-in-time email dated November 30, 2005.

**d) Jody Coulson**

[75] At the time of the Merits Hearing, Jody Coulson (“**Coulson**”) was an associate advisor with RBCDS and testified that he is registered as such with the Commission. Brown became a client of Coulson’s in 2000.

[76] Coulson referred to a printout of Brown’s RBCDS Account which shows a transaction on February 7, 2005 whereby Brown purchased 143,145 JEGF units for \$900,000. The notes to that transaction state that a prospectus was mailed to Brown because this was his initial purchase of units in JEGF. Coulson said that he processed this purchase himself. He noted that it was an

unusual purchase because this was Brown's own mutual fund that he was starting himself and it did not come recommended to him by RBCDS. Coulson noted that he took extra notes regarding Brown's RBCDS Account because he had never dealt with a client like Brown who was running his own mutual fund and purchasing units in his own mutual fund through RBCDS.

[77] Coulson referred to a Morningstar report dated December 31, 2004, which gave him background on JEGF. It shows the top fifteen holdings of JEGF, showing that 10% of the JEGF portfolio was invested in Poly Inc. Coulson testified that Brown had also opened an account with RBCDS on behalf of Poly Inc.

[78] Coulson reviewed the purchase and sales in Brown's RBCDS account, noting that on June 13, 2005, Brown sold 70,631 JEGF units for a credit of \$460,000 which was marked "unsolicited" indicating that RBCDS did not recommend this sale. As part of his notes, Coulson had a comment that Brown sold these JEGF units to put into a real estate deal with his father, which funds Brown had indicated he intended to bring back into this account. On that same day, the compliance group at RBCDS instructed Coulson that there were to be no new orders of Juniper allowed. Concerns were raised about the net asset values and the unit numbers reconciling with the JFM records.

[79] On July 26, 2005, Brown tried to transfer certain JEGF units held in his RBCDS account to another brokerage firm but RBCDS would not allow the transfer without a minimum cash payment of \$550,000 in order to cover the margin. Brown did not want to make this deposit and as such the transfer never took place. Ultimately, on September 27, 2005, Brown delivered a CIBC bank draft of \$518,000 for deposit into Brown's RBCDS Account to cover the margin in order that he could transfer out the JEGF units. The units were transferred to NBFL.

[80] Finally, Coulson stated that he had never heard of a Juniper Equity Growth Private Class Series Fund nor had he seen any reference to such in his files upon review. Further, he stated that a private class did not show up during the due diligence with the compliance department and the national credit department or any of the correspondence with Brown. He denied ever seeing a memo from Brown to Coulson at volume 9, tab N, page 194 of Staff's hearing brief of documents dated February 4, 2005, wherein Brown refers to a purchase of JEGF units, complaining that the wrong units were purchased and he gives the codes for the equity and private class funds as JEF001 and JEF001P (the "**Private Class Memo**"). Notwithstanding the date of this memo, the first purchase of the JEGF units by Brown at RBCDS took place on February 7, 2005, according to the evidence submitted at the hearing, as referred to herein. Coulson denied having seen the Private Class Memo and could not reconcile why it would be dated three days earlier than the transaction it appears to refer to.

#### e) **Karen Anderson**

[81] At the time of the Merits Hearing, Karen Anderson ("**Anderson**") was the supervisor of mutual fund reconciliations with RBCDS. Her responsibilities included ensuring that the RBCDS records balance with fund company records of units and to reconcile any discrepancies. With respect to JEGF, Anderson stated that because it was a manual fund, RBCDS depended on the fund company itself to send its client statements to reconcile against RBCDS' records. In a case where a discrepancy appears between RBCDS' records and a fund's records, the fund company is contacted and requested to send relevant documentation such as faxes of trade

confirmations or transaction screens as well as explanations for the discrepancy. If there are classes within a fund there would be a separate report for each class. If a discrepancy is less than .001, an investigation would be unlikely; however, where the discrepancy measures as low as .003 of a unit, an investigation would take place.

[82] Anderson became involved with JEGF when one of her staff members reported to her that there was a reconciliation issue and backup was not forthcoming from JEGF. Anderson reviewed two JFM documents that were confirmations of a purchase order of JEGF units dated February 7 and March 7, 2005, respectively. The former order was for 143,145.7064 units at \$6.2873 for an amount of \$900,000 and the second order was for 219,990.8861 units at \$6.3639 for an amount of \$1,400,000. A notation on the second order showed that there was a discrepancy in the price per unit on JFM's records for the March 7, 2005 transaction versus RBCDS' records, which had it priced at \$6.3629 per unit. Anderson referred to various correspondence wherein she requests back up information from Brown about discrepancies between number of units and/or unit price. At one point, Brown acknowledged that the discrepancy was due to human error on his part and indicated he would correct JFM's records. Anderson advised that JEGF was the only Juniper fund she dealt with and that she had never heard of a Juniper Equity Growth Private Class Series during her dealings with Brown.

#### **f) Ronald Landry**

[83] At the time of the Merits Hearing, Ronald Landry ("**Landry**") was the executive director of ETF Services at CIBC Mellon. He joined CIBC Mellon after it acquired Felcom in October of 2009. Prior to being with CIBC Mellon, Landry was the president of Felcom. Felcom was in the "back office" business and provided a range of client services including fund valuation, fund accounting, unit holder record keeping, and transferring services to mutual fund companies.

[84] Landry's first dealing with Brown and JFM was in July 2005 when he prepared a proposal for providing transfer agent services to JFM. JFM wished to keep fund accounting in-house and only sought transfer agent services. Landry understood that up until approaching Felcom, JFM had done their own transfer agent and record keeping services. Brown advised Felcom that JFM had one retail prospectus fund on FundServ valued daily and was looking to start two new pooled funds. Landry stated that Brown also advised him that JFM had recently bought four funds sold only in Ontario but were looking to go multi-jurisdictional. Landry prepared and sent a proposal to Brown on July 6, 2005 and also sent a draft form of a "Securityholder Services Agreement" (the "**Felcom Services Agreement**") which provided that Felcom would act as registrar, transfer agent, order processing and distribution/disbursement agent. Ultimately, a revised version of this agreement was accepted by Brown. Schedule "A" to the Felcom Services Agreement listed four Juniper funds that were included in Felcom's services: JEGF, JIF, Juniper Equity Growth Private Series Fund, and Juniper Pooled Income Fund.

[85] Landry stated that Felcom had a daily checklist of tasks to perform for JFM. One of the tasks was to email "share proofs" which were a daily print out of the units outstanding at the start of the day, the purchases, redemptions, etc., through the day, and the closing balance of units. Landry noted that this information was needed in order to calculate JFM's NAV to determine the per unit values of the various funds. Another of Felcom's tasks was to email the JFM "cash proofs" which shows the nature of any transaction, such as subscription, redemption, etc., in order that JFM knew what to book into the fund accounting records.

[86] Landry then described the breakdown of JFM's relationship with Felcom, which began with a series of emails dated November 3, 2005, wherein Brown instructed Felcom to make certain account transfers and Felcom, in response, expressed its opinion that it was not permitted to do so. In the emails, Felcom requested proof of JFM's power to do this in its declaration of trust with JEGF. The emails sparked a series of questions between Brown and Felcom about the nature of Felcom's services and ultimately resulted in the termination of the Felcom Services Agreement. Landry stated that JFM wanted Felcom to act as an agent for JFM which would remain the official transfer agent and registrar of the funds, but Felcom was not prepared to limit its role to an administrative one.

**g) Gary Tamura**

[87] Gary Tamura ("**Tamura**") is a lawyer whose career history includes positions held with the Commission, a secondment to the U.S. Securities Exchange Commission, the Toronto Stock Exchange, and in-house counsel with the Royal Bank of Canada Law Group with RBC Wealth Management, RBC Capital Markets and, at the time of giving evidence at the Merits Hearing, as director and senior counsel of the RBC Law Group based in Hong Kong. Tamura gave his evidence by teleconference from Hong Kong.

[88] Tamura testified that he first encountered Brown in July 2005 when he was contacted by RBC's business and credit groups as a result of Brown's RBCDS Account being significantly under margin. Tamura believed that the cause of the under margin was the transfer of a number of JEGF units from the RBCDS nominee name to Brown personally, reducing the collateral that effectively underpinned the account. This transfer had been executed without RBCDS' consent and caused concern for the bank as it no longer retained control of the JEGF units or had collateral for the amounts borrowed in Brown's RBCDS Account. Ultimately, an agreement was reached between RBCDS and Brown to right the margin balance by paying into the account, which he did, and to no longer be an account holder with RBCDS. Brown deposited \$518,000 into Brown's RBCDS Account to satisfy the debts owing. Tamura identified a cheque payable to JFM for \$900,000 issued by RBCDS in relation to a trade of the JEGF units. He identified that the cheque was deposited into a BMO account according the markings on the back of the cheque.

