

Re Nother

IN THE MATTER OF:

**The Rules of the Investment Industry Regulatory Organization of
Canada**

and

Sean Michael Nother

2020 IIROC 22

Investment Industry Regulatory Organization of Canada
Hearing Panel (Ontario District)

Heard: June 23, 2020 electronically in Toronto, Ontario
Decision: July 14, 2020

Hearing Panel:

Martin Scisizzi, Chair, Daniel Iggers and Peter Dymott

Appearance:

Natalija Popovic, Senior Enforcement Counsel

Hugh G. Lissaman, Counsel for Sean Michael Nother

Sean Michael Nother (present)

REASONS FOR DECISION

INTRODUCTION

¶ 1 The issue in this hearing is the appropriate sanction to be imposed on the Respondent, Sean Michael Nother. The merits hearing in this matter was scheduled to begin on April 28, 2020. As a result of COVID-19 which has caused the suspension of in-person hearings, on the consent of the parties the hearing was to proceed by WebEx video conference. On April 27, 2020, the Panel was advised in writing that the Respondent admitted the allegations contained in the Statement of Allegations dated December 10, 2019. Accordingly, the Panel issued a Consent Order, which is attached to this decision, finding the Respondent liable for the contravention set out in the Statement of Allegations, namely that between May and August 2018, the Respondent breached the standards of conduct when he was involved with and involved five clients and four non-clients in a gifting club that he knew or ought to have known was a pyramid scheme, contrary to Rule 1400 of the IIROC Consolidated Enforcement, Examination and Approval Rules (the “Consolidated Rules”). These Reasons address the appropriate sanctions for this contravention and how the Panel arrived at these sanctions.

¶ 2 The basic and fundamental allegations admitted by the Respondent (the “contravention”) are as follows:

1. Between May and August 2018, the Respondent breached the standards of conduct when he was involved with, and involved five clients and four non-clients in a gifting club, contrary to Consolidated Rule 1400; and

2. Beginning in May 2018 and through August 2018, the Respondent was involved with a gifting club that he knew, or ought to have known, was a pyramid scheme or had the hallmarks of one. The Respondent involved five of his clients and four non-clients in the gifting club.

¶ 3 The balance of the Statement of Allegations contains the particulars of the contravention.

¶ 4 A hearing took place on June 23, 2020 by WebEx video conference to determine the sanctions for the contravention.

¶ 5 The Panel imposes the following sanctions on the Respondent:

- a) Suspension from approval by, or registration with IIROC until November 16, 2020;
- b) Payment of a fine in the amount of \$20,000; and
- c) Payment of costs in the amount of \$15,000.

¶ 6 To explain the sanctions imposed by the Panel, we provide the factual background, the positions of the parties on the sanctions and the Respondent's circumstances.

BACKGROUND

¶ 7 The Respondent was a Registered Representative with CIBC World Markets Inc. from 2001 until January 16, 2019, when his employment was terminated because of his involvement in the gifting club. The Respondent resides in London, Ontario and worked in CIBC World Markets Inc.'s London Branch. He has no prior disciplinary record.

Dino Delellis

¶ 8 The Respondent was introduced to the gifting club by one of its organizers, Dino Delellis. The Respondent was introduced to Mr. Delellis in 2009 by a mutual friend. Over the next ten years, the Respondent and Mr. Delellis became personal friends. They played on the same pick-up hockey team. They had many friends and acquaintances in common. They socialized together, individually and with mutual friends and they took several family vacations together.

¶ 9 Mr. Delellis had been registered with the Ontario Securities Commission to sell mutual fund securities and limited market products. In 1997, Mr. Delellis was permanently banned from registration in the securities industry by the Ontario Securities Commission for, among other things, failing to deal fairly, honestly and in good faith with his clients.¹ The Respondent was aware that Mr. Delellis had been a Registered Representative and that he had been disciplined in the 1990s, but he did not personally know Mr. Delellis at that time. As the Respondent, Mr. Delellis and their families developed their friendship, the Respondent came to believe that Mr. Delellis was a wealthy, reputable and trustworthy businessman.

¶ 10 The Respondent believed Mr. Delellis to be a high net-worth businessman with interests in real estate limited partnerships and other businesses and investments in the capital market. Mr. Nother had been trying to get Mr. Delellis as a client for some time and Mr. Delellis often told him that at an appropriate time he might consider investing money with him at CIBC World Markets Inc. It would have been lucrative and financially beneficial for Mr. Nother to have Mr. Delellis as a client in his book of business.

