ALBERTA SECURITIES COMMISSION

DECISION

Citation: Aurora, Re, 2012 ABASC 7 **Date: 20120109**

Varun Vinny Aurora, David Humeniuk, David Jones and Vincenzo De Palma

Panel:	Stephen Murison Roderick McKay, FCA Neil Murphy
Appearing:	Don Young and Andrew Wilson for Commission Staff Timothy Chick for Vincenzo De Palma
Date of Hearing:	21 November 2011
Date of Decision:	9 January 2012

I. INTRODUCTION

[1] Varun Vinny Aurora ("Aurora"), David Humeniuk ("Humeniuk"), David Jones ("Jones") and Vincenzo De Palma ("De Palma") – together, the "Respondents" – contravened the *Securities Act*, R.S.A. 2000, c. S-4 (the "Act") and acted contrary to the public interest in the course of their involvement with Concrete Equities Inc. ("CEI"). More specifically, as set out in the decision of this panel of the Alberta Securities Commission (the "Commission") on the merits of allegations against the Respondents (the "Merits Decision", cited as *Re Aurora*, 2011 ABASC 501), all of the Respondents contravened the registration and prospectus requirements of the Act, and all but De Palma also made misleading or untrue statements prohibited by section 92 (4.1) of the Act.

[2] With the issuance of the Merits Decision, this proceeding moved to a second phase in which we received submissions from staff of the Commission ("Staff"), Aurora and (through his counsel) De Palma on the issue of what, if any, orders ought to be made against all or any of the Respondents. Humeniuk and Jones did not avail themselves of the opportunity to participate in this phase of the proceeding.

II. THE MISCONDUCT

[3] For convenience, we summarize here some of the relevant factual background and misconduct as found in the Merits Decision (with which this decision should be read).

[4] This proceeding centres on activities that began in Calgary in 2005. Aurora had worked for an insurance business run by his father while attending university. Jones was carrying on a business apparently involving a combination of financial and investment advice and sales, through a company called Wealthstreet Inc. ("Wealthstreet"), and also provided market commentaries on local radio. Before that, Jones had worked with Aurora's father's firm, and there became acquainted with Aurora. Humeniuk, who had a background as a mortgage broker, proposed to Jones a new venture involving the sale of real-estate-based investment products. Late in 2005 Jones invited Aurora to join this new venture – CEI, of which Jones, Aurora and (eventually) Humeniuk were sole shareholders. De Palma, with a sales background, was recruited to CEI in that capacity in May 2006.

[5] Jones was the president and (later) chief executive officer of CEI; Aurora its vice-president and (later) chief operating officer; Humeniuk its general manager and (later) senior vice-president and secretary; and De Palma its vice-president of sales and business development and (later) executive vice-president.

[6] The real-estate-based investments sold by CEI were issued by a variety of entities that CEI caused to be established, among them eight limited partnerships (the "LPs") and their respective corporate general partners (the "GPs"); we refer to CEI together with these LPs and their GPs as the "Concrete Group". The Respondents were the sole directors, officers and shareholders of each GP, although in different combinations.

[7] Each LP became associated with particular real estate, in most cases an existing income-producing commercial (office or retail) building (or buildings) in Calgary.

[8] Units of the LPs – securities – were sold without registration or prospectuses, in purported reliance on the "offering memorandum" exemption, at various times from February 2006 to May 2009. In all, some $110 million was raised from these sales.

[9] We found multiple deficiencies in the offering memoranda (the "Impugned OMs") used for sales of Units of six of the eight LPs:

- They stated that no commissions were being paid for Unit sales (a blatant untruth) and that officers and directors of the relevant GPs received no compensation (misleading).

- They overstated (by as much as 58.3%) the prices paid by the LPs for the relevant real estate, those purchases being the primary disclosed purpose of the offerings. The price differences – totalling over $26 million – stood to benefit Respondents as shareholders of CEI and the relevant GPs.

- They misled about Aurora's and Humeniuk's backgrounds, exaggerating Aurora's educational and business experience and omitting legally required disclosure of Humeniuk's lifetime ban from the Alberta real estate industry.

- They misled by touting, for each LP, a distinct real estate property or project and communicating that funds of the respective LPs would not be commingled. In reality, though, the LPs were not operated as discrete businesses, and commingling of their money was the norm – money being diverted from one LP for purposes of another, depending principally on what Humeniuk thought most urgent or convenient.

[10] In all, we found the Impugned OMs to have been so gravely deficient that the offering memorandum exemption purportedly relied upon in selling those Units was unavailable. The associated distributions were therefore illegal.

[11] A key condition of the offering memorandum exemption – that sales be restricted to investors who, if paying more than $10 000, satisfy specified eligibility criteria (implying an ability to bear financial risk and tolerate financial loss) – was not treated with anything approaching the requisite seriousness, and was repeatedly breached. The evidence as to the manner in which prospective investors' eligibility was purportedly assessed, and the evidence of actual sales to investors who clearly were not eligible, was such that we found, on this ground also, that the claimed offering memorandum exemption was unavailable for the sales of Units of seven of the eight LPs. On this ground also, those distributions were therefore illegal.

[12] The Concrete Group business foundered. Many of the entities, including CEI and seven of the LPs and their respective GPs, were placed into receivership in July 2009. A December 2009 report of the receiver offered insight into how the operation had been run. There was a failure to "maintain accurate and complete books and records" and "no complete set of financial statements", and business was conducted "without regard to observing corporate formalities and prudent governance practices". Despite this, the receiver was able to develop an informative, and very troubling, picture of how investors' money was used. This included "regular . . . (almost daily) . . . transfer[s of] funds between" entities in the Concrete Group – the

mentioned commingling of money – such that investors in some LPs unknowingly funded payments to investors in others. Prospects of all investors receiving all their invested money back – let alone the touted profits – are dim. The receiver opined that investors in only some of the LPs have a chance of recovering something.