[89] Tamura stated that he had never heard of Juniper Equity Growth Private Class Series in his dealings with Brown. He investigated within RBCDS if any of the advisors or individuals in the mutual funds operations group had heard of this private class series and no one had indicated any knowledge of this fund.

**h) John Nyssen**

[90] At the time of the Merits Hearing, John Nyssen ("**Nyssen**") was the manager of Investment Fund Administration Manufacturers with Desjardins. From 1998 to 2007, he was manager of Fund Administration at Felcom in charge of the transfer team and trust accounting team, processing mutual fund transactions for various clients, among other things. The transfer agent team processed mutual fund transactions coming in for different mutual fund company clients. His overall work experience has been focused on mutual fund administration strictly on the unitholder side.

[91] Nyssen first came into contact with Brown and JFM when they approached Felcom in 2005 to engage their transfer agent system. Nyssen understood that when Brown approached Felcom, JFM's transfer agent system was in-house. Nyssen's evidence was that Brown, on behalf of JFM, hired Felcom to be the record holder transfer agent for JFM but not to do any trust accounting. Felcom's tasks for JFM involved keeping unitholder records for investors inside of certain funds, recording the total number of units at the end of each day, processing all of the trades, and doing a daily report. Notwithstanding that Felcom did not provide JFM with any trust accounting services, Felcom would confirm the amount of money that should have moved for purchase or redemption for JFM to pay FundSERV or directly to a broker. Nyssen stated that JFM's funds included JEGF, JIF and a private fund called the Juniper General Investment Fund, and that all of these funds were listed on their system. JEGF was valued daily, which meant that Felcom reported the number of units outstanding on a daily basis in order that JEGF could self-calculate the price of their units.

[92] Nyssen testified that he only dealt with the two Funds and did not deal with the other pooled funds listed in the Felcom Services Agreement. He also noted that there was a fund called Juniper General Investment Fund that was launched subsequent to the execution of the Felcom Services Agreement.

[93] His evidence was that Brown provided Felcom with two different versions of an excel spreadsheet listing the unitholders of the various funds. Felcom had to manually input these numbers into their system, and then going forward would provide share proofs and cash proofs as described by Ron Landry.

[94] Nyssen recalled that on September 8, 2005, Brown sent a document to Felcom from NBCN to do a transfer of 171.430 JEGF units to the NBCN JFM 27R001E Margin Account. Nyssen testified that the transfer was mistakenly processed as 171,430 units and was corrected to be 171.430 units. He further recalled that on October 21, 2005, Brown sent him an email stating that JFM had to go offline FundSERV Inc. in order to work on reconciling a discrepancy in the fund accounting of JFM. Once JFM was offline FundSERV, transactions could only occur manually which would require permission by Brown to complete.

[95] Nyssen recalled the breakdown in the relationship between Felcom and JFM began in or around late October 2005, when Brown asked Nyssen's employee to change the name of one of the JFM account holders from Dorothy Huele to Marnie Brown. Felcom refused to do the transfer because it did not appear to be one and the same person and Felcom did not have instructions directly from Dorothy Huele to do this. After this incident, the relationship between Felcom and Brown began to deteriorate. Brown wanted Felcom to provide certain administrative support services but not registrar and transfer agent services. Brown proposed that JFM would act as its own transfer agent. Felcom was not comfortable with this proposal as the Felcom Services Agreement indicated that Felcom was to act as registrar and transfer agent. Felcom refused to release only these tasks and responsibilities and were not prepared to let JFM be the transfer agent.

[96] Nyssen testified that he found it odd that JFM would go offline FundSERV as none of Felcom's other clients did this. He also thought it strange in his experience that JFM took care of its own trust accounting – something that clients would normally hire Felcom to do. At the

end of their relationship, Felcom returned JFM's records in the same form of excel spreadsheet as it was first received by them. Brown took issue with the state of the records that were returned and indicated that there were great discrepancies in the account information at that time.

**i) Goretti Moniz**

[97] At the time of the Merits Hearing, Goretti Moniz ("**Moniz**") was a Financial Services Associate with CIBC dealing with higher net worth clients and had been in that position for 11 years in total. Moniz first met Brown when she was an associate to Kevin Henderson, the advisor who was managing Brown's accounts at CIBC sometime between 2003 and 2005. Moniz provided the back office, administrative services for Brown.

[98] Moniz identified account opening documents with CIBC dated February 7, 2005 for the Southgate Trust, the signatories of which were Brown and Marnie Brown. Brown is a beneficiary of the Southgate Trust and the trustees are Marnie Brown, Tony Rodrigues, and Bonnie Burgess. Moniz also identified an account opened for the Juniper Pooled Income and Property Fund on March 7, 2005, the principal of which was Brown. The authorized signing authority for this account was Brown. Brown, as trustee, was also the authorized signatory for a JIF account at CIBC and he delegated deposit inquiry authority to Purves in December 2005 and Bryl in February 2006, both of whom were understood to be JFM employees.

[99] Moniz identified a number of deposits and debits on the JEGF CIBC accounts. She identified a cheque drawn on one of the JEGF CIBC accounts that shows a subheading under JEGF, "(Private Class Series)", in the amount of \$400,000 made out to PAM. Notwithstanding the subheading, the legal account holder on the cheque is JEGF. Moniz also identified a cheque drawn on the NBCN JEGF Custodial Account in the amount of \$700,000 and a JEGF CIBC account statement reflecting a February 18, 2005 inter-transfer of \$900,000 between two of JEGF's accounts at CIBC. She identified a credit of \$1,399,990 on March 8, 2005 wired into one of the JEGF CIBC accounts and a debit memo for \$1 million on March 9, 2005 coming out of one of the CIBC JEGF accounts. On March 14, 2005, there was a deposit into one of the CIBC JEGF accounts of \$700,000 and on May 19, 2005 there was an incoming wire transfer of \$1,449,990 deposited and a debit the same day in the amount of \$1,450,035 from the same CIBC JEGF account.

**j) Daniel Wootton**

[100] At the time of the Merits Hearing, Daniel Wootton ("**Wootton**") was a senior manager at Grant Thornton Limited ("**Grant Thornton**," as defined above, the "Receiver"). Grant Thornton became the court-appointed Receiver of JFM, JIF and JEGF on May 18, 2006 to take possession of the operations and assets of these Juniper entities to preserve and protect their assets and operations and to work with the unitholders to see if the Funds should continue or be wound up. As noted above, Staff sought the appointment of the Receiver after NBCN, the custodian of the Funds, raised concerns regarding the existence of certain units which they had previously thought were held in the NBCN JFM 27R001E Margin Account. Wootton testified that the Funds no longer exist today. In November 2007, the Receiver held a unitholder meeting where the unitholders of the Funds voted in favour of the Funds being wound up and having the assets under management paid out.

[101] Wootton first met Brown on the day following the appointment of the Receiver when he attended the JFM premises to take control of the Juniper entities. Fifteen days following its appointment, on May 30, 2006, the Receiver prepared a report to advise the Court of its activities and findings and sought court-approval to enter into an interim management agreement with JFM, portfolio manager of the Funds, to ensure that the Funds would continue to be traded in accordance with the trust indenture.

[102] One of the Receiver's first tasks was to determine the whereabouts of \$900,000 that was withdrawn in February 2005. Wootton's evidence was that Brown was not forthcoming with this information but that Brown ultimately worked with the Receiver to create an affidavit with flow charts attached as appendices thereto that attempt to demonstrate the flow of funds between 26 different bank accounts related to the Respondents. This affidavit was part of the Second Receiver's report, which was filed with the Superior Court of Justice in or around October 6, 2006 and entered as an exhibit in the Merits Hearing.