The Gifting Club

¶ 11 "What's in a name? That which we call a rose by any other name would smell as sweet".² What matters is what something is, not what it is called. The "Gifting Club", also called the "Vine Club", was a pyramid scheme. Pyramid schemes are illegal in Canada being in contravention of the *Criminal Code* and the

¹ *Re DeLellis*, 1998 LNONOS 51

² William Shakespeare, *Romeo and Juliet* (II, ii,1-2)

*Competition Act.*³

¶ 12 A pyramid scheme is one where a person pays money under the scheme which then entitles the person who pays the money to receive a larger sum by reason of the fact that other persons pay money or are obligated to pay money under the scheme. The scheme is based on a structure whereby participants may be paid through their recruitment of new participants in the scheme. For the scheme to continue each recruit must in turn recruit others. However, the mathematics of a pyramid scheme is such that for most participants, other than the instigators, the end result is the loss of their investment.⁴ There are many different names and concepts for such schemes, but in all such schemes the concept remains basically the same. The person at the top of the pyramid receives money from the persons at the bottom.

¶ 13 In or about May 2018, Mr. Delellis introduced the Respondent to the gifting club. The gifting club was referred to as the “Vine Club”. The gifting club consisted of multiple groups of persons known as “Clouds”. Each Cloud had four levels beginning with the lowest, or entry level consisting of eight new members. The second level consisted of four members. The third level consisted of two members and the top position referred to as the “Birthday Position” consisted of one member.⁵

¶ 14 The eight new members in the entry level were expected to pay a “gift” of \$5,000 to the person in the Birthday Position. In order to move up a level, new members were also expected to bring in two new members each. As new members joined a Cloud, the existing members could move up the pyramid and form new Clouds. The members had nicknames to be used by the gifting club organizer.⁶

Respondent’s Involvement in the Gifting Club

¶ 15 In or about May 2018, Mr. Nother and Mr. Delellis had a meeting ostensibly to discuss the possibility of Mr. Delellis investing money at CIBC World Markets Inc. During the meeting, Mr. Delellis informed Mr. Nother that some mutual acquaintances had joined the gifting club which Mr. Delellis had organized (sometimes referred to in these Reasons for Decision as the “club”, the “gifting club” or the “Vine Club”). Mr. Delellis explained the concept of the Vine Club to Mr. Nother, advised him that it was legal from a tax perspective and offered to sponsor him by allowing him to join the club without paying the required \$5,000 “entry fee”. According to Mr. Nother, he subsequently arranged a meeting with his tax accountant and Mr. Delellis to discuss the tax implications of membership in the club. According to Mr. Nother, he was advised by his accountant that “gifting was not illegal”, that the Vine Club was legal from a tax perspective, in compliance with CRA tax rules and offered certain tax benefits. No evidence was proffered in this proceeding from the accountant.

¶ 16 Mr. Nother understood how the gifting club worked. The initial buy-in was \$5,000 and as the participant recruits other participants, he or she moves up the ladder, eventually to the top of the pyramid, referred to as the “birthday position”. When the participant reached the birthday position, he or she was to receive a payment of \$40,000, referred to as a “gift”. Mr. Nother says that based on the accountant’s advice he believed that the gifting club was not illegal. He says that he “would never want to get involved in anything that’s illegal”.

¶ 17 Mr. Nother did not personally join the club as he knew that he was not permitted to be involved in any outside business activity without the express consent of CIBC World Markets Inc. However, after speaking with his spouse, in May 2018 she joined the Vine Club through sponsorship by Mr. Delellis, without paying the required \$5,000. Mr. Nother also introduced a number of his friends to the gifting club. Some of them joined.

¶ 18 While new members of the club were expected to recruit additional members, the Respondent’s

³ *Criminal Code*, R.S.C., 1985, c. C-46, s. 206 (1); *Competition Act*, R.S.C., 1985, c. C-34, s. 55

⁴ *Mazo v. Canada*, 2016 TCC 232 (CanLII), paras. 15-16

⁵ IIROC Statement of Allegations dated December 10, 2019, Staff Sanction Documents (“Statement of Allegations”), Tab 1

⁶ Statement of Allegations, Staff Sanction Documents, Tab 1, para. 8

spouse did not do so, but nevertheless in or about July or August 2018, she was elevated to the next level in the pyramid. Mr. Nother's spouse ultimately ascended to the birthday position, but she did not receive payment of \$40,000. According to Mr. Nother's vague and somewhat confusing statements to IIROC and to CIBC Corporate Security, in or about September 2018, his spouse received only \$10,000 or \$20,000 because not all eight spots on the first tier of the pyramid were filled. The sum of \$5,000 was repaid to Mr. Delellis and she netted \$5,000 or \$10,000.

¶ 19 Between May and July 2018, the Respondent discussed the gifting club with seven clients, which he says were also his friends. Five of those clients joined the club. He also discussed the gifting club with a number of non-clients who were mutual friends of Mr. Nother and Mr. Delellis. Four of them joined the club. Mr. Nother says that the Vine Club was openly discussed in social settings among his friends, many of whom were also friends or acquaintances of Mr. Delellis and many of whom already knew about the Vine Club from Mr. Delellis. Mr. Nother stated that he did not actively discuss the Vine Club beyond the scope of his friend group, nor did he recommend the Vine Club as an investment to his clients.