[13] We found each Respondent to have been responsible for some of the illegalities and misconduct.

- All of the Respondents, in their capacities as officers or directors (or both) of one or more of CEI and the various GPs, bear responsibility for authorizing, permitting or acquiescing in the conduct of the respective illegal trades and distributions (De Palma only in respect of one of the LPs). While the evidence was that Aurora had very much a subordinate role under Humeniuk, and neither Aurora nor Jones did much (if any) work at CEI, ignoring or shirking their duties as directors and officers did not excuse Aurora or Jones from the associated responsibilities.

- Aurora had little direct involvement in selling Units except to family and friends. However, he bears personal responsibility for acts in furtherance of sales of Units. He signed and certified seven of the eight Impugned OMs. In so doing, he incurred personal responsibility for misleading or untrue statements prohibited by section 92(4.1) of the Act, and for breaching the registration and prospectus requirements.

- Jones signed and certified three of the Impugned OMs. He thus bears personal responsibility for misleading or untrue statements, and for breaching the registration and prospectus requirements. Jones also had a more direct role – and associated responsibility – in the selling activity: he solicited investments in Units through advertisements and sales seminars. According to the receiver, Jones was "mainly responsible for marketing and public relations for CEI". Jones also personally made some of the sales.

- Humeniuk signed and certified some of the Impugned OMs. He thus bears personal responsibility for misleading or untrue statements (given his primary role in determining how LPs' money was used, we view as acute his responsibility for misleading or untrue disclosure about "no commingling"), and for breaching the registration and prospectus requirements. Humeniuk was the driving force behind the high-pressure CEI sales operation and, as such, bears primary responsibility for it, including its illegal aspects. He also bears direct responsibility for personally selling some Units.

- De Palma was, but for Humeniuk, at the top of the sales-team hierarchy at CEI. He frequently met with Humeniuk in sales strategy meetings and met with attendees at sales seminars. These were acts in furtherance of sales of Units for which De Palma bore personal responsibility. De Palma also had more direct responsibility for sales of Units. He was proved personally to have made a sale to an ineligible investor. We reject his suggestion that, this being the only such example presented, we must regard his misconduct as isolated or anomalous. To the contrary, it was consistent with and illustrative of the systemic lack of serious attention given, at the Concrete Group, to the

conditions of the offering memorandum exemption. According to the receiver, and as De Palma implicitly acknowledged in his written submissions, De Palma received approximately $1 million in sales commissions; these would have been derived from various CEI-linked distributions – including those found to have been illegal.

III. APPROPRIATE ORDERS

A. Orders Sought by Staff

[14] Staff sought significant sanctions against each Respondent:

- against Aurora, 12-year bans on trading in or purchasing securities and exchange contracts, using any exemptions under Alberta securities laws and acting as a director or officer of any issuer, and an administrative penalty of $1 815 000;
- against Humeniuk, permanent trading-and-purchasing, use-of-exemptions and director-and-officer bans, and an administrative penalty of $3 520 000;
- against Jones, permanent trading-and-purchasing, use-of-exemptions and director-and-officer bans, and an administrative penalty of $1 265 000; and
- against De Palma, 12-year trading-and-purchasing, use-of-exemptions and director-and-officer bans, and an administrative penalty of $1 100 000.

[15] Staff also sought orders that the Respondents jointly and severally pay investigation and hearing costs of $67 219.91, and that De Palma alone pay a further $3 388.02 in costs relating to an unsuccessful application by De Palma for summary dismissal of the allegations against him.

B. Positions of the Respondents

1. Aurora

[16] Aurora submitted several grounds (discussed below) in support of a generalized plea "not to be so negatively stigmatized that I may never conduct business, or get a good job [in Alberta] again" and a request "for a fine that I could conceivably be able to pay back".

2. Humeniuk and Jones

[17] Humeniuk and Jones made no submissions on appropriate orders.

3. De Palma

[18] De Palma contested Staff's position, suggesting generally that the findings against De Palma – in contrast to "the overall CEI 'scheme' " – warranted, at most, 2-year bans on trading in securities in reliance on the offering memorandum exemption and acting as a "dealer", a public reprimand and a $50 000 administrative penalty. De Palma also submitted that his responsibility for costs should be limited to perhaps 10% of the total.

C. Analysis

1. The Law: Sanctions and Costs

[19] The Commission's authority to issue sanctions is grounded in sections 198 and 199 of the Act. This sanctioning authority is to be exercised in the public interest, prospectively, to protect investors and the capital market from future harm (*Committee for the Equal Treatment of Asbestos Minority Investors v. Ontario (Securities Commission)*, 2001 SCC 37 at paras. 39-45).

[20] In determining whether, or what, sanctions are appropriate, both specific deterrence (directed at a respondent) and general deterrence (directed at others) are relevant (*Re Cartaway Resources Corp.*, 2004 SCC 26 at paras. 52-62; and *Re Podorieszach*, 2004 ABASC 567 at para. 17). This Commission has also enumerated several factors that may be relevant (*Re Lamoureux*, [2002] A.S.C.D. No. 125 at para. 11 (affirmed on other grounds 2002 ABCA 253); restated in *Re Workum and Hennig*, 2008 ABASC 719 at para. 43 (affirmed 2010 ABCA 405)):

- the seriousness of the findings against the respondent and the respondent's recognition of that seriousness;
- characteristics of the respondent, including capital market experience and activity and any prior sanctions;
- any benefits received by the respondent and any harm to which investors or the capital market generally were exposed by the misconduct found;
- the risk to investors and the capital market if the respondent were to continue to operate unimpeded in the capital market or if others were to emulate the respondent's conduct;
- decisions or outcomes in other matters; and
- any mitigating considerations.

