

Tonino Fiorino: Summary, as Published in *CheckMark*

Tonino Fiorino, of Toronto, was found guilty of three charges under Rule 201.1 of failing to maintain the good reputation of the profession and its ability to serve the public interest, arising out of his involvement in fraudulent activities at Livent Inc. While a controller at Livent, Mr. Fiorino failed to disassociate himself from ongoing and material accounting irregularities, including the fraudulent manipulation of the books, and at the direction of others: participated in schemes to capitalize approximately \$2 million in show production costs to a theatre being constructed, transferred the costs of a show in production to the capital cost of a theatre being constructed, and transferred approximately \$10 million in show production costs to fixed assets, knowing that such transfers would result in materially false and misleading financial statements. Mr. Fiorino was fined \$10,000 and suspended for two years. It was also ordered that notice of his misconduct be published in *The Globe and Mail*, the *National Post* and *The Toronto Star* as well as in *CheckMark*.

CHARGE(S) LAID re Tonino Fiorino

The Professional Conduct Committee hereby makes the following charges against Tony Fiorino, CA, a member of the Institute:

1. THAT, the said Tony Fiorino, in or about the period July 1, 1994 through July 1, 1997, while a Controller at Livent Inc., failed to conduct himself in a manner that would maintain the good reputation of the profession and its ability to serve the public interest, in that, he failed to disassociate himself from ongoing and material accounting irregularities which he knew were being carried out at Livent Inc. including the fraudulent manipulation of the books and records of the company, contrary to Rule 201.1 of the Rules of Professional Conduct.
2. THAT, the said Tony Fiorino, in or about the period July 1, 1997 through August 6, 1998, while Construction Controller with Livent Inc., failed to conduct himself in a manner that would maintain the good reputation of the profession and its ability to serve the public interest, in that, he acquiesced in the direction of senior management to fraudulently manipulate the books of Livent Inc. and participated in a scheme to capitalize approximately \$2,000,000.00 in production costs incurred in the production of a show, "Ragtime", to a theatre being constructed by Livent Inc. in Chicago, contrary to Rule 201.1 of the Rules of Professional Conduct.
3. THAT, the said Tony Fiorino, in or about February 1998, while Construction Controller with Livent Inc., failed to conduct himself in a manner that would maintain the good reputation of the profession and its ability to serve the public interest, in that, he acquiesced in the direction of senior management to fraudulently manipulate the books of Livent Inc. and participated in a scheme to transfer approximately \$10,000,000.00 in production costs incurred in the production of various shows, to fixed assets, knowing that the transfer would result in financial statements that were materially false and misleading, contrary to Rule 201.1 of the Rules of Professional Conduct.

Dated at this day of 2000.

DOUGLAS BOUFFORD, CA - CHAIR
PROFESSIONAL CONDUCT COMMITTEE

DISCIPLINE COMMITTEE re Tonino Fiorino

DECISION AND ORDER IN THE MATTER OF: Charges against **TONINO FIORINO, CA**, a member of the Institute, under **Rule 201.1**, of the Rules of Professional Conduct, as amended.

DECISION MADE MARCH 28 AND ORDER MADE MARCH 30, 2000

DECISION

THAT, having seen and considered the evidence, including the agreed statement of facts, filed, charge No. 1 having been amended, and having heard the plea of guilty to charges Nos. 1, as amended, 2 and 3, the Discipline Committee finds Tonino Fiorino guilty of charges Nos. 1, as amended, 2 and 3.

ORDER

IT IS ORDERED in respect of the charges:

1. THAT Mr. Fiorino be reprimanded in writing by the chair of the hearing.
2. THAT Mr. Fiorino be and he is hereby fined the sum of \$10,000, to be remitted to the Institute within two (2) years from the date this Order is made.
3. THAT Mr. Fiorino be suspended from the rights and privileges of membership in the Institute for a period of two (2) years from the date this Order is made.
4. THAT notice of this Decision and Order, disclosing Mr. Fiorino's name, be given:
 - (a) to the Public Accountants Council for the Province of Ontario;
 - (b) to the Canadian Institute of Chartered Accountants;
 - (c) by publication in *CheckMark*; and
 - (d) by publication in *The Globe and Mail*, the *National Post* and *The Toronto Star*.
5. THAT Mr. Fiorino surrender his certificate of membership in the Institute to the discipline committee secretary within ten (10) days from the date this Order is made, to be held during the period of suspension and thereafter returned to Mr. Fiorino.
6. THAT in the event Mr. Fiorino fails to comply with the requirements of this Order within the time periods specified, he shall thereupon be expelled from membership in the Institute, and notice of his expulsion, disclosing his name, shall be given in the manner specified above.

DATED AT TORONTO THIS 31ST DAY OF MARCH, 2000
BY ORDER OF THE DISCIPLINE COMMITTEE

BRYAN W. STEPHENSON, BA, LLB
SECRETARY - DISCIPLINE COMMITTEE

DISCIPLINE COMMITTEE re Tonino Fiorino

REASONS FOR DECISION AND ORDER IN THE MATTER OF: Charges against **Maria Bernedette Messina, CA**, a member of the Institute, under **Rules 201.1 and 205**, of the Rules of Professional Conduct, as amended.