*The Movement of \$900,000 (February 2005)*

[103] Wootton reviewed a flow chart that showed the movement of \$900,000 beginning on February 10, 2005. Specifically, the chart shows \$900,000 deposited into a BMO JEGF trust account on February 10, 2005 arriving from Brown's RBCDS Account for the purchase of units in the JEGF Private Class Series. On February 11, 2005, the \$900,000 is deposited into a CIBC account for "JEGF Private Class Series". Shortly after this deposit, two amounts are withdrawn from the CIBC account: (1) on February 23, 2005, \$460,000 is transferred back into Brown's RBCDS Account, and (2) On February 25, 2005, \$400,000 is paid to a joint CIBC account between Roy Brown and Marnie Brown. One week later, \$410,000 is transferred from the CIBC joint account to Brown's RBCDS Account for a total deposit in that account of \$870,000. The original \$900,000 transaction is recorded on Brown's RBCDS Account statement as a purchase of JEGF units. Accordingly, Wootton pointed out that, ultimately, on March 1, 2005, as a result of this flow of funds, Brown's RBCDS Account ends up with both the JEGF units valued at \$900,000 and the cash amount paid in respect of those units in the amount of \$870,000.

*The Movement of \$1.4 Million (March 9-11, 2005)*

[104] Wootton reviewed a second flow chart that showed the movement of \$1.4 million. On March 4, 2005, \$1.4 million was withdrawn from Brown's RBCDS Account and deposited into a BMO JEGF account for the purchase of JEGF units. On March 8, 2005, \$1.4 million minus a \$10 transaction fee, being \$1,399,990, was withdrawn from the BMO JEGF account and paid to a JEGF Private Class account at CIBC. On March 9, 2005, the funds were withdrawn from the JEGF Private Class account at CIBC as follows: (1) \$1 million was deposited into a Juniper Pooled Income and Property Fund account at CIBC, and (2) on March 11, 2005, \$400,000 was deposited into Poly Inc.'s corporate account, then transferred to the BMO JEGF Account and again, transferred to the NBCN JFM 27R001E Margin Account.

*The Movement of \$1,248,000 (March 24-April 27, 2005)*

[105] Wootton reviewed another cash flow chart which follows the movement of \$1,248,000. On March 24, 2005, \$1,248,000 was transferred from the NBCN JEGF Custodial Account to the JEGF BMO Account. On that same day, the same amount minus a \$10 transaction fee, being \$1,247,990 was transferred to the Juniper Pooled Income & Property Fund CIBC account, where

it was pooled with the \$1,000,000 (referred to in (ii) above) such that the CIBC account had \$2.25 million. On March 31, 2005, \$2.2 million was transferred to the JEGF CIBC trust account. On that same day, \$580,000 was also deposited into the JEGF CIBC trust account, received from a JFM CIBC corporate account. On April 13, 2005, \$2,780,000, was transferred from the JEGF CIBC trust account back into the Juniper Pooled Income and Property Fund CIBC account.

[106] On April 21, 2005, two transfers were made from the Juniper Pooled Income and Property Fund CIBC account: (1) \$1.2 million was transferred to the Browns' joint CIBC account, and (2) \$450,000 was transferred to the JFM CIBC corporate account. The following day, \$450,000 was transferred from the JFM CIBC corporate account to the Browns' joint CIBC account.

[107] On April 27, 2005, \$1,699,948 was transferred from the Browns' joint CIBC account to Brown's lawyer and used to pay Brown's personal mortgage on his home. Ultimately, however, Wootton testified that he discovered that a new mortgage was taken as against Brown's house in Marnie Brown's name and no equity was left in the home.

*The Movement of \$700,000 (March 15-23, 2005)*

[108] Wootton reviewed another cash flow chart which followed the movement of \$700,000. On March 14, 2005, \$700,000 was transferred from the NBCN JFM 27R001E Margin Account to the JEGF Private Class account at CIBC and is recorded on NBCN's books as a purchase of JEGF units. On March 16, 2005, three fund transfers from the CIBC JEGF Private Class account took place: (1) \$375,000 was transferred to a JFM BMO corporate account which was transferred the same day to the NBCN JEGF Custodial Account; (2) \$75,000 was transferred to a PAM BMO account; and (3) \$250,000 was transferred to the Juniper Pooled Income & Property Fund CIBC account, and then on March 23, 2006, this \$250,000 was transferred to Windrush Abbey's corporate account at BMO – a corporation wholly controlled by Brown.

*The Movement of \$500,000 (May 27–June 6, 2005)*

[109] Wootton reviewed another cash flow chart which followed the movement of \$500,000. On May 27, 2005, JFM redeemed 108,000 units in JEGF for proceeds in the amount of \$700,000 which amount was transferred from the NBCN JEGF Custodial Account to the NBCN JFM 27R001E Margin Account. On June 2, 2006, \$500,000 was transferred from the NBCN JFM 27R001E Margin Account to the JEGF BMO Account and that same day then transferred to JFM's corporate BMO Account. On June 3, 2006, \$499,900 was transferred from the JFM BMO account to the JFM CIBC account (68-04810). On June 6, 2006, \$500,000 was transferred from the CIBC JFM account to the Browns' CIBC joint account.

*The Movement of \$1,450,000 (May 19, 2005)*

[110] Wootton reviewed another cashflow chart which followed the movement of \$1,400,000. On May 19, 2005, \$1,450,000 was transferred three times: (1) from the NBCN JFM 27R001E Margin Account to the JEGF BMO account, then (2) to the JEGF Private Class Series Fund CIBC account, and then (3) to the NBCN JEGF Custodial Account. Wootton stated that although the original transaction from JFM to JEGF is recorded on JFM's books as a purchase of 229,503.007 JEGF units, Brown did not agree that this purchase took place.

[111] With respect to the securities in the NBCN JFM 27R001E Margin Account, Wootton's evidence was that over 230,000 JEGF units were in the account. With respect to the transactions taking place in the flow charts prepared in collaboration with Brown, Wootton made the following observation:

We did review the transactions through the NBCN accounts and it was our conclusions that none of the monies borrowed under the credit facility margin account were used to purchase Equity Fund units, and that the funds borrowed from NBCN were not deposited into the Equity Fund operating account or the general pool of Equity Fund assets under management.

(Transcript of Merits Hearing, September 28, 2011 at page 162)

[112] He continued to state that although the banking statements reflected that there were JEGF units on deposit in each of the margin accounts in the Receiver's investigation; it could not see those units being properly created.

[113] With respect to the Juniper Equity Growth Private Class Series Fund, Wootton testified that the Receiver received a copy of the trust deed for the fund, reviewed the available records for it as well as the fund's bank statements and ultimately concluded that the bank account was "relatively inactive".

[114] The Receiver concluded that NBCN borrowings were not used for the benefit of JEGF. It could not find any evidence on the trade blotter or recorded or referenced in the net asset value statements of JEGF that any units were traded. The Receiver found that some of the accounts listed in the Juniper records for related parties were showing negative unitholdings, raising concern that units were being redeemed that were not properly purchased. Specifically, the Receiver looked at dates in the NBCN JFM 27R001E Margin Account statements where there were withdrawals from the margin account and, although the units were being increased or decreased respectively on the NBCN account statements, the same transactions did not appear to the Receiver to be reflected in JFM's records.

[115] Wootton referred to a document prepared by the Receiver entitled "Juniper Equity Growth Fund Review of Related Parties" which contained information obtained from JFM's office computers. The chart provides details of related party transactions during the time that JFM was the fund trustee, fund manager, transfer agent and fund accountant. The chart reflects a trade entered on January 4, 2005 for the purchase of 75,171.647 units of JEGF in the Windrush Abbey account, which is a related party. The records indicate that the units were paid by cheque dated June 30, 2005; however, in working with Brown to source the funds the Receiver discovered that no such payment existed and, in fact, the units were paid in four payments between March and December, 2005. Notwithstanding that the units were not paid for in January, the JFM records indicated that on February 2, 2005, there was a redemption of 71,179.782 JEGF units in the Windrush Abbey account for \$449,898.93. Brown was unable to explain to the Receiver the reason for the notation of a June 30<sup>th</sup> payment.

[116] Ultimately, the Receiver came to discover Felcom on its own and not by information given from Brown. After reviewing Felcom's records, the Receiver discovered 500,000-700,000

more units reflected on the Felcom records between August 2005 and December 2005. As a result of this discovery, the Receiver revisited its analysis of the JFM records. After reviewing the Felcom records and the JFM records, the Receiver discovered that the number of units that were pledged to the RBCDS, NBCN and NBFL margin accounts were very similar to the discrepancy between the JFM records and the Felcom records. Staff allege that this evidences that JFM was maintaining two sets of books and records, one set with Felcom that is materially different from the set maintained by JFM, and that, when looking at those differences, it is clear that these differences relate to these pledged units. Wootton testified that Brown was asked about this discrepancy during his examination in the receivership proceedings and that Brown did not have any explanation.

