

Re Kazina

IN THE MATTER OF:

The Mutual Fund Dealer Rules¹

and

Andrew Kazina

2025 CIRO 01

Canadian Investment Regulatory Organization
Hearing Panel (Manitoba District)

Heard: March 20 and November 13, 2024

Decision: November 13, 2024

Reasons for Decision (Penalty): January 15, 2025

Hearing Panel:

Sherri Walsh, Chair

Guenther Kleberg, Industry Representative

Greg Wiebe, Industry Representative

Appearances:

Alan Melamud, Senior Enforcement Counsel for CIRO

Lerina Koornhof, Enforcement Counsel for CIRO

Andrew Kazina, Respondent, self-represented

REASONS FOR DECISION (PENALTY)

INTRODUCTION

¶ 1 The Hearing on the Merits of this matter took place on November 14 to 18 and 21, 2022 and January 13 and April 3, 2023.

¶ 2 In the Hearing Panel’s Decision and Reasons issued November 15, 2023 (the “Misconduct Decision”) we found that the Respondent engaged in the following misconduct:

¹ On January 1, 2023, the Investment Industry Regulatory Organization of Canada (“IIROC”) and the Mutual Fund Dealers Association of Canada (the “MFDA”) were consolidated into a single self-regulatory organization recognized under applicable securities legislation that is called the Canadian Investment Regulatory Organization (referred to herein as “CIRO”). CIRO adopted interim rules that incorporate the pre-amalgamation regulatory requirements contained in the rules and policies of IIROC and the by-law, rules and policies of the MFDA (the “Interim Rules”). The Interim Rules include (i) the Investment Dealer and Partially Consolidated Rules, (ii) the UMIR and (iii) the Mutual Fund Dealer Rules. These rules are largely based on the rules of IIROC and certain by-laws, rules and policies of the MFDA that were in force immediately prior to amalgamation. Pursuant to transition provisions in Mutual Fund Dealer Rule 1A, MFDA By-law No. 1 continues to be applicable to this proceeding.

- a) Between February 8, 2002 and October 5, 2017, the Respondent engaged in outside business activities that were not disclosed to and approved by the Member by operating businesses that provided tax and financial planning services to individuals, and marketing franchising and other consulting services to businesses, contrary to the policies and procedures of the Member and MFDA Rules 1.2.1(d) [now 1.3.2], 2.1.1, 2.5.1, 2.10 and 1.1.2. (“Contravention #1”)
- b) Between January 2012 and October 5, 2017, the Respondent recommended and accepted approximately \$257,500 for investment in a business that he operated from at least eight clients and at least two non-clients, thereby engaging in securities related business that was not carried on for the account of the Member or processed through the facilities of the Member, contrary to the policies and procedures of the Member and MFDA Rules 1.1.1, 1.2.1(d) [now 1.3.2], 2.1.1, 2.5.1, 2.10 and 1.1.2. (“Contravention #2”)
- c) Between January 2012 and October 5, 2017, the Respondent solicited approximately \$232,500 from at least eight clients that he used to finance and operate his business and commingled the money with his personal savings in bank accounts that he held in his own name or jointly with his wife, thereby engaging in personal financial dealings with clients that gave rise to a conflict of interest that he failed to disclose to the Member or address by the exercise of responsible business judgment influenced only by the best interests of the clients, contrary to MFDA Rules 2.1.4 and 2.1.1. (“Contravention #3”)
- d) Between no later than 2006 and October 5, 2017, the Respondent provided false or misleading information to the Member in responses to questions on annual compliance questionnaires from the Member, contrary to MFDA Rule 2.1.1. (“Contravention #4”)

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- ¶ 3 On March 20, 2024 the Hearing Panel (the “Panel”) reconvened to hear submissions from the parties with respect to penalty (the “Penalty Hearing”).
- ¶ 4 Before the Penalty Hearing concluded, the Panel adjourned the hearing to allow Staff to provide further submissions with respect to the principles relating to disgorgement.
- ¶ 5 The Penalty Hearing was reconvened on November 13, 2024.
- ¶ 6 In total, Staff provided the Panel with four sets of written submissions dated: February 20, 2024; March 20, 2024; May 10, 2024; and October 22, 2024.
- ¶ 7 The Respondent provided the Panel with two sets of written submissions dated March 10, 2024 and October 8, 2024.
- ¶ 8 On June 17, 2024 the Respondent swore an Affidavit in which he stated that the documents attached to it as exhibits, were true (the “Affidavit”).
- ¶ 9 The affidavit and its attached exhibit were entered into evidence with Staff’s consent, when the Penalty Hearing resumed on November 13, 2024.
- ¶ 10 The documents which were attached to the Affidavit as exhibits included:

- Correspondence from 2021 and 2024 relating to several business dealings in which the Respondent was attempting to engage either in his personal capacity or on behalf of Eagle Franchising and Business Services or Bullseye Business Consultants;
- Evidence of legal fees the Respondent has incurred with respect to these proceedings;
- CRA Assessment Notices for the Respondent for the years 2019-2022;
- Information with respect to liabilities owed by the Respondent;
- Contractual Agreements between the Respondent and some of the clients who were the subject of these proceedings;
- Correspondence identified by the Respondent as “proof of purchase from SK and CP”;
- Assured Value Agreement between Investors Group and the Respondent dated November 1, 2017 (“AVP Agreement”);
- Termination Notice of AVP from IG Wealth Management dated August 8, 2019;
- Correspondence with MFDA Enforcement Counsel;
- Correspondence from the Respondent to clients and non-clients who were the subject of these proceedings, ranging from 2013 to 2024;
- Letter dated August 3, 2018 from Investors Group to the Respondent, described by the Respondent in his Affidavit as “IG Notice re: Gardiner Repayment”;
- Correspondence between Investors Group and the Respondent with respect to the outstanding AVP balance;
- Excerpts from the MFDA interview transcript from November 19, 2019;
- An Income and Expense Statement for the Respondent for a 5-month average for 2024;
- The Respondent’s personal bank statements for January and June 2024; and
- A Declaration from the Respondent stating that as of June 17, 2024 he has no personal assets including any real property or investment accounts.

¶ 11 Our findings with respect to misconduct are set out in detail in the Misconduct Decision. It is not necessary to repeat them here. These Reasons should be read together with the Misconduct Decision.

AUTHORITY OF THE HEARING PANEL

¶ 12 Pursuant to s. 24.1.1 of MFDA By-law No. 1 [now Mutual Fund Dealer Rule 7.4.1.1] if, in the opinion of the Hearing Panel, an Approved Person has failed to comply with the provisions of any by-law, rule or policy of the MFDA, the Panel can impose any of the penalties set out in ss. 24.1.1(a)-(f), including a permanent prohibition of the Approved Person’s authority to conduct securities related business and a fine, not exceeding the greater of \$5,000,000.00 or three times the profit obtained or loss avoided by engaging in the misconduct.