¶ 20 According to Mr. Nother, in July or August 2018, after reading an on-line article about a gifting club with similar features to the Vine Club operating in Vancouver that was being investigated as an illegal pyramid scheme, he and his spouse became uncomfortable with the Vine Club and shortly thereafter, but not before receiving the net payment of at least \$5,000, his spouse quit the club.

¶ 21 Mr. Nother stated that although he became uncomfortable with the gifting club after reading the on-line article, he did not fully appreciate that he and his spouse should not have participated in the Vine Club until November 2018, when he read an article in the London newspaper stating that criminal charges had been laid against Bernard Baratta, a colleague of Mr. Delellis, in respect to his operation of a gifting club similar to the Vine Club.

¶ 22 In his statements to CIBC Corporate Security and to the IIROC investigators, Mr. Nother minimized his involvement in the Vine Club. He says that his involvement in the club was limited to the activities described above. However, the evidence demonstrates that he was more actively involved.

¶ 23 One of the clients Mr. Nother spoke to about the Vine Club was BS. BS and Mr. Nother were also close friends. BS who had known Mr. Delellis for about 10 years knew that he was the organizer of the Vine Club. BS had also discussed the Vine Club directly with Mr. Delellis. BS joined the Vine Club in July 2018. As payment to join the club, BS provided a cheque to Mr. Nother for \$5,000 payable to Mr. Nother. The cheque was deposited in Mr. Nother's personal bank account.⁷ The payment was treated as Mr. Nother's spouse's "birthday gift". BS provided a letter dated May 16, 2020 to Mr. Nother's counsel, attached as Exhibit "I" to Mr. Nother's affidavit sworn on May 20, 2020, filed for the sanction hearing. BS' letter exonerates Mr. Nother from any responsibility for the loss of his investment in the Vine Club. However, the letter does not explain why BS provided the cheque to Mr. Nother and not to Mr. Delellis, who he knew was the organizer and had spoken with about joining the club.

¶ 24 The non-client, DR also known as DH, is Mr. Nother's former common law partner. They remain good friends. DR has personally known Mr. Delellis for about ten years. Mr. Nother spoke to DR about the Vine Club. DR also spoke directly with Mr. Delellis about joining the Vine Club. In July 2018, DR joined the Vine Club. As payment to join the club, DR sent two electronic funds transfers each for \$2,500 to Mr. Nother. He stated that he accepted the funds on the understanding that he would pass the funds on to Ms. Delellis. There was no evidence that Mr. Nother delivered the funds he received from DR to Mr. Delellis.⁸ DR provided a letter dated May 18, 2020 to Mr. Nother's counsel, which letter is attached as Exhibit "J" to Mr. Nother's affidavit sworn May 20, 2020. DR's letter exonerates Mr. Nother from any responsibility for the loss of the \$5,000, but it does

⁷ Statement of Allegations, Staff Sanction Documents, Tab 1, paras. 17-18

⁸ Statement of Allegations, Staff Sanction Document, Tab 1, para. 19

not explain why she sent the funds to Mr. Nother and not directly to Mr. Delellis, who she knew and who she had spoken with about joining the club.

¶ 25 Mr. Nother kept track of the persons who joined the Vine Club. He kept a “master sheet” with the names, nicknames and telephone numbers of the persons who joined the Vine Club. He passed this information on to Mr. Delellis and to the administrator of the club. He vented concern and frustration about replacing the administrator of the club.

¶ 26 These events and activities strongly suggest that Mr. Nother was much more involved in the activities of the Vine Club than he admits.

¶ 27 According to Mr. Nother, at the relevant time, he was under personal and financial stress. He was in a “bad financial position”. His “credit cards were racked”, he had lost a property due to financial difficulties, and he was experiencing marital problems. In the interview with CIBC Corporate Security, Mr. Nother said that because of his marital and financial situation he was “put in a bad position” and it was “good timing” on Mr. Delellis’ part to have introduced him to the Vine Club at that time.

¶ 28 We conclude that Mr. Nother saw his involvement in the Vine Club as an opportunity to make some money and at the same time ingratiate himself with Mr. Delellis by assisting him to find recruits for the club. In our view, Mr. Nother involvement in the Vine Club was motivated by the desire to please Mr. Delellis in order to obtain Mr. Delellis as a client in his book of business.

SANCTION PRINCIPLES

¶ 29 The issue in this hearing is the appropriate sanction to be imposed on the Respondent in light of all the circumstances described above. In determining that sanction, regard must be had to the specific facts applicable to Mr. Nother, the circumstances of his conduct, the IIROC Sanction Guidelines (the “Guidelines”)⁹ and previous securities industry disciplinary decisions in similar circumstances. As the sanctions in each case must be determined on its own facts, precedents can serve only a limited function. However, prior decisions are relevant to ensure that Mr. Nother is dealt with fairly in relation to other persons in similar circumstances and to promote consistency in determining the appropriate sanctions for similar misconduct.

