Ontario Securities Commission | Commission des valeurs mobilières de l'Ontario | P.O. Box 55, 19th Floor 20 Queen Street West Toronto ON M5H 3S8 | CP 55, 19e étage 20, rue queen ouest Toronto ON M5H 3S8

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

- AND -

IN THE MATTER OF DANIEL DUIC

REASONS FOR DECISION ON SANCTIONS AND COSTS
(Sections 127 and 127.1 of the *Securities Act*)

Hearing:	August 19, 2008	
Decision:	September 29, 2008	
Panel:	James E. A. Turner	– Vice-Chair and Chair of the Panel
	Suresh Thakrar	– Commissioner
Counsel:	Matthew Boswell	– for Staff of the Ontario Securities Commission
	Steven Sofer James Camp	– for Daniel Duic

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REASONS AND DECISION ON SANCTIONS AND COSTS

A. OVERVIEW

[1] This was a hearing before the Ontario Securities Commission (the "Commission") pursuant to sections 127 and 127.1 of the *Securities Act*, R.S.O. 1990, c. S.5, as amended (the "Act") to consider whether it is in the public interest to make an order imposing certain regulatory sanctions on the respondent Daniel Duic ("Duic").

[2] This matter arose out of a Notice of Hearing issued by the Commission on August 14, 2008, in relation to a Statement of Allegations issued by Staff of the Commission ("Staff") on that date. Staff alleged that Duic breached the terms of a cease trade order made under a settlement agreement dated March 3, 2004 (the "2004 Settlement Agreement"), which was approved by a Commission order on March 3, 2004 (the "2004 Order").

[3] Staff and Duic jointly submitted an Agreed Statement of Facts (the "Agreed Statement of Facts") that states that Duic breached the terms of the 2004 Order. Staff and counsel for Duic also agreed in their respective written submissions that certain sanctions should be ordered; however the parties were not in agreement on what all of the sanctions should be.

[4] Written submissions were received from both Staff and counsel for Duic. A hearing to consider the appropriate sanctions was held on August 19, 2008. We rendered our decision orally at the conclusion of the hearing. On September 3, 2008, an order was issued by the Commission sanctioning Duic for his breach of the 2004 Order. These are our reasons for issuing that order.

B. THE SETTLEMENT AGREEMENT

[5] Pursuant to the 2004 Settlement Agreement, Duic admitted to having engaged in illegal insider trading in breach of subsection 76(1) of the Act in respect to his trading in securities of Canadian Pacific Limited and Moffatt Communications Limited in 2000 and 2001.

[6] In approving the 2004 Settlement Agreement, the Commission made an order substantially to the following effect:

(a) Duic was required to make a settlement payment of $1,900,000 to the Commission for allocation to or for the benefit of such third parties as approved by the Minister under section 3.4(2) of the Act;

(b) Duic was required to pay $25,000 for costs pursuant to section 127.1 of the Act;

(c) trading in any securities by Duic was to cease permanently, with the exception that (i) Duic was permitted to trade mutual funds through a registered dealer for the account of his registered retirement savings plan (as defined in the *Income Tax Act*

(Canada)) and (ii) Duic was entitled to divest himself of securities held as of the date of the order within 30 days from the date of the order;

(d) exemptions contained in Ontario securities law were not to apply to Duic permanently;

(e) Duic was reprimanded;

(f) Duic was required to resign from all positions that he held as a director or officer of a reporting issuer; and

(g) Duic was permanently prohibited from becoming or acting as a director or officer of a reporting issuer.

(*Re Duic* (2004), 27 O.S.C.B. 2721)

[7] Andrew Rankin ("Rankin") was charged with providing Duic with undisclosed material information while in a special relationship with certain issuers, as a result of which Duic illegally made substantial profits trading in the securities of the issuers.

[8] One of the terms of the 2004 Settlement Agreement was that Duic testify as a witness for Staff at any proceedings which were commenced by Staff before the Commission or in the courts with respect to the relevant trading.