¶ 13 Pursuant to s. 24.2 of MFDA By-law No. 1 [now Mutual Fund Dealer Rule 7.4.2], the Hearing Panel also has the discretion to require an Approved Person to pay the whole or part of the costs of the proceeding before the Hearing Panel and any investigation relating to that proceeding.

PROPOSED PENALTY

¶ 14 Staff submitted that the appropriate penalty to impose on the Respondent was:

- a) A permanent prohibition on the authority of the Respondent to conduct securities related business while in the employ of or associated with any Dealer Member of the Corporation that is registered as a mutual fund dealer, pursuant to s. 24.1.1(e) of MFDA By-law No. 1 [now Mutual Fund Dealer Rule 7.4.1.1(e)];
- b) A total fine of at least \$342,500, pursuant to s. 24.1.1(b) of MFDA By-law No. 1 [now Mutual Fund Dealer Rule 7.4.1.1(b)] comprised of the following:
 - i. A fine of an amount that would disgorge the \$242,500 that the Respondent received in connection with accepting monies for investment into his business; and
 - ii. An additional fine in the amount of at least \$100,000 on account of the contraventions to deter such misconduct; and
- c) Costs in the amount of at least \$30,000 pursuant to s. 24.2 of MFDA By-law No. 1.

¶ 15 The Respondent's position was that he would be prepared to accept a permanent prohibition on his ability to conduct securities related business in any capacity while in the employ of or association with any MFDA [now Mutual Fund Dealer] Member but that the appropriate fine should be no more than \$10,000 and each party should bear responsibility for their own legal costs.

FACTORS CONCERNING THE APPROPRIATENESS OF THE PROPOSED PENALTY

¶ 16 The primary goal of all securities regulation is investor protection.

Pezim v. British Columbia (Superintendent of Brokers), [1994] 2 S.C.R. 557 at paras. 59 and 68.

¶ 17 In addition to investor protection, the goals of securities regulation include fostering public confidence in the capital markets and in the securities industry as a whole.

Pezim supra

Tonnies (Re), [2005] MFDA File No. 200503, Hearing Panel of the Prairie Regional Council, Decision dated June 27, 2005 ("*Tonnies (Re)*")

¶ 18 In furtherance of these goals, disciplinary sanctions imposed in the securities regulatory context are intended to restrain future conduct. As the Panel in *Tonnies (Re)* stated:

The Ontario Securities Commission has set out succinctly its role, not dissimilar to the role of this Panel, in determining penalty in Re Mithras Management Ltd. et al (1990), 13 O.S.C.B. 1600. The Commission stated at 1610:

...[T]he role of this Commission is to protect the public interest by removing from the capital markets – wholly or partially, permanently or temporarily as the circumstances may warrant – those whose conduct in the past leads us to conclude that their conduct in the future may

well be detrimental to the integrity of those capital markets. We are not here to punish past conduct; that is the role of the courts, particularly under section 118 of the Act. We are here to restrain, as best we can future conduct that is likely to be prejudicial to the public interest in having capital markets that are both fair and efficient.

Tonnies (Re) supra at p. 22

¶ 19 We also note the comments of the Panel in *Kowalsky (Re)*, [2022] LNCNFDA 31 at para 11:

“While the primary objective of sanctions is to prevent future misconduct by the Respondent and other industry participants, and not to punish the Respondent, some element of punishment of the Respondent is the inevitable result of any sanctions. But the fact that some punishment of the Respondent may occur, should not inhibit the Panel from imposing sanctions, so long as the primary goal of those sanctions is the prevention of future misconduct.” (emphasis in original text)

¶ 20 To this, we add that any sanction must be proportionate and reasonable having regard to the seriousness of the misconduct and the particular circumstances of the Respondent.

¶ 21 The sanction principles in the cases referred to above have been cited in numerous decisions reached by MFDA and CIRO Hearing Panels. These principles are well established and the Panel has followed them in determining the appropriate sanction in this case.

¶ 22 In particular, when determining the appropriate sanction a Hearing Panel should consider:

- a) the protection of the investing public;
- b) the integrity of the securities market;
- c) specific and general deterrence;
- d) the protection of the MFDA’s [now CIRO’s] membership; and
- e) the protection of the integrity of the MFDA’s [now CIRO’s] enforcement process.

Tonnies (Re) supra at p. 22

¶ 23 Additional factors for a Hearing Panel to consider are:

- a) the seriousness of the allegations provided against the Respondent;
- b) the Respondent’s past conduct, including prior sanctions;
- c) the Respondent’s experience and level of activity in the capital markets;
- d) whether the Respondent recognizes the seriousness of the improper activity;
- e) the harm suffered by investors as a result of the Respondent’s activities;
- f) the benefits received by the Respondent as a result of the improper activity;
- g) the risk to investors and the capital markets in the jurisdiction, were the Respondent to continue to operate in capital markets in the jurisdiction;

- h) the damage caused to the integrity of the capital markets in the jurisdiction by the Respondent's improper activities;
- i) the need to deter not only those involved in the case being considered, but also any others who participate in the capital markets, from engaging in similar improper activity;
- j) the need to alert others to the consequences of inappropriate activities to those who are permitted to participate in the capital markets; and
- k) previous decisions made in similar circumstances.

Tonnies (Re) supra at p. 23

¶ 24 Finally, the Panel also referred to the CIRO Sanction Guidelines which came into effect on February 1, 2024 (the "Guidelines") and which closely mirror the former MFDA's Sanction Guidelines.

¶ 25 While the Guidelines as their name suggests are not mandatory or binding on a Hearing Panel, they do provide a summary of the key factors upon which Hearing Panels can exercise their discretion in a consistent and fair manner. The Guidelines list many of the same factors that are listed in the cases cited above.

APPLICATION TO THE PRESENT CASE

Seriousness of the Misconduct

¶ 26 Each of the individual types of misconduct committed by the Respondent in this matter have been found by previous Hearing Panels to be serious misconduct, a conclusion with which this Panel agrees. The seriousness of the misconduct in this case, we find, is exacerbated because it involved four separate types of misconduct involving factual circumstances that lasted over many years.

Seriousness of the Misconduct: Outside Business Activities

Contravention #1:

Between February 8, 2002 and October 5, 2017, the Respondent engaged in outside business activities that were not disclosed to and approved by the Member by operating businesses that provided tax and financial planning services to individuals, and marketing, franchising and other consulting services to businesses, contrary to the policies and procedures of the Member and MFDA Rules 1.2.1(d)2 [now 1.3.2], 2.1.1, 2.5.1, 2.10 and 1.1.2.