¶ 30 The Guidelines set out general principles that provide a framework as well as key factors that should be considered when determining the appropriate sanctions. The overarching principle is that the primary purpose of sanctions in a regulatory proceeding is to protect the public interest by restraining future conduct that may harm the capital markets. Disciplinary sanctions are preventative in nature and should be designed to protect the investing public, strengthen market integrity and improve overall business standards and practices. In order to achieve this, sanctions should be significant enough to prevent and discourage future misconduct by the particular respondent (specific deterrence) and to deter others in the industry from engaging in similar misconduct (general deterrence). The primary goal of sanctions is not to punish the particular respondent but rather to prevent and discourage a respondent and others in the industry from engaging in misconduct.

¶ 31 Industry expectations and understanding are particularly relevant to general deterrence. General deterrence can be achieved if the sanction strikes an appropriate balance by addressing a respondent’s specific misconduct, but is also in line with industry expectations.¹⁰

¶ 32 The sanctions imposed on a respondent should be proportionate to the particular conduct involved and should be within an acceptable range of sanctions imposed on respondents for similar contraventions in similar circumstances. Sanctions consistent with previous securities industry disciplinary decisions foster both specific and general deterrence and public confidence in the securities industry. However, the determination of the appropriate sanctions is fact-specific and discretionary. The appropriate sanction depends on the facts

⁹ IIROC Sanction Guidelines, February 2, 2015

¹⁰ *Re Mills*, [2001] I.D.A.C.D. No. 7 at page 3; *Re Wong* 2020 IIROC 50 at para 29

of the particular case and the circumstances of the respondent's conduct. Sanctions should be tailored to the particular misconduct in each case. This necessitates a review of the nature of the misconduct, both mitigating and aggravating factors and the degree of responsibility of the respondent. The sanctions may be reduced or increased depending on mitigating or aggravating factors in the particular case and the degree of responsibility of the respondent.

¶ 33 The Guidelines recommend consideration of a suspension for serious, multiple, repeated, fraudulent, willful or reckless misconduct or misconduct that has caused harm to investors, the integrity of a marketplace, or to the securities industry as a whole.

¶ 34 The Guidelines recommend consideration of a permanent bar from registration for contraventions involving significant harm to the investing public, the integrity of the capital market, or the securities industry, where the misconduct has an element of criminal or quasi-criminal activity, or where there is reason to believe that the respondent cannot be trusted to act in an honest and fair manner in their dealings with the public, their clients and the securities industry as a whole.

¶ 35 The Guidelines are intended to promote consistency, fairness and transparency by providing a framework to guide the hearing panel's exercise of discretion in determining sanctions which meet the general sanctioning objectives, but the Guidelines are not intended to fetter, and do not fetter, the discretion of the hearing panel in determining the appropriate sanction. The hearing panel retains the discretion to impose the sanctions it considers appropriate in light of the circumstances of the particular case.

¶ 36 In determining the sanctions appropriate to the Respondent's conduct in this case, we have considered the aforesaid principles, the prior decisions cited by counsel for the parties, the transcript of Mr. Nother's interview by IIROC investigators on July 3, 2019, the transcript of Mr. Nother's interview by CIBC Corporate Security on January 16, 2019, Mr. Nother's affidavit sworn on May 20, 2020 and the exhibits thereto, the transcript of Mr. Nother's cross-examination on his affidavit on June 11, 2020 and the written and oral submissions of the parties.

POSITION OF THE PARTIES ON SANCTIONS

Staff's Submissions

¶ 37 Staff submitted that the following sanctions are warranted in this case:

- a) A permanent ban from approval by IIROC;
- b) A fine in the amount of \$50,000; and
- c) Payment of costs in the amount of \$20,000.

¶ 38 Staff submitted that Mr. Nother's involvement in the criminal or quasi-criminal activity of a pyramid scheme was intentional, willful or reckless and demonstrates that he cannot be trusted to act in an honest and fair manner in his dealings with the public or his clients and therefore he should be permanently barred from approval. Staff submitted that the Respondent, as an experienced registered representative, was required to hold himself, and to be held, to a high standard of ethical conduct. Staff submitted that the proposed sanctions are consistent with previous disciplinary decisions and the principles set out in the Guidelines and that such sanctions will prevent future misconduct by the Respondent, deter others from engaging in similar misconduct and foster public confidence in the securities industry. Staff further submitted that the proposed sanctions will also highlight the importance for registrants to be vigilant of illegal activities.