[9] We understand that Duic has complied with his obligations under the 2004 Settlement Agreement, except for the conduct that is the subject of this proceeding.

C. THE ALLEGATION

[10] In the Statement of Allegations, Staff allege that Duic breached the 2004 Order when he purchased and sold certain equity securities through his U.S. dollar margin account and RRSP account at TD Waterhouse Canada (the "Toronto Accounts") during the period from March 16, 2007 to December 11, 2007. All of those trades were effected through the New York Stock Exchange and/or NASDAQ, exchanges located outside Canada.

D. AGREED FACTS

[11] The parties submitted an Agreed Statement of Facts to us, the relevant provisions of which are referred to below.

[12] The Agreed Statement of Facts states that Duic was advised by his legal counsel that the 2004 Order did not prevent Duic from trading securities listed on a U.S. exchange. Because Duic's counsel anticipated that Duic would be residing in California permanently, there was no discussion as to whether or not Duic was permitted to trade securities listed on a U.S. exchange from a brokerage account in Ontario. At the hearing, Duic's counsel submitted that Duic erroneously believed that he was permitted to trade on U.S. exchanges regardless of the location

of the brokerage account through which the trades were made, largely because of the legal advice provided to him by his counsel. Staff agreed that if Duic had traded securities listed on a U.S. stock exchange through a brokerage account in California while Duic was residing there, that trading would not have breached the 2004 Order. However, because Duic traded through two brokerage accounts located in Toronto, Duic did breach the 2004 Order.

1. Trading in the Toronto Accounts

[13] Duic engaged in the following trading of shares through the Toronto Accounts. All of the securities traded were listed on the New York Stock Exchange and/or the NASDAQ and the trades were effected on those exchanges:

i. On March 16, 2007, Duic purchased 500 shares of The Boeing Company at an aggregate cost of $45,344 (U.S.). These shares were purchased in Duic's RRSP account.

ii. On June 26, 2007, Duic purchased 7,500 shares of Cerner Corporation at an aggregate cost of $421,570.35 (U.S.). These shares were purchased in Duic's U.S. dollar margin account.

iii. On August 8, 2007, Duic sold 7,500 shares of Cerner Corporation at an aggregate price of $462,419.11 (U.S.) and realized a profit of $40,848.76 (U.S.).

iv. On October 10, 2008 and November 27, 2007, Duic purchased 1,800 shares of Cerner Corporation at an aggregate cost of $111,498.64 (U.S.). These shares were purchased in Duic's U.S. dollar margin account. Duic continues to hold these shares.

v. On December 3, 2007, Duic purchased 1,500 shares of RCM Technologies Inc. at an aggregate cost of $8,865 (U.S.). These shares were purchased in Duic's RRSP account and he continues to hold these shares.

vi. On December 7, 2007, Duic purchased 1,000 shares of The Boeing Company at an aggregate cost of $93,029.69 (U.S.). These shares were purchased in Duic's U.S. dollar margin account. Duic continues to hold 110 of these shares.

vii. On December 11, 2007, Duic purchased 5,000 shares of RCM Technologies Inc. at an aggregate cost of $30,009.99 (U.S.). Duic continues to hold these shares.

[14] Duic conducted these transactions from the Toronto Accounts because he thought he was permitted to do so and it was more convenient than using the U.S. account in terms of transferring the necessary funds. Duic did not seek additional legal advice prior to using the Toronto Accounts for these transactions.

[15] On December 12, 2007, TD Waterhouse Canada, acting on its own initiative without any involvement of Staff, froze Duic's Toronto Accounts and advised him that it wanted to consider the trading activity in the Toronto Accounts in light of the 2004 Order.