¶ 27 Contravention No. 1 related to the operation of Kazina Financial Services ("KFS") and Eagle Franchising and Business Services ("Eagle Franchising"). KFS was an accounting and tax preparation business and Eagle Franchising provided franchising support to companies that wanted to expand their operations using a franchising model. It also engaged in tax preparation and miscellaneous business consulting. The Respondent started engaging in these outside business activities in 1973 and around 1995/1996 respectively and continued to conduct them until he stopped working with the Member in 2017.

¶ 28 In the Misconduct Decision we found that the Respondent clearly conducted business activities which were not businesses of the Member while he was registered as an Approved Person. The

Respondent acknowledged that he never disclosed information about any outside business activity to the Member, after being hired in 1991.

¶ 29 The rationale for Rule 1.2.1 was described by the Hearing Panel in *Vitch (Re)* as follows:

The need for a Member to know what other occupations and businesses its employee might be engaged in is obvious...The first is that a failure to know about an employee's other commercial activities impinges upon the Member's ability to properly supervise its employee. The second reason is the Member could be exposed to litigation alleging that the Approved Person's activity was within the scope of his/her employment with the Member.

Vitch (Re), MFDA File No. 201103, Hearing Panel of the Central Regional Council, Decision and Reasons dated September 22, 2011 at para. 53

¶ 30 By failing to disclose his outside business activities to the Member the Respondent prevented it from being able to fulfill its regulatory obligations to supervise and to protect clients.

¶ 31 As the Panel in *Giuliani (Re)* stated:

... an Approved Person's failure to disclose and obtain approval of his or her outside activities is serious misconduct, as it deprives the Member of a proper opportunity to supervise the Approved Person, prevent the Approved Person from contravening regulatory requirements and protect itself from the risk of litigation.

Giuliani (Re), MFDA File No. 2017103, Hearing Panel of the MFDA Central Regional Council, Decision dated June 13, 2018 at para. 8

¶ 32 Such conduct has also been found to be a breach of the standard of conduct under MFDA Rule 2.1.1.

Giuliani (Re) supra

Harmer (Re), MFDA File No. 202051, Hearing Panel of the Prairie Regional Council, Decision and Reasons (Misconduct) dated March 22, 2002

¶ 33 With respect to the requirements set out in the Member's Policies, the evidence at the Misconduct Hearing was clear that dating back to 1997 the Member required Approved Persons to seek and obtain approval to carry on any outside business activities. The Panel also accepted the Member's evidence that an outside business activity would not have been approved where there were concerns regarding conflict of interest, for example, relating to investing with clients, as was the case in this matter.

¶ 34 In the Misconduct Decision, with respect to the Respondent's position that he had no obligation to disclose his outside business activities to the Member, the Panel stated that this belief demonstrated a disturbing failure on the Respondent's part to understand the requirements which were imposed on him by both the MFDA and the Member.

¶ 35 We agree with Staff's submission that the Respondent's conduct with respect to outside business activities and his lack of understanding of his obligation to disclose those activities is aggravated by the fact that for a portion of the material time, he was a District Director who was responsible to act as a

Branch Manager and therefore was expected to know the MFDA Rules and the Member's Policies and Procedures so that he could fulfill his supervisory rule and compliance responsibilities.

Goodison (Re), [2021] MFDA File No. 202122, Hearing Panel of the Pacific Regional Council, Decision dated September 13, 2021 at para 22

Bast (Re) [2019] MFDA File No. 201956, Hearing Panel of the Central Regional Council, Decision dated October 22, 2019

Seriousness of the Misconduct: Securities Related Business

Contravention #2

Between January 2012 and October 5, 2017, the Respondent recommended and accepted approximately \$257,500 for investment in a business that he operated from at least eight clients and at least two non-clients, thereby engaging in securities related business that was not carried on for the account of the Member or processed through the facilities of the Member, contrary to the policies and procedures of the Member and MFDA Rules 1.1.1, 1.2.1(d) [now 1.3.2], 2.1.1, 2.5.1, 2.10 and 1.1.2.

¶ 36 In the Misconduct Decision, we found that the Respondent engaged in securities related business outside the Member by soliciting investments from clients and non-clients in KFS and Eagle Franchising. While engaging in this misconduct he obtained \$257,500.00 from client and non-clients that he comingled with his personal savings in bank accounts that he held in his own name or jointly with his wife and then used to pay personal expenses and debts.

¶ 37 MFDA Rule 1.1.1(a) requires that all securities related business be carried on for the account of the Member and through the facilities of the Member.

¶ 38 Plus, the Member's evidence at the Hearing on the Merits was that pursuant to its Policies and Procedures, it would not have allowed the Respondent to conduct outside securities related activity.

¶ 39 Hearing Panels have consistently stressed that the importance of complying with this Rule is to ensure that Members can properly supervise the securities related business that is conducted by Approved Persons while they are registered with them.

¶ 40 In *Caicco (Re)*, the Hearing Panel, citing an earlier 2010 MFDA decision: *Re Laverdiere* File No. 200936 at para. 5, commented on some of the principles which underly this Rule:

MFDA Rule 1.1.1(a) is fundamental to the regulatory mandate of the MFDA. An Approved Person must not trade in securities other than through the firm employing him/her, and the firm must have knowledge and consent to those business dealings. The Rule enhances investor protection and strengthens public confidence in the Canadian Mutual Fund Industry, as it creates a regime whereby an Approved Person (*sic*) is only permitted to sell investment products that have first been approved for sale by the Member, and which are sold through the facilities of the Member, thus ensuring the trading activity is subject to appropriate review and supervision.

Caicco (Re), MFDA File No. 201503, Hearing Panel of the Central Regional Council, Decision and Reasons dated Aug 4, 2015 at para. 23

¶ 41 Engaging in both, securities related business and undisclosed outside activities outside the Member undermines the regulatory regime, exposes clients to harm, and can bring the mutual fund industry into disrepute. The seriousness of such misconduct was expressed by the Hearing Panel in *Qi (Re)*:

Conducting securities related business or outside business activity without the approval or knowledge of the Member is serious misconduct. The Member loses its ability to supervise the transactions and to assess the suitability of the transactions for the investors. The misconduct can have dire consequences for the investors involved as the off-book investments may not be suitable for the investors or even legitimate investments. The misconduct may bring the Member or the mutual fund industry into disrepute.

Qi (Re), [2013] MFDA File No. 201253, Hearing Panel of the Central Regional Council, Decision dated November 20, 2013 at para. 11.

Seriousness of the Misconduct: Personal Financial Dealings

Contravention #3

Between January 2012 and October 5, 2017, the Respondent solicited approximately \$232,500 from at least eight clients that he used to finance and operate his business and commingled the money with his personal savings in bank accounts that he held in his own name or jointly with his wife, thereby engaging in personal financial dealings with clients that gave rise to a conflict of interest that he failed to disclose to the Member or address by the exercise of responsible business judgment influenced only by the best interests of the clients, contrary to MFDA Rules 2.1.4 and 2.1.1.