Respondent's Submissions

¶ 39 The Respondent submitted that the penalty sought by Staff "does not fit the crime". He submitted that a permanent ban on approval by IIROC is excessive and unwarranted on the facts of this case for the following reasons:

- a) Mr. Nother was not the organizer of the pyramid scheme;
- b) Mr. Nother sought the advice of his accountant with respect to tax aspects of the gifting club;
- c) Mr. Nother did not promote the club to clients, but restricted it to a group of friends, some of whom were also clients;
- d) Mr. Nother's involvement in the gifting club was only for several months;
- e) The friends group to whom Mr. Nother promoted the club were not naïve members of the public at large;
- f) The losses to each participant were not significant (\$5,000);
- g) The related benefit to Mr. Nother is unclear on the evidence;
- h) To date there has been no identifiable client complaint to CIBC World Markets Inc.;
- i) None of the five clients and four non-clients filed a complaint against Mr. Nother with CIBC Capital Markets Inc. or IIROC;
- j) Six of Mr. Nother's friends who joined the club provided letters to his counsel exonerating Mr. Nother of any responsibility for their having participated in the gifting club;
- k) Five of the aforesaid letters provided character references for Mr. Nother and expressions of desire that he return to the investment industry;
- l) CIBC World Markets Inc. has suffered no losses as a result of Mr. Nother's conduct;
- m) Mr. Nother had no prior disciplinary record;
- n) Mr. Nother's friends and clients who joined the club did not liquidate assets in their CIBC World Markets Inc. accounts to fund their participation in the club;
- o) There is no evidence of any transfer of funds in CIBC accounts between Mr. Nother and Mr. Delellis;
- p) Due to his concerns about the gifting club, Mr. Nother ended his involvement with the club months before CIBC World Markets Inc.'s investigation began;
- q) Mr. Nother co-operated fully with CIBC World Market's Inc. prior to the termination of his employment and he has shown remorse for his conduct;
- r) Mr. Nother's employment was terminated by CIBC World Markets Inc. on January 16, 2019 and he has remained out of the investment industry and unemployed ever since;
- s) Mr. Nother has lost his income, stock options and his book of business;
- t) Mr. Nother took the initiative to enroll in the CSI Conduct and Practices course in October 2019 and he passed the course.

¶ 40 The Respondent submitted that that there was no malfeasance in his conduct. He submitted that when he initially became involved in the Vine Club, he did not perceive the gifting club as illegal, inappropriate or wrong. When, a few months later, Mr. Nother came to learn that the gifting club was illegal, he and his spouse ceased their involvement in the club and he unsuccessfully attempted to recover from Mr. Delellis the investments his friends had lost.

¶ 41 The Respondent submitted that the appropriate sanctions on the facts of this case are:

- a) A six month suspension commencing January 16, 2019, the date of termination of his employment;

- b) A fine of \$20,000 to \$30,000, payable in installments;
- c) Close supervision for 12 months if Mr. Nother becomes re-employed in the industry;
- d) Costs of \$5,000, payable in installments.

ANALYSIS

Permanent Bar

¶ 42 Despite Enforcement Counsel's able and forceful submissions, the Panel ultimately declined to impose a permanent bar against the Respondent. As stated above, Enforcement Counsel submitted that Mr. Nother's involvement in the pyramid scheme demonstrates that he cannot be trusted to act honestly and fairly with the public or his clients and therefore he should not be permitted to work in the industry again as a registered representative. Enforcement Counsel submitted that a permanent bar is necessary to achieve specific and general deterrence in this case. While we view Mr. Nother's misconduct very serious, calling for a very serious sanction, we are not persuaded that the ultimate sanction of a permanent bar is warranted. We do not believe that it is necessary for the protection of the public interest and for general deterrence that Mr. Nother be permanently removed from the capital markets.

¶ 43 Mr. Nother says that when he became involved in the Vine Club, he was not aware that the scheme was illegal. He says that his tax accountant advised him that the Vine Club offered certain tax benefits and he "understood that it was in compliance with CRA tax rules"¹¹. He says that he would not knowingly become involved in anything illegal. It is not necessary for the Panel to determine whether Mr. Nother knew that the gifting club was illegal when he became involved in the club. However, it is difficult to understand how an experienced registered representative would not have been suspicious of the scheme. In our view, given the true nature of the gifting club, Mr. Nother should have been suspicious of the scheme. He failed to exercise proper due diligence to determine the legality of the scheme. It can be said that he was wilfully blind to the nature of the pyramid scheme. He was blinded by his desire to obtain Mr. Delellis' business.

¶ 44 While principles which are applied in criminal cases are not directly applicable in disciplinary proceedings, we found the principle that the maximum sentence is reserved for the worst offence and the worst offender¹² relevant in this case to the application of the sanction principles in the Guidelines. As set out in *Re Mills*¹³ :

If a penalty is less than industry understandings would lead its Members to expect for the conduct under consideration, it may undermine the goals of the Association's [IIROC's] process; **similarly, excessive penalties may reduce respect for the process and concomitantly diminish its deterrent effect.** Thus the responsibility of the District Council [Hearing Panel] is to determine **a penalty appropriate to the conduct and respondent before it**, reflecting that its primary purpose is prevention rather than punishment. [Emphasis added]

¶ 45 Without in any way minimizing the seriousness of the Respondent's misconduct, his offence does not rank in the worst category of offences. Mr. Nother was not the organizer of the Vine Club. There is no evidence that he promoted the Vine Club to his clients, beyond a group of his friends who were also friends of the organizer of the club. All of the persons Mr. Nother introduced to the Vine Club, both clients and non-clients, were friends of his and of Mr. Delellis.