[16] On March 27, 2008, TD Waterhouse Canada sold 890 shares of The Boeing Company held in the Toronto Accounts, without consulting Staff or Duic. This sale was effected by TD Waterhouse Canada in order to cover a margin call in respect of the Toronto Accounts. That sale resulted in a loss to Duic of $22,734.40 (U.S.).

[17] Staff and Duic's counsel submit that if the remaining shares held in the Toronto Accounts had been liquidated on August 1, 2008 (based on the closing share prices on July 31, 2008), the sale of those securities would have resulted in a loss of $74,739.

[18] Consequently, if Duic's holdings in the Toronto Accounts were liquidated as of August 1, 2008, Duic would have suffered an aggregate loss of over $55,000 from all of his trades over the relevant period.

2. Duic's Cooperation with Staff

[19] The Agreed Statement of Facts states that Duic cooperated fully with Staff in its investigation of this matter. Duic contacted Staff immediately after the Toronto Accounts were frozen and made no attempt to hide his transactions in the Toronto Accounts. Duic also waived solicitor-client privilege in order to allow Staff to question his legal counsel with respect to the nature of the legal advice he received regarding the scope of the 2004 Order. On December 14, 2007 and January 25, 2008, Duic voluntarily attended the offices of the Commission in order to provide statements to Staff.

E. SUBMISSIONS

1. Agreed Sanctions

[20] While the parties agree that Duic breached the 2004 Order, they are not in agreement on all of the appropriate sanctions. However, the parties do agree that the imposition of the following sanctions would be in the public interest:

a. pursuant to clause 6 of subsection 127(1), Duic shall be reprimanded;

b. pursuant to clause 8.1 of subsection 127(1), Duic shall resign any positions that he holds as a director or officer of a registrant;

c. pursuant to clause 8.2 of subsection 127(1), Duic shall be prohibited permanently from becoming or acting as a director or officer of a registrant;

d. pursuant to clause 8.3 of subsection 127(1), Duic shall resign any positions that he holds as a director or officer of an investment fund manager;

e. pursuant to clause 8.4 of subsection 127(1), Duic shall be prohibited permanently from becoming or acting as a director or officer of an investment fund manager;

f. pursuant to clause 8.5 of subsection 127(1), Duic shall be prohibited permanently from becoming or acting as a registrant, as an investment fund manager, or as a promoter; and

g. Duic shall close the Toronto Accounts after divesting all shares held in the Toronto Accounts. To the extent that Duic makes any profit as a result of the divestiture of all of the shares in the Toronto Accounts, he will account for and disgorge to the Commission any profit realized.

2. Staff's Submissions

[21] In addition to the agreed sanctions, Staff submits that the Commission should order the following sanctions against Duic:

(1) pursuant to clause 2 of subsection 127(1), trading in any securities by Duic shall cease permanently, except that Duic shall divest himself of all securities held in the Toronto Accounts within twenty-one days from the date of the order and shall close the Toronto Accounts immediately thereafter;

(2) pursuant to clause 2.1 of subsection 127(1), the acquisition of any securities by Duic shall be prohibited permanently;

(3) pursuant to clause 9 of subsection 127(1), Duic shall pay an administrative penalty of $84,000; and

(4) pursuant to clause 10 of subsection 127(1), Duic shall disgorge to the Commission $42,000, being the amount obtained by him as a result of non-compliance with securities law.

[22] Staff submits that all of these sanctions are proportionately appropriate and will serve as specific and general deterrence, sending a clear message that the Commission expects strict compliance with the terms of its cease trade orders.

[23] Staff notes that good faith commitment and mutual reliance form the cornerstone of settlement agreements, and the undertakings and Commission orders made under such agreements. Staff asserts that if a respondent wishes to trade securities while bound by the terms of a cease trade order, the onus is on the respondent to ensure that such trading falls within any exceptions provided for in the order (*Re Rash* (2006), 29 O.S.C.B. 7403 at paras. 29-30).