REASONS FOR DECISION AND ORDER IN THE MATTER OF: Charges against **Tonino Fiorino, CA**, a member of the Institute, under **Rule 201.1**, of the Rules of Professional Conduct, as amended.

REASONS FOR DECISION AND ORDER THE MATTER OF: A charge against **Christopher Mark Craib, CA**, a member of the Institute, under **Rule 201.1**, of the Rules of Professional Conduct, as amended.

REASONS FOR THE DECISION MADE MARCH 28 AND THE ORDER MADE MARCH 30, 2000

This panel of the discipline committee of the Institute of Chartered Accountants of Ontario met on March 28, 29, and 30, 2000 to hear evidence and submissions concerning charges brought by the professional conduct committee against Maria Messina, Tony Fiorino and Christopher Craib.

It had been agreed at an assignment hearing for the three members that the charges against them would be heard together by the same panel of the discipline committee.

The professional conduct committee was represented by Mr. Paul Farley, who was accompanied by Ms. Melanie Russell, CA, the investigator appointed by the professional conduct committee. Ms. Messina was represented by Mr. John Rosen, Mr. Fiorino was represented by Ms. Marlys Edwardh, and Mr. Craib was represented by Mr. Peter Wardell.

The decision made on March 28 and the order made on March 30 were made known at the hearing on those days. A formal decision and order was sent to each member on March 31. The notice required to be published in the newspapers pursuant to the orders has already been published. The suspensions imposed by the orders commenced on March 30. These reasons, given in writing pursuant to Bylaw 574, include the charges and the decisions and orders.

PRELIMINARY MATTERS

The Notices of Assignment Hearing dated January 24, 2000 for Ms. Messina, Mr. Fiorino and Mr. Craib were marked as Exhibit Nos. 1, 2 and 3, respectively. The three Notices of Hearing dated February 17, 2000 for Ms. Messina, Mr. Fiorino and Mr. Craib were marked as Exhibit Nos. 4, 5 and 6, respectively.

As a preliminary matter, counsel for the professional conduct committee outlined the procedure which all counsel had agreed to follow. This procedure was acceptable to the panel.

Also as a preliminary matter, counsel for the professional conduct committee withdrew the fourth charge which had been laid against Ms. Messina, and on consent amended the first charge laid against Mr. Fiorino.

DECISION ON THE CHARGES

The Charges Against Ms. Messina

The three charges laid against Ms. Messina, dated January 19, 2000, which were filed as Exhibit No. 7, read as follows:

THAT, the said Maria B. Messina, on or about the sixth day of November 1997, while Chief Financial Officer of Livent Inc., signed a registration statement and caused it to be filed with the United States Securities and Exchange Commission in support of a Livent Inc. public promissory note offering to raise approximately U.S.\$125,000,000.00 knowing that the financial statements attached to the registration statement were false and misleading in a material respect, contrary to Rule 205 of the Rules of Professional Conduct.

THAT, the said Maria B. Messina, in or about the period August 1, 1997 through August 6, 1998, while Chief Financial Officer of Livent Inc., failed to conduct herself in a manner that would maintain the good reputation of the profession and its ability to serve the public interest, in that, knowing there were ongoing and material accounting irregularities at Livent Inc. including the fraudulent manipulation of the books and records of the company, she did not disassociate herself from this conduct, contrary to Rule 201.1 of the Rules of Professional Conduct.

THAT, the said Maria B. Messina, in or about the period February 1, 1998 through August 6, 1998, while Chief Financial Officer of Livent Inc., failed to conduct herself in a manner that would maintain the good reputation of the profession and its ability to serve the public interest, in that, knowing that the balance sheet of Livent Inc. for the 1997 year-end was misstated in a material amount of at least \$16,000,000.00 as a result of the fraudulent manipulation of the books and records of the company, she did not disclose her knowledge of the fraud to the company's Board of Directors, Audit Committee or the auditors, and took insufficient steps to prevent the release of the misstated audited financial statements, contrary to Rule 201.1 of the Rules of Professional Conduct.

The Charges Against Mr. Fiorino

The three charges laid against Mr. Fiorino, dated January 19, 2000, as amended, which were filed as Exhibit No. 8, read as follows:

THAT, the said Tony Fiorino, in or about the period July 1, 1994 through July 1, 1997, while a Controller at Livent Inc., failed to conduct himself in a manner that would maintain the good reputation of the profession and its ability to serve the public interest, in that, he failed to disassociate himself from ongoing and material accounting irregularities which he knew were being carried out at Livent Inc. including the fraudulent manipulation of the books and records of the company, contrary to Rule 201.1 of the Rules of Professional Conduct.

THAT, the said Tony Fiorino, in or about the period July 1, 1997 through August 6, 1998, while Construction Controller with Livent Inc., failed to conduct himself in a manner that

would maintain the good reputation of the profession and its ability to serve the public interest, in that, he acquiesced in the direction of senior management to fraudulently manipulate the books of Livent Inc. and participated in a scheme to capitalize approximately \$2,000,000.00 in production costs incurred in the production of a show, "Ragtime", to a theatre being constructed by Livent Inc. in Chicago, contrary to Rule 201.1 of the Rules of Professional Conduct.