¶ 46 Each of the five clients and one non-client that Mr. Nother introduced to the club provided letters to Mr. Nother's counsel, attached as exhibits to Mr. Nother's affidavit, essentially exonerating Mr. Nother from any responsibility for their joining the club and indicating that they had discussed joining the club directly with

¹¹ Nother Affidavit, Nother's Penalty Submissions, Tab 2, para. 12

¹² *Re Peroni*, [2006] I.D.A.C.D. No. 28, para. 75

¹³ *Supra* p. 3

the organizer before joining. One of the clients who provided a letter, informed IIROC's investigators that Mr. Nother in fact recommended that he not get involved in the club, but that he joined the club anyway. Staff submitted that the Panel should give little weight to the letters as they are relatively generic in nature and do not speak directly to the Respondent's overall involvement in the gifting club. In our view, the letters are consistent with Mr. Nother's evidence that he only spoke to a group of friends, who were also friends of the organizer, about the club and that those friends also spoke to the organizer themselves about joining the club.

¶ 47 As the Statement of Allegations indicates, the Respondent's involvement in the club and "engagement in the misconduct" was over a period of four months from May to August 2018.¹⁴ In or about August 2018, Mr. Nother and his spouse quite the club because of their concerns that the club was an illegal pyramid scheme.

¶ 48 The parties agree that the Respondent's conduct in this case is unique among IIROC decided cases. However, the lack of case precedents that imposed a permanent bar does not preclude the imposition of a permanent bar where such sanction is appropriate to achieve specific deterrence and general deterrence. In *Malley (Re)*¹⁵, the Hearing Panel noted:

This Panel does not accept the absence of case authority to support imposition of a permanent ban as a compelling reason against such a penalty. If a hearing panel is satisfied on the evidence that a suspension will not achieve the requisite specific deterrence to a registrant or general deterrence to others who may be similarly tempted to cross the boundary against unsuitable trading behaviour, such a penalty must be considered.

¶ 49 Staff referred us to a number of decisions in support of their submission that a permanent bar is the appropriate sanction in this case. Each case is fact specific and the misconduct in those cases was much more egregious than in this case.

¶ 50 In *Nelbar Financial Corp. (Re)*¹⁶, Nelbar was a cover for a ponzi scheme. The hearing panel found the principals of Nelbar guilty of misappropriating client funds, removing client funds without authorization, using client funds without authorization to repay an indebtedness to another client, failing to deposit funds of clients to the accounts indicated by the clients and redirecting the funds to other uses, among other misconduct.

¶ 51 Similarly, in *Gold-Quest International (Re)*¹⁷, the corporation was operating a ponzi scheme. In essence, Gold-Quest had no legitimate business although they promised investors that their funds would be invested in foreign exchange which would provide returns of 87.5%. Early investors were paid with funds from subsequent investors. As the number of investors dwindled, the inflow of money ceased and the later entry investors suffered substantial losses. The respondents traded unregistered securities of Gold-Quest in Ontario and received an up-front commission. Notwithstanding that the Ontario Securities Commission had issued a temporary cease-trade order pursuant to which the respondents were prohibited from trading in any securities, they continued to trade. The respondents admitted they had traded without registration contrary to the Ontario *Securities Act*, had made illegal distributions, had directed, permitted or acquiesced in various other breaches of the Ontario *Securities Act* and had traded in securities while prohibited.

¶ 52 In *Hoshizaki (Re)*¹⁸, the respondent engaged in an undisclosed outside business activity by raising capital for a private company that was planning to run an automotive service business and by running a personal online securities trading business. The hearing panel found that without the clients' consent, the respondent had deposited clients' funds to the private companies he controlled to run an automotive business

¹⁴ Statement of Allegations, *supra*, Tab 1, paras. 2, 12 and 20

¹⁵ 2014 LNIROC 29, para 36

¹⁶ [2001] I.D.A.C.D. No.13

¹⁷ 2010 LNONSC 887

¹⁸ 2017 LNIROC 40 and 2017 LNIROC 52

and for his personal online securities trading business and that he used some of this money to pay his personal debts and expenses.

¶ 53 *Arvanitakis (Re)*¹⁹ is a settlement approval decision. The respondent passed herself off as a qualified registered representative. She forged a document attesting to her academic education, which she had not successfully completed, and presented the forged document to prospective employers, who in turn sent it to IIROC. The respondent deliberately falsified a document to mislead her prospective employers and IIROC. The hearing panel concluded that the respondent's deliberate falsification of a document was fraudulent and demonstrated a lack of honesty.