[21] As to costs orders under section 202 of the Act, this Commission commented on their nature and purpose in *Re Marcotte*, 2011 ABASC 287 at para. 20; such orders are:

> . . . a means of recovering, from a respondent found to have engaged in capital-market misconduct, certain investigation and hearing costs that would otherwise be borne indirectly by law-abiding market participants whose fees fund the Commission's operations. It is generally appropriate that a respondent pay at least some portion of the relevant costs. Determination of the appropriate portion may involve assessing parties' contributions to the efficient conduct and ultimate resolution of the proceeding.

2. Appropriate Sanctions

(a) Sanctioning Factors

[22] We now apply the relevant sanctioning factors to the facts.

Seriousness of Misconduct and Resulting Harm

[23] The misconduct of each Respondent was serious. Their roles, and the nature and extent of their responsibility, were not identical. Humeniuk, for example, was both the driving force behind the CEI selling operation and the principal determiner of how Concrete Group LPs' money was used.

[24] That said, each Respondent bears responsibility for illegal trades and distributions. Each was a director or officer (or both) of one or more of CEI and the various GPs. Aurora, Jones and Humeniuk each bore direct responsibility for several materially misleading and untrue offering memoranda. Each Respondent bore direct responsibility for acts in furtherance of illegal sales of Concrete Group securities. Jones, De Palma and Humeniuk personally made such sales. The misconduct – of all Respondents, De Palma included, his contrary suggestions notwithstanding – was systemic, not limited to isolated instances.

[25] Much harm resulted from all of this misconduct. Prospective investors were given materially misleading information, and denied the prospectus disclosure and registrant involvement (or appropriate substitutes under properly-used exemptions) to which they were

entitled by law. Their ability to make sound, informed investment decisions thus impeded, a large number of investors handed over large sums – large in the aggregate but also, in the case of many of the witnesses from whom we heard, disastrously large in light of their own personal circumstances. Full financial recovery is, as noted, a dim prospect. Some of the money seems to be gone forever, and whatever might ultimately be recovered is unlikely fully to repay all investors, let alone deliver the touted profits. We repeatedly heard – and we believed – testimony of individual investors distraught and traumatized by what they have endured as a result of their involvement with the Concrete Group. Moreover, the harm is not limited to identifiable investors and their families; it is plausible to believe that the harm extends to the Alberta capital market and its participants generally. Individuals who know Concrete Group investors or learn of their plight may themselves become suspicious and reluctant investors. Such diminished investor confidence impairs the ability of legitimate businesses to raise capital economically.

[26] Aurora and De Palma both contended that their respective families had invested heavily in the Concrete Group and so, by extension, also suffered significantly from the debacle. Aurora testified to this effect, indicating that his family collectively was the largest single investor in the Concrete Group. De Palma submitted (he did not testify) that his family invested roughly $500 000, and in this he was to some extent supported by Aurora's evidence. Even accepting that their families were harmed – and that Aurora and De Palma themselves were thereby hurt also – this does not diminish either the seriousness of Aurora's and De Palma's misconduct or the harm to other investors.

[27] In short, misconduct – on the part of each Respondent – was serious, as is the resulting harm. These factors argue for substantial sanctions against each Respondent.

Recognition of Seriousness

[28] Aurora – who attended throughout the proceeding and testified under oath – expressed to us repeatedly his contrition, stemming from his understanding and awareness of the seriousness of his misconduct and the harm done. We believed him. This indicates to us that the likelihood of his repeating his misconduct is somewhat limited. While we do not conclude that this entirely forecloses the possibility that future temptation could again lead him astray, we do consider that this factor argues for some moderation in sanction against Aurora, certainly insofar as it is directed at specific deterrence.

[29] Humeniuk, as noted, took no part in the present phase of this proceeding. His participation in the earlier phase of the proceeding was limited to a written submission that demonstrated essentially no recognition of the seriousness of the proceeding, let alone recognition that he had engaged in serious – or any – misconduct or bore responsibility for any resulting harm, instead hinting at flawed legal advice or laying blame on fellow Respondents and "human error". This indicates to us that Humeniuk, absent orders on our part, poses a continuing and serious risk to the investing public. This factor argues for significant sanction against him.

[30] Jones also did not participate in the present phase of this proceeding. During the earlier phase of the proceeding, in which Jones participated sporadically, he uttered some expressions of regret for what had befallen investors, but the overwhelming impression he conveyed was of

sorrow at the position he found himself in. Jones seemed – wrongly – to consider himself the primary victim of the Concrete Group debacle. He evinced little or no comprehension of the nature or seriousness of his misconduct or of a connection between that and the harm suffered by investors. This factor argues for significant sanction against Jones.

[31] De Palma, through counsel, acknowledged the seriousness of the findings against him in the Merits Decision, and conveyed "deep remorse and sadness regarding the tragedy that befell" investors. That said, we have nothing but these assertions – not evidence – by which to judge De Palma's state of mind. He did not testify. While he was under no obligation to do so, his choice not to testify had natural consequences. In this instance, his claimed recognition of the seriousness of his misconduct is markedly less resonant than Aurora's. De Palma's written submissions do not convey a persuasive sense of real contrition; whether grounded in a litigation strategy or for other reasons, they refer to the seriousness of our findings rather than of his own misconduct, and of regret at a tragedy – conveying, overall, a tone of distance between the harm done and De Palma's own misconduct.