¶ 42 Contravention #3 relates to the Respondent having engaged in personal financial dealings with clients. The Panel found that the Respondent obtained \$232,500.00 from clients and co-mingled those funds with his personal savings in bank accounts that he held in his own name or jointly with his wife.

¶ 43 In the Misconduct Decision we quoted the Panel in *Nunweiler (Re)* that:

Where an Approved Person borrows money from a client, or arranges investments by clients in companies in which the Approved Person has a personal interest, such conduct immediately raises a significant actual conflict of interest, a conflict that in most if not all cases will be impossible to resolve in favour of the client. It is patently obvious that facilitating investments by a client in your company, or borrowing money from a client is not the exercise of responsible business judgment in the best interests of the client.

Nunweiler (Re), MFDA File No. 201030, Hearing Panel of the Pacific Regional Council, Decision and Reasons dated May 28, 2012 at para. 17

¶ 44 Hearing Panels have consistently found that where Approved Persons solicit and accept monies from clients for investment in businesses that they control or ventures that they have an interest in, such conduct gives rise to conflicts of interest that cannot be addressed by the exercise of responsible business judgment influenced only by the best interests of the clients, contrary to MFDA Rule 2.1.4 and the standard of conduct under MFDA Rule 2.1.1.

Harmer (Re), *supra* at paras. 284-309

Visneskie (Re), MFDA File No. 201553, Hearing Panel of the Central Regional Council, Decision and Reasons (Misconduct) dated December 7, 2017 at paras. 15-20

Nunweiler (Re), *supra* at paras. 15-23

Tonnies (Re), *supra* at pp. 13-16

Wang (Re), MFDA File No. 201762, Hearing Panel of the Pacific Regional Council, Decision and Reasons dated October 2, 2017 at para. 16

¶ 45 As the Panel in *Szekely (Re)* stated, significant penalties are warranted in cases where a Respondent co-mingles client funds with their own personal funds in circumstances “which could only have been undertaken to enhance his own personal gain, and constituted a clear conflict of interest, demonstrating the Respondent appeared to have acquired very little insight into the gravity of his conduct.”

Szekely (Re), MFDA File No. 2018132, Hearing Panel of the Prairie Regional Council, Decision and Reasons dated October 24, 2019 at para. 76 (b)

¶ 46 We find that the same circumstances exist in this case and significant penalties are, therefore, warranted.

¶ 47 Finally, as we noted in the Misconduct Decision, the MFDA has provided guidance to the industry relating to personal financial dealings with clients for many years. For example, MDFA Bulletin MSN-0047 issued on October 3, 2005 specifically identified that the same conduct the Respondent carried out in this matter, was not permitted.

¶ 48 The fact that the Respondent’s personal financial dealings all occurred after the publication of this Bulletin is, therefore, an aggravating factor.

Seriousness of the Misconduct: False or Misleading Statements to the Member

Contravention #4

Between no later than 2006 and October 5, 2017, the Respondent provided false or misleading information to the Member in responses to questions on annual compliance questionnaires from the Member, contrary to MFDA Rule 2.1.1.

¶ 49 For over ten years the Respondent misled or provided false information to the Member by stating that he either had no outside business activities at all, had obtained written approval of any outside business activities, or that such outside activities had been submitted for reporting on the NRD, depending on the wording of the section of the questionnaire for the particular year.

¶ 50 Misleading a Member undermines the Member’s compliance process and can delay, prevent or undermine the discovery of conduct that has given or may give rise to client harm. In this case, the false or misleading statements the Respondent made on the Member’s annual questionnaires directly related to the conduct which was the subject of Contraventions #1-3 and prevented the Member from engaging in its supervisory role in respect of that conduct.

¶ 51 The Panel agrees with Staff's position that this conduct of the Respondent which concealed his outside business activities and prevented the Member from potentially preventing further misconduct and harm to both clients and non-clients, constitutes serious misconduct.

THE RESPONDENT'S RECOGNITION OF THE SERIOUSNESS OF THE MISCONDUCT

¶ 52 Although, the Respondent submitted that he understands that rules and regulations are important and he respects the rules, the Panel remains of the view that the Respondent has not recognized the seriousness of his misconduct.

¶ 53 This is because throughout his submissions at both the Misconduct and Penalty Hearings he continued to maintain that he either did nothing wrong or to the extent that his conduct fell below what was required by the Member and the Regulator, others were to blame.

¶ 54 We also noted that in his written submission dated March 10, 2024, the Respondent argued that he did not view his actions as constituting misconduct but rather stated they would "better fall under a professional error category".

THE RESPONDENT'S PAST CONDUCT

¶ 55 The Respondent submitted that the fact that he has no prior discipline history is a mitigating factor.

¶ 56 While the Panel agrees that a respondent's past disciplinary record is a factor to consider and that typically, a clean record is considered a mitigating factor, in the circumstances of this case, we have given it very little weight. This is because the very nature of the Respondent's misconduct including failing to disclose information the Member needed to receive and providing the Member with misleading information, prevented the Member from detecting his misconduct.

¶ 57 A Panel should not give a respondent "credit" for having a clean disciplinary record when the very misconduct for which they are being sanctioned has prevented both the regulator and the Member from detecting the respondent's misconduct in the first place.

¶ 58 In any event Panels have concluded that when considering the protection of the investing public, the integrity of the securities markets, specific and general deterrence and protection of the regulator's membership and the integrity of its enforcement processes, a Respondent's clear disciplinary history does not mitigate against the imposition of severe penalties.

Szekely, (Re), supra at para. 66, citing *Westguard (Re)* MFDA File No. 20093, Hearing Panel of the Prairie Regional Council, Decision and Reasons dated July 15, 2020

EXPERIENCE AND LEVEL OF ACTIVITY IN CAPITAL MARKETS

¶ 59 The Respondent worked for the Member, servicing its clients' investment accounts for 26 years, including 15 years while registered with the MFDA and approximately 4 years as a Branch Manager. As the Hearing Panel stated in *Notis (Re)*, based on his experience the Respondent "ought to have known his conduct contravened the MFDA Rules."

Notis (Re) MFDA File No. 201953, Hearing Panel of the Central Regional Council, Decision dated October 7, 2019 at para. 43.

RISK TO INVESTORS AND CAPITAL MARKETS

¶ 60 The Panel agrees with Staff's submission that the Respondent poses a significant risk to the capital markets and the investing public were he allowed to return to the industry. He breached the trust of his clients and the other individuals whom he convinced to invest in his outside business activities. He co-mingled the money those people gave him with the money in his personal bank account, and he prevented the Member from protecting its clients and the public.

¶ 61 Hearing Panels have consistently held that this type of misconduct is serious and warrants a significant penalty which includes a permanent prohibition.

Harmer (Re), supra at paras. 27-28

Szekely, (Re), supra, para. 66.

