

Re MOODY

IN THE MATTER OF:

The Mutual Fund Dealer Rules

and

John Dixon Moody

2024 CIRO 23

Canadian Investment Regulatory Organization
Hearing Panel (Alberta District)

Heard: January 24 and June 21, 2023 by electronic hearing in Calgary, Alberta

Decision (Sanction): June 21, 2023

Reasons for Decision (Sanction): December 1, 2023

Decision and Reasons (Costs): February 12, 2024

Hearing Panel:

Robert Stack, Chair

Adam Dudley, Industry Representative

Annette Stevens, Industry Representative

Appearances:

Alan Melamud, Senior Enforcement Counsel

Zachary Pringle, Counsel for the Respondent

John Dixon Moody, Respondent

DECISION AND REASONS (COSTS)

I. Background

¶ 1 On December 1, 2023, a hearing panel of the Canadian Investment Regulatory Organization (“**CIRO**”) issued reasons for a Decision to penalize John Dixon Moody in relation to its conclusion he had used altered or pre-signed forms contrary to MFDA Rule 2.1.1.¹ The Hearing itself was based on an Agreed Statement of Facts and involved a contest over what penalty that should be awarded. Staff sought \$23,000.00 and the Respondent proposed \$10,000.00 to \$13,000.00. Neither party was successful in a monetary or numerical sense as the Panel ordered a fine of \$18,500.00. Certain administrative arguments of the Respondent were rejected, while the Panel also noted the potential need to provide some evidence when a regulator seeks to increase penalties substantially beyond prior ranges based on general deterrence.

II. Current Positions of the Parties

¶ 2 Staff has submitted a Bill of Costs for \$5,762.00 and seeks cost recovery of \$5,000.00. It submits that in cases where the respondent agrees both to the allegations as well as a joint submission on penalty, costs are typically awarded in the range of \$2,500.00, but they can go as high as \$5,000.00.

¹ Re Moody, 2023 CIRO 32,

¶ 3 The Respondent asserts that no costs should be awarded to either party in this proceeding. The Respondent cites a number of reasons for arguing that no costs should be awarded:

- (a) There was no “successful” party;
- (b) CIRO has more bargaining power than do respondents and a cost award in the circumstances of a contested penalty hearing would discourage respondents from bringing meritorious arguments;
- (c) Staff should not receive its costs of the investigation, or in the alternative, it should receive nominal costs, as the Respondent had admitted to all contraventions at issue in this matter to his member prior to the investigation;
- (d) The Staff investigation and litigation hourly rates are too high and do not reflect reality in so much as the people doing the investigations are salaried staff; and
- (e) There is some indication that not every inquiry by investigators turned into an allegation proven at the hearing or agreed to in advance of the hearing.

III. Law and Analysis

¶ 4 Section 24.2 of MFDA By-law No. 1, which remained in force for this proceeding, reads as follows:

24.2 Costs

A Hearing Panel may in any case in its discretion require that the Member or Approved Person pay the whole or part of the costs of the proceedings before the Hearing Panel pursuant to Section 20 and Section 24.1 or Section 24.3 and any investigations relating thereto.

¶ 5 The discretion of Panels in regard to costs is broad under section 24.2. Panels may apply general principles from the Law of Costs, though adapted to CIRO’s regulatory context.

¶ 6 In our view, some general considerations relevant to this case include:

- (a) When there is an agreed statement of facts admitting some contraventions, there will in most circumstances be recoverable costs for investigation and prosecution time; at the same time, some consideration can be given to the fact that the respondent shortened the proceeding by making admissions;
- (b) Where there is a hearing only to set penalty, the success of one party or the other may play a role in deliberations regarding costs; however, this is not a civil proceeding before a court paid for by the public, and consideration needs to be given to the fact that the hearing would not have been necessary at all had it not been for the admitted misconduct;
- (c) In the context of a profession that regulates itself, there is the consideration that the membership as a whole not be burdened with excessive costs for the misconduct of a respondent; and
- (d) respondents should not be unduly discouraged from advancing arguable or meritorious defences out of concern of punishing costs awards should panels not agree with particular arguments they have raised.

¶ 7 In this case an award for investigation work is merited. Staff’s Bill of Costs lists \$1,675.00 of investigation time. In terms of the arguments that the \$100.00 per hour rate for the investigator is too high and does not reflect the salaried status of the investigator, some means of valuing Staff time and effort must be found. The use of “billable” hours is one such means and is common in the world of securities regulation.

¶ 8 In relation to the argument that the investigator may have looked at matters that did not make it to the hearing, an investigation is just that, an investigation. An investigator who finds some evidence of misconduct may have to look for other evidence of misconduct and must follow certain leads to discover what happened. Not every inquiry will lead to an allegation or a finding against a respondent. The current case is distinguishable from *Homerun International Inc. (Re)*, 2016 ABASC 95, where significant allegations were withdrawn or unproven at the hearing, particularly an allegation of fraud. In the present case we are not

convinced that the investigation costs were too high.

¶ 9 In relation to litigation costs, considerable time was spent on drafting written submissions in the context where Staff did not obtain the penalties it sought. Most of the time at the Oral Hearing was spent discussing the issue of general deterrence. Staff listed on its Bill of Costs \$3,487.50 in relation to counsel costs. This is based on \$150.00 per hour for counsel time.

¶ 10 We do not think that the rate of \$150.00 per hour is excessive. Further, had there been an agreement on penalty, some counsel time would have had to be spent on this drafting in any case, since CIRO Panels have to accept or reject penalties agreed to by the parties. However, counsel time should be discounted by the fact that Staff was not successful in obtaining the penalty sought.

¶ 11 The Respondent was also not wholly successful in his arguments. However, it was not unreasonable to raise with a panel the issue of “increasing penalties” for form violations. Costs awards should not unduly discourage the bringing of arguable cases before the Panel.

¶ 12 In all the circumstances, the Panel has determined that the Respondent should pay \$3,000.00 in costs.

IV. Conclusion

¶ 13 The Panel therefore orders that the Respondent pay \$3,000.00 in costs to CIRO.

Dated at Calgary Alberta, this 12 day of February 2024.

“Robert Stack” _____

Robert Stack, Chair

“Adam Dudley” _____

Adam Dudley, Industry Representative

“Annette Stephens” _____

Annette Stephens, Industry Representative

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