THAT, the said Tony Fiorino, in or about February 1998, while Construction Controller with Livent Inc., failed to conduct himself in a manner that would maintain the good reputation of the profession and its ability to serve the public interest, in that, he acquiesced in the direction of senior management to fraudulently manipulate the books of Livent Inc. and participated in a scheme to transfer approximately \$10,000,000.00 in production costs incurred in the production of various shows, to fixed assets, knowing that the transfer would result in financial statements that were materially false and misleading, contrary to Rule 201.1 of the Rules of Professional Conduct.

The Charge Against Mr. Craib

The charge laid against Mr. Craib, dated January 19, 2000, which was filed as Exhibit No. 9, reads as follows:

THAT, the said Christopher Craib, in or about the period August 1, 1997 through August 6, 1998, while a Senior Controller-Corporate Budgeting at Livent Inc., failed to conduct himself in a manner that would maintain the good reputation of the profession and its ability to serve the public interest, in that, being aware of ongoing and material accounting irregularities at Livent Inc. including the fraudulent manipulation of the books and records of the company, he did not disassociate himself from this conduct and indirectly supported those responsible by preparing schedules to assist senior management in reviewing the effect of the manipulations, contrary to Rule 201.1 of the Rules of Professional Conduct.

The Pleas of Guilty to the Charges

Ms. Messina and Mr. Fiorino each entered a plea of guilty to the charges made against them, and Mr. Craib entered a plea of guilty to the charge made against him. They all confirmed they understood that on the basis of their pleas, and on that basis alone, they could be found guilty of the charges.

The Case for the Professional Conduct Committee

Mr. Farley outlined the case for the professional conduct committee, and filed three separate agreed statements of facts, one for each member charged. In addition, he filed a document brief which consisted of the 1997 annual report of Livent Inc., including the audited financial statements for the year ending December 31, 1997 with the auditor's report dated March 27, 1998; and the restated financial statements for the year ending December 31, 1997 with the auditor's report dated November 18, 1998.

Mr. Farley reviewed each of the three agreed statements of facts and the document brief in some detail, as they constituted the case for the professional conduct committee with respect to the issue of guilt or innocence on the charges.

The members did not call evidence with respect to the issue of guilt or innocence.

Mr. Farley made submissions with respect to the issue of guilt or innocence, as did counsel for each of the members, it being their position that the agreed statements supported findings of guilt on the charges laid.

Findings of Guilty on the Charges

Upon deliberation and review of the charges, the agreed statements of facts, the document brief and the submissions, the panel concluded that the charges had been proven, and that the members were guilty of professional misconduct. Accordingly, Ms. Messina was found guilty of the three charges laid against her, Mr. Fiorino was found guilty of the three charges laid against him, and Mr. Craib was found guilty of the single charge laid against him.

ORDERS AS TO SANCTION

The three applicable general principles which govern the imposition of a sanction, namely general deterrence, specific deterrence and rehabilitation, enable the discipline committee to fashion orders intended to reinforce the standards of the profession, and thus strengthen the profession which serves the public.

A sanction imposed by the discipline committee must be tailored to the facts of the particular case and be consistent with past cases. This requires a careful examination of the misconduct and the particular circumstances of the member being sanctioned, and of the misconduct and the circumstances of other members who have been found guilty of similar professional misconduct in the past.

In this case, as is often the case, the most difficult task for the discipline committee was determining the appropriate sanction. This was so despite the fact that the professional conduct committee and the members put forward a joint submission with respect to sanction.

The point of the extensive review of the agreed statements of facts and the document brief by counsel for the professional conduct committee, in addition to establishing that the facts warranted a determination of professional misconduct, was to give the members of the panel a good understanding of the misconduct and the members. The professional conduct committee did not present additional evidence with respect to sanction, and relied on the evidence it called with respect to guilt or innocence.

The members did call evidence with respect to the issue of sanction. Ms. Messina and Mr. Craib testified. Mr. Robert Webster, who became Executive Vice-President of Livent on July 1, 1998, and later became CEO, testified on behalf of the members. Mr. James Hunter, CA, President and CEO of MacKenzie Financial Corporation, testified on behalf of Ms. Messina. This evidence provided the panel with an opportunity to better understand both the misconduct and the members themselves.

We also had the benefit of lengthy submissions from counsel, including a thorough review of a number of relevant precedents. The reason for the attention and care given by all counsel was that the misconduct of Ms. Messina and Mr. Fiorino was of a kind that necessarily raised the question of whether expulsion was warranted, or even required.

Counsel for Mr. Fiorino submitted that the imposition of sanction should not be a mechanical application of the principle that misconduct involving moral turpitude required automatic expulsion, and in this context referred to and quoted from the decision of the discipline committee involving Mr. Michael Gary to this effect:

There have been occasions when the discipline committee has been satisfied that the member can be rehabilitated, that the public can be adequately protected, and that the misconduct itself was not such that it warranted expulsion

in furtherance of the principle of general deterrence in light of the mitigating factors involved.