DAMAGE CAUSED TO THE INTEGRITY OF THE CAPITAL MARKETS FROM THE RESPONDENT'S ACTIONS

¶ 62 The Panel agrees with Staff's submission that the Respondent's actions bring the reputation of the industry into disrepute.

¶ 63 In light of the Respondent's refusal to recognize the nature and seriousness of his misconduct, we find that the only way to satisfy the primary goal of securities regulation on which the integrity of the capital markets depends, namely, protection of the investing public, is to impose a sanction which includes a permanent prohibition on his authority to conduct securities related business while in the employ of or associated with any dealer member of the Corporation that is registered as a mutual fund dealer.

DETERRENCE

¶ 64 In order to properly protect investors, penalties imposed by Hearing Panels should prevent or at least discourage the Respondent and other Approved Persons from engaging in similar conduct.

¶ 65 Both the Supreme Court of Canada and Hearing Panels have held that deterrence is a factor to be taken into account when determining an appropriate penalty.

Cartaway Resources Corp. (Re), [2004] 1 S.C.R. 672 SCC, at paras. 52-62

Tonnies (Re), supra, at para. 47

¶ 66 Deterrence is intended to capture both specific deterrence of the wrongdoer and general deterrence of other participants in the capital markets.

¶ 67 The effect of general deterrence should advance the goal of protecting investors. A penalty should be sufficient so as to affirm public confidence in the regulatory system and to ensure that the misconduct is not repeated, not only by the particular respondent, but by others in the industry.

¶ 68 With respect to general deterrence the Supreme Court of Canada stated:

The Oxford English Dictionary (2nd ed. 1989), vol. XII, defines "preventive" as "[t]hat anticipates in order to ward against; precautionary; that keeps from coming or taking place; that acts as a hindrance or obstacle". A penalty that is meant to deter generally is a penalty that is designed to keep an occurrence from happening; it discourages similar wrongdoing in others. In a word, a

general deterrent is preventative. It is therefore reasonable to consider general deterrence as a factor, albeit not the only one, in imposing a sanction under s. 162. The respective importance of general deterrence as a factor will vary according to the breach of the Act and the circumstances of the person charged with breaching the Act.

Cartaway Resources Corp. (Re), supra, at 61

¶ 69 In the Panel's view, the sanction we have imposed in this decision satisfy the goals of both specific and general deterrence.

¶ 70 By permanently prohibiting the Respondent from engaging in securities related business on behalf of any Dealer Member that is registered as a mutual fund dealer, he is specifically prevented from engaging in further misconduct in the mutual fund industry and in its entirety the sanction sends a message to others in the industry that similar conduct will not be tolerated.

BENEFITS RECEIVED BY THE RESPONDENT AND HARM SUFFERED BY INVESTORS

¶ 71 In the Misconduct Decision, we found that with respect to Contravention #2, the Respondent accepted approximately \$257,500.00 from both clients and non-clients for investment in businesses that he operated, thereby engaging in securities-related business that was not carried on for the account of the Member or processed through the facilities of the Member.

¶ 72 We further found, with respect to Contravention #3 that the Respondent deposited and comingled these funds with his personal savings in bank accounts that he held in his own name or jointly with his wife.

¶ 73 We find that the Respondent's receipt of these funds was, therefore, clearly a benefit to him.

Disgorgement

¶ 74 Staff submitted that an appropriate sanction should include a fine that has the effect of disgorging some or all of any amounts the Respondent obtained as a result of his misconduct.

¶ 75 The Panel's authority to impose a fine in an amount which has the effect of disgorging any money an Approved Person has received as the result of their misconduct, was set out in section 24.1.1 of MFDA By-law No. 1:

"24.1 Power of Hearing Panels to Discipline

24.1.1 Approved Persons

A Hearing Panel of the applicable Regional Council shall have power to impose upon an Approved Person or any other person under the jurisdiction of the Corporation any one or more of the following penalties:

- (a) a reprimand;*
- (b) a fine not exceeding the greater of:
 - (i) \$5,000,000.00 per offence; and*
 - (ii) an amount equal to three times the profit obtained or loss avoided by such person as a result of committing the violation;**

...”

¶ 76 The same authority is now set out in Mutual Fund Dealer Rule 7.4.1.

¶ 77 It has been a long-standing principle, as reflected not only in both the former MFDA Sanction Guidelines and CIRO’s Sanction Guidelines that wrongdoers should not benefit from their misconduct. Relying on the disgorgement principles that Securities Commissions across the country apply when exercising their respective powers of disgorgement, Hearing Panels have imposed fines that at a minimum amount to disgorgement of all benefits a Respondent has received as a result of their misconduct.

CIRO Sanction Guidelines Part 1 – Sanctions Principles

MFDA Sanction Guidelines Part II – Fine

Kowalsky (Re), 2022 LNMCFDA 31 at para. 24

Vanlandschoot (Re), 2021 LNCMFDA 10 at para. 29

Rojas Diaz (Re), 2021 ONSEC 24

Levesque (Re), 2022 LNCMFDA 88

¶ 78 At the Penalty Hearing the Panel asked Staff whether the word “profit” in s. 24.1.1(b)(ii) of By-law No. 1 requires a Panel to find evidence that a respondent obtained a sum after deducting all costs, before they can make an order which amounts to disgorgement.

¶ 79 We agree with Staff’s submission that it does not.

¶ 80 Staff submitted that a disgorgement order should not be restricted to an amount that is calculated by considering expenses or losses. What is relevant is the amount a respondent has obtained through their misconduct, not what they retained or spent inappropriately. Citing the B.C. Court of Appeal’s decision in *Poonian v. British Columbia Securities Commission*, 2017 BCCA 207, the Panel in *Fauth* explained the rationale for this approach:

One way to deter is to remove the incentive for non-compliance. However, if the disgorgement amount is based on profits, then wrongdoers would not be deterred from contravening, or attempting to contravene. They would only face the risk of having to disgorge amounts if their schemes succeeded. However, the public is still harmed. A profit-oriented interpretation would undermine the statute's remedial and protective purpose. The failure to "turn a profit" on the wrongdoing should not prevent the regulator from requiring the wrongdoer to give up money received from the wrongdoing. (Emphasis in the original).

Fauth (Re) 2019 LNABASC 90 at 82

¶ 81 Staff also pointed the Panel to the Ontario Securities Commission’s (“OSC”) decision in *Dennis (Re)* 2012, 35 OSCB 7374. That case involved a review of the decision made by a Hearing Panel of what was formerly known as the Investment Industry Regulatory Organization of Canada (IIROC).

¶ 82 The wording of the Dealer Member Rule in *Dennis* (Dealer Member Rule 20.33) was materially the same as the wording in s. 24.1.1 of the MFDA By-law. It read:

“ . . .