¶ 54 In *Vitug (Re)*²⁰, the respondent was found to have had undisclosed financial interests and undisclosed financial dealings in clients' accounts. He made unauthorized transfers of funds from his aunt's and father-in-law's accounts to his accounts. The respondent originally claimed the funds received were gifts from the clients and subsequently described the funds as repayments of loans made by him. He did not inform his member firms of his involvement in the client's accounts. The hearing panel found that the respondent acted deceitfully for his own personal financial gain.

¶ 55 The final decision referred to us by Staff is *Gareth (Re)*²¹. That case involved the respondent using a pseudonym to invest, thereby to be assessed less income tax on any investment income. The respondent obtained the name and date of birth of an individual and represented himself as that person to obtain a social insurance number and driver's license. Without that person's knowledge or consent, the respondent funded a bank account and opened and operated an investment account in that person's name. The respondent did not appear at the discipline hearing and left the industry before the sanction hearing.

¶ 56 In our view, the facts and circumstances in the aforesaid cases involved misconduct, which was more egregious than in this case, that clearly demonstrated dishonesty, deception and a lack of integrity on the part of the respondents. While Mr. Nother's misconduct was very serious, the Panel does not view his misconduct as reaching the same level as the misconduct in the cases referred to us. Moreover, the undercurrent of client letters is that the clients were not victimized by Mr. Nother. None of the clients or the non-clients identified in the Statement of Allegations filed a complaint or claim losses against Mr. Nother. Rather, the clients exonerated Mr. Nother from any responsibility and expressed a desire for him to return to the industry.

Suspension

¶ 57 For specific deterrence and also for general deterrence, as well as for the integrity of the regulatory framework, a significant suspension is necessary in this case to bring home to the Respondent the very serious nature of his misconduct and to signal a warning to deter others. The suspension must be sufficiently long that it recognizes the seriousness of the misconduct, but not so long that the practical effect of it is a permanent bar.²²

¶ 58 As noted in *Debus (Re)*²³, in many of the suspension decisions, the suspension would not affect the individual respondent, often because the respondent had already left the industry and had no intention of returning. In other cases, lengthy suspensions were imposed in the context of settlements and usually where the respondents had been out of the industry for some time with no intention of returning, and in other cases the respondents failed to appear and therefore the suspensions were unopposed.

¶ 59 The Respondent submitted that in effect, he has been under suspension for over 16 months, since the date of termination of his employment. He submitted that he has fully experienced specific deterrence by the

¹⁹ 2012 LNIROC 30

²⁰ 2009 LNIROC 17 and 2009 LNIROC 31

²¹ [2001] I.D.A.C.D. No. 29

²² *Re Peroni, supra*, para 74

²³ 2019 IIROC 18, para. 33

effective 16-month suspension, the loss of his book of business and the loss of income. He submitted that in the circumstances, a six-month suspension commencing on January 16, 2019, the date of termination of his employment, is appropriate.

¶ 60 There are many cases in which a suspension was determined to commence when a respondent's employment was terminated as a result of the misconduct at issue in the case and had not since worked in the industry.²⁴ In our view, in an appropriate case, an allowance can and should be made by a hearing panel for the time during which the respondent is effectively suspended from acting as a registrant. In all the circumstances, the Panel concludes that this is not an appropriate case for such allowance. The Panel concludes that a six-month suspension commencing on the date of termination of the respondent's employment would not satisfy the objectives of general and specific deterrence and market integrity.

¶ 61 The Respondent has already paid a heavy price for his misconduct. Regarding specific deterrence, we took into account the fact that the Respondent lost his job as a result of his misconduct, that he has been unemployed for 16 months as at the date of the Hearing, that he suffered financially and that an additional suspension will result in additional financial loss. A suspension usually has a significant financial impact on respondents and their book of business. However, in arriving at the appropriate length of suspension, the Panel must also give sufficient weight to general deterrence and the public interest.²⁵

¶ 62 In all the circumstances, the Panel concludes that a suspension of 22 months from January 16, 2019 until November 16, 2020, together with a fine and a cost award, are appropriate sanctions to satisfy the objectives of specific and general deterrence, market integrity and the public interest.

¶ 63 The Panel would normally have required that the Respondent re-write and pass the *Conduct and Practices* Handbook course as a condition of registration. However, that is not necessary in this case because the Respondent already re-wrote the examination of his own volition and passed.

Fine

¶ 64 Staff is seeking a fine of \$50,000. The Respondent argues inability to pay and financial hardship with respect to the quantum of the fine and submitted that the fine should be in the \$20,000 to \$30,000 range, but payable in installments. The Respondent did not propose the amount of the installment payments or the number of installments.