Mr. Fiorino's counsel made the point that a review of past cases discloses a "delicate matrix of considerations" which have been applied by the discipline committee in the past.

The panel agrees that a rigid mechanical structure is inappropriate, but does not think of the matrix of considerations as delicate, but rather as durable and flexible, and able to take account of factors not found in other cases.

One of the factors which we considered in this case was the joint recommendation of the professional conduct committee and the members. While the discipline committee has the ultimate responsibility for determining the appropriate sanction, and is not bound by a joint recommendation, it is an important factor. A sanctions recommendation made after the investigation and the members' appearance before the professional conduct committee deserves considerable weight.

The recommendation of the professional conduct committee was that:

- Ms. Messina be suspended for two to three years and fined \$10,000 to \$15,000;
- Mr. Fiorino be suspended for two to three years and fined \$10,000 to \$15,000; and
- Mr. Craib be suspended for six to twelve months and fined \$2,000 to \$5,000.

With respect to Mr. Craib, the joint recommendation clearly fell within the range of sanctions which would be appropriate.

But it was not as readily apparent that the jointly recommended sanctions for Ms. Messina or Mr. Fiorino were appropriate. Their conduct was such as to raise the issue of whether or not, as a matter of general deterrence, they should be expelled.

If it were only their conduct before July 1998 which was relevant, it is likely both would have been expelled.

But the conduct we had to consider included the very substantial efforts these members made to expose the fraud, efforts which disclosed an understanding of their professional obligations and a determination to adhere to those standards. In Ms. Messina's case, the evidence was that she made serious efforts to adhere to the required standards of the profession prior to July 1998. She resisted and then refused to accept further fraudulent manipulation before new management took over on July 1, 1998.

Whether the profession will be strengthened and the public interest advanced by an order which removes a member's right to the designation and the privileges and benefits it brings, or by an order which facilitates rehabilitation so that the member's professional life continues within the discipline the designation requires, is often a difficult determination.

In this case we concluded that our duties to the public, the profession and the members would best be served by orders which provided the members an opportunity to continue to rehabilitate themselves. We were satisfied that the members were capable of rehabilitation and had proven this to be the case. We were satisfied that the experience of the past three years and the

suspensions and fines imposed would specifically deter the members from similar conduct in the future.

We were satisfied as well that in the circumstances of this case the damage to the members' careers, the sanctions imposed, and the publicity given to the matter will be a sufficient general deterrent to other members.

We have set out in these reasons, following the recital of the orders below, the facts and circumstances of this case, and the factors which persuaded us that, in this case, the principle of rehabilitation should have priority.

While it is true in every case, it bears repeating here that the determinations made by the discipline committee are made based on the evidence presented to it in the particular case before it.

The orders we made were announced at the hearing and a formal copy was sent to each member. The orders read as follows:

The Order Against Ms. Messina

IT IS ORDERED in respect of the charges:

1. THAT Ms. Messina be reprimanded in writing by the chair of the hearing.
2. THAT Ms. Messina be and she is hereby fined the sum of \$7,500, to be remitted to the Institute within two (2) years from the date this Order is made.
3. THAT Ms. Messina be suspended from the rights and privileges of membership in the Institute for a period of two (2) years from the date this Order is made.
4. THAT notice of this Decision and Order, disclosing Ms. Messina's name, be given:
 - (a) to the Public Accountants Council for the Province of Ontario;
 - (b) to the Canadian Institute of Chartered Accountants;
 - (c) by publication in *CheckMark*; and
 - (d) by publication in *The Globe and Mail*, the *National Post* and *The Toronto Star*.
5. THAT Ms. Messina surrender her certificate of membership in the Institute to the discipline committee secretary within ten (10) days from the date this Order is made, to be held during the period of suspension and thereafter returned to Ms. Messina.
6. THAT in the event Ms. Messina fails to comply with the requirements of this Order within the time periods specified, she shall thereupon be expelled from membership in the Institute, and notice of her expulsion, disclosing her name, shall be given in the manner specified above.

The Order Against Mr. Fiorino

IT IS ORDERED in respect of the charges:

1. THAT Mr. Fiorino be reprimanded in writing by the chair of the hearing.

2. THAT Mr. Fiorino be and he is hereby fined the sum of \$10,000, to be remitted to the Institute within two (2) years from the date this Order is made.
3. THAT Mr. Fiorino be suspended from the rights and privileges of membership in the Institute for a period of two (2) years from the date this Order is made.
4. THAT notice of this Decision and Order, disclosing Mr. Fiorino's name, be given:
 - (a) to the Public Accountants Council for the Province of Ontario;
 - (b) to the Canadian Institute of Chartered Accountants;
 - (c) by publication in *CheckMark*; and
 - (d) by publication in *The Globe and Mail*, the *National Post* and *The Toronto Star*.
4. THAT Mr. Fiorino surrender his certificate of membership in the Institute to the discipline committee secretary within ten (10) days from the date this Order is made, to be held during the period of suspension and thereafter returned to Mr. Fiorino.
5. THAT in the event Mr. Fiorino fails to comply with the requirements of this Order within the time periods specified, he shall thereupon be expelled from membership in the Institute, and notice of his expulsion, disclosing his name, shall be given in the manner specified above.