[24] Staff also submits that breaches of Commission orders show disregard for the rule of law as well as the Commission, and consequently undermine public confidence in the capital markets (*Re Prydz* (2000), 23 O.S.C.B. 3399 at paras. 14-18). Hence, a breach of a Commission order should be taken very seriously and should be considered an aggravating factor in determining the appropriate sanctions for such breach (see also: *Re National Gaming Corp.* (2000), LNABASC 583 at pp. 7-8; *Re Koonar* (2002), 25 O.S.C.B. 2691 at para. 25; and *Re Prydz*, at para. 18).

[25] Staff argues that Duic's past conduct is indicative of what might be expected of him in the future, and that the 2004 Order has clearly not been effective. Consequently, a stronger order is needed. Staff notes that the breach of the 2004 Order occurred less than four years after it was made.

[26] Staff further submits that as a consequence of his past illegal insider trading, and the proceedings against him and against Rankin, Duic is very familiar with the securities laws of Ontario. Staff asserts that Duic's breach of the 2004 Order should be viewed with this in mind.

[27] As a matter of both specific and general deterrence, Staff submits that the elimination of the RRSP carve-out from the 2004 Order with respect to trading in mutual fund securities, along with the financial sanctions proposed, would send a message to Duic and like-minded individuals that a return to the status quo after a breach of a settlement order is not sufficient and that the Commission considers settlement obligations made to it seriously and it will not tolerate breaches of its orders. Staff also submits that the sanctions proposed by it are proportionate to Duic's conduct in this matter, reflect the circumstances of the case, and uphold the principles and purposes of the Act.

[28] Staff acknowledges Duic's cooperation after the Toronto Accounts were frozen, but notes that his cooperation was not necessary for Staff to advance its case against him.

[29] Staff also notes that it chose not to seek the consent of the Commission to initiate a prosecution under section 122 of the Act for breach of the 2004 Order, for which Duic could have faced the possibility of incarceration, if convicted.

[30] Staff submits that it incurred investigation and hearing costs of $33,245 in this matter and that Duic should be ordered to pay $24,000 to indemnify the Commission for a portion of its costs. According to Staff, the costs claimed in this case are reasonable and conservative. They are claimed only for the two litigation counsel and the lead investigator, and not for the Assistant Manager in the Enforcement Branch of the Commission or other Staff members who worked on the case. Further, only a portion of the full amount incurred by litigation counsel and the lead investigator is being claimed. To support their claim for costs, Staff provided information setting forth the number of hours spent by Staff on this matter.

3. Duic's Submissions

[31] Duic submits that the increased sanctions sought by Staff are not appropriate in all of the circumstances, and they are not necessary for deterrence. Duic submits that his breach of the 2004 Order was inadvertent. Further, through his counsel, Duic states that he is remorseful, accepts full responsibility for his actions and that he has cooperated fully with Staff. Instead of the additional sanctions sought by Staff, Duic proposes that the RRSP mutual fund carve-out provided for in the 2004 Order be maintained, that no administrative penalty be ordered, and that he pay the Commission's investigation costs in the amount of $5,000.

[32] Duic draws an analogy between sanctions for a breach of a Commission order and sanctions for breach of a court order. In particular, Duic refers us to a document produced by the Canadian Judicial Council (CJC) entitled "*Some Guidelines on the Use of Contempt Powers*" (the "Guidelines") published by the CJC in May 2001. With respect to sanctions for contempt the Guidelines state that:

> In Canada punishment for contempt has been quite moderate, reflecting the courts' usual view that a conviction for contempt and a modest fine is usually sufficient to assert the courts' authority, to protect their dignity or to ensure compliance. Often these sentences are imposed after the contemnor has apologized and purged his or her contempt which substantially mitigates any punishment that might otherwise be imposed (at p. 40).

For cases involving failure to obey an injunction the guidelines note:

> It is the defiance of the court order, and not the illegality of any actions which led to the granting of the court order in the first place, which must be the focus of the contempt penalty (at p. 41).