[32] Moreover, De Palma's submissions endeavoured to position him as having played a limited, if not peripheral, role at the Concrete Group, with his misconduct limited to isolated instances (one proved direct illegal sale and his role with but one of the LPs). However, as we found in the Merits Decision, his involvement – and his misconduct – were not as limited as he contended.

[33] We are unable to conclude that De Palma truly recognizes the seriousness of his misconduct. This factor argues for significant sanction against De Palma.

Respondents' Histories

[34] Aurora had essentially no capital market experience before he joined the Concrete Group, and he has never before been sanctioned. During the Relevant Period he was a young man; CEI seems to have been his first employment outside his family business. This factor argues for some moderation in sanction against him.

[35] Humeniuk was an older man with capital market experience – recent experience, with an enterprise whose business model he brought to CEI – in the capital market. He also had experience in the real estate industry (which ended with a lifetime ban against him). Humeniuk's experience ought to have taught him both that capital-market activities are governed by laws and carry important responsibilities, and that misconduct can trigger serious consequences. He should have known better than to behave as he did at the Concrete Group. We consider this a further indicator that Humeniuk poses a continuing and serious risk to investors. This factor argues for significant sanction against Humeniuk.

[36] Jones had a long history of selling financial products, and he held himself out as something of an expert commentator in the field. At one time he had been a registrant. These characteristics tell us not only that he should have known, but that he did in fact know, that participation in the capital market carries with it important responsibilities, governed by securities laws. That he nonetheless proceeded as he did, in breach of those laws, further

indicates that he poses a continuing and serious risk to investors. This factor argues for significant sanction against Jones.

[37] De Palma apparently joined the Concrete Group with no background in the capital market. There is no evidence of his ever having been sanctioned. This factor argues for some moderation in sanction against De Palma.

Benefits from Misconduct

[38] It is clear that each of the Respondents intended to, and did, benefit financially from his involvement with the Concrete Group.

[39] All Respondents received occasional payments, including CEI management fees (up to $30 000 per month by the end of 2008) and bonuses. Aurora, Humeniuk and Jones were all in a position to benefit from tens of millions of dollars in so-called "partner profits" representing the mentioned difference between the actual and the disclosed purchase prices for Concrete Group real estate.

[40] Jones and De Palma benefited from sizeable selling commissions. Having found that distributions of Units of seven of the eight LPs were illegal, we conclude that more than a modest portion of De Palma's commissions derived from illegal distributions (certainly not restricted to the one proved instance of a direct sale by him to an ineligible investor, nor to sales of Units of just one of the LPs).

[41] Aurora and Humeniuk, through a company they owned, also ended up with two floors of a new office building, for which it seems they paid nothing and on account of which the receiver ascribed a benefit – a "Net Payable" to other Concrete Group projects – of over $3.3 million. Aurora testified that these floors were meant partly to house CEI and partly (as we understood it) for a future Concrete Group financing project. While that never did occur, we incline to accept that, in Aurora's case at least (we have no evidence as to what Humeniuk expected or intended for himself), Aurora did not really expect or intend to benefit personally to the full extent of the value of his half-share in these two floors. However, there surely remained the likelihood – given the established pattern at the Concrete Group – that Aurora would enjoy at least a "partner profit" in relation to this asset.

[42] Humeniuk benefited in some or all of these ways – and others, including acquiring a condominium in Mexico for which the receiver indicated approximately $1.2 million was paid.

[43] Staff (citing the Merits Decision, which noted that the underlying information derived from the receiver's report) asserted that the Respondents benefited in the following amounts: Aurora – $1.65 million; Humeniuk – $3.2 million; Jones – $1.15 million; and De Palma – $1 million.

[44] The benefit so ascribed to Aurora included all monetary payments attributed to him, plus the full value of his half-share of the mentioned office building floors, less (apparently) an offset of some $1 million on account of payments by his father to the Concrete Group. For the reasons given above, we believe that a sizeable (but not full) reduction in respect of the office building

floors is appropriate in his case. On the other hand, we know too little about the precise nature, purpose and effect of the payments from Aurora's father to concur with a full offset on that account. A partial offset appears warranted, based on the plausible prospect (intended or not) that these payments may to some extent help to limit ultimate losses to Concrete Group investors. In addition, we accept that Aurora incurred direct personal costs, likely substantial (he asserted that he had borrowed over $1 million for this purpose), in his salvage efforts. The uncertainties preclude a precise quantification of Aurora's benefit; in the circumstances, we conclude that Aurora benefited from the misconduct found, to the extent of at least several hundred thousand dollars and possibly as much as $1.5 million.

[45] The benefit ascribed by Staff to Humeniuk also included his half-share in the mentioned office building floors. As noted, we lack evidence of what Humeniuk expected from this apparent windfall. While he (like Aurora) might not have expected to receive the full benefit of this asset, we are keenly aware that it was primarily Humeniuk who determined how LPs' funds were handled at the Concrete Group, and that he amassed for himself the largest financial benefits of all the Respondents (even without considering these office building floors) in dubious circumstances (including those surrounding his acquisition of a Mexican condominium). We consider that no more than a modest downward adjustment in this regard is appropriate for Humeniuk, leading us to conclude that an amount of $3 million reasonably reflects his benefit from the misconduct found.

[46] We discern nothing warranting an adjustment of the $1.15 million benefit ascribed to Jones by both Staff and the receiver.

[47] Turning to De Palma, we considered possible adjustments to reflect apparent uncertainties or errors in the receiver's characterization of some Concrete Group payments to De Palma, as well as $50 000 that De Palma contended he had personally paid in an effort to sort out the problems at Concrete Group toward the end. Ultimately, we conclude that $1 million remains a reasonable estimate of the quantum of his benefit from the Concrete Group, mainly in the form of sales commissions and most of it – we are in no doubt, for reasons mentioned – reasonably attributable to illegal distributions.