[117] The Receiver reviewed the actions of NBCN, NBFL and RBCDS and determined that the banks each respectively took the proper steps that they should have to verify that the funds withdrawn from the respective Juniper and Brown margin accounts were in the form of a cheque made payable to the JEGF or wire transfer to JEGF directly and the banks understood it would be deposited to the benefit of the JEGF to complete the transaction. Wootton stated that when Brown was specifically asked about certain transactions, he indicated that some of those purchases that the banks understood were for JEGF units were in fact purchases of the Private Class series or in-kind transfers between accounts and not purchases of JEGF units. The Receiver concluded that the monies taken from the RBCDS and NBCN margin accounts were in fact diverted from their intended purpose of purchasing JEGF units. Ultimately, NBCN and NBFL made a claim as secured creditors in the receivership proceedings. As noted above, the final payment to NBCN and NBFL in the receivership proceedings was approximately \$2,154,000, which reduced the value to JEGF unitholders by 16%.

[118] In the fifth report of the Receiver to the Court, the Receiver detailed its conclusion that where the payment, for the purchase for JEGF units were made outside of the T+3 requirements and not paid at the time due, this resulted in opportunity costs for JEGF wherein they should have had those proceeds to invest and the related party benefited from an interest-free loan. When asked about the overall loss to investors, Wootton responded as follows:

Q. ...In terms of the amounts owing, the loss to investors, from your perspective as the receiver, how would you quantify those for us?

A. We would look to the amount that was paid to NBCN and NBFL because that relates to units where we don't see the proceeds relating to those purchases going to the benefit and staying to the benefit of the Equity Fund. So, we see that as a dilution. That would be one amount.

The second amount would be the result of the receiver's review of the netting out process of related party account holdings, and the result of the T-3 [*sic*] market timing transactions and adjustments which result in approximately 11,100 units of Equity Fund units that would be due from the related party accounts to the fund. So, we would want to value those units. We'll consider that as a loss because that's due to the Equity Fund.

In addition, you could calculate any opportunity cost where those proceeds should have been a part of the Equity Fund at the time that those transactions took place so that the Equity Fund could benefit from those proceeds and realize on the general appreciation that occurred in the fund.

....

We've looked at a couple of ways of valuing the units that would be due as a result of the market timing. And if we look at the value of the fund or at least the price of the fund at the time of the receivership and the Cease Trade Order, which was approximately \$7.39, the total value would be about \$84,000 and change with respect to those units, plus the payments to NBCN and NBFL for the 2,154,000 approximate amount. And we have not done any calculations to quantify any opportunity costs but that would be something that we would look at too.

(Transcript of Merits Hearing, September 29, 2011 at pages 53-55)

[119] With respect to the JEGF 10% investment in PAM, Wootton stated that JFM's records showed a receivable of approximately \$400,000 on the NAV statements for JEGF but that these funds were not collectible because PAM had no assets.

[120] Ultimately, the JEGF unitholders voted (1) in favour of liquidating the JEGF and distributing the asset on a pro rata basis, (2) in favour of approving the Receiver's agreement to enter into a mutual release with NBCN, NBFL and JFM, (3) against holding back \$250,000 to commence legal proceeding against JFM and its principal, and (4) against holding back \$250,000 to pursue an investigation on the officers and directors of JFM and whether they complied with their statutory duties. As at the time of the Merits Hearing, Wootton's evidence was that approximately 95% of the JEGF assets were distributed to unitholders, who collectively received an amount of approximately \$11-12 million at approximately \$6.89 per unit, with another \$400,000-500,000 remaining in trust for the approximately 200 JEGF unitholders that had not yet been located.

#### **k) Naomi Chak**

[121] At the time of the Merits Hearing, Naomi Chak ("**Chak**") was a senior forensic accountant with the Enforcement Branch of the Commission. She was the primary investigator on the Juniper file with the Commission since March 22, 2006. Chak reviewed the bank statements of Brown and the Juniper entities and found various discrepancies within them. Accordingly, Chak conducted a voluntary interview of Brown over four days beginning on April 18, 2006. When asked about specific transfers of units into the JFM corporate margin account at NBCN, Chak gave evidence that Brown's explanations of such units being "transfers" were inconsistent with NBCN's records including cheques and emails showing these as purchases. For example, neither the \$900,000 transaction nor the \$1.4 million transaction referred to above could be found by Chak on the trade blotter or in the bank statements.

[122] Chak received a cancelled cheque in the amount of \$900,000 from Tamura at RBCDS that is marked as having been deposited into a 1024-450 account. Chak testified that when she

compared the bank account shown on the back of this cheque with the list provided to her from Brown's counsel she could not find the account on this list. This caused Chak concern and it was at that point that the Commission decided to seek an order to freeze all of the Juniper bank accounts on the basis that there were undisclosed accounts and \$3,000,000 unaccounted for. Accordingly, the Commission sent two directions to CIBC and BMO to freeze all of the bank accounts of JFM and the Funds on the basis that there were undisclosed bank accounts and the Commission was trying to locate the \$3,000,000, which included the \$900,000, \$1,400,000 and \$700,000 transactions mentioned herein. It was at that time that Brown advised Chak of the Juniper Equity Growth Private Class Series F Fund. Upon request of Brown's counsel, Staff then received a FundSERV print-out that referenced the JEGF Private Class Series Fund. Staff then contacted FundSERV who advised that the Private Class Series fund was added onto FundSERV on December 7, 2005.

[123] Ultimately, Chak did not get any answers from Brown as to where the \$900,000, \$1,400,000 and \$700,000 were deposited. 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. Chak became aware of Felcom and obtained their unitholding information for the JEGF units and found that there was discrepancy of 617,590.1137 units between Felcom's records, which had 2,509,926.5080 units listed, and JFM's records of 1,892,336.3943 units. Staff asked Chak to go over some of the transcripts of her voluntary interview with Brown wherein he denied any relationship with Windrush Abbey. Brown also denied having any relationship with Southgate Trust and told Chak that it was a trust for his children in his wife's name, notwithstanding that CIBC bank documents indicate that Brown was an authorized signatory and a partial beneficiary of the trust. Further, Chak identified a cheque dated February 25, 2005 written by Windrush Abbey for \$400,000 to Marnie Brown with what appeared to Chak as Brown's signature. Finally, Chak identified two cheques made out by PAM payable to JEGF for \$40,000 and \$36,000, with what appeared to her to be Brown's signature dated February 23, 2005 and February 25, 2005 respectively.

### **C. The Brown Interviews**

[124] Although Brown did not participate in the Merits Hearing, we had the benefit of reviewing the transcripts of Brown's voluntary interviews by Staff held at the Commission on April 18, 25, 26 and May 2, 2006 (the "**Brown Interviews**"), during which time he was represented by counsel. The transcripts of the Brown Interviews were accepted into evidence in their entirety and marked as exhibit 20 at the Merits Hearing, and are summarized in more detail below.

#### *The In-House Recordkeeping: RecordSource*

[125] On the first day of the Brown Interviews, Brown described what he believed to be the impetus for the matters concerning the Juniper entities. In May 2004, Brown purchased all of JFM's shares from its single shareholder and thereby took over management of JEGF. At that time, JEGF was the only fund managed by JFM. He recalled that in July or August 2004, JFM took over as trustee of JEGF from CIBC Mellon. Brown also decided that he wanted to bring the recordkeeping and fund accounting work that was previously done by CIBC Mellon in-house in order to save on costs. He believed that CIBC Mellon's charges were too high for JEGF and so

he made the decision to develop a recordkeeping system that would ultimately be called RecordSource (“**RecordSource**”) in order to do the fund accounting in-house.

[126] Brown engaged a company he referred to as D-tech (“**D-tech**”) to develop RecordSource. D-tech outsourced the software and database development of RecordSource to a company Brown referred to as MJC Software (“**MJC**”). CIBC Mellon officially stopped acting as record keeper for JEGF on December 1, 2004, prior to the launch of RecordSource. Accordingly, JEGF’s records were recorded on an excel spreadsheet for December 2004 and January 2005. Ultimately, the JEGF unitholder list was uploaded to RecordSource, which launched on February 1, 2005.