The Order Against Mr. Craib

IT IS ORDERED in respect of the charge:

1. THAT Mr. Craib be reprimanded in writing by the chair of the hearing.
2. THAT Mr. Craib be and he is hereby fined the sum of \$1,000, to be remitted to the Institute within six (6) months from the date this Order is made.
3. THAT Mr. Craib be suspended from the rights and privileges of membership in the Institute for a period of six (6) months from the date this Order is made.
4. THAT notice of this Decision and Order, disclosing Mr. Craib's name, be given:
 - (a) to the Public Accountants Council for the Province of Ontario;
 - (b) to the Canadian Institute of Chartered Accountants;
 - (c) by publication in *CheckMark*; and
 - (d) by publication in *The Globe and Mail*, the *National Post* and *The Toronto Star*.
5. THAT Mr. Craib surrender his certificate of membership in the Institute to the discipline committee secretary within ten (10) days from the date this Order is made, to be held during the period of suspension and thereafter returned to Mr. Craib.
6. THAT in the event Mr. Craib fails to comply with the requirements of this Order within the time periods specified, he shall thereupon be expelled from membership in the Institute, and notice of his expulsion, disclosing his name, shall be given in the manner specified above.

Evidence Re: Livent

It is important to be explicitly clear that based on the evidence we heard:

- The senior management of Livent, including Mr. Myron Gottlieb, and in particular Mr. Garth Drabinsky, the Chairman and Chief Executive Officer until the end of June 1998, virtually created the financial statements they wanted by a fraudulent manipulation of the books and records of Livent;
- Prior to July 1, 1998, when new management took over, Mr. Gordon Eckstein, the Senior Vice-President of Finance and Administration, to whom Ms. Messina, Mr. Fiorino and Mr. Craib reported, carried out Mr. Drabinsky's instructions, and neither he nor Mr. Drabinsky tolerated disagreement with the financial statements they wanted;
- Those who disagreed with senior management were dismissed, and those who were publicly critical of senior management had to be prepared for aggressive litigation intended to silence them;
- The corporate culture at Livent, the culture in which Drabinsky set the tone, was characterized by threats, intimidation, abusive and demeaning language, and other workplace abuse, which generated an atmosphere of fear and precluded disagreement with senior management.

The evidence was that the financial statements for Livent for the year ending December 31, 1997, which were the financial statements of senior management under Mr. Drabinsky's control (sometimes referred to as the old management), were false and misleading. When the financial statements were restated in November 1998, the cumulative adjustments approached \$100,000,000.

The evidence presented made it clear that there was a scheme in which the books and records were repeatedly manipulated. The scheme was so established that the information system services department at Livent (in which the three members before the panel were not involved), had created an accounting system which permitted the accounting staff to make false entries without leaving a paper trail. Senior management knew the real financial position of the company as well as the false information which was presented to the public, as staff prepared schedules that showed the real information as well as those that showed the publicly-presented false information.

The scheme involved:

- "expense rolls", which were transfers of direct operating expenses and general and administrative expenses from one fiscal quarter to the next that significantly distorted the financial statements for the quarter, and in particular distorted the earnings before interest, taxes, depreciation and amortization ("EBITDA") for the quarter (referred to as Q1, Q2, Q3 or Q4);
- "amortization rolls", wherein preproduction costs, which were to be amortized over the life of a theatrical performance, were reversed and thus not recorded as an expense, so that productions appeared to be making a profit when they were not, thereby distorting the core business performance;

- the reclassification of direct operating expenses as preproduction costs of shows that had not opened, which falsely inflated the reported EBITDA;
- the transfer of the preproduction costs of shows that performed poorly and could therefore not cover their costs, to other shows that were not yet operating or operating at a profit; and
- the transfer of preproduction costs of some shows to the construction costs of new theatres, thus showing them as capital assets rather than expenses.

It appeared from the evidence that the fraud at Livent had been carried out by senior management at least from the time that Livent went public in 1993. The period of time most relevant to the misconduct of these members was the last three quarters of 1997 and the first two quarters of 1998, though some of Mr. Fiorino's misconduct preceded this period.

Evidence Re: Ms. Messina

Ms. Messina was 37 years of age at the time of the hearing. She was less than 30 years of age when she first worked on the Livent audit for the year 1992 as a senior manager at Deloitte & Touche, and just over 30 years of age when she was made a partner of the firm in September 1994. She became the engagement partner on the Livent audit for the 1995 year end.

In May 1996, she left Deloitte & Touche, where her income was approximately \$150,000 per year, to become the Vice-President Finance at Livent for a salary of \$200,000 and a promise that within a year she would be named the Chief Financial Officer, which she was in November 1996. In May 1997, her salary was increased to \$275,000. She held the position of Senior Vice-President under the new management, and in August 1998 her remuneration was increased to \$305,000 per year.