[48] We make no adjustment, for the purpose of quantifying benefits, on account of investments (or losses) by Respondents' family members. However, we return to this topic below.

[49] In the result, we find that each Respondent anticipated, and in fact derived, substantial financial benefits from the misconduct found. This factor argues for significant sanctions against each Respondent.

Mitigation

[50] Aurora and De Palma both submitted that there were, in effect (whether so characterized or not), circumstances that mitigated their misconduct. Stated generally, these may be said to have included: (i) unawareness, until very late, of improprieties at the Concrete Group; (ii) vigorous efforts to address such problems once they came to their attention; (iii) personal

financial outlays to try to clarify and ameliorate the situation; (iv) ruinous outcomes for themselves; and (v) adverse consequences to their own families.

[51] Aurora also gave evidence on these points. He testified to having borrowed heavily to try to salvage matters, to having been bankrupted as a result of his involvement with the Concrete Group, and to the shame he endures at family members having suffered from their investments in the Concrete Group.

[52] De Palma, as mentioned, did not testify. However, he made some submissions similar to Aurora's, to some extent supported by evidence from Aurora and the receiver.

[53] While we do discern mitigation (and quasi-mitigation) on the parts of both Aurora and De Palma, we do not consider it to have been as extensive or compelling as contended. Aurora and De Palma began their ameliorative efforts very late – long after we consider that both were in a position to perceive, and act on, serious problems at the Concrete Group. Had either or both of them acted earlier, and with more vigour, in the face of obvious inconsistencies at the Concrete Group, a good deal of harm might have been averted.

[54] Aurora's disregard of his responsibilities was, until near the end, almost complete, as he admitted.

[55] De Palma, in his submissions, stressed that he did not knowingly engage in misconduct. However, even in his comparatively narrow functional (sales) role, he had ready access to information that we think ought to have alarmed him enough to act earlier than he did. For example, some of the information disclosed to investors in the Impugned OMs ought reasonably, in our view, to have alerted De Palma to serious discrepancies. (De Palma did not prepare or certify the Impugned OMs, but we would certainly expect anyone selling securities on the basis of such documents – let alone the second-ranked person in the sales operation – to have read them.) It ought to have been immediately apparent to De Palma that the disclosure did not match reality – one example being the repeated statements in the Impugned OMs that no commissions were paid on Unit sales, whereas De Palma was (directly or indirectly) receiving such commissions. As noted in the Merits Decision, when an investor alerted De Palma – the evidence was that this took place in 2006 – to Humeniuk's real estate industry ban, the investor was left with the comforting understanding that there was no reason for concern because Humeniuk "wasn't in a position to make any of the final decisions" (an assessment not at all consistent with the evidence). Moreover, Unit sales continued well into 2009 – after Aurora and De Palma clearly perceived serious problems at the Concrete Group.

[56] The term "quasi-mitigation", which we used above, we apply in respect of the investments (and associated losses) of members of Aurora's and De Palma's families. We do not consider these investments to have delivered true mitigation, in the sense of assisting other investors. Still, we accept that the investments were made, that they were substantial, and that they can be inferred to cause enduring emotional discomfort, at least, to these two Respondents. Moreover, the fact that Aurora and De Palma allowed – even encouraged – family members to invest in the Concrete Group persuades us that Aurora and De Palma did not, at the time,

appreciate the risks of such investment. For these reasons, we discern in these family investments something akin to mitigation for purposes of this sanctioning factor.

[57] In the result, we find substantial mitigation (or efforts at mitigation) on the parts of both Aurora and De Palma.

[58] Although Jones did not participate in the present phase of the proceeding, some of his remarks in the earlier phase could be considered relevant to mitigation. He suggested that all he ever did and wanted to do was help people. This was both vague and unconvincing. He also referred to a transaction with a third party that he promoted, late in the relevant period, with a view to salvaging something for investors in at least some of the LPs; Jones seemed to suggest that investors harmed themselves when they voted to reject that proposal. We cannot assess the merits of this putative transaction but we are prepared to accept that, in pursuing it, Jones was trying, in part at least, to mitigate harm. Still, we consider this limited mitigation to have been largely, if not wholly, offset by the evidence of his having absented himself from the scene once the full scale of the Concrete Group debacle became apparent, leaving Aurora and De Palma to sort things out.

[59] There was no suggestion of any mitigation on the part of Humeniuk.

[60] In the result, this factor argues for some moderation in sanction against Aurora and De Palma, very slight moderation in respect of Jones and none whatsoever in respect of Humeniuk.

Risk of Future Harm

[61] The sanctioning factors do not always operate independently of one another. Here, our assessment of the risk of future harm from any or all of the Respondents turns to some extent on our assessments of other factors.

[62] We discern a risk of future harm from each of the Respondents in the absence of sanctions, attributable primarily to the substantial benefits that each of them reaped from his involvement with the Concrete Group, and the striking ease with which the Concrete Group was able, in breach of Alberta securities laws, to amass an enormous sum of money from so many investors.

[63] Our concern is in some instances aggravated, and in others ameliorated, by circumstances particular to each Respondent. Aurora's recognition of the seriousness of his misconduct in our view significantly (but not wholly) diminishes the likelihood of him repeating his misconduct – correspondingly diminishing the need for sanction against him for the purpose, at least, of specific deterrence. Similarly, we consider that Aurora's and De Palma's mitigation efforts (which we think will have had an instructive effect on them, even bearing in mind the offsetting circumstances mentioned above), and the quasi-mitigating circumstance of their families' investments in the Concrete Group, diminish the likelihood of these two Respondents repeating their misconduct. In all, these factors somewhat diminish the need for sanctions against them.