(2) Pursuant to subsection (1) a Hearing Panel may impose any one or more of the following penalties upon the Approved Person:

(a) a reprimand;

(b) a fine not exceeding the greater of:

(i) \$1,000,000 per contravention; and

(ii) an amount equal to three times the profit made or loss avoided by such Approved Person by reason of the contravention. . . .”

¶ 83 The OSC held that the word “profit” contained in Dealer Member Rule 20.33 should not be interpreted to mean “a profit in the nature of the sum remaining after deducting all costs”.

Dennis (Re) supra at para 43

¶ 84 In making that finding the OSC accepted IIROC’s submissions that a purposive reading of the Rule was more appropriate, stating that they doubted that it can have been the Rule’s intention to make a distinction between wrong doers whose activities required an outlay of costs and those whose activities did not and to levy sanctions accordingly.

Dennis (Re), supra at para. 42-44

¶ 85 We agree with this principled approach. We find, based on a purposive reading of s. 24.1.1(b)(ii) (now Mutual Fund Dealer Rule 7.4.1) that the word “profit” should not be interpreted to mean “a profit in the nature of the sum remaining after deducting all costs”.

¶ 86 When considering whether a disgorgement order is appropriate, a Panel should consider the following non-exhaustive list of factors:

- a) Whether an amount was obtained by a Respondent as a result of the non-compliance with the regulator’s rules and/or the Member’s policies and procedures;
- b) The seriousness of the misconduct and whether that misconduct caused serious harm whether directly to original investors or otherwise;
- c) Whether the amount obtained as a result of the non-compliance is reasonably ascertainable; and
- d) Whether those who suffered losses are likely to be able to obtain recovery; and
- e) The deterrent effect of a disgorgement order on the Respondent and on other market participants.

Pro-Financial Asset Management Inc. (Re), 2018 LNONOSC 192 at para. 56

¶ 87 Whether or not clients have suffered harm or losses is not something on which Securities Commissions have relied in determining whether to order disgorgement. By focusing on any benefits a Respondent has received as opposed to any losses a client has sustained, disgorgement serves the aim of specific and general deterrence because it sends the message that one cannot benefit from contravening securities regulations.

Pro-Financial Asset Management Inc. (Re), *supra* at para. 53

Fauth (Re), 2019 LNABASC 90, at para. 77, citing *Planned Legacies Inc. Re*, 2011 ABASC 278, at para. 71
Limelight Entertainment Inc. (Re), 2008 LNONOSC 990, at paras. 48-49, 60-61
Poonian v. British Columbia Securities Commission, *supra*, at paras. 70-71, 81-82.

Application of Disgorgement Principles to this Case

¶ 88 The calculation of the amount to be disgorged remains a discretionary exercise for a Hearing Panel and is not purely the result of a mathematical calculation. Neither compensation nor restitution is the purpose of such calculation. Its purpose is to compel a wrongdoer to give up any ill-gotten gains.

Poonian v. British Columbia Securities Commission, [2017] BCCA 207 at paras. 70, 71 and 81

¶ 89 In ordering disgorgement, the Panel in *Fauth* proceeded on the basis that Staff has the initial burden to prove on a balance of probabilities the amount they say a Respondent has obtained as a result of the misconduct. The burden then shifts to the Respondent to disprove the reasonableness of that amount. In doing so, the Panel noted that “any risk of uncertainty in calculating disgorgement should fall on the wrongdoer whose non-compliance with the Act gave rise to the uncertainty”.

Fauth (Re) supra at para. 81

¶ 90 The Panel agrees with and has followed this approach.

¶ 91 In the Misconduct Decision we found that with respect to Contravention #2, of the \$257,500.00 the Respondent received, JG and MG were reimbursed their principal investment of \$15,000.00. Staff submitted that the remaining investors (whom the Respondent described as “co-owners”) suffered a financial loss of the full amount of their investment in the amounts set out below:

- (a) Clients CP and DP: \$19,000
- (b) Client SK: \$10,000
- (c) Client DK: \$132,000
- (d) Client GT: \$5,000
- (e) Clients RW and JW: \$5,500
- (f) Client GC: \$44,000
- (g) Client GA: \$2,000
- (h) Non-client HW: \$10,000
- (i) Non-client # Manitoba Inc.: \$15,000

Total: \$242,500

¶ 92 The evidence the Respondent filed at the Penalty Hearing showed that he had also repaid to client SK and individual CP, the monies they had invested with him in the amounts of \$10,000.00 and \$19,000.00 respectively. When combined with the \$15,000.00 that was repaid to clients JG and MG via the Member, Staff submitted the outstanding benefits the Respondent retained as a result of his misconduct amounted to \$213,500.00.

¶ 93 Accordingly, Staff submitted that the penalty ought to include a fine which had the effect of disgorging \$213,500.00.

Respondent's Position

¶ 94 The Respondent raised a number of arguments in support of his position that there were no grounds for disgorgement.

¶ 95 First, he stated that CIRO or the MFDA only has jurisdiction over six clients: SK; DK; GT; GC; GA; and JG/MG.

¶ 96 Of those six clients he submitted that SK, JG, and MG had their "ownership re-purchased" by him and also had gains.

¶ 97 Of the remaining clients, he said that GT and GA were in a gain position and that for DK and GC – the end results of their gain or loss could not be measured until their ownership was sold but that based on the earnings to date, consideration of future earnings and proceeds of sale, he believed a gain was very probable and expected for both of them.

¶ 98 The Respondent made a number of submissions relating to the AVP Agreement he entered into with the Member on November 1, 2017 when he ceased active employment and registration with the Member. Pursuant to this agreement, the Member agreed to make payments to the Respondent subject to the Agreement's terms and conditions, for a period of sixty months commencing on the first day of the month following the agreement.

¶ 99 When the Member reimbursed clients JG and MG the amount of \$15,000.00, in 2018, it confirmed that it was exercising its right to offset that amount against the Assured Value Payments the Respondent was still receiving under the AVP Agreement.

¶ 100 The Respondent's evidence disclosed that on August 8, 2019 the Member wrote to him to advise that because of matters relating to the MFDA's investigation of his conduct during his time at the Member and matters associated with that investigation, it took the position that he had not abided by the terms of his consultant's agreement and as of August 15, 2019 payments under the AVP Agreement would be frozen until further notice.

¶ 101 The Respondent argued that the fact that the Member stopped making payments to him under the AVP Agreement has had a direct effect on the earnings of the investors or "co-owners" and that had these payments continued it would have increased their earnings.

¶ 102 He also argued that no harm to clients had been proven; no gain for him had been proven; and no "co-owners" have requested termination of their contract with him.

¶ 103 With respect to this last point, relying on a number of authorities, the Respondent submitted that because neither CIRO nor the MFDA is a party to the contracts that he entered into with the "co-owners", it has no privity of contract and therefore no authority to do anything which interferes with his contractual relationships with the co-owners who were the clients and non-clients that invested in his businesses.