[33] Duic relies on the same case law on sanctions arising from breaches of Commission orders as Staff, but comes to a different conclusion on the manner in which we should apply them. In *Re Rash* the respondent was subject to a cease trade order and was found to have violated the terms of that order. In considering sanctions, the Commission placed importance on the fact that Rash did not attempt to conceal his conduct during the investigation nor act in a manner that was unreasonable at the hearing (*Re Rash*, at para. 44-45). Duic's counsel notes that Duic went further than Rash, in that he cooperated fully with Staff, drew Staff's attention to his trading activity in the Toronto Accounts after they were frozen by TD Waterhouse Canada, and helped simplify and shorten the hearing by submitting the Agreed Statement of Facts and by agreeing to some of the sanctions.

[34] Duic also refers us to *Re Hinke* ((2007), 30 O.S.C.B. 6269). In *Re Hinke* the Commission found that the respondent had intentionally breached a cease trade order, breached a settlement undertaking and had made a misleading or untrue statement to Staff and the Commission. The fact that the respondent had a history of misconduct before the Commission was an important factor in considering sanctions. In addition Hinke's attempt to conceal his actions was considered an aggravating factor (*Re Hinke*, at para. 118). In contrast to the actions of Hinke, Duic's counsel argues that Duic did not breach the 2004 Order intentionally nor make any attempt to conceal his actions.

[35] Duic notes that in the cases of *Re Prydz* (at para. 18) and *Re National Gaming Corp.* (at pp. 7-8) the Commission (in the case of *Re National Gaming Corp.*, the Alberta Securities Commission) emphasized that the breaches of commission orders were "intentional" and "repeated".

[36] Duic submits that his breach of the 2004 Order was inadvertent, that he made no attempt to conceal the breach, and he cooperated fully with Staff, in contrast to the actions of the

respondents in *Re Rash* and *Re Hinke*. Further, Duic agrees that where a respondent breaches securities laws and the conduct is also a breach of a prior Commission order or undertaking, then that fact is an aggravating factor. Duic submits that in his case his conduct was a breach of securities law only because it contravened the 2004 Order, not because it otherwise constituted an offence under the Act. Thus, Duic's breach should not be considered an aggravating factor.

[37] Duic submits that he did not, as a result of his violation of the 2004 Order, obtain a benefit. Both Duic and Staff agree that liquidating the Toronto Accounts as of August 1, 2008, would have resulted in an aggregate loss of over $55,000. For this reason, Duic submits that neither disgorgement nor an administrative penalty would be appropriate.

[38] Duic also submits that specific deterrence should not be a consideration in determining the sanctions in this case. Duic notes that his breach of the 2004 Order was inadvertent and that there is no evidence that he does not have due regard for the authority of the Commission. Duic submits that he believed in good faith that he was acting in accordance with the 2004 Order, based on prior legal advice. Accordingly, Duic submits that the Commission need not be concerned about deterring him from committing a future breach of the 2004 Order.

[39] Given the circumstances of this case, Duic also submits that general deterrence is sufficiently served by a reprimand.

[40] With respect to costs, Duic submits that the Commission should not award costs on a "substantial indemnity" basis, given the factors discussed above, including Duic's cooperation.

F. ANALYSIS

1. Factors in Determining Sanctions

[41] In considering appropriate sanctions for breaches of securities laws or an order of the Commission, the Commission is guided by the underlying purposes of the Act. Those purposes are set out in section 1.1 of the Act and are:

a. to provide protection to investors from unfair, improper or fraudulent practices; and

b. to foster fair and efficient capital markets and confidence in capital markets.