[64] On the other hand, the fact that Aurora benefited substantially without – by his own evidence – any apparent work or effort on his part, indicates a risk of future harm were he in future presented with a similarly tempting prospect.

[65] Similarly, the sizeable benefit that accrued to De Palma from illegal distributions also indicates a risk of future harm were he in future presented with a similar opportunity.

[66] Jones's and Humeniuk's lack of recognition of the seriousness of their misconduct, and their respectively limited and non-existent efforts at mitigation, cause us to consider that these two Respondents present a continuing and serious risk of harm to investors. Our view is bolstered by the apparent failure of either of them to attach much importance to this proceeding.

[67] In short, we consider each Respondent to pose a threat of future harm, significant in the cases of Humeniuk and Jones, less in the cases of Aurora and De Palma.

[68] We perceive the risks posed by Humeniuk and Jones to be permanent. There is no safe place for either of them in the Alberta capital market; they must never again have access, directly or indirectly, to the faith or funds of investors.

[69] We do not have the same view of either Aurora or De Palma.

[70] We do not consider Aurora to be incorrigible. As stated, we believe that he appreciates the seriousness of his misconduct and the associated harm done. Our observation of him in the course of the hearing persuades us that he is intelligent and capable of learning – and that he has learned from this experience. We consider that the harm Aurora poses to the capital market can be addressed and, in a sense, managed by sanctions that – although significant – need not preclude permanently his future participation in the Alberta capital market.

[71] We do not have the benefit of direct observation and testimony of De Palma as we had with Aurora, and we therefore cannot reach similar conclusions with the same confidence. That said, the circumstances discussed lead us to conclude that the risk he poses is not permanent, and can be addressed by appropriate sanction.

[72] This factor, thus, argues for significant sanctions against each Respondent. Those against Humeniuk and Jones must address our concern at the permanent risks they pose; those against Aurora and De Palma should reflect the more limited risks we perceive from them.

Prior Decisions

[73] The assessment of appropriate sanction being so fact-specific, we find in none of the earlier decisions put forward by the parties any guidance of specific assistance here.

Conclusion on Factors

[74] Taken as a whole, the relevant sanctioning factors applied to the facts here lead us to conclude that significant sanctions are required against each Respondent. There are grounds for moderating, to differing degrees and in differing ways, the sanctions against Aurora and De Palma, but very little in the case of Jones and none at all for Humeniuk.

(b) Specific and General Deterrence Both Required

[75] The misconduct in this case arose in the context of a large, high-pressure and successful securities-selling operation. The receiver reported that over $102 million was raised from what we found to have been illegal distributions of Units of seven LPs. As discussed, the illegalities involved breaches of the fundamental prospectus and registration requirements of Alberta securities laws – depriving investors of the associated protections – and included, for six of the LPs, materially misleading and untrue offering memorandum disclosure.

[76] The nature of the misconduct and our conclusions on the factors discussed above persuade us that specific deterrence – stronger for some of the Respondents than for others, but significant for all – is necessary to dissuade each of them from repeating their misconduct.

[77] Equally (or more) important in this case is deterrence directed at third parties. The ease with which the Concrete Group improperly raised so much investor money – and was thus able to deliver such substantial benefits to each Respondent – might tempt observers to emulate what the Respondents did, unless dissuaded by significant sanctions here. Overall, we find a compelling need for strong general deterrence in respect of the misconduct of each Respondent.

(c) Appropriate Sanctions: Nature and Quanta

(i) Types of Sanction

Bans and Monetary Sanction

[78] Given the nature and context of the misconduct here, we consider that appropriate protection of the investing public and the Alberta capital market requires packages of sanctions that remove each Respondent from the capital market in capacities relevant to their respective misconduct, coupled with a significant direct monetary sanction.

[79] Although De Palma suggested that appropriate orders might include a reprimand against him, our conclusions as to other types of sanction render such an order unnecessary here.

Market-Access Bans

[80] In view of their roles within the Concrete Group and the nature of the misconduct for which we found them responsible, we consider that the appropriate market-access bans must restrict each Respondent from trading in or purchasing securities and exchange contracts, benefiting from exemptions under Alberta securities laws, and acting as officers and directors.

[81] The Respondents other than De Palma did not express, clearly or at all, their positions on specific types of sanctions that might be appropriate or inappropriate. As to De Palma's position, we do not consider that the limited scope of market-access bans he proposed would deliver anything approaching the degree of deterrence and protection we think his misconduct warrants.

[82] One issue not addressed by any of the submissions was allowance for limited personal securities trading (although De Palma's proposal would leave room for this, among much else). Given that the misconduct in this case centred on the raising of money from the investing public rather than on improprieties in personal trading, and given also that appropriate conditions can

minimize the risk of abuses (and make any abuses readily detectable), we consider that limited personal-trading carve-outs would not jeopardize the public interest.

Administrative Penalties

[83] In addition to market-access bans, we consider a direct monetary sanction (in the form of an administrative penalty) against each Respondent essential to deliver the requisite protective messages of both specific and general deterrence.

[84] We took note of assertions of poverty on the part of the Respondents, and Aurora's specific plea that any monetary order against him be limited to an amount he "could conceivably be able to pay back". The implicit proposition that administrative penalties should be minimized or forgone in such circumstances is, both generally speaking and in this case, unpersuasive. First, we lacked compelling evidence as to the Respondents' current and anticipated financial positions. Second, in any event, tailoring an administrative penalty – reducing it from an otherwise-indicated quantum – in response to a respondent's current financial weakness could, in a case such as this (involving a large and successful illegal capital-raising operation), fatally undermine the required general deterrence.