¶ 104 In response, Staff submitted, as the Panel found in the Misconduct Decision, the misconduct which related to Contravention #2 – that the Respondent engaged in securities related business that

was not carried on for the account of the Member or processed through the facilities of the Member, does not differentiate between clients and non-clients.

¶ 105 Staff argued that it was of no consequence, therefore, whether the investors who were affected by the Respondent's misconduct were clients or non-clients. The focus of disgorgement, Staff submitted, is on the benefit the Respondent received, not the losses anyone suffered as a result of his misconduct.

¶ 106 We agree with this position which is consistent with the findings of the Hearing Panels in: *Rojas Diaz (Re)*, *supra* at para. 55 and *Levesque (Re)*, 2022 LNCMFDA 88 at paras. 38-39.

¶ 107 Staff further submitted that none of the principles or arguments the Respondent cited from contract and negligence law on the issue of disgorgement are applicable to this matter.

¶ 108 Again, we agree.

¶ 109 Those principles arise in the context of private disputes whereas disgorgement in the securities regulatory context is governed by the principles we have set out above including, as we emphasized, that a fine that disgorges the amounts wrongfully obtained by the Respondent is appropriate to ensure specific and general deterrence and confirm the public's confidence in the industry.

¶ 110 Similarly, we agree with Staff's submission that to the extent the Respondent relied on sentencing principles from criminal law authorities, those authorities are not applicable to these proceedings.

¶ 111 With respect to the AVP Agreement, Staff submitted that the fact that the Member has suspended payments to the Respondent under that agreement is not relevant to the issue of disgorgement because the Member's decision to cease future payments does not amount to removing the ill-gotten gains obtained by the Respondent.

¶ 112 The Panel agrees with these submissions.

Harm Suffered by Clients

¶ 113 The Respondent argued that Staff had not established that the clients and individuals who invested in his businesses had suffered any harm.

¶ 114 He submitted that they received business income from their ownership in his businesses and those investors who sold their ownership back to him received the full value of their original purchase price. He argued that similar to being invested in a mutual fund, the value of an investment may deviate up or down from the original purchase price but a final gain or loss can only be measured when the sale of ownership actually occurs. His position was that with respect to at least some of the investors, that sale had not occurred.

¶ 115 He submitted that the reason why the businesses in which clients and non-clients had invested had lower net income since 2020 related to the fact that the Member had stopped making AVP payments to him between August 2019 and 2022, and to the number of hours he has spent working on these proceedings.

¶ 116 He also pointed out that there was only one complaint – the one made by JG and MG and that they have been reimbursed and that he had no intention to harm anyone.

¶ 117 On the first point, we agree with Staff's submission that there can be many reasons why an individual does not file a complaint and their failure to do so does not establish whether they sustained harm in fact.

¶ 118 Next, we agree with Staff's submission that whether or not the Respondent intended to harm his clients is not a mitigating factor. Quite the contrary.

¶ 119 The Hearing Panel in *Walker (Re)* rejected similar arguments:

Whether the Respondent broke the rules for altruistic reasons does not change the fact that he broke the rules and investors were harmed as a result. We did not consider the Respondent's intent a mitigating factor to be considered in determining penalty.

...

As discussed above, the Respondent argued that he should not be penalized because his intention was to benefit the mutual fund industry. Regardless of what the Respondent's intention was, he received a benefit of \$1,573,772 and the investors collectively suffered a corresponding loss of \$1,573,772 as a result of the failure of IFS to become a successful operating business and its ultimate collapse. It is appropriate therefore that the fine be at least the amount that the Respondent benefited.

Just because there was no evidence of fraud does not negate the fact that the Respondent broke MFDA rules and investors suffered losses as a result. Had there been evidence of fraud, it would have been appropriate to impose a larger penalty.

Walker (Re), 2024 CIRO 43 at paras. 40-44, 51-52

¶ 120 Staff submitted that the Respondent's assertion that the investors were not harmed does not render disgorgement inapplicable or unnecessary because disgorgement is not a compensation mechanism.

¶ 121 They also argued that except for JG, MG, SK and CP, the Respondent's evidence does not establish that the monies which investors paid to him and which he deposited into his personal bank account, were ever repaid to those investors and that the investors were, in fact, harmed.

¶ 122 In making this argument, Staff relied on the letters to clients and non-clients which were attached to the Affidavit, and in which he said things to clients such as that their "business income" from Eagle Franchising was to be received on an "accrual" basis.

¶ 123 Other letters referred to an "enclosed cheque" which the Respondent said represented the investors' share of business income from Kazina Financial Services and/or Eagle Franchising, however, copies of such cheques were not entered into evidence.

¶ 124 Plus, Staff submitted, the Respondent's repeated submissions to the Panel that he was unable to pay a fine suggest that the businesses in which the clients and non-clients had invested, were not profitable.

¶ 125 We agree.

¶ 126 It is clear from the Respondent's evidence that any monies the investors might be repaid will depend on the health and viability or profitability of KFS and Eagle Franchising.

¶ 127 However, the evidence on which the Respondent relied in support of his position that he is unable to pay a fine demonstrated that these businesses were not profitable and were adversely affected by these proceedings. Plus, the evidence at the Misconduct Hearing was that KFS' income depended on the commissions the Respondent earned while employed with the Member which, of course, has discontinued.

¶ 128 Having carefully considered the Respondent's evidence, the Panel finds on a balance of probabilities that with the exception of JG, MG, SK and CP, it is unlikely that the individuals who invested money with the Respondent, as per Contravention #2, will be reimbursed for the amount of their initial investment. We find, therefore, that those individuals have suffered harm.

¶ 129 Our decision to base a portion of the fine on disgorgement principles does not rely on whether the individuals – whether clients or non-clients, who invested in the Respondent's businesses, suffered losses. However, whether the Respondent's clients sustained harm is relevant to our determination with respect to the appropriate sanction overall.

¶ 130 In particular, with respect to the amount of the fine, Staff submitted that the Panel should impose a penalty which includes not only an amount equivalent to the financial benefit the Respondent received as a result of his misconduct but also an additional amount to deter not only the Respondent but other individuals from engaging in similar misconduct.

¶ 131 In making this argument Staff cited the OSC's decision in *Rojas supra* where the Panel agreed that a fine additional to the amount representing disgorgement was appropriate given the seriousness of the Respondent's misconduct because the principles of public protection and deterrence required a more onerous financial penalty than simply equalling disgorgement.

¶ 132 We agree with this approach and have followed it in determining the fine to order in this case.