[42] In making an order under section 127 of the Act, the Commission is to exercise its public interest jurisdiction in a protective and preventative manner. As stated in *Re Mithras Management Ltd.*:

> …, the role of this Commission is to protect the public interest by removing from the capital markets – wholly or partially, permanently or temporarily, as the circumstances may warrant – those whose conduct in the past leads us to conclude that their conduct in the future may well be detrimental to the integrity of those capital markets. We are not here to punish past conduct; that is the role of the

> courts, particularly under section 118 [now 122] of the Act. We are here to restrain, as best we can, future conduct that is likely to be prejudicial to the public interest in having capital markets that are both fair and efficient. In doing so we must, of necessity, look to past conduct as a guide to what we believe a person's future conduct might reasonably be expected to be; we are not prescient, after all (*Re Mithras Management Ltd.* (1990), 13 O.S.C.B. 1600 at 1610-1611).

[43] The Supreme Court of Canada has confirmed that the Commission may also impose sanctions which function as a general deterrent, stating that "… it is reasonable to view general deterrence as an appropriate, and perhaps necessary, consideration in making orders that are both protective and preventative" (*Re Cartaway Resources Corp.*, [2004] 1 S.C.R. 672 at para. 60, Le Bel J.).

[44] In determining the appropriate sanctions in this matter, we must consider the specific circumstances to ensure that the sanctions are proportionate to the conduct involved (*Re M.C.J.C. Holdings Inc. and Michael Cowpland*, (2002), 25 O.S.C.B. 1133 ("*Re M.C.J.C. Holdings"*) at para. 26).

[45] *Belteco Holdings Inc.* provides examples of the types of factors that the Commission should consider when imposing sanctions:

(a) the seriousness of the allegations;

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

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

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

(e) whether or not the sanctions imposed may serve to deter not only those involved in the case being considered but any like-minded people from engaging in similar abuses of the capital markets; and

(f) any mitigating factors.

(Belteco Holdings Inc. (1998), 21 O.S.C.B. 7743, at paras. 25-26)

[46] Additional examples of factors to consider were set out in *Re M.C.J.C. Holdings*. They include:

(a) the remorse of the respondent;

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

(c) the size of any financial sanction;

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

(e) the restraint any sanction may have on the ability of the respondent to participate without check in the capital markets;

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

(g) the reputation and prestige of the respondent; and

(h) the shame, or financial pain, that any sanction would reasonably cause to the respondent.

(Re M.C.J.C. Holdings, at para. 41)

[47] The Commission has observed that these are only some of the factors to consider. Depending on the particular circumstances, not all of the factors will be relevant and there may be others that are relevant (*Re M.C.J.C. Holdings*, at para. 41).

[48] We have considered all of these various factors in making our order in this matter. We have, however, been most influenced by considering the nature of the breach of the 2004 Order, the deterrent effect of our order on others, the restrictions on Duic's future ability to participate in our capital markets and his remorse. We discuss below the mitigating circumstances that we have considered.

2. The Appropriate Sanctions in this Case

[49] As noted above, Staff and Duic agree that Duic breached the terms of the 2004 Order by trading through his Toronto Accounts. We accept their joint submissions on the agreed facts.

(i) Overview

[50] In our view, the breach of any Commission order is a matter of the utmost seriousness. The Commission's orders must be adhered to by the persons to whom they apply. Public confidence in the fair functioning of the capital markets is related directly to the public's perception of the effectiveness of the Commission's enforcement efforts. Accordingly, we agree with Staff that significant consequences must follow any breach of the Commission's orders.

[51] We also agree with Staff that it was Duic's responsibility to comply with the 2004 Order and to determine whether any trading he proposed to do was permitted. Duic knew that the 2004 Order restricted his trading in Ontario. It was up to him to determine whether any trading he proposed to do was permitted and to ensure that any such trading fell within the terms of the 2004 Order. He failed to do so.

[52] The sanctions imposed in this matter must be adequate to deter not only Duic, but others from breaching any similar Commission order.

[53] At the same time, we recognize that there may be circumstances involving a mere technical breach of a Commission order where the Commission may be satisfied that no sanction is

necessary (*Re Mithras Management Ltd.* (1990), 13 O.S.C.B. 1600 at 1610). That is not the case here.