(ii) Quantifying Sanctions

Market Access Bans

[85] In the circumstances here, trading-and-purchasing and use-of-exemptions bans work logically together. Accordingly, where one is ordered for a particular duration, we consider that the other ought also to be ordered, and for the same duration. However, the same does not necessarily apply to director-and-officer bans, which have different protective effects and respond to different aspects of the misconduct found.

[86] Given our conclusion that Humeniuk and Jones present permanent risks to the investing public, we consider that all three types of market-access ban against Humeniuk and Jones must, in the public interest, likewise be permanent.

[87] Turning to Aurora and De Palma, we concluded above that neither presents a permanent risk to the investing public, and that there are grounds for moderating sanction against each. In general, we consider that trading-and-purchasing and use-of-exemption bans against them should be time-limited – their durations differing as between these two Respondents, and differing also from the durations of the director-and-officer bans against each. Aurora's role in the selling of securities in distributions that misused exemptions was, although important, less direct than De Palma's. For these reasons, we consider it to be in the public interest that trading-and-purchasing and use-of-exemptions bans against Aurora continue for 5 years, while those against De Palma continue for 9 years.

[88] Aurora's failure to fulfil his responsibilities as director and officer (of multiple entities) was profound, whereas this was a less central aspect of De Palma's misconduct. We therefore consider that a director-and-officer ban against Aurora should be greater in duration than the other market-access bans against him, and vice-versa for De Palma. In the result, we consider it to be in the public interest that Aurora be banned from acting as a director and officer of any issuer for 9 years, and De Palma for 5 years.

Administrative Penalties

[89] We turn now to administrative penalties. Section 199 of the Act contemplates such orders in amounts of up to $1 million for each contravention of Alberta securities laws and for each instance of a director or officer having authorized, permitted or acquiesced in a company's contravention of such laws. As mentioned, more than one such contravention or instance was found against each Respondent – multiple examples, relating to multiple illegal distributions, in the cases of Aurora, Humeniuk and Jones.

[90] Staff contended, in effect, that the appropriate administrative penalties can be determined by applying a 10% surcharge to the amounts of benefits they attributed to the Respondents. Although there is no necessary link between the quantum of benefits derived by a respondent and the quantum of an administrative penalty (the link would be more obvious in the case of an order for disgorgement, which was not sought here), nothing precludes the assessment of an administrative penalty by reference to benefits. In the right circumstances, such a linkage may offer the advantages of computational simplicity and a clear deterrent message.

[91] To some extent, this case presents such circumstances. As discussed, we accepted Staff's quantification of Jones' benefit, and we made only a modest adjustment in quantifying Humeniuk's benefit. We found no grounds to moderate Humeniuk's sanctions, and grounds for only slight moderation of Jones'. Taking into account our conclusions on appropriate market-access bans, we consider that Staff's approach would be fair, and deliver requisite messages of specific and general deterrence, in the cases of these two Respondents. Applying this approach to the benefits as quantified above, we find it to be appropriate, in the public interest, to order administrative penalties of $3.3 million against Humeniuk and (moderating slightly) $1.2 million against Jones.

[92] This approach is less obviously applicable to either Aurora or De Palma. First, we did not arrive at a precise quantification of these two Respondents' benefits attributable to misconduct. Second, as discussed, we found grounds to moderate the sanctions against these two Respondents.

[93] Concerning Aurora, taking into account the market-access bans already discussed, our finding that his benefits were in the range of several hundred thousand dollars to $1.5 million, and our finding of grounds for moderation in sanction, we conclude that sufficient deterrence and protection will be delivered, and thus that the public interest will appropriately be served, by an administrative penalty against Aurora of $500 000.

[94] As to De Palma, whereas Staff asked in effect that he be made to surrender all of his Concrete Group earnings (roughly $1 million) plus 10%, he urged an administrative penalty of just $50 000. Neither position was persuasive.

[95] An administrative penalty of the comparatively modest scale proposed by De Palma might reasonably be perceived as merely a modest business expense (no more substantial than GST) – not at all the deterrent message required, even coupled with market-access bans.

[96] Given the systemic nature of the Concrete Group's illegal distributions and De Palma's senior sales role, we think Staff's position – looking first at the total of De Palma's benefits – a more logical starting point. However, it is no more than that. We found above that most of De Palma's approximate $1 million in benefits was reasonably attributable to illegal distributions. Bearing this in mind, and taking into account the market-access bans already discussed as well as our finding of grounds for moderation in sanction, we conclude that sufficient deterrence and protection will be delivered, and thus that the public interest will appropriately be served, by an administrative penalty against De Palma of $600 000.

IV. COSTS

[97] In support of their position on appropriate costs orders, Staff tendered a summary of investigation and hearing costs and some corroborative documentation. The costs so recorded totalled $70 607.93. There was no dispute, and we accept, that costs were incurred in the amounts and for the purposes presented and that they are, in their entirety, potentially recoverable under section 202 of the Act.

[98] As noted, Staff submitted that $3 388.02 of these costs (relating to a summary-dismissal application by De Palma) should be born entirely by De Palma, and that the four Respondents should share, jointly and severally, responsibility for the remaining $67 219.91. De Palma contended that his responsibility should be limited, perhaps to 10% of the total, while no other respondent took a position.