INABILITY TO PAY AND PERSONAL CIRCUMSTANCES

¶ 133 The Sanction Guidelines say that a Respondent's ability to pay may be a consideration in determining the appropriate monetary sanction to be imposed but they stress that it is only one of the factors to be weighed in relation to all other applicable factors, including general and specific deterrence and the need to ensure public confidence in the regulator's disciplinary process. They also say:

“The burden is on the respondent to raise the issue and provide evidence of financial hardship. Evidence of financial hardship should be in the form of sworn affidavits or declarations, along with standard or commonly accepted documents, such as tax returns, bank, and investment account statements, audited financial statements, or other externally verified financial statements.”

Sanction Guidelines, Part I – Sanction Principles, General Principle No. 5

¶ 134 Ultimately, Staff did not dispute that the Respondent has limited financial means but they emphasized, as held by the Alberta Securities Commission, that inability to pay “would seem

inapplicable” to affect a disgorgement order as that would encourage and reward wrongdoers that spent and squandered ill-gotten gains.

Fauth (Re) supra at paras. 84-85.

¶ 135 We agree with this approach.

¶ 136 We find that the Respondent has submitted evidence which shows he has limited financial means, however as the Hearing Panel in *Brauns* stated:

“ . . . any inability to pay the fine (while relevant) is trumped by the need to articulate the seriousness of the Respondent’s misconduct, and to at least impose a fine that bears some relationship to the benefit obtained as a result of the misconduct and/or the loss to those affected.”

Brauns (Re), [2014] MFDA File No. 201203, Hearing Panel of the Central Regional Council, Decision and Reasons (Penalty) dated February 4, 2014

¶ 137 In opposing the fine which Staff was seeking the Respondent pointed to: the business opportunities which he was no longer being offered because of the MFDA proceedings; the Member’s suspension of his AVP payments; legal bills he incurred for a portion of these proceedings; and the amount of time he has had to devote to these proceedings which has detracted from the time he can spend earning a livelihood.

¶ 138 The Panel finds that these personal circumstances in which the Respondent finds himself are the natural consequence of his misconduct and do not outweigh the factors which warrant the imposition of a fine which is appropriate to ensure general and specific deterrence and promote the public’s confidence in the regulator’s disciplinary processes.

TOTALITY PRINCIPLE

¶ 139 Where there are multiple contraventions, the total or cumulative sanction should appropriately reflect the totality of the misconduct.

¶ 140 The Sanction Guidelines state:

Where there are multiple violations, the overall sanction imposed should not be excessive or disproportionate to the gravity of the total misconduct. For this reason, a global approach to sanctioning may be appropriate where the imposition of a sanction for each contravention would have the effect of imposing on the respondent a cumulative sanction that is excessive. Depending on the facts and circumstances of a case, however, multiple contraventions may be treated individually such that a sanction is imposed for each contravention so long as the total sanction is proportionate to the overall misconduct.

In addition, numerous, similar contraventions may warrant higher sanctions since the existence of multiple contraventions may be treated as an aggravating factor.

Sanction Guidelines, Part I – Sanction Principles, General Principle No. 4

¶ 141 The Panel has taken this principle into account and finds that the penalty we have ordered is appropriate given the totality of the misconduct and all of the circumstances of this matter.

PREVIOUS DECISIONS MADE IN SIMILAR CIRCUMSTANCES

¶ 142 The penalty we have imposed is consistent with the penalties imposed by Hearing Panels in the following comparator cases to which we were referred by Staff and which we considered:

- *Brake (Re) supra; Boldt (Re)* [2016] MFDA File No. 201649, Hearing Panel of the Prairie Regional Council, Decision dated February 6, 2017;
- *Luong Dao (Re)* [2019] MFDA File No. 201971, Hearing Panel of the Central Regional Council, Decision and Reasons dated April 9, 2021;
- *Szekely (Re) supra;*
- *Harmer (Re) supra;*
- *Cheung (Re)* [2018] MFDA File No. 201808, Hearing Panel of the Central Regional Council, Decision and Reasons dated January 28, 2019; and
- *Dziadecki (Re)* [2024] 47 OSCB 8383.

COSTS

¶ 143 Staff submitted a Bill of Costs which totaled \$46,400.00 and sought costs in the amount of at least \$30,000.00.

¶ 144 By awarding costs in a disciplinary proceeding, a Hearing Panel holds a respondent accountable for a portion of the costs that Staff has incurred as a result of the respondent's regulatory misconduct.

¶ 145 Staff reminded the Panel that in our decision granting the Respondent's request to compel witnesses from the Member to testify at the Hearing on the Merits, the Panel said that to the extent we found a party had unduly prolonged the Hearing by calling witnesses whose evidence was either not relevant or was unduly repetitious, such a determination might be reflected in an order for costs.

¶ 146 Staff submitted that the evidence the Respondent adduced through the 17 witnesses he called to testify at the Hearing on the Merits was indeed unduly repetitious and of little relevance.

¶ 147 In response, the Respondent argued that he was just not able to anticipate what the witnesses would remember or say.

¶ 148 The Panel acknowledges that the Respondent represented himself at the Hearing on the Merits and that he is not a lawyer. Nonetheless, we find that with respect to the witnesses he called to testify, their evidence was repetitious and of little relevance or probative value.

¶ 149 Having considered both parties' submissions with respect to costs, therefore, the Panel is of the view that an order of \$30,000.00 is appropriate given the number of appearances the parties made before the Panel regarding preliminary matters, the number of hearing days and the complexity of the matters at issue which were addressed through extensive written and oral submissions.

SANCTION

¶ 150 For all of the reasons set out above, the Panel has determined that the appropriate sanction in this matter is:

- a) A permanent prohibition on the authority of the Respondent to conduct securities related business while in the employ of or associated with any Dealer Member of the Corporation that is registered as a Mutual Fund Dealer, pursuant to section 24.1.1(e) of MFDA By-law No. 1 [now Mutual Fund Dealer Rule 7.4.1.1(e)]
- b) A total fine of \$313,500.00 pursuant to section 24.1.1(b) of MFDA By-law No. 1 [now Mutual Fund Dealer Rule 7.4.1.1(b)] comprised of the following:
 - i) A fine in the amount of \$213,500.00 representing disgorgement of the amount the Respondent received in connection with accepting monies for investment into his businesses; and
 - ii) An additional fine in the amount of \$100,000.00; and
- c) Costs in the amount of \$30,000.00, pursuant to section 24.2 of MFDA By-law No. 1 [now Mutual Fund Dealer Rule 7.4.2].

¶ 151 This penalty is reasonable and proportionate and in keeping with CIRO'S purpose to enhance investor protection and strengthen public confidence in the Canadian Mutual Fund Industry by ensuring that Members and Approved Persons are held accountable for their behaviour and are deterred from engaging in similar conduct.

DATED this 15th day of January 2025

"Sherri Walsh"

Sherri Walsh
Chair

"Guenther Kleberg"

Guenther Kleberg
Industry Representative

"Greg Wiebe"

Greg Wiebe
Industry Representative

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