Ms. Messina accepted employment at Livent knowing that senior management engaged in aggressive accounting policies. She was confident she would be seen to do well in this senior position. She was proud of her technical abilities and wanted exposure on a big stage for her obvious competence to be seen.

In the beginning, Ms. Messina was given special projects to work on, was not allowed to really act as the CFO, and was generally kept in the dark about what was going on at Livent until Mr. Eckstein was on holidays in July 1997. She then became aware of fraudulent manipulations of the financial statements for Q2 of 1997. Only after August 1998 was she aware of the full extent of the fraudulent manipulation of the books and records.

In June 1997, before she had any knowledge of accounting irregularities, Ms. Messina assisted in the preparation of the preliminary registration statement to be filed with the United States Securities and Exchange Commission pursuant to which Livent hoped to raise approximately U.S.\$100,000,000. She did not play a part in the presentations to the bond rating agencies and potential institutional investors.

On November 6, 1997, at the direction of Mr. Eckstein, Ms. Messina signed the registration statement as the Chief Financial Officer of Livent, and caused it, together with financial statements which she now knew were false and misleading in a material respect, to be filed with the U.S. Securities and Exchange Commission.

On January 7, 1999, as part of a plea agreement with the United States attorney in Manhattan, Ms. Messina entered a plea of guilty to a criminal violation of the *United States Securities Act* on account of the registration statement. While sentence had not been pronounced at the time of the hearing, and may not be until Mr. Drabinsky is dealt with by the U.S. courts, it is not likely Ms. Messina will have another opportunity to obtain employment as a high ranking officer of an entity which must register with the SEC.

The period between July 1997 and January 1999 was a traumatic time for Ms. Messina. On the evidence we heard, she was promised that the 1997 year end financial statements would be corrected, but they were not. In May 1998, she prepared a memorandum to Mr. Drabinsky and others making it clear that she would not support the draft financial results for Q1 of 1998, and had at least one confrontation with Mr. Drabinsky where she stuck to her position. She became increasingly insistent that the manipulations stop, and directed the accounting staff to make entries which substantially rectified the manipulations for Q1 of 1998.

Ms. Messina did not disclose her knowledge of the fraud to the audit committee or the Board of Directors of Livent, or to Deloitte & Touche, the auditors (and her former partners), for the year end December 31, 1997. She did, however, take some steps to improve the disclosures in the company's financial reporting practices, by alerting the auditors to certain aggressive accounting practices, fully supporting a substantial write-down of assets for Q4 of 1997, and rewriting with the assistance of the auditors the management discussion and analysis for 1997 to disclose to users of the financial statements that the core business of Livent - the production of live musical performances - was losing millions of dollars.

In the early part of 1998, Ms. Messina had an opportunity to accept other employment, as Mr. Hunter made clear in his testimony. It was the kind of employment opportunity that she had hoped to ultimately obtain when she first went to Livent. While the false registration statement filed with the SEC might have hung over her head, it was not at all certain that the fraud, or her knowledge of it, would have been discovered. Ms. Messina had the chance to leave Livent with a relatively unblemished record. The panel accepted her explanation that she stayed in an effort to minimize and undo, to the extent that was possible, the damage which had been done.

The continuing need of Livent for money led Mr. Roy Furman and associated investors to explore the possibility of investing in and taking over the operation of Livent. This became a reality in July 1998 when Mr. Furman became the Chairman and CEO, and Mr. Webster became Executive Vice-President. In effect, Mr. Webster became the new management. But this was after the firm of KPMG conducted a due diligence review for the proposed new owners. Ms. Messina did not deal extensively with the KPMG team. While she did not actively mislead them, and in fact took some steps to alert them to problem areas, she did not disclose the frauds she knew about.

In July 1998, when Ms. Messina became the Chief Financial Officer in fact as well as in name under the new management, following Mr. Eckstein's termination, the financial information she presented to the new management, and in particular to Mr. Webster, was accurate.

Evidence Re: Mr. Fiorino

Mr. Fiorino was admitted to membership in the Institute in 1986. Starting in 1987, he worked for Livent's predecessor, Cineplex-Odeon. Mr. Fiorino always held relatively junior positions. He was not responsible for the overall presentation of the financial information of Livent.

Mr. Fiorino was a theatre controller responsible for the budgets and profit and loss statements of the Pantages Theatre in Toronto. In September 1992 he became one of a number of

production controllers responsible for producing profit and loss statements for the various productions. In April 1996 he became a construction controller whose responsibilities included tracking the construction costs on several projects.

Mr. Fiorino was aware in the fall of 1992 that production costs were being transferred, and he raised questions about such transfers with Mr. Eckstein. While questioning the answers he was given, Mr. Fiorino satisfied his concern with the knowledge that one of the auditors knew of such transfers, and he continued as directed to bury costs and administrative expenses. In the third quarter of 1994, Mr. Fiorino was aware that operating costs were being capitalized, and he knew of fictitious fixed asset transfers and fraudulent ticket transactions. While he did not participate in the manipulation of the books, he did not disclose what he knew to the auditors.