[127] In March 2005, Brown decided to change JEGF’s portfolio manager from Leon Frazer to MMA in anticipation of a merger with the Capstone Funds. MMA was the portfolio manager for the Capstone Funds at that time. Also in March 2005, Brown discovered that RecordSource was not communicating properly with FundSERV, resulting in what Brown thought were isolated errors with the unitholder account balances. The problems with RecordSource came to a head in July 2005, when Brown noticed that the errors were more widespread than originally thought and the account balances were showing higher unit amounts after redemptions instead of lower unit amounts. In order to deal with this issue, Brown decided to take JEGF off of FundSERV until RecordSource was repaired. In the interim, trades were conducted manually through JFM’s internal trade order entry system. Brown said that he was advised by MJC that this was an isolated issue and that going forward everything would run properly; however, JEGF remained off FundSERV while RecordSource was reworked.

#### *The Capstone Merger*

[128] Following the merger of JEGF with the Capstone Funds on October 6, 2005, the record data of the Capstone Funds were kept separate from JEGF due to the ongoing problems with RecordSource. Brown wanted to keep the new data off RecordSource until it was running properly. At that time, JFM also switched from using PC Quote to ViewPort as the portfolio management system to value assets, produce net asset statements and calculate the net asset values. JFM produced a merged spreadsheet that combined the Capstone Merged Funds and JEGF in order to obtain the proper amount of aggregate capital stock for Viewport. At this point in time, the record keeping was kept separate but the portfolio management system was operating with the total aggregate capital stock for both the Capstone Merged Funds and JEGF.

#### *The Capstone Letter & Brown’s Notice to the Commission*

[129] By November 2005, the Capstone Consultants’ letter had gone out and there was a significant increase in redemption requests by the unitholders of the former Capstone Merged Funds. Although JFM briefly attempted to go back on FundSERV around this time, Brown decided that all of the redemption requests made it too costly to wire transfer funds through FundSERV. Accordingly, the Funds came off FundSERV again so that JFM could process redemption cheques manually and deal directly with dealer requests. Ultimately, there were two large redemptions in each of JEGF and JIF, which concerned Brown and prompted him to call the Commission, along with his counsel, in order to disclose that the Funds were having a difficult time meeting their T+3 requirements.

### *The JFM Auditor*

[130] In December 2005, Brown contacted the Funds' auditor, Barry Doerbecker, in order to resolve the ongoing account balancing problems with RecordSource. Ultimately, Brown determined that the bug discovered in the RecordSource software in July 2005 was not resolved properly and as a result the redemptions were continuously miscalculated throughout that time.

### *Transfers vs Buys in the NBCN NetRep System*

[131] Brown explained the reason for the issues in the NBCN JFM 27R001E Margin Account were due to NBCN's NetRep system. He mistakenly assumed that he could conduct "transfers in" of JEGF units by entering them as a "buy" in the NetRep system. He explained that although he meant certain transactions to be transfers they were erroneously accounted for as purchases, resulting in the data error entries in the NBCN records. Sometime in May or June 2005, Brown realized that he was not doing the transfers-in correctly and stopped using the "buy" function on NetRep for this purpose. At no time did Brown advise NBCN that his prior "buys" were in fact transfers-in. He did not believe it was necessary to report the prior activity to NBCN even though he realized he had not executed the transfers properly.

[132] Staff took Brown to an email dated March 7, 2005, where he describes one such transaction as a \$700,000 "purchase" of JEGF units through NetRep. He agrees that there is nothing in the email that indicates this was meant to be a transfer and not a purchase and that at no time did he ever advise NBCN otherwise. When asked to explain his actions, Brown said "...at the time I didn't think I needed to advise [NBCN] that these were transfers in because I knew the account was whole." (Brown Interviews Transcript, April 25, 2006 at page 147)

[133] Staff also questioned Brown about the transfer route of \$400,000 that was deposited into the NBCN JFM 27R001E Margin Account. Brown explained that, in an effort to avoid a wire transfer charge, and because the necessary authorizations were not properly set up at the time for a direct transfer from JFM's BMO account into the NBCN JFM 27R001E Margin Account, Brown directed \$400,000 to move from the JFM BMO account, through a JEGF account at NBCN, into the NBCN JFM 27R001E Margin Account. He said that the purpose of depositing \$400,000 into the account, in addition to the \$700,000 "purchase"/transfer-in of JEGF units in March, was to create an equity position in the NBCN JFM 27R001E Margin Account such that JFM had the ability to purchase and increase its position in JEGF and create a manageable margin facility that he could borrow against it if needed. Ultimately, however, there were no purchases made of JEGF shares through the NBCN JFM 27R001E Margin Account at any time.

[134] Brown referred to a second transfer-in of 229,503 units to the NBCN JFM 27R001E Margin Account on May 16, 2005, which he described as a "buy" on NBCN's NetRep system. The value of those units was \$1,450,000. Brown also identified a transfer of funds into the NBCN JFM 27R001E Margin Account at that time in the amount of \$800,000. Ultimately, \$1,450,000 was transferred out of the NBCN JFM 27R001E Margin Account but Brown did not provide an answer as to where it was allocated.

### *The September and November 2005 Transfer Errors*

[135] Staff directed Brown to NBCN's records that show two transfers-in to the NBCN JFM 27R001E Margin Account of 171,430 units in September and 224,964 units in November, 2005.

Brown's records indicate that the transfers-in should have been 71,430 and 24,964 respectively. Brown was unable to explain the discrepancy or provide any documentation with respect to the September transfer. Regarding the November transfer, Brown explained that two errors took place: JFM erroneously requested a transfer of 224,964 units and NBCN erroneously recorded a transfer of 224.964. When Brown discovered NBCN's error, instead of advising that the transfer should have been 24,964, he confirmed the transfer should have been 224,964 units. When Staff asked him why he did not correct the number, Brown stated,

THE INTERVIEWEE: ... And all of this because of the historical context. We did not want to look like a bunch of idiots again with all of the blunders that had happened over the course of the last 60 days, because of all of the issues related to mergers, the subsequent historical position, the wrong settlement into the account, and a bunch of other administrative issues that had happened.

I just – my... I made the decision at that time we're going to – rather than go back and tell them, 'By the way, the real number should be 24,000' I confirmed 246[,000] because I know he's got the form, and my decision was let's correct it internally, send a new form in to them with the revised amount...

(Brown Interviews Transcript, April 25, 2006 at pages 191-192)

[136] Brown said that soon after this took place, Juniper was hit with a number of administrative problems causing him to forget about the necessary correction. He did not advise NBCN of the correction until meeting with them in February 2006.

[137] Following the transfer of these units; Brown withdrew \$719,567 from the NBCN JFM 27R001E Margin Account but did not identify where the money was allocated. Staff asked Brown about two purchases of JEGF units recorded in his RBCDS account statements. The first purchase was of 143,145 JEGF units on February 7, 2005 for the amount of \$900,000 and the second purchase was of 219,990 units recorded on March 4, 2005 for the amount of \$1.4 million. Staff sought clarification on as to why there was no indication in the JEGF records or on the trade blotter of those purchases and as to where the \$900,000 was deposited. Brown advised that he did not have any paper records of his RBCDS account.

#### *The February 2006 NBCN Meetings*

[138] Brown admitted that he did not turn his mind to the impact that the reconciliation issues would have on the collateral in the NBCN JFM 27R001E Margin Account. By January 2006, Brown realized that the debits in this account were too high when the statements were sent with the Funds' account statements. He advised that up until that time he had never reviewed any of the NBCN JFM 27R001E Margin Account statements sent to him as it was his practice to rely on his own personal records:

Q. But you have been receiving statements from NBCN.

A. But I don't open those statements up.

Q. So only in January you opened the statements?

A. There's context to that. I'm a person who -- I think it's important that I qualify -- when you say I've been 'getting statements', I normally don't open statements of any kind, whether they're sent to my home or...because I try logically to keep things in my own mind. So I didn't open these statements up.

In January, we got statements all -- and this one was attached with the fund statements, and it was at that time that I noticed --

Q. Hold on. What statement? The statement of JFM account 27R001E --

A. Yes.

Q. -- was attached to the fund statement?

A. Yeah, the --

Q. That's why you opened it?

A. Because I -- normally what happens, there was -- it would come in two batches, right? They would come traditionally in -- the fund statements would come in one batch. And then there were a bunch of other statements that would come in in which -- shortly afterwards that I just never opened up because I was much more worried about the fund statements and putting them into the binders and keeping a record of those statements for a variety of purposes. So for whatever reason, this statement came in attached to the fund statements in January, and, in fact, I didn't open up those statements I believe until after we -- I'm going by recollection here, until after we -- remember, in January we're trying to do all of these four key items that we have to meet the deadlines for Mr. Walz, the last one being on...I forget the date, whenever it was in January.