[99] We discern no reason not to order recovery of costs from the Respondents. Nor, having regard to the mentioned factor that we consider most relevant – a respondent's contribution to the efficient conduct of a proceeding – do we find grounds to diminish substantially the proportion of incurred costs that ought to be recovered. None of the Respondents, in our view, did all that might reasonably have been done (without impairing their ability fairly to defend themselves) to narrow the issues that ultimately had to be decided, in respect of each, in a full hearing.

[100] That said, there were marked differences in how the Respondents conducted themselves in the hearing. In this regard we perceive two classes of Respondents: first, Humeniuk and Jones, whose evident failure to take this proceeding seriously has been mentioned; and second, Aurora and De Palma, who clearly did take it seriously.

[101] Humeniuk's general silence – he took almost no part in the proceeding – did not amount to a positive contribution to efficiency.

[102] Jones participated intermittently in the first phase of the hearing, but his conduct did not contribute measurably to efficiency, and at times detracted from it – to an extent not attributable solely to his lack of legal representation.

[103] Aurora, although similarly unrepresented, conducted himself differently from Jones. While he could reasonably have done more to assist in narrowing the issues for determination, his generally cooperative and constructive approach did, in our observation, contribute to efficiency, warranting a smaller allocation of costs than in the cases of Humeniuk and Jones.

[104] De Palma also conducted his case (wholly through counsel) in a constructive manner, warranting a smaller allocation of costs than for Humeniuk and Jones. However, we discern no basis for limiting De Palma's share of costs to 10% of the total, as he suggested. On the other hand, we do not think it necessary to make any special provision for the costs of De Palma's interlocutory dismissal proceeding; the quantum being in any event comparatively modest, we remove that amount from the recoverable total.

[105] For simplicity, we make a further modest rounding adjustment, arriving at total recoverable costs of $66 000.

[106] For the reasons given, we conclude that it is appropriate to allocate such adjusted recoverable costs one-third to Humeniuk, one-third to Jones, one-sixth to Aurora and one-sixth to De Palma.

[107] Staff, as noted, submitted that responsibility for payment of costs should be joint and several. The consequence of such an order would be that any shortfall in recovery from one Respondent could be made good from the others. There can be good reason to impose such a term in appropriate circumstances. This is not such a case. Simply put, the conduct of each Respondent in the hearing was too distinct to warrant such an approach here.

V. ORDERS

[108] For the reasons given, we make the following orders.

Aurora

[109] Against Aurora, we order that:

- under sections 198(1)(b) and (c) of the Act, he must cease trading in or purchasing any securities or exchange contracts, and all of the exemptions contained in Alberta securities laws do not apply to him, until 9 January 2017, except that these orders do not preclude him from trading in or purchasing securities or exchange contracts through a registrant (who has first been given a copy of this decision) in registered retirement savings plans ("RRSPs") and registered education savings plans ("RESPs") (each as defined in the *Income Tax Act* (Canada)) for the benefit of one or more of himself, his spouse and dependent children;

- under sections 198(1)(d) and (e), he must resign any position that he currently holds as a director or officer of any issuer, and he is prohibited from becoming or acting as a director or officer (or both) of any issuer until 9 January 2021;

- under section 199, he must pay an administrative penalty of $500 000; and

- under section 202 of the Act, he must pay $11 000 of the costs of the investigation and hearing.

Humeniuk

[110] Against Humeniuk, we order that:

- under section 198(1)(b) and (c) of the Act, he must cease trading in or purchasing any securities or exchange contracts, and all of the exemptions contained in Alberta securities laws do not apply to him, permanently, except that these orders do not preclude him from trading in or purchasing securities or exchange contracts through a registrant (who has first been given a copy of this decision) in RRSPs and RESPs for the benefit of one or more of himself, his spouse and dependent children;

- under sections 198(1)(d) and (e), he must resign any position that he currently holds as a director or officer of any issuer, and he is prohibited from becoming or acting as a director or officer (or both) of any issuer, permanently;

- under section 199, he must pay an administrative penalty of $3.3 million; and

- under section 202, he must pay $22 000 of the costs of the investigation and hearing.

Jones

[111] Against Jones, we order that:

- under section 198(1)(b) and (c) of the Act, he must cease trading in or purchasing any securities or exchange contracts, and all of the exemptions contained in Alberta securities laws do not apply to him, permanently, except that these orders do not preclude him from trading in or purchasing securities or exchange contracts through a registrant (who has first been given a copy of this decision) in RRSPs and RESPs for the benefit of one or more of himself, his spouse and dependent children;

- under sections 198(1)(d) and (e), he must resign any position that he currently holds as a director or officer of any issuer, and he is prohibited from becoming or acting as a director or officer (or both) of any issuer, permanently;

- under section 199, he must pay an administrative penalty of $1.2 million; and

- under section 202, he must pay $22 000 of the costs of the investigation and hearing.

De Palma

[112] Against De Palma, we order that:

- under section 198(1)(b) and (c) of the Act, he must cease trading in or purchasing any securities or exchange contracts, and all of the exemptions contained in Alberta securities laws do not apply to him, until 9 January 2021, except that these orders do not preclude him from trading in or purchasing securities or exchange contracts through a registrant (who has first been given a copy of this decision) in RRSPs and RESPs for the benefit of one or more of himself, his spouse and dependent children;

- under sections 198(1)(d) and (e), he must resign any position that he currently holds as a director or officer of any issuer, and he is prohibited from becoming or acting as a director or officer (or both) of any issuer until 9 January 2017;

- under section 199, he must pay an administrative penalty of $600 000; and

- under section 202, he must pay $11 000 of the costs of the investigation and hearing.

[113] This proceeding is concluded.

9 January 2012

For the Commission:

"original signed by"
Stephen Murison

"original signed by"
Roderick McKay, FCA

"original signed by"
Neil Murphy