In the second quarter of 1997, Mr. Fiorino became directly involved in transferring costs of shows to costs of theatres under construction.

In the last quarter of 1997, under great pressure, he followed the instructions of Mr. Eckstein to transfer production costs to construction costs by creating dummy accounts. While Mr. Fiorino was not aware of the entire scope of the fraudulent manipulation, he himself prepared a biweekly report "Construction: Budget to Actual" for senior management.

While Mr. Fiorino was not involved directly with the due diligence work being done by KPMG for the new owners of Livent, he knew that the information received by the auditors and by KPMG in the due diligence process was false and misleading, but at no time did he take any steps to advise them of these facts.

From the time Ms. Messina disclosed the fact that there was fraud in August 1998, Mr. Fiorino cooperated fully with new management and the auditors in explaining and disclosing what he knew.

Mr. Fiorino received no personal benefit for the manipulation of the books and records other than his employment with Livent. In the year 1998 his remuneration was \$65,000 per annum.

Evidence Re: Mr. Craib

Mr. Craib was admitted to membership in the Institute in August 1994. He was employed as a senior accountant at Deloitte & Touche at the end of 1994, and was the audit manager for the Livent audit for the 1995 and 1996 year ends.

He was not yet 30 years old when he accepted employment with Livent in June 1997 at a starting salary of \$70,000, which was increased to \$80,000 in June 1998. His position was senior controller - corporate budgeting.

When he became aware, after a few weeks of employment, that Livent's books and records were being manipulated, he raised the matter with his superior, Mr. Eckstein, who provided detailed arguments to defend senior management's manipulations. Mr. Craib knew the explanations were not valid, but found the abusive and demeaning atmosphere in the workplace so intimidating that he had neither the power to stop the manipulations nor the confidence to leave Livent.

Mr. Craib helped keep track of some of the fraudulent manipulations, and prepared internal draft quarterly budget-to-actual schedules that assisted management in reviewing the effect of their manipulations.

While Mr. Craib was aware there was a substantial difference between the actual net income of the company and the net income adjusted through the manipulation of the company's records, he did not know the full extent of the fraud. What he did know, however, he failed to disclose to the auditors.

Mr. Craib had gone to work at Livent at the invitation of Ms. Messina, whom he admired. While he reported directly to Mr. Eckstein, he thought of Ms. Messina as a mentor. In April 1998, Mr. Craib telephoned Ms. Messina at her home, and advised her that he had attended a meeting with Mr. Drabinsky and Mr. Eckstein at which the financial results for the first quarter had been reviewed, and proposals put in place to reduce the company's \$20,000,000 loss and continue the manipulation of the books and records. From April 1998 on, Mr. Craib looked to Ms. Messina to take the lead in sorting out the problems and resisting further manipulation of the books and records of Livent.

New Management Learns of the Fraud

Mr. Eckstein was terminated at the end of July 1998. On August 5, Mr. Webster met with Ms. Messina and Mr. Fiorino to discuss certain questions he had regarding budget overages in the Chicago theatre. That evening Ms. Messina asked Mr. Webster to meet with her and Mr. Fiorino in the finance department, and after dealing specifically with fraudulent transactions connected with the Chicago theatre, she disclosed to Mr. Webster that she knew of frauds perpetrated by senior management of \$15,000,000 to \$20,000,000.

Thereafter, as employees of Livent, until the SEC insisted that the company terminate their employment in December 1998, the three members cooperated fully and unconditionally with new management, the lawyers for Livent, and the police authorities, in efforts to help uncover and disclose the extent of the fraud. Further, they have continued to cooperate subsequent to their dismissal from Livent with the authorities in Canada and the United States. This cooperation has required substantial amounts of their time and energy without compensation. At the time of the hearing, the members had not been able to find other employment.

Members' Acceptance of Responsibility and Actions in the Public Interest

Counsel for the members submitted that this was a case in which their clients should be recognized for blowing the whistle on fraudulent criminal misconduct. The panel recognized that soon after new management took over on July 1, 1998, when she was made CFO in fact as well as in name, Ms. Messina disclosed the fraud to Mr. Webster. In doing so she was supported by Mr. Fiorino and Mr. Craib.

The panel accepted that the disclosure initiated by Ms. Messina exposed the irregularities and fraud which enabled new management to make the disclosure it did to the public.

But on the evidence we heard, this is not a true "whistleblowing" case. Clearly Mr. Webster knew that there had been some fraud, and while it would have been more difficult for him to uncover it without the disclosures made by these three members, it appeared to us that he was close to finding out more about the frauds with or without their disclosure. As well, telling Mr. Webster at that time, even in the absence of suspicions on his part, would have been disclosure after the game was over, and not true "whistleblowing" at a time when the losses to the public could have been prevented or minimized.

Counsel for the members suggested that the corporate culture at Livent precluded disclosure prior to new management gaining control, and that the members blew the whistle as soon as they could. But it was clear from the evidence given by Ms. Messina and Mr. Craib that they knew they had not openly challenged senior management when they should have. In this case, "blowing the whistle" required standing up to Mr. Drabinsky, which these members failed to do.