¶ 65 Inability to pay is a relevant consideration in determining the appropriate financial sanctions to be imposed on a respondent. The burden is on the respondent to raise the issue and provide evidence of financial hardship. Evidence of inability to pay can result in the reduction or waiver of a fine and/or the imposition of an installment payment plan.²⁶

¶ 66 Mr. Nother provided evidence of financial hardship in the form of a sworn affidavit, along with CRA's List of All Slips for Tax Year 2019. He has been unemployed since the termination of his employment by CIBC World Markets Inc. on January 16, 2019. In 2019, he had taxable income of approximately \$29,000, which was money from an RSP he was forced to commute upon the termination of his employment. To earn some income, in March 2020, he started selling and delivering food for a supplier to customers during the Covid-19 pandemic on a contract basis. He is paid \$5 per box of food he sells and delivers, plus gas expenses. As a result of the termination of his employment, Mr. Nother lost his 2016, 2017 and 2019 stock options valued at \$208,990. CIBC World Markets Inc. is claiming repayment of his interest-free loan in the amount of \$18,314. Although Mr. Nother did not provide a detailed sworn statement of affairs containing a description of his assets and liabilities or an audited financial statement, we are satisfied on the evidence he presented that he

²⁴ *Re Eley* 2014 IIROC 52 at paras. 69-70; *Re Peter Michael Smith* 2014 IIROC 16; *Re Conville* 2013 IIROC 5; *Re Little*, [2007] I.D.A.C.D. No.24; *Re Parkinson* 2012 LNIROC 18; *Re Nott* 2011 LNIROC 26; *Re Vargas* 2019 IIROC 6

²⁵ *Re Pariak-Lukic*, 2015 LNONOSC 357, paras. 82 and 103

²⁶ Guidelines, Principle 7

is suffering financial hardship.

¶ 67 Given the significant period of suspension we have imposed, even if we had not concluded that Mr. Nother is experiencing financial hardship, the Panel would not have imposed a fine of \$50,000 as requested by Staff. In our view, a 22-month suspension coupled with a \$20,000 fine will achieve the objectives of specific deterrence with respect to Mr. Nother and general deterrence.

¶ 68 Mr. Nother has not proposed an installment payment plan for the fine and costs, nor has he presented sufficient evidence to enable the Panel to determine a reasonable installment payment plan. We would encourage Staff to work with the Respondent to achieve a reasonable payment plan for the fine and cost. However, the fine and costs must be paid in full by the Respondent by no later than November 16, 2020.

Costs

¶ 69 Staff seek costs in the amount of \$20,000 from the Respondent. Staff filed a Bill of Costs and an affidavit indicating that the costs incurred are \$55,871, representing approximately \$36,000 for Enforcement Counsel's time and approximately \$20,000 for the investigator's time.

¶ 70 The Respondent submitted that the costs awarded should be \$5,000. He does not challenge the time spent or the hourly rates reflected in the Bill of Costs. The Respondent submitted that he could not reach a settlement with IIROC because Staff would not accept any resolution of the contravention that did not include a permanent bar. He argues that this position is directly reflected in the amount of IIROC's costs.

¶ 71 In considering all of the circumstances and the submissions of counsel, the Respondent shall pay IIROC's costs in the amount of \$15,000.

DISPOSITION

¶ 72 Accordingly, for these reasons, the Panel imposes the following sanctions and costs on the Respondent:

- a) A suspension from approval by, or registration with IIROC for 22 months, from January 16, 2019 until November 16, 2020;
- b) Payment of a fine in the amount of \$20,000; and
- c) Payment of IIROC's costs in the amount of \$15,000.

Dated at Toronto, Ontario this 14th day of July, 2020.

Martin Scisizzi

Daniel Iggers

Peter Dymott

INVESTMENT INDUSTRY REGULATORY ORGANIZATION OF CANADA

IN THE MATTER OF:

THE RULES OF THE INVESTMENT INDUSTRY REGULATORY

ORGANIZATION OF CANADA

AND

SEAN MICHAEL NOTHER

ORDER

WHEREAS on April 27, 2020 the Hearing Panel members herein were advised in writing that the Respondent has admitted liability in respect of the Statement of Allegations dated December 10, 2019;

IT IS HEREBY ORDERED THAT:

1. The Respondent is hereby found liable in respect of the contravention set out in the Statement of Allegations dated December 10, 2019, that: Between May and August 2018, the Respondent breached the standards of conduct when he was involved with and involved five clients and four non-clients in a gifting club contrary to Consolidated Rule 1400; and
2. The hearing in this matter scheduled to begin on April 28, 2020 is adjourned to continue as a sanctions hearing on a date to be scheduled and posted on the IIROC website.

DATED at Toronto, Ontario, this 12 day of May, 2020.

"Martin Scisizzi"

Martin Scisizzi, Chair

"Daniel Iggers"

Daniel Iggers

"Peter Dymott"

Peter Dymott

Copyright © 2020 Investment Industry Regulatory Organization of Canada. All Rights Reserved