So my recollection is I believe I opened up that statement after that date, and that's when I recognized the issue. And my immediate reaction was -- and it dawned on me what had happened. But I also didn't think that our debit balance was that high...

(Brown Interviews Transcript, April 18, 2006 at pages 64-66)

[139] On February 10, 15 and 24, 2006, Brown met with NBCN to discuss the debit issues in the NBCN JFM 27R001E Margin Account. The three matters that were discussed were (1) the reconciliation issues in the NBCN JFM 27R001E Margin Account; (2) the possibility of converting the debit balance to a commercial term loan, which NBCN did not allow; and (3) data error entries in NBCN's statements. Ultimately, by February 28, 2006, NBCN advised Brown

that they intended to contact the Commission directly with their concerns about the management of the Funds and the collateral issues in the NBCN JFM 27R001E Margin Account.

#### *Brown's Reconciliation Data*

[140] Staff asked Brown about a reconciliation spreadsheet that was prepared by him and forwarded to Walz, which listed the final positions of JEGF unitholders as at the end of December 2005. The list included Brown's family members, D-tech, the Southgate Trust, Stonewall Landscaping, and Windrush Abbey. Brown stated that he did not have any relationship with Southgate Trust, which was a trust for his children with his wife as trustee, and that D-tech and Stonewall Landscaping received JEGF units in lieu of payment. Stonewall Landscaping was the landscaper for Brown's house and Brown said that he gave them his personal JEGF units in lieu of cash. With respect to Windrush Abbey, Brown stated that he held no relationship with it but that JFM paid for Windrush Abbey's purchase of JEGF units in 2005 in full.

#### *The Delay of Settlement Dates*

[141] Staff asked Brown about the delay between certain trade dates and settlement fund dates. Specifically, Staff asked Brown to explain why the JEGF trade blotter showed a purchase of 3,342.410 JEGF units by Marnie Brown on January 6, 2005 but the settlement date is listed as April 4, 2005. Likewise, Staff asked about a March 11, 2005 purchase by Southgate Trust of 39,547.57 units for consideration of \$250,000 with a settlement date of June 30, 2005. Staff asked about a purchase on August 24, 2005 of 74,312.4297 JEGF units by Brown himself with a settlement date of September 27, 2005. Staff asked about a purchase of 26,337.18 JEGF units by Marnie Brown on October 28, 2005 for consideration of \$186,277.61 with a settlement date of November 18, 2005. Staff asked about three more similar examples of delays between purchase and trade dates. Brown was unable to explain the delay between trade dates and settlement dates beyond the T+3 timeline.

## **IV. LAW & ANALYSIS**

[142] The Merits Hearing involved allegations of various breaches of the Act and two National Instruments. Staff must prove its allegations on the balance of probabilities (*Re Sunwide Finance Inc*, above at paragraphs 26 to 28, applying *F. H. v. McDougall*, above). This is the civil standard of proof. We must scrutinize the evidence with care and be satisfied whether it is more likely than not that the allegations occurred (*F.H. v. McDougall*, above, at paragraph 49).

[143] The following is a summary of the law that governs the relevant alleged breaches at the time of the Respondents' impugned conduct and an analysis of the evidence submitted at the Merits Hearing and findings of this Panel in relation thereto.

### **A. Recordkeeping**

[144] Subsection 19(1) of the Act provides as follows:

Every market participant shall keep such 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 others and shall keep such other books, records and documents as may otherwise be required under Ontario securities law.

[145] This subsection of the Act is supplemented by section 18.1 of NI 81-102, which provides as follows:

A mutual fund that is not a corporation shall maintain, or cause to be maintained, up to date records of

(a) the names and latest known addresses of each securityholder of the mutual fund;

(b) the number and class or series of a class of securities held by each securityholder of the mutual fund; and

(c) the date and details of each issue and redemption of securities, and each distribution, of the mutual fund.

[146] Further, section 15.1 of Companion Policy 81-102CP provides:

Section 18.1 of the Instrument requires the maintenance of securityholder records, including past records, relating to the issue and redemption of securities and distributions of the mutual fund. Section 18.1 does not require that these records need be held indefinitely. It is up to the particular mutual fund, having regard to prudent business practice and any applicable statutory limitation periods, to decide how long it wishes to retain old records.

[147] The evidence submitted at the Merits Hearing, including the Brown Interviews, demonstrates a history of questionable record keeping with respect to the Juniper entities, dating back to July 2004 when Brown took over the recordkeeping and fund accounting functions from CIBC Mellon. In the Brown Interviews, Brown gave a history of his effort to create his own recordkeeping system in RecordSource to enable JFM to do the fund accounting for JEGF. However, by March 2005 at the latest, Brown was well-aware that there were bookkeeping and fund accounting issues with JEGF. These issues went unresolved resulting in repeated inaccuracies in the books and records. Brown even describes steps that he took *not* to correct inaccuracies with NBCN in order not to look foolish to the bank. Brown and JFM did not keep books and records for the proper recording of JFM's business transactions or the transactions of the Funds in accordance with subsection 19(1) of the Act. Brown and JFM also did not act within the recordkeeping requirements described in section 18.1 of NI 81-1092 and its companion policy.

[148] Staff also allege that the Respondents breached subsections 14.2(1) and 14.4 of NI 81-106 which, during the time of the Respondents' impugned activities, provided as follows:

## 14.2 Calculation, Frequency and Currency

(1) The net asset value of an investment fund must be calculated in accordance with Canadian GAAP.

...

**14.4 Capital Transactions** - The investment fund must include each issue or redemption of a security of the investment fund in the next calculation of net asset value the investment fund makes after the calculation of net asset value used to establish the issue or redemption price.

[149] The law required the Respondents, as market participants, to keep proper records of their business transactions and financial affairs in general and, specifically, to maintain proper records of the specific names, addresses, unitholdings, and date and details of issues and redemptions of the Funds. Although these records do not have to be maintained indefinitely, prudent business practices and statutory limitations should guide those responsible as to when maintaining such records is no longer required.

[150] Coulson and Anderson gave evidence on behalf of RBCDS describing the reconciliation issues that the bank had with the Respondents dating back to March 2005. Anderson was advised of a discrepancy with the price per unit of JEGF between JFM's and RBCDS' records. Chak, on behalf of Staff, gave evidence that during the course of her investigation, Brown did not give her all of the account information that she requested. She came to discover unmentioned bank accounts on her own through her forensic investigation in trying to locate a missing \$3 million. Her discovery of unlisted accounts led to her conclusion that it was necessary to freeze the Respondents' bank accounts.

[151] On behalf of NBCN, Phillips and Walkowiak gave consistent evidence about the discrepancy between NBCN's records and JFM's records. Although Brown provided NBCN with a JFM reconciliation spreadsheet in an effort to resolve the issues, he was unable to explain the reason for not reconciling errors in his records. Specifically, Phillips and Walkowiak described certain transactions that were requested by Brown in his personal e-mails and recorded by NBCN as purchases of JEGF units but that Brown describes as transfers. NBCN gave evidence that these transactions were recorded as purchases. This is corroborated by Brown's evidence in the Brown Interviews wherein he attributes the error to his own actions of misusing NBCN's NetRep system.

[152] 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. Brown further advised Staff that he had no paper records of his own RBCDS account – an account where, according to the flow charts that he prepared for the Receiver, a significant amount of JEGF units and funds travelled through. Brown also told Staff that at no time did he ever review the NBCN JFM 27R001E Margin Account statements until January 2006, at which time he did so by chance and, as a result, discovered the significant issues in that account. Brown's explanation for this was that he solely relied upon his own records. Finally,

when asked by Staff about the significant delay in various instances between JEGF unit purchases at settlement dates well beyond the T+3 requirement, Brown was unable to provide any explanation.

[153] Wootton, on behalf of the Receiver, described the poor accounting and recordkeeping in its review of the Respondents' records. We note that he acknowledged that Brown worked cooperatively to create the series of flow charts to illustrate the movement of funds raised through the Funds; however, the Receiver was not able to reconcile the funds raised with the purchase of JEGF units. Wootton stated that even Brown himself disagreed with some of JFM's books and records. Further, Wootton said that Brown did not even mention Felcom at any point during his discussions with Brown.

[154] 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.

[155] 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.

[156] 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.