[54] We note that the only matter before us is a breach of a Commission cease trade order. While past conduct of a respondent may be a consideration in imposing sanctions, we do not agree that the sanctions imposed here should be more severe simply because the 2004 Order was issued in connection with serious illegal insider trading. We have to decide this matter based on the circumstances before us and without reference to the facts surrounding the 2004 Settlement Agreement.

(ii) Mitigating Factors

[55] As noted above, regardless of their knowledge or experience of securities laws, individuals who are bound by orders of the Commission have the responsibility of ensuring that they comply with those orders. We acknowledge that Duic had previously sought legal advice about the application of the 2004 Order. The fact that Duic thought he was relying on legal advice and believed in good faith that his trading was in compliance with the terms of the 2004 Order is a mitigating factor.

[56] Based on the Agreed Statement of Facts, it is clear that Duic did not intentionally or knowingly breach the 2004 Order. Aside from the evidence that Duic thought he was relying on previous legal advice, we note that Staff has acknowledged that if Duic had traded the securities in question through a brokerage account in California, he would not have been in violation of the 2004 Order. Duic's trading in connection with this matter constitutes trading in Ontario and a breach of the 2004 Order because acts in furtherance of those trades occurred in Ontario; but the actual trades were all effected on stock exchanges located outside Canada. Trading in securities that occurs wholly outside Ontario (and that involves no act in furtherance of such trading in Ontario) is not prohibited by the 2004 Order.

[57] But for the fact that Duic was in breach of the 2004 Order, there is no suggestion that Duic's trading resulted in any harm to investors or was improper in any other way.

[58] Upon discovering that he had breached the 2004 Order, Duic expressed remorse and accepted full responsibility for his actions. Duic cooperated with Staff during its investigation and substantially shortened the time and expense of this hearing by agreeing to the Agreed Statement of Facts and some of the sanctions.

[59] Absent these mitigating factors, the sanctions we would have imposed for Duic's breach of the 2004 Order would have been much more severe.

(iii) Disputed Sanctions

[60] As requested by Duic, we have in our order retained the mutual fund carve-out for his registered retirement savings plan, that was contained in the 2004 Order. In our view, such a

carve-out, restricted to mutual funds only, does not significantly increase the risk to the capital markets of future inappropriate market conduct by Duic. Trading mutual funds for his RRSP was permitted under the 2004 Order in circumstances where the relevant conduct giving rise to the 2004 Order was very serious insider trading. Removing the carve-out now is not, in our view, justified given its very restricted scope. In our view, if the RRSP carve-out was appropriate in the 2004 Order, it continues to be appropriate in these circumstances.

[61] Because the securities in the Toronto Accounts were acquired in breach of the 2004 Order we agree with Staff that Duic should divest himself of all securities held in the Toronto Accounts within 21 days from the date of our order, and that Duic should close the Toronto Accounts immediately thereafter.

[62] Staff requested disgorgement of $42,000, taking into account the profit from the sale of the shares of Cerner Corporation. We agree that a person who breaches a Commission order should not be permitted to profit from doing so. Our order in this matter reflects that principle. We consider it fair and appropriate, however, to determine Duic's profits on an aggregate basis, based on the disposition of all of the securities that were acquired in breach of the 2004 Order. If Duic realizes any profit as a result of his divestment of all securities in the Toronto Accounts, he shall pay this realized profit to the Commission forthwith, to be allocated by the Commission to or for the benefit of third parties under section 3.4(2)(b) of the Act.

[63] In order to emphasize the seriousness with which we view Duic's breach of the 2004 Order, we imposed an administrative penalty of $25,000. This sanction recognizes the need to strongly deter others from breaching Commission orders. It also recognizes the mitigating factors discussed above.