On the evidence we heard, the money raised by Livent which required the registration with the SEC in November 1997 was already in Livent's bank when Ms. Messina signed the registration certificate. While it was not clear from the evidence whether the substantial losses resulting from the fraud could have been avoided had Ms. Messina "blown the whistle" in July 1997, when she first learned there was fraudulent manipulation of the books and records, given Mr. Drabinsky's ability to deal with those who challenged his financial presentations, this was likely her last opportunity to effectively stop the fraud.

In concluding this was not a true “whistleblowing” case, we do not minimize the efforts the members made beginning in August 1998 to expose the fraud, or the difficulties they have faced since as a result of doing what the standards of the profession require.

It will be apparent from the facts set out above that, of the three members, Ms. Messina had by far the most senior position, was by far the best compensated, and had substantially more responsibility than Mr. Fiorino or Mr. Craib for the financial statements of Livent.

It should also be apparent that she has already paid the heaviest price in terms of opportunities lost. A once promising career now seems to lie in tatters. She had the chance to leave Livent for a well-paying job elsewhere, with some basis for hoping that her knowledge of the fraud would not be discovered.

The efforts she made, given the corporate culture at Livent, to first minimize the fraud and later disclose it were extraordinary. While her continued cooperation with police and security authorities is explained in part by a desire not to be charged, or if charged not to be punished as severely as she might otherwise be, we accepted that she is genuinely remorseful for what she did, and that she acted in a forthright and honest manner from the time new management took over at Livent.

Ms. Messina felt compromised and trapped within a few days after she learned of fraud in the summer of 1997 and did not blow the whistle. Mr. Eckstein confronted her in November 1997 with a demand that she sign the SEC registration certificate, pointing out that her inaction to that point had already made her part of the scheme. In retrospect, she knows that to whatever extent she was compromised she ought not to have signed the certificate. We do not think she would act the same way in similar circumstances again.

Mr. Craib seemed to be remorseful to the point where he may never be able to forgive himself for not being able to stand up to the intimidation at Livent and do what he knew was right. We are satisfied that in similar circumstances in future he would do what is right.

It was more difficult to assess the extent of Mr. Fiorino’s remorse. He actively participated in some of the fraudulent schemes over a long period of time. With some difficulty, we concluded that in future Mr. Fiorino would not act as he did in the past.

Other important considerations in this case included the relative youth of the members, particularly Mr. Craib, and, given her senior position, Ms. Messina; the previous unblemished records of the members; and their cooperation throughout with the professional conduct committee and the authorities.

It is also relevant that these members did not initiate the fraudulent scheme, and were not motivated by and did not receive personal enrichment from it. They received their employment incomes from Livent, but those incomes were not substantially greater than what they could have earned elsewhere.

The Other Provisions of the Orders

As stated earlier, the most difficult issue in this case was the determination of appropriate sanction, especially for Ms. Messina and Mr. Fiorino, who both avoided expulsion by only the narrowest of margins. The reasons have set out in some detail above the particular circumstances of this case which ultimately persuaded the panel to suspend rather than expel these two members. Briefly set out below are the reasons for the other provisions of the orders made against Ms. Messina, Mr. Fiorino and Mr. Craib.

Reprimand

In keeping with past cases, the panel ordered that the members be reprimanded in writing by the chair of the hearing, to stress to them the serious nature of the offences committed in this case, and the unacceptability of such misconduct by chartered accountants.

Fine

In light of the length of this hearing and its attendant expense to Mr. Craib, and the fact that the appropriateness of the sanction proposed for him was an issue that consumed a modest amount of time at this hearing relative to other issues, the panel concluded that a fine of \$1,000 was appropriate.

In view of the fact Ms. Messina took the lead in disclosing the fraud, the panel concluded that her fine should be less than the fine imposed on Mr. Fiorino. The current financial status of these members was taken into account by the panel in determining the appropriate quantum of the fines to be imposed.

It is relevant to note for all three members that they will be expelled if they do not pay their respective fines before their suspensions end.

Notice

The profession and the public should know that these members have been disciplined. The public knows of the Livent case, and that chartered accountants were involved. It is important, therefore, that it also be made aware that the Institute, as the self-governing body of the profession in the province, does not condone the roles played by its members, and that in the public interest it has taken the required steps to sanction their misconduct. As a matter of general deterrence, it is important that members of the Institute know that notice of discipline proceedings includes the names of the members disciplined.

Certificate

As it is important that the members not appear to be chartered accountants during their periods of suspension, they were ordered to surrender their certificates of membership to the discipline committee secretary.

DATED AT TORONTO THIS 9TH DAY OF NOVEMBER, 2000
BY ORDER OF THE DISCIPLINE COMMITTEE

D. P. SETTERINGTON, FCA – CHAIR
THE DISCIPLINE COMMITTEE

MEMBERS OF THE PANEL:

E. R. ARCHIBALD, CA
H. B. BERNSTEIN, CA

P. B. A. CLARKSON, CA
B. A. TANNENBAUM, FCA
B. A. YOUNG (Public representative)