[157] Therefore, we find that 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. Registration**

[158] Staff have alleged that JFM breached subsection 25(1)(a) of the Act, which provided, at the time of the allegations, as follows:

25. (1) No person or company shall,

(a) trade in a security or act as an underwriter unless the person or company is registered as a dealer, or is registered as a salesperson or as a partner or as an officer of a registered dealer and is acting on behalf of the dealer...

...

and the registration has been made in accordance with Ontario securities law and the person or company has received written notice of the registration from the Director and, where the registration is subject to terms and conditions, the person or company complies with such terms and conditions.

[159] The definition of “trade” or “trading” included:

(a) any sale or disposition of a security for valuable consideration, whether the terms of payment be on margin, instalment or otherwise, but does not include a purchase of a security or, except as provided in clause (d), a transfer, pledge or encumbrance of securities for the purpose of giving collateral for a debt made in good faith...

...

(e) any act, advertisement, solicitation, conduct or negotiation directly or indirectly in furtherance of any of the foregoing...

[160] Accordingly, Staff’s allegations in respect of subsection 25(1)(a) must relate to sales or dispositions of securities and not to the purchase of a security or a transfer, pledge or encumbrance of securities for the purpose of giving collateral for a debt made in good faith.

[161] Staff submit that the JEGF simplified prospectus and AIF dated July 5, 2005 provide that both unit classes of JEGF were offered on a continuous basis by JFM and could be purchased through securities dealers, investment dealers, brokers and mutual fund dealers or “directly from the Fund in the Province of Ontario”. Staff submit that based on the wording of the JEGF prospectus and the AIF, JFM traded in units of JEGF contrary to the Act. The impugned wording of the JEGF prospectus dated July 5, 2005 provides, under the heading “How to Purchase Units,” as follows:

Units of the Fund (the “Units”) are offered on a continuous basis by The Juniper Fund Management Corporation, the Manager of the Fund (the “Manager”) and through registered securities dealers, investment dealers, brokers and mutual fund dealers in the Province of Ontario.

[162] The impugned wording of the AIF dated July 5, 2005 provides, under the heading, “How to Purchase Units,” as follows:

Both unit Classes are offered on a continuous basis by the Manager and can be purchased through registered securities dealers, investment dealers,

brokers and mutual fund dealers, as well as directly from the Fund in the Province of Ontario.

[163] In Walz's compliance field review dated March 14, 2006, he concluded as follows:

You act as a mutual fund dealer for purchases and redemptions of units of the Funds. You are not registered as a mutual fund dealer. Also, the JEGF's simplified prospectus and AIF dated July 5, 2005 state that "...units ...can be purchased ...directly from the Fund in the Province of Ontario."

[164] At the Merits Hearing, Walz was asked about his concerns and conclusions regarding JFM acting as a mutual funds dealer:

Q. Just to finish off the -- and this was paragraph 21 of your affidavit -- the preliminary results of your finding, is there anything with respect to the concern about JFM acting as a mutual fund dealer, or is that concern resolved after your compliance review?

A. It was a concern we had that JFM was, in fact, acting as a dealer in mutual fund securities of JEGF and JIF without being registered as a dealer.

Q. And when you were on site, did you speak to Mr. Brown about your concern, or did you do any further analysis of files or documents on site in respect of that issue?

A. Yes. For a sample of trade transactions for JEGF and JIF that we examined, we did note that three out of ten transactions that we looked at, that JFM was, in fact, acting as the dealer for those trades. And we were also informed by Mr. Brown that he had in his possession cheques from investors for future purchases of mutual fund units in JEGF that he would process as the date of the post-dated cheques would come to realization, and he would process those purchase cheques himself.

So those things I have described, along with the fact that the JEGF prospectus holds out that investors can directly purchase units of the fund not only with dealers but also with the fund itself indicated to me that JFM was acting as a dealer in these mutual fund securities without registration as such.

(Transcript of Merits Hearing, September 20, 2011 at pages 85-86)

[165] In the Agreed Facts, the parties agree that JFM was not registered in any capacity with the Commission. The representation in the JEGF simplified prospectus and the AIF that units may be purchased directly from the Fund constitutes an act, advertisement, solicitation, and/or conduct directly in furtherance of a sale or disposition of a security for valuable consideration contrary to section 25(1)(a) of the Act, which was in force during the time the conduct took place. We are satisfied that the simplified prospectus, the AIF, and Walz's evidence of sampling trade transactions of the Funds establishes that JFM engaged in trading and acts in furtherance of

trades while unregistered when no exemptions were available to them and therefore breached subsection 25(1)(a) of the Act.

[166] We find that 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. Full, True & Plain Disclosure**

[167] In the Agreed Facts, Staff and Brown agree that JEGF's simplified prospectus, information circular and AIF contained certain inaccurate statements with respect to (a) who calculates the NAVs; (b) the name of the auditor; (c) the amount of the minimum initial investment; and (d) the minimum amount of the aggregate NAV value at which JEGF has the right of redemption. Staff and Brown further agree that the Juniper website and press release dated November 14, 2005 were inaccurate in stating that JFM managed assets of \$130 million when it actually managed assets of \$15 million, among other ancillary statements. Staff claim that these admissions establish a breach of subsection 56(1) of the Act and subsection 15.2(1) of NI 81-102.

[168] Subsection 56(1) of the Act provides as follows:

56. (1) A prospectus shall provide full, true and plain disclosure of all material facts relating to the securities issued or proposed to be distributed and shall comply with the requirements of Ontario securities law.

[169] During the time of the Respondents' impugned conduct, subsection 15.2(1) of NI 81-102 provided as follows:

- (1) Despite any other provision of this Part, no sales communication shall
  - (a) be untrue or misleading; or
  - (b) include a statement that conflicts with information that is contained in the preliminary simplified prospectus, the preliminary AIF, the simplified prospectus or AIF,
    - (i) of a mutual fund, or
    - (ii) in which an asset allocation service is described.

[170] We find that the inaccurate statements in the simplified prospectus, information circular and AIF are all misleading and in breach of the required disclosure obligations in the Act. The four inaccuracies listed with respect to the representations made in the simplified prospectus, information circular and AIF are symptomatic of the poor administration practices of the Respondents and, although material, are not at the core of the issues in this proceedings.

[171] The representation that JFM managed assets of \$130 million when in fact it managed only \$15 million worth of assets is, in our opinion, a material overstatement. Staff did not lead any evidence at the Merits Hearing in respect of this allegation; however, Brown did agree to this

fact in the Agreed Facts and it is on that basis that we find that this inaccuracy in fact took place and was in breach of subsection 15.2(1) of NI 81-102 and subsection 56(1) of the Act.

[172] We find that 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. Prohibited Investments & Loans by Mutual Funds**

[173] In the Amended Statement of Allegations, Staff allege that JEGF provided prohibited loans and held prohibited investments contrary to sections 111(1)(a), 111(2)(c)(ii), 111(3) and 112 of the Act and paragraph 2.6 of NI 81-102. Staff further allege that JFM and Brown breached their custodial obligations contrary to subparagraphs 6.1(1) and (6) of NI 81-102.

[174] The relevant sections of the Act in respect of these allegations are as follows:

111. (1) No mutual fund in Ontario shall knowingly make an investment by way of loan to,

(a) any officer or director of the mutual fund, its management company or distribution company or an associate of any of them;

...

(2) No mutual fund in Ontario shall knowingly make an investment,

...

(c) in an issuer in which,

...

(ii) any person or company who is a substantial security holder of the mutual fund, its management company or its distribution company,

has a significant interest.

(3) No mutual fund in Ontario or its management company or its distribution company shall knowingly hold an investment made after the 15th day of September, 1979 that is an investment described in this section.

112. No mutual fund or its management company or its distribution company shall knowingly enter into any contract or other arrangement that results in its being directly or indirectly liable or contingently liable in respect of any investment by way of loan to, or other investment in, a person or company to whom it is by section 111 prohibited from making a loan or in which it is prohibited from making any other investment, and for the purpose of section 111 any such contract or other arrangement shall be deemed to be a loan or an investment, as the case may be.

[175] As at the time of the Respondents' impugned conduct, the relevant sections of NI 81-102 provided as follows:

2.6 Investment Practices - A mutual fund shall not

(a) borrow cash or provide a security interest over any of its portfolio assets unless

(i) the transaction is a temporary measure to accommodate requests for the redemption of securities of the mutual fund while the mutual fund effects an orderly liquidation of portfolio assets, or to permit the mutual fund to settle portfolio transactions and, after giving effect to all transactions undertaken under this subparagraph, the outstanding amount of all borrowings of the mutual fund does not exceed five percent of the net assets of the mutual fund taken at market value at the time of the borrowing,

(ii) the security interest is required to enable the mutual fund to effect a specified derivative transaction under this Instrument, is made in accordance with industry practice for that type of transaction and relates only to obligations arising under that particular specified derivatives transaction, or

(iii) the security interest secures a claim for the fees and expenses of the custodian or a sub-custodian of the mutual fund for services rendered in that capacity as permitted by subsection 6.4(3);

...