3. Costs

[64] Duic cooperated with Staff during its investigation, he agreed to a waiver of his solicitor-client privilege, and he substantially shortened the time and expense of this hearing by entering into the Agreed Statement of Facts and by agreeing with Staff on some of the sanctions that should be imposed. The fact that Staff could have relatively easily investigated this matter without Duic's cooperation should not be treated as undermining the value of his cooperation. We also recognize that the costs claimed by Staff are not excessive and do not include the full costs of Staff's investigation and response to these circumstances.

[65] It was Duic's trading in breach of the 2004 Order that gave rise to this matter and required Staff to investigate and respond to the circumstances. Accordingly, we believe that Duic should be required to pay a substantial portion of the costs incurred by the Commission. We have concluded that it is appropriate that Duic pay costs of the investigation and hearing in the amount of $15,000, rather than the $24,000 requested by Staff.

G. CONCLUSION

[66] For the reasons discussed above, we believe that the sanctions imposed by our order are proportionately appropriate to the circumstances before us, including the mitigating circumstances discussed above. Accordingly, we considered it to be in the public interest to issue our order dated September 3, 2008 that was substantially to the effect that:

(a) pursuant to clause 2 of subsection 127(1) of the Act, trading in any securities by Duic shall cease permanently, with the following two exceptions:

   i. Duic is permitted to buy and sell securities in mutual funds, including index funds and exchange traded funds, through a registered dealer for the account of his registered retirement savings plan (as defined in the *Income Tax Act* (Canada)); and

   ii. Duic shall sell all securities held in his Toronto Accounts within twenty-one days and shall close the Toronto Accounts immediately thereafter. If Duic realizes a profit as a result of his divestiture of all securities in the Toronto Accounts (determined after taking into account: (a) the profit of $40,848.76 (U.S.) Duic realized on or about August 8, 2007 through the sale of 7,500 shares of Cerner Corporation; and (b) the loss Duic sustained of $22,734.40 (U.S.) on March 27, 2008, as a result of the sale of 890 shares of Boeing), he shall pay this realized profit to the Commission forthwith, to be allocated by the Commission to or for the benefit of third parties under section 3.4(2)(b) of the Act;

(b) pursuant to clause 2.1 of subsection 127(1) of the Act, acquisition of any securities by Duic shall be prohibited permanently, with the exception that Duic is permitted to buy and sell securities in mutual funds, including index funds and exchange traded funds, through a registered dealer for the account of his registered retirement savings plan (as defined in the *Income Tax Act* (Canada));

(c) pursuant to clause 6 of subsection 127(1) of the Act, Duic is hereby reprimanded;

(d) pursuant to clause 8.1 of subsection 127(1) of the Act, Duic shall resign any positions that he holds as a director or officer of a registrant;

(e) pursuant to clause 8.2 of subsection 127(1) of the Act, Duic shall be prohibited permanently from becoming or acting as a director or officer of a registrant;

(f) pursuant to clause 8.3 of subsection 127(1) of the Act, Duic shall resign any positions that he holds as a director or officer of an investment fund manager;

(g) pursuant to clause 8.4 of subsection 127(1) of the Act, Duic shall be prohibited permanently from becoming or acting as a director or officer of an investment fund manager;

(h) pursuant to clause 8.5 of subsection 127(1) of the Act, Duic shall be prohibited permanently from becoming or acting as a registrant, as an investment fund manager or as a promoter;

(i) pursuant to clause 9 of subsection 127(1) of the Act, Duic shall immediately pay an administrative penalty in the amount of $25,000, to be allocated by the Commission to or for the benefit of third parties under section 3.4(2)(b) of the Act;

(j) pursuant to section 127.1 of the Act, Duic shall immediately pay costs in the amount of $15,000; and

(k) except as modified by the foregoing orders, Duic continues to be subject to the terms of the 2004 Order made by the Commission against him.

DATED at Toronto this 29th day of September, 2008.

"James Turner"

James E. A. Turner

"Suresh Thakrar"

Suresh Thakrar