6.1 General - (1) Except as provided in sections 6.8 and 6.9, all portfolio assets of a mutual fund shall be held under the custodianship of one custodian that satisfies the requirements of section 6.2.

...

(6) Despite any other provisions of this Part, the manager of a mutual fund shall not act as custodian or sub-custodian of the mutual fund.

[176] Staff rely on Walz's conclusions, based on the information provided to him by Brown, that JFM was improperly using the funds in the NBCN JEGF Custodial Account for its own and Brown's purposes and not for JEGF's purposes:

... I would not have an issue at all if JFM had, in fact, borrowed on behalf of JEGF for purposes of it being used on a de minimis basis to fund unit holder redemption requests or to settle portfolio securities for JEGF.

The issue at hand is it was not used for those purposes. It was, in fact, as acknowledged by JFM, used for its own purposes and benefit for the reasons we've already discussed.

(Transcript of Merits Hearing, September 20, 2011 at pages 132-133).

[177] Staff also rely on Walz's evidence regarding JEGF's investment in PAM that Les Kobli, an individual appearing to be an officer or director of JEGF, held 88% of the shares in PAM. Staff submit that JEGF was prohibited from making an investment in PAM in accordance with subsection 111(2) of the Act, which prohibits a mutual fund from investing in a company in which an officer or director of the fund's management company owns more than 10% of the shares.

[178] Walz' evidence regarding JEGF's liability with respect to the nature of the NBCN JEGF Custodial Account was corroborated by Phillips' evidence wherein she confirmed that if a debit were created in the NBCN JEGF Custodial Account, the amounts owing would first be covered by liquidating the JEGF assets in the account and if the assets were not sufficient to cover that debit, NBCN would look to JFM, the trustee of the account, to obtain assets to settle the debit.

[179] Further, Wootton reviewed the charts created with Brown's assistance and submitted into evidence at the Merits Hearing, which demonstrate the flow of \$1,248,000 from the NBCN JEGF Custodial Account to, ultimately, be applied against the mortgage of Brown's residential property.

[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.

[181] Therefore, we find that 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. Standard of Care**

[182] Staff alleges that Brown and JFM have breached their statutory duty of care contrary to subsection 116(1) of the Act, which provides as follows:

116. (1) Every person or company responsible for the management of a mutual fund shall exercise the powers and discharge the duties of its office honestly, in good faith and in the best interests of the mutual fund, and in connection therewith shall exercise the degree of care, diligence and skill that a reasonably prudent person would exercise in the circumstances.

(2) For the purposes of subsection (1), a person or company is responsible for the management of a mutual fund if he, she or it has legal power or right

to control the mutual fund or if in fact the person or company is able to do so.

[183] Staff further alleges that, in breaching their statutory duty of care to JEGF and JEGF unitholders, Brown and JFM engaged in conduct in breach of sections 9.4 and 11.1 of NI 81-102. The salient parts of these sections in relation to Staff's allegations are as follows:

#### 9.4 Delivery of Funds and Settlement

(1) A principal distributor, a participating dealer, or a person or company providing services to the principal distributor or participating dealer shall forward any cash received for payment of the issue price of securities of a mutual fund to an order receipt office of the mutual fund so that the cash arrives at the order receipt office as soon as practicable and in any event no later than the third business day after the pricing date.

...

#### 11.1 Principal Distributors

(1) Cash received by a principal distributor of a mutual fund, or by a person or company providing services to the mutual fund or the principal distributor, for investment in, or on the redemption of, securities of the mutual fund, or on the distribution of assets of the mutual fund, until disbursed as permitted by subsection (3),

(a) shall be accounted for separately and be deposited in a trust account or trust accounts established and maintained in accordance with the requirements of section 11.3; and

(b) may be commingled only with cash received by the principal distributor or service provider for the sale or on the redemption of other mutual fund securities.

#### *Fiduciary Duty Owed to Unitholders*

[184] 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)

#### *Duty of Care Owed to Investors*

[185] Staff submits that an objective standard should be applied in determining whether or not the Respondents breached their statutory duty of care owed to the unitholders. Staff rely on this Commission's decision in *Re AGF Funds Inc.* (2005), 28 O.S.C.B. 73 at paragraph 6:

In order for there to be fairness and confidence in Ontario's capital markets it is critical that mutual fund managers faithfully and diligently fulfill their duty to fully protect the best interest of their funds (and the investors in those funds) such that certain investors are not given preferential treatment to the detriment of others. Ontario's investors must be in a position to believe that their investment will be treated with the utmost care by those in whose trust they are placed.

[186] The evidence presented at the Mertis Hearing demonstrated that Brown and JFM breached their statutory obligations under section 116 of the Act by failing to act in the best interests of the Funds. There are many examples of the Respondents' failure to exercise the degree of care, diligence and skill that a reasonably prudent person would exercise in the circumstances, including, but not limited to:

- (a) Failing to advise NBCN of incorrect transfers-in and purchases of JEGF units when the Respondents knew they had given NBCN incorrect information;
- (b) Failing to record the Off-Book Purchases;
- (c) Failing to maintain proper daily NAV calculations for the units in the Funds;
- (d) Borrowing against JEGF's assets through the NBCN JEGF Custodial Account for purposes that were not related to JEGF;
- (e) Failing to require related parties to settle purchases and redemptions within three business days of the trade date;
- (f) Engaging in prohibited investments;
- (g) Failing to maintain proper and accurate books and records of the Funds; and
- (h) JFM failing to be properly registered as a mutual fund dealer.

[187] Staff further alleged that Brown, as an officer and director of JFM, is responsible for JFM's breaches of securities law pursuant to section 129.2 of the Act, which provides as follows:

For the purposes of this Act, if a company or a person other than an individual has not complied with Ontario securities law, a director or officer of the company or person who authorized, permitted or acquiesced in the non-compliance shall be deemed to also have not complied with Ontario securities law, whether or not any proceeding has been commenced against the company or person under Ontario securities law or any order has been made against the company or person under section 127.

[188] In *Re Momentas Corp.* (2006), 29 O.S.C.B. 7408 at paragraph 118, this Commission determined that the threshold for finding a director or officer liable pursuant to section 129.2 of the Act is low:

Although these terms have been interpreted to include some form of knowledge or intention, the threshold for liability under section 122 and 129.2 is a low one, as merely acquiescing the conduct or activity in question will satisfy the requirement of liability. The degree of knowledge of intention found in each of the terms "authorize", "permit" and "acquiesce" varies significantly. "Acquiesce" means to agree or consent quietly without protest. "Permit" means to allow, consent, tolerate, give permission, particularly in writing. "Authorize" means to give official approval or permission, to give power or authority or to give justification.

[189] We find that the Respondents have breached their statutory duty of care owed to the Funds and unitholders contrary to subsection 116(1) of the Act and that the Respondents have failed to properly settle and deposit funds in accordance with sections 9.4 and 11.1 of NI 81-102.

[190] By his own admission, Brown was the primary person in charge of all aspects of JFM and the Funds, and as such we find that he is liable under section 129.2 of the Act for authorizing, permitting and acquiescing in all of the JFM's breaches of Ontario securities law.

[191] Therefore, we find that 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.

## **VI. CONCLUSION**

[192] We find that the Respondents acted contrary to the public interest and contravened Ontario securities law through the following breaches of the Act and National Instruments:

- (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.

[193] For the reasons outlined above, we will issue an order directing the parties to appear before the Commission on June 14, 2013 at 10:00 a.m. at the offices of the Commission at 20 Queen Street West, Toronto, ON, for the sanctions and costs hearing. The schedule for filing submissions is as follows:

1. Staff shall file written submissions by 4:30 p.m. on May 24, 2013;
2. The Respondents shall file responding written submissions by 4:30 p.m. on June 7, 2013; and
3. Staff shall file reply written submissions (if any) by 4:30 p.m. on June 12, 2013.

Dated at Toronto this 11<sup>th</sup> day of April, 2013.

*"Vern Krishna"*

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Vern Krishna, QC

*"Margot C. Howard"*

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Margot C. Howard, CFA